

HOUSE FINANCE COMMITTEE  
May 06, 2003  
8:45 AM

TAPE HFC 03 - 78, Side A

CALL TO ORDER

Co-Chair Williams called the House Finance Committee meeting to order at 8:45 AM.

MEMBERS PRESENT

Representative Bill Williams, Co-Chair  
Representative Kevin Meyer, Vice-Chair  
Representative Mike Chenault  
Representative Eric Croft  
Representative Richard Foster  
Representative Mike Hawker  
Representative Reggie Joule  
Representative Carl Moses  
Representative Bill Stoltze  
Representative Jim Whitaker

MEMBERS ABSENT

Representative John Harris, Co-Chair

ALSO PRESENT

Representative Jim Holm; Mark O'Brien, Chief Contracts Officer, Contracting Procurement and Appeals, Department of Transportation and Public Facilities; Wendy Redman, Vice President, Statewide Programs, University of Alaska; Jay Hogan, Deputy Director, Office of Management and Budget.

PRESENT VIA TELECONFERENCE

Dick Cattanach, Associated General Contractors; Clyde Sniffen, Jr. Assistant Attorney General, Fair Business Practices Section, Civil Division (Anchorage), Department of Law.

SUMMARY

HB 225 "An Act relating to certain civil actions brought by the attorney general under monopoly and restraint of trade statutes; relating to the award of damages in actions brought under those statutes; and providing for an effective date."

HB 225 was REPORTED out of Committee with a "do pass" recommendation and one previously published

indeterminate fiscal note #1 from the Department of Law.

HB 243 "An Act establishing state agency program performance management and audit powers in the Office of the Governor for the evaluation of agency programs; and providing for an effective date."

CS HB243 (STA) was REPORTED out of Committee with "no recommendation" and one new zero fiscal note from Office of the Governor.

HB 250 "An Act relating to protests of state contract awards, to claims on state contracts, to the arbitration of certain state construction contract claims, and to hearings and appeals under the State Procurement Code; making conforming amendments in the State Procurement Code; and providing for an effective date."

CSHB 250 (FIN) was REPORTED out of Committee with a "do pass" recommendation and one zero fiscal note from the Department of Transportation and Public Facilities.

#hb250

HOUSE BILL NO. 250

"An Act relating to protests of state contract awards, to claims on state contracts, to the arbitration of certain state construction contract claims, and to hearings and appeals under the State Procurement Code; making conforming amendments in the State Procurement Code; and providing for an effective date."

REPRESENTATIVE JIM HOLM, SPONSOR, provided information about the bill. He noted that the bill was important given the amount of contract work outstanding in the state this year. He explained that the Associated General Contractors of Alaska and the Department of Transportation had collaborated to create a proposal that worked for both parties. He discussed the difficulty of construction claims in Alaska, due to the costs of litigation and arbitration. He noted that arbitrations had in the past been drawn out to a point when they were no longer financially feasible for either party. He maintained that the bill meets the needs of both contractors and the state, and facilitates more expedient negotiations, placing all parties on equal standing. He referred to the sectional analysis of the Sponsor Statement as follows:

The purpose of HB 250 is to modify the construction

claims process to once again create a fair and expeditious claims process. Specifically HB 250 will modify the procurement code pertaining to construction claims in the following manner:

1. If a procurement officer does not issue a written decision by the due date, the contractor may seek arbitration.
2. On appeals of all construction claims, the parties can agree to binding arbitration.
3. The timelines for decisions have been tightened, and redundant requirements have been eliminated.
4. An arbitrator or hearing officer who does not issue a decision by the deadline is disqualified for a year.
5. Qualifications for arbitrators and hearing officers will be established by the commissioner of administration in regulation.
6. The contractor is entitled to recover some of the claims costs incurred.

Prompt passage of HB 250 will expedite contractor's claims and return fairness to the process.

Representative Croft referred to Section 7 of the bill and asked if currently each side of the negotiations paid for their own costs related to the claims process. He observed that the bill would authorize full costs related to rule 82 [of the Alaska Rules of Civil Procedure].

MARK O'BRIEN, CHIEF CONTRACTS OFFICER, CONTRACTING PROCUREMENT AND APPEALS, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, in response to questions by Representative Croft, confirmed that the bill would introduce provisions under Rule 79 and Rule 82 [Alaska Rules of Civil Procedure] to the recovery of both costs and fees for claims adjudicated under AS 36.30.

Representative Croft referred to a reform of the claims process in the previous year. Mr. O'Brien stated that the process had existed for two years, but that this was the first time the bill had been introduced to address issues agreed upon by both the State and contractors. In response to a question by Representative Croft, Mr. O'Brien confirmed that last year a provision was added to collect interest on claims back to the date upon which they were filed. He noted that the bill does not affect that provision.

Mr. O'Brien added that when the Associated General Contractors (AGC) approached the office, they were trying to make the process faster, fairer and less expensive. He stated that the bill specified time frames and shortened existing time frames. He noted that most people viewed arbitration as a better process and pointed out that the bill made arbitration outcomes final, involving the courts in only a few circumstances. He explained that arbitration decisions might be appealed if the cases included fraud or gross misapplication of the law. He stated that this prevented a lengthy and expensive process that would include both arbitration and a court case.

Mr. O'Brien stated that the bill would put in place a selection process ensuring a neutral third party that is acceptable to both sides. He explained that prior to this, the hearing officer was appointed by the commissioner, a practice that contractors viewed as being unfair. He maintained that these factors would make the process more expedient and impartial.

Mr. O'Brien pointed out that the only issue about which they had not reached complete agreement was that of provisions pertaining to Rules 79 and 82. He referred to the fiscal note, which listed associated costs. He discussed the contractors' viewpoint that they should be able to recoup hearing costs and fees in order to actually recover their court appointed awards. He noted that in the past eleven years, claims costs roughly averaged \$145 thousand per year, averaging from between \$350 thousand and \$7 thousand, depending on the complexity and length of cases. In addition there were costs and fees associated with adjudication, which varied based on the complexity of litigation. These varying costs are taken into consideration in the fiscal note. He emphasized that these costs were not federal aid participating, making the costs a general fund expense.

Representative Croft addressed the concern of determining the extent of claims, and asked if this was mitigated by Section 7 (b), which allowed an offer of judgment. Mr. O'Brien confirmed that this was correct, making it difficult to calculate the costs unless one assumed that no Rule 68 offer existed, preempting the payment of costs and fees. He explained that this was the "meet or beat" rule and sometimes resulted in the payment of a substantial portion of state costs. He maintained that this was a part of the bill that the AGC and the Administration felt would encourage settlement. He stated that the Administration supports the bill.

DICK CATTANACH, EXECUTIVE DIRECTOR, ASSOCIATED GENERAL CONTRACTORS OF ALASKA testified via teleconference in support of the bill. He emphasized the importance of the

provisions that generated the fiscal note, and added that the fiscal note would only manifest if the Department of Transportation and Public Facilities did not change its procedures. In regard to the costs not being offset by federal dollars, he maintained that contractors were currently paying all costs. He noted examples when contractors paid over \$250 thousand in legal fees for a \$530 thousand claim. He maintained that the bill encouraged both sides to arrive at reasonable amounts.

WENDY REDMAN, VICE PRESIDENT, STATEWIDE PROGRAMS, UNIVERSITY OF ALASKA testified and raised concern about the section which required mandatory arbitration in regard to small claims. She stated that the University had not been considered in crafting the bill, and had requested to be exempted from that section. She indicated that the University would work with the other provisions of the bill and communicate with AGC and DOT in the coming year to examine the small contract claims arbitration procedures. She expressed support of the bill with the requested exemption.

In response to a question by Representative Whitaker, Ms. Redman stated that the amount that delineated a small claim was less than \$250 thousand. Representative Whitaker asked about the rationale for requesting an exemption. Ms. Redman stated that attorneys felt it would encourage more litigation.

Representative Croft asked why the University would be different from other portions of state government. Wendy noted that AGC and DOT had been working on the bill for over a year, and explained that the University was not part of that discussion and did not have the same types of projects, such as roads.

Representative Stoltze pointed out that the Department of Natural Resources and other agencies engaged in projects different from the Department of Transportation and Public Facilities, and asked why they would not also be exempted.

Ms. Redman pointed out that the University was treated differently than a state agency under the state procurement code. They are directed, as are the Railroad and the Courts System, under AS 36.30.005 to establish features equivalent to the state, but are governed under the Board of Regents. Representative Croft asked if the [Alaska State] Railroad had been considered in the bill. Ms. Redman was unaware of those provisions.

Representative Whitaker observed that factors that might work for one state agency might not necessarily work for the University. Wendy reiterated that the Department of Transportation and Public Facilities had a considerable

amount of time to work with the bill and increase their comfort level. She speculated that in the course of the coming year, the University might increase its comfort level as well.

Representative Holm stated that the Alaska Railroad was in support of and is considered in the bill.

Representative Whitaker MOVED Amendment #1.

Sec. \_\_ AS 36.30.005

(d) Notwithstanding the provisions of 36.30.627, the University of Alaska is not required to arbitrate construction contract claims unless it specifically agrees to such arbitration.

In response to a question by Vice-Chair Meyer, Representative Whitaker stated that he was not yet certain where the amendment would be placed.

Ms. Redman referred to section 36.30.005 of the procurement law, not included in HB 250, and explained that the amendment would add a section that included that statute. She added that the bill as written would prevent the University from arbitrations in small contracts, and noted that the University desired to become involved in such negotiations, without it being mandated solely on the part of the contractor. She indicated that the amendment would allow the University to move forward in gaining experience with these arbitrations.

Representative Whitaker clarified that 36.30.005 had not yet been included in the bill, but stated that if the amendment were adopted, then the bill language should be changed in a manner to accept it.

In response to a question by Representative Stoltze, Mr. Cattanach observed that the amendment would exempt the University from binding arbitration on claims less than \$250 thousand. He pointed out that as the bill was written, a contractor could decide to challenge a decision by a hearing officer through a third party arbitration. The University was asking for exemption due to problems they had experienced with binding arbitration. He stated that, since the University had not been involved in discussions with the Department of Transportation and Public Facilities over the past two years, the Department of Law did support the exemption.

There being NO OBJECTIONS, the Amendment was ADOPTED.

Representative Foster MOVED to report CSHB 250(FIN) out of Committee with individual recommendations and the accompanying fiscal note.

CSHB 250 (FIN) was REPORTED out of Committee with a "do pass" recommendation and one zero fiscal note from the Department of Transportation and Public Facilities.

#hb243

HOUSE BILL NO. 243

"An Act establishing state agency program performance management and audit powers in the Office of the Governor for the evaluation of agency programs; and providing for an effective date."

JAY HOGAN, DEPUTY DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET (OMB) provided information regarding the bill. He explained that the bill would formally reinstate the internal audit function within OMB. The bill does three things: 1) establishes the ability of OMB to do performance budgeting, measurement and evaluation, 2) allows OMB to conduct internal audits in the executive branch, and 3) rewrites the language in statute to ensure confidentiality of work papers. He stated that the funding of the bill is included in the Governor's [FY 04] budget, part of which was moved from functions that were transferred from the Governor's office. The additional cost to the OMB budget is \$325 thousand, to cover the movement of three positions and related costs.

Representative Foster asked whether or not OMB still performed a management function. Mr. Hogan discussed that when OMB was originally established it consisted of internal audit, management, planning and governmental coordination functions. He noted that currently it was focused on budget and governmental coordination, and that the internal audit function had dissipated.

Representative Croft referred to Section 3, and asked when if ever the internal audits were released to the public. Mr. Hogan stated that the confidentiality related to the background work for the audits. He discussed the history of audit functions related to background materials, and stated that traditionally these work papers remained confidential indefinitely.

Representative Croft observed that while the reports were public, the work papers remained confidential. He asked how this was impacted by the statement "kept confidential only to the extent required by law applicable to the agency". Mr. Hogan stated that the last sentence was added by the House State Affairs Committee to focus on the confidentiality laws that preceded the bill. He gave the

example that if state employee records had been examined, any related findings would remain confidential based on state law. He speculated that State Affairs intended to restrict the authority.

Representative Croft referred to Section 44.19, "internal audit work papers confidential until released"; "can only be confidential to the extent required by law". He claimed that these statements were not complimentary. Mr. Hogan maintained that the governor's bill did not contain those two sentences. Representative Croft conceded that the second sentence provided for some public disclosure. Representative Foster MOVED to report HB243 out of Committee with individual recommendations and the accompanying fiscal note. There being NO OBJECTIONS it was so ordered.

CS HB243 (STA) was REPORTED out of Committee with "no recommendation" and one new zero fiscal note from Office of the Governor.

#hb225

HOUSE BILL NO. 225

"An Act relating to certain civil actions brought by the attorney general under monopoly and restraint of trade statutes; relating to the award of damages in actions brought under those statutes; and providing for an effective date."

CLYDE SNIFFEN, JR. ASSISTANT ATTORNEY GENERAL, FAIR BUSINESS PRACTICES SECTION, CIVIL DIVISION (ANCHORAGE), DEPARTMENT OF LAW testified via teleconference and provided information about the bill. He stated that an antitrust law currently existed that prevented indirect purchasers from recovering losses in anti-trust cases. He explained that an indirect purchaser would be a consumer who purchases a product without being aware that an "upstream" anti trust conspiracy or violation had artificially inflated the product price. He pointed out that as a result of current anti-trust statutes, consumers might not be able to receive a positive settlement against the wrongdoer since they did not purchase the product directly from the wrongdoer. He gave the example that the price of a product might be kept high all the way down to the retailer, but that the fault would actually remain with the supplier. This bill would amend current anti-trust law, and give the Attorney General authority to bring claims on behalf of consumers against anti-trust wrongdoers "upstream".

Mr. Sniffen stated that the current law originated with the Supreme Court case of Illinois Brick Company vs. Illinois, when the Court had stated that a suit could not be brought "upstream". He noted, however, that the Court had also indicated that states had the right to craft their own anti-

trust laws. He mentioned that 30 other states had amended their laws to allow "upstream" suits. He maintained that there had been a number of cases when the state of Alaska had lost millions of dollars of potential revenue due to an inability to bring certain anti-trust suits.

Representative Stoltze expressed concern about the price of fuels, and asked if this bill provided tools to impact investigation in this area. Mr. Sniffen confirmed that the bill would enable the Attorney General to bring action on behalf of consumers should a gas price increase conspiracy be discovered. He stated that currently such a claim could not be brought.

Representative Croft MOVED to report HB225 out of Committee with individual recommendations and the accompanying fiscal note. There being NO OBJECTIONS, it was so ordered.

HB 225 was REPORTED out of Committee with a "do pass" recommendation and one previously published indeterminate fiscal note #1 from the Department of Law.

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ADJOURNMENT

The meeting was adjourned at 9:31 AM.