Kenai Youth Facility
Project No. 2299/2.1.3

March 14, 2000

Tom Lane
Facilities & Planning Section
Dept. of Health and Social Services
State of Alaska
P. O. Box 110650
Juneau, AK 99811-0650

RE: Site Evaluation Scoring

Dear Tom:

Thank you for forwarding to me the January 25, 2000 letter that was prepared by Senator Torgerson and Pete Sprague regarding the Kenai Youth Facility site evaluation process.

HYER

Their letter raises a number of very good points and a different perspective than the ones raised during the public meeting. This open dialogue is the basis for good sound public process and we welcome the opportunity to discuss the issues.

The site evaluation report commended the communities for offering such favorable potential sites and noted that either site would be suitable for the Youth Detention Facility. That point was brought home by the close scoring which separates the Kenai site from the Soldotna site.

The letter sent to us questions five of our scoring recommendations. The following is our response to those questions and our reasoning why they were scored as they were.

**Criteria #1 & #2 (Area and Topography)**
The letter questions our responses to criteria numbers one and two, both of the issue of usable site area. I have combined the topics into one response.

ARCHITECTURE
PLANNING
INTERIORS
DEVELOPMENT

301 WEST BENSON
SUITE 306
ANCHORAGE, ALASKA 99503
(907) 561-5540

It is important to note that no weighting has been applied to any of the criteria topics. Had we decided to weigh some criteria higher than others,

the area offered would certainly been deemed as having very high importance. Sufficient area is critically important to provide buffers, allow for future expansion and minimize the need for future site acquisition which will become very difficult as neighborhoods are established around these well positioned sites.

Senator Torgerson and Mr. Sprague question the need for a ten-acre site and refer to the proposed Ketchikan building that is sited on a very small parcel and yet it has the same number of beds as the proposed Kenai Facility.

We also recommended a ten-acre site for the Ketchikan facility, but there simply were not that large of a level tract available in Ketchikan. Site size was a compromise forced upon the selection committee by local topographic conditions that do not exist in the Kenai/Soldotna area.

HYER

Additionally, the Ketchikan facility will service a regional population of less than 14,000 people while the Kenai Borough includes nearly 50,000 people. The need for expansion of the Ketchikan Facility appears to be far into the future, while the expansion of the Kenai Facility is likely on the horizon and clearly within the life frame of the building.

Detention facilities are rarely abandoned or modified to another use due to the high development costs. For this reason, the facility needs to be located on a site that will accommodate the Borough's growth for at least the next fifty, and likely many years beyond. The question we must ask is the proposed 5.3 acres of developable land in Soldotna adequate to accommodate the future growth over this time period.

We concluded that it was prudent and advisable for the State to locate this important, long term capital investment on the larger, flat, square site. Deciding otherwise is neither advisable, nor wise. While argument might be made about the other scoring factors, providing enough expansion capability for future needs is critical and the Kenai site offers nearly twice as much useable land as the Soldotna site.

The sites have nearly equal costs associated with site development and acquisition. There is no economic advantage for the State to choose the smaller site over the larger, more developable location offered in Kenai. For these reasons we are confident that there is strong justification for four additional points being awarded to the Kenai site.

**Criteria #6 (Zoning)**
Criteria Number 6 addressed the issue of zoning both on the offered sites and on adjacent lots.

Both sites are currently zoned to accept the Youth Facility and both received full points in this category. The adjacent site zoning and current land use was scored differently between the sites. The land surrounding the proposed Kenai site is all zoned as commercial and is either undeveloped or developed for commercial use. The proposed Soldotna site offers an undevelopable parcel to the south of the site, the State Trooper's District Office to the east and a community recreation area to the north and west.

HYER

We felt that casual trespass, introduction of contraband and the heavily traveled Kalifornsky Beach Road were detrimental to the facility's mission and awarded the Soldotna site four points less than the Kenai site in this category.

Senator Torgerson and Mr. Sprague take issue with our finding and suggest we evaluated the likelihood of the Soldotna deterrents too highly. They also noted that the proximity of the State Troopers Post will enhance public confidence.

Scoring of intrinsic issues such as *what makes better neighboring land use* can be subjective and does evoke controversy.

In responding to this land use issue, we relied on our recent experience at the McLaughlin Youth Center which has been required to undertake an extensive security upgrade project to stop the very activities mentioned above. The upgrade included a 12 foot tall perimeter security fence topped with razor wire, more security cameras, additional lighting and new vehicle barriers. We recently designed similar measures at the

Fairbanks Youth Facility again to limit trespass, stop contraband from entering the facility and to preclude unauthorized site access.

The proposed Kenai Youth Facility is far smaller than the two institutions mentioned above and may not attract the same level of objectionable activity. Upon reflection, we recognize that the trooper's office will provide more immediate law enforcement access in the case of an emergency and therefore, we recommend one additional point be scored for the Soldotna site.

**Criteria #8 (Travel Distance)**

Criteria Number 8 addresses the distance of the proposed facility from various important daily users and services. In most cases, the difference was either negligible (less than 10 minutes additional travel time) or significant (10-30 minutes additional travel time). In our evaluation, we indicated the distance to food/laundry providers was three miles difference and judged this difference inconsequential since there is less than a 5 minute travel time difference between the two sites. The letter from Senator Torgerson and Mr. Sprague indicated that the site with less travel distance (Soldotna) should be awarded more points.

HYER

This is clearly a point of personal judgement and I agree that this issue and the criterion that identifies point value for distance to law enforcement should be modified by reducing the site B score by one point.

**Criteria #9 (Transportation)**

Criteria Number 9 addresses public transportation and site access. One of the tests addressed access to air transportation. The Kenai site is within a few blocks of the Kenai Airport, but the Soldotna site is 9-10 miles away. We scored the Kenai site two points higher due to its proximity to the airport. In Senator Torgerson and Mr. Sprague's letter, the test was questioned. They stated that the airport was not critical to the facility's operation and should not be scored as a measure of site suitability. I disagree with this point for a number of reasons. The Kenai Youth Facility will be a detention facility. All adjudicated youth (youth whom the court has determined require long term treatment) will be transported

to a site that offers appropriate programs (Anchorage or Fairbanks). The Kenai Facility will not be equipped or staffed to deal with very violent offenders for more than a short time. These kids will need to be transported to Anchorage. If the facility becomes over crowded, the overflow population will need to be transported to Anchorage. Due to the nature of their crime, some of the youngsters will be held in Anchorage but need multiple court appearances in Kenai. These youngsters will likely overnight in Kenai. These are only a few of the numerous reasons why juveniles will be transported to the airport from the Youth Facility.

Air transportation to the facility is necessary and adjacency to the airport is beneficial to the effective operation of the facility.

HYER

Since the site selection evaluation study was completed, we have been able to obtain better information on the actual driving distance between Homer and Soldotna (74 miles), Homer and Kenai (82 miles), Seward and Soldotna (88 miles), and Seward and Kenai (100 miles). Since nearly an equal number of transports originate from Homer and Seward, it is safe to conclude that there is an 8 mile travel advantage from Homer to Soldotna and a 12 mile travel advantage from Seward to Soldotna. The travel difference is approximately 10% between the two sites. The two point advantage given to the Soldotna site may be viewed by some residents as unfair to the Kenai site and suggest a point differential to be more equitable. I feel this is a controversial issue and further discussion should be conducted before points are reallocated.

The scoring criteria and tabulation have been reproduced with the current revised scoring for your reference. As you will see, the scoring is still in favor of site B, the Kenai site.

| Criteria | Site A | Site B |
|---|---|---|
| 1. Area | 2 | 4 |
| 2. Topography | 2 | 4 |
| 3. Public View | 3 | 4 |
| 4. Soils | 4 | 4 |
| 5. Utilities | | |
| a. Electrical | 4 | 4 |
| b. Water | 4 | 4 |
| c. Gas | 4 | 4 |
| d. Sewer | 4 | 4 |
| 6. Zoning | | |
| a. Current Zoning | 4 | 4 |
| b. Adjacent Zoning | 3 | 4 |
| c. Adjacent Usage | 2 | 4 |
| 7. Road Access | 4 | 4 |
| 8. Travel Distance | | |
| a. Food Providers | 2 | 2 |
| b. Medical Services | 4 | 2 |
| c. Law Enforcement | 4 | 2 |
| d. Fire Protection | 4 | 4 |
| e. Court System | 2 | 4 |
| 9. Transportation | | |
| a. Highway | 4 | 2 |
| b. Airport | 2 | 4 |
| 10. Public Acceptance | 4 | 4 |
| 11. Site Acquisition Cost | 4 | 4 |
| 12. Site Development Cost | 4 | 4 |
| *Total ranking points per site:* | *74* | *80* |

ECI/HYER

Again, I would like to stress that we feel either site will serve the Borough and State admirably, but we continue to recommend, and are supported by the scoring criteria, that the Kenai site offers a better solution to the facility's short and long term needs.

Sincerely,
ECI/Hyer, Inc.

Steve Fishback, AIA

cc: Jerry Watkins

SF:so

## ▶ FUNCTIONAL COMPONENTS

▼ The Kenai Youth Facility will serve four primary functions:

- It will provide a central booking area for juveniles on the Kenai Peninsula which will facilitate a rapid response to delinquent activity.
- It will accommodate a total of 10 male and/or female juvenile detainees for emergency and pretrial detention.
- It will provide office and interview space for Kenai Juvenile Probation operations.
- It will provide on-site continuing Kenai district education of all juveniles, detained for any length of time, reducing the likelihood of future criminal conduct and social dependency.

▼ As a multiple-use facility the building will consist of four primary program components: Secure Housing, Probation, Intake/Booking, and Administration, all arranged around a central Control Room. The Probation, Intake, and Administration components will share spaces such as interview rooms, toilet rooms, and office space.

▼ The Housing component will be defined by a secure building enclosure and a controlled security line which divides the interior of the building between public and secure activities.

## SCHEDULE

▼ The project is expected to be ready for solicitation of construction bids by early summer of 2001. However, the solicitation cannot be issued until adequate project funding has been obtained.

## ▶ FUNDING REQUIRED ..... $4,600,000

**CLIENT:**

State of Alaska
Department of Health and Social Services
Division of Juvenile Justice
P.O. Box 110635
Juneau, Alaska 99811-0635

State of Alaska
Department of Transportation and Public Facilities
Public Facilities Branch
2200 East 42nd Avenue
Anchorage, AK 99508

**CONSULTANT TEAM:**

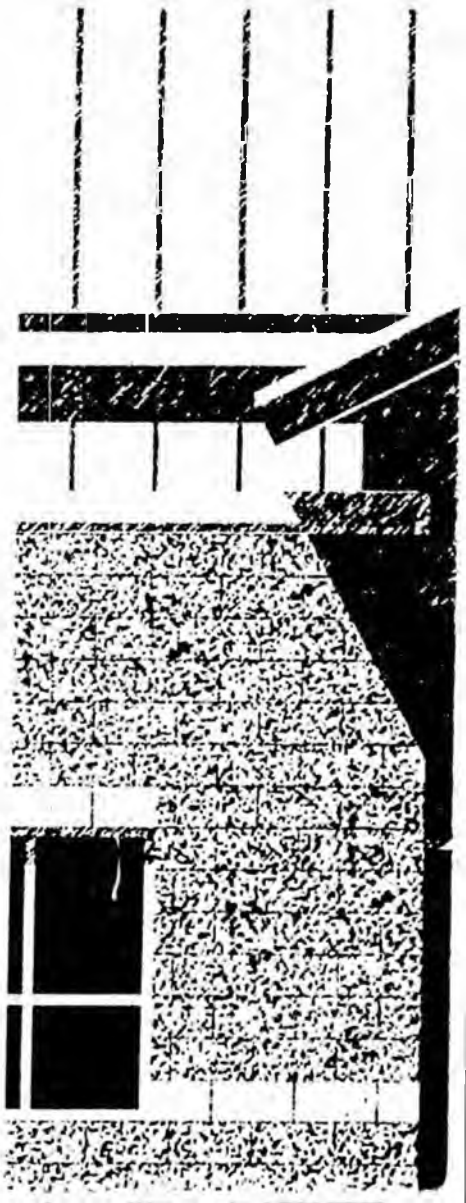
ECI/Hyer, Inc. *(Architectural)*
101 West Benson, Suite 306
Anchorage, Alaska 99503

Wm. J. Nelson & Assoc. *(Civil)*
215 Fidalgo Suite 204
Kenai, Alaska 99611

BBFM Engineers, Inc. *(Structural)*
510 L Street, Suite 200
Anchorage, Alaska 99509

RSA Engineering, Inc. *(Mechanical/ Electrical Engineers)*
2522 Arctic Boulevard, Suite 200
Anchorage, Alaska 99503

Earthscape *(Landscape Design)*
705 W 13th Ave.
Anchorage, Alaska 99501



*Prepared by ECI/Hyer, Inc. Architects*

**Currently, there are *no* youth corrections facilities on the Kenai Peninsula. All Peninsula juvenile offenders are transported and detained at the McLaughin Youth Center**

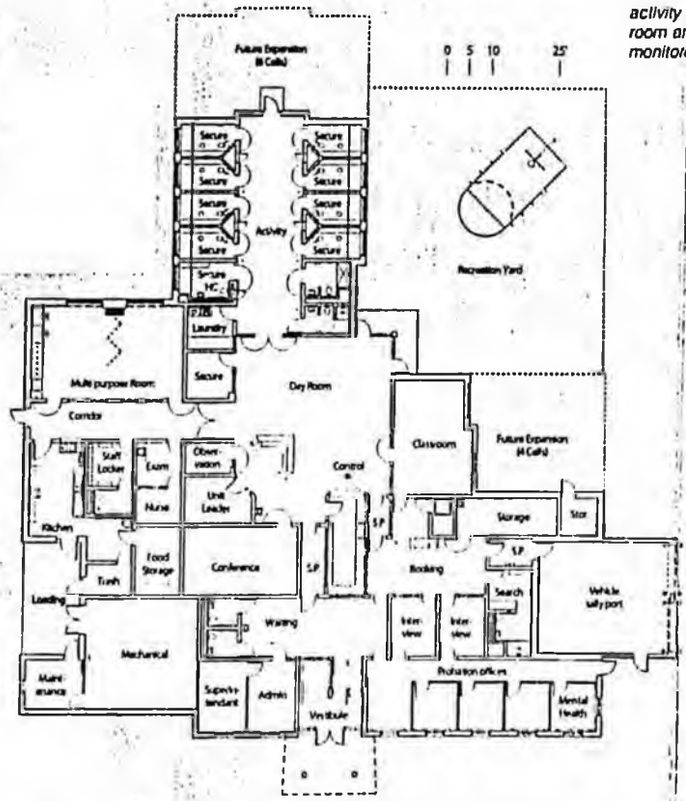
in Anchorage, at a great expense in time and money to local area police and to the Division of Juvenile Justice. With accelerating regional population growth in the area the need for a juvenile detention center on the Kenai Peninsula has been clearly demonstrated.

The proposed Kenai Youth Facility will combine Juvenile Detention and Juvenile Probation under one roof to facilitate booking, assessment, and court proceedings associated with the Juvenile Justice System. Bringing this facility to the Kenai Peninsula will fill a void in the Juvenile Justice System by providing a centralized "headquarters" for the various local interdisciplinary agencies and a focus on rehabilitative and reintegrative programmatic links within the communities it serves.

**This facility wi provide a vita rehabilitation pro within the commu it serves.**

The combination of Intake Screening and Secure Detention will assure the efficient, rapid and comprehensive processing and evaluation of incoming offenders. Police officers will be able to quickly return to the street, and a closer working relationship among State, local, nonprofit agencies, and local schools will be fostered. Redundancy and conflicts in juvenile handling and records will be eliminated, leading to a more consistent and effective intervention policy.

The Detention Program will provide a much-needed secure housing environment for Peninsula residents near family, teachers, counselors, attorneys and probation staff. Youth Facility residents will participate in intervention and educational programs focused on effective reintegration into the community. More violent or difficult youth requiring long term treatment will continue to be housed at the McLaughlin Youth Center in Anchorage.




**Intake/Booking:** *This area is under the direct observation of the control room and includes two interview rooms, a holding cell, a toilet/shower room, and U/A testing equipment. The intake and booking area will be accessible from the police vehicle sallyport, the secure housing unit, and the public waiting area. The primary purpose of this area is to facilitate the transfer of a juvenile from the custody of a police officer to the custody of juvenile justice staff. Booking and assessment will occur in the main booking area. A booked juvenile will be admitted to the detention unit and held until a probation intake officer completes an assessment. This assessment will decide if and when the juvenile will appear for court, and if the juvenile should be released to the protective custody of a parent or outside agency.*

**Probation:** *Offices are provided for the co-location of Kenai Juvenile Probation. Probationers will be brought through the public waiting area and into the intake waiting area. Interview rooms and U/A testing areas in the intake/booking area will be shared with probation operations. Office space in this area has also been designated for juvenile drug and alcohol counseling and juvenile mental health.*

**Secure Housing Unit:** *The secure housing unit is constructed as a secure living area with 10 "wet" sleeping rooms with lock-down capability. The activity area and a larger dayroom provide multi-use space for socialization, meetings, and visitations, as well as short-term overflow. The housing unit is also served by a reheat kitchen for preparing food service-delivered meals, a laundry area for juveniles to wash their own clothing, a conference/courtroom, a nurses exam room, and a smaller conference room. A secure observation room is located next to the staff duty station. The central control room has visual contact and immediate backup access to the dayroom and activity areas, as well as to the staff duty station. A staff locker room and toilet is provided off the housing unit, and a secure, monitored recreation yard is provided for outdoor activities.*

**Education:** *A classroom space has been provided which can be divided into two smaller meeting rooms. This classroom will support High-School education provided by the Kenai Peninsula Borough School District.*

**Future Expansion:** *There are two potential expansion phases. The secure housing unit is planned to allow for expansion of up to an additional 10 beds as the need arises and funding is secured, with wing extensions off the ends of each activity area. The administration area is expected to grow as the rest of the facility grows, with an area immediately to the (plan) south of the existing offices and mechanical room reserved for future expansion. The area to the (plan) west of the probation wing is reserved for a future office addition, at which time the vehicle sallyport will be enclosed and heated. The area to (plan) east is reserved for an indoor recreation/dining addition.*

**Administration:** *The building's main entry vestibule will serve all staff, counselors, attorneys, and public including probation youth and their parents. The administration office space is located adjacent to the public waiting area and consists of the facility superintendent's office and clerical office space. The unit leader's office, nurse's office, and provisions for a teacher's office are provided on the secure housing unit.*

**Security:**

# WELCOME TO THE KENAI PENINSULA YOUTH FACILITY

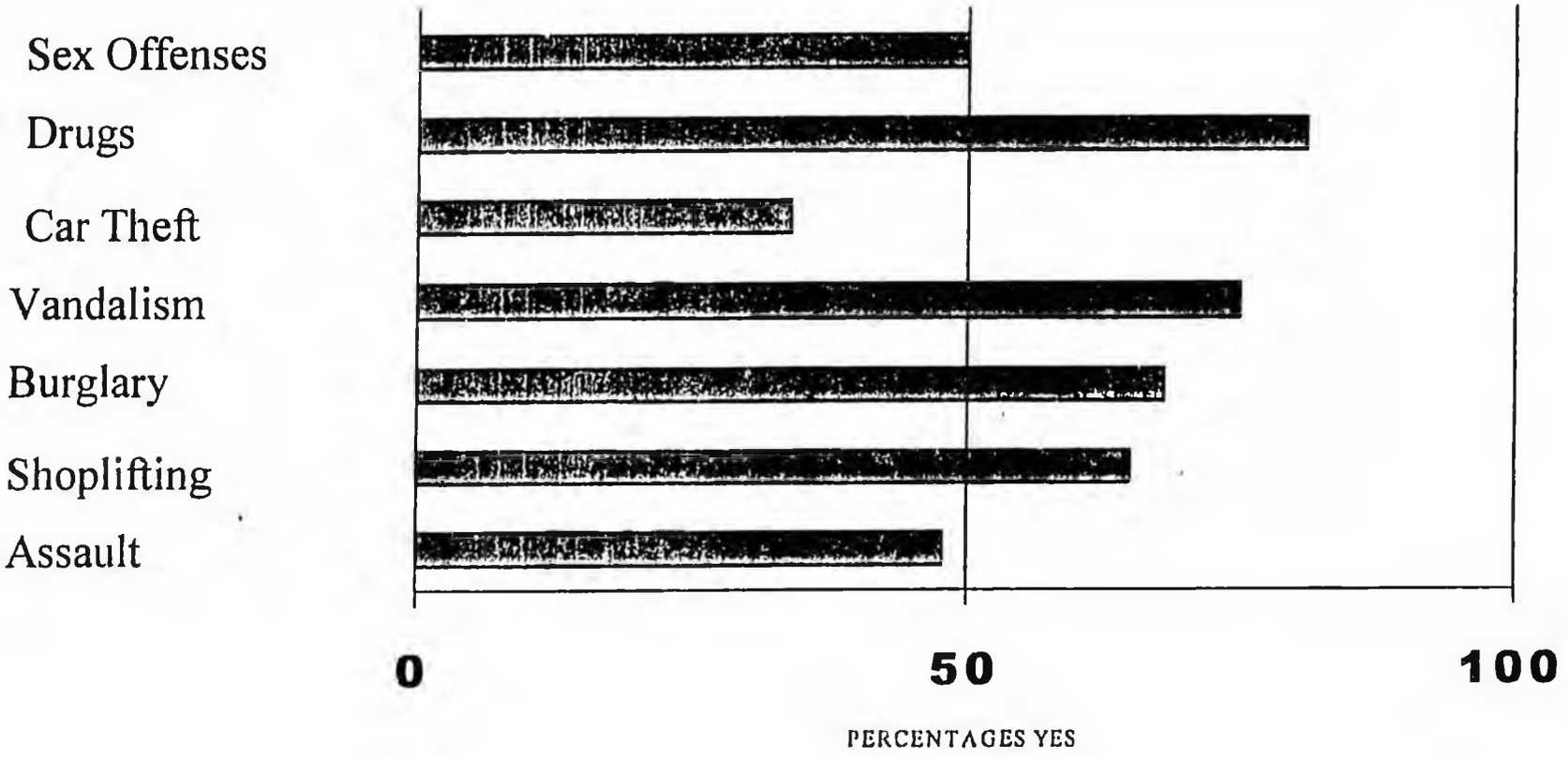
## ~INTRODUCING YOUR KENAI PENINSULA YOUTH FACILITY COMMITTEE MEMBERS~

- Chairman - Pete Sprague
  - City of Soldotna / SPD - Chief Shirley Warner
- City of Kenai / KPD - Lt. Jeff Kohler
  - Citizen Members - Joan Schrader & Karen Rogers
- KPBSD - Dr. Ed McLain
  - Division of Juvenile Justice - Eric Weatherby
- Central Peninsula Counseling Services - Karen Ruebsamen
  - Youth Court - Ginny Espenshade
- Division of Family and Youth Services - Katie Stafford

# THE TIME HAS COME FOR THE KENAI PENINSULA YOUTH FACILITY

- 1980 - Community voices need for local facility
- 1997 - DHSS identifies the need in its Master Plan
- 1998 - The Kenai Peninsula Youth Facility Committee forms
- 1999 - Committee conducts needs survey
- 2001 - Construction of the Kenai Peninsula Youth Facility begins!

# March 1999 Survey Results
# Types of Juvenile Crime



# FACILITY COST & BENEFITS

## Cost:

- The estimated construction cost is $4.0 to $4.5 million

## Benefits:

- Increased Public Safety through increased police presence
- Maintain community standards
- Youth requiring detention will be detained immediately
- Youth will maintain connections with community and family
- 14 local full time jobs

# KENAI PENINSULA YOUTH FACILITY INCREASES PUBLIC SAFETY

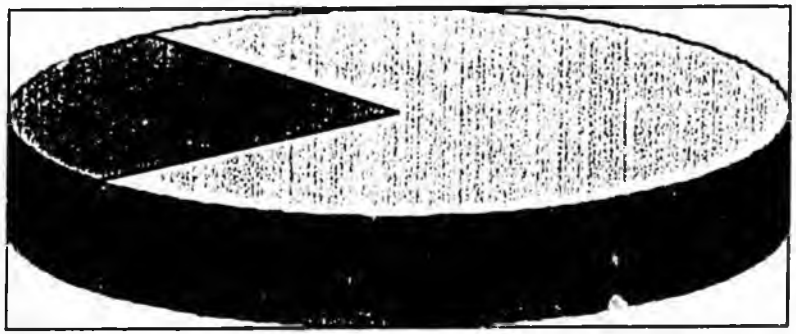
- Police refer 500 to 700 Peninsula youth to Juvenile Justice annually.

- 28 percent of these police contacts result in an arrest.

- An arrest can take police off the streets for up to 5 hours.

- A Youth Facility will return 75% of lost patrol time.

**OFFICER ARREST TIMES**



**Time w/Facility** **Time Saved**

# OUR PRESENT REALITY WITHOUT A YOUTH FACILITY

- Arrested youth must now be held at local police department

- Males and females cannot be held together.

- Youth needing arrest and custody are often released for lack of space.

# BENEFITS OF A LOCAL FACILITY

- Provides Immediate Consequence

- Increases Community Protection

- Reduces Exposure to Sophisticated Urban Delinquents

- Youths stay connected with their own families, local schools, counselors and community

# HELPING PENINSULA FAMILIES

- Better support for the families of delinquent and pre-delinquent youths.

- Improved agency coordination assisting families with issues such as substance abuse, health services, and education.

- More timely delivery of services.

# MENTAL HEALTH & DELINQUENCY

- 4 out of 10 Peninsula youths in the Alaska Juvenile Justice System have serious mental health issues
- In FY 2000 54 Peninsula youths received emergency psychiatric assessments through CPCS.
- 45 of those 54 assessments resulted in hospitalization
- There is currently no appropriate place to hold mentally ill youth
- KPYF will provide a safe place to hold seriously mentally ill youth until they can be hospitalized

# MENTAL HEALTH & DELINQUENCY

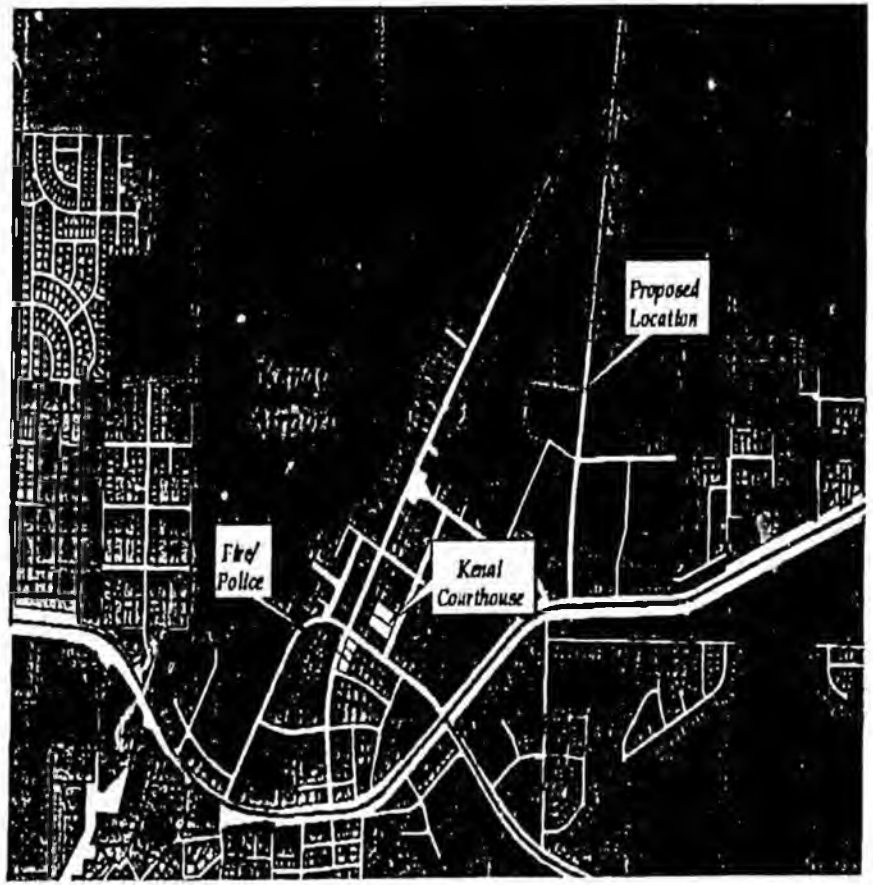
- Youth who do not require hospitalization can receive:
- Complete psychological and substance abuse assessments
- Testing for Fetal Alcohol Effect / Syndrome
- Benefits of a community wide plan of integrated services
- **If we don't address the mental health issues of our youth they will be back.**

# SITE LOCATION

**10 Acre Site Donated by the City of Kenai located on Marathon Road**

- Close to Airport, Court House and Police Station

- Meets All Current Design Requirements Including Space for Future Expansion



# EDUCATION ISSUES

## The Hidden Cost of No Facility

- The Peninsula averages 10 detained youths taken out of district schools at any given time.
- Revenue dollars to support educational services are lost.
- Students lose days of instruction and support services.

## Benefits of a Peninsula Facility

- Detained students remain in a Peninsula school
- Revenue dollars to support educational services will stay in district and support local education
- Local district provides consistent instruction and educational support services to detained youths

# EDUCATION ISSUES

## The Hidden Cost of No Facility

- The break in educational services to students is lengthened.
- Educational services in Anchorage are not KPBSD controlled.
- KPBSD cannot design, manage or coordinate educational services.

## Benefits of a Peninsula Facility

- Improved , timely access to appropriate educationa' services
- Coordination and continuity of curriculum & instruction
- Greater local definition, design, control of educational services

# WELCOME TO THE KENAI PENINSULA YOUTH FACILITY

**You are invited to a Public Meeting**
**November 14, 2000 at 00 p.m.**
**At the Kenai Peninsula Borough Building**

188 Farnsworth Blvd.
Soldotna, AK 99669-7602
March 21, 2001

Senator Jerry Ward
State Capitol Room 423
Juneau, AK 99801-1182

Dear Senator Ward,

On behalf of the Kenai Detention Facility Committee, I wanted to send along my sincerest thanks to you for the introduction of SB 150. As you know, the committee has worked quite diligently over the past three plus years to bring this project to fruition. Your bill is a great step forward in the process. There is still much work to be done, and we will continue to work for passage of this legislation. Please let us know how we can be of assistance as the session advances. Once again, thank you.

Respectfully,

Pete Sprague

Pete Sprague
Chair
Kenai Detention Facility Committee

# STATE OF ALASKA

**DEPT. OF HEALTH AND SOCIAL SERVICES**

*DIVISION OF JUVENILE JUSTICE*

*TONY KNOWLES, GOVERNOR*

*P.O. BOX 110635*
*JUNEAU, ALASKA 99811-0635*
*PHONE: (907) 465-2212*
*FAX: (907) 465-2333*


March 19, 2001

The Honorable Senator Jerry Ward
Alaska State Senate
Alaska State Capital, Room 423
Juneau, Alaska 99801

Re: Kenai Youth Facility

Dear Senator Ward:

We are pleased to provide the following information requested by your office in support of SB150 to appropriate funds for the construction of the Kenai Peninsula Youth Facility.

- The Kenai Peninsula Youth Facility is based on the working prototypical design used for the Mat-Su Youth Facility. Design and Construction of the Mat-Su Facility was completed in August 2000.

- Design work has already been started on the Kenai Youth Facility with the $232,500 appropriated in SLA 97 for that task. The following design services have already been accomplished: 1) Site title transfer is continuing and the replat has been accomplished as required by the land donation process. 2) The site survey and geotechnical investigation has been accomplished. 3) The Program and Conceptual Design has been completed and an informational brochure produced.

- The construction cost estimate for remaining funds needed, developed by the Department of Transportation and Public Facilities, is $4.6 million. The estimated is predicated on construction beginning in FY 2002 and completed in FY 2003. These funds have yet to be appropriated.

- The City of Kenai has donated the land; a 10 acre tract of land. The site is well drained, with water, gas, electrical and sewer in close proximity to the property.

I hope this answers your questions concerning the project. If I can be of further assistance, please feel free to contact me.

Sincerely,

George Buhite, Director

# KENAI PENINSULA BOROUGH SCHOOL DISTRICT

148 North Binkley Street • Soldotna, AK 99669-7598 • Phone 907/262-5846 • Fax 907/262-9645


March 21, 2001

To Senator Jerry Ward

CC Sandy Altland, Aide to Senator Ward

From Ed McLain, Ed.D, Assistant Superintendent - Instruction
Kenai Pen. Borough School District

Re Appreciation of support for the Kenai Juvenile Detention Facility and comment on grant support for social support and assessment services in the Center

Thank you for the notification that Senator Ward has introduced an appropriation bill for the Kenai Juvenile Detention Center.

As we discussed, in addition to its basic mission of providing immediate and locally based detention facility for Peninsula youth in need of such detention, the center will allow the School District in concert with Peninsula based social service agencies to pursue federal grant funding to support locally delivered, timely and appropriate services, assessments and interventions for peninsula youth and their families.

One possible source of grant funding that the District is examining is the *Safe School / Healthy Student Initiative* grant. We are studying carefully the *Safe School* grant project secured by the Mat-Su Borough as a model for a grant proposal of our own to fund services for local youth and families.

Following the awarding and construction of the Mat-Su detention facility, the Mat Su Borough School District, working with a consortium of Valley based police, social and family service agencies, secured a three million dollar / three year federal grant to pay some of the operating costs associated with running a juvenile assessment center in consort with the recently opened juvenile detention center in Mat-Su.

We plan to build upon their proposal to construct a locally relevant and appropriate service and support delivery model here on the peninsula.

Thank you for your leadership and support of the Kenai Juvenile Detention Center.

Please convey my appreciation to the Senate for their support of the Kenai juvenile detention facility project.

Sincerely,
Ed McLain, Ed.D

# Alaska State Legislature

Please enter into the record my testimony to the Senate Finance
committee name

Committee on SB 150, dated 3/22/01
bill # / subject

I fully support SB 150 as it would greatly help the Kenai Peninsula Communities better address juvenile delinquency. It also helps the state complete the final stages of its Master Plan for Juvenile Detention facilities statewide.

Signed: Virginia Espenshade
Testifier

Representing (optional)

Box 1752 Homer AK 99603
Address

235-1823
Phone number

# SB 152

# HOUSE COMMITTEE REPORT

(11)
Date Referred to Committee: April 28, 2001 — FURTHER REFERRALS:

Date of Committee Action: 5/3/01

The FINANCE Committee considered: SB 152

SENATE BILL NO. 152 — DOTPF-RELATED CONTRACT CLAIMS

"An Act relating to the handling of and interest on contract controversies involving the Department of Transportation and Public Facilities or state agencies to whom the Department of Transportation and Public Facilities delegates the responsibility for handling the controversies."

Recommends it be replaced with H CS SB 152 (FIN) [ ] Same Title [ ] New Title
*For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____*

[ ] attach amendments
[ ] add new referral to _____ Committee
[ ] Letter of Intent _____ Committee

*List of Abbrev. For Depts.:*
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LAA
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

**NEW FISCAL NOTES**
*For Chief Clerk's Office Use Only

| FN# * | List by Dept(s): | Fiscal | Indet. | Zero |
|---|---|---|---|---|
| | | | | |

**PREVIOUS FISCAL NOTES**

| List by Dept(s): | FN # | Fiscal | Indet. | Zero |
|---|---|---|---|---|
| DOTPF | 1 | | ✓ | |
| DCED | 2 | | ✓ | |

| Signing with recommendations | Printed Last Name | DP | DNP | NR | AM |
|---|---|---|---|---|---|
| C Bunde | Bunde | | | — | |
| Fay Lancaster | Lancaster | ✓ | | | |
| [illegible] | Whitaker | ✓ | | | |
| John L. Harris | HARRIS | ✓ | | | |
| Jon Dawley | Dawley | ✓ | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| Chair: | | | | | |
| Chair: Ese Olson | Mulder | ✓ | | | |

# FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: SB 152
(S) Publish Date: 4/25/01

Revision Date/Time (Note if correction): 04/19/2001 10:55a.m.
Dept. Affected: DCED
Title: DOTPF - Contract Related Claims
BRU: AIDEA
Component: AIDEA
Sponsor: Senator Cowdery
Requester: Senate Finance
Component Number: 1234

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | * | * | * | * | * | * |
| CAPITAL EXPENDITURES | * | * | * | * | * | * |
| CHANGE IN REVENUES ( ) | * | * | * | * | * | * |

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| 1156 RSS | | | | | | |
| TOTAL | * | * | * | * | * | * |

Estimate of any current year (FY2001) cost: *

POSITIONS

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

**ANALYSIS:** *(Attach a separate page if necessary)*

*AIDEA has a delegation of authority from DOTPF for construction of AIDEA Development Finance projects (AIDEA owned and operated). This bill will result in additional interest payments on contract related claims. There is no way to predict the costs in the future. AIDEA Development Finance projects generally do not use General Funds (Healy Clean Coal Plant and the DeLong Mountain Transportation System funding included state grants). Additional costs, such as claims, are charged to the project proponent or are funded by AIDEA funds. In the past AIDEA has had small and multi-million dollar claims on construction projects. The claims have resulted in negotiated settlements. For example, a $1.17 million claim was paid on the Healy Clean Coal Plant in 1999. If this legislation were in effect, AIDEA would have had to pay an additional $188,018 (10% compounded interest for 18 months). Originally the claim was upwards of $10 million. If AIDEA funds are required, AIDEA's net income declines, decreasing the annual dividend AIDEA pays to the General Fund.

Prepared by: Robert G. Poe, Jr., Executive Director
Phone 907-269-3000
Division AIDEA
Date/Time 04/19/2001 10:55a.m.
Approved by: Commissioner Deborah B. Sedwick
Date 4/19/2001
Agency Department of Community & Economic Development

For distribution information, call the Governor's Legislative Office

(Rev 11/2000 OMB)



COMMITTEE COPY

# FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 152
(S) Publish Date: 4/11/01
Dept. Affected: DOT&PF
BRU:
Component:
Component Number:

Revision Date/Time (Note if correction):
Title: An act related to the handling of interest on contract controversies involving the Department of Transp...
Sponsor: Senator Cowdery
Requester: Senate Transportation

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|---|---|---|---|---|---|---|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL EXPENDITURES | 0.0** | 0.0** | 0.0** | 0.0** | 0.0** | 0.0** |
| CHANGE IN REVENUES ( ) | | | | | | |

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type) | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

ANALYSIS: *(Attach a separate page if necessary)*

**This bill will result in additional interest payments on contract related claims. The additional interest could range from $500.0 to several million dollars per year. Although this won't affect our capital budget request, these payments will reduce the amount available for other capital projects. Most of the additional interest payments will be eligible for 90% federal funding with a 10% GF match.

Prepared by: Dennis R. Poshard, Special Assistant
Phone 465-3904
Division: Commissioner's Office
Date/Time 4/10/01 12:00 AM
Approved by: Commissioner Joseph L. Perkins, P.E.
Date 4/10/01
Agency: Department of Transportation and Public Facilities

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(Rev 2/7/2001 OMB)



COMMITTEE COPY

withdrawn

**AMENDMENT** 2

OFFERED IN THE HOUSE BY REPRESENTATIVE Hudson
Davies

TO: SB 152

Page 1, line 11:

Following interest:

Insert **"from the date the procurement officer's decision is issued in accordance with AS 36.30.620"**

(b) The procurement officer may request an extension of time to prepare the protest report. The request must be in writing listing the reasons for the request. The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall respond to the request in writing. If an extension is granted, the commissioner shall list the reasons for granting the extension and indicate the date the protest report is due. The commissioner shall notify the protester in writing that the time for submission of the report has been extended and the date the report is due.

(c) The protester may file comments on the protest report with the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, within 10 days after the report is received. The protester shall provide copies of the comments to the procurement officer and to interested parties that have requested a copy of the appeal under AS 36.30.595(b).

(d) The protester may request an extension of time to prepare the comments on the protest report. The request must be in writing listing the reasons for the request. The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall respond to the request in writing. If an extension is granted, the commissioner shall list the reasons for granting the extension and indicate the date the comments are due. The commissioner shall notify the procurement officer in writing that the time for submission of the comments has been extended and the date the comments are due. (§ 2 ch 106 SLA 1986; am §§ 37, 38 ch 137 SLA 1996)

**Effect of amendments.** — The 1996 amendment, effective September 30, 1996, substituted "10 days" for "seven days" in the first sentence of subsections (a) and (c).

**Sec. 36.30.610. Decision without hearing.** (a) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall dismiss a protest appeal before a hearing is held if it is determined in writing that the appeal is untimely under AS 36.30.590(a).

(b) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, may issue a decision on an appeal without a hearing if the appeal involves questions of law without genuine issues of fact.

(c) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall, within 15 days from the date the appellant's comments on the protest report are due under AS 36.30.605(c) and (d), notify the appellant of the acceptance or rejection of the appeal and, if rejected, the reasons for the rejection. (§ 2 ch 106 SLA 1986; am § 20 ch 65 SLA 1987; am § 9 ch 37 SLA 1993)

**Cross references.** — For applicability of the 1993 amendment to (c) of this section, see § 13(e), ch. 37, SLA 1993 in the Temporary and Special Acts.

**Effect of amendments.** — The 1993 amendment, effective August 25, 1993, in subsection (c), substituted "within 15 days from the date the appellant's comments on the protest report are due under AS 36.30.605(c) and (d)" for "within 15 days after receipt of an appeal."

**Sec. 36.30.615. Hearing on protest appeal.** A hearing on a protest appeal shall be conducted in accordance with AS 36.30.670 and regulations adopted by the commissioner. (§ 2 ch 106 SLA 1986)

**Sec. 36.30.620. Contract controversies.** (a) A contractor shall file a claim concerning a contract awarded under this chapter with the procurement officer. The contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of the contractor's knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the state is liable. Except for a lease rate adjustment called for in the lease, a claim under this section must be filed within 90 days after the contractor becomes aware of the basis

of the claim or should have known the basis of the claim, whichever is earlier. A lease rate adjustment called for in the lease must be filed prior to the expiration date of the lease.

(b) If a controversy asserted by a contractor concerning a contract awarded under this chapter cannot be resolved by agreement, the procurement officer shall, after receiving a written request by the contractor for a decision, issue a written decision. The decision shall be made no more than 90 days after receipt by the procurement officer of all necessary information from the contractor. Failure of the contractor to furnish necessary information to the procurement officer constitutes a waiver of the claim. Before issuing the decision the procurement officer shall review the facts relating to the controversy and obtain necessary assistance from legal, fiscal, and other advisors.

(c) The time for issuing a decision under (b) of this section may be extended for good cause by the commissioner of administration, or for a controversy involving a construction contract or procurement for the state equipment fleet, the commissioner of transportation and public facilities, if the controversy concerns an amount in excess of $50,000. The procurement officer shall notify the contractor in writing that the time for the issuance of a decision has been extended and of the date by which a decision shall be issued.

(d) The procurement officer shall furnish a copy of the decision to the contractor by certified mail or other method that provides evidence of receipt. The decision must include a

(1) description of the controversy;

(2) reference to the pertinent contract provisions;

(3) statement of the agreed upon and disputed facts;

(4) statement of reasons supporting the decision; and

(5) statement substantially as follows:

"This is the final decision of the procurement officer. This decision may be appealed to the commissioner of (administration/transportation and public facilities). If you appeal, you must file a written notice of appeal with the commissioner within 14 days after you receive this decision."

(e) If a decision is not made by the date it is due, the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor.

(f) If a controversy asserted by the state concerning a contract awarded under this chapter cannot be resolved by agreement the matter shall be immediately referred to the commissioner of administration or the commissioner of transportation and public facilities, as appropriate.

(g) This section does not apply to payment disputes governed by AS 37.05.285. (§ 2 ch 106 SLA 1986; am §§ 39, 40 ch 137 SLA 1996)

**Effect of amendments.** — The 1996 amendment, effective September 30, 1996, added the last two sentences in subsection (a) and added subsection (g).

**Sec. 36.30.625. Appeal on a contract controversy.** (a) An appeal from a decision of the procurement officer on a contract controversy may be filed by the contractor with the commissioner of administration, or for a controversy involving a construction contract or procurement for the state equipment fleet, the commissioner of transportation and public facilities. The appeal shall be filed within 14 days after the decision is received by the contractor. The contractor shall file a copy of the appeal with the procurement officer.

(b) An appeal must contain a copy of the decision being appealed and identification of the factual or legal errors in the decision that form the basis for the appeal. (§ 2 ch 106 SLA 1986)

**Sec. 36.30.630. Hearing on a contract controversy.** (a) Except as provided in (b) of this section, a hearing shall be conducted according to AS 36.30.670 and regulations

NO OBJ Lancaster

22-LS0856\C.1
Bannister
4/30/01

amended

**AMENDMENT 1**

(2)

OFFERED IN THE HOUSE
TO: HB 235 → SB 152

Page 2, following line 8:

Insert a new bill section to read:

"* Sec. 3. The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 36.30.623 and 36.30.625(c), added by this Act, apply to controversies

delete [ adopted — (1) that are pending before an agency on the effective date of this Act; or ]

(2) for which a claim is filed with an agency under AS 36.30.620 on or after the effective date of this Act.

(b) In this section, "agency" means the Department of Transportation and Public Facilities or a state agency to whom the responsibility for handling the controversy is delegated by the Department of Transportation and Public Facilities under AS 36.30.632."

adopted 5/3/01

**AMENDMENT #4**

OFFERED IN THE HOUSE BY REPRESENTATIVE DAVIES

TO: SB 152

* Sec. 3. AS 36.30.625(a) is amended to read:

**Sec 36.30.625. Appeal on a contract controversy.** (a) An appeal from a decision of the procurement officer on a contract controversy may be filed by the contractor with the commissioner of administration, or for a controversy involving a construction contract or procurement for the state equipment fleet, the commissioner of transportation and public facilities. The appeal shall be filed within 14 days after the decision is received by the contractor. The appeal may not raise any new factual issues or theories of recovery that were not raised to and decided by the procurement officer in the decision under AS 36.30.620 (b). The contractor shall file a copy of the appeal with the procurement officer.

*TONY KNOWLES, GOVERNOR*

**DEPARTMENT OF LAW**

*OFFICE OF THE ATTORNEY GENERAL*

*P.O. BOX 110300*
*JUNEAU, ALASKA 99811-0300*
*PHONE: (907)465-3600*
*FAX: (907)465-2075*

April 16, 2001

The Hon. Vic Kohring, Chair,
and Members, House Transportation Committee
State Capitol, Room 24
Juncau, AK 99801

**Re: HB 235 – An Act relating to the handling of and interest on contract controversies involving the Department of Transportation and Public Facilities or state agencies to whom the Department of Transportation and Public Facilities delegates the responsibility for handling the controversies.**

Dear Representative Kohring,

I am the attorney assigned by the Alaska Department of Law to provide testimony on HB 235, which provides for prejudgment interest on administrative claims. Due to litigation demands in another case, I am in Ketchikan today and unable to testify. As a consequence, I respectfully submit this letter in place of in-person testimony. If any committee member has questions regarding the contents of this letter, I would be happy to meet with that member in person, or respond in writing to the entire committee. I can be reached by phone at 465-6712, and by fax at 465-6735.

- **Prejudgment Interest on Administrative Claims Not Allowed in Majority of Other States**

  We have not undertaken a survey of every state in the country. However it appears that a fair number of states do not pay prejudgment interest on administrative contract claims either outright or because the law in those states limits payment of interest to "liquidated" claims, i.e., claims that are capable of calculation under some contractual formula that does not require the exercise of discretion by agency personnel.

Alaska law, AS 36.90.200(a), already requires payment of interest on "payment requests" for work satisfactorily performed on state construction projects. If the state gives notice to the contractor that the work covered under the payment request is unsatisfactory, no interest is paid on that payment request until 21 days after the unsatisfactory work is corrected. AS 36.90.200(e). While this statute does not cover payment of interest on contract claims filed under the State Procurement Code, it is an example of the type of "liquidated" amount on which interest would ordinarily be paid if timely payment were not made by the state.

Where contract claims are concerned, there may be good policy reasons to withhold the payment of prejudgment interest. There may be policy reasons why the agency should have the opportunity to examine such claims before prejudgment interest begins accruing.

- **Cost of Application of HB 235 to Construction Contracts**

Under the Alaska Procurement Code, the Alaska Department of Transportation has the procurement authority for all construction projects conducted in the state. AS 36.30.005(b). The Department of Transportation may delegate that authority to other agencies under AS 36.30.632. Therefore, since all construction is either being performed by DOT&PF or by other agencies under delegation of authority by DOT&PF, prejudgment interest will affect all agencies conducting construction that are either subject to AS 36.30 or that are required to have similar procurement procedures.

The costs to the state for prejudgment interest if HB 235 became law could be substantial. For example, DOT&PF estimates that annual interest indebtedness could be between $500,000 and several million dollars if the companion bill to HB 235 (SB 152) were to become law, although federal matching money would be available to cover some of that cost. Fiscal Note 1, SB 152. On just three recent claims of which we are aware, prejudgment interest totaling approximately $1,200,000 would have been paid by the state if prejudgment interest were due on those claims.

- **If HB 235 Becomes Law, How Will the State Pay Prejudgment Interest?**

FHWA Projects: DOT&PF does most of its construction in the State of Alaska by using funding from the Federal Highway Administration (FHWA). While the budget process for federal funding is beyond the scope of this letter, it appears that FHWA will participate in payment of interest on construction claims according to

a federal participation rate that typically is 90 percent. Of course, payment of interest on a project means that fewer dollars will be available for projects in the state. In other words, prejudgment interest paid on one project may mean that the state is unable to fund another project somewhere else in the state.

FAA Projects: DOT&PF also conducts construction activities at airports throughout the state to build new, or expand existing, facilities utilizing Federal Aviation Administration ("FAA") funding). FAA grants operate differently than those for FHWA-funded projects. In FAA projects, the amount of a grant is based on the state's total estimate of all costs to design and construct the project. Increases in the grant amount are limited to 15 percent of the original grant. Any additional costs incurred above the grant plus 15 percent must be covered entirely by the state. If interest exceeds the amount of the FAA grant, the state will have to fund all additional expenses without FAA participation.

HB 235 affects all agencies in the state that conduct construction activities under a delegation of authority from DOT&PF. Many of these projects are supported by programs that include funding and grants from federal agencies other than FHWA and FAA. As a consequence, it may be that federal participation in administrative claims is limited in certain situations, depending on the funding source, and that state funds will have to be used to pay interest claims. Because we have not undertaken a study of the way other agencies performing construction with a delegation from DOT&PF fund projects, it is unclear that federal participation will be available to fund interest payments owed as HB 235 is currently drafted.

- **Equal Protection Issues for Other AS 36.30 Claims**

There may be an equal protection problem with this legislation as presently drafted. HB 235 authorizes the payment of interest on claims under AS 36.30.620 – .630 and 36.30.670 – 36.30.685 against DOT&PF and other agencies acting under a delegation from DOT&PF. HB 235 therefore applies to DOT&PF construction claims. Contractors asserting claims against other agencies under AS 36.30.620 – .630 and 36.30.670 - .685 may allege that they are denied equal protection of the law because they are denied prejudgment interest on their claims, while DOT&PF contractors who file claims under the same statute are entitled to interest.

The state would have to demonstrate at least a legitimate state interest in allowing prejudgment interest on some claims while denying it on others. A court might conclude that the legislature's interest in limiting prejudgment interest only to

construction claims simply to save the costs of having to pay interest on all AS 36.30 claims does not bear a substantial relationship to a legitimate state objective.[1]

- **Equal Protection Issues for Non-AS 36.30 Construction Projects**

  The Alaska Railroad Corporation, the Alaska Aerospace Development Corporation, and the Alaska Seafood Marketing Institute must adopt procedures "substantially equivalent" or "substantially similar" to AS 36.30. AS 36.30.015(e), AS 36.30.015(h). Claimants against these agencies may argue that, by virtue of the changes proposed to the procurement code by HB 235, these agencies also have to provide for the payment of prejudgment interest on claims.

  Other agencies exempt from AS 36.30 include the University of Alaska, the Alaska Housing Finance Corporation, the Alaska State Pension Investment Board, the Alaska Court System. AS 36.30.005(c), AS 36.30.015(f), and AS 36.30.030. These agencies do not have to adopt procedures equivalent to the State Procurement Code. However, the same or a similar equal protection argument may be advanced with respect to those agencies. In the recent past, at least AHFC and the Court System have faced construction claims.

---

[1] The Alaska Supreme Court has held that Equal Protection Clause of the Alaska Constitution affords greater protection to individual rights than that afforded under the U.S. Constitution. *State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624. 631 (Alaska 1989); *Laborers Local No. 942 v. Lampkin*, 956 P.2d 422, 429 (Alaska 1998). The court uses a sliding scale analysis that determines the relative importance of the individual right and the State interest and, depending on the importance of the individual interest, requires the State interest to "fall somewhere on a continuum from mere legitimacy to a compelling interest." *Enserch*, 787 P.2d at 631. The nexus between the State's interest and the means used by the State to achieve that interest must fall on a continuum from a "substantial relationship to [the] least restrictive means," again, depending on the importance of the individual right at issue. Id. at 631-32. *Williams v. State*, 895 P.2d 99, 104 (Alaska 1995); *Herricks Aero-Auto Aqua Repair v. State, DOT&PF*, 754 P.2d 1111, 1114 (Alaska 1988)(economic interests entitled to only minimal protection under Alaska Equal Protection Clause; cost savings alone may not be a legitimate state interest).

If you or any committee member has questions regarding the testimony summarized above, please advise.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Doug Gardner
Assistant Attorney General

cc: Michael K. Abbot, Legislative Director, Governor's Office
Vern Jones, Chief Procurement Officer, State of Alaska
Legislative Liaisons
Deborah Behr, Legislation Attorney, Department of Law
Chrystal Smith, Legislative Liaison, Department of Law.

[redacted]

OLES MORRISON RINKER & BAKER LLP

LAWYERS

May 2, 2001

Representative Bill Williams
State Capitol, Room 511
Juneau, AK 99801-1182

Fax: (907) 465-3793

Re: SB 152

Dear Representative Williams:

As you may already know, this law firm represents South Coast, Inc. In conjunction with the AGC, we have prepared a proposed amendment with comments that address most of the concerns that were raised during the House Finance Committee's hearing on SB 152. Any efforts you can make on behalf of incorporating this amendment into SB 152 would be appreciated.

If you have any questions regarding this matter, you may contact me at your convenience.

Very truly yours,

OLES MORRISON RINKER & BAKER LLP

Kevin G. Brady

745 WEST FOURTH AVENUE, SUITE 502, ANCHORAGE ALASKA 99501-2136
TELEPHONE: 907-258-0106 FAX: 907-258-3519

**AMENDMENT**

OFFERED IN THE HOUSE BY REPRESENTATIVE _____
TO: SB 152

Page 1, lines 1 – 4:

Delete "involving the Department of Transportation and Public Facilities or state agencies to whom the Department of Transportation and Public Facilities delegates the responsibility for handling the controversies."

Insert "filed under AS 36.30.620"

Page 1, line 7

Delete "certain"

Insert "contract"

Page 1, line 7 following "controversies."

Insert "(a)"

Page 1, line 9

Delete "department contractor, the department, or a contracting agency to whom the responsibility for handling the controversy is delegated by the department under AS 36.30.632"

Insert "contractor"

Page 1, line 13

Insert "properly" following "claim was"

Page 1, line 13 – Page 2, line 3

Delete "a decision by the procurement officer under AS 36.30.620, a decision by the commissioner of transportation and public facilities under AS 36.30.680, or a judicial decision under AS 36.30.685, whichever is latest. In this section, "department" means the Department of Transportation and Public Facilities"

Insert "payment by the agency."

Page 2, line 2

Insert following "later" "(b) The provisions of this section shall be applicable to all unresolved contract controversies pending before the agency on the effective date of this act."

Comment:

The amendments set forth above address several of the criticisms raised by the Department of Law and provide for payment of interest on pending claims.

Specifically, the amendment makes the bill applicable to all state agencies that fall within the parameters of the State Procurement Code.

Furthermore, the Department of Law was concerned that interest could may begin accruing from the date a contractor simply sends a letter asserting a claim. By amending the bill to require a contractor to "properly" file his or her claim pursuant to AS 36.30.620(a), interest does not begin to accrue until the contractor has met the statutory requirements for submission of a claim.

Finally, subsection (b) provides that this section is applicable only to "unresolved contract controversies" pending before the agency on the effective date of this act. This clearly establishes that all prior "settled" or "resolved" claims are not covered by this act.

The Department of Law's assertion that "settled" claims may be resurrected after the effective date of this act is without merit.

5/3/01

**AMENDMENT** #3

Replaced

OFFERED IN THE HOUSE

TO: SB 152
Version "C"

Page 1, line 13:

After "filed"

Delete "under"

Insert "that meets the requirements of"

# STATE OF ALASKA

**DEPARTMENT OF LAW**

*OFFICE OF THE ATTORNEY GENERAL*

*TONY KNOWLES, GOVERNOR*

*P.O. BOX 110300*
*DIMOND COURT HOUSE, 6TH FLOOR*
*JUNEAU, ALASKA 99811-0300*
*PHONE: (907)465-3600*
*FAX: (907)465-6735*


April 20, 2001

The Honorable Albert Kookesh
House of Representatives
Alaska State Capitol
Juneau, AK 99801

Dear Representative Kookesh:

During the April 19, 2001, hearing on HB 235 before the House Transportation Committee you asked us to explain the connection between Alaska's sovereign immunity and the payment of interest on administrative contract claims filed under the State Procurement Code (AS 36.30). This letter responds to your request.

The State of Alaska is an inherently sovereign power. One of the central attributes of sovereignty, which has its roots in the common law, is that a state may not be sued in court or forced to expend money from the public treasury without its prior express and unequivocal consent.

With regard to the payment of interest, it has long been recognized that, unless interest is specifically authorized by legislative enactment, it may not be paid. *Fidalgo Island Packing Co. v. Phillips*, 147 F. Supp. 883, 886, 16 Alaska 621 (1957), modified 149 F. Supp. 260, appeal dismissed 253 F.2d 621, 17 Alaska 377 (9th Cir.); *Stewart & Grindle v. State*, 524 P.2d 1242 (Alaska 1974); *Danco Exploration, Inc. v. State*, 924 P.2d 432 (Alaska 1996).

The Alaska Supreme Court has repeatedly held that "only the legislature has the power to direct the assessment of interest against the sovereign." *Stewart & Grindle*, 524 P.2d at 1245; *Danco Exploration*, 924 P.2d at 434. Officials of the executive branch of government do not possess discretion to pay interest on sums owed by the state. Likewise, the courts are without jurisdiction to order the award

of interest against the state based on judicial assessment of public policy. The power to assess interest against the state resides exclusively with the legislature.

The sovereignty of the state and the sanctity of the legislative prerogative in this area are so important that the courts have developed special rules of interpretation when considering whether the state's sovereign immunity has been waived by a particular statute. First, a statute that purports to waive the sovereign immunity of the state must do so "explicitly" and "specifically." *Stewart*, 524 P.2d at 1245; *Hayes v. Bering Sea Reindeer Products*, 983 P.2d 1280, 1284 (Alaska 1999)(applying the same rule to Tribal waivers of sovereign immunity). Second, statutes waiving the state's immunity "must be construed strictly in favor of the sovereign and not enlarge[d] beyond what the language of the statute requires." *U.S. v. Nordic Village*, 112 S.Ct. 1011, 1014-15 (1992).

Under AS 09.50.250, the Alaska Legislature has authorized the filing of certain actions against the State of Alaska in state court. Alaska Statute 09.50.250 is a limited waiver of sovereign immunity and is modeled on the Federal Tort Claims Act, 28 U.S.C. § 2674. Any action filed against the state under AS 09.50.250 resulting in a judgment bears prejudgment interest under AS 09.50.280.

However, the Alaska Supreme Court has long held that court actions seeking judicial review of final agency decisions are not authorized under AS 09.50.250 if those claims must first be filed with and decided by a state agency with mandatory claims procedures. Rather, actions for judicial review of final agency decisions must be filed under the Alaska Rules of Appellate Procedure. *State v. Lundgren Pacific Construction Co.*, 603 P.2d 889, 892-93 (Alaska 1979)(case involved a contract claim against the Dep't of Highways, now DOT&PF).893 (Alaska 1979). Because judicial review actions are not authorized under AS 09.50.250, interest may not be awarded in those cases under AS 09.50.280. *Danco Exploration*, 974 P.2d at 434.

If interest is to be paid on administrative agency claims, the legislature must enact a statutory waiver of Alaska's sovereign immunity that expressly and unequivocally requires the payment of interest on such claims. In that regard, this office has already expressed its concern that HB 235 and its companion bill in the Senate (SB 152) may bear constitutional infirmities in their present form. *Letter to Representative Kohring Re. HB 235* (April 16, 2001).

If you have additional questions concerning this letter or HB 235, please do not hesitate to contact me at 465-6712.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Doug Gardner
Assistant Attorney General

cc: Members, House Transportation Committee
Michael K. Abbott, Legislative Director, Governor's Office
Vern Jones, Chief Procurement Officer, State of Alaska
Deborah Behr, Legislation Attorney, Department of Law
Chrystal Smith, Legislative Liaison, Department of Law

# SENATE BILL NO. 152

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - FIRST SESSION

BY SENATOR COWDERY

Introduced: 3/20/01
Referred: Transportation

## A BILL

## FOR AN ACT ENTITLED

**"An Act relating to the handling of and interest on contract controversies involving the Department of Transportation and Public Facilities or state agencies to whom the Department of Transportation and Public Facilities delegates the responsibility for handling the controversies."**

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

* **Section 1.** AS 36.30 is amended by adding a new section to read:

**Sec. 36.30.623. Interest on certain controversies.** The amount ultimately determined to be due under AS 36.30.620 - 36.30.630 and 36.30.670 - 36.30.685 to a department contractor, the department, or a contracting agency to whom the responsibility for handling the controversy is delegated by the department under AS 36.30.632 accrues interest at the rate applicable to judgments under AS 09.30.070(a). Notwithstanding AS 09.30.070(b), the interest accrues from the date [the claim was filed under] a complete claim was filed & meets the requirements of AS 36.30.620(a) through the date of a decision by the procurement officer under AS 36.30.620, a decision by the commissioner of

adopted #3

Delete

transportation and public facilities under AS 36.30.680, or a judicial decision under AS 36.30.685, whichever decision is latest. In this section, "department" means the Department of Transportation and Public Facilities.

* **Sec. 2.** AS 36.30.625 is amended by adding a new subsection to read:

(c) The Department of Transportation and Public Facilities, or a contracting agency to whom the responsibility for handling the controversy is delegated by the Department of Transportation and Public Facilities under AS 36.30.632, shall handle the appeal of a controversy under this section expeditiously.

# INTEREST ON CONTRACT CONTROVERSIES
# SB 152 & HB 235

Position Paper of
The Associated General Contractors of Alaska

ISSUE: Given the complexity of construction projects, it is not unusual that differences sometimes develop between the owner and contractor regarding the scope of work covered in the contract. In those instances when the differences cannot be successfully resolved, the parties can avail themselves of the claims process set forth in the Alaska procurement code. One problem with this process is the inherent delay in the ultimate payment of the claim. The position of the State of Alaska is that they do not owe interest on the ultimate awards. Contractors believe that the delayed payment costs them not only foregone interest but also the costs of preparing and defending their claim, and that the avoidance of interest is not only contrary to common practice, it is bad public policy.

ADVANTAGES: For the State of Alaska, delaying claims allows them to earn interest on money they ultimately owe the contractor. Through such delays the State derives an economic interest in postponing the claims process. Another advantage enjoyed by the State accrues from its superior financial strength and legal resources, which sometimes can be used to force financially, strapped companies to settle their claims at a fraction of the claims value.

The current system offers no advantages to the contractor.

DISADVANTAGES: The primary disadvantage to the State will be derived from the addition of interest to the cost of a claim for the period the claim is being contended. The proposed law will put a premium on the expeditious settlement of construction claims. The State will have to change its procedures to handle such claims in a more timely manner.

There are no disadvantages to the contractor.

AGC POSITION

The current process regarding the settlement of a claim places the contractor at an economic disadvantage. Since the expenses underlying a claim have to be paid, the contractor incurs these costs plus the costs of preparing and defending its position. During this entire process the State is allowed to invest those funds for its own economic gain as well as using its superior resources to threaten the economic viability of the claimant. Payment of interest on claims is not only good public policy, but it is consistent with prior practices of the Department of Transportation regarding such claims. Currently the State of Alaska must pay prejudgment interest for virtually all other contract claimants. Contractors, however, have been singled out for disparate treatment.

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April 6, 2001

Re: SB 152 – Interest on Contract Controversies

Dear Senator:

On public works projects in the State of Alaska, a contractor encountering a condition that requires a change in the contract, is required to perform the work even if there is a dispute as to the appropriate adjustment. Resolution of such a claim frequently takes as long as four years and the State currently disallows interest on the amount of the ultimate settlement.

Most, if not all, public works contracts include contract adjustment clauses that provide a method for adjusting the contract amount when the contractor encounters changed conditions or the owner desires to change the contract in some manner. The purpose of this clause is to assure that the contractor is fairly compensated for the extra work occasioned by the change.

Alaska courts generally recognize that awarding prejudgment interest to a plaintiff is necessary to make him "whole" by compensating him for the use of money rightfully his between the time of injury and trial. The courts have held that prejudgment interest should be denied only in the most unusual cases and place the burden of proving the unusual situation on the party opposing the award of prejudgment interest. The State of Alaska apparently believes that contractor claims in general represent an "unusual case" and therefore prejudgment interest should not be applied to these claims.

We urge you to support SB 152. This bill allows construction contract claims to be treated the same as all other claims in the State of Alaska. There is no public interest in discriminating against the entire construction industry in these matters.

Sincerely,

Richard Cattanach
Executive Director

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April 23, 2001

The Hon. Dave Donley and Pete Kelly, Co-Chairs
and Members, Senate Finance Committee
State Capital, Room 520
Juneau, Alaska 99801

**Re: The Associated General Contractors, Alaska Chapter's Response to the Department of Law's Position Paper Regarding SB 152 and HB 235**

Dear Senators and Representatives:

As many of you may know, the AGC is in favor of the passage of SB 152. I believe that the merits of the bill should compel passage but I believe that it is appropriate to address the "smoke screen" raised by the Alaska Department of Law concerning this bill.

I was just provided a copy of the State of Alaska Department of Law's position paper on HB 235, dated April 16 2001 and authored by Assistant Attorney General Doug Gardner. I feel obligated to respond to a number of statements in the Department of Law's position paper because it glosses over the legal history and the recent Department of Law policy that led the AGC to advocate for the passage of this legislation.

In 1965, the Alaska Supreme Court first addressed the issue of whether a contractor claimant was entitled to prejudgment interest. *Wright Truck & Tractor v. State*, 398 P.2d 216 (Alaska 1965). In that case, the Alaska Supreme Court interpreted the precursor to Alaska Stat. § 09.50.280, [Alaska's waiver of sovereign immunity state], which provided as follows:

> Sec. 26.04. *Judgment for Plaintiff.* If judgment is rendered for the plaintiff, it shall be for the legal amount found due from

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> the state with legal interest only from the date of judgment and without punitive damages.

*Wright*, 398 P.2d at 218.

While upholding the trial court's denial of the contract claimant's request for prejudgment interest pursuant to § 26.04, the Alaska Supreme Court was extremely critical of the inequity and unfairness of the State not having to pay prejudgment interest to contractor claimants:

> We are in agreement with appellant's argument that the statutory prohibition can easily work an injustice on a party who has contracted with the state. There are business situations where agents of the state, in good conscience and even with business justification, may withhold for a time or even refuse payment. Where the contracting party is required by contract regulations to continue to perform, subject to later determination, as in the case before us, the problem often facing the contractor is where to get the capital to continue to finance his work. And even if the capital can be obtained the rate of interest required to be paid cannot be ignored. The matter would appear to be one, which the Legislative Council might refer to the legislature for reconsideration in the light of the greatly increased contract authority and activity of the State Department of Public Works.

*Wright*, 398 P.2d at 220. The Alaska Supreme Court issued the *Wright* decision on January 21, 1965.

In *State v. Phillips*, 470 P.2d 266 (Alaska 1970), the Alaska Supreme Court commented on its decision in *Wright* as follows:

> Prior to 1965 the prevailing party in an action against the State of Alaska was entitled to interest 'only from the date of judgment.' In the *Wright Truck* case, decided in 1965, we said that the prohibition against prejudgment interest 'can easily work an injustice on a party who has contracted with the state,' and suggested to the legislature that it consider amending the statute. Two months later, the legislature acted on this suggestion, replacing 'only from the date of judgment' with 'from the date it (the amount found due from the state) became due.' The statute, AS 09.50.280, now reads:

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> **If judgment is rendered for the plaintiff, it shall be for the legal amount found due from the state with legal interest from the date it became due and without punitive damages.**

*State v. Phillips*, 470 P.2d at 272.

The March 19, 1965, modifications to Alaska Stat. § 09.50.250 and Alaska Stat. § 09.50.280 discussed in *Phillips* provided as follows:

> Sec. 09.50.250. **Actionable Claims Against the State.** A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in superior Court. A person who may present his claim under AS 44.77.010 - 44.77.070 may not bring an action under this section except as set out in AS 44.77.040(c). . . . .
>
> . . . .
>
> Sec. 09.50.280. **Judgment for Plaintiff.** If judgment is rendered for the plaintiff, it shall be for the legal amount found due from the state with legal interest from the date it became due and without punitive damages.

Thus, in response to the Alaska Supreme Court's suggestion that prejudgment interest be made a component of actionable claims against the State, the 1965 State Legislature acted accordingly and intended, pursuant to Alaska Stat. § 09.50.280, that prejudgment interest begin accruing from the date it became due. Concurrently with this statutory modification expressly permitting the award of prejudgment interest, the legislature mandated that that certain types of claimants pursue and exhaust administrative remedies pursuant to Alaska Stat. § 44.77.010-.070.

In *State v. ZIA, Inc.*, 556 P.2d 1257 (Alaska 1976), the Alaska Supreme Court construed Alaska Stat. § 44.77.010-.070 with Alaska Stat. § 09.50.250 as requiring a contract claimant bringing an action against the State to first exhaust administrative remedies prior to initiating court action.

In *ZIA*, the contractor contracted with the State to install safety canopies on State equipment. ZIA then sued the State for breach of

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contract without first pursuing the required administrative review of the claim. The Alaska Supreme Court explained that:

> By virtue of AS 09.50.250 we recognize the legislative policy, which dictates that actions against the State first should be considered by the affected administrative agency. While we do not find AS 09.50.250 to be of the jurisdictional nature, . . . we find, with respect to cases which fall within AS 09.50.250, that that statute establishes an administrative procedure which can be characterized as a condition precedent, [to a suit in state court].

*ZIA*, at 1263.

In 1986, the State Legislature enacted Alaska Stat. § 36.30, *et seq.* -- the State Procurement Code -- thereby adopting internal administrative procedures for contract claimants. In conjunction with the adoption of the State Procurement Code, the legislature modified Alaska Stat. § 09.50.250 as follows:

> 09.50.250. **Actionable claims against the state.** A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in a state court that has jurisdiction over the claim. A person who may present the claim under AS 44.77 may not bring an action under this section except as set out in AS 44.77.040(c). A person who may bring an action under AS 36.30.560-- 36.30.695 may not bring an action under this section except as set out in AS 36.30.685.

Since adopting Alaska Stat. § 09.50.280 in 1965, there has been no statute enacted which limits any contractor claimant's entitlement to prejudgment interest from the date of the claim pursuant to Alaska Stat. § 09.50.280.

Further, the controlling case law does not afford the State any basis to argue that contractor claimants are not entitled to prejudgment interest. State agencies, in particular the Department of Law, have instead taken an arbitrary and unsupportable position on this issue based upon an erroneous interpretation of *dicta* in a 1996 Alaska Supreme Court Case, *Danco Exploration, Inc. v. State*, 924 P.2d 432 (Alaska 1996).

Succinctly, Danco involved a claim that the State of Alaska Department of Natural Resources declined to return a bid deposit to the

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claimant. The Alaska Supreme Court concluded that Danco was not entitled to prejudgment interest on the bid deposit because it was not an action against the state sounding in contract or tort.

This very argument defies common sense in a state where "prejudgment interest is a form of consequential damages [that] . . . becomes a part of the judgment proper" and where "it is only in the most unusual cases that prejudgment interest is not proper." *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 35 (Alaska 1998).

The Department of Law's position paper must also be placed in historical context. In late 1976, the Department of Law adopted a strategy for handling contractor claims on public works projects. Assistant Attorney General Ray Preston authored the strategy memorandum. It states:

> Thus looms the strategy of protracted conflict: the happenstance of one party (the State) with limitless resources and one without. Compounding things is the fact that attorneys fees go to the winner, which will be significantly more flowing from a de novo situation than one where it is review of the Board's decision, and whether that decision is supported by "substantial evidence based upon the record as a whole" (or something close to that). Thus, the State would have the opportunity of winning by attrition, including the factor of hiring a new expert who is even more proficient (and more expensive) than [the contractor] can muster and all the while building up the potential that the contractor will ultimately be liable for those costs. Thus, I believe that the strategy and advantages of protracted conflict in this case is available to the State alone, and that it should seriously be considered in this case.

This strategy of winning through attrition and forcing the contractor to spend literally hundreds of thousands of dollars through a lengthy and protracted claims process is precisely the strategy adopted by the Department of Law for the past several decades.

In 1993, seven years after the enactment of the State Procurement Code, the Alaska Supreme Court explicitly acknowledged that prejudgment interest was an appropriate component of a contractor's claim. *State v. Eastwind, Inc.*, 851 P.2d 1348, 1352 n.5 (Alaska 1993)

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Up until 1998, State agencies recognized that contractors who prosecuted claims were entitled to an award of prejudgment interest on the ultimately claim amount awarded. For example, in a letter authored by Commissioner Perkins to the attorney for a successful contractor claimant, Commissioner Perkins directed Tony Johansen to "initiate payment in the amount of $1,945,857.39, . . . plus statutory interest compounded at 10.5 % from October 10, 1996, . . . ."

Even as late as March of last year, Commissioner Perkins personally advised me that:

> On the issue of paying prejudgment interest on a claim appeal, we are not avoiding making such payments by choice. Rather, we are following the advice of the Attorney General's Office that such payments are contrary to law.

Thus, it is not the Department of Transportation and Public Facilities that opposes awards of prejudgment interest to contractor claimants. Rather, it is the Department of Law that opposes this legislation because it undermines their strategy of "protracted wars of attrition."

With that historical perspective in mind, I wish to address a number of statements submitted by the Department of Law in opposition to the passage of SB 152 and HB 235.

**1. Prejudgment Interest on Administrative Claims Not allowed in Majority of Other States.**

In the State of Alaska, every contract claim filed against a municipality, city, or federal agency requires an award of prejudgment interest. The state simply cannot argue that every individual who brings a contract action against the state of Alaska that does not fall within an administrative review process is entitled to an award of prejudgment interest. The department of law's assertion that "a fair number of states do not pay prejudgment interest on administrative contract claims . . . because the law in those states limits payments of interest to "liquidated" claims. . ." is sophistry. Contractors who file claims and certify that they are accurate are requesting a specific sum of money that is "liquidated."

Alaska's Prompt Payment Act, AS 36.90.200, was enacted to ensure that the State did not delay paying undisputed amounts to contractors.

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Thus, where the State delays in making prompt payment for work accepted, the State must pay interest as a penalty for its dilatory processing of contractor pay requests.

The Department of Law's position paper suggests that "there may be good policy reasons to withhold the payment of prejudgment interest" and that "there may be policy reasons why the agency should have the opportunity to examine such claims before prejudgment interest begins accruing." No policy reasons are articulated for either proposition. A concrete reason to mandate the award of prejudgment interest on contractor claims lies in the same underlying rationale that resulted in the enactment of the Prompt Payment Act. It would encourage the State to make payment quickly when payment is due and it would encourage prompt and timely resolution of contractor claims.

**2. Cost of Application of HB 235 to Construction Contracts.**

The Department of Law's position paper states, "[t]he costs to the state for prejudgment interest if HB 235 became law could be substantial." My members and I dispute this for a number of reasons.

First, the availability of prejudgment interest on contractor claims would serve as an incentive for State agencies to quickly evaluate and resolve construction disputes. Contractors who suffer losses on state public works projects are only interested in resolving the claim and moving on to the next project. The State Agency and the Department of Law are the only entities that have no interest in timely resolving construction disputes. Rather, they perceive it is in their best interests to delay, make the contractor incur the costs of prosecuting his or her claim, and essentially "break" the contractor by adversely impacting the contractor's bonding capacity and ability to continue to exist.

Second, when state agencies refuse to negotiate or settle a contractor claim, they force the contractor to spend $200,000 to $300,000 to retain lawyers and expert consultants to prosecute the claim. As a general observation, most contractors would be content to recover a percentage of their liquidated claim rather than pay attorneys and consultants. When one adds in $200,000 - $300,000 in fees on top of that liquidated claim amount, the contractor is forced to pursue the administrative process vigorously to the end just to break even.

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Third, for all FHWA projects, 23 CFR 635.124, describes those situations wherein the Federal Highway Authority will contribute its 90.97 percent of funds awarded to successful contractor claimants. Specifically:

> (f) Payment of interest associated with a claim will be eligible for participation provided that the payment to the contractor for interest is allowable by State statute or specification and the costs are not a result of delays caused by dilatory action of the State or the contractor. The interest rates must not exceed the rate provided for by the State statute or specification.

Lastly, cost considerations are clearly appropriate in these budget-conscious times. I submit that creating a clearly identifiable incentive and downside risk for State agencies [and the Department of Law] to promptly settle these claims would result in cost savings in the long run. You should be aware that incurring costs is a two-way street. State agencies at issue and the Department of Law also incur tremendous expenses from retained attorneys, retained consultants, and retained experts for the purpose of defending against contractor claims. In some cases, state agencies have prospectively applied for hundreds of thousands of dollars in FHWA funds for the purpose of defending against a contractor's affirmative prosecution of a construction claim. It is our position that that those funds would be better spent by settling the claim in a timely fashion.

**3. If HB 235 Becomes Law,. How will the State Pay Prejudgment Interest?**

This question ignores the fact that the State must pay prejudgment interest to virtually all other claimants. The better question is: Why have state agencies and the Department of Law made the arbitrary decision to treat construction contractors differently than any other contract or tort claimant? I assure you that neither the Department of Transportation & Public Facilities nor the Department of Law will provide you with a satisfactory answer to this question.

**4. Equal Protection Issues for Other AS 36.30 Claims.**

The AGC agrees that this statute should define Department as all state administrative agencies authorized to procure construction or contracts under the State Procurement Code, AS 36.30 et seq.

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**5. Equal Protection for Non-AS 36.30 Construction Projects.**

The Department of Law's Equal Protection arguments appear to be designed to scare these honorable committees into inactivity with respect to this needed legislation. Notwithstanding these arguments, these committees should recognize that, based upon the institutional knowledge of the agency I represent, the Alaska Railroad Corporation, The University of Alaska, and the Alaska Court System have all had construction claims which were timely settled rather than drawn out through a 3 - 5 year claims process. These agencies, unlike the Department of Transportation and Facilities, recognize that timely resolution of claims avoids attorney's fees, consultant's costs, and expert witness fees, and the associated costs of defending a claim for several years.

Lastly, my apologies for the length of this letter. It was necessary to give the committee members a historical context and perspective into the Department of Law's opposition to this essential legislation. The Associated General Contractors of Alaska support this legislation, as it would give its members equal treatment to that accorded other tort and contract claimants who have claims against the state of Alaska.

If any of you has any questions regarding this letter, please advise me at your earliest convenience.

Very truly yours,

Richard Cattanach

Executive Director

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(b) The procurement officer may request an extension of time to prepare the protest report. The request must be in writing listing the reasons for the request. The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall respond to the request in writing. If an extension is granted, the commissioner shall list the reasons for granting the extension and indicate the date the protest report is due. The commissioner shall notify the protester in writing that the time for submission of the report has been extended and the date the report is due.

(c) The protester may file comments on the protest report with the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, within 10 days after the report is received. The protester shall provide copies of the comments to the procurement officer and to interested parties that have requested a copy of the appeal under AS 36.30.595(b).

(d) The protester may request an extension of time to prepare the comments on the protest report. The request must be in writing listing the reasons for the request. The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall respond to the request in writing. If an extension is granted, the commissioner shall list the reasons for granting the extension and indicate the date the comments are due. The commissioner shall notify the procurement officer in writing that the time for submission of the comments has been extended and the date the comments are due. (§ 2 ch 106 SLA 1986; am §§ 37, 38 ch 137 SLA 1996)

**Effect of amendments.** — The 1996 amendment, effective September 30, 1996, substituted "10 days" for "seven days" in the first sentence of subsections (a) and (c).

**Sec. 36.30.610. Decision without hearing.** (a) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall dismiss a protest appeal before a hearing is held if it is determined in writing that the appeal is untimely under AS 36.30.590(a).

(b) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, may issue a decision on an appeal without a hearing if the appeal involves questions of law without genuine issues of fact.

(c) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall, within 15 days from the date the appellant's comments on the protest report are due under AS 36.30.605(c) and (d), notify the appellant of the acceptance or rejection of the appeal and, if rejected, the reasons for the rejection. (§ 2 ch 106 SLA 1986; am § 20 ch 65 SLA 1987; am § 9 ch 37 SLA 1993)

**Cross references.** — For applicability of the 1993 amendment to (c) of this section, see § 13(e), ch. 37, SLA 1993 in the Temporary and Special Acts.

**Effect of amendments.** — The 1993 amendment, effective August 25, 1993, in subsection (c), substituted "within 15 days from the date the appellant's comments on the protest report are due under AS 36.30.605(c) and (d)" for "within 15 days after receipt of an appeal."

**Sec. 36.30.615. Hearing on protest appeal.** A hearing on a protest appeal shall be conducted in accordance with AS 36.30.670 and regulations adopted by the commissioner. (§ 2 ch 106 SLA 1986)

**Sec. 36.30.620. Contract controversies.** (a) A contractor shall file a claim concerning a contract awarded under this chapter with the procurement officer. The contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of the contractor's knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the state is liable. Except for a lease rate adjustment called for in the lease, a claim under this section must be filed within 90 days after the contractor becomes aware of the basis

of the claim or should have known the basis of the claim, whichever is earlier. A lease rate adjustment called for in the lease must be filed prior to the expiration date of the lease.

(b) If a controversy asserted by a contractor concerning a contract awarded under this chapter cannot be resolved by agreement, the procurement officer shall, after receiving a written request by the contractor for a decision, issue a written decision. The decision shall be made no more than 90 days after receipt by the procurement officer of all necessary information from the contractor. Failure of the contractor to furnish necessary information to the procurement officer constitutes a waiver of the claim. Before issuing the decision the procurement officer shall review the facts relating to the controversy and obtain necessary assistance from legal, fiscal, and other advisors.

(c) The time for issuing a decision under (b) of this section may be extended for good cause by the commissioner of administration, or for a controversy involving a construction contract or procurement for the state equipment fleet, the commissioner of transportation and public facilities, if the controversy concerns an amount in excess of $50,000. The procurement officer shall notify the contractor in writing that the time for the issuance of a decision has been extended and of the date by which a decision shall be issued.

(d) The procurement officer shall furnish a copy of the decision to the contractor by certified mail or other method that provides evidence of receipt. The decision must include a

(1) description of the controversy;
(2) reference to the pertinent contract provisions;
(3) statement of the agreed upon and disputed facts;
(4) statement of reasons supporting the decision; and
(5) statement substantially as follows:

"This is the final decision of the procurement officer. This decision may be appealed to the commissioner of (administration/transportation and public facilities). If you appeal, you must file a written notice of appeal with the commissioner within 14 days after you receive this decision."

(e) If a decision is not made by the date it is due, the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor.

(f) If a controversy asserted by the state concerning a contract awarded under this chapter cannot be resolved by agreement the matter shall be immediately referred to the commissioner of administration or the commissioner of transportation and public facilities, as appropriate.

(g) This section does not apply to payment disputes governed by AS 37.05.285. (§ 2 ch 106 SLA 1986; am §§ 39, 40 ch 137 SLA 1996)

**Effect of amendments.** — The 1996 amendment, effective September 30, 1996, added the last two sentences in subsection (a) and added subsection (g).

**Sec. 36.30.625. Appeal on a contract controversy.** (a) An appeal from a decision of the procurement officer on a contract controversy may be filed by the contractor with the commissioner of administration, or for a controversy involving a construction contract or procurement for the state equipment fleet, the commissioner of transportation and public facilities. The appeal shall be filed within 14 days after the decision is received by the contractor. The contractor shall file a copy of the appeal with the procurement officer.

(b) An appeal must contain a copy of the decision being appealed and identification of the factual or legal errors in the decision that form the basis for the appeal. (§ 2 ch 106 SLA 1986)

**Sec. 36.30.630. Hearing on a contract controversy.** (a) Except as provided in (b) of this section, a hearing shall be conducted according to AS 36.30.670 and regulations

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ALASKA STATE CHAMBER OF COMMERCE

# ALASKA STATE CHAMBER OF COMMERCE

Testimony on SB 152, DOTPF Contract Related Claims
By Pamela La Bolle, President

The Alaska State Chamber of Commerce supports Senate Bill 152, requiring DOT&PF to pay interest on contract controversies that are settled in favor of the contractor. Disputed claims can take month or years to settle, and without the accrual of interest, the state agency has little incentive to settle a disputed claim. Without an incentive to settle a dispute, the State can extend negotiations to the point that a contractor who needs the money can be forced to take a reduced settlement.

In civil court cases, the losing party in a monetary dispute would be required to pay interest on the amount in dispute. It should be no different for the agency in dealing with contractors.

We urge support for SB 152.

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May 3, 2001

Representative_Bill_Williams@legis.state.ak.us
Alaska House of Representatives

Re: SB 152

Dear Representative Bill Williams:

During the last public hearing on SB 152 the Department of Law raised a legitimate concern about interest accruing on a claim prior to the State having sufficient information to evaluate a claim. A review of the current statute indicates that this issue is already addressed. AS 36.30.620 states

(a) A contractor shall file a claim concerning a contract awarded under this chapter with the procurement officer. The contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of the contractor's knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes that state is liable. . . .

(b) If a controversy asserted by a contractor concerning a contract awarded under this chapter cannot be resolved by agreement, the procurement officer shall, after receiving a written request by the contractor for a decision, issue a written decision. The decision shall be made no more than 90 days after receipt by a procurement officer of all necessary information from the contractor. Failure of the contractor to furnish necessary information to the procurement officer constitutes a waiver of the claim. (emphasis added). . .

(e) If a decision is not made by the date it is due, the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor. . .

As can be seen above, a contractor cannot file a claim without certifying that the "claim is made in good faith, . . . the supporting data are accurate and complete . . . and that the amount requested accurately reflects the contractor adjustment : . .. After a claim is filed, the state has 90 days "after receipt by a procurement officer of all necessary information (emphasis added) to render a decision. The state has been adept in using this clause to delay decisions by asking for extraneous, redundant, and superfluous information thereby creating endless delays and imposing further hardships on contractors.

It is important to remember that the claim process does even start until after

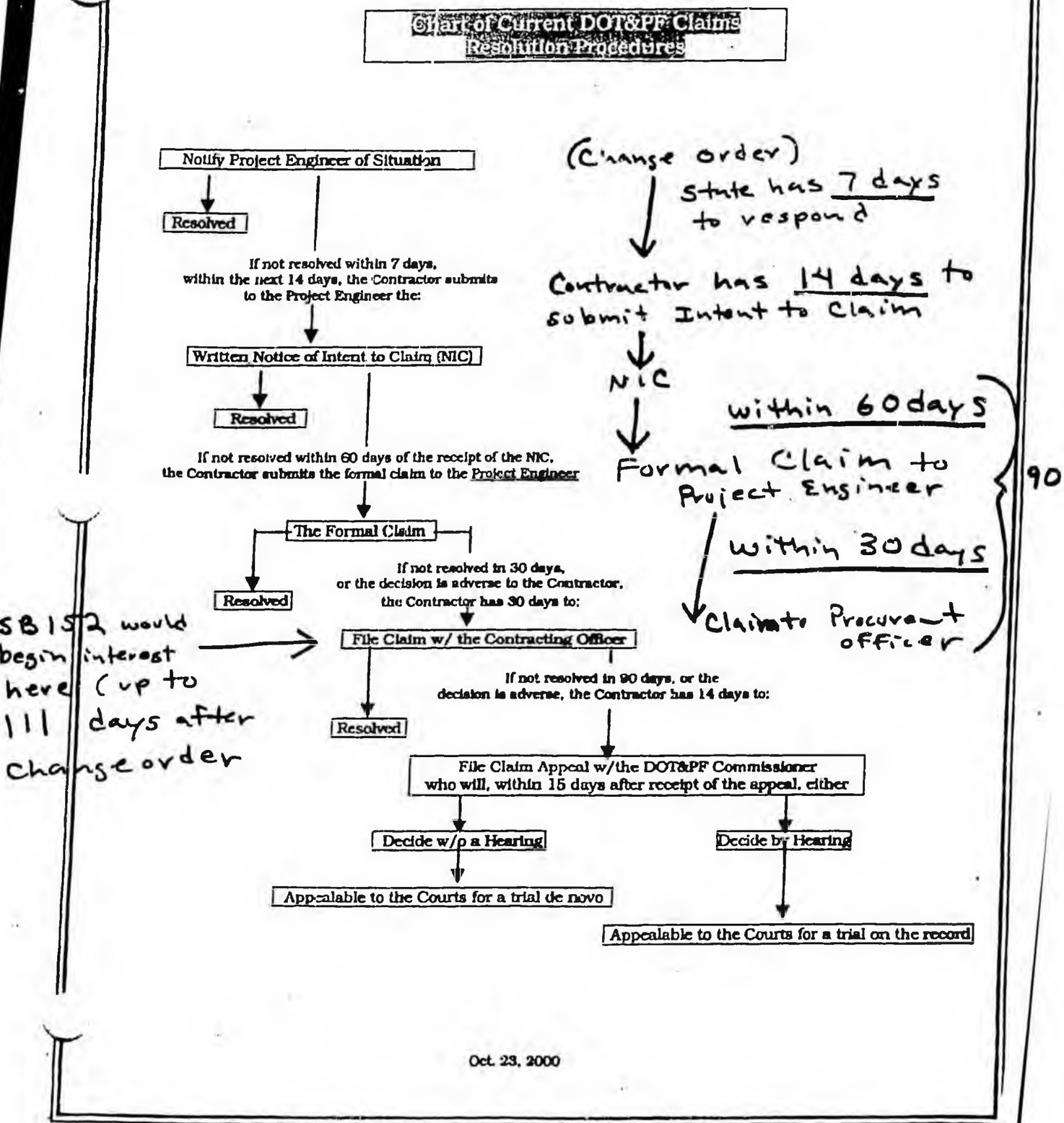
(1) the contractor has notified the project engineer of a situation that the contractor believes is not covered by the project scope of work.
(2) the parties could not resolve the issue at the project level.
(3) the contractor has provided the state with an official " Notice of Intent to Claim".
(4) The parties are unable to resolve the issue after receipt of the intent to claim.
This "pre-claims process" can take as long as 81 days before the official claim is filed.

It is AGC's position that interest should start once the claim has been filed since sufficient time has already lapsed prior to the filing. The proposed amendment to delay the starting date until an "adverse decision" merely awards the state for delaying the timely adjudication of the claim. Prior to the filing of the claim the state has already denied an adjustment at the job level and at the Notice of Intent to Claim level. It is reasonable to find that the state has issued two adverse decisions prior to the filing of the official claim. We cannot in good conscience support the amendment.

Sincerely,

Richard Cattanach
Executive Director

# Chart of Current DOT&PF Claims Resolution Procedures



**SB 152 – Relating to the handling of and interest on contract controversies involving DOTPF or state agencies to whom DOTPF delegates the responsibility for handling the controversies**

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## What would passage of SB 152 do?

- **Current Alaska law requires that interest be paid on payment requests for work satisfactorily performed on state construction projects.**

  If the work is satisfactorily completed, the state must pay interest if timely payments are not made. If the state gives notice to the contractor that the work covered under the payment request is unsatisfactory, no interest is paid on that request until 21 days after the work has been satisfactorily completed. AS 36.90.200(e). This is an example of a "liquidated" sum on which interest would ordinarily be due if timely payment were not made by the state. A liquidated sum exists only where the parties agree on the amount due or where the amount due can be exactly determined by the application of rules of arithmetic or law.

- **SB 152 would change the rules governing payment of interest on contested construction claims.**

  Under current law, contested claims, which result when a contractor and the state do not agree on the costs of a project, first go through the administrative hearing procedure. During this time the parties may attempt to settle the dispute using alternative dispute resolution. Over 80 percent of disputes involving construction claims are settled amicably and efficiently during this phase. If there is no resolution of the claim during the administrative hearing stage, it can then be appealed to Superior Court. By Alaska law no interest can be paid during this period.

  SB 152 would require the state to pay prejudgment interest from the time a contractor filed its first complaint with the agency. This could cost the state millions of dollars each year.

## How much would SB 152 cost the State of Alaska?

- **The costs to the state could be substantial.** For example, DOTPF estimates that annual interest indebtedness fo · its projects alone could be between $500,000 and several million dollars, although federal matching money would be available to cover some of the cost. On three recent DOTPF claims, prejudgment interest totaling approximately $1.2 million would have been due from the state if the provisions of SB 152 had been in place.

  In the case, for instance, of a $20 million claim that was settled after one year (a relatively short time for such a sizable claim), the state's obligation if the provisions of SB 152 were in effect would be approximately $1.6 million, an amount that would require funding through the supplemental budget process.

  The requirement to pay prejudgment interest from the time the administrative claim is filed would affect many agencies because DOTPF has procurement authority for all construction projects conducted in the state. It may delegate that authority to other agencies. SB 152 would thus apply to most construction projects done by state agencies, including, but not limited to, the Alaska Industrial Development and Export Authority, the Alaska Energy Authority, the Department of Administration, the Department of Fish and Game, and the Department of Health and Social Services.

## How would the increased interest costs be paid for?

- **For many DOTPF projects, federal funding would cover most, but not all, of the increased costs.** DOTPF does the majority of its construction by using funding from the Federal Highway Administration (FHWA). It appears that FHWA will participate in payment of interest on construction claims according to a federal participation rate that is typically 90 percent. Federal funds available to a state are limited, however, so using FHWA funds to pay prejudgment interest on an administrative claim for one project means there will be less money available for other projects.

- **Federal Aviation Agency (FAA) project funds are dependent on the state's estimate and are limited.** The grants DOTPF receives from the FAA to build new airport facilities or expand existing facilities are based on the state's estimate of the total costs to design and construct the project. Increases in the grant amount are limited to 15 percent of the original grant. Additional costs,

such as payment of prejudgment interest on administrative contract claims, would have to come out of the General Fund.

- **The General Fund or bond revenue would have to cover additional prejudgment interest charges on projects of most agencies.** Many construction projects of other agencies are funded by the state's General Fund or bond revenues or by federal agencies other than FHWA. It is unclear whether any other federal agencies would absorb the additional costs that would result from passage of SB 152. Additional costs of the state-funded projects would have to come from either the General Fund or bond revenues, thus limiting other uses of these funds.

## How will SB 152 affect the claims process?

- **SB 152 will encourage the filing of claims earlier in the construction process.** This will divert state resources and personnel from working to complete projects to litigating claims in order to avoid the running of interest. It will make project administration more costly and less efficient. The bill could also have the unintended effect of encouraging DOTPF to pay unwarranted claims to avoid the running of interest and interference with project administration.

## Does SB 152 pose equal protection issues?

- **Non-construction claims under AS 36.30, the State Procurement Code, would not be treated equally with construction claims.** The provisions of SB 152 apply to construction claims only, and to claims against DOTPF and other agencies acting under delegation from DOTPF. Non-construction contractors asserting claims under AS 36.30.620 - .630 and 36.30.670-.685 might allege that they were denied equal protection of the law because they could not be given prejudgment interest on those claims while DOTPF construction contractors were entitled to such interest.

- **The state would have to demonstrate at least a legitimate state interest in allowing prejudgment interest on some claims while denying it on others.** A court might conclude that the legislature's interest in limiting prejudgment interest to only construction claims simply to save the costs of having to pay interest on all AS 36.30 claims did not bear a substantial relationship to a

legitimate state objective and that the provisions of SB 152 therefore violated the Equal Protection Clause of the Alaska Constitution.

- **There could be equal protection issues for non-AS 36.30 construction projects.** The Alaska Aerospace Development Corporation, University of Alaska, Alaska Housing Finance Corporation, and Alaska Court System, among others, are not bound by AS 36.30. Contractors with construction claims against those agencies might argue that these agencies are violating the Equal Protection Clause of the Alaska Constitution.

## How do other states deal with prejudgment interest?

- **Nearly a third of the states surveyed by the Department of Law pay no interest on administrative contract claims.**

- **A number of the states pay interest on administrative claims only from the date the claims are liquidated.** It should be noted that most contract claims are not liquidated when they are first filed with the agency because they cannot be calculated by simple reference to a contractual formula or a rule of law. Most contract claims will not be liquidated until they are finally decided through the administrative hearing process.

- **Another group of the states surveyed pay interest on contract claims beginning from a variety of different dates**, including 90 days after the project is completed or final payment is made; date claim is complete and denied by agency; date claim is filed only until date lawsuit is filed; date of claim; date claim accrued.

## How does SB 152 relate to the sovereign immunity of the State of Alaska?

- **SB 152 will require a further waiver of the state's sovereign immunity.** The State of Alaska is an inherently sovereign power. If interest is to be paid on administrative agency claims, as is proposed by SB 152, the legislature must enact a statutory waiver of Alaska's sovereign immunity that expressly and unequivocally requires the payment of interest on such claims.

  One of the central attributes of sovereignty is that a state may not be sued in court or forced to expend money from the public treasury without its prior

express and unequivocal consent. The sovereignty of the state and the sanctity of the legislative prerogative in this area are so important that the courts have developed special rules of interpretation when considering whether the state's sovereign immunity has been waived by a particular statute. First, a statute that purports to waive the sovereign immunity of the state must do so "explicitly" and "specifically." (*Stewart & Grindle v. State*) Second, statutes waiving the state's immunity "must be construed strictly in favor of the sovereign . . . ." (*U.S. v. Nordic Village*)

*Alaska Department of Law*
*April 26, 2001*

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

**DEPARTMENT OF LAW**

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April 26, 2001

The Honorable Jerry Ward
Alaska State Senate
State Capitol, Room 423
Juneau, AK 99811

**Re: Senate Bill 152 – Relating to the handling of and interest on contract controversies involving DOTPF or state agencies to whom DOTPF delegates the responsibility for handling the controversies**

Dear Senator Ward:

At the hearing held on Senate Bill 152 on April 24, 2001, you asked me to provide information, based on a survey we recently conducted, on which states pay interest on administrative contract claims. In addition to the information provided in this letter, I am enclosing two letters distributed to the House Transportation Committee summarizing our concerns with HB 235 -- a bill identical to SB 152.

I share the following information from the nineteen responses we had to our survey.

- **States that do not pay interest on administrative contract claims:** 6 (Alaska, Rhode Island, Nebraska, Texas, Colorado[1], Georgia[2]

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[1] Colorado may pay interest if the parties agree to go through alternative dispute resolution and interest is part of the arbitrated award.

[2] Georgia pays interest only if a case goes to court and then only from the date that judgment is entered against the state.

- **States that pay interest on administrative claims only from the date the claims are liquidated:** 5 (Wyoming, Kansas, Washington, Arizona, California)

  - A liquidated claim exists only where the parties agree on the amount due or where the amount due can be exactly determined by the application of rules of arithmetic or law. Air Van Lines v. Buster, 673 P.2d 774, 778 n. 3 (Alaska 1983), quoting 1 S. Williston, *A Treatise on the Law of Contracts* § 128 (3d ed. 1957).

  - This date may vary from case-to-case, but rarely will the date a claim is liquidated be the day the claim is filed with the agency.

  - The AGC is incorrect in its letter of April 23, 2001, to the Senate Finance Committee when it alleges that contractors' claims are liquidated simply because the contractors request a specific sum of money in the claim.

  - Most contract claims are **not** liquidated when they are first filed with the agency because they **cannot** be calculated by simple reference to a contractual formula or a rule of law.

  - Most contract claims will not be liquidated until they are finally decided by the agency.

- **States that pay interest on contract claims even though they may not be liquidated at the time they are filed:** 6 (Missouri, Vermont, West Virginia, Florida, New York, Hawaii)

  - These states pay interest from the following dates:

    Missouri -- from date of claim

    Vermont – from date claim accrued

    West Virginia – from date claim accrued

Florida -- from the date the claim is complete and denied by the agency

New York – interest on claims begins to run 90 days following the acceptance of all work on the project or final payment without regard to when a notice of claim is given or a lawsuit filed.

Hawaii – if settled, interest is paid from the date the claim is filed until the date the claim is allowed by the agency. If the claim is not allowed, interest is paid only until the time a lawsuit is filed. No interest is paid while the lawsuit is pending. Thereafter, interest is paid only from the date judgment is entered.

- **Conclusions that may be drawn from this information:**

  - The majority of the above-listed states do not pay interest on contract claims from the date a claim is first filed with the agency.

  - Alaska would join a distinct minority of states if it enacted SB 152 or HB 235 and started paying interest on contract claims from the date a claim is first filed with the agency.

- **Policy reasons for not paying interest from the date a claim is first filed.**

  - Doing so would increase contract claims, as contractors would feel compelled to claim on every conceivable item to try to get interest or to create pressure on the departments to accept their version of facts and pay their claims.

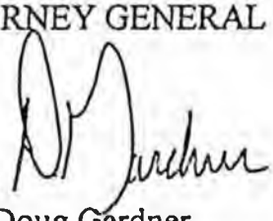
  - Because of increased claims, contracts will be more difficult to administer; project personnel may spend more time evaluating claims than getting the job done.

  - AS 36.30 functions as an alternative dispute resolution mechanism and was enacted by the legislature to provide an out-of-court means of settling disputes. With interest running on claims, settlement discussions may become more complicated and more litigious. Most claims are currently resolved amicably by the department and contractors; adding a

litigious element of interest to the process will not assist in the ADR process.

Sincerely yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: 
Doug Gardner
Assistant Attorney General

DG:pvp:css

Enclosures

cc: Senator John Cowdery
Mike Abbott, Office of the Governor
Vern Jones, Chief Procurement Officer, Department of Administration
Chrystal Smith, Legislative Liaison, Department of Law
Deborah Behr, Legislation Attorney, Department of Law