ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672
10702 SENATE TRANSPORTATION 547

contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

- (b) Finality of board decision
  In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

- (c) Remand or retention of case
  In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 607 of this title, the court may render an opinion and judgement and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

- (d) Consolidation
  If two or more suits arising from one contract are filed in the United States Court of Federal Claims and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Court of Federal Claims may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

- (e) Judgments as to fewer than all claims
  In any suit filed pursuant to this chapter involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

- (f) Advisory opinions
  - (1) Whenever an action involving an issue described in paragraph (2) is pending in a district court of the United States, the district court may request a board of contract appeals to provide the court with an advisory opinion on the matters of contract interpretation at issue.
  - (2) An issue referred to in paragraph (1) is any issue that could be the proper subject of a final decision of a contracting officer appealable under this chapter.
  - (3) A district court shall direct any request under paragraph (1) to the board of contract appeals having jurisdiction under this chapter to

adjudicate appeals of contract claims under the contract or contracts being interpreted by the court.

- (4) After receiving a request for an advisory opinion under paragraph (1), a board of contract appeals shall provide the advisory opinion in a timely manner to the district court making the request.

US Code as of: 01/05/99

Sec. 610. Subpena, discovery, and deposition

A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board through the Attorney General; or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.

US Code as of: 01/05/99

Sec. 611. Interest

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

US Code as of: 01/05/99

Sec. 612. Payment of claims

- (a) Judgments
  Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of title 31.

- (b) Monetary awards
  Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.

- (c) Reimbursement
  Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 1304 of title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.

- (d) Tennessee Valley Authority
  - (1) Notwithstanding the provisions of subsection (a) through (c) of this section, any judgment against the Tennessee Valley Authority on a claim under this chapter shall be paid promptly in accordance with the provisions of section 831h(b) of title 16.
  - (2) Notwithstanding the provisions of subsection (a) through (c), any monetary award to a contractor by the board of contract appeals for the Tennessee Valley Authority shall be paid in accordance with the provisions of section 831h(b) of title 16.

US Code as of: 01/05/99

Sec. 613. Separability

If any provision of this chapter, or the application of such provision to any persons or circumstances, is held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

Alaska State House of Representatives
Twenty-Second Legislature
First Session

RCS# 367
Item 11

5-07-01
11:08:00

SB 152
Second Reading
Adopt RLS CS

Yeas:	15	Coghill, Dyson, Fate, Foster, James, Kohring, Kott, McGuire, Meyer, Moses, Porter, Rokeberg, Scalzi, Stevens, Wilson
Nays:	24	Berkowitz, Bunde, Chenault, Cissna, Crawford, Croft, Davies, Green, Guess, Halcro, Harris, Hayes, Hudson, Joule, Kapsner, Kerttula, Kookesh, Lancaster, Masek, Morgan, Mulder, Murkowski, Whitaker, Williams
Excused:	0	
Absent:	1	Ogan

ASSOCIATED GENERAL CONTRACTORS of ALASKA

4041 B STREET • ANCHORAGE, ALASKA 99503
P.O. BOX 240609 • ANCHORAGE, ALASKA 99524-0609
TELEPHONE (907) 561-5354 • FAX (907) 562-6118

May 4, 2001

Thyes Shaub
Shaub and Associates
217 Second Street, Suite 206
Juneau Alaska 99801

Re: SB 152

Dear Thyes,

AGC cannot support the amendment to Section 3 of SB 152 which states, **"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)."** for the following reasons:

1. The process prior to the procurement officer's decision is primarily an administrative process that normally does not include attorneys, claims experts, or discovery. This amendment would basically force contractors to assume an expensive "claims mode" while the parties are still attempting to determine their positions. The contractor would be forced to enumerate all potential defenses and factual issues that "might" apply rather than focusing on the primary impacts of the issue. This amendment would drive up the costs of all claims and serve to further disadvantage small contractors.
2. Discovery of information and documents traditionally occurs after the procurement officer's decision. This amendment would delay the process, as both sides would be required to undertake discovery at an earlier stage in the process.
3. At this point the procurement officer is an employee of the Department of Transportation and Public Facilities and is not truly independent. To the contractor this is just one more person on the "other side" and one more step that must be taken to arrive at arbitration and a more independent process.
4. The amendment ignores situations where the basis of the claim continues to cause additional damages. For instance, Herndon & Thompson have sustained damages and will continue to sustain damages during this year's construction season based upon the same differing site conditions encountered last year. Herndon & Thompson's theory has not changed, but the amount of damages will increase because they have not yet occurred during the second season. This would lead to a situation where Herndon & Thompson are required to file a new claim for the second season and lead to additional Department administrative costs to administer the same claim twice.

5. This proposed amendment is contrary to the State's Procurement Code's federal counterpart, which permits contractors post-claim submission to increase their calculation of damages as long as the damages "flow from" or "arise out of" the same operative facts giving rise to the original claim. The federal counterpart permits this even after issuance of the procurement officer's decision.
6. The amendment ignores the fact that the documents upon which the contractor relies are not readily available prior to claim submission but are only available after the procurement officer issues a decision. This is why AS 36.30.670 and the DOT&PF Hearing Officer Guidelines have provisions for discovery of documents and depositions of witnesses.

As outlined above, the amendment would drive up the costs of pursuing a claim, delay the timely resolution of claims, and penalize contractors with increased costs of legitimate claims.

We do not understand the basis of this amendment and believe that it is "anti-contractor". If the state alleges that problems exist regarding this issue, it should be addressed by the DOTPF/AGC taskforce working to revise the claims process set forth in the procurement code. Thus far neither party has identified the issue as being a problem.

We urge you to remove this language from the bill.

Sincerely,

Richard Cattanach
Executive Director

HTI

41740 BEAR CREEK CT. HOMER, ALASKA 99603 PHONE (907) 235-8741 FAX (907) 235-6945

Monday, April 23, 2001

The Honorable Senator John Cowdery
Chairman
Senate Transportation Committee
State Capitol, Room 101
Juneau, Alaska 99801-1182

Subject: State of Alaska, DOTPF
Seward Highway MP 8 – 18
Project No. STP-031-1(25)/52419

Dear Senator Cowdery:

Herndon & Thompson, Inc. ("HTI"), an Alaska general contractor, based out of Homer, requests your assistance in obtaining a suitable equitable adjustment from the State of Alaska Department of Transportation and Public Facilities ("DOTPF") for cost overruns HTI incurred on the Seward Highway project, Milepost 8-18.

HTI has lost in excess of $4.7 million on this project as a direct consequence of differing site conditions and design errors and omissions in the plans and specifications. We will briefly state some of the background facts for your consideration. If you are interested, we would be more than happy to provide you with the underlying claim and data that supports the statements we make in this letter.

In 1999, DOTPF issued invitations to bid for the project. The project called for the repair/resurfacing of approximately 15.4 kilometers of the Seward Highway, near Seward, Alaska, with assorted modifications to the related shoulder areas and roadbed.

HTI submitted a bid in the amount of $14,663,564.51 to perform this work. The first three bidders were within 2.2% of each other and only slightly higher than the Government estimate. Clearly all three bidders saw the project the same way. HTI's claims consultants have verified that HTI's bid was good as was HTI's anticipated project sequencing, production and planning.

However, the project did not develop as HTI anticipated. Specifically, HTI was plagued by differing site conditions and design errors and omissions from the beginning to the end of its first season work. These problems thoroughly disrupted HTI to the point that the project became one of error correction rather than road construction. Our claim identifies these problems and describes the impacts in great detail, including the accompanying costs.

With respect to the differing site conditions, HTI believes that DOTPF had in its possession geotechnical information that would have disclosed several of the problems HTI encountered on the project. Unfortunately, during the design phase of this project, DOTPF chose to ignore its geotechnical information and issue a "watered down" geotechnical report, which "scrubbed" much of the warning information from the report. As a consequence, HTI was caught unawares when actual field conditions varied from represented conditions. These changed conditions affected HTI from the beginning, at the project's critical, primary material source, and resulted in a complete disruption of HTI's material development and placement plan.

Moreover, DOTPF's internally developed design was flawed, incomplete, less than professional, and insufficient for the purpose of bidding, planning, and constructing the project. Mismatched and internally inconsistent documents were provided to the bidders. Specifically the mathematical information upon which the design was based is not the same mathematical information used to generate the cross sections and design computations.

The cross sections and design computations are provided to the bidders as important and necessary visual and mathematical information upon which to base their bids. The information is also essential to plan equipment requirements and form a project plan for accomplishing the work. The mismatched information created inherent conflicts, erroneous quantity calculations and numerous ambiguities in the project documents. Further, within the project design plans themselves, there were numerous errors and conflicts, which led to a "design as you go" sort of project.

There is considerable evidence that DOTPF was aware of many of the conflicts in their documents, and chose to conceal this information from the bidders. This was not foreseeable by HTI at the time it placed its competitive bid for the project, and it certainly is not conducive to the efficient, productive use of men and equipment, which was necessary for HTI to meet its carefully thought out budget and plan for accomplishing the work.

As a consequence of the changed conditions and design errors, HTI spent a great deal of time jumping from location to location, under the direction of DOTPF personnel, trying to find competent material to build the road, perform additional work, and remedy design deficiencies. This made it impossible for HTI to proceed in a cost-effective manner or to meet its original schedule.

The result is that HTI, a certified small business concern, has suffered over $4.7 million in damages, and is faced with the certain destruction of its business. The increased costs are primarily the result of equipment and labor inefficiency caused by the changed conditions and design changes. HTI is now in liquidation mode, and has been forced to sell off its equipment and real property, at reduced prices, to try to survive the losses from last year long enough to return to complete the project this year.

Additional significant shortfalls (in excess of $1,000,000) are expected to complete the work. If HTI is not quickly and fairly compensated for this project, HTI will have to close its doors and let go its employees. This is not a proper ending for a company that has for many years, and without ever filing a claim, served the State of Alaska and DOTPF in particular, well.

HTI has incurred a significant amount of time, expense, and effort to prepare a fully supported claim, based on the above facts. However, due to the nature of the losses, it is not possible for HTI to tie each dollar of loss to a specific event. DOTPF has penalized HTI for their inability to discreetly price and document each and every instance of additional cost created as a direct result of the changes. By economically strangling HTI to death, DOTPF avoids taking responsibility for its own shortcomings in the design and administration of this project, and makes it impossible to cost effectively seek an equitable adjustment in time to survive.

HTI letter re Seward Highway, Mile 8 – 18
Monday, April 23, 2001

HTI losses on this project were specifically related to the fact that the project upon which HTI prepared and submitted its "bid" could not be constructed as designed. DOTPF has been aware of HTI's devastation since last July. To date, there have been no meaningful negotiations or offers which would allow HTI to continue as a viable entity beyond the completion of this project. Absent immediate relief, the personal and corporate assets of all those vested in HTI will be obliterated by HTI's commitment to complete this project which will undoubtedly add to the losses it has suffered to date. Negotiation of outstanding issues and this season's project startup are schedule for May.

We urge you to contact DOTPF and remind them to act quickly and to act fairly, in evaluating this claim.

Respectfully,

HERNDON & THOMPSON, INC.

Fred Thompson

Larry Herndon

AURORA ELECTRIC DATATEL

April 23, 2001

Senator John Cowdery
Alaska State Senate

Dear Senator Cowdery:

I am writing to urge your support in passage of Senate Bill 152 and House Bill 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."

As a subcontractor who has been involved in construction in the State of Alaska for 19 years, this bill is especially important to me and other members of the construction industry. I am aware that the State of Alaska Department of Transportation & Public Facilities always paid prejudgment interest on claims until just very recently. I disagree with the State's position because prejudgment interest is, has been, and will continue to be an appropriate component of a contractor's damages. Why the State has decided to discontinue paying prejudgment interest is apparent. Prejudgment interest served as a valuable incentive for the Department to expeditiously handle contractor claims and subcontractor pass-through claims. Since the Department recently made the decision it would no longer pay prejudgment interest, I have heard several accounts of the Department literally dragging out is claims handling process for as long as three to four years. In some cases State maladmininstration of these contracts has resulted in good, reputable firms suffering tremendous financial burdens and even going under.

As a large subcontractor, my company cannot afford to finance State projects for these periods of time. As a result of this, we have even considered avoiding submitting bids on DOTPF projects or we factor DOTPF's retributive project maladministration into our bid to cover for these eventualities. While this may be wasteful of public funds for construction projects, it is essential for our survival in the competitive construction industry. I believe that the threat of prejudgment interest will result in State agencies treating general contractors and subcontractors more favorably. In addition to urging that you pass this legislation immediately, I urge you to make it apply to every claim that is pending as of the effective date of the legislation. This would provide relief for those

contractors who successfully prosecuted claims through DOTPF's administrative process during the 31/2 year period that DOTPF arbitrarily and wrongly declined to pay prejudgment interest

Please give this matter your immediate attention.

Sincerely,

Clark L. Smith

Clark L. Smith
Business Development
Aurora Electric/DataTel
1118 E. 70th Avenue
Anchorage, Alaska 99688
(907) 868-2239

c/c

Senator Pete Kelly
Senator Dave Donley
Senator Jerry Ward
Representative Bill Williamson
Representative Eldon Mulder

ASSOCIATED GENERAL CONTRACTORS of ALASKA

4041 B STREET, SUITE 100 • ANCHORAGE, ALASKA 99503
TELEPHONE (907) 561-5354 • FAX (907) 562-6118

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

FAIRBANKS
P.O. BOX 6005 •FAIRBANKS, AK 99706
TELEPHONE (907) 452-1809

SOLDOTNA
43335 KALIFONSKI BEACH ROAD, STE. 32 • SOLDOTNA, AK 99669
TELEPHONE (907) 262-8535

Tamsher Construction Inc.
PO Box 878990
Wasilla, AK 99687
(907) 373-3828
(907) 373-3822 FAX

April 18, 2001

President Rick Halford
State Capital, room 107
Juneau, AK 99801-1182

RE: Passage of Senate Bill 152 and House Bill 235

Dear Senator Halford:

I am writing to urge that you support passage of Senate Bill 152 and House Bill 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 delegated the responsibility for handling the controversies."

As a general contractor who has been involved in construction in the State of Alaska for 10 years, this bill is especially important to me and other members of the construction industry. I am aware that the State of Alaska Department of Transportation and Public Facilities always paid prejudgment interest on claims until just very recently. I disagree with the State's position because prejudgment interest is, has been, and will continue to be an appropriate component of a contractor's damages. Why the State has decided to discontinue paying prejudgment interest is apparent. Prejudgment interest served as a valuable incentive for the Department to expeditiously handle contractor claims and subcontractor pass-through claims. Since the Department recently made the decision it would no longer pay prejudgment interest, I have heard several accounts of the Department literally dragging out its claims handling process for as long as three to four years. In some cases State maladministration of these contracts has resulted in good, reputable firms suffering tremendous financial burdens and even going under.

As a small contractor, my company cannot afford to finance State projects for these periods of time. As a result of this, we have even considered avoiding submitting bids DOTPF projects or we factor DOTPF's retributive project maladministration into our bid to cover for these eventualities. While this may be wasteful of public funds for construction projects, it is essential for our survival in the competitive construction industry. I believe that the threat of prejudgment interest will result in State agencies treating general contractors and subcontractors more favorably.

In addition to urging that you pass this legislation immediately, I urge you to make apply to every claim that is pending as of the effective date of the legislation. This would provide relief for those contractors who successfully prosecuted claims through DOTPF'S administrative process during the 3 ½ year period that DOTPF arbitrarily and wrongly declined to pay prejudgment interest.

Please give this matter you immediate attention.

Sincerely,

Sharon Wessels
Office Manager

GENERAL & ENVIRONMENTAL
CONTRACTORS

April 19, 2001

Honorable Senators and Representatives.
State of Alaska

RE: Senate Bill 152, and House Bill 235

Dear Legislators,

Currently, there are 2 bills before the state legislature that require vigorous support of our state representatives and senators. Those are Senate Bill 152, and House Bill 235. My husband and I have been involved in construction in the State of Alaska for over 20 years. The State DOT always used to pay prejudgment interest on successful claims until recently. This policy provides a disincentive for the State to handle claims expeditiously. In the long run, it only costs the State more time and money.

In April of 1997, we were the low bidder on a State of Alaska project, Ft. Richardson Fish Hatchery, for approximately $2.5M. As the project started we became instantly aware of differing site conditions and design defects. The owner (State of AK ADF&G) acknowledged the problems and the delay and asked us to continue with the project and they would issue a change order at the end of the project after all the differing site conditions, design defects and delay was a completely known factor. We complied with the directive but put our objection in writing, that we wanted to be paid for the changes as they became known. The state refused and continued to direct us to perform 6 months of additional work to correct the design defects, then they backcharged us for not being complete with the additional work within the confines of the original schedule. The additional work and delay cost us $1,020,000. The liquidated damages cost us $168,000. It cost us an additional $250,000 for an attorney and $50,000 for expert witnesses and testimony.

In December of 1997, we filed a claim with the State of Alaska. The claim process mandated by the State of Alaska is very lengthy. We spent 2 years going through the process. In the summer of 1999 we were preparing for the Administrative Hearing level of the claim. In July of 1999 we spent 3-1/2 weeks in a Administrative Hearing trial. I knew I would need to provide inducement to the Department of Law to get them to settle the lawsuit because by now we did not have the additional funds to pay the attorney to continue to pursue the lawsuit.

We sued the state and *"won"* at the Administrative Hearing level. However the state of Alaska by statute, does not have to pay attorney fees or interest. The Hearing Officer's decision was rendered in December 1999. The Administrative Hearing Officer did not consider distinct costs for distinct work and simply awarded a lump sum of $225,000 and a remission of $80,000 in liquidated damages. We appealed to the Superior Court. In April of 2000, The State agreed to settle the suit with Linder Construction for $460,000, no interest, no attorney fees.

220 Petersburg Street - Anchorage, Alaska 99507 - Phone (907) 349-6222 * Fax (907) 349-8303, E-mail: linda@lindercon.com

To add insult to injury, Linder had to get a legislative appropriation to give the state a 'vehicle' and funding approval to pay us. If the State Department of Law did not have so much legislative pressure, they would have strung Linder out even longer. The $460,000 was written into the supplemental funding bill. We got paid in June of 2000. But the damage had already been done to our business. Linder Construction is a small business. The normal reserves that we use as our operating capital were depleted by this devastating $1.5M loss on the Fish Hatchery job. In the aftermath of the Fish Hatchery Claim, this small company could not withstand other negative impacts. Therefore, sadly we have made the strategic decision to avoid bidding on all state job. This lack of competition also costs the state additional money. I am on the board of directors of Associated General Contractors and I know many other contractors who have had the same negative experience with a State claim causing tremendous financial impact. They too have made the decision not to do business with the state.

It is for all the above stated reasons that I strongly urge you to pass Senate Bill 152, and House Bill 235. I believe this will afford the state a competitive slate of contractors and will result in State Agencies treating contractors more fairly. It will also promote the Governors policy that the state is ***'Open for Business'***

In addition to passing this legislation, please make it apply retroactively to every pending claim and claims settled during the 3-1/2 year period that DOTPF arbitrarily and wrongly declined to pay prejudgment interest.

Sincerely,

LINDER CONSTRUCTION, INC.

S/b

Linda J. E. Henrikson
President & CEO

220 Petersburg Street - Anchorage, Alaska 99507 - Phone (907) 349-6222 * Fax (907) 349-8303, E-mail: linda@lindercon.com

Subject: Support for Senate Bills 83 & 152
Date: Sat, 21 Apr 2001 02:52:27 -0800
From: "Randy Ruedrich" <raraep@gci.net>
To: "Senator Pete Kelly" <Senator_Pete_Kelly@Legis.state.ak.us>,
"Senator Lyda Green" <Senator_Lyda_Green@Legis.state.ak.us>,
"Senator Loren Leman" <Senator_Loren_Leman@Legis.state.ak.us>,
"Senator John Cowdery" <Senator_John_Cowdery@Legis.state.ak.us>,
"Senator Jerry Ward" <Senator_Jerry_Ward@Legis.state.ak.us>,
"Senator Gary Wilken" <Senator_Gary_Wilken@Legis.state.ak.us>,
"Senator Dave Donley" <Senator_Dave_Donley@Legis.state.ak.us>,
"Senator Alan Austerman" <Senator_Alan_Austerman@Legis.state.ak.us>

Senate Bill 83

I urge you to support Senate Bill 83 that ends force account contract awards for large DOT&PF projects. Senate Bill 83 stops the Department of Transportation and Public Facilities from entering into Force Account work where the job would exceed $250,000 in value.

Currently the DOT&PF is planning a $3.5 million dollar Force Account job in Saint Mary's this summer with no bids. This is an absolutely unacceptable use of public funds. Pass SB 83 to end large Force Account contract awards.

Randy Ruedrich
Anchorage
227-3031

Senate Bill 152

I urge you to support Senate Bill 152 that requires DOT&PF to pay interest on settled claims. Such payments are proper business practice.

Senate Bill 152, which was requested by the Associated General Contractors, will require that the Department of Transportation and Public Facilities pay interest on contract controversies that are settled in favor of the contractor. Currently, a disputed claim can take months or even years to settle. Contractors, after successfully winning their claims, are not paid any interest on the disputed amounts. The DOT&PF can negotiate for years without incurring interest expense. I have heard the DOT&PF proudly talk about using earned interest to fund other work. This unacceptable behavior is damaging to private sector contractors. Pass SB 152 and end this abusive practice.

Randy Ruedrich
Anchorage

WOLVERINE SUPPLY, INC.
GENERAL CONTRACTORS
5099 East Parks Highway, Suite 201
Wasilla AK 99654
Phone (907) 373-6572
Fax (907) 357-2023

April 18, 2001

Dear Representatives and Senators:

I am writing to urge that you support passage of Senate Bill 152 and House Bill 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."

As a general contractor who has been involved in construction in the State of Alaska for 36 years, this bill is especially important to me and other members of the construction industry. I am aware that the State of Alaska Department of Transportation & Public Facilities always paid prejudgment interest on claims until just very recently. I disagree with the State's position because prejudgment interest is, has been, and will continue to be an appropriate component of a contractor's damages. Why the State has decided to discontinue paying prejudgment interest is apparent. Prejudgment interest served as a valuable incentive for the Department to expeditiously handle contractor claims and subcontractor pass-through claims. Since the Department recently made the decision it would no longer pay prejudgment interest, I have heard several accounts of the Department literally dragging out its claims handling process for as long as three to four years. In some cases State maladministration of these contracts has resulted in good, reputable firms suffering tremendous financial burdens and even going under.

As a small contractor, my company cannot afford to finance State projects for these periods of time. As a result of this, we have even considered avoiding submitting bids on DOTPF projects or we factor DOTPF's retributive project maladministration into our bid to cover for these eventualities. While this may be wasteful of public funds for construction projects, it is essential for our survival in the competitive construction industry. I believe that the threat of prejudgment interest will result in State agencies treating general contractors and subcontractors more favorably.

In addition to urging that you pass this legislation immediately, I urge you to make it apply to every claim that is pending as of the effective date of the legislation. This would provide relief for those contractors who successfully prosecuted claims through DOTPF's administrative process during the 3½ year period that DOTPF arbitrarily and wrongly declined to pay prejudgment interest.

Please give this matter your immediate attention.

Sincerely,
WOLVERINE SUPPLY, INC.

Marc Van Buskirk
Owner

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 152
() Publish Date:

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)

OLES MORRISON RINKER & BAKER LLP

LAWYERS

May 1, 2001

Senator John Cowdery
State Capitol, Room 101
Juneau, AK 99801-1182

Fax: (907) 465-2069

Re: SB 152

Dear Senator Cowdery:

Attached please find a letter that was sent to all members of the House Finance Committee this morning. In it I have detailed two particular claims that were mishandled by the Department of Transportation & Public Facilities. Additionally, I wished to debunk many of the comments and deliberate misrepresentation that were made by the Department of Law's representative who testified before the House Finance Committee.

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: 907-258-5519

OLES MORRISON RINKER & BAKER LLP

LAWYERS

May 1, 2001

Representative Bill Hudson
House Finance Committee
State Capitol, Room 502
Juneau, AK 99801-1182

Fax: (907) 465-2273

Re: Hearing on SB 152

Dear Representative Hudson:

I sat through the entirety of the House Finance Committee's hearing on SB 152 and listened with interest to the comments of the members of the committee and those of Assistant Attorney General Doug Gardner. This will serve to correct the confusion generated by the representations made during the course of that hearing. There are three essential points that need to be made with respect to the Department of Law's representative's testimony regarding the passage of SB 152 and the proposed amendments.

1. Pre-Claim interest must run from the date of certification of the contractor's claim.

It was suggested by that pre-claim interest should begin to accrue at the time the Procurement Officer issues his or her final decision. While this may present a readily-definable bright-line rule, it ignores the Department of Transportation & Public Facilities' misuse of the claims handling process as a means of delaying and prolonging claims, which further undermines the very purpose of this bill. It would also give the procurement officer an incentive to delay issuance of the procurement officer's decision, as required by AS 36.30.620. This is dramatically represented by the following contractor claims, both of which were administered by the Department of Transportation & Public Facilities and both of which were vigorously defended by the Department of Law:

	South Coast	D&L
Project Name	Unalaska Airport Beach Road	Church Road Upgrade
Project Number	RS-0310(4)/58242	STP-0001(65)51202
Date of Initial Notice of Intent to Claim	October 19, 1995	October 21, 1998
Date of Project Completion	October 27, 1995	October 31, 1998
Date Contractor submitted its Claim	March 3, 1997	March 12, 1999
Date of Engineer's Decision	January 8, 1998	None Issued[1]
Amount of Money Awarded in Engineer's Decision	$0.00	
Date of Contracting Officer's [Procurement Officer's] Decision	December, 1998	July 12, 1999
Amount of Money Awarded in Procurement Officer's Decision	$0.00	$0.00
Date of Hearing	08/09/99 - 09/03/99	12/06/99 - 12/17/99
Hearing Officer's Decision	January 4, 2000	January 22, 2000
Date Hearing Officer's Decision is submitted to the Commissioner of ADOT&PF	January 27, 2000	February 11, 2000
Amount of Money awarded by Hearing Officer	$768,000.00	$922,000.00
Date of Commissioner's Decision	February 11, 2000	March 17, 2000
Amount Awarded by Commissioner	$538,000.00	$738,000.00
Pre-Claim Interest component of award	$230,000.00	$90,000.00
Percent Federally Funded	90.97%	90.97%
Actual Cost to State of Alaska to Pay Claim	$69,350.00	$66,641.00
Interest Component payable by the State of Alaska	$20,769.00	$8,127.00
Total Length of Time for ADOT&PF's administrative process	4 years, 4 months	1 year, 5 months

As should be apparent from the above summary, the sheer length of time that the Department of Transportation & Public Facilities delayed the claims process was the primary reason for the amount of pre-claim interest awarded. Further, despite aggregate awards in these cases totaling some $1,276,000.00, the state's portion was only $136,000.00. I submit that this is a small price to pay for the State's decision to "borrow" $1,276,000.00 from these two contractors that completed these projects on 17 to 52 months earlier. Further, the actual cost of paying prejudgment interest to the State of Alaska on these federally funded project totals $28,896.00, an extremely minor amount in light of the hardship these two contractors suffered in prosecuting their affirmative claims.

Please do not consider the examples set forth above as exhaustive. They are merely representative of the maladministration of contractor claims in the Department of Transportation and Public Facilities claims-handling process.

Running pre-claim interest from the date of the contractor's certification of the claim would remedy the situation in that it would give the Department of Transportation & Public Facilities some downside risk -- i.e., the Department's delay would result in a greater award. The fundamental problem with the position advocated is that it presumes Department of Transportation & Public Facilities' personnel act

[1] Because the State's Engineer had already delayed issuing the Engineer's Decision from October 21, 1998 through March 12, 1999, D&L was entitled to a "deemed" denial provided for in the contract.

honorably and timely. That is inconsistent with my experience and the experience of my clients who have waged protracted, costly battles in order to be paid what they are rightfully owed. As should apparent from the table set forth above, the Engineer's Decision and the Procurement Officer's Decision, both of which are drafted by Department of Transportation & Public Facilities' personnel, typically deny the contractor any meaningful relief and typically award nothing. Conversely, hearing officers view these situations differently by an order of magnitude.

The amendment that has been proposed which sets the "trigger" fro pre-claim interest as the "date of the "Procurement Officer's Decision" would give each procurement officer the incentive to delay his or her decision indefinitely and defeat the underlying purpose of this legislation, which is to give the Department of Transportation & Public Facilities some incentive to settle these claims. You must remember that currently, any interest accruing is a function of the Department's delay in expeditiously administering these claims and the Department's refusal to settle them. This delay and claims-handling maladministration is what led to Senator Cowdery sponsoring this legislation.

Lastly, I personally have witnessed procurement officers, as a delaying tactic, request additional information for periods in excess of 12 months. While it may be that some contractors delay in providing information, I can personally assure you that with every single claim I have been involved with, all essential information was provided within the 90 days contemplated in AS 36.30.620 or this period was extended by mutual agreement. In spite of this, the procurement officer's typical reaction was to request additional information, whether or not it existed, which the procurement officer then never bothered to read. I earnestly believe that the amendment offered, which would tie the accrual of prejudgment interest to the Contracting Officer's Decision, would result in adding an additional year or more to this process. This is at odds with the purpose of this legislation.

2. The Department of Law's Representations Regarding Settled Claims were Inaccurate or Deliberately False.

In an effort to create a false "parade of horribles," it was represented to this committee that all contractors with "settled claims" would come crawling out of the woodwork requesting to be paid pre-claim interest. This ignores the simple fact that the Department of Transportation & Public Facilities has already obtained a signed and executed release from each of these contractors that terminates the contractors' rights to seek additional compensation. The point is this: "settled" claims are settled and cannot be revived when the contractor has executed a release of all claims. Any contractor who sought additional compensation could not sustain a cause of action against the state based upon the existence of a release.

What is abundantly clear is that the Department Law is willing to say virtually anything in order to preserve the status quo of the claims-handling process – that being, the delay in the claims-handling process and the Department of Transportation & Public Facilities' refusal to pay pre-claim interest works an extreme

hardship to the contracting community. This is why this vital legislation was sponsored by Senator Cowdery.

Additionally, Mr. Gardner's specific misrepresentations regarding 1.5 million dollars in pre-claim interest which the State would be required to pay if this legislation were made applicable to all "pending claims" needs to be corrected. You have seen that the pre-claim interest component of South Coast and D&L is only $320,000.00 and that the State's portion of that pre-claim interest component is $28,896.00. The alleged 1.5 million dollar-figure that was discussed by Mr. Gardner is inaccurate and includes 90.97% federal matching funds payable by the Federal Highway Authority. Thus, of the 1.5 million dollar figure which the Department of Law's Representative stated would be borne by the State of Alaska, the actual figure is $136,455.00. The remainder would be paid by the Federal Highway Authority pursuant to 23 CFR 635.124.

3. The Department of Law's Representations Regarding "Equal Protection" are Equally Uncompelling.

The last misstatement which needs to be corrected is that the Department of Law's discussion of equal protection and the applicability of this legislation to other state agencies could cost the state of Alaska money and that other contractor claimants who perform public works would likewise be entitled to pre-claim interest. This legislation should apply to all state agencies. Why should the State of Alaska be entitled to interest-free loans from general contractors for indefinite periods of time? To date I have yet to hear the Department of Law articulate a legitimate reason why contractors should make interest-free loans to the State to finance public works project.

Please give this letter your earnest consideration. I will make myself available for the purpose of responding to the concerns raised by members of the committee and the Department of Law if requested. 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

cc: Mr. Mike Swalling
Mr. Brad Finney
Mr. Larry Smith
Mr. Jerry Renich
Mr. Dick Cattanach
Mr. Mano Frey

ASSOCIATED GENERAL CONTRACTORS of ALASKA

4041 B STREET, SUITE 100 • ANCHORAGE, ALASKA 99503
TELEPHONE (907) 561-5354 • FAX (907) 562-6118

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

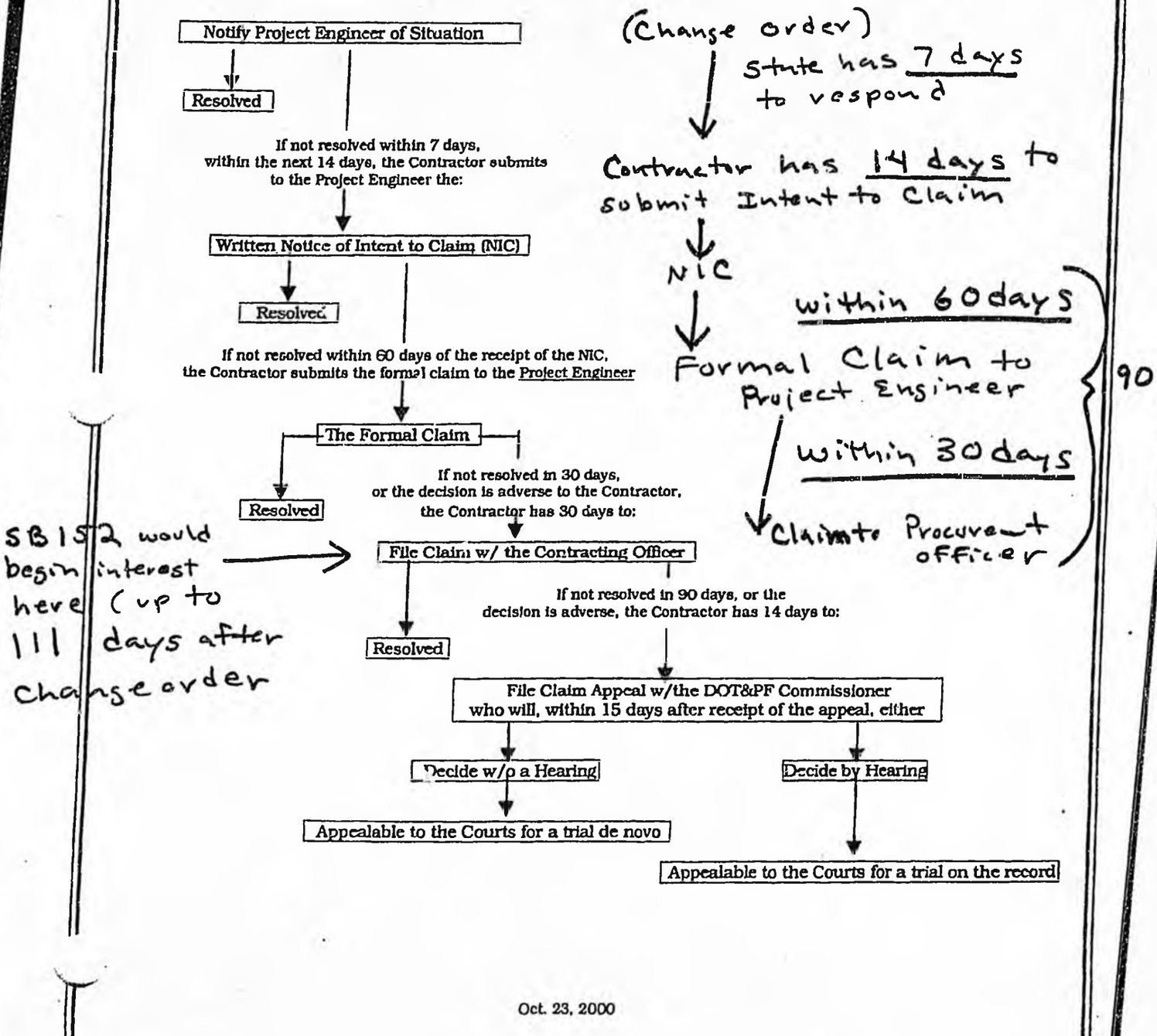
(1) the contractor has notified the project engineer of a situation that the contractor believes is not covered by the project scope of work.
(2) the parties could not resolve the issue at the project level.
(3) the contractor has provided the state with an official " Notice of Intent to Claim".
(4) 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 sufficie ime has already lapsed prior to the filing. The proposed amendment to delay the star. .g 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,

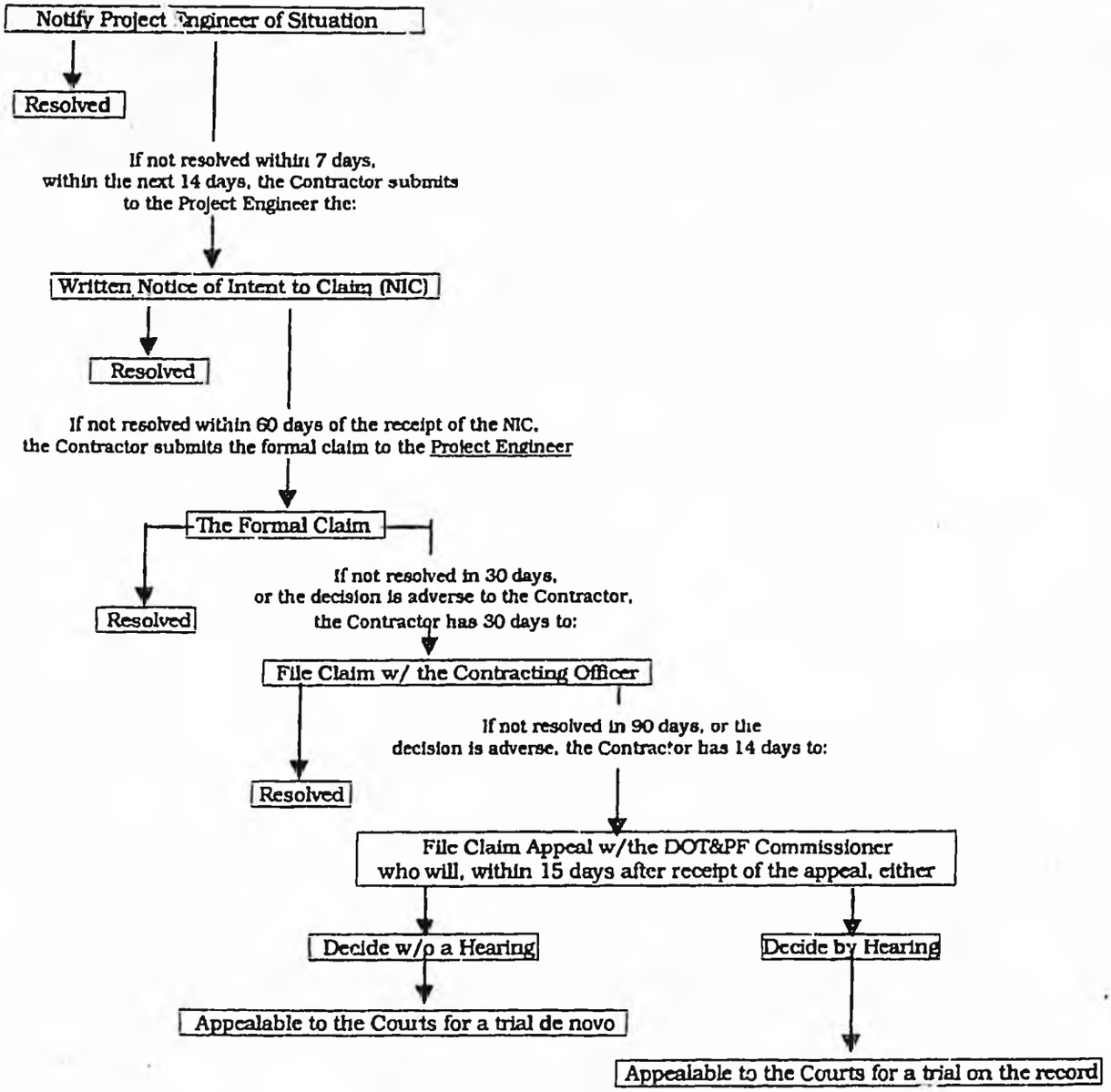
Richard Cattanach
Executive Director

Chart of Current DOT&PF Claims Resolution Procedures



Oct. 23, 2000

Chart of Current DOT&PF Claims Resolution Procedures



Oct. 23, 2000

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

May 5, 2001

The Honorable Pete Kott, Chair,
and Members
House Rules Committee
Alaska State Legislature
Juneau, Alaska 99801

RE: CS SB 152(Fin) – "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 Kott and Rules Committee Members:

The House Rules Committee has CS SB 152 (Fin) – "Relating to the handling of and interest on contract controversies involving . . ." in its possession. I support this version of SB 152 because it represents a balanced and fair resolution to the question of when the state must pay prejudgment interest on construction claims.

CS SB 152 (Fin) changes the rules governing the payment of interest on contested construction claims for claims after the effective date of the act. It requires the payment of prejudgment interest to a contractor from the time a complete claim is filed with the procurement officer under AS 36.30.620(a) through the date of a decision by the procurement officer, a decision by the Commissioner of Transportation and Public Facilities, or a judicial decision, whichever is last. Payment of prejudgment interest is intended to speed up the settlement of construction claims, although standing alone it removes incentives of contractors to expedite the proceedings.

An additional provision of the Finance Committee CS, included in Section 2, will address this imbalance in settlement of construction claims and appeals of decisions by contractors. Under this section, a contractor in a dispute with the state must make a complete claim to the procurement officer, that is, must present all of the factual evidence and theories of recovery in the claim prior to that officer's decision on the case. A

claimant would not be allowed to present new evidence or new theories of recovery in an appeal to the commissioner (or the commissioner's designated hearing officer) or in superior court.

I support CS SB 152 (Fin) because when a contractor fully and fairly lays out its case the department can make a fair and expeditious decision on the merits of the claim. Having a complete record of the claim available to the procurement officer will help ensure that the claims review process at that level is thorough and efficient, which is a goal of both the contractors and the state.

If you have any questions, please don't hesitate to call me at 465-2133.

Sincerely,

Bruce M. Botelho
Attorney General

cc: Senator John Cowdery
Mike Abbott, Legislative Director, Office of the Governor
Shari Kochman, Deputy Legislative Director, Office of the Governor
Dennis Poshard, Legislative Liaison, DOTPF
Chrystal Smith, Legislative Liaison, Department of Law
Deborah Behr, Legislation Attorney, Department of Law

DON –

FAX (907) 247-6125
Telephone (907) 225-6125
Post Office Box 8620
4049 Tongass Avenue
Ketchikan, Alaska 99901

South Coast Inc.

April 26, 2001

Senator John Cowdery
State Capitol, Room 101
Juneau, Alaska 99801-1182

Re: Pending Legislation – Prejudgment Interest for Contractor Claims

Dear Senator:

I am writing to urge your support of Senate Bill 152 and House Bill 235 regarding payment of interest on Construction Claims by the State of Alaska DOT&PF.

South Coast Inc. has been involved in construction in Alaska for over 40 years. Although our company mantra is "no claims", we occasionally have the misfortune of working on a project or with an individual that simply does not allow us to walk away from the dollars involved.

We recently had such an experience on the Unalaska Airport Beach Road project in Dutch Harbor. This project was completed in October of 1995 with several outstanding issues that had been reduced to a claim status at that point. Although our claim was filed in a timely matter and per contract specifications, it did not go to a Hearing Officer until August of 1999. The Hearing Officer subsequently tendered his draft decision January 4, 2001. Although this State appointed Hearing Officer awarded SCI a substantial settlement, including prejudgment interest, the DOT to date has refused to pay the interest portion of this claim. The net affect of the DOT's protraction of this issue has allowed them to utilize our money interest free for over four years.

The best way to settle any contract issue is through negotiations. To equitably settle an issue, it is paramount that both parties have something to risk if a negotiated settlement is to be reached. Without a prejudgment interest award, the DOT has nothing to risk and no incentive to equitably and timely settle any dispute. In fact, they now have a reason to not settle contract issues as it gives them interest free money to utilize.

We would greatly appreciate your support of these Bills and ask that this legislation "cover all claims, that are pending as of the effective date of the legislation."

Thank you for your time in this matter.

Sincerely,

Brad W. Finney
Vice President

ASSOCIATED GENERAL CONTRACTORS of ALASKA

041 B STREET, SUITE 100 • ANCHORAGE, ALASKA 99503
TELEPHONE (907) 561-5354 • FAX (907) 562-6118

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

FAIRBANKS
P.O. BOX 6005 •FAIRBANKS, AK 99706
TELEPHONE (907) 452-1809

SOLDOTNA
43335 KALIFONSKI BEACH ROAD, STE. 32 • SOLDOTNA, AK 99669
TELEPHONE (907) 262-8535

ASSOCIATED GENERAL CONTRACTORS of ALASKA

4041 B STREET, SUITE 100 • ANCHORAGE, ALASKA 99503
TELEPHONE (907) 561-5354 • FAX (907) 562-6118

> 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:

FAIRBANKS
P.O. BOX 6005 •FAIRBANKS, AK 99706
TELEPHONE (907) 452-1809

SOLDOTNA
43335 KALIFONSKI BEACH ROAD, STE. 32 • SOLDOTNA, AK 99669
TELEPHONE (907) 262-8535

ASSOCIATED GENERAL CONTRACTORS of ALASKA

4041 B STREET, SUITE 100 • ANCHORAGE, ALASKA 99503
TELEPHONE (907) 561-5354 • FAX (907) 562-6118

> **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

FAIRBANKS
P.O. BOX 6005 • FAIRBANKS, AK 99706
TELEPHONE (907) 452-1809

SOLDOTNA
43335 KALIFONSKI BEACH ROAD, STE. 32 • SOLDOTNA, AK 99669
TELEPHONE (907) 262-8535

ASSOCIATED GENERAL CONTRACTORS of ALASKA

4041 B STREET, SUITE 100 • ANCHORAGE, ALASKA 99503
TELEPHONE (907) 561-5354 • FAX (907) 562-6118

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

ASSOCIATED GENERAL CONTRACTORS of ALASKA

4041 B STREET, SUITE 100 • ANCHORAGE, ALASKA 99503
TELEPHONE (907) 561-5354 • FAX (907) 562-6118

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).

ASSOCIATED GENERAL CONTRACTORS of ALASKA

4041 B STREET, SUITE 100 • ANCHORAGE, ALASKA 99503
TELEPHONE (907) 561-5354 • FAX (907) 562-6118

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.

FAIRBANKS
P.O. BOX 6005 •FAIRBANKS, AK 99706
TELEPHONE (907) 452-1809

SOLDOTNA
43335 KALIFONSKI BEACH ROAD, STE. 32 • SOLDOTNA, AK 99669
TELEPHONE (907) 262-8535

ASSOCIATED GENERAL CONTRACTORS of ALASKA

4041 B STREET, SUITE 100 • ANCHORAGE, ALASKA 99503
TELEPHONE (907) 561-5354 • FAX (907) 562-6118

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.

ASSOCIATED GENERAL CONTRACTORS of ALASKA

4041 B STREET, SUITE 100 • ANCHORAGE, ALASKA 99503
TELEPHONE (907) 561-5354 • FAX (907) 562-6118

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.

ASSOCIATED GENERAL CONTRACTORS of ALASKA

4041 B STREET, SUITE 100 • ANCHORAGE, ALASKA 99503
TELEPHONE (907) 561-5354 • FAX (907) 562-6118

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 chat, 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

FAIRBANKS
P.O. BOX 6005 •FAIRBANKS, AK 99706
TELEPHONE (907) 452-1809

SOLDOTNA
43335 KALIFONSKI BEACH ROAD, STE. 32 • SOLDOTNA, AK 99669
TELEPHONE (907) 262-8535

"Senator_Jerry_Ward@legis.state.ak.us" <Senator_Jerry_Ward@legis.state.ak.us>,
"Senator_John_Cowdery@legis.state.ak.us" <Senator_John_Cowdery@legis.state.ak.us>,
"Senator_John_Torgerson@legis.state.ak.us" <Senator_John_Torgerson@legis.state.ak.us>,
"Senator_Johnny_Ellis@legis.state.ak.us" <Senator_Johnny_Ellis@legis.state.ak.us>,
"Senator_Kim_Elton@legis.state.ak.us" <Senator_Kim_Elton@legis.state.ak.us>,
"Senator_Loren_Leman@legis.state.ak.us" <Senator_Loren_Leman@legis.state.ak.us>,
"Senator_Lyda_Green@legis.state.ak.us" <Senator_Lyda_Green@legis.state.ak.us>,
"Senator_Lyman_Hoffman@legis.state.ak.us" <Senator_Lyman_Hoffman@legis.state.ak.us>,
"Senator_Pete_Kelly@legis.state.ak.us" <Senator_Pete_Kelly@legis.state.ak.us>,
"Senator_Randy_Phillips@legis.state.ak.us" <Senator_Randy_Phillips@legis.state.ak.us>,
"Senator_Rick_Halford@legis.state.ak.us" <Senator_Rick_Halford@legis.state.ak.us>,
"Senator_Robin_Taylor@legis.state.ak.us" <Senator_Robin_Taylor@legis.state.ak.us>

Dear Senators and Representatives,

I would like to voice my support for House Bill 152. In a time of declining revenue from natural resources, we should be encouraging not limiting Alaska based manufacturing businesses.

When HB 152 comes up for your consideration, I encourage you to vote yes.

Todd Savoie
4920 Hartman Circle
Anchorage AK 99507
907-561-5365

Email ADDRESS ?

Subject: Pre-Judgement Interest to Contractor Claimants
Date: Wed, 2 May 2001 08:37:51 -0800
From: "Chumley" <chumley@ptialaska.net>
To: <Senator_John_Cowdery@legis.state.ak.us>

Dear Senator Cowdery:

I am writing to urge that you support passage of Senate Bill 152 and House Bill 235, "An Act relating to th

[illegible]

[illegible]

[illegible]

Please give this matter your immediate attention.

Sincerely,

Hugh Chumley

President

Raven Contractors, Inc.

Subject: Senate Bill 152
Date: Tue, 24 Apr 2001 14:59:48 -0800
From: "Chris Hamre" <denaligc@alaska.net>
To: "Rick Halford" <Senator_Rick_Halford@legis.state.ak.us>,
"Loren Leman" <Senator_Loren_Leman@legis.state.ak.us>,
"Johnny Ellis" <Senator_Johnny_Ellis@iegis.state.ak.us>,
"Alan Austerman" <Senator_Alan_.Austerman@legis.state.ak.us>,
"John Cowdery" <Senator_John_Cowdery@legis.state.ak.us>,
"Bettye Davis" <Senator_Bettye_Davis@legis.state.ak.us>,
"Dave Donley" <Senator_Dave_Donley@legis.state.ak.us>,
"Kim Elton" <Senator_Kim_Elton@legis.state.ak.us>,
"Lyda Green" <Senator_Lyda_Green@legis.state.ak.us>,
"Lyman Hoffman" <Senator_Lyman_Hoffman@legis.state.ak.us>,
"Pete Kelly" <Senator_Pete_Kelly@legis.state.ak.us>,
"Georgianna Lincoln" <Senator_Georgianna_Lincoln@legis.state.ak.us>,
"Donald Olson" <Senator_Donny_Olson@legis.state.ak.us>,
"Drue Pearce" <Senator_Drue_Pearce@legis.state.ak.us>,
"Randy Phillips" <Senator_Randy_Phillips@legis.state.ak.us>,
"Robin Taylor" <Senator_Robin_Taylor@legis.state.ak.us>,
"Gene Therriault" <Senator_Gene_Therriault@legis.state.ak.us>,
"John Torgerso" <Senator_John_Torgerso@legis.state.ak.us>,
"Jerry Ward" <Senator_Jerry_Ward@legis.state.ak.us>,
"Gary Wilkin" <Senator_Gary_Wilken@legis.state.ak.us>

Dear Senator:

I am writing in support of Senate Bill 152, relating to interest on contract claims involving the Department of Transportation and Public Facilities.

As a General Contractor who has been involved in construction in the State of Alaska for more than eighteen years and as a contractor who has had to resolve disputes with DOT through the claims process, this bill is especially important to me and other members of the construction industry. The State of Alaska Department of Transportation & Public Facilities has always paid prejudgment interest on claims until just very recently. Why the State has decided to discontinue paying prejudgment interest is apparent. Since the Department recently made the decision it would no longer pay prejudgment interest, I have heard several accounts of the Department literally dragging out its claims handling process for years. In some cases State misadministration of these contracts has resulted in good, reputable firms suffering tremendous financial burdens and even going out of business.

As a General Contractor, my company cannot afford to finance State projects for these periods of time. As a result, we have considered avoiding bidding on DOT/PF projects or we factor DOT/PF's contract administration practices into our bid to cover this ample of exposure. I believe that the threat of prejudgment interest will result in State agencies treating general contractors and subcontractors more fairly.

In addition to urging your support on this legislation, I urge you to make it apply retroactively to claims pending as of the effective date of legislation. This would provide relief for those contractors who successfully prosecuted claims through DOT/PF's administrative process during the 3 1/2 year period that DOT/PF wrongly refused to pay prejudgment interest.

Your consideration is appreciated.

Sincerely,
Chris Hamre
President

Subject: Re: Important Legislation
Date: 23 Apr 2001 18:45:13 -0800
From: Don Anderson <don.anderson@softwarenorth.com>
To: John Cowdery <Senator_John_Cowdery@legis.state.ak.us>

John,

I have sent an initial letter to Dave Donley with a blind copy to you asking for his support on 152. I have the rest of the finance commitee members ready to go with individual letters.

Your e-mail template says Senator_Last_First@legis.state.ak.us I think it should be First_Last. At least that was the address I used on a previous e-mail to Donely.

On 83, I need more information. Force Account work in the bush may be the only way to complete some work, given the extremely high mob/demob costs and the multi-year timeframes. I am open to persuasion.

Don

--
Donald N. Anderson, Ph.D.
President, Software North
don.anderson@SoftwareNorth.com
(907) 561-4412

On Sunday, April 22, 2001 10:01 AM, Senate Transportation Committee <Senate_Transportation_Committee@Legis.state.ak.us> wrote:

>Don.....
>
>I need your help. On Tuesday at 9:00 am the Senate Finance Committee
>will be hearing two of my bills - SB 152 and SB 83.
>
>Senate Bill 152, which was requested by the Associated General
>Contractors, will require that the Department of Transportation and
>Public Facilities pay interest on contract controversies that are
>settled in favor of the contractor. Currently, a disputed claim can
>take months or even years to settle. Contractors winning their claim
>are not paid any interest on the disputed amount.
>
>Senate Bill 83 stops the Department of Transportation and Public
>Facilities from entering into Force Account work where the job would
>exceed $250,000 in value. Currently the State of Alaska is planning
>a $3.5 million dollar Force Account job in Saint Mary's this summer -
>no bids.
>
>I would ask that you contact members of the Senate Finance Committee
>and indicate your support for these bills.
>
>Included is a list of the Senate Finance Committee membership:
>

> Dave Donley	rm 506	p465-3892	f465-6595
> Pete Kelly	rm 518	p465-2327	f465-5241
> Jerry Ward	rm 423	p465-4940	f465-3766
> Alan Austerman	rm 417	p465-2487	f465-4956
> Lyda Green	rm 125	p465-6600	f465-3805
> Loren Leman	rm 516	p465-2095	f465-3810
> Gary Wilken	rm 514	p465-3709	f465-4714
> Lyman Hoffman	rm 7	p465-4453	f465-4523
> Donny Olson	rm 510	p465-3707	f465-4821

>
>All legislators mail can be sent to: Legislator
> Room ___, Alaska State Capitol
> Juneau, Alaska 99801
>
>All Senators use the same format for emails:
>Senator_Last_First@legis.state.ak.us
>
>Your support of these bills will be very helpful. Please call, fax,
>write or send an email in support.
>
>Thank you very much.
>
>Senator John J. Cowdery, Chairman
>Senate Transportation Committee
>

Subject: Senate Bill 152
Date: 23 Apr 2001 18:36:53 -0800
From: Don Anderson <don.anderson@softwarenorth.com>
To: Dave Donley <Senator_Dave_Donley@legis.state.ak.us>

Dear Senator Donley,

I hope you will help move 152 along.

It only seems fair that the State pay interest on disputed amounts that are settled in favor of the contractor. To do otherwise provides a perverse incentive for a state department to delay settlement even in cases where the State is virtually guaranteed to lose. There was a case some years ago that could only be described a an attempt to bankrupt a contractor to avoid a lawful payment. Be sure the interest rate is a current commercial loan rate and that it comes out of that Departments capital budget.

Donald N. Anderson, Ph.D.
President, Software North
don.anderson@SoftwareNorth.com
(907) 561-4412

Subject: 152
Date: 24 Apr 2001 07:50:35 -0800
From: Don Anderson <don.anderson@softwarenorth.com>
To: John Cowdery <Senator_John_Cowdery@legis.state.ak.us>

Senator Cowdrey,
I have sent a message to each member of the Senate Finance Committe asking for their help in moving Senate Bill 152.

If you wish assistance with SB 83 please send a more detailed justification.

Donald N. Anderson, Ph.D.
President, Software North
don.anderson@SoftwareNorth.com
(907) 561-4412

Senate Bill 152

I urge you to support Senate Bill 152 that requires DOT&PF to pay interest on settled claims. Such payments are proper business practice.

Senate Bill 152, which was requested by the Associated General Contractors, will require that the Department of Transportation and Public Facilities pay interest on contract controversies that are settled in favor of the contractor. Currently, a disputed claim can take months or even years to settle. Contractors, after successfully winning their claims, are not paid any interest on the disputed amounts. The DOT&PF can negotiate for years without incurring interest expense. I have heard the DOT&PF proudly talk about using earned interest to fund other work. This unacceptable behavior is damaging to private sector contractors. Pass SB 152 and end this abusive practice.

Randy Ruedrich
Anchorage
227-3031

Subject: Re: Support for Senate Bills 83 & 152
Date: Sat, 21 Apr 2001 07:36:42 -0800 (AKDT)
From: ELBecker@webtv.net (Eileen Becker)
To: raraep@gci.net (Randy Ruedrich)
CC: Senator_Pete_Kelly@legis.state.ak.us (Senator Pete Kelly),
Senator_Lyda_Green@legis.state.ak.us (Senator Lyda Green),
Senator_Loren_Leman@legis.state.ak.us (Senator Loren Leman),
Senator_John_Cowdery@legis.state.ak.us (Senator John Cowdery),
Senator_Jerry_Ward@legis.state.ak.us (Senator Jerry Ward),
Senator_Gary_Wilken@legis.state.ak.us (Senator Gary Wilken),
Senator_Dave_Donley@legis.state.ak.us (Senator Dave Donley),
Senator_Alan_Austerman@legis.state.ak.us (Senator Alan Austerman)

Dear Senators, I concur with Chairman Ruedick's support of Senate Bills 83 & 152.
Eileen Becker, Dist 7 Chairman

Subject: Support for Senate Bills 83 & 152
Date: Sat, 21 Apr 2001 02:52:27 -0800
From: "Randy Ruedrich" <raraep@gci.net>
To: "Senator Pete Kelly" <Senator_Pete_Kelly@Legis.state.ak.us>,
"Senator Lyda Green" <Senator_Lyda_Green@legis.state.ak.us>,
"Senator Loren Leman" <Senator_Loren_Leman@legis.state.ak.us>,
"Senator John Cowdery" <Senator_John_Cowdery@legis.state.ak.us>,
"Senator Jerry Ward" <Senator_Jerry_Ward@legis.state.ak.us>,
"Senator Gary Wilken" <Senator_Gary_Wilken@legis.state.ak.us>,
"Senator Dave Donley" <Senator_Dave_Donley@legis.state.ak.us>,
"Senator Alan Austerman" <Senator_Alan_Austerman@legis.state.ak.us>

Senate Bill 83

I urge you to support Senate Bill 83 that ends force account contract awards for large DOT&PF projects. Senate Bill 83 stops the Department of Transportation and Public Facilities from entering into Force Account work where the job would exceed $250,000 in value.

Currently the DOT&PF is planning a $3.5 million dollar Force Account job in Saint Mary's this summer with no bids. This is an absolutely unacceptable use of public funds. Pass SB 83 to end large Force Account contract awards.

Randy Ruedrich
Anchorage
227-3031

Subject: [Fwd: Important Legislation]
Date: Sat, 21 Apr 2001 19:03:17 -0800
From: John Suter <suter@gci.net>
To: Senator_Rick_Halford@legis.state.ak.us, Representative_Fred_Dyson@legis.state.ak.us

It seems reasonable to me. If I was a contractor I would not want to be jercked around by DOT. Who would. We need to stop rancor in DOT. There is a lot of it there. It is time for fair play, don't you think? All of this cut throat is very dishearting. Hope you think about it.
John Suter

Subject: Important Legislation
Date: Sun, 22 Apr 2001 15:05:36 -0800
From: Senate Transportation Committee <Senate_Transportation_Committee@Legis.state.ak.us>
Organization: Alaska State Legislature
To: suter@gci.net

I need your help. On Tuesday at 9:00 am the Senate Finance Committee will be hearing two of my bills - SB 152 and SB 83.

Senate Bill 152, which was requested by the Associated General Contractors, will require that the Department of Transportation and Public Facilities pay interest on contract controversies that are settled in favor of the contractor. Currently, a disputed claim can take months or even years to settle. Contractors winning their claim are not paid any interest on the disputed amount.

Senate Bill 83 stops the Department of Transportation and Public Facilities from entering into Force Account work where the job would exceed $250,000 in value. Currently the State of Alaska is planning a $3.5 million dollar Force Account job in Saint Mary's this summer - no bids.

I would ask that you contact members of the Senate Finance Committee and indicate your support for these bills.

Included is a list of the Senate Finance Committee membership:

Dave Donley	rm 506	p465-3892	f465-6595
Pete Kelly	rm 518	p465-2327	f465-5241
Jerry Ward	rm 423	p465-4940	f465-3766
Alan Austerman	rm 417	p465-2487	f465-4956
Lyda Green	rm 125	p465-6600	f465-3805
Loren Leman	rm 516	p465-2095	f465-3810
Gary Wilken	rm 514	p465-3709	f465-4714
Lyman Hoffman	rm 7	p465-4453	f465-4523
Donny Olson	rm 510	p465-3707	f465-4821

All legislators mail can be sent to: Legislator
Room ___, Alaska State Capitol
Juneau, Alaska 99801

All Senators use the same format for emails:
Senator_Last_First@legis.state.ak.us

Your support of these bills will be very helpful. Please call, fax, write or send an email in support.

Thank you very much.

Subject: SB83
Date: Tue, 1 May 2001 11:55:53 -0800
From: "Karen Henderson" <denalidi@alaska.net>
To: <Senator_John_Cowdery@legis.state.ak.us>, <Senator_Dave_Donley@legis.state.ak.us>, <Senator_Johnny_Ellis@legis.state.ak.us>, <Senator_Lyda_Green@legis.state.ak.us>, <Senator_Rick_Halford@legis.state.ak.us>, <Senator_Loren-Leman@legis.state.ak.us>, <Senator_Drue_Pearce@legis.state.ak.us>, <Senator_Randy_Phillips@legis.state.ak.us>, <Senator_Robin_Taylor@legis.state.ak.us>, <Senator_Jerry_Ward@legis.state.ak.us>

Please vote in favor of SB83 regarding DOT Force Accounting. Although I recommended a $250,000 cap, this is at least a start to bring the DOT into accountability.

Hal Ingalls @ Denali Drilling, Inc.
denalidi@alaska.net

Dear Senator Cowdery:

I am writing to urge that you support passage of Senate Bill 152 and House Bill 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."

As a general contractor who has been involved in construction in the State of Alaska for 23 years, this bill is especially important to me and other members of the construction industry. I am aware that the State of Alaska Department of Transportation & Public Facilities always paid prejudgment interest on claims until just very recently. I disagree with the State's position because prejudgment interest is, has been, and will continue to be an appropriate component of a contractor's damages. Why the State has decided to discontinue paying prejudgment interest is apparent. Prejudgment interest served as a valuable incentive for the Department to expeditiously handle contractor claims and subcontractor pass-through claims. Since the Department recently made the decision it would no longer pay prejudgment interest, I have heard several accounts of the Department literally dragging out its claims handling process for as long as three to four years. In some cases State maladministration of these contracts has resulted in good, reputable firms suffering tremendous financial burdens and even going under.

As a small contractor, my company cannot afford to finance State projects for these periods of time. As a result of this, we have even considered avoiding submitting bids on DOTPF projects or we factor DOTPF's retributive project maladministration into our bid to cover for these eventualities. While this may be wasteful of public funds for construction projects, it is essential for our survival in the competitive construction industry. I believe that the threat of prejudgment interest will result in State agencies treating general contractors and subcontractors more favorably.

In addition to urging that you pass this legislation immediately, I urge you to make it apply to every claim that is pending as of the effective date of the legislation. This would provide relief for those contractors who successfully prosecuted claims through DOTPF's administrative process during the 3½ year period that DOTPF arbitrarily and wrongly declined to pay prejudgment interest.

Please give this matter your immediate attention.

Sincerely,

Hugh Chumley
President
Raven Contractors, Inc.

South Coast Inc.

FAX (907) 247-6125
Telephone (907) 225-6125
Post Office Box 8620
4049 Tongass Avenue
Ketchikan, Alaska 99901

VIA FACSIMILE

May 8, 2001

Dear Senator or Representative:

I have been following the progress of SB 152 regarding prejudgment interest for construction claims with great interest. I have the following observations:

1. I am concerned because of the last-man-standing syndrome. The contract community has been allowed to verbalize their concerns and mistreatment by the DOT regarding these claim issues. However, the Attorney General office and DOT folks are subsequently allowed to white wash our concerns and smooth over the issues by utilizing selective issues and entertaining renditions of how the system works – they are the last man standing.

2. This interest concern is not for when the system works. It is to give the contract community some financial retribution for when it is not working. Assistant Attorney General Gardner said the process works 90% of the time. You ask contractors if that is a fair percentage. My experience has been 90% of the time a claim is given a "No" on the job, a "No" at the engineering level and a "No" at the Contracting Officer level.

   On our claim after "No, No, No", we spent an additional $300,000 to take the claim to the next level to a Hearing Officer. 90% of my issues are less than $100,000 issues. When I drop them after my first three "No's" because of a financial reason, has the process worked? Is the process fair? Is it equitable?

   I understand the DOT is at risk for $136,000 for their portion of pending prejudgment interest. These dollars are for the contractors who have championed clarifying this current issue for equity and right in the contract community. They are the ones who have been awarded prejudgment interest by the DOT appointed Hearing Officers, but as of yet, have not been paid. Is $136,000 too much for the great state of Alaska to pay to correct the past transgressions of its representatives?

   After our "No, No, No", we were awarded $750,000 at the Hearing Officer level including the interest. This was an independent review to pay us $750,000 of project earned payments that was due nearly five years earlier. Surely the DOT should pay interest as awarded in this decision. We must include "pending claims" in this Bill.

3. There is a proposed Amendment to SB 152 that states an appeal can not raise any new factual issues or theories that had not previously been raised. There is a fundamental folly to this reasoning.

   Essentially, if an issue materializes on a construction project that cannot be settled with the project people it becomes a "claim". You are given usually 60 days to present your concerns (claim) to the project peoples boss – the Project Engineer. If you are not satisfied with these results you have 30 days to take it up one more notch to the Contracting Officer. After the Contracting Officer you go to a Hearing Officer.

   The point is, we are contractors and not claim specialists. The first three steps of this process from the project to the Project Engineer to the Contracting Officer are relatively informal. These are steps that most contractors have the sophistication to prepare and negotiate through.

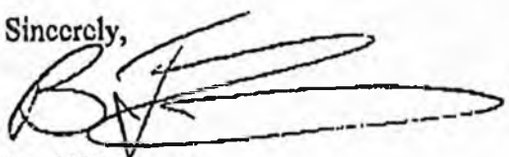
   If the system is working the claim should be resolved within these first three steps. The State and contractor should reach a mutually fair and equitable settlement and everybody goes back to work.

   When the system is not working it goes to the Hearing Officer, then the Attorney General Office steps in and the contractor quickly is out of his league. At this level the game changes, it is not longer what's fair and equitable, but what is legal and per contract. When the game changes so do the rules. The new rules of "factual issues or theories of recovery" may not have been raised in the previous steps when we were just trying to get paid a fair amount for some extra work. We are now set adrift in the murky world of "legalities".

   I don't think this is what anybody really wants to see happen. It will force contractors to put on staff or incorporate legal counsel at the very onset of the claim process. In so doing you will guarantee an earlier appearance of the Attorney General Office and pretty well hamstring the original process back where we were just trying to get paid a fair price for our extra work.

Let's not wreck what works in trying to fix what doesn't. Thank you for your time and consideration in this matter.

Sincerely,



Brad W. Finney
Vice President

South Coast Inc.

P.O. Box 8620, Ketchikan, Alaska 99901

Fax

To:	See List	**From:**	Brad Finney, VP
		Company:	South Coast Inc.
Fax:		**Fax:**	(907) 247-6125
Phone:		**Phone:**	(907) 225-6125
Date:	May 8, 2001	**# of Pages** including cover	

Alaska Senate Members

Sen. Rick Halford, President	907-465-4928
Sen. Loren Leman, Majority Leader	907-465-3810
Sen. Johnny Ellis, Minority Leader	907-465-2529
Sen. Alan Austerman	907-465-4956
Sen. John Cowdery	907-465-2069
Sen. Bettye Davis	907-465-3756
Sen. Dave Donley	907-465-6595
Sen. Kim Elton	907-465-2108
Sen. Lyda Green	907-465-3805
Sen. Lyman Hoffman	907-465-4523
Sen. Pete Kelly	907-465-5241
Sen. Georgianna Lincoln	907-465-2652
Sen. Donald Olson	907-465-4821
Sen. Drue Pearce	907-465-3872
Sen. Randy Phillips	907-465-4979
Sen. Robin Taylor	907-465-3922
Sen. Gene Therriault	907-465-3884
Sen. John Torgerson	907-465-4779
Sen. Jerry Ward	907-465-3766
Sen. Gary Wilkin	907-465-4714

STATE OF ALASKA

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

May 5, 2001

The Honorable Pete Kott, Chair,
and Members
House Rules Committee
Alaska State Legislature
Juneau, Alaska 99801

RE: CS SB 152(Fin) – "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 Kott and Rules Committee Members:

The House Rules Committee has CS SB 152 (Fin) – "Relating to the handling of and interest on contract controversies involving . . ." in its possession. I support this version of SB 152 because it represents a balanced and fair resolution to the question of when the state must pay prejudgment interest on construction claims.

CS SB 152 (Fin) changes the rules governing the payment of interest on contested construction claims for claims after the effective date of the act. It requires the payment of prejudgment interest to a contractor from the time a complete claim is filed with the procurement officer under AS 36.30.620(a) through the date of a decision by the procurement officer, a decision by the Commissioner of Transportation and Public Facilities, or a judicial decision, whichever is last. Payment of prejudgment interest is intended to speed up the settlement of construction claims, although standing alone it removes incentives of contractors to expedite the proceedings.

An additional provision of the Finance Committee CS, included in Section 2, will address this imbalance in settlement of construction claims and appeals of decisions by contractors. Under this section, a contractor in a dispute with the state must make a complete claim to the procurement officer, that is, must present all of the factual evidence and theories of recovery in the claim prior to that officer's decision on the case. A

claimant would not be allowed to present new evidence or new theories of recovery in an appeal to the commissioner (or the commissioner's designated hearing officer) or in superior court.

I support CS SB 152 (Fin) because when a contractor fully and fairly lays out its case the department can make a fair and expeditious decision on the merits of the claim. Having a complete record of the claim available to the procurement officer will help ensure that the claims review process at that level is thorough and efficient, which is a goal of both the contractors and the state.

If you have any questions, please don't hesitate to call me at 465-2133.

Sincerely,

Bruce M. Botelho
Attorney General

cc: Senator John Cowdery
Mike Abbott, Legislative Director, Office of the Governor
Shari Kochman, Deputy Legislative Director, Office of the Governor
Dennis Poshard, Legislative Liaison, DOTPF
Chrystal Smith, Legislative Liaison, Department of Law
Deborah Behr, Legislation Attorney, Department of Law

From the office of . . . Senator John J. Cowdery
State Capitol Building, Rm #101
Juneau, AK 99801
907-465-3879 phone
907-465-2069 fax

MEMORANDUM

Sponsor Statement for SB 152

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.

This proposed legislation would simply require that when a contract settlement with DOTPF is in dispute and finally settled in favor of the contractor that interest must be paid to the contractor on the settlement amount for the time the contract was in dispute.

Interest will accrue at the rate applicable to judgements and the interest accrues from the date the claim was filed through the date of the settlement.

The rate of interest referred to in SB 152 (AS 09.30.070) is three percentage points above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgement or decree is entered... ..

DEPARTMENT OF LAW LETTER.....

By this letter it's clear that there's a strategy to NOT pay interest yet DOTPF earns interest on the very money that they eventually pay out to the contractors.

There are also many references to "a fair number, there may be, could be, it may be, it is unclear, may be, court might,etc."

LETTER FROM AURORA ELECTRIC DATATEL.....

...always paid pre judgement interest on claims until just very recently.

Prejudgment interest served as a valuable incentive for the Department to expeditiously handle contractor claims and subcontractor pass-through claims.

...literally dragging out ... three or four years. In some cases State maladministration of these contracts has resulted in good reputable firms suffering tremendous financial burden and even going under.

...my company cannot afford to finance State projects for these.....

I believe that the threat of prejudgement interest will result in State agencies treating general contractors and subcontractors more favorably.

....apply to every claim that is pending as of the effective date of the legislation.

Basically there is unfairness in the current procedures.

- Construction projects are complex
- There are disputes
- Disputes take too long to resolve
- No urgency on the part of the state to settle – interest expenses might speed up settlement
- State earns interest on the money that is in dispute
- Financially strapped contractors are sometimes forced to settle
- Contractors have to pay their expenses and the cost of defending their position
- SB 152 would provide fairness... ..

Basically there is unfairness in the current procedures.

- Construction projects are complex
- There are disputes
- Disputes take too long to resolve
- No urgency on the part of the state to settle – interest expenses might speed up settlement
- State earns interest on the money that is in dispute
- Financially strapped contractors are sometimes forced to settle
- Contractors have to pay their expenses and the cost of defending their position
- SB 152 would provide fairness... ..

DEPARTMENT OF LAW LETTER.....

By this letter it's clear that there's a strategy to NOT pay interest yet DOTPF earns interest on the very money that they eventually pay out to the contractors.

There are also many references to "a fair number, there may be, could be, it may be, it is unclear, may be, court might,etc."

LETTER FROM AURORA ELECTRIC DATATEL.....

...always paid pre judgement interest on claims until just very recently.

Prejudgment interest served as a valuable incentive for the Department to expeditiously handle contractor claims and subcontractor pass-through claims.

...literally dragging out ... three or four years. In some cases State maladministration of these contracts has resulted in good reputable firms suffering tremendous financial burden and even going under.

...my company cannot afford to finance State projects for these.....

I believe that the threat of prejudgement interest will result in State agencies treating general contractors and subcontractors more favorably.

....apply to every claim that is pending as of the effective date of the legislation.

AMENDMENT

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.

AMENDMENT

OFFERED IN THE HOUSE

TO: SB 152
Version "C"

Page 1, line 13:

After "filed"

Delete "under"

Insert "that meets the requirements of"

SENATOR
JOHN COWDERY

District I
Anchorage

Committees
Chair: Transportation
Chair: World Trade
State & Federal Relations
Rules
Legislative Council
Judiciary

Alaska State Legislature
Senate

During Session:
State Capitol, Suite 101
Juneau, Alaska 99801-1182
Tel: 907-465-3879
Toll Free: 888-269-3879
Fax: 907-269-2069

Interim:
716 W. 4th Avenue
Anchorage, Alaska 99501
Tel: 907-269-0222
Fax: 907-269-0223

Senator_John_Cowdery@legis.state.ak.us

TO: The Honorable Pete Kelly and
The Honorable Dave Donley, Co Chairmen
Senate Finance Committee

FROM: Senator John J. Cowdery JJC

DATE: April 18, 2001

RE: SB 152
"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"

I would like to respectfully request a hearing on Senate Bill 152

This proposed legislation would simply require that when a contract settlement with DOTPF is in dispute and finally settled in favor of the contractor that interest must be paid to the contractor on the settlement amount for the time the contract was in dispute. Interest will accrue at the rate applicable to judgements and the interest accrues from the date the claim was filed through the date of the ~~decision~~. Settlement

Attached are the following:

1. SB 152
2. Sponsor Statement
3. Fiscal Note
4. Associated General Contractors letter

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE Hudson

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) this section, a hearing shall be conducted according to AS 36.30.670 and regulations

22-LS0552\C.1
Bannister
4/30/01

AMENDMENT

OFFERED IN THE HOUSE

TO: 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

deleted

(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."

22-LS0552\C.2
Bannister
5/1/01

AMENDMENT

OFFERED IN THE HOUSE

TO: SB 152

Page 1, lines 12 - 14:

Delete "date the claim was filed under AS 36.30.620(a) through the date of a decision by the procurement officer under AS 36.30.620,"

Insert "adverse decision date through the date of"

Page 2, line 1, following "AS 36.30.680":

Delete ","

Page 2, line 2:

Delete "is latest. In this section,"

Insert "is later. In this section,

(1) "adverse decision date" means the date the procurement officer issues a decision under AS 36.30.620(b) or the date under AS 36.30.620(e) that the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor;

(2)"

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

22-LS0552\C.1
Bannister
4/30/01

AMENDMENT

OFFERED IN THE HOUSE

TO: 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

deleted

(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."

Davies – offered amendment #2

AF. 36.36.20
90 days

B – decision – 90 days

Atkinson –
30 days

22-LS0552\C.2
Bannister
5/1/01

AMENDMENT

OFFERED IN THE HOUSE

TO: SB 152

Page 1, lines 12 - 14:

Delete "date the claim was filed under AS 36.30.620(a) through the date of a decision by the procurement officer under AS 36.30.620,"

Insert "adverse decision date through the date of"

Page 2, line 1, following "AS 36.30.680":

Delete ","

Page 2, line 2:

Delete "is latest. In this section,"

Insert "is later. In this section,

(1) "adverse decision date" means the date the procurement officer issues a decision under AS 36.30.620(b) or the date under AS 36.30.620(e) that the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor;

(2)"

22-LS0552\C.2
Bannister
5/1/01

AMENDMENT

OFFERED IN THE HOUSE

TO: SB 152

Page 1, lines 12 - 14:

Delete "date the claim was filed under AS 36.30.620(a) through the date of a decision by the procurement officer under AS 36.30.620,"

Insert "adverse decision date through the date of"

Page 2, line 1, following "AS 36.30.680":

Delete ","

Page 2, line 2:

Delete "is latest. In this section,"

Insert "is later. In this section,

(1) "adverse decision date" means the date the procurement officer issues a decision under AS 36.30.620(b) or the date under AS 36.30.620(e) that the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor;

(2)"

FAX COVER SHEET

LEGAL SERVICES
DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

TO: Sen Cowdery attn: Dan

FAX: 2069 PHONE: _____

NUMBER OF PAGES (Including cover sheet): 2 DATE SENT 5-1-01 TIME 10:50 SENT BY EL

DISPOSAL OF ORIGINAL: MAIL___ FILE___ THROW AWAY___ HOLD FOR PICKUP___

NOTES/INSTRUCTIONS:

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 30, 2001

SUBJECT: Amendment to SB 152 relating to DOT/PF related controversies (Work Order No. 22-LS0552/C)

TO: Senator John Cowdery
Attn: Don Smith

FROM: Theresa L. Bannister
Legislative Counsel

This memo accompanies the amendment you requested relating to the bill described above.

Impairment of contracts issue. The application of the interest rate provisions of this bill to controversies pending before an agency on the effective date of the Act may raise an issue under the constitutional prohibitions against the impairment of contracts (under U.S. Const. art. I, sec. 10, and Alaska Const. art. I, sec. 15). The issue may be raised in those situations where the contractor is ultimately required to pay the agency money and the contract between the contractor and the agency provided for a lower rate of interest. The change in interest rates may not be considered substantial enough for a violation, but I wanted you to be aware that the issue exists.

If I may be of further assistance, please advise.

TLB:glc
01-295.glc

Enclosure

Mike Abbott

STATE OF ALASKA

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 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 can 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]

---

[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.

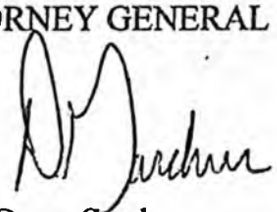
- **Conclusions that may be drawn from this information:**
  - The majority of the above-listed states do not pay interest on contract claims from the date a claim is first filed with the agency.
  - Alaska would join a distinct minority of states if it enacted SB 152 or HB 235 and started paying interest 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

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
Juneau, 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