

ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672

10703 SENATE TRANSPORTATION

548

The Honorable Vic Kotring, Chair,  
and Members, House Transportation Committee  
April 16, 2001  
Page 4

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

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

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

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

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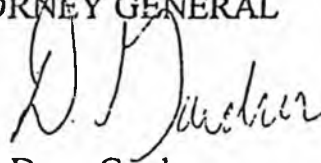
<sup>1</sup> The Alaska Supreme Court has held that Equal Protection Clause of the Alaska Constitution affords greater protection to individual rights than that afforded under the U.S. Constitution. *State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624, 631 (Alaska 1989); *Laborers Local No. 942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

The Honorable Vic Kohring, Chair,  
and Members, House Transportation Committee  
April 16, 2001  
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If you or any committee member has questions regarding the testimony summarized above, please advise.

Sincerely,

BRUCE M. BOTELHO  
ATTORNEY GENERAL



By: Doug Gardner  
Assistant Attorney General

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

# STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

P.O. BOX 110300  
DINGND COURT HOUSE, 6<sup>TH</sup> FLOOR  
JUNEAU, ALASKA 99811-0300  
PHONE: (907)465-3600  
FAX: (907)465-6735

April 20, 2001

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

Dear Representative Kookesh:

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

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

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

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

The Honorable Albert Kookesh  
April 20, 2001  
Page 2

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

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

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

However, the Alaska Supreme Court has long held that court actions seeking judicial review of final agency decisions are not authorized under AS 09.50.250 if those claims must first be filed with and decided by a state agency with mandatory claims procedures. Rather, actions for judicial review of final agency decisions must be filed under the Alaska Rules of Appellate Procedure. *State v. Lundgren Pacific Construction Co.*, 603 P.2d 889, 892-93 (Alaska 1979)(case involved a contract claim against the Dep't of Highways, now DOT&PF).893 (Alaska 1979). Because judicial review actions are not authorized under AS 09.50.250, interest may not be awarded in those cases under AS 09.50.280. *Danco Exploration*, 924 P.2d at 434.

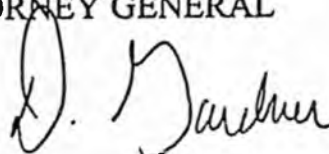
If interest is to be paid on administrative agency claims, the legislature must enact a statutory waiver of Alaska's sovereign immunity that expressly and unequivocally requires the payment of interest on such claims. In that regard, this office has already expressed its concern that HB 235 and its companion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

The Honorable Albert Kookesh  
April 20, 2001  
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If you have additional questions concerning this letter or HB 235, please do not hesitate to contact me at 465-6712.

Sincerely,

BRUCE M. BOTELHO  
ATTORNEY GENERAL



By: Doug Gardner  
Assistant Attorney General

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

# FISCAL NOTE

**STATE OF ALASKA**  
**2001 LEGISLATIVE SESSION**

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

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

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

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

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

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

Estimate of any current year (FY2001) cost: 0.0

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

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

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

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

For distribution information, call the Governor's Legislative Office



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

Thursday, April 26, 2001

The Honorable Senator John Torgerson  
State Capitol, Room #427  
Juneau, AK 99801-1182

Send via fax to 907-260-3044 and 907-465-4779

Subject: Senate Bill 152

Dear Senator Torgerson:

We understand the above referenced bill is before the Senate at this time. We appreciate the effort our legislature is making to address this matter, and respectfully request an amendment be considered.

In the interest of justice, we request that the bill be amended to include claims currently before DOTPF, if decided in favor of the contractor.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Fred Thompson', written in a cursive style.

Fred Thompson

A handwritten signature in black ink, appearing to read 'Helene Herndon', written in a cursive style.

Helene Herndon



# ALASKA STATE LEGISLATURE

## SENATOR JOHN TORGERSON

- ◆ CHAIR, SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE
- ◆ CHAIR, SENATE RESOURCES COMMITTEE

Session:

State Capitol, Room 427, Juneau, AK 99801  
Telephone 907/465-2828 Fax 907/465-4779

District:

45457 Kenai Spur Hwy.; Suite 101B, Soldotna, AK 99669  
Telephone 907/260-3042 Fax 907/260-3044

April 24, 2001

Commissioner Joseph L. Perkins  
Department of Transportation & Public Facilities  
3132 Channel Drive  
Juneau, AK 99801-7898

Dear Commissioner Perkins;

This letter is intended to provoke a positive action in resolving the claim of Herndon & Thompson, Inc. (HTI).

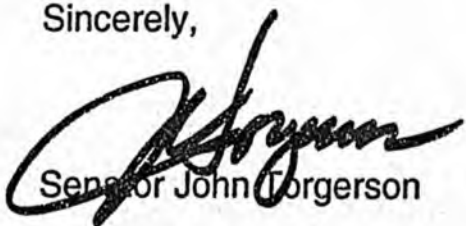
HTI has filed a claim of \$4.7 million for overruns they incurred on the Seward Highway project, Milepost 8-18. HTI is a certified small business concern and are now in liquidation mode. They have been forced to sell off equipment and real property, at reduced prices, to try to survive the losses from last year so they can complete the project this year.

I believe it is in the best interests of the State to resolve claim disputes and not drag it out to the point where the affected small business is forced to dissolve.

I ask you to personally acquaint yourself in this matter and resolve it.

Thank you for your time and consideration.

Sincerely,



Senator John Torgerson

JT/mj: HTI 4-24-01

Xc: Herndon & Thompson, Inc.

### REPRESENTING THE KENAI PENINSULA

Anchor Point Bear Creek Clam Gulch Cooper Landing Crown Point Fritz Creek Happy Valley Halibut Cove Homer Hope Kachemak City Kachemak Selo  
Kasilof Lowell Point Moose Pass Nanwalek Nikolaevsk Ninilchik Port Graham Razdolna Seward Seldovia Soldotna Stariski Sterling Voznesenka



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

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.

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

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.

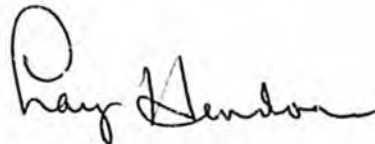
We urge you to contact DOTPF and remind them to act quickly and to act fairly, in evaluating this claim.

Respectfully,

HERNDON & THOMPSON, INC.



Fred Thompson



Larry Herndon

# *University Redi-Mix, Inc.*

PHILLIPS FIELD ROAD P.O. BOX 60750 FAIRBANKS, ALASKA 99706  
(907) 479-2996

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

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."

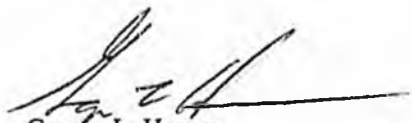
As a subcontractor who has been involved in construction in the State of Alaska for 26 years, this bill is especially important to me and other members of the construction industry. I am aware that the State of Alaska Department of Transportation & Public Facilities always paid prejudgment interest on 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 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 3½ year period that DOTPF arbitrarily and wrongly declined to pay prejudgment interest.

Please give this matter your immediate attention.

Sincerely,



George L. Horner  
President  
University Redi-Mix, Inc.



## *H & H Contractors, Inc.*

3050 Phillips Field Road  
P.O. Box 60610  
Fairbanks, Alaska 99706  
(907) 479-2235 FAX (907) 479-2253

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

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 and subcontractor who has been involved in construction in the State of Alaska for 37 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 large contractor/ 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 3½ year period that DOTPF arbitrarily and wrongly declined to pay prejudgment interest.

Please give this matter your immediate attention.

Sincerely, *George R. Horner*

George R. Horner  
President  
H&H Contractors, Inc.



OLES MORRISON RINKER & BAKER LLP

LAWYERS

April 26, 2001

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

fax: (907) 465-2069

Re: SB 152 & HB 235

Dear Senator Cowdery,

As your constituent, I wish to express my sincere thanks and appreciation for your efforts at introducing SB 152, relating to compensating contractors with interest on claimed amounts. As a lawyer who has represented multiple contractors during the administrative process, I can tell you that it is simply unfair that state agencies make contractors finance state projects interest-free for two to five years while claims are pending in the administrative process. This legislation will correct this unfortunate situation and give state agencies an incentive to settle contractor claims.

There are two aspects of this legislation that have not been considered however. First, I am aware of no less than five contractors who have claims that are pending against state agencies at this time. I earnestly believe that it would be unfair for these contractors to be excluded from the benefits of this legislation merely because their claims arose during the 3-year period of time that the State arbitrarily decided it had no obligation to pay interest on contractor claims. Please consider adding language that would make this legislation effective to *all claims that are pending* as of the effective date of the legislation. My second concern is that this legislation needs to apply to all state agencies rather than just the Department of Transportation & Public Facilities.

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

22-LS0552\C  
Bannister  
3/19/01

**SENATE BILL NO.**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-SECOND LEGISLATURE - FIRST SESSION**

**BY SENATOR COWDERY**

**Introduced:**  
**Referred:**

**A BILL**  
**FOR AN ACT ENTITLED**

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

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

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

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

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

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

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

# 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

February 15, 2001

**SUBJECT:** DOT contract claims (Work Order No. 22-LS0552\A)

**TO:** Senator John Cowdery

**FROM:** *TLB*  
Theresa L. Bannister  
Legislative Counsel

This memo accompanies a draft of the bill described above.

1. Time considerations. With respect to the private review of contract controversies, do you want to extend or change any of the deadlines established in AS 36.30.620(b) to accommodate the procurement of the private reviewer and the time necessary for the reviewer to review the claim?
2. Coverage of bill. I interpreted your work order to intend to cover contract controversies, which are essentially contract disputes after the contract is awarded or entered into. It does not cover protests of the award of a contract to a specific person or the debarment of a contractor.

If I may be of further assistance, please advise.

TLB:glc  
01-139.glc

Attachment

22-LS0552\A  
Bannister  
2/15/01

**SENATE BILL NO.**

IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-SECOND LEGISLATURE - FIRST SESSION

BY SENATOR COWDERY

Introduced:  
Referred:

**A BILL**

**FOR AN ACT ENTITLED**

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

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

6 \* **Section 1.** AS 36.30.620 is amended by adding new subsections to read:

7 (h) Before making a decision on a controversy being handled under this  
8 section, the Department of Transportation and Public Facilities, or a contracting  
9 agency to whom the responsibility for handling a controversy of the Department of  
10 Transportation and Public Facilities is delegated under AS 36.30.632, shall have the  
11 merits of the controversy reviewed by a private person who is not employed by a state  
12 agency and who does not have an interest in the outcome of the controversy. In this  
13 subsection, "private person" includes an organization that specializes in the arbitration  
14 of contract controversies.

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

5 \* Sec. 2. AS 36.30 is amended by adding a new section to read:

6 **Sec. 36.30.623. Interest on certain controversies.** The amount ultimately  
7 determined to be due under AS 36.30.620 - 36.30.630 and 36.30.670 - 36.30.685 to a  
8 department contractor, the department, or a contracting agency to whom the  
9 responsibility for handling the controversy is delegated by the department under  
10 AS 36.30.632 accrues interest at the rate applicable to judgments under  
11 AS 09.30.070(a). Notwithstanding AS 09.30.070(b), the interest accrues from the date  
12 the claim was filed under AS 36.30.620(a) through the date of a decision by the  
13 procurement officer under AS 36.30.620, a decision by the commissioner of  
14 transportation and public facilities under AS 36.30.680, or a judicial decision under  
15 AS 36.30.685, whichever decision is latest. In this section, "department" means the  
16 Department of Transportation and Public Facilities.

17 \* Sec. 3. AS 36.30.625 is amended by adding a new subsection to read:

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

# FISCAL NOTE

**STATE OF ALASKA  
2001 LEGISLATIVE SESSION**

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

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

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

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

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE (Thousands of Dollars)**

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

Estimate of any current year (FY2001) cost: 0.0

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

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

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

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

For distribution information, call the Governor's Legislative Office



## ASSOCIATED GENERAL CONTRACTORS of ALASKA

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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

INTEREST ON CONTRACT CONTROVERSIES  
SB 152

Position Paper of  
The Associated General Contractors of Alaska

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

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

The current system offers no advantages to the contractor.

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

There are no disadvantages to the contractor.

#### AGC POSITION

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

**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.

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and Members, House Transportation Committee  
April 16, 2001  
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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(c). 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

The Honorable Vic Kohring, Chair,  
and Members, House Transportation Committee  
April 16, 2001  
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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

The Honorable Vic Kohring, Chair,  
and Members, House Transportation Committee  
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construction claims simply to save the costs of having to pay interest on all AS 36.30 claims does not bear a substantial relationship to a legitimate state objective.<sup>1</sup>

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

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

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

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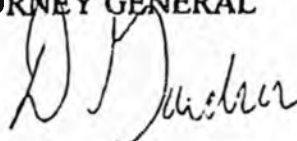
<sup>1</sup> The Alaska Supreme Court has held that Equal Protection Clause of the Alaska Constitution affords greater protection to individual rights than that afforded under the U.S. Constitution. *State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624, 631 (Alaska 1989); *Laborers Local No. 942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

The Honorable Vic Kohring, Chair,  
and Members, House Transportation Committee  
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if you or any committee member has questions regarding the testimony  
summarized above, please advise.

Sincerely,

BRUCE M. BOTELHO  
ATTORNEY GENERAL



By: Doug Gardner  
Assistant Attorney General

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



## 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.

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 jobs. 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

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

**Subject: RE: Important Legislation**

**Date:** Mon, 23 Apr 2001 11:43:42 -0600

**From:** "Damron, Floyd/ANC" <FDamron@CH2M.com>

**To:** "Senate Transportation Committee" <Senate\_Transportation\_Committee@Legis.state.ak.us>

Senator Cowdery - I have a couple of questions. On SB 152: Do Contractors have to pay interest to ADOT for claims by the State has against Contractors where the Contractor is found to be at fault? If you want the state to pay interest to Contractors, shouldn't Contractors be liable for interest when they owe money to the state for a claim against them?

What will the interest rate be? Can the interest rate be tied to something like the fed furd rate instead of being a fixed rate? Rates changes rapidly and are currently in a downward trend.

Regarding SB 83 - I think \$250,000 may be too little of an amount, and what ever amount you come up with, it should be allowed to inflate each year by some amount. What we sometimes see legislation for a specific dollar amount and the amount does not change for 10 to 20 years. Without some escalator (or reconsideration each year), the amount ends up being too great of a constraint to get projects completed on time.

For an existing contract, I would think ADOT and other state agencies should have the ability to go force account on a set amount or a percentage of an existing contract, which ever is greater. For a competitively bid contract, I would think going up to 25% more on the basic contract amount should be allowed without competition. Often times changes happen in the field, or the State wants to make a change to enhance the project, and using the existing contractor is usually the best deal for the state due to the amount of time and effort it takes to put a new bid out on the street.

I would recommend being careful with SB 83 in trying the address the St Mary's situation and maybe causing unintended problems for other projects. I think going to a percentage basis of additional work on a competitively bid contract will be helpful.

If the only intent of SB 83 is to stop new contracts that are not competitively bid, then my above comments are not helpful, except the first one on escalating the dollar amount each year. I am opposed to new contracts of any significant size that are not competitively bid.

Floyd Damron/Alaska Manager CH2M HILL

-----Original Message-----

From: Senate Transportation Committee

[mailto:Senate\_Transportation\_Committee@Legis.state.ak.us]

Sent: April 22, 2001 9:24 AM

To: Damron, Floyd/ANC

Subject: Important Legislation

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

**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\_Alán\_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

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 accrues at the rate applicable to judgements and the interest accrues from the date the claim was filed through the date of the decision.

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

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# FISCAL NOTE

STATE OF ALASKA  
2001 LEGISLATIVE SESSION

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

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

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

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

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

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

Estimate of any current year (FY2001) cost: 0.0

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

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

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

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

For distribution information, call the Governor's Legislative Office



41740 BEAR CREEK CT. HOMER, ALASKA 99603 PHONE (907) 235-8741 FAX (907) 235-8945

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

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.

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

There is considerable evidence that DOTPI<sup>2</sup> 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 DOTPI<sup>2</sup> 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. DOTPI<sup>2</sup> 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. DOI/PF 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 scheduled for May.

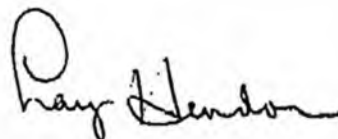
We urge you to contact DOI/PF and remind them to act quickly and to act fairly, in evaluating this claim.

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."

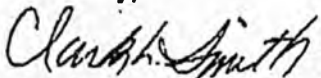
As a subcontractor who has been involved in construction in the State of Alaska for 19 years, this bill is especially important to me and other members of the construction industry. I am aware that the State of Alaska Department of Transportation & Public Facilities always paid prejudgment interest on 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 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 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 3 1/2 year period that DOTPF arbitrarily and wrongly declined to pay prejudgment interest

Please give this matter your immediate attention.

Sincerely,



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

c/c

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

RE: Important Legislation

**Subject: RE: Important Legislation**

**Date: Mon, 23 Apr 2001 11:43:42 -0600**

**From: "Damron, Floyd/ANC" <FDamron@CH2M.com>**

**To: "Senate Transportation Committee" <Senate\_Transportation\_Committee@Legis.state.ak.us>**

Senator Cowdery - I have a couple of questions. On SB 152: Do Contractors have to pay interest to ADOT for claims by the State has against Contractors where the Contractor is found to be at fault? If you want the state to pay interest to Contractors, shouldn't Contractors be liable for interest when they owe money to the state for a claim against them?

What will the interest rate be? Can the interest rate be tied to something like the fed fund rate instead of being a fixed rate? Rates changes rapidly and are currently in a downward trend.

Regarding SB 83 - I think \$250,000 may be too little of an amount, and what ever amount you come up with, it should be allowed to inflate each year by some amount. What we sometimes see legislation for a specific dollar amount and the amount does not change for 10 to 20 years. Without some escalator (or reconsideration each year), the amount ends up being too great of a constraint to get projects completed on time.

For an existing contract, I would think ADOT and other state agencies should have the ability to go force account on a set amount or a percentage of an existing contract, which ever is greater. For a competitively bid contract, I would think going up to 25% more on the basic contract amount should be allowed without competition. Often times changes happen in the field, or the State wants to make a change to enhance the project, and using the existing contractor is usually the best deal for the state due to the amount of time and effort it takes to put a new bid out on the street.

I would recommend being careful with SB 83 in trying the address the St Mary's situation and maybe causing unintended problems for other projects. I think going to a percentage basis of additional work on a competitively bid contract will be helpful.

If the only intent of SB 83 is to stop new contracts that are not competitively bid, then my above comments are not helpful, except the first one on escalating the dollar amount each year. I am opposed to new contracts of any significant size that are not competitively bid.

Floyd Damron/Alaska Manager CH2M HILL

-----Original Message-----

From: Senate Transportation Committee

[mailto:Senate\_Transportation\_Committee@Legis.state.ak.us]

Sent: April 22, 2001 9:24 AM

To: Damron, Floyd/ANC

Subject: Important Legislation

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

RE: Important Legislation

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

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.

The Honorable Vic Kohring, Chair,  
and Members, House Transportation Committee  
April 16, 2001  
Page 2

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(c). 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

The Honorable Vic Kohring, Chair,  
and Members, House Transportation Committee  
April 16, 2001  
Page 3

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

The Honorable Vic Kohring, Chair,  
and Members, House Transportation Committee  
April 16, 2001  
Page 4

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

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

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

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

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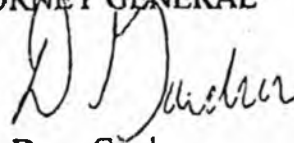
<sup>1</sup> The Alaska Supreme Court has held that Equal Protection Clause of the Alaska Constitution affords greater protection to individual rights than that afforded under the U.S. Constitution. *State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624, 631 (Alaska 1989); *Laborers Local No. 942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

The Honorable Vic Kohring, Chair,  
and Members, House Transportation Committee  
April 16, 2001  
Page 5

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

Sincerely,

BRUCE M. BOTELHO  
ATTORNEY GENERAL



By: Doug Gardner  
Assistant Attorney General

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

**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.

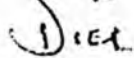
5. This proposed amendment is contrary to the State's Procurement Code's federal counterpart, which permits contractors post-claim submission to increase their calculation of damages as long as the damages "flow from" or "arise out of" the same operative facts giving rise to the original claim. The federal 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 Cattanch  
Executive Director

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

April 24, 2001

TO: Senator John J. Cowdery  
FROM: Don Smith  
SUBJECT: Interest Rate - re SB 152

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

From the office of . . . Senator John J. Cowdery

State Capitol Building, Rm #101

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## ASSOCIATED GENERAL CONTRACTORS of ALASKA

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April 6, 2001

Re: SB 152 – Interest on Contract Controversies

Dear Senator:

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

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

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

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

Sincerely,

Richard Cattanach  
Executive Director

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## ASSOCIATED GENERAL CONTRACTORS of ALASKA

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April 23, 2001

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

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

Dear Senators and Representatives:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sec. 09.50.250. **Actionable Claims Against the State.** A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in superior Court. A person who may present his claim under AS 44.77.010 - 44.77.070 may not bring an action under this section except as set out in AS 44.77.040(c). . . .

. . . .

Sec. 09.50.280. **Judgment for Plaintiff.** If judgment is rendered for the plaintiff, it shall be for the legal amount found due from the state with legal interest from the date it became due and without punitive damages.

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

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

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

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

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

ZIA, at 1263.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

Richard Cattanach

Executive Director

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From the office of . . . Senator John J. Cowdery  
State Capitol Building, Rm #101  
Juneau, AK 99801  
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## 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 accrues at the rate applicable to judgements and the interest accrues from the date the claim was filed through the date of the decision.

# FISCAL NOTE

**STATE OF ALASKA**  
**2001 LEGISLATIVE SESSION**

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

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

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

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

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

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

Estimate of any current year (FY2001) cost: 0.0

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

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

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

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

For distribution information, call the Governor's Legislative Office

2 pages

Subj: FW: Prejudgment Interest Alaska Construction Contracts  
Date: 4/9/01 6:24:02 PM Pacific Daylight Time  
From: mdm.mbcontracting@alaska.com (Mike Miller)  
To: thyes@aol.com

To: Don Smith

Helpful background  
info that Mike  
Miller passed along  
to me.

Thyes

—Original Message—

From: Jpalaw2@aol.com [mailto:Jpalaw2@aol.com]  
Sent: Thursday, April 05, 2001 11:45 AM  
To: mdm.mbcontracting@alaska.com  
Subject: Prejudgment Interest Alaska Construction Contracts

Mike,

I had some time to look at the books this morning and hope this will be helpful in your testimony.

Public works construction contracts contain "changes" clauses that provide a vehicle for contract adjustment in the event the contractor encounters changed (differing site) conditions or the public works owner desires to change the contract in some manner. The basic purpose of the changes clause is to fairly compensate the contractor for the extra work occasioned by the change. That is, the clause provides for an equitable adjustment to the contractor's contract and makes the contractor whole for the extra scope (outside the basic contract scope) work performed.

Alaska courts recognize that awarding of prejudgment interest to a plaintiff is to make the plaintiff whole by compensating him for the use of money rightfully his between the time of injury and trial. *McConkey v. Hart*, 930 P.2d 402 (1996). Alaska courts also recognize that prejudgment interest should be denied only in the most unusual case; burden of proving the unusual situation is on the party opposing the award of prejudgment interest. *Hancock v. Northcutt*, 808 P.2d 251 (Alaska 1999). The purpose of awarding prejudgment interest is to compensate the successful claimant for loss of use of money between the date he/she was entitled to it and the date of judgment; the corollary purpose is to prevent the unsuccessful party from being unjustly enriched by the use of the money. *Lundgren v. Gaudiane*, 782 P.2d 285 (Alaska 1989). In contract actions the right to prejudgment interest generally arises on the date of breach. *Morris v. Morris*, 724 P.2d 527 (1986).

Applying those principals to construction changes in public works contracts, the date on which the prejudgment interest should be calculated is the date the change occurred (e.g., the date the differing site condition was discovered, the date the owner directed the contractor to change the work, the date the contractor learned that the contract specifications contained an error . . . etc.). If the purpose of the changes clause is to make the contractor whole in the event of a change, then the time value of money (prejudgment interest) should be an element of the contractor's recovery. Keep in mind that the contractor, when changes are encountered on a public works project, has no option but to perform the changed work if there is a

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If you have any questions please do not hesitate to contact me.

JPA

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Headers

Return-Path: <mdm.mbcontracting@alaska.com>  
Received: from rly-xd01.mx.aol.com (rly-xd01.mail.aol.com [172.20.105.166]) by air-xd05.mail.aol.com (v77\_r1.36) with ESMTP; Mon, 09 Apr 2001 21:24:02 -0500  
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From: "Mike Miller" <mdm.mbcontracting@alaska.com>  
To: <thyes@aol.com>  
Subject: FW: Prejudgment Interest Alaska Construction Contracts  
Date: Mon, 9 Apr 2001 17:23:47 -0800  
Message-ID: <NFBBKIJEILCGEFPMDLNEEOJCBA.mdm.mbcontracting@alaska.com>  
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Importance: Normal  
X-MimeOLE: Produced By Microsoft MimeOLE V5.00.2615.200

# FISCAL NOTE

**STATE OF ALASKA  
2001 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB152  
 ( ) Publish Date: 4/10/01  
 Dept. Affected: DOT&PF  
 BRU: \_\_\_\_\_  
 Component: \_\_\_\_\_  
 Component Number: \_\_\_\_\_

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

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

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

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>	<b>0.0**</b>
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

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

Estimate of any current year (FY2001) cost: 0.0

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

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

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

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

For distribution information, call the Governor's Legislative Office



## 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





## ASSOCIATED GENERAL CONTRACTORS of ALASKA

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2 pages

Subj: FW: Prejudgment Interest Alaska Construction Contracts  
Date: 4/9/01 6:24:02 PM Pacific Daylight Time  
From: mdm.mbcontracting@alaska.com (Mike Miller)  
To: thyes@aol.com

to: Don Smith

Helpful background info that Mike Miller passed along to me.

—Original Message—

From: jpalaw2@aol.com [mailto:jpalaw2@aol.com]  
Sent: Thursday, April 05, 2001 11:45 AM  
To: mdm.mbcontracting@alaska.com  
Subject: Prejudgment Interest Alaska Construction Contracts

Thyes

Mike,

I had some time to look at the books this morning and hope this will be helpful in your testimony.

Public works construction contracts contain "changes" clauses that provide a vehicle for contract adjustment in the event the contractor encounters changed (differing site) conditions or the public works owner desires to change the contract in some manner. The basic purpose of the changes clause is to fairly compensate the contractor for the extra work occasioned by the change. That is, the clause provides for an equitable adjustment to the contractor's contract and makes the contractor whole for the extra scope (outside the basic contract scope) work performed.

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To: <thyes@aol.com>

Subject: FW: Prejudgment Interest Alaska Construction Contracts

Date: Mon, 9 Apr 2001 17:23:47 -0800

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X-MSMail-Priority: Normal

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Importance: Normal

X-MimeOLE: Produced By Microsoft MimeOLE V5.00.2615.200

**SITE: ANCHORAGE LIO**

**COMMITTEE:**  
Transportation

Senate

**DATE:** 4-10-2001

**SUBJECT OF MEETING:**

SB 44 - Alaska Toll Bridge and  
Causeway Authority  
SB 152 - DOTPF Related Contract  
Claims  
HB 8 - Legis. Pioneer Road  
Development Task Force  
SB 45 - Approp: Design of Knik  
Arm Crossing  
Bills previously heard/scheduled

**UPDATE #:**



# PLEASE SIGN IN

**PLEASE PRINT:**

**NAME**

**ADDRESS (MAILING & ZIP)**

**REPRESENTING**

**DO YOU WANT  
TO TESTIFY?  
Y or N**

NAME	ADDRESS (MAILING & ZIP)	REPRESENTING	DO YOU WANT TO TESTIFY? Y or N
Kevin G. Brady	[REDACTED]		Y - SB 152
Mike Miller	[REDACTED]		Y - SB 152
Katelyn Markley	[REDACTED]		Y - SB 152

**SB**

**206**



**SENATOR DAVE DONLEY**  
ALASKA STATE LEGISLATURE

2002

**MEMORANDUM**

To: Senator John Cowdery, Chair  
Senate Transportation Committee

From: Senator Dave Donley **DD**

Date: January 25, 2002

Re: Senate Bill 206

---

I request that Senate Bill 206 "An Act relating to registration plates and parking permits for persons with disabilities and to illegal use of parking spaces for persons with disabilities", be scheduled for a hearing in the Judiciary Committee at your earliest convenience.

Senate Bill 206 helps insure the availability of priority parking for truly disabled Alaskans and is intended to prevent many of the instances of abuse that currently exist in our state's disabled parking system. Senate Bill 206 improves the issuing process for disabled parking permits and cracks down on individuals convicted of illegally parking in disabled parking areas or convicted of misusing disabled parking permits.

Thank you in advance for your consideration of this request. If you or your staff should have any questions, please contact myself or Marilyn Wilson of my staff at 6541.

DD/mjw

**Co-Chair: Senate Finance Committee**  
**Vice-Chair: Senate Judiciary Committee**

**Member: Legislative Budget and Audit Committee • Legislative Council**



# SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE

## Senate Bill 206 Sponsor Statement

**"An Act relating to registration plates and parking permits for persons with disabilities and to illegal use of parking spaces for persons with disabilities."**

Senate Bill 206 helps insure the availability of priority parking for truly disabled Alaskans and is intended to prevent many of the instances of abuse that currently exist in our state's disabled parking system. Senate Bill 206 improves the issuing process for disabled parking permits and cracks down on individuals convicted of illegally parking in disabled parking areas or convicted of misusing disabled parking permits.

To provide better access to disabled parking spaces for the truly disabled, the State of Washington toughened its laws to combat widespread abuse of disabled parking placards. Other states, fed up with abuse and fraud in their system, have also tightened up their disabled parking laws. A recent Alaska Division of Motor Vehicles' task force recommended the need to reform and strengthen Alaska's disabled parking laws. Senate Bill 206 is consistent with the recommendations of the DMV task force.

It is often difficult to identify whether or not individuals who have parked an automobile in a disabled parking space are disabled or not. Senate Bill 206 requires a person with a permanent disability to obtain a photographic identification card from the Division of Motor Vehicles to utilize handicap parking spaces. The issuance of photo identification cards would assist enforcement officials in identifying those individuals who are authorized to park in disabled parking spaces and those who are not.

Under current law, anybody may park in a disabled parking space as long as their vehicle has a disabled placard or license plate. SB 206 clearly defines who may park in a parking place reserved for disabled individuals. A new provision is added specifying that in order to park in disabled parking areas, the person issued a disabled permit must be occupying or operating the vehicle; or the person operating the vehicle is doing so for the purpose of transporting a disabled person.

SB 206 increases the penalties for illegally parking in a disabled parking space and for misusing a disabled permit to park in a disabled parking space. Under existing law, violators are fined \$100 if they are convicted of either of these offenses. Under SB 206 individuals convicted of illegally parking in a disabled parking space would be fined \$125 and assessed two points from their driver's license. Individuals convicted of misusing a disabled permit would be fined \$250, assessed four points from their driver's license and be required to perform eight hours of community service.

**Co-Chair: Senate Finance Committee**

**Vice-Chair: Senate Judiciary Committee**

**Member: Legislative Budget and Audit Committee • Legislative Council**

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June-December: 716 West Fourth Avenue • Suite 400 • ANCHORAGE, AK • 99501 • (907) 269-0234 • FAX: (907) 269-0238

[www.akrepublicans.org/Donley.htm](http://www.akrepublicans.org/Donley.htm) • [www.legis.state.ak.us/senate/donley/htm](http://www.legis.state.ak.us/senate/donley/htm)

Page 2  
Sponsor Statement  
SB 206

SB 206 adds protections for those who truly need to utilize disabled parking spaces and sends a clear message that misuse of disabled permits and the unauthorized use of disabled parking spaces is unacceptable and will no longer be tolerated in Alaska. Accessible parking areas are necessary to provide easier access to services for our disabled population and abusers of the system are hindering that access for those who truly need it.

DD/mjw



# SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE

## SECTIONAL ANALYSIS SENATE BILL 206

**"An Act relating to registration plates and parking permits for persons with disabilities and to illegal use of parking spaces for persons with disabilities."**

**Section 1.** Amends AS 28.10.181(d) to provide for a disabled person to receive a photographic identification card authorizing them to use parking spaces for a person with a disability. It also changes the term "standard handicap symbol" to "international symbol of accessibility".

**Rational** Under current law, anybody may park in a disabled parking space as long as their vehicle has a disabled placard or license plate. SB ?? clearly defines who may park in a parking place reserved for disabled individuals. A new provision is added specifying that in order to park in disabled parking areas, the person issued a disabled permit must be occupying or operating the vehicle; or the person operating the vehicle is doing so for the purpose of transporting a disabled person.

**Section 2.** Amends AS 28.10.421(d)(3) to reflect a change of wording from "disabled or handicap person" to "a person with a disability".

**Section 3.** Amends AS 28.10.441 to reflect a change of wording from "disabled or handicap person" to "a person with a disability".

Rationale The Alaska ADA

**Section 4.** Amends AS 28.10.495 to reflect a change from "disabled or handicap person" to "a person with a disability". It also allows the Department of Motor Vehicles to authorize other entities to issue special disabled parking permits.

**Section 5.** Amends AS 28.15.231(b) to provide for assessing points when someone is convicted of violating accessible parking laws under AS 28.35.235(b).

**Section 6.** Amends AS 28.35.235 to specify what constitutes a violation for unauthorized use of disabled parking spaces. It also adds a two point assessment against a person's driver's license and changes the fine to \$125 for misuse of a disabled parking space. This section adds a penalty of 4 points assessed against a person's driver's license, a \$250 fine and eight hours of community service for those convicted of misusing a disabled parking permit or license plate.

**Co-Chair: Senate Finance Committee**

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**Section 7.** Adds a new subsection to AS 28.35.235 that will allow municipalities to enact ordinances that are needed to enforce disabled parking violations.

**Section 8.** Allows for a transition period in the issuance of photographic identification cards by providing that the cards be issued upon registration or renewal of a vehicle.



# SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE

## MEMORANDUM

DATE: February 15, 2002

TO: Senator John Cowdery, Chair  
Senate Transportation Committee

FROM: Senator Dave Donley

RE: Work Draft CSSB 206, Version O "An Act relating to registration plates and parking permits for persons with disabilities and to illegal use of parking spaces for persons with disabilities"

Thank you for scheduling a Senate Transportation Committee hearing on Senate Bill 206. Attached for your consideration is a work draft of CSSB206, version "O." The changes from the prior version to Version O are listed on the attached page.

Attached with the proposed work draft are a sponsor statement reflecting the changes in this new work draft and a sectional analysis of the work draft.

Thank you for considering this legislation. If you have any questions, please do not hesitate to call my office.

DD:dld

cc: Senate Transportation Members

**Co-Chair: Senate Finance Committee**

**Vice-Chair: Senate Judiciary Committee**

**Member: Legislative Budget and Audit Committee • Legislative Council**