

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks

report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

HOUSE COMMITTEE ON HOUSING AND URBAN DEVELOPMENT

February 28, 1991Hearing Room D 8:00 a.m.Tape 33 - 34

MEMBERS PRESENT:Rep. Bob Repine, Chair Rep. Judy Bauman, Vice-Chair Rep. Marie Bell Rep. Rod Johnson Rep. Dave McTeague Rep. Ron Sunseri

MEMBERS EXCUSED:Rep. Gail Shibley

STAFF PRESENT: Janet McComb, Committee Administrator Kimberly Burt, Committee Assistant

MEASURES CONSIDERED: HB 2463

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TAPE 28, SIDE A

005 CHAIR REPINE: Calls the hearing to order. (8:00 a.m.)

Roll Call: Representatives Sunseri & Repine answer "present".

PUBLIC HEARING ON HB 2463 Witnesses: Rep. Bill Dwyer, House District 42 Kim Mingo, Associated General Contractors, (AGC) Rick Vancleave, Chair, Associated General Contractors Environmental Affairs Committee Jack Kalinoski, Associated General Contractors Ken Karnosh, State Highway Division Valerie SalisB ury, League of Oregon Cities Bill Penhollow, Associated Oregon Counties John L. DuBay, Multnomah County Susan Snider, City of Portland Ruth Spelter, City of Portland Clifford Freeman, Department of General Services Karen Hafner, Oregon School Boards Association

Staff submits fiscal impact statement, staff measure summary and revenue impact statement, (EXHIBIT A).

010 REP. BILL DWYER, HOUSE DISTRICT 42: I believe that there should be full disclosure when people contract with public entities in regard to bidding practices and basically this bill requires that disclosure.

REP. BELL arrives. (8:05 a.m.)

DWYER: This works toward "truth in bidding".

050 KIM MINGO, ASSOCIATED GENERAL CONTRACTORS, (AGC): Testifies in

support of HB 2463; gives overview of current statute, problems involved and what HB 2463 would do.

070 MINGO: The problem that we have is that public agencies have boiler plate language contained within their contracts; they aren't listing specific public, federal or state agencies, but listing all agencies that have any rules or regulations having to do with environmental or natural resource regulations.

This bill would require public agencies to notify contractors of any contingencies they may encounter and if during the course of construction something does come up, that contractor would be entitled to an appropriate change order.

100 MINGO: There are three types of change orders:

1. There are change orders done under the conditions of the public contract. 2. There are change orders called "price agreements" which are negotiated between the contractor and the agency. 3. There are change orders called "force account" or "time and materials" where the contractor does the work and is paid according to the blue book rate the agency has.

In the original statute a change order is only allowed if the agency didn't list any of the agencies who had regulations or a new statute or law was enacted after the contract had been entered into and we feel that this legislation would correct a problem that many of our contractors are encountering.

117 RICK VANCLEAVE, CHAIR, ASSOCIATED GENERAL CONTRACTORS ENVIRONMENTAL AFFAIRS COMMITTEE: If you compare the amount of environmental regulations that existed in 1975 and those that exist today, it isn't adequate to tell a contractor that he may run into a condition that would require them to comply with one of thousands of regulations.

We are trying to put public contracts on the same line as private contracts in terms of environmental assessments and level 1 assessments.

In the long run this will make public contracts less expensive as there won't be so much litigation.

173 CHAIR REPINE: If the level 1 assessment is done and the site is declared clean, but the contractor finds a problem, would that be a good opportunity for re-negotiation of the contract?

VANCLEAVE: There is the common law rule of contracting when conditions change after a level 1 assessment.

185 REP. BELL: How much does this type of assessment cost?

VANCLEAVE: My understanding is that the cost is not significant.

CHAIR REPINE: What does the cursory investigative process consist of?

VANCLEAVE: They look for areas that may be contaminated.

217 JACK KALINOSKI, ASSOCIATED GENERAL CONTRACTORS: When a contractor discovers an undisclosed storage tank, they must take it out, incurring the costs.

This bill says that the contractor should be paid for doing that work; it does say "unforeseen environmental concerns must be addressed during the course of the contract, the contractor will get paid for it."

242 REP. BELL: If a proper investigation is done ahead of time, how often do you find unforeseen conditions?

REP. MCTEAGUE arrives. (8:20 a.m.)

KALINOSKI: Quite often; investigations can't find everything.

We are only saying that if we must do the work, we should get paid for it and if it takes extra time to complete the contract, we should be given a time extension.

280 VANCLEAVE: The intent is for financial incentive for the agency to identify as much as possible so they can avoid force account work and change order litigation.

REP. BELL: What does time and materials mean to a contractor?

MINGO: Time and materials normally go by blue book prices for equipment or labor; the problem with force account is that the blue book rate is based on an average of the monthly rental rate.

REP. BAUMAN arrives. (8:25 a.m.)

320 CHAIR REPINE: Are these agreements built into the contract or left negotiable?

MINGO: If the contractor and the public agency can't come to an agreement on the price, they will go into the time and materials.

337 MINGO: There isn't language stating that the level one investigation will be done, but this language will cause that action.

360 KEN KARNOSH, CONTRACT ADMINISTRATION ENGINEER, OREGON STATE HIGHWAY DIVISION: Testifies in opposition to HB 2463, summarizes written testimony, (EXHIBIT B).

385 If you do pass this bill you should ask the Attorney General for assistance in drafting the final language of the bill.

REP. BELL: How many agencies have a policy like this?

KARNOSH: I don't know how many agencies have this; the Highway Division put this into it's contracts approximately two years ago.

405 REP. SUNSERI: What language troubles you?

KARNOSH: The language is vague, it is a "catch all" piece of legislation, but we don't disagree with the intent of the bill.

REP. BELL: If we changed the language on line 18 would you be pleased?

KARNOSH: If it was tied along the lines of of the different site conditions clause, then yes, it would be more favorable to us.

433 CHAIR REPINE: What is the experience since the language has been in

place and in what capacity are the negotiations conducted?

KARNOSH: We would hope that negotiations are conducted in a fair manner.

A contractor should have a set of conditions upon which to base their bid and if those conditions change, then modifications should be made.

TAPE 34, SIDE A

035 VALERIE SALISB URY, LEAGUE OF OREGON CITIES: Testifies in opposition to HB 246 3; summarizes written testimony, (EXHIBIT C).

REP. JOHNSON arrives. (8:35 a.m.)

080 REP. BAUMAN: One purpose of this bill is to have the requestor of the bids lay out, in greater detail, what the circumstances are so that all of the bids would be responsive to the circumstances.

SALISB URY: The language says that any condition that wasn't discovered by the contractor entitles that contractor to a change order; it may be something that is apparent, but if a contractor isn't obliged to account for that in their bid, they could conceivably not investigate and claim that there was an undiscovered condition.

125 CHAIR REPINE: The contracts I've seen usually require a signature under the disclaimer of site visiting, so if someone signs off but later says they discovered adverse conditions there is no one to blame but themselves.

I have had two job sites where I have unearthed conditions that there was no way to find out about without doing the job.

SALISB URY: If the conditions weren't able to be seen upon inspection, then the contract should be changed; that is common under normal contract law.

CHAIR REPINE: Why then would the Highway Division have language specifically talking about unforeseen conditions?

SALISB URY: Most public works construction projects have language to cover with some changed circumstances not anticipated; that is normally handled in the contract negotiation process up front.

175 REP. BELL: I am concerned about the contractors responsibility for the "thorough" investigations without discussing your own responsibility or the public institutions responsibility to do a thorough investigation.

I would think that every agency would go to every length to make sure that jobs don't become larger than anticipated; I don't see any incentive here for the very thorough contractor.

SALISB URY: There is an obligation for the agency to investigate it's project.

We are concerned that if the duty is taken away from the contractor, there won't be an incentive to go look and see what is on the ground to be seen.

REP. BELL: If the investigation has been done and is included in the contract, how can they not know what they are bidding on?

SALISB URY: Everything specified in the contract is included in the bid; things that aren't specified can come up.

This language, as written, takes away the obligation of the contractor.

235 REP. JOHNSON: If we removed the words "or undiscovered" and added the phrase "which could not have been discovered by reasonable visual site inspection by the successful bidder", would that take care of your concern?

SALISB URY: That would address one of our major concerns; the other concern is the right to terminate contracts.

As written, if the price of a job went up, the public agency would have to pay that price, regardless of whether or not there were funds.

262 REP. JOHNSON: Would you be comfortable if when the public agency wanted to terminate the contract they had to pay the contractor the profit that would have been gained?

SALISB URY: If that determination is made early, then that could create some disproportional expense which could detract from the public agencies ability to get the work finished.

305 REP. BELL: Is there a time limit where the contractor can walk away?

SALISB URY: Yes; when the project starts the contract is set and if the scope of the project changes, general contract law would allow for negotiation.

335 REP. BAUMAN: Are there a lot of situations where the contractor raises the price severely?

SALISB URY: My experience is from another state; I am not aware of a time where prices jumped severely and didn't count as a change of description.

There is a cost estimate and if you increase that it will be obvious that it is a different contract; that is best taken care of on a project by project basis as the nature of the projects will differ so much.

440 REP. BAUMAN: If a low bid doesn't take the condition into account and gets the contract, under current law there would be a change order?

SALISB URY: If the condition wasn't discovered by the low bidder, but should have been with a reasonable inspection, then the contractor would be held to have included that; we are concerned that because of the "undiscovered" language in this bill the contractor will be entitled to a change order which will boost the contract price up.

470 REP. BAUMAN: Under current law there is an incentive for the bidder to discover all aspects of the site and this language would take that incentive away from the bidder?

SALISB URY: That is correct.

TAPE 33, SIDE B

030 REP. BELL: I don't see where the contractor has an opportunity to renegotiate or get out of the contract in current law.

SALISBURY: This is an obligation on the part of the agency to grant additional time and money if something can't be worked out between the agency and the contractor about the appropriate amount of time and money and if they couldn't then I would assume that the dispute resolution process would be used.

If the project required was very different from what was bid on, the contractor would have the opportunity to terminate the contract.

057 BILL PENHOLLOW, ASSOCIATION OF OREGON COUNTIES, (AOC): We asked Mr. Dubay to review HB 2463 and would like him to share his insights.

JOHN L. DUBAY, CHIEF ASSISTANT, COUNTY COUNSEL, MULTNOMAH COUNTY: This bill covers the disclosure requirement and also the requirement of the change order.

The basic principal that suspected conditions should be disclosed is laudable; there is no point to be gained by hiding things as they will be discovered and there will be additional costs.

The idea of disclosure isn't bad, but the bill has some problems with how it does that.

If the intention is to require a "type 1" or "level 1" environmental assessment, the bill should say that; I'm am most concerned with the language in line 18.

I would recommend deleting "and contingencies or conditions or contingencies under investigation" and have it read that "the public contract for public improvement shall make specific reference to all known or suspected conditions that may require compliance with the statutes, ordinances or regulations identified as required in subsection 1".

100 DUBAY: On line 20 I would delete "the successful bidder to comply" so it would read "known or suspected conditions that may require compliance with environmental statutes".

Contingencies is an uncertain term; we want to disclose to the contractor what we know about the project.

120 DUBAY: The bill requires a change order, granting an extension of time and contract price; this requires the owner to continue the contract and the cost may be enormous.

CHAIR REPINE: Once a condition has been discovered it has to be taken care of, so there will be a cost whether the municipality or the entity wants to oblige by those costs.

DUBAY: We are concerned about environmental risks that cost so much and there may not be the funds to cover the cost.

The cost may require termination of the contract and that should be an option, or at least to enter the change order as there just may not be enough money to follow through.

REP. MCTEAGUE leaves. (9:08 a.m.)

DUBAY: The cost may require termination of the contract and that should be an option; basic public contracting law is designed to get the least possible cost to the public and that is done through competitive bidding.

REP. BAUMAN leaves. (9:10 a.m.)

170 DUBAY: There is a restriction against setting a contract through competitive bidding and then later amending it so that it becomes a different contract and then that violates public contract law.

When the cost of the project exceeds 20% of the original price, it is a different contract.

This requirement for a change order to increase the cost, regardless of the amount, violates the competitive bidding process.

REP. JOHNSON leaves. (9:12 a.m.)

190 CHAIR REPINE: A relationship between the ability to terminate the contract based on existing conditions in the community should be considered?

DUBAY: Yes; this isn't a fatal flaw, but the language should take that into account.

REP. BELL: If something truly unforeseen comes along, both parties should have the option to get out of a contract?

DUBAY: Yes; if it is a major cost, primarily the one paying the cost should have the chance to opt out of the contract.

250 REP. SUNSERI: Do you see a problem with providing a portion of the profit to the contractor if the contract is terminated?

DUBAY: It would be fair to give a portion of the profits.

CHAIR REPINE: Mr. DuBay, please submit your comments in writing, along with proposed amendments.

280 SUSAN SNIDER, CITY OF PORTLAND: We have a number of concerns with the bill as written.

281 RUTH SPETTER, SENIOR DEPUTY CITY ATTORNEY, CITY OF PORTLAND: Testifies in opposition to HB 2463; follows outline of testimony, (EXHIBIT D).

I will address the wording of this bill; the concept being proposed isn't wrong, but the wording doesn't get you to your objective.

315 SPETTER: The proposed legislation says that the public owner must include in the contract, regulations talked about in the first section and that there must be specific reference to conditions and contingencies that may require the contractor to comply with those regulations.

That is exactly what is provided by the first section.

325 REP. BELL: Public agencies are complying by giving lists of every agency and everything that could possibly deal with environment and every law that could deal with environment; being so long and generic it becomes meaningless.

SPETTER: This requires adding new information, contingencies and conditions, so not only will governmental bodies be putting in all the regulations, but adding to those to figure out what contingencies and conditions may affect.

The remedy in the first section is extra time and money and if there are regulations in those two areas you will have to deal with them.

The remedy in the second section is that if a contractor is delayed because of having to comply with statutes or ordinances they will get more time and money, so it is the same thing.

REP. JOHNSON returns. (9:25 a.m.)

363 SPETTER: There are many questions on the words "conditions and contingencies" & "suspected" and the way the bill is written, the courts will have to determine their definitions.

410 SPETTER: If you look at the requirement for a change order in the bill, there is no reference to the regulations.

REP. SUNSERI: From my experience, this is exactly expressive of what happens; it is unknown.

442 SPETTER: In the requirement, beginning in section 21, it doesn't tie into hazardous issues or environmental regulations.

The legislation needs to be clear and not vague; a work group could help with the language.

TAPE 34, SIDE B

CHAIR REPINE: REP. SUNSERI will lead a work group; I encourage everyone to bring forward comments that would help clarify this and bring us closer to the intent of the bill.

045 CLIFFORD FREEMAN, EXECUTIVE ASSISTANT TO ADMINISTER, PURCHASING DIVISION, DEPARTMENT OF GENERAL SERVICES: Testifies in opposition; reads written testimony, (EXHIBIT E).

It is our sense that if there is to be disclosure, it should be in the advertisement for the project, not in the contract.

"Known or suspected condition" is ambiguous; the measure doesn't identify the party to have such knowledge or notice that would trigger the disclosure.

070 FREEMAN: Lines 22 & 23 don't refer to a known or suspected condition or contingency, but instead triggers additional time and payment requirements for any "undisclosed or undiscovered condition or contingency".

Reading written testimony, see Exhibit G.



095 CHAIR REPINE: Would you like to participate in a work group?

FREEMAN: Yes.

100 KAREN HAFNER, OREGON SCHOOL BOARDS ASSOCIATION: We do have concerns about the bill and would like to have a representative from the schools participate in the work group.

115 REP. BELL: How does this work when dealing with a private individual; are we asking for more or less from our public agencies?

VANCLEAVE: We aren't asking public agencies to do more than what is already done in the private sector; private bodies don't have county exemptions so more is dealt with on the front end.

145 REP. SUNSERI: Were you involved with writing this language?

VANCLEAVE: Yes; the word "condition" is a term of art in the industry & "contingency" was meant to cover "a matter that may arise".

In concept, much of what has been said reaches the intent of the bill.

CHAIR REPINE: You have no opposition to a work group?

VANCLEAVE: No.

Bonding is difficult to obtain and it is expensive to get environmental bonding.

CHAIR REPINE: For the record, the City of Salem submitted a letter in opposition to HB 2463 (EXHIBIT F).

182 CHAIR REPINE: The meeting is adjourned. (9:45 a.m.)

Submitted by: Reviewed by:

Kimberly Burt Janet McComb Assistant Administrator

EXHIBIT SUMMARY:

A - SMS, revenue impact and fiscal impact statement submitted by STAFF, pp 3 B - Written testimony in opposition to HB 2463 submitted by KARNOSH, pp 1 C - Written testimony in opposition to HB 2463 submitted by SALISB URY, pp 3 D - Written testimony in opposition to HB 2463 submitted by SPETTER, pp 2 E - Written testimony in opposition to HB 2463 submitted by FREEMAN, pp 2 F - Written testimony in opposition to HB 2463 submitted for the record by CLARK, pp 1