



# House of Representatives

General Assembly

**File No. 543**

January Session, 2001

House Bill No. 6894

*House of Representatives, May 1, 2001*

The Committee on Judiciary reported through REP. LAWLOR of the 99th Dist., Chairperson of the Committee on the part of the House, that the bill ought to pass.

## **AN ACT CONCERNING ACTIONS AGAINST THE STATE ON HIGHWAY AND PUBLIC WORKS CONTRACTS.**

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 4-61 of the general statutes is repealed and the following is  
2 substituted in lieu thereof:

3 (a) Any person, firm or corporation which has entered into a  
4 contract with the state, acting through any of its departments,  
5 commissions or other agencies, for the design, construction,  
6 construction management, repair or alteration of any highway, bridge,  
7 building or other public works of the state or any political subdivision  
8 of the state may, in the event of [any disputed claims under such  
9 contract or] any claims arising out of or relating to such contract for  
10 which it is alleged that the state is or may be liable in whole or in part  
11 or any claims arising out of or relating to the awarding of a contract by  
12 the Commissioner of Public Works, bring an action against the state to  
13 the superior court for the judicial district of Hartford for the purpose of

14 having such claims determined, provided notice of each such claim  
15 under such contract and the factual bases for each such claim shall  
16 have been given in writing to the agency head of the department  
17 administering the contract within the period which commences with  
18 the execution of the contract or the authorized commencement of work  
19 on the contract project, whichever is earlier, and which ends two years  
20 after the acceptance of the work by the agency head evidenced by a  
21 certificate of acceptance issued to the contractor or two years after the  
22 termination of the contract, whichever is earlier. No action on a claim  
23 under such contract shall be brought except within the period which  
24 commences with the execution of the contract or the authorized  
25 commencement of work on the contract project, whichever is earlier,  
26 and which ends [three] six years after the acceptance of the work by  
27 the agency head of the department administering the contract  
28 evidenced by a certificate of acceptance issued to the contractor or  
29 three years after the termination of the contract, whichever is earlier.  
30 Issuance of such certificate of acceptance shall not be a condition  
31 precedent to the commencement of any action. Acceptance of an  
32 amount offered as final payment shall not preclude any person, firm or  
33 corporation from bringing a claim under this section. Such action shall  
34 be tried to the court without a jury. [All legal defenses except  
35 governmental immunity] The defense of governmental or sovereign  
36 immunity shall not apply to any claim asserted by the person, firm or  
37 corporation having a contract with the state, provided the claim arises  
38 out of or relates to the contract with the state, notwithstanding that the  
39 claim or any portion thereof may include claims of other persons, firms  
40 or corporations that have provided materials, labor or services relating  
41 to the contract. All other legal defenses shall be reserved to the state. In  
42 no event shall interest be awarded under section 13a-96 and section 37-  
43 3a by a court or an arbitrator to the claimant for the same debt for the  
44 same period of time. Interest under section 37-3a shall not begin to  
45 accrue to a claimant under this section until at least thirty days after  
46 the claimant submits a bill or claim to the agency for the unpaid debt

47 upon which such interest is to be based, along with appropriate  
48 documentation of the debt when applicable. Any action brought under  
49 this subsection shall be privileged in respect to assignment for trial  
50 upon motion of either party.

51 (b) As an alternative to the procedure provided in subsection (a) of  
52 this section, any such person, firm or corporation having a claim under  
53 said subsection (a) may submit a demand for arbitration of such claim  
54 or claims for determination under (1) the rules of any dispute  
55 resolution entity, approved by such person, firm or corporation and  
56 the agency head, and (2) the provisions of subsections (b) to (e),  
57 inclusive, of this section, except that if the parties cannot agree upon a  
58 dispute resolution entity, the rules of the American Arbitration  
59 Association and the provisions of said subsections shall apply. The  
60 provisions of this subsection shall not apply to claims under a contract  
61 unless notice of each such claim and the factual bases of each claim has  
62 been given in writing to the agency head of the department  
63 administering the contract within the time period which commences  
64 with the execution of the contract or the authorized commencement of  
65 work on the contract project, whichever is earlier, and which ends two  
66 years after the acceptance of the work by the agency head evidenced  
67 by a certificate of acceptance issued to the contractor or two years after  
68 the termination of the contract, whichever is earlier. A demand for  
69 arbitration of any such claim shall include the amount of damages and  
70 the alleged facts and contractual or statutory provisions which form  
71 the basis of the claim. No action on a claim under such contract shall  
72 be brought under this subsection except within the period which  
73 commences with the execution of the contract or the authorized  
74 commencement of work on the contract project, whichever is earlier,  
75 and which ends [three] six years after the acceptance of the work by  
76 the agency head of the department administering the contract  
77 evidenced by a certificate of acceptance issued to the contractor or  
78 three years after the termination of the contract, whichever is earlier.  
79 Issuance of such certificate of acceptance shall not be a condition

80 precedent to the commencement of any action.

81 (c) Once a notice of claim is given to the agency head as required by  
82 subsection (b) of this section, each party shall allow the other to  
83 examine and copy any nonprivileged documents which may be  
84 relevant either to the claimant's claims or to the state's defenses to such  
85 claims. Requests to examine and copy documents which have been  
86 prepared by the contractor in order to submit a bid shall be subject to a  
87 claim of privilege and grounds for an application to any court or judge  
88 pursuant to section 52-415 for a decision on whether such documents  
89 constitute trade secrets or other confidential research, development or  
90 commercial information and whether such documents shall not be  
91 disclosed to the state or shall be disclosed to the state only in a  
92 designated way. Any such documents for which no decision is sought  
93 or privilege obtained shall not be subject to disclosure under section 1-  
94 210 and shall not be disclosed by the agency to any person or agency  
95 that is not a party to the arbitration. Such documents shall be used  
96 only for settlement or litigation of the parties' claims. The arbitrators  
97 shall determine any issue of relevance of such documents after an in  
98 camera inspection. The arbitrators shall seal such documents during  
99 arbitration and shall return such documents to the claimant after final  
100 disposition of the claim.

101 (d) Hearings shall be scheduled for arbitration in a manner that  
102 shall ensure that each party shall have reasonable time and  
103 opportunity to prepare and present its case, taking into consideration  
104 the size and complexity of the claims presented. Unless the parties  
105 agree otherwise, no evidentiary hearing on the merits of the claim may  
106 be held less than six months after the demand for arbitration is filed  
107 with the dispute resolution entity.

108 (e) The arbitrators shall conduct the hearing and shall hear evidence  
109 as to the facts, and arguments as to the interpretation and application  
110 of contractual provisions. After the hearing, the arbitrators shall issue

111 in writing: (1) Findings of fact, (2) a decision in which the arbitrators  
112 interpret the contract and apply it to the facts found, and (3) an award.  
113 The arbitrators' findings of fact and decision shall be final and  
114 conclusive and not subject to review by any forum, tribunal, court or  
115 government agency, for errors of fact or law. Awards shall be final and  
116 binding and subject to confirmation, modification or vacation pursuant  
117 to chapter 909.

118 (f) Claims brought pursuant to this section may be submitted for  
119 mediation under the mediation rules of such dispute resolution entity  
120 as the parties may agree upon.

121 (g) This section shall apply to claims brought on or after July 1, 1991.  
122 The provisions of sections 4-61, 4b-97, 13b-57a, 13b-57b and 13b-57c of  
123 the general statutes, revised to January 1, 1991, shall apply to claims  
124 brought before July 1, 1991.

**JUD**      *Joint Favorable*

The following fiscal impact statement and bill analysis are prepared for the benefit of members of the General Assembly, solely for the purpose of information, summarization, and explanation, and do not represent the intent of the General Assembly or either House thereof for any purpose:

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**OFA Fiscal Note**

**State Impact:** Significant Cost<sup>1</sup> (Bond Funds and General Fund)

**Affected Agencies:** Claims Commissioner, Attorney General, Department of Transportation, Department of Public Works, University of Connecticut, Department of Correction, Various State Agencies

**Municipal Impact:** Potential Significant Cost

**Explanation**

**State Impact:**

The bill would result in significant costs to the state by extending: (1) the statute of limitations for bringing action against the state for claims made arising from state highway or public works contracts; and (2) the waiver of sovereign immunity to claims made by subcontractors. It is unknown how many additional claims would result, but even a slight increase in the number of claims could result in a significant cost. Claims regarding highway and public works contracts typically involve significant sums. For example, two claims pending before the Claims Commissioner total almost \$900,000.

Extending the waiver of sovereign immunity is expected to result in

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<sup>1</sup> OFA defines significant cost as exceeding \$100,000.

a greater number of lawsuits regarding contractual matters against the state because certain claimants would no longer need the General Assembly's permission to sue. This would result in greater litigation costs to state agencies and the Attorney General, and could increase litigation settlement and adjudicated claims costs to the state.

The Department of Public Works (DPW) indicates that the bill could result in significant cost and many additional claims. DPW currently has 10 claims pending at a value of over \$3.6 million. It cost DPW over \$110,000 in consulting fees to prepare for just one of these claims. In the last three years, DPW has settled twenty-seven claims from general contractors at a cost of about \$11.3 million. The DPW indicates that it would need to establish a contract litigation unit comprising six positions, at an annual cost of about \$300,000.

According to the Department of Transportation (DOT), the bill would permit subcontractors to bring tort (including personal injury) lawsuits against the state. The DOT would require additional staffing and consultants to handle analyses and litigation of contractual and tort claims. It is anticipated that there could be more claims to be settled which could result in additional settlement payments. Additional settlement costs would be charged to the capital program; thus potentially impacting debt service costs.

Various other state agencies that administer their own construction projects could also be impacted, including the University of Connecticut, State University, the Department of Correction, and the Judicial Department.

***Municipal Impact:***

Under state programs giving assistance on road projects, the State holds municipalities responsible for claims based on defective design or failure to disclose conditions that result in cost overruns. As the number of claims increases, so does the likelihood that claims would

be made for which municipalities would be responsible.

**OLR Bill Analysis**

HB 6894

***AN ACT CONCERNING ACTIONS AGAINST THE STATE ON HIGHWAY AND PUBLIC WORKS CONTRACTS.*****SUMMARY:**

Under current law, upheld by the state Supreme Court, the state allows a limited waiver of its sovereign immunity for disputed claims arising under a state highway or public works contract. Any person, firm, or corporation that has entered into such a contract may file the suit. This bill broadens the waiver to include claims arising out of, or relating to, the contract for which the state is or may be wholly or partially liable.

It also bars the state from raising the defense of governmental or sovereign immunity against a contractor who advances the claims of subcontractors who provided materials or services relating to the contract. The Connecticut Supreme Court has held that the "pass-through claims" (claims of potential liability brought by general contractors on behalf of subcontractors) are barred under existing law, which limits actions to those that arise under the contract.

Lastly, the bill extends, from three to six years, the statute of limitations for bringing an action on such contracts.

EFFECTIVE DATE: October 1, 2001

**PASS-THROUGH CLAIMS**

Under current law, a subcontractor who has a dispute regarding work or services he provides on a state highway or construction contract must seek to recover from the general contractor. If he is successful, the general contractor may attempt to sue the state claiming a dispute under the contract between him and the state. The bill consolidates these actions and allows the general contractor to sue the state for claims brought by subcontractors.

## BACKGROUND

### ***Related Case Law***

The state Supreme Court recently denied a contractor's attempt to compel the state to arbitrate a dispute over the state's alleged agreement to settle the contractor's original breach of contract claim. The Court held that the contractor's claim fell outside the scope of the limited waiver of sovereign immunity. The Court found that the legislature's use of the word "under" as opposed to broader terms, such as "related to," "connected with," or "derived from" indicated an intent to authorize only those claims against the state that fall directly under the contract (*Department of Public Works v. ECAP Construction Co.*, 250 Conn. 553 (1999)).

### ***Related Case Law on "Pass Through" Claims***

The plaintiff, as successor in interest to a subcontractor on a state road reconstruction contract, sought to recover from the general contractor extra expenses the subcontractor had incurred. The general contractor denied liability and then moved to make the state a third party defendant. The Court found the general contractor's claim insufficient to allege a waiver of the state's sovereign immunity because it failed to allege that the general contractor had a disputed claim under its contract with the state as required by law (*Federal Deposit Ins. Corp. v. Peabody, N.E., Inc.*, 239 Conn. 93 (1996)).

## COMMITTEE ACTION

Judiciary Committee

Joint Favorable Report  
Yea 21    Nay 18