



# House of Representatives

General Assembly

**File No. 243**

February Session, 2008

House Bill No. 5769

*House of Representatives, March 27, 2008*

The Committee on General Law reported through REP. STONE of the 9th Dist., Chairperson of the Committee on the part of the House, that the bill ought to pass.

## ***AN ACT CONCERNING PASS-THROUGH CLAIMS.***

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

1 Section 1. Section 4-61 of the general statutes is repealed and the  
2 following is substituted in lieu thereof (*Effective October 1, 2008*):

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] (1) claims arising out of such contract, including  
10 subcontractor or supplier pass-through claims, but not including any  
11 claim for personal injury or any other tort in which it is alleged that the  
12 state is or may be liable in whole, or in part, or (2) claims arising out of  
13 the awarding of a contract by the Commissioner of Public Works,  
14 bring an action against the state to the superior court for the judicial  
15 district of Hartford for the purpose of having such claims determined,

16 provided, (A) notice of each such claim [under] arising out of such  
17 contract and the factual bases for each such claim shall have been  
18 given in writing to the agency head of the department administering  
19 the contract within the period which commences with the execution of  
20 the contract or the authorized commencement of work on the contract  
21 project, whichever is earlier, and which ends two years after the  
22 acceptance of the work by the agency head evidenced by a certificate  
23 of acceptance issued to the contractor or two years after the  
24 termination of the contract, whichever is earlier, and (B) such claim has  
25 been submitted for mediation pursuant to subsection (f) of this section.  
26 No action on a claim [under] arising out of such contract shall be  
27 brought except within the period which commences with the execution  
28 of the contract or the authorized commencement of work on the  
29 contract project, whichever is earlier, and which ends three years after  
30 the acceptance of the work by the agency head of the department  
31 administering the contract evidenced by a certificate of acceptance  
32 issued to the contractor or three years after the termination of the  
33 contract, whichever is earlier. Issuance of such certificate of acceptance  
34 shall not be a condition precedent to the commencement of any such  
35 action. Acceptance of an amount offered as final payment shall not  
36 preclude any person, firm or corporation from bringing a claim under  
37 this section. Such action shall be tried to the court without a jury.  
38 Sovereign immunity shall not be a defense to any such claim,  
39 including subcontractor or supplier pass-through claims, asserted by  
40 any person, firm or corporation that has a contract with the state,  
41 provided such claim arises out of such contract and does not include  
42 any claim for personal injury or any other tort. All other legal defenses  
43 [except governmental immunity shall be] are reserved to the state. In  
44 no event shall interest be awarded under section 13a-96 and section 37-  
45 3a by a court or an arbitrator to the claimant for the same debt for the  
46 same period of time. Interest under section 37-3a shall not begin to  
47 accrue to a claimant under this section until at least thirty days after  
48 the claimant submits a bill or claim to the agency for the unpaid debt  
49 upon which such interest is to be based, along with appropriate  
50 documentation of the debt when applicable. Any action brought under

51 this subsection shall be privileged in respect to assignment for trial  
52 upon motion of either party.

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

83 (c) Once a notice of claim is given to the agency head as required by  
84 subsection (b) of this section, each party shall allow the other to

85 examine and copy any nonprivileged documents which may be  
86 relevant either to the claimant's claims or to the state's defenses to such  
87 claims. Requests to examine and copy documents which have been  
88 prepared by the contractor in order to submit a bid shall be subject to a  
89 claim of privilege and grounds for an application to any court or judge  
90 pursuant to section 52-415 for a decision on whether such documents  
91 constitute trade secrets or other confidential research, development or  
92 commercial information and whether such documents shall not be  
93 disclosed to the state or shall be disclosed to the state only in a  
94 designated way. Any such documents for which no decision is sought  
95 or privilege obtained shall not be subject to disclosure under section 1-  
96 210 of the 2008 supplement to the general statutes and shall not be  
97 disclosed by the agency to any person or agency that is not a party to  
98 the arbitration. Such documents shall be used only for settlement or  
99 litigation of the parties' claims. The arbitrators shall determine any  
100 issue of relevance of such documents after an in camera inspection.  
101 The arbitrators shall seal such documents during arbitration and shall  
102 return such documents to the claimant after final disposition of the  
103 claim.

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

111 (e) The arbitrators shall conduct the hearing and shall hear evidence  
112 as to the facts, and arguments as to the interpretation and application  
113 of contractual provisions. After the hearing, the arbitrators shall issue  
114 in writing: (1) Findings of fact, (2) a decision in which the arbitrators  
115 interpret the contract and apply it to the facts found, and (3) an award.  
116 The arbitrators' findings of fact and decision shall be final and  
117 conclusive and not subject to review by any forum, tribunal, court or  
118 government agency, for errors of fact or law. Awards shall be final and

119 binding and subject to confirmation, modification or vacation pursuant  
120 to chapter 909.

121 (f) Claims brought pursuant to this section [may] on or after October  
122 1, 2008, shall be submitted for mediation under the mediation rules of  
123 such dispute resolution entity as the parties may agree upon, provided  
124 if the parties do not agree upon mediation rules, the mediation rules of  
125 the American Arbitration Association shall apply.

126 (g) All claims made pursuant to subsection (a) of this section may be  
127 consolidated in a single proceeding in the superior court for the  
128 judicial district of Hartford, or, in the alternative, consolidated in a  
129 single arbitration proceeding pursuant to subsection (b) of this section,  
130 at the discretion of the court or arbitration panel before which the  
131 matter is pending. The adjudication of such arbitration or proceeding  
132 shall be bifurcated and the court or arbitrator shall first make findings  
133 as to liability. If it is determined that the state is liable, in whole or in  
134 part, for the claim, the court or arbitrator shall then make findings as to  
135 the damages for which the state is liable.

136 (h) Nothing in this section shall be construed to permit a  
137 subcontractor or supplier that does not have a contract with the state to  
138 bring a direct action against the state.

139 [(g)] (i) This section shall apply to claims brought on or after July 1,  
140 1991. The provisions of sections 4-61, 4b-97, 13b-57a, 13b-57b and 13b-  
141 57c of the general statutes, revised to January 1, 1991, shall apply to  
142 claims brought before July 1, 1991.

This act shall take effect as follows and shall amend the following sections:		
Section 1	October 1, 2008	4-61

**GL**            *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 chamber thereof for any purpose:

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**OFA Fiscal Note**

**State Impact:**

Agency Affected	Fund-Effect	FY 09 \$	FY 10 \$
Various State Agencies	All Funds - Cost	Greater than \$1 million	Greater than \$1 million

**Municipal Impact:** None

**Explanation**

The bill allows any subcontractor or supplier to a state highway or public works contract to sue the state, subsequent to mandatory mediation provided for in the bill, in order to recover damages.

Under current law any such claim must be made against the general contractor who, if liability is admitted, could then press a claim against the state. The bill removes this buffer to litigation involving the state which could increase the state's direct cost for legal counsel and associated expenses. The magnitude of any such increase is likely to be considerable given the relatively large number of subcontractors on these projects and the proportionate share of work completed by them, which is often eighty per cent or more of the total. State agencies could incur costs to pay for contracted legal services, expert witnesses and other expenses. As an alternative to contracted legal services, additional staff members with the Office of the Attorney General might be hired. Any such costs are anticipated to be significant (ie, greater than \$100,000) on an annual basis.

Facilitating claims by subcontractors against the state could result in significant cost because it may result in the filing of many additional claims. The Department of Public Works (DPW) currently has 10 claims pending at a value of over \$28 million. To prepare for such

claims, DPW has to hire construction claim consultants (audit firms, claim consultants and out-side counsel) to conduct the due-diligence required to research the validity of claims and to develop defenses and assist the state in negotiating/arbitrating and/or litigating claims. DPW's cost for these services averages between 12% and 15% of the base claim so the estimated cost to the state for these fees is between \$3.4 and \$4.2 million for the current 10 claims.

The DPW would also need to establish a contract litigation unit. The unit would consist of 6 full-time employees with expertise in both the technical and legal aspects of construction claims. The estimated annual cost of the unit is: (1) \$350,000 in Personal Services for the 6 positions and \$175,000 in fringe benefits (according to the current fringe benefit cost estimate provided by the Office of the State Comptroller) and (2) \$100,000 in Other Expenses for office space, document coping charges, and other associated operating expenses.

The Department of Transportation would require additional staffing and consultants to handle analyses and litigation of contractual claims. The cost of these positions is \$1.5 million annually. Additionally, there is an impact to Capital Projects (Bonding) of \$12.5 million in FY 09 and \$15.5 million in FY 10 from settlement of claims, legal counsel and arbitration fees that would be charged to the capital program; thus impacting debt service costs.

### ***The Out Years***

The annualized ongoing fiscal impact identified above would continue into the future subject to inflation.

**OLR Bill Analysis****HB 5769*****AN ACT CONCERNING PASS-THROUGH CLAIMS.*****SUMMARY:**

The law establishes a waiver of the state's sovereign immunity from suit for disputed claims under a state highway or public works contract. This bill broadens the waiver to include certain subcontractor or supplier pass-through claims and applies it to claims arising out of the contract rather than brought under a contract. It excludes from the waiver claims for personal injury or any other tort in which it is alleged that the state may be wholly or partially liable.

The bill specifies that (1) it must not be construed to allow a subcontractor or supplier that does not have a contract with the state to bring a direct action against the state and (2) sovereign immunity is not a defense for any claims as long as they do not include claims for personal injury or any tort.

It requires all such claims related to highways and public works contracts to be mediated before the suit may be brought. It also allows courts and arbitration panels to consolidate the claims and requires the proceedings to be bifurcated.

EFFECTIVE DATE: October 1, 2008

**MEDIATION**

By law, claims brought under the limited waiver of sovereign immunity must first be submitted for mediation according to the rules of an agreed-upon dispute resolution entity. On and after October 1, 2008, the bill requires them to follow the rules of the American Arbitration Association if they do not agree on mediation rules.

**CLAIMS CONSOLIDATION AND BIFURCATION**

The bill allows claims brought against the state to be consolidated in Hartford Superior Court or in a single arbitration proceeding, at the discretion of the court or arbitration panel.

It requires the adjudication or proceeding to be bifurcated. In the first part, the court or panel must make findings about liability. If it determines that the state is wholly or partially liable, it must then make findings concerning the damages for which the state is liable.

**COMMITTEE ACTION**

General Law Committee

Joint Favorable

Yea 18    Nay 0    (03/11/2008)