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**Testimony of Robert O'Brien  
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**IN OPPOSITION TO SB 965  
"AN ACT CONCERNING FALSE CLAIMS"**

**Judiciary Committee  
March 6, 2009**

The CBA Construction Law Section is **opposed** to SB 965, "AN ACT CONCERNING FALSE CLAIMS". This legislation is intended to apply to all state contracting as part of contracting reform in Connecticut.

The CBA Construction Law Section consists of several hundred members who represent in their law practices not only construction contractors, but architects, sureties, owners and others, as well as the state. The overwhelming majority of their contractor-clients have a long and respected track record in doing business with the state.

A false claims act imposes civil liability on any person or entity that submits a false or fraudulent claim for payment to the government. The federal False Claims Act, significantly amended in 1986, allows the government to bring civil actions to recover damages and civil penalties when false claims are made. It also provides for *qui tam* suits, that is, suits brought by private informants in the name of the government charging fraud on the part of persons who improperly receive or use public funds.

Only 14 states and the federal government have a false claims act. Of those jurisdictions, only eight including the federal government have one of general application. The others have adopted acts that address medical assistance claims or Medicaid fraud only. Thus, experience with a false claims act is limited. Bills proposing a false claims act in Connecticut failed in 1999, and 2005 through 2008.

The Construction Law Section of the Connecticut Bar Association believes that a **false claims act should not be enacted** in Connecticut because:

- **Potential Misuse.** A false claims act is a powerful tool that could be used to intimidate lawful contractors who have done business with the state, are genuinely owed money by the state, but face severe disagreement with the state agency as to the merits of the claim or the amounts owed. Contractors regularly make claims to collect that money. If faced with a threat of a false claims process imposing significant liability, a contractor is confronted with a challenging decision: withdraw the claim or risk civil liability, possibly even criminal sanctions. Private individuals could also misuse a false claims act to recover damages.

The chief issue is the collision between the inherent complexity of today's construction process, with all its players and documents, and the low level of awareness required to trigger a claim under a false claims act. Dishonesty is not required, merely "deliberate ignorance" or "reckless disregard", without "proof of specific intent to defraud". Further, Section 13 of the proposed legislation merely requires the state or a *qui tam* plaintiff to prove the essential elements of its cause of action by a "preponderance of the evidence". Therefore, while a contractor can assure himself that, having been an honest operator, he can never be held liable for having made intentionally false statements, he may feel less certain of his fate under the other standards. Ultimately, the state's case may have little merit, but a prudent businessman may opt not to gamble but to take a safer route instead.

A very significant difference between the Federal False Claims Act and SB 965, modeled on the federal act, is that the U.S. Attorney General is not directly involved in negotiating and litigating construction disputes, whereas the Connecticut Attorney General is intimately involved in this process and would have the discretion (instead of a mandate as under federal law) to pursue a false claim action.

- **Significant Penalties.** A false claims act typically imposes monetary penalties, treble damages, and criminal liability even in the absence of any significant harm to the state.
- **Incorrect Remedy.** The proposed legislation originated from attempts to enact the recommendations of the Governor's Task Force regarding changes to the state's contract *procurement* process that arose out of the Rowland administration's contract award scandals. A false claims act would not address these problems, and state law already provides remedies, including actions for fraud or misrepresentation, and debarment procedures, all of which have been used by state agencies to address actual false claims. As no evidence or allegations have been presented indicating a false claims problem in the state, a false claims act is the wrong approach to dealing with procurement issues.
- **Reduction in Business with the State and Revenue.** Contractors faced with a false claims act in the state that is capable of being misused and its significant penalties will be less likely to engage in business with the state. Public construction costs will rise from a combination of a decrease in competition and the incorporation by remaining contractors of contingencies in their bids to account for potential losses suffered when the state uses the false claims act as a negotiating tool. Professionals who counsel contractors regarding government contracts in other parts of the country have advised their clients not to enter into contracts with public agencies that have used a "false claims" defense against contractors. In my own work as an engineer in private practice I saw first-hand how contractors stayed away from bidding on work let by New York City simply because "it wasn't worth the aggravation". For example, though NYCDOT required a minimum of three bidders for work such as soil borings, I could regularly only find two in the entire NYC metro area willing to submit bids. Additionally, there will be a direct cost to the state to administer the act, bring claims, and defend against claims. The potential revenue loss to the state is significant and would be unfortunate in the current fiscal environment.
- **Real-Life Examples in the Context of a False Claims Act.** Experience with false claims acts elsewhere in the country shows a willingness by public agencies to use a

"false claims" allegation as a negotiating tool to settle legitimate contractor claims knowing that few of the state contractors have the resources to fight this battle. For example:

- A contractor makes a legitimate claim of \$100,000 against the state for additional work performed at the direction of an agent of the state. The state counterclaims that the contractor violated the false claims act by falsely stating that a subcontractor qualified as a small, minority business enterprise as defined by General Statutes § 4a-60(b) when it was merely a front for a non-MBE. The contractor may not have any reasonable basis to know this, especially when the subcontractor was certified by the Department of Administrative Services as an MBE. The state nevertheless claims that under Section 1(1), the contractor acted "in deliberate ignorance" or "in reckless disregard" of "the truth or falsity of the information" and "no proof of specific intent to defraud is required". The contractor might be given the choice of either (i) spending \$65,000 in legal fees, with a net win of \$35,000 or a loss of \$165,000, or (ii) settling for \$20,000 outright. Faced with the possibility of severe penalties and the threat of jail time, the contractor settles, vowing "never to do another state job as long as I live", while state officials can happily report that they have saved the state \$80,000.
- A contractor retains the services of several subcontractors for a state project. Each time the contractor submits an application for payment to the state, it includes documentation from its subcontractors. The contractor keeps general daily reports but relies on each subcontractor to keep track of its own employees. It turns out that one of the subcontractors has been reimbursing its key employees for "expenses" in lieu of overtime payments in accordance with a long-standing "wink and nod" agreement. At some point, a disgruntled ex-employee of the subcontractor becomes an "original source" and informs the state of the subcontractor's pay practices. The state, which happens to be facing a series of proposed change orders from the contractor, claims the contractor has been submitting "false" information in its payment requests and is liable for damages and penalties. The contractor, not at all confident its ignorance of the subcontractor's practices will be seen as an "innocent mistake", strikes an unfavorable bargain with the state in exchange for a withdrawal of the "false claim" action.
- A small contractor budgets 15,000 man-hours for a particular project, and 35 years of experience has proven his budgets correct to within  $\pm 5\%$ . The contractor experiences unusual losses of productivity on the project that he attributes to the construction manager's failure to properly administer the overall project. The contractor finds that he has expended 10,000 man-hours over his original budget. Negotiations with the state break down, and the contractor has no choice but to make a formal claim against the state for the significant additional cost. The contractor feels he is right and that in the claim process he will discover all the information he needs to bear him out. In the meantime, the state claims the contractor has submitted a "false claim". The contractor has learned that his type of claim is typically hard to prove, so the odds are against him; but if he loses, he's also made the state's case that his claim was "false". Not only is he not compensated for the additional 10,000 man-hours; he may also owe the state an enormous sum. As a result, the contractor withdraws his

claim in exchange for a promise from the Attorney General that he will not be prosecuted for making "false claims" against the state.

- A contractor on a federally funded state project, following a prevailing wage schedule, classifies its employees using the "tools of the trade" analysis approved in other jurisdictions by the U.S. Department of Labor. The contractor later learns that the U.S. Department of Labor claims a different classification should have been used based on its own unpublished guidelines. Not only is the contractor faced with an unexpected claim for "back pay" by the federal government, its claim for payment to the state, based on certified payrolls, exposes it to staggering penalties for "false claims": \$5,000 to \$10,000 for each "fraudulent" act. The state could conceivably count as an act each entry for an employee for each week of payroll.
- A contractor keeps a mediocre project manager on its payroll because it knows it's hard to find qualified employees. If the contractor makes its expectations known to the project manager loud and clear, maybe he will "shape up". On the other hand, the project manager could take umbrage at the increased pressure, quit to work elsewhere, and become a confidential "original source" of information for the Attorney General to launch an investigation of the contractor. The contractor knows the investigation will turn up nothing, but it will suffer great inconvenience, cost, and bad publicity in the meantime. As a result, the contractor keeps the project manager and hopes he will leave on his own one day.

The Construction Law Section of the Connecticut Bar Association commends state officials for their sincere attempt to address the contracting challenges confronting the state. The section supports these efforts. Members believe, however, that a false claims act would not solve these problems and would instead unfairly place a significant burden on legitimate contractors.