

# MICHELSON, KANE, ROYSTER & BARGER, P.C.

ATTORNEYS AND COUNSELORS AT LAW

HARTFORD SQUARE NORTH  
TEN COLUMBUS BOULEVARD  
HARTFORD, CONNECTICUT 06106

TELEPHONE (860) 522-1243  
FACSIMILE (860) 548-0194

[www.mkrb.com](http://www.mkrb.com)

RICHARD L. BARGER  
STEVEN B. KAPLAN  
MARK E. BLAKEMANT  
CHRISTOPHER W. HUCKT  
PAUL S. TAGATAC

BETH N. MERCIER  
PAUL R. FITZGERALD  
MARK D. O'HARA

ALSO ADMITTED IN MASSACHUSETTS

**Testimony of Attorney Steven B. Kaplan**  
**Legal Counsel, Connecticut Subcontractors Association**  
**Raised Bill 131, An Act Concerning Construction Change Orders**  
**General Law Committee**  
**February 16, 2010**

My name is Steven B. Kaplan. I am Legal Counsel to the Connecticut Subcontractors Association, a trade association that represents the subcontracting industry in our state, and I submit this testimony on the CSA's behalf. I have practiced construction law in Connecticut for 28 years. I also am a founding member and the current chairman of the Construction Law Section of the Connecticut Bar Association.

I strongly support Raised Bill 131, An Act Concerning Retainage.

Under the present Connecticut law, retainage for towns and cities is limited to 5%. By statute, the Connecticut Department of Transportation is limited to retainage of 2½%. On an administrative level, the Connecticut Department of Public Works retains 5%. The present bill would bring the retainage percentages for commercial, institutional, and industrial construction in Connecticut to an amount in line with these requirements for public construction.

Payment problems plague contractors and subcontractors—especially at the end of a project. Raised Bill 131 addresses this critical problem—paying contractors and subcontractors for work that has been duly accepted by the owner and its representatives.

“Retainage” is the amount of money that has been approved for payment for work performed, but is “retained” by the owner until the project has been 100% completed. Frequently, retainage includes work a contractor has successfully performed several years before it finally gets fully paid for that work. Meanwhile, the contractor must pay its laborers every week, and its material suppliers on an ongoing basis. This means, quite simply, that the contractors and subcontractors are financing the owner's project.

Even at the proposed 5% level in this bill, this means that 5% of the construction costs are being financed by the contractors and subcontractors until the final completion and acceptance of the project—oftentimes, many months after the owner has taken

beneficial use of the project. Withholding large amounts of retainage over an extended period of time imposes an unfair burden on contractors and subcontractors. It also provides owners with unfair leveraging tools to use to pressure contractors and subcontractors in all sorts of situations that have nothing to do with payment for completed contract work.

Owners try to justify higher retainage levels by claiming that it “guarantees that a contractor will complete its work.” This argument is a red herring. In reality, contractors don’t get paid periodic contract payments until their work is approved and accepted by the owner and its representatives. It is the rule, not the exception, for owners to underpay contractors for the percentage of work completed and accepted—“staying ahead of the contractor”—which provides owners with another mechanism of forcing contractors to finance their projects.

Unless work is properly performed, it does not get paid for. But when work is properly performed, it should be paid for promptly. And by law, that means no less than thirty days after receipt of an approved payment application. Owners should not be allowed to enjoy the benefit of the work completed by contractors and subcontractors, and also withhold large sums for this accepted contract work under the guise of “retainage.”

**Raised Bill No. 131 should be approved because:**

- It will bring the retainage levels for private commercial, institutional, and industrial construction in line with the most of the public construction being performed in Connecticut;
- It is critical that contractors and subcontractors get paid promptly for the labor and materials they have performed, and that has been duly accepted by the owner;
- Owners should not be allowed to enjoy the benefit of the work performed by contractors and subcontractors while withholding excessive amounts of “retainage” – as opposed to paying for that work in a timely manner;
- Contractors and subcontractors should not be forced to “finance” the construction costs of private projects.

Again, thanks to the General Law Committee for considering this important legislation.