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Testimony of Attorney Steven B. Kaplan
Legal Counsel, Connecticut Subcontractors Association
Re: Raised Bill No. 413—"An Act Concerning The Denial of Prequalification Certificates
by the Commissioner of Administrative Services"

TRANSPORTATION COMMITTEE-- March 10, 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.

Members of the Connecticut Subcontractors Association (CSA), as well as myself and other construction attorneys, have worked continuously with DAS officials to improve the mandatory Prequalification program in Connecticut. Although the program could have led to much confusion and abuse, this has not happened. Rather, it has been implemented with fairness and efficiency, mostly due to the efforts of DAS, and in particular Carlos Velez and his staff. Most important, DAS has managed the Prequalification program fairly, benefiting both the public and the construction industry. Even when outside pressures have been asserted, DAS has refused to subject any contractor to disparate treatment due to politics, personal grudges, labor affiliation, or any other criteria that would undermine the integrity of this program.

Although the CSA strongly supports the rationale behind Raised Bill No. 413—enhancing the quality of public contracting—CSA, myself, and other construction lawyers oppose the bill in its present form.

The Achilles heel of the Prequalification process is the damage that can result from an improperly issued "unsatisfactory" evaluation. Currently, DAS averages the evaluation scores to determine prequalification, which mitigates the effect of a bogus "unsatisfactory" evaluation. This bill injects a numerical quotient of "unsatisfactory written evaluations" as a stand-alone basis for denial of prequalification, which would greatly increase the chance that even one bogus evaluation might severely damage or even ruin the businesses of a perfectly qualified contractor.

Even before the mandatory Prequalification program was enacted by the Legislature, the CSA and other members of the construction community have sought an administrative process by which a contractor could challenge a bogus "unsatisfactory" evaluation. Presently, a

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contractor can only submit a written objection to such an evaluation, which is then placed in its file at DAS. But this mechanism is of limited value—the “horse is out of the barn” as soon as that bogus “unsatisfactory evaluation” gets filed with DAS.

An “unsatisfactory” evaluation is frequently used by towns and other public bidding authorities to determine a contractor’s “responsibility” for subsequent projects. Unfortunately, situations arise—such as a local “favored” bidder or pressure being applied by labor groups or other political interests—that lead a town to try to disqualify a perfectly competent low bidder from a municipal project. Just one “unsatisfactory evaluation” is all a town needs to provide a basis to reject a contractor’s bid. Courts will not interfere in the “good faith discretion” exercised by a municipal bidding authority. It would not matter that the “unsatisfactory evaluation” was unfair or inaccurate, or that the contractor had submitted a well-documented refutation to DAS in response. And with one such bid rejection, the next town that wants to follow the same tactic could use both the improper evaluation and the prior town’s rejection of that bidder to justify its own improper rejection of a qualified bidder.

These things happen. By the nature of public construction, contractors and towns, and the supervising architects and project managers, experience disputes and claims on projects. Human nature dictates that in those contentious circumstances, the public agency will issue an “unsatisfactory evaluation”—and this very well could be a bogus evaluation motivated by all the wrong factors. If a contractor performs poorly, it deserves an unsatisfactory evaluation. Unfortunately, the issuance of bogus “unsatisfactory” evaluations occurs too frequently, and the potential damage to qualified contractors should not be exacerbated.

This danger would be greatly alleviated, and the mandatory Prequalification system much improved, if a simple administrative procedure was enacted where contractors could challenge the issuance of an “unsatisfactory” evaluation. A neutral official at DAS could review the contractor’s documented challenge solely to determine whether substantial questions have been raised as to the validity of the evaluation. If so, then the evaluation would not be considered for DAS Prequalification purposes. If not, the contractor’s objection would remain on file. There is no need for a further appeal to any other administrator or to the courts. The mere existence of a neutral, third-party review would significantly enhance the integrity of the entire process.

This procedure would not be cumbersome or expensive. It is doubtful that there would be many such “appeals.” They would be truncated in scope. Not only would this greatly reduce the chances of a contractor improperly losing its Prequalification status due to bogus evaluations, it also would decrease the likelihood of litigation between a contractor and DAS over a prequalification denial or revocation. Overall, it is likely to save the state money in administering the program, while at the same time greatly enhancing the program’s quality.

In conclusion—please do not pass this bill in its present form. Again, thanks to the Transportation Committee for considering this important legislation.