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

RICHARD L. BARGER
STEVEN B. KAPLAN
MARK E. BLAKEMAN†
CHRISTOPHER W. HUCK†

PAUL S. TAGATAC
PAUL R. FITZGERALD†
BETH N. MERCIER

† ALSO ADMITTED IN MASSACHUSETTS

Testimony of Attorney Steven B. Kaplan
Legal Counsel to the Connecticut Subcontractors Association
Committee on Government Administration and Elections
Re: Raised Bill 1119--
An Act Concerning Licensing Agreements of the Department of Public Works, The Prequalification and Rejection of Bidders, etc.
March 7, 2011

My name is Steven Kaplan. I am a partner with the Hartford law firm of Michelson, Kane, Royster & Barger P.C. in Hartford, where I have concentrated in the area of construction law for 30 years. I routinely represent contractors, subcontractors, construction managers, design professionals, and owners in all matters involving contracts for public and private construction. I am Legal Counsel to the Connecticut Subcontractors Association, as well as Chairman and a founding member of the Construction Law Section of the Connecticut Bar Association.

The Connecticut Subcontractors Association strongly **opposes** certain provisions of Raised Bill 1119, An Act Concerning Licensing Agreements of the Department of Public Works, The Prequalification and Rejection of Bidders, etc.. CSA specifically objects to sections 2 and sections 4 of the bill:

> Section 2: This section would amend Conn. Gen. Stat. §4a-100 and eliminate a very specific description of the scope of the prequalification system. If the intent is to alter the scope of the present prequalification requirements, that should be expressly spelled out in the bill.
>
> Section 4: This section would amend Conn. Gen. Stat. §43b-95 and require the "awarding authority"—as opposed to the DAS Commissioner who is responsible for prequalification-- to reject the bid of the low bidder if that bidder had received "three or more unsatisfactory written evaluations" submitted to DAS within the past seven years.

As noted above, the effect of the provision in Section 2 is unclear. Does the bill seek to change the scope and application of the entire prequalification program? What is the purpose for eliminating the referenced language? Does it seek to divest DAS from its present authority in administering the prequalification program? Presently, prequalification is required for most prime contracts and for substantial subcontracts (over $500,000.00) on state and municipal building projects. CSA sees no reason to change these requirements, of DAS's role in managing the program-- if in fact that is this section's intent.

As to Section 4: Although well-intentioned, the effect of this amendment would be to impose unfair and draconian punishment on many responsible and qualified contractors or substantial subcontractors (hereinafter referred to as "contractors"). The specific problems here are: (a) the mandatory nature of these provisions, which eliminate all discretion in reviewing a contractor's qualifications on a case-by-case basis; (b) Assigning this mandatory obligation to the "awarding authority" rather than to DAS, which has been managing the prequalification program to date with excellent results; (c) the lengthy timeframes for penalizing contractors regarding previous jobs over seven years—which is a lifetime in the construction industry; and (d) the lack of any criteria for imposing these absolute requirements.

CSA, along with other industry groups, was instrumental in establishing the contractor prequalification program that is now being administered by DAS. The CSA continues to work closely with DAS officials to ensure that the program runs smoothly and efficiently, and above all fairly. DAS, and its administrative personnel, deserve special praise for their great efforts in implementing this very successful program. We know from discussions with other trade groups and government agencies in the Northeast that the Connecticut Contractor Prequalification Program is widely respected and emulated.

If a contractor's prequalification status is revoked or rejected, it imposes a death sentence on that contractor. Likewise, if a bidder is denied a contract solely because of an arbitrary, subjective "evaluation" submitted by an owner or even another contractor on some other job—going back as far as seven years prior-- not only does this bar the contractor from performing that particular project, but it also stamps an indelible, highly prejudicial mark on the contractor's resume that will have an extremely deleterious effect on its ability to procure both public and private work in the future.

It is a fact of life in the construction industry that disputes arise despite the good faith efforts by all parties involved, and these frequently lead to litigation or arbitration. There is little doubt that parties involved in such disputes lose their objectivity toward one another, and oftentimes seek to "get even" with their adversary. When an owner, or its agent (construction manager, architect, etc.), issues a negative contractor evaluation—at the same time that party is engaged in contentious disputes with that contractor—the fairness or accuracy of that evaluation automatically is suspect.

Currently, these factors are skillfully sorted out by DAS when it reviews contractor evaluations, and considers explanations provided by the contractor as to mitigating factors—including facts that may undermine the credibility of a negative evaluation issued by a disgruntled owner. But if all agency discretion was eliminated from this process, and moreover, this task of "automatic rejection" is placed upon an "Awarding authority"--as would be the case with this proposed legislation-- the "contractor evaluation" mechanism would become a readily available "contractor assassination" weapon.

Consider, too, that a construction manager on one project frequently will be supervising one of its competitors for future projects. What better way to eliminate one's competition than to issue (improperly) an unsatisfactory evaluation of that contractor. Per the proposed legislation, incredible power would be conferred upon owners, and their representatives. Just the threat of issuing one of these "three strikes and you're out" unsatisfactory evaluations would severely restrict the ability of

contractors to pursue otherwise meritorious contract adjustments or claims on virtually all construction projects, public or private.

Finally, the length of time that would be provided to this devastating effect for "unsatisfactory evaluations" —seven years for any and all prior projects, public or private--is excessive. Key personnel can change in construction companies from year to year—and companies that experience bad projects in a given year usually correct their problems and practices on subsequent projects. Contractors should be given the opportunity to improve their performance; a few "unsatisfactory" evaluations issued seven years ago should not mandate a "lingering death sentence." The local construction market is a small universe, and a contractor's problems on one significant project usually are widely broadcast. The ramifications of this negative publicity in and of itself imposes curative results on bad contractor practices— through natural market forces.

Thanks to the Chair and all members of Committee on Government Administration and Elections for considering the CSA's comments on this important legislation.