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Testimony of Attorney Steven B. Kaplan Legal Counsel to the Connecticut Subcontractors Association

Re: Raised Bill No 70--

“An Act Concerning Fairness in Certain Commercial Construction Contracts” COMMITTEE ON GENERAL LAW-- February 21, 2012

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 a past Chairman and a founding member of the Construction Law Section of the Connecticut Bar Association.

The Connecticut Subcontractors Association supports Raised Bill No 70, “An Act Concerning Fairness in Certain Commercial Construction Contracts.” The CSA thanks the General Law Committee for raising the bill. The proposed legislation would amend Conn. Gen. Stat. §42-158j for most private construction projects (excluding smaller residential) to provide much-needed parameters for billing and payment of excessive change order work, and also to clarify escrow account provisions to ensure payment for subcontractor’s work.

The proposed legislation addresses the critical problem of procuring payment for contractors or subcontractors who have performed authorized work, but cannot get paid through no fault of their own—either because a written “change order” has not been issued, or the owner simply has not met its payment obligations. There are two salient sections to the proposed legislation:

Section (a) Regarding Extra Work: Contractors and subs cannot bill or get paid for authorized work they already have performed until the owner issues a written “change order.” This legislation provides that if change directives (without written change orders) exceed 5% of the contract amount, then the contractor or subcontractor does not have to perform additional extra work under new change directives until the current, pending change directives are processed and can be billed. The bill does NOT apply to approved change orders or to original contract work. The bill does apply only to approved work. Also, the 5% ceiling reflects the current change order limits for state funding on public school construction projects per Conn. Gen. Stat. §10-286(c), which eliminates additional funding for all change order work that exceeds the authorized project cost by 5%.

The proposed legislation would require all parties to manage the project properly and to process payment for authorized extra work in order for additional changed work to be performed. Owners and contractors will be required to timely process payment for extra work that has been authorized and performed, but cannot be billed for payment through no fault of the contractor or

subcontractor. This will prevent the unfair and unethical practice of an owner, or contractor, from batching unprocessed change directives and then “leveraging” them against the contractor or subcontractor for payment purposes at the end of the project.

Raised Bill No. 70 should be approved because:

- Typical contract provisions, and the current law, forces contractors and subcontractors to perform authorized extra work without any means of getting paid when a written change order has not been issued—“through no fault of their own.”
- The bill will require all parties to address in a timely fashion problems arising from unprocessed change orders.
- The bill will prevent owners from unfairly shifting the project financing burdens onto trade contractors by imposing unlimited, authorized extra work directives without also providing prompt payment for that work.
- Contractors and subcontractors would no longer be forced to finance the performance of excessive, authorized extra work for unlimited, extended time periods.
- Owners and contractors would be required to properly manage projects involving significant, authorized extra work, rather than ignore paying for this work at the expense of the contractors or subcontractors who perform the work.

Section (c)4(B) Regarding Escrow Accounts: This provision mirrors the mechanism already included at §(a) of the statute for contractors, and would allow a subcontractor to demand that the owner establish an escrow account when it has failed to pay for labor and materials supplied to the project by the sub. This language reflects the original intention of the statute: to provide unpaid subcontractors with a direct right of action against the owner for failure to pay for work performed by the sub. It is limited in scope to “first tier” subcontractors so as to protect the owner from remote or duplicative demands.

It is a plain fact that contractors do not always aggressively pursue the owner for payment owed solely to their subcontractors. This legislation is critical to enable subcontractors to procure payment for their work directly from the owner when the normal requisition and payment process has broken down. It also protects the owner by limiting the owner’s overall payment obligations in accord with payments it has made to either the contractor or the sub for the work performed

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