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Testimony by Don Shubert,
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for the
Government Administration and Elections Committee

March 6, 2023

Raised Bill No. 6826, An Act Concerning Liability for False And Fraudulent Claims

Position: Opposed

Good morning Senator Flexer, Senator Sampson, Representative Blumenthal, Representative Mastrofrancesco, and members of the Committee.

The Connecticut Construction Industries Association (CCIA) is an organization of associations that represent various sectors of the construction industry. Members include building and facility contractors; transportation contractors; environmental and utility contractors; material producers; suppliers; equipment dealers; and related professional firms.

CCIA opposes this bill for the basic reason that applying the Connecticut State False Claims Act to construction is not a prescription for fair and efficient contracting. It will change the risk profile on every state contract. It would pose real danger to even the most scrupulous contractor.

False Claims Acts have broad elements, low standards of proof, and high penalties and damages. Legal terms and requirements are defined broadly and are interpreted broadly by the courts.

The loose legal standards of a FCA are remarkably problematical with the uncertain nature of construction disputes. There often is no clear meaning of "true" or "false" on a construction project. Determining liability and calculating damages is never certain in construction disputes and often involve wide ranging opinions from accountants to engineers. Questions of interpretation of contract provisions, specifications, drawings or other technical requirements may be matters of opinion on which reasonable minds may disagree without making a "false" statement.

The FCA can be abused by both private and public actors. In the private sector, the qui tam or whistleblower provisions provide a significant share in any recovery, plus costs and attorney's fees. This alone creates incentives for would-be whistleblowers to bring an action. In addition, increasingly cases are being filed not by true whistleblowers with inside information, but by competitors seeking advantage in the marketplace or who have lost contractual opportunities. Unfortunately, the FCA's provisions also create incentives for abuse—even if unintentional—by public actors. More and more common in local public sector cases, the response to a claim is a FCA allegation in the counterclaims.

While it is well-established that the FCA is not an all-purpose anti-fraud statute and is not meant to allow a plaintiff to shoehorn a garden-variety breach of contract action into a claim of fraud, contractors typically have to go through protracted, expensive litigation in order to obtain such a ruling at summary judgment or beyond. *See, e.g., U.S. ex rel. Owens v FKTC*, 612 F.3d 724 (4th Cir. 2010) (affirming summary judgment because claims of deficient construction work involved ordinary contractual disputes, not fraud). State contractors will be

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forced to spend enormous sums defending themselves or settling claims characterized as fraudulent.

After many years of contracting reform in Connecticut, the collateral consequences of an abusive action can easily put a contractor out of business and employees out of work. If the State FCA applies to construction, upon filing of a complaint, even where no false claim was committed, a contractor faces the real exposure of losing its prequalification status or being suspended, debarred, or deemed a non-responsible bidder. It could also lead to existing contracts being terminated.

There will be a cost to the state to administer the FCA as additional staff will be needed to sort through and dismiss the many frivolous actions brought by bounty seeking whistleblowers and the segment of the plaintiff's bar that services those whistleblowers. In addition, the state will be burdened with discovery requests and will have to produce witnesses to testify. Increasingly, both defendants and whistleblowers are seeking extensive discovery from the government in litigating FCA cases. This is because of the renewed importance of government knowledge with respect to proof of materiality. Such requests may be burdensome even when limited to the particular contract at issue, but increasingly discovery is being sought beyond those limits in order to assess how the government responds to similar violations with other contracts. Contractors facing FCA liability would have little choice but to seek discovery into the state contracting agency's administration of its contracts writ large in order to defend themselves.

The state FCA in Connecticut does not provide for an independent third-party, such as the U.S. Department of Justice in Federal matters, to conduct an independent investigation and issue a written finding prior to allowing the Attorney General to pursue a FCA action.

- The federal FCA is enforced by the Department of Justice that is not a political office. A state false claims act will be enforced through the Office of the Attorney General which adds a political aspect that could compromise the objectivity and discretion that is necessary to control the tremendous incentive to abuse the act in unintended ways for improper purposes.
- Moreover, the Office of the Attorney General often represents the state in construction matters. Here, the FCA can be used as a tool in counterclaims to intimidate contractors into settling legitimate claims.
- The Connecticut FCA is wide open to abuse unless an objective third-party investigates and concludes, as a result of a diligent investigation, that there is a reasonable, good faith belief that a violation of the FCA has occurred or is occurring, and that filing an action would not be in retaliation for a contractor's good faith dispute regarding change orders, payment, or other terms of the contract or for some other improper purpose.

The FCA does not have a provision restricting cross-complaints and consolidations of FCA actions.

- When a government agency uncovers a falsity during the course of conducting a business transaction, and in turn, brings a cause of action against a contractor, the case is not shrouded in vagueness and the purpose is lucid. However, the issue becomes clouded, when the FCA is not the initial cause of action, but exists in a multitude of counter claims filed in a response to a contractor's initial claim.

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State law already provides sufficient remedies, including actions for fraud or misrepresentation, prequalification laws, and many legal and contractual contracting reform measures, all of which can be used effectively by state agencies, the Attorney General, and the Office of State Ethics to address issues related to the administration and performance of contracts. Additionally, contract provisions and agency policies and procedures provide more than sufficient means to address contracting issues that arise.

Many versions of the State False Claims Act pertaining to construction have been proposed in the General Assembly over the years. All provisions relating to construction have been rejected.

Several states have false claims acts. However, nearly a third expressly limit their FCA to Health Care fraud, as Connecticut currently does, and some have no qui tam provisions, which are subject to rampant abuse.

In conclusion: The False Claims Act creates an uneven playing field for contractors given the enormous damages and penalties provided for, the high costs to defend even frivolous actions, and the undemanding standards of proof. At a minimum these create significant leverage for the government or a whistleblower in extracting a settlement. At worst, these actions often threaten the continued existence of the contractor's business.

The incentives for abuse in this False Claims Act must be addressed before the legislature considers if it would be an effective and worthwhile deterrent to the alleged problems in state contracting.

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