INVESTIGATIONS, ENFORCEMENT AND COMPLIANCE WORKING GROUP

APPENDIX

1. Working Group Minutes for August 4, 2004
2. Working Group Minutes for August 6, 2004
3. Working Group Minutes for August 11, 2004
4. Submission by Working Group Member Donald J. Shubert, with attachments, dated August 3, 2004
5. Submission by Working Group Member Donald J. Shubert dated August 6, 2004
6. Submission by Working Group Member Kenneth E. Fargnoli dated August 8, 2004
7. Submission by Working Group Member Representative Richard O. Belden dated August 3, 2004
8. Submission by Working Group Member Representative Richard O. Belden dated August 9, 2004
9. Submission by Working Group Member Pasquale A. Pepe dated August 5, 2004
10. Testimony by Attorney General Richard Blumenthal dated February 27, 2004
11. Recommendations to the Legislature for a Comprehensive Approach to Reforming State Contracting from Attorney General Blumenthal dated January 22, 2004
12. Letter from Attorney General Blumenthal to Commissioner Fleming, with attachment, dated May 24, 2004
13. Submission by Merle W. Harris, Executive Director, Board of State Academic Awards, dated July 30, 2004
14. Submission by Daniel Rawson, Municipal Manager, Interstate Ford Truck Sales, Inc., undated
15. Submission by Harold R. Burke, Esq., of Casper & de Toledo, LLC dated August 5, 2004 with attachments concerning False Claims Act
16. Submission by Julie C. Trunk, Federal Highway Commission dated March 23, 2004 concerning Federal suspension of contractors

17. OLR Research Report dated October 31, 2001 regarding False Claims Act

18. OLR Research Report dated February 5, 1993 regarding Debarment of Contractors

19. OLR Research Report dated June 26, 2002 regarding Contractor Debarment Lists

20. Compilation of Connecticut Statutes concerning disqualification, bidding and False Claims Act information

21. Package of research materials from Subcommittee Chairman Christopher L. Morano to Working Group Members dated August 2, 2004

22. State of Connecticut Department of Transportation Construction Contract Bidding & Award Manual

23. State of Connecticut Department of Administrative Services Contractor Prequalification Program Application

24. State of Tennessee Office of Contracts Review

25. State of Connecticut Public Act No. 03-215 and No. 04-141

26. Supreme Court of Connecticut Cases on State Contracting

27. Federal False Claims Act Materials

    a. 31 U.S.C. § § 3729-3733

    b. 18 U.S.C. § 287

    c. Excerpt from the Department of Justice Criminal Resource Manual, section 921, "False Claims"

    d. Excerpt from the Department of Justice United States Attorney's Manual, section 9-42.010, "Coordination of Criminal and Civil Fraud Against the Government Cases"

28. State False Claims Acts

    California
    Nevada
    Illinois
    Massachusetts
    Virginia
    Hawaii
    Delaware

29. Additional Materials on False Claims Act

    a. Download from The False Claims Act Resource Center, www.falseclaimsact.com

    b. Download from The False Claims Act Legal Center, www.taf.org/whyfca.htm

    c. Excerpt from Bruner & O'Connor on Construction Law, pages 179-197

30. Whistleblower Materials

    a. Excerpt from 2003 Report of the Auditors of Public Accounts, pages 8-13

    b. C.G.S. Section 4-61dd

    c. Excerpt from Attorney General's "Recommendations To The Legislature For A Comprehensive Approach To Reforming State Contracting," pages 10, 21-23.

    d. Substitute Senate Bill No. 386, "An Act Concerning Whistleblower Complaints and Civil Recovery of Misappropriated Funds," February 2004 Session

Governor's Task Force on Contracting Reform
Investigation, Enforcement and Compliance Working Group Meeting
Wednesday, August 4, 2004

Members Present: Christopher L. Morano, Chief State's Attorney and Chair; Richard O. Belden, State Representative; Donald Shubert, Esq., Director of Regulatory Affairs, Connecticut Construction Industries Association; Robert Jaekle, State Auditor; Kenneth Post, State Auditor; John J. Russotto, Deputy Chief State's Attorney for Administration, Personnel & Finance; and Paul E. Murray, Deputy Chief State's Attorney for Operations

Also Attending: Judith Rossi, Executive Assistant State's Attorney; Brian Austin, Assistant State's Attorney; Ann Nichols, Department of Public Works; Doug Moore, Department of Public Works; Marjorie London, Board of Trustees, Community Colleges; Ken Fargnoli, Department of Transportation; Dennis O'Brien, Sullivan & LeShane; Nancy Arnold, Assistant Attorney General; and Anna Ficeto, Esq., Department of Public Works

Chief State's Attorney Christopher L. Morano called the meeting to order at 10:18 a.m. Mr. Morano introduced the members of the Investigation, Enforcement and Compliance Working Group and staff from his Office.

The Working Group's draft recommendation to the full Task Force is due on August 16, 2004, and will address the following issues: disqualification of contractors; establishment of an oversight review board; False Claims Act; Whistleblower statute; and investigative subpoena authority. The draft recommendation should be 5-7 pages, in a format similar to that used by the State Auditors, with a front page of recommendations with supporting documentation and corrective measures.

The next Working Group meeting will be held on Friday, August 6, 2004, at 1:00 p.m. at the Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, 1st Floor. The final Working Group meeting will be held on Wednesday, August 11, at a time to be determined.

Mr. Morano invited Nancy Arnold, Assistant Attorney General of the Office of the Attorney General, to address the Subcommittee. Attorney Arnold was joined by Attorney Anna Ficeto of the Department of Public Works (DPW).

- Attorney Arnold has been an Assistant Attorney General since 1994. As Department Head, she assigns attorneys to client agencies, including the Department of Transportation, Department of Public Works, Department of Administrative Services, Department of Information Technology, Department of Motor Vehicles, Consumer Protection Licensing Board and the Historical Commission. These agencies account for the majority of procurement done by the State.

- Attorney Arnold advised against using the word "debarment." Instead the proper term is "disqualification." To date, only one disqualification case, Electrical Contractors, Inc. v. Tianti, has been decided by the Connecticut Supreme Court in which the Department of Labor used three (3) factors under the disqualification statutes. The contractor appealed and after a lengthy process (10 years) the matter was remanded for further findings. Once a firm is disqualified, it must admit to that in all future bids.

- Prequalification of vendors provides only financial information and does not require reporting of criminal pleas or convictions. Discussion ensued regarding the use of adjectives in some fora so that "disqualification" does not become a matter of semantics. Example: New York City construction

firm didn't respond to Connecticut agency's question of prior "disqualification" because it was designated as "ineligible" in New York proceedings.

- Responsibility Determination - The language used in inviting bids is for "the lowest qualified responsible bidder." Agencies can use the following criteria when evaluating a company: integrity of past performance, proper resources, and manpower. After bids are submitted and there is a question whether the apparent low bidder is responsible, a letter is drafted to the bidder with the Commissioner's signature requesting a meeting. Specific reasons for concern are set forth. AG's office will be present with the client agency and the bidder is free to bring counsel and/or staff. Proceedings are done informally and generally are not recorded or transcribed. The contractor leaves and the remaining parties deliberate. If the bidder is found "non-responsible," the committee will put in writing their findings/recommendations. The Commissioner will then decide if the contractor may be awarded the project. A rejected bidder is considered an "unsuccessful" bidder. Bidders will protest sometimes, however, an unsuccessful bidder has no standing or administrative law rights.

- There is, however, a bid protest procedure. Independent hearing officers are assigned to handle claims and the protestor is allowed to cross examine, submit evidence and have a record made. DPW and DAS have bid protest regulations. Mr. Jaekle asked if any records were kept regarding the number of protests received. Close prices guarantee a bid protest.

- A bid is only an offer. CT statutes allow for rejection of all bids. The Working Group should ensure that the criteria for a "non-responsible" finding is objective enough.

- The State is immune from lawsuits. There are three exceptions to sovereign immunity: Constitutional violation; agency acting outside its authority (fraud, favoritism, or corruption); and a statute expressly allowing a lawsuit.

- Bidders' conference - nothing is done orally. Always in writing and open to all bidders. No questions should be answered on the telephone. Information on Bidders' conferences now can be obtained from agency websites.

- There was discussion regarding practicality of using one disqualification statute across the board. Mr. Fargnoli stated concern regarding such uniformity because agencies differ in terms of applicable regulations and/or statutes. For example, DOT's qualifications and criteria are stricter than other agencies.

- An informal advisory opinion issued by the Attorney General's office regarding Claywell Electric and Worth Construction was discussed.

- The prequalification statute applies only to vertical construction (buildings), not road and bridge construction projects. The Attorney General's office considers DOT's Bidding & Award Manual a model for the state. This manual is on the Internet. DOT has a Specifications Committee, of which Mr. Shubert is a member. Very few bid protests.

- There was discussion regarding the Connecticut State University food service contract. The statute applicable to the University contains an express provision nullifying/voiding contract if the contract

is not entered into properly. C.G.S. 10a-(15)c. A President or Acting President can issue an Emergency Declaration until a new contract can be properly bid.

- Discussion regarding the Attorney General's review of contracts. It is client agency specific and the charge is to review only as to form. However, agencies will ask for assistance in creating terms and conditions of a contract. Rep. Belden envisions a Review Board that would receive a package with a checklist attached with appropriate signatories after it has been reviewed.

- A safeguard measure is to include a contractual provision stating that a contract is not in effect until the Attorney General's office has signed it.

- Attorney Arnold will provide the Subcommittee with a copy of a 1946 Attorney General opinion she referenced.

At this time, Mr. Morano asked if any members of the public or other agencies had any remarks; there were none.

Mr. Morano invited Attorney Harold Burke of Casper & de Toledo to attend the next meeting to provide information on the False Claims Act. Scheduled also to attend are Attorney Arnold Menchel of the Healthcare Fraud & Whistle Blower Division of the Attorney General's Office, Paul Murray of the Office of the Chief State's Attorney who will discuss the Whistleblower Act and the need for the investigative subpoena, and Subcommittee member Attorney Pasquale Pepe who will discuss the Oversight Review Board.

Ann Nichols, of DPW, advised that the Subcommittee's focus should not be concerned about funding issues at this level. Ideas should be free-flowing. The Full Committee will synthesize the Working Group's summary.

Members were asked to prepare by Friday, August 6th, a one (1) page summary of recommendations to be incorporated into the final draft. Mr. Morano offered the services of his staff to coordinate the responses into a cohesive report. Mr. Jaekle advised that as a non-voting member, he does not plan to memorialize his advice in writing. Mr. Morano stated that he understood Mr. Jaekle's restraints. Mr. Russotto advised that he would contact Messrs. Pavia and Pepe regarding the August 6th meeting time.

There being no further business, the meeting was adjourned at 12:35 p.m.

Governor's Task Force on Contracting Reform
Investigation, Enforcement and Compliance Working Group Meeting
Friday, August 6, 2004

Members Present: Christopher L. Morano, Chief State's Attorney and Chair; Richard O. Belden, State Representative; Donald Shubert, Esq., Director of Regulatory Affairs, Connecticut Construction Industries Association; Kevin Johnston, State Auditor; Kenneth Post, State Auditor; John J. Russotto, Deputy Chief State's Attorney for Administration, Personnel & Finance; and Paul E. Murray, Deputy Chief State's Attorney for Operations

Also Attending: Judith Rossi, Executive Assistant State's Attorney; Brian Austin, Assistant State's Attorney; Ann Nichols, Department of Public Works; J. Carlos Velez, Department of Administrative Services; Arnold Menchel, Assistant Attorney General; Joseph Zakrzewski, Department of Environmental Protection; Bryan Gunning, Department of Environmental Protection; Annmarie Cooke, retired from Department of Children and Families; Ann Nichols, Department of Public Works; Ken Fargnoli, Department of Transportation; Harold Burke, Esq., Casper & de Toledo; Daniel Rawson, Interstate Ford; and Tony Zangoglia, Sterling Truck Corporation

Chief State's Attorney Christopher L. Morano called the meeting to order at 1:00 p.m. Mr. Morano reviewed the last meeting and distributed the minutes to the Working Group's members. He then provided an overview of today's meeting.

Arnold Menchel, Assistant Attorney General of the Office of the Attorney General, discussed the following:

- Whistleblower complaints first go to the Auditors of Public Accounts and then to the Attorney General's Office. The Attorney General has subpoena authority and supports the Chief State's Attorney having the same authority.

- Attorney Menchel discussed the recent Tomasso case that limited the whistleblower scope–can only investigate the issues raised by the whistleblower. The scope is set by the parameters of the whistleblower complaint–the decision is on appeal.

- Legislation to allow the expansion of the Whistleblower statute was introduced in the 2004 General Assembly Session. Subpoena power is necessary for investigative purposes. It would be extremely difficult to investigate government fraud and corruption without this statute and its subpoena power.

- Attorney Menchel spoke about the Federal False Claims Act. The Attorney General's whistleblower unit tries to work closely with the Office of the Chief State's Attorney. Based upon past practices, if the Office of the Chief State's Attorney were included in the whistleblower statute, the two offices would work out any concerns between civil and criminal investigations. A current Memorandum of Understanding (MOU) exists between the agencies. Examples include the areas of public integrity, environmental and Medicaid Fraud.

- The False Claims Act was proposed by the Attorney General because the only current option is restitution. There is no civil penalty, therefore, no deterrence.

- The Attorney General has submitted legislation to clarify what types of investigations can be

undertaken. A copy of the legislative proposals by the Attorney General will be forwarded.

The next presenters were Daniel Rawson of Interstate Ford and Tony Zangoglia of Sterling Truck Company. They provided handouts for the Working Group. Interstate Ford provides all types of trucks to state and local governmental agencies.

- They expressed concern about the way bid specifications are written in that only one manufacturer/vendor can supply the good/service. Recent problem after retirement of two DOT officials. Methodology of specifications writing has changed.

- DAS administers the RFP. Mr. Rawson is concerned that DAS doesn't have the appropriate staff to recognize that an agency has put together a bid proposal that can only be met by one vendor. He has complained about this situation to DOT and DAS. Bid protest was denied and no response received to two letters for an appeal.

- Suggested proposals to the problem: personnel oversight - independent oversight on bid specifications; address the issue of sole vendor/provider/source.

The next presenter was Paul Murray, Deputy Chief State's Attorney for Operations at the Office of the Chief State's Attorney.

- Mr. Murray explained the investigative subpoena and its need at the Division of Criminal Justice (DCJ). Look at the possibility of including the Chief State's Attorney within the whistleblower statute. Would assist in investigating state corruption. DCJ could establish a protocol with the Attorney General. DCJ can't use the Attorney General's subpoena for criminal purposes.

- False Claims Act is needed. Federal government has recovered over $9 billion since 1986.

- Reviewed Federal procedure. Cited the need for both the Attorney General and Chief State's Attorney to be involved in qui tam actions. A percentage of recovered funds should be returned to agencies to further pursue these cases.

The next presenter was Attorney Harold R. Burke of Casper & de Toledo. LLC.

- Opposed SB396 - the bill regarding False Claims Act. Percentage to whistleblower is not high enough. Original proposal 5%. The Federal law sets the amount between 15% and 25%.

- Attorney Burke provided handouts that further detailed his presentation.

- Fraud in government is not strictly a construction problem. It involves all areas of government.

- A qui tam provision is a necessary provision. Unsuccessful qui tam can be sanctioned for frivolous claims. Consider a Federal Rule 11 standard - where an attorney can be sanctioned for bringing a

frivolous case.

- Recommends the enactment of a False Claims Act on the state level that includes the involvement of the Attorney General and the Chief State's Attorney.

The next presenter was Richard Kehoe, Esq., Special Counsel to the Attorney General.

- Discussed qui tam proposal from last year. The Office of the Attorney General has encountered major opposition from the business community on qui tam provision. Attorney General's Office is open to percentage of recovery to qui tam relator. Proposed immunity for good faith claims. Proper resources must be dedicated to this undertaking.

- Attorney General's Office will provide statistics on the use of the whistleblower's statute.

Mr. Morano led a discussion regarding a State Oversight Board. Mr. Pepe discussed the State Properties Review Board (SPRB) and provided handouts to the Working Group. The SPRB has a limited staff reviewing over 600 transactions. It does not review construction contracts. The SPRB should expand scope to include MOUs and subleases. Average turnaround time on reviews is 7 to 11 days. DOT has serious concerns about a State Oversight Board - should have more of an audit role.

Annmarie Cooke, a retired Department of Children and Families employee, discussed a purchase service committee when purchasing human services.

Mr. Johnston, State Auditor, will provide a copy of the annual report to the legislature that contains data requested by Representative Belden.

All members of the Working Group were asked to prepare comments and send them to the Office of the Chief State's Attorney via e-mail by Monday, August 9, 2004.

The next meeting was scheduled for Wednesday, August 11, 2004, at 10 a.m. at the Office of the Chief State's Attorney.

GOVERNOR'S TASK FORCE ON CONTRACTING REFORM
Investigation, Enforcement and Compliance Working Group
Wednesday August 11, 2004

Members Present: Christopher L. Morano, chair; Representative Richard O. Belden; Donald Schubert, Esq., Connecticut Construction Industries Association; John Pavia, Esq.; Robert Jaekle and Kenneth Post, Auditors of Public Accounts; J. Carlos Velez, Department of Administrative Services; Pasquale Pepe, State Property Review Board; Ken Fargnoli, Department of Transportation.

Also attending: Paul Murray, Deputy Chief State's Attorney for Operations; John Russotto, Deputy Chief State's Attorney for Administration, Personnel & Finance; Judith Rossi, Executive Assistant State's Attorney; and Brian Austin, Assistant State's Attorney.

Chair Morano called the meeting to order at 10:15 a.m.

Chair Morano distributed a draft of the Working Group's Report, including findings and recommendations on the following issues: Disqualification of Contractors; Oversight Review Board; Whistleblower Statute; and False Claims Act. The issue of Investigative Subpoena was not treated as a separate issue but rather was subsumed in the whistleblower and false claims recommendations.

Thereafter the Working Group members and staff discussed the issues, and suggestions were made for the revisions to the draft. Members decided to include a page of ethical recommendations in the final draft.

A revised draft will be circulated to members by Friday, August 13, 2004, with comments due back by the end of that day. The final draft will be sent to the Committee Co-chairs by Monday August 16, 2004.

The meeting adjourned at 1:15 p.m.

JRR
JJR
BA

MEMORANDUM

Date: August 3, 2004

To: Chief State's Attorney Christopher L. Morano, Chairman
Subcommittee on Contracting Enforcement, Investigation and Compliance

From: Donald J. Shubert

Re: Committee Issues

The following is a response to your request for a summary of problems, causes, and suggested improvements in the state contracting system.

In general, a system that affords all contractors an equal opportunity to compete for work under fair and open competition:

- Works to divest public officials with decision making authority of discretion in the contractor selection process;
- Separates the component parts of the contractor selection system throughout the bureaucracy, so that no one area can control the selection process;
- Ensures that all parties involved in the state contracting process fully understand and abide by its uniform rules, regulations, procedures and requirements;
- Ensures that if and when exemptions from competitive bidding requirements are granted, selection processes remain fair, open, objective, cost effective and free of political influence; and
- Since procurement continues to be a dynamic process that is continuously evolving, and recognizing that highly detailed statutes tend to hinder improvement and reform, the system considers whether detailed legislation best serves the public or whether it should be controlled through detailed uniform agency procedures and regulations.

This memorandum briefly addresses three of the various issues germane to this committee:

1. State Properties Review Board
2. False Claims Act
3. Authorizing the Suspension of Contractors

1. State Properties Review Board

The former Transportation Accountability Board was eliminated because it was unworkable and expensive. See **Exhibit A.** If created, an oversight board for state contracting should perform two functions. It should provide policy and program review; and it should randomly review contracts. It should not delay the award of contracts. Any delay in the award of contracts increases costs to the state and citizens of Connecticut. For example, steel prices increased during the first quarter of this year. During that time, the award of bidded contracts was delayed because state agencies struggled to administer the Attorney General's Affidavit requirements. As illustrated by the attached graph, an analysis of the state projects that were bid, but not awarded, would obviously show the additional cost that Connecticut incurred due to the administrative delays. **See Exhibit B.** Steel is not the only building material subject to a volatile market. **See Exhibit C.** Likewise, under the state wage statutes, prevailing wage rates increase annually.

2. False Claims Act

The Task Force should consider whether a False Claims Act (FCA) could have prevented the concerns associated with the state's construction contracting system. Likewise, the Task Force should consider whether a state FCA would cost more than the benefit it yields.

A state FCA may actually apply against, if any, a small number of construction contractors, but it would deprive all others of recovery for legitimate contract claims. In Connecticut, the Office of the Attorney General is involved in negotiating and litigating construction claims brought by contractors on state projects. The threat of a FCA action would provide the Attorney General tremendous leverage in negotiations and settlement discussions during litigation. Based on previously proposed legislation, contractors will be reluctant to advance legitimate claims facing the threat of a false claims action because the potential of additional fines and penalties, combined with the public humiliation of such allegations, presents overwhelming risk to their business and reputation.

The risk is overwhelming simply because calculating construction claims is not an exact science and the FCA will be applied to penalize and threaten contractors who pursue claims without precise amounts. For example, using the same financial data, acceptable calculations for Home Office Overhead (which is only one component of damages in a construction claim) can yield results that vary by millions of dollars. **See Exhibit D.** If a contractor bases its claim on one formula, and a court or arbitration panel relies on a different formula in its decision, the contractor could be subject to an action under the FCA. An authority on construction law advises that "[t]he fine line between legitimate contract disputes and violations of the False Claims Act requires that the government carefully exercise its discretion in invoking the False Claims Act in response to a contractor's claim certification."[1] The Task Force should consider how that discretion will be applied when adversaries are negotiating and litigating construction claims. Of the mere 13 states that have False Claims Acts, four apply FCA only to medicaid. Similarly, some of the states, like the federal government, enforce the FCA through a nonpolitical officer.

The Office of the Chief State's Attorney and the Office of the Attorney General can pursue fraud against the state by construction contractors under existing laws. Providing the Chief State's Attorney with subpoena power, and increasing the fines and penalties under criminal states would provide adequate protection and deterrent without unbalancing the negotiating positions of construction contractors and the state on legitimate claims.

3. Authorizing the Suspension of Contractors

Construction contractors can be suspended and restricted from state contracting by various means.

- PA 03-215 (As Amended) The State Prequalification system administered through the Department of Administrative Services;
- The Department of Transportation Bidding and Award prequalification process;
- Termination For Convenience provisions in state contracts; and
- The Disqualification statutes, CGS §§31-57b, 31-57c, 31-57d, 4b-95(e), and PA 04-102.

Further reforms should not create additional layers of bureaucracy that invite organizational conflict and paralysis. Additionally, contractor suspension and disqualification do not have to be absolute remedies. Contracting systems in other states have had success with innovative programs such as Independent Private Sector Inspector Generals in lieu of contractor disqualification and suspension.

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[1] BRUNER & O'CONNOR ON CONSTRUCTION LAW, West Group, 2002, p.183.

EXHIBIT A

The Hartford Courant

Established 1764

The Oldest Continuously Published Newspaper in America

Michael J. Davies, Editor and Publisher

John J. Zakarian, *Editorial Page Editor* · Marty Petty, *Managing Editor* · Irving M. Kravsow, *Associate Editor* · Henry McNulty, *Associate Editor*

EDITORIALS

Forget Accountability Board

Republican legislators are rightly concerned about the $5.5 billion Connecticut infrastructure repair project. They want to make sure that the money is wisely spent.

But they need not create another layer of bureaucracy to achieve their goal. The state auditors can and should be responsible for the oversight functions. The Program Review and Investigations Committee is there to meet the challenge, if the Legislature takes it seriously. The chief state's attorney also can play an important role.

All that apparently is not enough. Under a Republican proposal that will be considered by the Legislature's Transportation Committee on Wednesday, a Transportation Accountability Board would be created with awesome and potentially paralyzing powers over the Transportation Department.

The six-member bipartisan board, appointed by legislative leaders, would include experts in transportation systems, bonding, public finance and contracts. Anyone "directly involved in any enterprise which does business with the state or directly or indirectly involved with any enterprise concerned with" Transportation Department projects would be prohibited from serving on the board.

Who, then, is left with expertise in infrastructure repairs? And what expert will agree to work on what could be a full-time job for $150 per diem up to a maximum of $25,000 annually?

Perhaps someone qualified will agree to serve, but there would be nothing to prevent him from joining the board for a year and then getting out of the revolving door to work for an infrastructure repairs contractor.

The bill would prevent the transportation commissioner from implementing an infractructure repairs plan — including regulations — without board approval. The board also would have to approve the selection of contracts and consultants.

Additionally, the board would examine the operations and performance of the department at any time. The board itself may hire consultants, technical assistants, research and other personnel.

Using the logic behind this legislation, shouldn't there also be oversight of the accountability board to make certain that its hiring policies are without fault?

When all is said and done, such a board could add many months to an already lengthy repairs timetable.

There already are checks and balances. Let the state auditors carry on their oversight functions. Give them more staff and direct the Legislature's Program Review and Investigations Committee to do what it's supposed to do and has rarely done.

DANBURY News Times - June 7, 1985

in our opinion

Glow of bipartisan compliments

The 1985 session of the General Assembly opened with much confusion, saw improvements and some accomplishments as the weeks wore on, approached chaos in its final days and ended Wednesday night in a glow of bipartisan compliments which legislative leaders exchanged among themselves and with Governor William O'Neill.

Some bad measures got through, in addition to the one discussed above. Many good bills were dumped, through either committee or leadership action. All of this, of course, is normal in any legislative session.

Particular interest had centered on how well the Republicans, controlling the House and Senate for the first time in more than 10 years, would get along with Democratic Governor William O'Neill. On the whole, it went well.

Much of that was due to the fact that unexpectedly high sales and corporation tax receipts in recent years put the state is the highest surplus condition it has ever enjoyed.

Of special interest to local taxpayers were the steps the Legislature took in accepting two O'Neill plans — revenue sharing and an infrastructure repair fund — but modifying them to a considerable degree in their financing and in the amounts individual cities and towns will receive.

Additionally, the Republicans tacked onto the infrastructure fund a measure that adds another level of bureaucracy to state government, an accountability board to oversee the state Department of Transportation. Here is another example of legislators passing the buck to someone else instead of insisting that committees exercise proper oversight of government operations.

Furthermore, experience in public works construction has shown that adding new layers of bureaucracy creates delays, piles up costs and poorly serves the taxpayers of the state. The amendment did not belong on a bill designed to help local communities.

Some of the mixtures of good and bad will not be fully understood until the exact wording of assorted public laws has been determined and until the governor has had the opportunity to decide which bills he will sign and which he will veto.

All in all, the 1985 session turned out better than its early weeks had indicated it would.

Danbury News Times 7/16/85

News Times 7/16

A mistake doubled

Governor O'Neill was right to veto a public works aid bill for cities and towns because Republican legislative leaders had attached to it an amendment setting up a so-called Transportation Accountability Board.

They did so in the apparent belief the governor would not veto a measure which was similar to one he had proposed urging state aid for local infrastructure repairs.

The governor was also right to ask the General Assembly to enact a new aid program at the brief special session he called for next Monday.

But he was wrong to suggest that the Legislature enact a new transportation accountability board without the features of the amendment to which he objected.

The governor also made a mistake in signing the badly-flawed measure calling for another level of legislative bureaucracy, an office of inspector general.

The General Assembly already has two committees that should concern themselves with accountability in transportation matters. One is the Transportation Committee, which has specific oversight of the Department of Transportation, and the other is the Program Review and Investigations Committee.

Connecticut does not need more bureaucracy in either the legislative or executive branch of state government. It needs to make better use of the tools it already has.

TAB, as its Republican sponsors like to call the proposed new board, is nothing more than a gimmick that will diffuse rather than improve responsibility and, in the long run, will lead to unnecessary expense and confusion.

A few years from now, legislators will be working on steps to reverse these gimmicks, just as the current Legislature had to undo the earlier decision to eliminate front license plates.

June 6, 1985

Norwich Bulletin

(203) 887-9211 • 66 Franklin St., Norwich CT 06360

Ricki W. Smith
Publisher

William F. Mungo, Jr.
Editor

Mal Morse
Editorial Page Editor

The editorial board of the Norwich Bulletin meets weekly. Additional members include Nancy Gallinger, managing editor, Marleah Ross, assistant editorial page editor, and Doug MacGregor, editorial cartoonist.

Established 1791

A Gannett Newspaper

In our opinion:

The legislature's Frankenstein

In a classic demonstration of the herd instinct, both Democrats and Republicans participated this week in the creation of a brand new, potentially costly, useless and duplicative bureaucracy. In doing so, both relinquished any claim to careful husbandry of state resources.

Beginning in April, 1986, the office of Inspector General will come into being with a budget for a single quarter of $100,000 to pay for the IG plus up to six assistants. But it is not a single quarter trial period. The Inspector General will be appointed for five years.

The annual budget of $400,000 or more will be only a start. It is inevitable that the new Inspector General will look at the competition, the state auditors' office, and envy its staff of 87 and budget of $3 million. Since the two offices are designed to do precisely the same job, there will be an argument for matching the staff of one with the other.

It is uncertain what the Inspector General's function will be, other than a vague mission of rooting out corruption, waste and mismanagement. The IG will come complete with powers to command presentation of state documents and to burrow into all state records. But the bipartisan auditor's office already does that.

To be sure, the auditors do not always catch corruption, although they are pretty sharp about waste and mismanagement. The difficulty record the fact on official documents.

Where corruption is discovered, it is usually the work of a whistle-blower, a disgruntled person within the agency who has first hand knowledge of misconduct. The legislature itself, through its standing committee on program review and investigations, is supposed to monitor whether agencies are capably carrying out state policy.

Useless as it may be, the Inspector General's office will probably create a brand new set of problems. Simply, who will inspect the inspectors? Given their power to destroy by accusation and innuendo, how will they be isolated from the temptations of power — selling indulgences and wearing blindfolds where the price is right?

The Republicans have already demonstrated their own lack of faith in the Inspector General's office. They have also created, for another $400,000, an accountability board to do precisely the same job for the projects of the Department of Transportation.

There can be no backtracking now. Responding to previous Republican pressure, Gov. O'Neill this year put money for an Inspector General in his own budget. The Republicans, not to be robbed of their self-image of corruption-busters, went along with a few modifications. So the new bureaucracy will be in place by next year, fertilized and ready to grow. Few bureaus, once entrenched, whether

Danbury News Times (85)

in our opinion

Plus-minus legislative session

The lengthy reviews of actions taken by the 1985 General Assembly, featured on Page 1 and in the Focus section of Sunday's News-Times, showed the session was like many of its predecessors, scoring some hits, some misses and leaving plenty of things to be taken up in the "short" session, beginning next February.

For the first time in more than a dozen years, the 1985 session had the luxury of operating with the state treasury in a substantial surplus condition.

That surplus occurred because business activity and employment have been at particularly high levels in Connecticut the past couple of years, resulting in hefty increases in sales tax and corporation tax revenues.

Some of the credit for this flush condition goes to prior legislatures which authorized high technology programs, expansion in state development activities and other steps to improve Connecticut's economy.

Because of the confusion which marked the handling of amendments in both houses on the last legislative day, and also during the two days preceding it, the final outcome of some pieces of legislation will not be known until they have been engrossed and presented to Governor William O'Neill.

Those he vetoes, either because he disagrees with their terms, or because he finds them legally flawed, will go back to the "trailer" session when it is called in July.

Republicans, who controlled both houses this session for the first time since the 1974 session ended, have an exact two-thirds majority in the Senate, but fall short of that majority needed to override a veto in the House.

One of the bills that was made worse by the amending process in the final few days, that setting up the unnecessary office of inspector general, clearly calls for a gubernatorial veto.

Few will disagree with the steps the House and Senate took to reduce the impact of state taxes imposed as a result of the lean days of the 1981-82 recession, as well as during some of the downturns in the 1970s.

Instead of cutting the too-high state sales tax by a half percentage point as the governor recommended, legislators decided to apply a $50 exemption to clothing effective April 1 and to increase it $75 on Oct. 1. They dropped the sales tax on nonprescription drugs and seeds and fertilizer for home use and eliminated 2 percent tax on home heating oil.

Also reduced was the impact of the taxes on dividends and interest and on utility companies providing domestic gas and electricity.

But along with these and other pluses were a number of minuses.

These included steps to make state government more complex. New funds were established outside the general and the transportation funds.

In addition to the duplicative, unnecessary and potentially expensive office of inspector general, the General Assembly put an amendment on a special fund for municipal infrastructure aid (to be taken from current surplus) to create a so-called accountability board to oversee the Department of Transportation. If history is any guide, that will lead to extra costs and long delays in accomplishing road and bridge repairs that nearly everyone in the state agrees are needed.

The Legislature also set up a special, partisan committee to probe the Judicial Department. Why legislative leaders did not trust the Joint Committee on the Judiciary to do its job in this respect says something — either about the makeup of the Judiciary Committee or the intent of the leadership to keep the limelight on itself.

Particularly distressing was the manner in which the Legislature played around with or even rejected gubernatorial nominations for political considerations or even of a leader's pique, with no regard for the devoted service that the nominees — particularly the state Board of Education chairman, June Goodman of Danbury — had provided for many years to fellow citizens of the state.

As we noted in a Sunday editorial concerning the dumping of Donald F. Friedman of Storrs from the Freedom of Information Commission, this type of action sends a chilling message to those who volunteer their services on state agencies and commissions.

The record of the 1985 session would have been a better one if these distressing incidents had not occurred.

The ADVOCATE
Founded in 1829 | Steven Isenberg

Politics at a gallop

The special session of the General Assembly that began and ended last week was a topsy-turvy affair of posturing, procedure, and politics.

Gov. William A. O'Neill's tenacious attempt to keep a transportation accountability board out of a bill on public works aid failed in the face of an equally tenacious campaign by Republicans to get it in. The approval of $20 million in public works assistance, with a somewhat altered transportation board as a companion, was a victory for House Speaker R.E. Van Norstrand of Darien and his fellow Republicans.

If the new board does what Mr. Van Norstrand hopes, namely "cut down the tie, the linkage, of political contributions to contracts," well and good. If it does what Mr. O'Neill feared, that is create red tape and delay millions of dollars in projects, then not good at all.

Getting accountability from the state Department of Transportation is a good idea, but only good management can insure that, and creating a new board will not insure anything. At best, the oversight is likely to be harmless, provided that it doesn't throw up obstacles to getting important projects off the ground. But it's not likely to do much to improve the recruiting, hiring, and training of competent supervisors.

If partisan politics ran through the debate on the transportation board, they were at a full gallop on the governor's attempt to expand the agenda to include an $18.2 million increase in general revenue sharing. It evolved, through a maze of procedural squabbling, into a question of who would get to play Santa Claus in July.

Republicans challenged the way O'Neill issued a hasty second call. They toyed with a scheme to call another special session next month. That way they — not a Democratic governor — could be the ones to decide how to spread surplus money around the state.

The legislators eventually adjourned without ever debating the governor's revenue-sharing proposal. As they went home, it seemed unlikely that much would be done about the surplus for awhile. Which only goes to show that a line of politicians forms quickly to take credit, but it's ever so slow to disperse.

DANBURY News Times - June 7, 1985

in our opinion

A bad bill made much worse

A badly-flawed and unnecessary bill setting up a new layer of legislative bureaucracy, the office of inspector general, passed the Connecticut House and was taken up in the Senate on the day before adjournment.

It clearly needed amendment if it was to be passed at all. So the Senate amended it — and made it worse.

And then, in an apparent effort to show the public that the Legislature "did something" about a problem that should not exist if legislators did their job, the House accepted the Senate amendment and passed the bill before sine die adjournment Wednesday night.

We call on Governor O'Neill to veto this monstrosity because, as its chief House sponsor admits, the measure does nothing more than attempt to correct failures by her and other legislators to provide proper oversight of state government.

Since colonial times, the Connecticut General Assembly has had at its beck and call two bipartisan state auditors whose system of riding herd on the handling of state funds has been the envy of many other states.

The big problem has been the unwillingness of legislative committees and of legislators, individually as well as collectively, to respond to the continuing stream of recommendations that the auditors issue.

"The auditors are doing a fine job," Rep. Maureen Baronian of West Hartford, the chief House sponsor, said during Wednesday's final debate. But she said legislators have been "less than enthusiastic" in responding to auditors' suggestions.

Just how a new political appointee with a new bureaucratic staff is going to make legislators in the future more enthusiastic about government oversight than Mrs. Baronian and other legislators have shown themselves to be in current and recent sessions was not explained.

The amendment added by the Senate had the temerity to attempt to provide a public perception that the new appointment would be a nonpolitical one. It did this by drawing the two bipartisan auditors into the process.

If it was not such a smokescreen, then it was an attempt to pass the buck of blame just in case the new office or the person chosen to fill it does not work out the way the bill's sponsors claim.

The Senate's contorted amendment, which the House swallowed, provides that three candidates for the inspector generalship be selected by the Legislative Management Committee, that the auditors then recommend one of these to the Executive Nominations Committee and that the latter submit its report to both House and Senate.

One party or another controls and in future years will continue to control each of the committee and each house, so the supposed aura of bipartisanship really will not exist.

State Auditor Leo V. Donohue has already announced that he will not participate in such a charade if the bill should become law. Donohue, a Democrat, has spent his adult life in state service, rising from a beginning accounting position to commissioner of finance and control in 1969, and is in his second stint as one of the two auditors of public accounts since 1971.

His Republican counterpart, Henry C. Becker Jr., who has served in that post since 1967, also takes a dim view of the inspector general bill.

"This is Austin McGuigan's legacy as he leaves office," Becker has said, referring to the fact that the controversial chief state's attorney suggested the office to legislators who sponsored the bill.

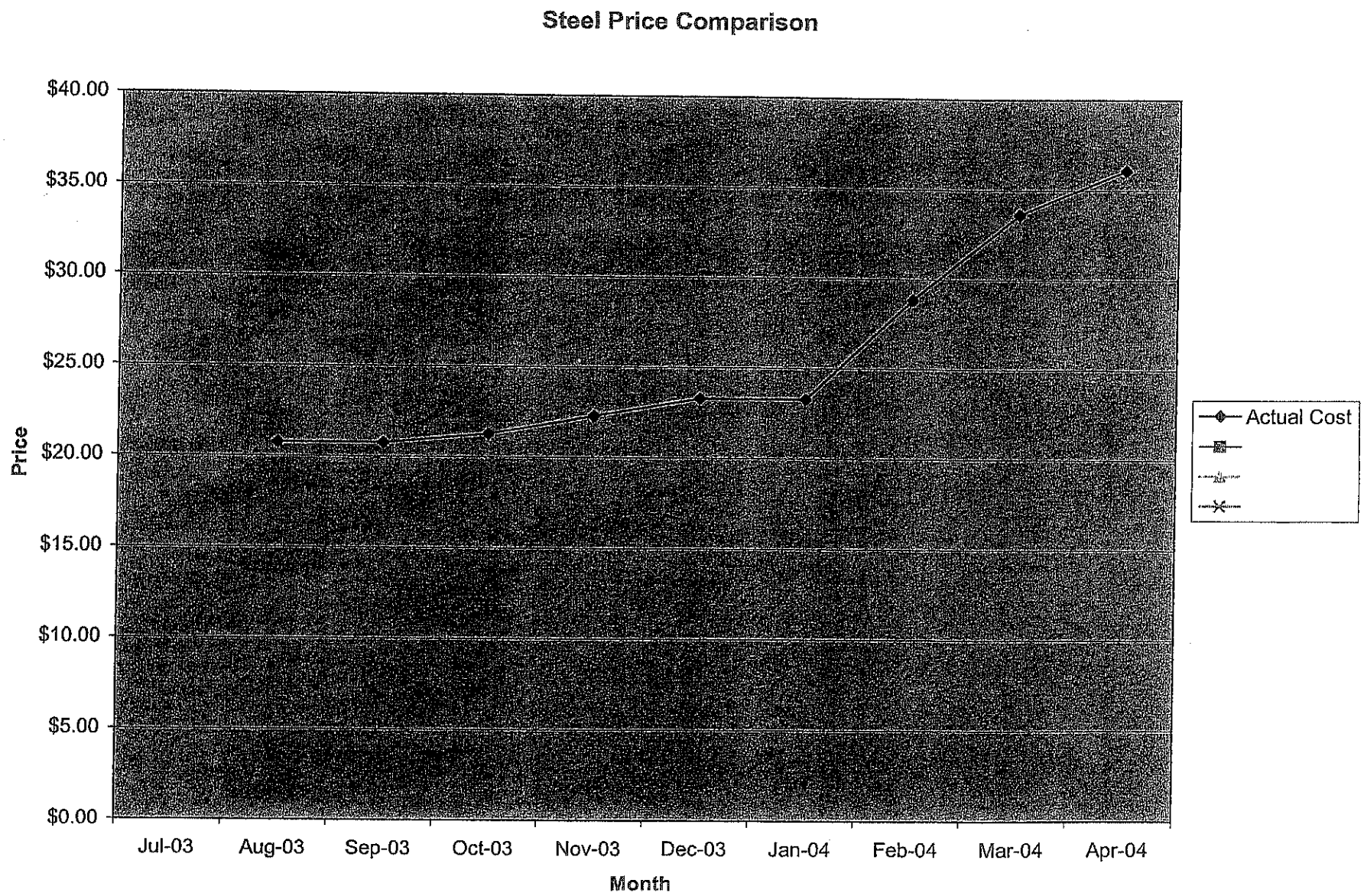
Becker also said he didn't see the need for subpoena power, which is supposed to be one reason for having an inspector general. As he pointed out, if the Legislature wants to review documents, it already has the power to do so. He also noted that state law gives auditors the power to review all state operations.

Neither the chief sponsor of the bill nor the two chairmen of the Judiciary Committee who reported it out could clear up the confusion, let alone give satisfactory answers, when questions were raised on the floors of the House and Senate.

The General Assembly has the tools it needs to provide proper supervision of state government. Creating a new bureacuracy will not cure the failure to use those tools properly.

Governor O'Neill should veto this confused, expensive and unnecessary bill.

EXHIBIT B


Steel Price Comparison
$40.00
$35.00
$30.00
$25.00
$20.00
$15.00
$10.00
$5.00
$0.00
Price
Jul-03
Aug-03
Sep-03
Oct-03
Nov-03
Dec-03
Jan-04
Feb-04
Mar-04
Apr-04
Month
Actual Cost

	Jul-03	Aug-03	Sep-03	Oct-03	Nov-03	Dec-03	Jan-04	Feb-04	Mar-04	Apr-04
Actual Cost		$20.75	$20.75	$21.25	$22.25	$23.25	$23.25	$28.85	$33.60	$36.10

EXHIBIT C

From the Chief Economist—

Ken Simonson
Chief Economist
Associated General Contractors of America
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July 7, 2004

The Big Build-Up: Growing Pressure on Construction Materials Prices and Supply

So far, 2004 is shaping up as the year of living dangerously for construction contractors. After several years of flat or falling prices, abundant supplies, and prompt deliveries, none of these conditions is a certainty any more.

This paper discusses what the economic developments that have made materials so pricy and/or scarce, the specific factors affecting several key materials, and the outlook. Information is based on visits with contractors and suppliers around the country, conversations with supplier associations, news articles, and calls, emails, and faxes to AGC.

What in the World Is Going on?

Each material has special factors affecting its price and availability. But all are affected as well by the strong economic growth that is occurring in many parts of the world and by a shift in the past several years to hold smaller inventories.

The favorite one-word explanation for materials shortages is "China." It is true that China's enormous economy is growing rapidly and that the country is resource-poor and must rely on imports for many goods. However, China's growth alone is not enough to cause such tightness.

The broadest measure of output (and, by implication, demand for goods and services) is "real" (net of inflation) gross domestic product (GDP). China's real GDP has been growing at 8-10% per year. But so has India's. Japan achieved a 6% real GDP growth rate, at a seasonally adjusted annual rate, in the first quarter of 2004. (Seasonal adjustment is a statistical technique for removing normal seasonal variation to show the underlying growth rate. Annual rate means grossing up a month-to-month or quarter-to-quarter change to allow comparisons to full-year periods.) As large consumers of raw materials and labor-intensive products, all of these economies have been importing goods from elsewhere in Asia (and around the world) , adding to growth in other countries.

The United States also is consuming larger amounts. Real GDP grew more than 6% in the second half of 2003, the fastest half-year growth rate in nearly 20 years. The expansion slowed slightly in the first quarter, to 3.9%. It appears that second-quarter growth was also in the 4-5% range.

Growth is occurring at a time when "just-in-time" has replaced stockpiling "just in case". Inventory/sales ratios have dropped steadily through the recession and, now, the expansion in the U.S. Meanwhile, employment in trucking and rail dropped by 6% and 8%, respectively, from late 2000 to early 2003. As a result, when sales accelerated through 2003, inventories were neither on hand nor further up the supply chain. If supplies existed elsewhere, ships, trains, or trucks may have been lacking to bring goods where they were needed.

Beyond those common factors, there are individual circumstances for each material. These are discussed in turn for steel, cement, petroleum and natural gas, wood products, and gypsum, with brief comments on other materials, labor, and insurance.

Steel

Worldwide overcapacity in steelmaking led to the bankruptcy or closure of more than 30 steel companies in North America from 2000 to 2004. Selective tariffs imposed by the Bush Administration did not stop the bankruptcies but may have led some foreign steel producers to turn away from the U.S. market. Beginning in early 2003, the price of scrap iron and steel rose steeply as China bought all the scrap it could find ships to carry. (The producer price index, or PPI, for scrap rose 90% from March 2003 to March 2004.) "Mini-mills," which use electric arc furnaces to turn scrap into new steel that fabricators make into structural components, began passing on the higher scrap prices in "scrap surcharges" in early 2004. "Integrated" steel mills, which make steel from coking coal, limestone, and iron ore in blast furnaces, also raised prices somewhat after a disastrous fire in the Pinnacle Coal Mine in West Virginia cut the supply of coal used to produce coke.

Fabricators, in turn, passed the surcharges along to contractors, notwithstanding the "firm" prices the contractors thought they had been quoted upon award of their bids. Because the lead times are long for many types of structural steel and construction contracts often have stiff penalties for late completion, contractors had no choice

but to accept the unexpected surcharges. Subcontractors seeking products as diverse as studs, sprinkler pipe, and guardrail found supplies especially tight, with rumors of allocation rampant.

By April, scrap supplies had picked up and the PPI for scrap fell 10% that month and 16% in May. However, demand for finished steel has been strong enough to enable steelmakers to push up prices by more than the drop in scrap costs.

Opinion differs as to whether structural steel prices have finished rising or the increases are merely less frequent now than they were earlier in the year. But the damage to contractors' profits is clearly ongoing, because many projects that were bid before prices went up are just starting to use steel that now costs much more.

Worldwide supplies of steel are ample, and shipping rates are starting to ease. Orders for durable goods, the major non-construction use for steel, have declined for two months in a row, while private nonresidential construction remains in a slump. Therefore, it appears steel prices are more likely to retreat than to rise much more over the next 12-18 months.

Cement

Most cement consumed in the U.S. is domestically produced. But nearly one-quarter of the 2003 consumption was imported. Coastal states derive as much as 30-50% of supplies from abroad.

In 2004, demand for ships to haul a variety of materials and products to Asia and elsewhere has driven up shipping rates beyond the price that is affordable for hauling cement. Greece, which supplies some cement, reportedly is holding up shipments now to assure sufficient local supply for Olympic construction.

The cement shortage is acute in Florida. The state is a large importer of cement. In addition, a plant in Miami broke down for several weeks this spring. Demand is high because of a booming housing market that uses more cement than most residential markets, partly for hurricane resistance. Nonresidential construction in Florida appears to be doing better than in the nation as a whole, with Florida's construction employment up 5% in the year ending April 2004, double the national growth rate for construction employment.

A June 8 "Flash Report" from the Portland Cement Assn. (www.cement.org) stated that 23 states "reported evidence of a shortfall in cement supply, and these states accounted for 48% of total United States cement consumption during 2003. A follow-up email on June 23 added Arizona, Pennsylvania, New Jersey, and Delaware to states "now in shortage condition. Many of the states in the Great Lakes areas report extremely tight supply and are likely to gain shortage status in a month to six weeks. Clearly, shortage conditions are spreading and will probably continue to spread through summer."

Domestic capacity is being added slowly but many localities resist opening or expanding cement plants. Transport is a problem at the moment with tight capacity for trucks and congestion in some rail hubs. One other possible source of additional supply is Mexico. Mexican cement is subject to a $57/ton anti-dumping duty. Cemex is reported working on a settlement with the Commerce Department to remove the duty; AGC, the National Assn. of Home Builders, and Rep. Mark Foley (R-FL) have separately written Commerce Secretary Evans to seek suspension or removal of the duty.

Cement prices have risen 5-20% in many markets. The supply-demand balance looks as if it will grow increasingly precarious through the current construction season unless housing demand drops sharply. Prices are likely to rise further in 2005.

Petroleum and natural gas

Petroleum shows up directly in asphalt paving and roofing materials. Diesel fuel is a significant operating cost for offroad construction equipment, construction trucks, and the freight charges on delivery of materials. Natural gas is the raw material for polyvinyl chloride (PVC) pipe and some insulation and roofing materials. Both fuels are used in producing energy for processing construction materials.

Oil prices are expected to remain volatile. Any number of foreign interruptions (from strikes, terrorism, war, natural disasters) or domestic refinery or pipeline breakdowns can cause price spikes, because supply and demand are closely balanced. However, there does not appear to be an upward bias going forward.

Natural gas prices are currently 15-20% below their peaks of the past two years. Supplies are tight, with significant growth in demand from residential, utility, and industrial users expected. Domestic supplies are being depleted. Several liquefied natural gas importation facilities are in various stages of approval or planning but supplies will increase gradually at best in the next few years. Thus, prices can be expected to rise but with frequent backtracking.

Wood products

Oriented strand board (OSB) and plywood prices have traced a line as jagged as the saw used to cut them, with an upward tilt. Prices approached a five-year high last September, dropped halfway back to their springtime

low by December, then passed the earlier peak this spring. Softwood lumber also has been volatile. The outlook is for more of the same, although resolution of longstanding disputes with Canada or a housing slump could bring prices down. Most nonresidential construction does not use much wood.

Gypsum

Suppliers of gypsum wall board in New Jersey and Florida reported this month that they expect customers to be on allocation later this year. Suppliers in Minnesota and Kansas report double-digit price increases but no shortages. Demand is currently driven by new housing and home improvements. A pickup in commercial construction will exacerbate the situation unless housing demand slackens.

Other costs

Copper, aluminum, and insulation costs have risen in recent months as a result of both domestic and global demand. Historically, these costs have been cyclical, with no long-term upward bias.

The most important cost for most contractors is labor. For the past three years, wage costs have been very moderate. Even in the past few months, increases in payroll employment have not been sufficient to bring overall employment back to pre-recession levels. There is no sign of an upward tilt emerging in wages. Health care costs, the most important benefit cost, are showing signs of moderating slightly from the double-digit increases of recent years but are likely to grow more than 5% again in 2005.

Insurance and surety (for public projects) costs have risen by large amounts in each of the past three years. Costs for some lines of insurance are now flattening or falling slightly. But contractors have yet to report any leveling. Insurance will probably go up for at least one more year.

Conclusion

Contractors have gone from an era of largely stable prices to extreme and unexpected volatility. Because owners, and many contractors, remain unwilling to share the risk of volatility, the burden is likely to remain with contractors, some of whom have insufficient ability to afford price spikes. The steel price spike has caused surprisingly few business failures so far, but the next spike or product shortage could push firms weakened by unbudgeted steel costs out of business. Thus, even though the outlook is for slow improvement in the number of nonresidential construction projects, not all contractors will be able to benefit.

EXHIBIT D

CM eJOURNAL
August 2001

CALCULATION AND RECOVERY OF HOME OFFICE OVERHEAD

BY JAMES G. ZACK, JR.

ABSTRACT

When construction is delayed by owner-caused actions, contractors request compensation for the delay. It is difficult to reach agreement on the causes and extent of delay and even tougher to agree on the cost of delay, especially the component costs of home office overhead. This is due, in part, to the lack of a single, accepted method of calculating home office overhead. This paper explores nine methods of calculating such damages and shows the results of each. It also discusses the new rules developed by Federal Courts and Boards of Contract Appeals concerning the recovery of "unabsorbed overhead".

INTRODUCTION

Owner-caused delay, or delay brought about by owner-assumed issues, is common on construction projects. Delay may have many sources, including directed or constructive changes, delays in furnishing owner-provided equipment or materials, differing site conditions, slow responses to shop drawing submittals or requests for information, for example. Despite the number of reasons for owner-caused delay, the result is almost always the same. Contractors typically request an equitable adjustment to the contract to compensate them for both time and cost. It is often difficult for owners and contractors to reach agreement on the cause(s) of delay. Contractors tend to view most delays as the responsibility of the owner. Owners, on the other hand, often try to establish the delay as either third party-caused or concurrent delay, either of which results in excusable, non-compensable delay. Proper delay analysis usually sorts out this argument.

Once agreement is reached concerning the cause of the delay, the argument turns more technical. What is the extent of the delay? Due to the complexity of modern day scheduling and multiple ways to perform delay analysis, negotiations over the extent of a delay are often difficult. Delay analyses performed by two different parties, on the same incident, can yield results substantially at odds with one another. Generally, however, if both the owner and the contractor stay focused on resolution, some agreement can be reached on both the extent of delay and quantification (i.e., non-excusable, excusable, compensable and concurrent).

The issue is now settled, right? Wrong! The argument now turns to financial impact. That is, what is the cost of a day of compensable delay? Provided that the contractor maintains reasonably good job-cost records, determining daily field-office overhead (FOOH) costs is not terribly difficult. However, in owner-caused delay situations, contractors frequently seek recovery of extended or unabsorbed home-office overhead (HOOH). This is where negotiations often deadlock. Why? There is no **standard** accepted way of calculating

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HOOH. Most contractors want to use formulas to calculate their damage. Most owners, on the other hand, want to see "real damage" based on some sort of audit – "Prove that your overhead increased as a result of my delay!"

This paper discusses the HOOH issue. What is HOOH? What are typical cost elements of HOOH? How is HOOH generated or recaptured under normal circumstances? The paper identifies nine different formulas which have been used in construction litigation in the United States and Canada and applies all nine formulas to the same delay situation to demonstrate the wide variance in resulting cost recovery. The paper also discusses some relatively new rules developed by Federal Courts for use on U.S. government contracts concerning the recovery of unabsorbed HOOH.

HOME OFFICE OVERHEAD – WHAT IS IT?

HOOH is generally described as company costs incurred by the contractor for the benefit of all projects in progress. This is the actual cost, which is an essential part of the cost of doing business.[1] These are costs that cannot be directly allocated to a project. This definition excludes those costs incurred by the contractor solely in support of a single project or group of projects. Typical examples of HOOH discussed in the industry include:

- Executive and administrative salaries
- Home office rent and expenses
- Company insurance
- Utilities, telephone, fax and computers for the home office
- Travel for home office staff
- Depreciation of company assets
- Professional fees
- Bid and proposal costs
- Legal and accounting expenses
- Marketing, sales and advertising
- Recruiting costs
- Human relations costs
- Interest on company borrowings
- Bad debt
- Entertainment
- Contributions

The following are three definitions that are important when dealing with HOOH:

- Normal Home Office Overhead % - The company's typical HOOH percentage based on past year audit or accounting.
- Actual Home Office Overhead % – The company's actual home office overhead percentage during the year(s) of the project, again based on audit or company accounting.
- Actual Home Office Overhead % Delay Period – The company's actual HOOH percentage solely during the period of the delay.

[1] Schwartzkopf, William, John J. McNamara and Julian F. Hoffar. 1992. Calculating Construction Damages. New York, NY: John Wiley & Sons, Inc.

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There are few regulations concerning accounting for HOOH costs. Contractors are reasonably free to account for such costs in whatever manner they choose. They must, however, use the same system at all times and on all contracts. While Federal Acquisition Regulations (FAR) limit the recoverability of some types of HOOH costs, these limitations apply only to contracts directly with agencies of the Federal government.[2]

In analyzing delay costs, one must distinguish between HOOH costs (those that support all projects) and FOOH costs (those that support a single project or group of projects). In performing such cost analysis, one must also guard against the possibility of "double dipping", accounting for the same costs twice. An example is a home office estimator who is assigned to a project for a few weeks to resolve a series of changes. If the estimator is typically accounted for in home office costs, they should not be charged to the project. If the estimator is charged to the project, over-recovery will occur if the normal HOOH rate is applied since the estimator's cost will be included twice.

INCLUSION AND RECOVERY OF HOME OFFICE OVERHEAD

HOOH costs are generally added during bidding to the contractor's estimate of direct costs and field overhead costs. HOOH is typically added as a single percentage number – that is, "Let's use 7.5%!" Of course this single multiplier actually includes home office costs, contingency and profit, unless another line item is added to the bid takeoff to account for these other numbers. That is how HOOH enters the budget.

How is HOOH typically recovered on the normal job? Few contracts have a pay item for overhead and profit. Most contracts tell the contractor to spread or allocate their overhead and profit costs across all pay items in the schedule of values. Setting aside the issue of unbalanced bid breakdowns, the contractor is expected to spread their overhead and profit cost uniformly across all pay items in the contract. Thus, when a contractor accomplishes pay-item work, they recapture both the cost of the work and the overhead and profit allocated to that work.

That gets the overhead and profit into the contractor's job cost accounts. But, one step in this financial transaction remains. The contractor must move part of the money received from the project job-cost records to the corporate accounts in order to pay for HOOH costs. This is typically accomplished by cost adjustments moving funds from project costs to corporate overhead. This completes the financial transaction.

HISTORY OF HOME OFFICE OVERHEAD RECOVERY IN DELAY SITUATIONS

The recovery of HOOH as a result of compensable delay is not new law. In fact, as far back as 1941 Federal courts awarded recovery of HOOH to a contractor for a

[2] 48 C.F.R. (Code of Federal Regulations) §§31.205-1 to 31.205-23 (1990)

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government-caused delay in *Herbert M. Baruch v. United States*.[3] This court did not, however, discuss how the HOOH costs were calculated. In 1945, a Federal court again addressed the issue of HOOH in *Fred R. Comb Co. v. United States*.[4] Here, as a result of a government-caused delay the court awarded "increased office overhead" as part of the damages due to site unavailability. In this case, the decision did include a formula for calculating HOOH, and this formula looked remarkably like the Eichleay Formula used oftentimes today.

The landmark case in the area of HOOH is the *Eichleay Corporation* case decided in 1960.[5] In this case, the Armed Services Board of Contract Appeals (ASBCA) concluded that there were multiple work stoppages for which the government was responsible. The ASBCA concluded also that HOOH costs continued during the suspension periods; that the Eichleay Corporation was unable to take on new work during these periods to replace lost project revenue; and, thus, had to absorb the unrecovered HOOH costs. The keys to the *Eichleay* decision appear to be as follows:

- A contractor is entitled to compensation for unabsorbed HOOH resulting from owner-caused delay, if they meet certain criteria.
- There is no exact accounting method for calculating unabsorbed HOOH.
- A fair, realistic cost estimating formula is necessary to determine the compensation owed.

Thus, the *Eichleay* Formula was born, a creature of the Boards of Contract appeals. There has been continuous controversy concerning this formula almost from the outset. Some courts have accepted it at face value – Virginia, for example.[6] Other State courts have adamantly refused to use *Eichleay* – New York, for example.[7] And, many have tried to substitute other formulas in place of *Eichleay*.

DOES IT MATTER?

As a result, there are at least nine formulas that have been used, with varying degrees of success, in litigation in the United States and Canada. Now, if these formulas are all "fair, realistic methods" of estimating damages then it should not matter which formula is used, should it? To get an answer to this question, let's look at the same case using all eight formulas. For the purposes of this paper, we will use the case set forth below.

ABC Construction, Inc. – Contract and Financial Data

Total Firm Revenue: Original Period	$247,711,967

[3] 93 Ct. Cl. 1078 (1941)
[4] 103 Ct. Cl. 174 (1945)
[5] ASBCA No. 5183, 60-2 BCA (CCH) ¶2688 (1960)
[6] *Fairfax County Development and Housing Authority v. Worcester Brothers Company*, 257 Va. 382 (1999)
[7] *Berley Industries v. City of New York*, 45 N.Y.2d 683 (1978)

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Total Firm Revenue: Actual Period	$381,095,333
Total Labor Cost: Actual Period	$137,194,333
Original Contract Value	$ 68,500,000
Total Contract Value (before claim)	$ 76,866,128
Billings: Original Period	$ 69,753,854
Billings: Actual Period	$ 76,866,128
Billings: Delay Period	$ 7,112,274
Labor Costs: Delay Period	$ 2,560,419
Company Overhead: Original Period	$ 16,265,000
Company Overhead: Actual Period	$ 28,918,417
Total Overhead & Profit: Actual Period	$ 37,156,795
Planned Contract Duration	365 calendar days (cd's)
Actual Duration	655 cd's
Extended Duration	290 cd's
Owner-caused Delay	235 cd's
Planned Overhead & Profit % at Bid	7.0%
Normal Home Office Overhead %	4.5%
Actual Home Office Overhead %	5.3%
Actual Home Office Overhead %: Delay Period	6.1%

Let's look at the same case using all eight formulas to see if the results are reasonably close.

EICHLEAY FORMULA[8]

The original *Eichleay Formula* enunciated in 1960 follows.

$$\frac{\text{Contract Billings}}{\text{Total Billings for Actual Contract Period}} \times \text{Total Company Overhead During Actual Contract Period} = \text{Overhead Allocable to Contract}$$

$$\frac{\text{Allocable Overhead}}{\text{Actual Days of Contract Performance}} = \text{Overhead Allocable to Contract/Day}$$

$$\text{Daily Overhead Rate} \times \text{Days of Owner-Caused Delay} = \text{Home Office Overhead Owed}$$

This formula attempts to allocate HOOH for the entire contract period first to the project and then recalculate it on a daily basis to determine the compensation owed. Using the numbers from the above tables, here are the results:

[8] *Eichleay Corporation,* ASBCA No. 5183, 60-2 BCA (CCH) ¶2688 (1960)

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$\frac{\$76,866,128}{\$381,095,333}$ x $28,918,417 = $5,832,787

$\frac{\$5,832,787}{655 \text{ cd's}}$ = **$8,905/cd**

$8,905 x 235 cd's = **$2,092,675**

MODIFIED EICHLEAY FORMULA – VARIATION 1[9]

The first modification to the *Eichleay Formula* is set forth below:

$\frac{\text{Contract Billings}}{\text{Total Billings for Original Contract Period}}$ x Total Company Overhead During Original Contract Period = Overhead Allocable to Contract

$\frac{\text{Allocable Overhead}}{\text{Original Days of Contract Performance}}$ = Overhead Allocable to Contract/Day

Daily Overhead x Days of Owner-Caused Delay = Home Office Overhead Owed

This formula attempts to allocate HOOH for the **original** contract period first to the project and then on a daily basis to determine the compensation owed. But, it assumes that the HOOH rate from the original contract period should hold the same even during the delayed period. Using the numbers referenced above, here are the results:

$\frac{\$76,866,128}{\$247,711,967}$ x $16,265,000 = $5,047,095

$\frac{\$5,047,095}{365 \text{ cd's}}$ = **$13,828/cd**

$13,828 x 235 cd's = **$3,249,580**

[9] *Capital Electric Co. v. United States*, 729 F.2d 743 (Fed. Cir., 1984) and *Gregory Construction, Inc.*, ASBCA No. 35,960, 88-3 BCA(CCH) ¶20,934 (1988)

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MODIFIED EICHLEAY FORMULA – VARIATION 2[10]

A later variation of the *Eichleay Formula* follows:

$$\frac{\text{Contract Billings}}{\text{Total Billings for Original Contract Period + Contract billings for Extended Period}} \times \text{Total Company Overhead During Original Contract Period} = \text{Overhead Allocable to Contract}$$

$$\frac{\text{Allocable Overhead}}{\text{Original Days of Contract Performance}} = \text{Overhead Allocable to Contract/Day}$$

$$\text{Daily Overhead} \times \text{Days of Owner-Caused Delay} = \text{Home Office Overhead Owed}$$

Like the first variation to *Eichleay*, this formula attempts to allocate HOOH for the **original** contract period first to the project and then on a daily basis to determine the compensation owed. It adds into the calculation the value of contract billings during the extended period in an attempt to compensate for overhead costs spread over a longer period of time. With the real numbers from the above referenced case, here are the results:

$$\frac{\$76{,}866{,}128}{\$254{,}824{,}241} \times \$16{,}265{,}000 = \$4{,}906{,}240$$

$$\frac{\$4{,}906{,}240}{365 \text{ cd's}} = \mathbf{\$13{,}442/cd}$$

$$\$13{,}442 \times 235 \text{ cd's} = \mathbf{\$3{,}158{,}870}$$

HUDSON FORMULA[11]

The *Hudson Formula* is set forth below:

$$\text{Planned Home Office Overhead \& Profit \%} \times \frac{\text{Original Contract Sum}}{\text{Original Contract Period}} = \text{Allocable Overhead Per Day}$$

[10] *G.S. & L. Mechanical & Construction, Inc.*, DOT CAB No. 1640, 86-3 BCA (CCH) ¶19,026 (1986) and *Schindler Haughton Elevator Corp.*, GSBCA No. 5390, 80-2 BCA (CCH) ¶14,871 (1980)
[11] *J.F. Finnegan, Ltd. V. Sheffield City Council*, 43 Build. L.R. 124 (Q.B. 1989)

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Allocable Overhead Per Day	x	Period of Owner-Caused Delay	=	Home Office Overhead Owed

This formula was created by the courts in the United Kingdom and later exported to Canada. It derives its daily HOOH rate on the basis of the as-bid calculations and assumes that the bid rate should hold constant throughout the life of the project. Some along the U.S.-Canadian border have started seeing this in claims. Using the information above, we have the following.

$$7.0\% \times \frac{\$68{,}500{,}000}{365 \text{ cd's}} = \mathbf{\$13{,}137/cd}$$

$$\$13{,}137 \times 235 \text{ cd's} = \mathbf{\$3{,}087{,}195}$$

ERNSTROM FORMULA[12]

The *Ernstrom Formula* can best be explained with the following formula.

$$\frac{\text{Total Overhead for Contract Period (All Projects)}}{\text{Total Labor Costs for Contract Period (All Projects)}} = \text{General Labor/Overhead Ratio}$$

Labor/Overhead Ratio x Labor Costs During Delay = Overhead Allocable to Delay

This formula rests on the theory that there is a direct relationship between overhead costs and labor costs that can be calculated and applied to a delay situation. That is, as labor costs grow so do the corresponding home-office costs. Thus, by calculating this ratio and applying it to the amount of labor expenses incurred during a delay period, the amount of damages due to the delay can also be calculated. Since this is a ratio formula, it does not develop a daily HOOH cost but rather calculates a lump sum cost[13]. Utilizing the number from the case set forth above, the Ernstrom Formula develops the following calculation:

$$\frac{\$28{,}918{,}417}{\$137{,}194{,}333} = 21.08\%$$

$$21.08\% \times \$2{,}560{,}419 = \$539{,}736$$

[12] The Construction Lawyer, Volume 3, Number 1, Winter, 1982

[13] *In discussing this formula with the author, J. William Ernstrom, he advises that while there are no citations in New York case law, he has had some success in getting juries to accept this approach in trials.*

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MANSHUL FORMULA[14]

The *Manshul Formula* is shown below:

$$\text{Cost of Work Performed During Delay Period} \times \frac{\text{Contract Cost \%}}{\text{Cost + Mark Up \%}} = \text{Direct Cost}$$

$$\text{Direct Cost Incurred During Delay Period} \times \text{Home Office Overhead \%}^{*} = \text{Home Office Overhead Owed}$$

** Estimated or known HOOH % portion of bid markup.*

This formula has also been referred to as the **Direct Cost Allocation Method.** It is a creature of the courts in the State of New York. When New York courts rejected *Eichleay* they were challenged to pose a substitute method of calculating overhead and created this formula. It does not arrive at a daily overhead rate. Rather, it uses the as-bid HOOH rate times the cost of work performed during the delay period to determine the overhead used. Using the information above, we have the following.

$$\$7{,}112{,}274 \times \frac{100\%}{107\%} = \$6{,}646{,}985$$

$$\$6{,}646{,}985 \times 4.5\% = \mathbf{\$299{,}114}$$

CARTERET FORMULA[15]

The *Carteret Formula* is displayed below:

$$\text{Actual Overhead Rate During Delay Period} - \text{Normal Overhead Rate} = \text{Excess Overhead Rate}$$

$$\text{Excess Overhead Rate} \times \text{Total Cost of Work During Delay Period} = \text{Home Office Overhead Owed}$$

Carteret is a formula that comes out of the manufacturing sector, but some have attempted to apply the formula to construction delay cases. It assumes that there is a differential in overhead rates during a delay period and calculates this difference. The formula then multiplies this rate differential times the cost of work performed during the delay period. Since this is a cost-based formula, like *Manshul*, it does not derive a daily rate. The problem with this approach is that if no rate differential can be shown, then no HOOH is owed. Let's take a look at the hypothetical case numbers.

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[14] *Manshul Construction Corp. v. Dormitory Authority*, 436 N.Y.S.2d 724 (App. Div.) (1981)
[15] *Carteret Work Uniforms, Inc.*, ASBCA No. 1647, 6 CCF §61,651-1951 (1954)

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6.1 % - 4.5% = 1.6%

1.6% x $7,112,274 = **$113,796**

ALLEGHENY FORMULA[16]

The *Allegheny Formula* is set forth below:

Actual Overhead Rate During Delay Period - Actual Overhead Rate During Entire Project Performance Period = Excess Overhead Rate

Excess Overhead Rate x Contract Base Cost = Home Office Overhead Rate Owed

Like *Carteret* this formula comes to the construction industry from the manufacturing sector. And, like *Carteret* and *Manshul* it is cost based, not time based. Thus, it does not derive a daily overhead rate but calculates overhead from the rate differential times the base bid cost. Again, if no rate differential can be demonstrated, then no HOOH is owed, even if owner-caused delay is present. Let's see how the numbers work out:

6.1% - 5.3% = 0.8%

0.8% x $68,500,000 = **$548,000**

EMDEN FORMULA[17]

The *Emden Formula* is displayed as follows:

$$\frac{\text{Total Overhead \& Profit */ Total Company Turnover **}}{100} \times \frac{\text{Gross Contract Sum}}{\text{Planned Contract Period}} \times \text{Owner-Caused Delay Period} = \text{Home-Office Overhead Owed}$$

* Total company overhead and profit during contract period
** Total company revenue for contract period

This formula is a creature of the Canadian Courts. Its approach is similar to *Eichleay* in that it attempts to allocate total company overhead to a project on first a proportionate basis

[16] *Allegheny Sportswear Co.*, ASBCA No. 4163, 58-1 BCA (CCVH) ¶1684 (1958)
[17] *Alfred McAlpine Homes North, Ltd. V. Property & Land Contractors, Ltd.*76 BLR 59 (1995)

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and then a daily basis. It utilizes both overhead and profit costs as a part of the calculation and then multiplies the result times the amount of owner-caused delay incurred. Looking at our hypothetical case we find the following.

$$\frac{\$37,156,795/\$381,095,333}{100} \times \frac{\$68,500,000}{365 \text{ cd's}} = \mathbf{\$18,298/cd}$$

$$\$18,298 \times 235 \text{ cd's} = \mathbf{\$4,300,030}$$

OVERHEAD FORMULAS – RESULTS

To determine whether these nine formulas deliver approximately the same results, the final outcome of each is shown below:

Formula	Daily Rate	HOOH Recovery
Eichleay Formula	$ 8,905	$2,092,675
Modified Eichleay Formula – Var. 1	$13,828	$3,249,580
Modified Eichleay Formula – Var. 2	$13,442	$3,158,870
Hudson Formula	$13,137	$3,087,195
Ernstrom Formula	n/a	$ 539,736
Manshul Formula	n/a	$ 299,114
Carteret Formula	n/a	$ 113,796
Allegheny Formula	n/a	$ 548,000
Emden Formula	$18,298	$4,300,030

Based on the above analysis, it would appear that the answer to the original question of whether an owner should care which formula is used is clearly "Yes!". What is generally presented as an accounting technique is obviously an estimating approach that yields wildly different results, even when applied to the same case.

NEW DEFINITIONS

In some recent court cases (cited herein below) Federal courts have started using familiar terms but giving them different meanings. This obviously adds to the confusion surrounding the issue of HOOH. Three terms that need to be understood to participate in today's debate on HOOH are.

Unabsorbed Overhead: When a project's cash flow is substantially diminished due to an owner-caused delay, the contractor's fixed HOOH costs are not absorbed by the project and must, therefore, be absorbed by other projects. This is the amount of overhead that occurs during this period.

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Delay Period: Although a term long used in construction, the new use of this term in the context of the HOOH issue is the period of time when the project's cash flow has been substantially diminished.

Extended Period: This is the period of time beyond the original contract completion date due solely to owner-caused delays.

EXTENDED vs. UNABSORBED HOME OFFICE OVERHEAD

Based on current court rulings at the Federal level, there is now a clear distinction between extended and unabsorbed HOOH. Extended HOOH stands for the proposition that, for every day of owner-caused delay, the owner owes the contractor HOOH based on a rate derived from one of the formulas outlined earlier. In contrast to this approach, unabsorbed overhead arises when a contractor's cash flow on a project is substantially diminished as a direct and sole result of an owner-caused delay of unknown duration at the outset. The unknown duration at the start of the delay prevents the contractor from replacing the stopped work with other work, which could help support (absorb) the overhead costs.

The keys to the recent unabsorbed HOOH cases at the Federal level can be summarized as follows:

- A contractor is entitled to recover unabsorbed HOOH if it arises due to owner-caused delay and if the contractor can meet certain other criteria.
- There is no exact method of accounting for unabsorbed HOOH costs.
- Therefore, a reasonable "estimating formula" is necessary.

PREREQUISITES FOR RECOVERING UNABSORBED HOME OFFICE OVERHEAD

The prerequisites for recovering unabsorbed HOOH can be derived from reading a number of Federal court decisions. The requirements, as they now stand, appear to be based on *Capital Electric Company*[18] and the *Savoy Construction Company v. U.S.*[19] cases, which establish the following:

- Compensable delay (owner-caused delay) must be proven.
- The contractor must show a "reduction in the stream of income from payments for direct costs" resulting in a reduction of income available to offset HOOH costs. (For example, a suspension of work order or a differing site condition resulting in stopped work.)

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[18] GSBCA Nos. 5316 & 5317, 83-2 BCA (CCH) ¶16,458 (1983)
[19] 2 Cl. Ct, 338 (1983)

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- The contractor must show that they could not mitigate damages by taking on new work during the delay period, (thus, the unknown duration rule) denying them the opportunity to replace the lost income.

Compensable Delay

Other cases (not cited in this paper due to space limitations) have addressed the issue of unabsorbed HOOH and the following situations seem to meet the above tests:

- Work stoppages caused by design defects.
- Work suspension caused by resolution of bid protests.
- Work suspension due to owner failure to respond to contractor submittals or inquiries.

It appears clear that the contractor is only entitled to recover damages when there is pure owner-caused delay. And, it is also clear that no recovery can be had when concurrent delay can be shown.

Reduction in Stream of Income

The contractor must demonstrate a clear cause and effect relationship between the owner-caused delay or disruption and the reduction in the stream of income from the project. That is, if a delay occurs but project cash flow is **not** substantially reduced, then **no** unabsorbed HOOH can be recovered. The problem, at the time of this writing, is that there is no court decision defining the term "substantial reduction" in project cash flow. Everyone, presumably, would agree that a complete stop-work order, which stops all project payments, meets the test. But, what if the owner directs work stopped on only one-half or two-thirds of the project; is this "substantial reduction"?

Inability to Mitigate Damages

The contractor must demonstrate that it was impractical to take on new work during the period of the owner-caused delay. The classic argument is that if the contractor does not know the duration of the delay at the outset, they are in no position to contract for new work. Additionally, some courts (cases not cited) have concluded that owner directives to "remain on standby" or "be ready to resume work on short notice" also preclude the contractor from seeking new work to replace lost income. Some examples of a contractor's inability to mitigate damages are:

- Numerous sporadic disruptions of the work.
- Exhaustion of a contractor's bonding capacity.
- Uncertainty of the duration of the delay.

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- Size and capability of the contractor.
- All available equipment committed to this project.

Corollary Cases on HOOH Recovery

In *Wickham Contracting Co. v. Fischer*[20] the court determined that the original *Eichleay* Formula is "the exclusive means available for calculating unabsorbed home-office overhead" costs. This ruling applies only to contracts with the Federal government and is not, as yet, applicable to any State – except, perhaps, Virginia.[21] However, it comes after the court reviewed various formulas and the basis for each. In *Community Heating & Plumbing Co. v. Kelso*[22] the court decided that if the delay to the project grows solely out of change orders (contract modifications) rather than a work suspension, then the contractor is **not** entitled to recover unabsorbed HOOH. This court took the position that delay caused by changes to the work is properly compensated through application of the contract's overhead and profit rates and no unabsorbed overhead is owed.

General Rules of Recovery for Unabsorbed HOOH

Based on the above, the general rules for recovering unabsorbed HOOH on Federal contracts are:

- Owner-caused delay must be proven.
- The owner-caused delay must result in a substantial reduction in project cash flow.
- The contractor must show they were unable to take on new work due to the unknown duration of the delay and were unable to perform other work on this project to support HOOH costs.
- The contractor must show the owner required them to remain on standby, ready to resume work quickly once the problem was resolved.
- The contractor must show that the project delay did not result from directed changes or modifications.
- The contractor must calculate the unabsorbed HOOH cost using the original *Eichleay* Formula.

While most State courts have not, as yet, adopted these rules, it is reasonable to assume that owners will urge adoption when litigation arises which contains a claim for HOOH costs.

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[20] 12 F.3d 1574 (Fed. Cir. 1994)
[21] *Fairfax County Redevelopment and Housing Authority v. Worcester Brothers Company*, 257 VA 382 (1999)
[22] 87 F.2d 1575 (Fed. Cir. 1993)

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CONCLUSION

HOOH is recoverable in certain delay situations and has been so for more than half a century. While numerous formulas have been put forth over the years, they give wildly varying results even when applied to the same fact setting. The issue is still unsettled, especially in State and local contracts. Owners seeking predictability with regard to HOOH damages in the event of owner-caused delay have a few choices. Contract language can be included which sets forth the rules outlined above, or something substantially similar, and specifies which formula is to be used if such delay arises. Alternatively, the owner may seek to limit recovery of such costs through use of a 'No Damage for Delay Clause' if the project is located in a State where such clauses are still enforced. Or, the owner may insert the new American Institute of Architects (AIA) clause concerning Mutual Waiver of Consequential Damages[23] and preclude this claim altogether.

[23] American Institute of Architects, Contract Document Form A201-1997, Clause 4.3.10

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MEMORANDUM

Date: August 6, 2004

To: Chief State's Attorney Christopher L. Morano, Chairman
Subcommittee on Contracting Enforcement, Investigation and Compliance

From: Donald J. Shubert

Re: **Contractor Disqualification Issues**

Current Situation

Three component parts of the Procurement System pertain directly to contractor disqualification:

1. Prequalification Prior to Bid
    a. Performed by CONNDOT under its Bidding and Award Manual, which is part of the agency's contract and bidding documents.
    b. Administered by DAS under PA 03-215 and amended by PA 04-141. This will be effective for certain Construction Contractors beginning October 1, 2004.
2. Contractor Disqualification Statutes and Regulations
    a. CGS §§31-57b, 31-57c, 31-57d, 4b-95(e), PA 04-102, 4a-63-1 – 4a-63-5.
3. Responsibility Determination Prior to Contract Award
    a. Performed by contracting agency during the selection process.

Problems With Current System

- The Prequalification System administered by DAS has limited applicability. It does not apply to subcontractors, unless those subcontractors are in a prime contractor relationship with the state. It does not apply to projects at UCONN or contracts entered into by quasi public-private agencies.
- The Prequalification System administered by DAS is not as strict as the CONNDOT prequalification system in certain aspects. For example: the DAS system bases single project limits and aggregate limits on the contractor's bonding capacity, where CONNDOT uses an objective numerical calculation that is not influenced by bonding companies that have an interest in contractors performing more work.
- Some agencies are not as adept at implementing Responsibility Determination procedures as others. However, the less adept agencies are in the process of independently improving their procedures.
- Several procurement-related statutes do not mandate that contracts which are entered into illegally are "void and of no effect".

Suggested Improvements

- Procedures under the Prequalification and Responsibility Determination components of the procurement system are the most effective and efficient means to accomplish this aspect of state contracting. Contractor Disqualification is best handled through uniform procedures implemented by all agencies rather than highly detailed statutes. Unification of procedures is important, and adoption of procedures in CONNDOT's Bidding and Award Manual is ideal. The Task Force should exercise care not to loosen the requirements and analysis of Prequalification and Responsibility Determinations in the CONDOT system.
- Uniform procedures for contractor Responsibility Determinations should be developed for administration by all state contracting agencies. Model Responsibility Determination criteria are set forth in CONNDOT's Bidding and Award Manual at §X 2. Proven safeguards are in place. Procedures for protest of CONNDOT decisions are set forth in §XIII of the Bidding and Award Manual. These procedures work and have worked for years. Likewise, DPW's bid protest regulations have worked for years.
    - Moreover, agency procedures could also be reviewed for performance by an oversight board, if such a board is formed.
- The Prequalification System administered by DAS, where appropriate, should incorporate the more thorough and effective provisions of the CONNDOT system.
- Procurement related statutes should mandate that all contracts entered into illegally are "void and of no effect". Model language can be found in C.G.S. §4a-65 Unlawful purchases.
- The Prequalification System administered by DAS should apply to subcontractors, UCONN projects, quasi public-private agency projects. The reason being, under the current system, a subcontractor that cannot meet the prequalification standards under DAS as a prime contractor can work under a general contractor as a traditional subcontractor, and, likewise, a general contractor that cannot meet the prequalification standards under DAS may be able to compete for state contracts with UCONN or quasi public-private agencies.

Date: August 8th, 2004

To: Chief State's Attorney Christopher L. Morano, Chairman
Subcommittee on Contracting Enforcement, Investigation, and Compliance

From: Kenneth E. Fargnoli

The following is a summary of my position on the issues that this Subcommittee has been asked to consider.

Disqualification of Contractors:

It is my recommendation that we leave the disqualification statutes alone.
Of major concern to is the potential for loosening the requirements and analysis of responsibility and qualification issues as explained by Nancy Arnold at our first working group meeting. I believe that we should improve both DPW and DAS's procedures and look to the DOT's bid manual for guidance and implementation of that manual including Bid Protest Requests. (The DOT's CONSTRUCTION CONTRACT BIDDING AND AWARD MANUAL is located on the internet at www.ct.gov/dot/lib/dot/Documents/dcontracts/construction.pdf)

If we are going to recommend unification of procedures, adoption of DOT's bid manual by all procuring agencies is the ideal. I am aware that the Attorney General's office has been recommending to DPW that they adopt this manual for a long time.

Establishment of an Oversight Committee:

I oppose the implementation Oversight review board (ORB) for construction contracts administered by the DOT. I believe that a review board would increase the cost, and significantly delay the implementation of transportation improvements.

Under an Oversight review board most DOT projects would need to be submitted to the ORB. This additional oversight requirement is duplicative – DOT construction projects are bid competitively and awarded to the lowest responsible bidder. The use of federal funds, which occurs on virtually all DOT projects, also necessitates the award to the lowest responsible bidder. The existing controls that the Department has in place are more than adequate to assure that the award of projects complies with state and federal laws. (like what controls)

A full oversight review board would require a great deal of administrative work on the sponsoring agency to provide them with the documentation. The time and manpower required would affect project schedules and our ability to obligate all earmarked federal funds. The Department's staffing, recently reduced dramatically by retirements and layoffs, and is not positioned to assume the additional administrative burden.

It would increase the time associated with engaging consulting engineer services and would increase the costs to the Department when contracting out for consultants.

DOT has had long-standing requirements and procedures that are followed prior to the recommendation to award any contract or agreement. Department procedures have been time-tested, are extensive, thorough, and have resulted in little, if any controversy. They are performed in a highly professional manner.

DOT actions are currently reviewed by numerous agencies. In addition, the State auditors, federal agency auditors, and bond rating agencies monitor the Department.

If a board is created it should perform primarily an audit function in which the board would establish policy and program review and then randomly review contracts to ensure that their policy is being followed. This would enable the agencies to timely prosecute their contracts without adding an additional approval step and not put at risk the millions of dollars of Federal funds that could result from delays to the process.

False Claims Act:

I support a state false claims act modeled after the Federal False Claims act including the "que tam" provisions, which reward individuals with a percentage of the recovery collected.

However, we need to carefully balance the need for a false claims act against the potential for frivolous claims of fraud. I would propose a lower percentage than allowed by the federal government, but higher than the bill recently endorsed by the attorney general. I believe that something around 20% would be high enough to encourage legitimate claims of fraud to be pursued. I also think we should consider provisions that discourage frivolous lawsuits by allowing the court the discretion to assess all legal fees to the losing party.

Any false claims act ought to include provisions that allow for the coordination of the investigations between the Attorney General's Office and the Chief State's Attorney's Office.

Whistleblower Statute:

The statute should be revised to allow more discretion to the Attorney General's Office to investigate all matters that are related to the complaint. Also, the Chief State's Attorney's Office should be given Subpoena power to allow them to fully investigate the complaint if it relates to criminal matters.

JRR
JJR

8/3/04

State Rep. Richard O. Belden comments on problems, cause and improvements regarding state contracting processes.

Regardless of what we do there will always be the possibility that an individual or group of individuals will attempt to defraud the state. Our goal should be to provide a system where checks and balances exist throughout the process to deter and prevent abuse while allowing the process to work without extensive and costly delays in the various acquisition activities of the state.

I generally agree with the Attorney General memo of August 2, 2004 except for the two items regarding campaign contributions. Many of these initiatives, coupled with legislation enacted earlier this year should open and improve the process. The affidavit content is an issue to be resolved and any campaign contribution information can be found in other places. I don't know what campaign finance reform means in this memo.

Checks and balances during the process are absolutely necessary. We should consider a history document that is prepared as the process unfolds indicating those involved and major milestones that would become a permanent part of the file. In managing capital equipment acquisition I found that having a person own and be primarily responsible for each individual project promotes ownership and teamwork. Checklists signed by other entities involved in the project should be maintained and a part of the file.

I support a new, separate oversight board that would cover those areas not covered by the State Property Review Board and changing the threshold for both their review to cover any transaction that exceeds a value of $500K if the contract/lease exceeds that value when including options to extend. (result is lower threshold)

Lack of Knowledge/Training. To insure compliance and to preclude the defense of lack of knowledge I believe a program similar to the mandated Sexual Harassment Training Program of a few years ago should be developed for all state employees and for all state vendors. The training completion form to be a permanent part of their personnel folder. Awareness by all, not just the few involved in procurement, is absolutely necessary to the overall system. Ethics starts at dollar one or improper favor performed and not at $500K.

The devil is in the details and I look forward to improving our procurement system over the next few weeks and months.

RO Belden

cc: J Russotto
J Rossi
B Austin

TO: Christopher L. Morano, Chairman
Investigation/Enforcement/Compliance Committee
State Contracting Reform Task Force

FROM: State Representative Richard O. Belden

DATE August 9, 2004

SUBJECT: Comment on issues

My comments will be brief. The overall issues involved in our subcommittee and the broader overall areas of concern are enormous and extremely complex.

*Training: All state employees should be given specific training on ethics in government and sign form for personnel folder signifying understanding and compliance.

*Disqualification of Contractors: Statute currently sets rules in this area. We should insure that a policy exists throughout all state procurement activity with as much standardization as possible. Those agencies dealing with Federal Dollars may have to meet federal requirements and our specific agency policies will have to be tailored around these issues. Particular areas of high value contract awards of concern are DOT, DSS and DOIT. All bid requests and/or other requests for services should require information on criminal pleas or conviction in any and all geographic locations for the company and its principals.

*Oversight Review Board: State Property Review Board powers should be expanded to all agencies and quasi-publics for matters currently under their jurisdiction.

A separate Oversight Board to review large contracts should be considered with appointees having expertise in specific contract areas. As a minimum I believe there should be a signoff procedure for "all" contracts that is public record. It would require all functions involved to sign off concerning their area of involvement. User, procurer and legal as a minimum and include others involved as applicable such as DOIT, specification writer, fire/safety, architect, etc. This would insure all aspects of the project have been considered and enhance visibility regarding potential wrong doing.

* False Claims Act: Enactment of this type of legislation will enhance the ability to recoup Federal Dollars from their program activity. This legislation will be a deterrent and enable our law enforcement agencies to have another tool to fight corruption.

*Whistle Blower Statute: It clearly needs to be expanded to allow use in all claims of fraud etc., in state procurement activity. A protocol between the Auditors, Attorney General and State Attorney should be developed to insure complaints are collected, evaluated/investigated and assigned to appropriate civil or criminal venue for action as necessary. Some statue changes may be required to accomplish the above.

*Investigative Subpoena Authority: Article IV as amended to the Connecticut Constitution clearly establishes the office of State Attorney and its duties. Subpoena powers for criminal issue investigations should be allowed as an appropriate tool to be prudently used in investigations conducted by this office. Concern over abuse can be addressed in statute as necessary. As a minimum these powers should be granted in Whistle Blower investigations.

8-9-01
JJR
cc: J Rossi
B Austin
8/10/04

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STAN T. BABIARZ
EXECUTIVE DIRECTOR

TO: Christopher L. Morano, Chairman
Investigation/Enforcement/Compliance Committee
State Contracting Reform Task Force

PAP **FROM:** Pasquale A. Pepe, Committee Member

DATE: August 5, 2004

SUBJECT: Oversight Of State Leases & Miscellaneous Contracts

In compliance with your request, I am sending you suggestions that will improve the oversight of the leasing and contract processes.

- Section 4b-3(c) of the CGS currently limits the Board staff to a secretary, a clerk and within its budget, such employees it deems necessary.

  The statute should be revised to authorize a staff of not less than an executive director, real estate examiner, fiscal administrative assistant, executive secretary, secretary and a clerk and within its budget, such additional employees it deems necessary.

  Reductions and/or under funding of the Board's Personal Services budget and consequent 33% staff reduction over the past three (3) fiscal years has materially undermined the Board's ability to process and underwrite an average of 533 proposals per year during this period.

- Section 4b-3(f) of the CGS currently provides that the Board shall review real estate acquisitions proposed by the Commissioner of Public Works and the acquisition, other than by condemnation, of the sale or lease of any property by the Commissioner of the Department of Transportation...

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To decrease ambiguity and therefore, agency questions concerning the Board's statutory right to review and approve certain contracts, 4b-3(f) should be modified, as italicized below, to provide that Board review *and approval* shall be required for real estate acquisitions, *real property sales* and *leases, real property subleases and license agreements and any such similar agreements* proposed by the Commissioners of Public Works and Transportation under *Sections 13a-80, 13a-80a,* Subdivision 12 of 13b-4, subject to Section 4b-23 and Subsection (h) of Section 13a-73.

- Sections 4b-23(i) and 4b-55(g) establish consultant fee and project cost thresholds above which Board review and approval are required.

  The aforesaid should be revised to include provisions that prohibit the division of a consultant fee and project cost into units that are less than threshold amounts for purposes of avoiding Board oversight.

- Sections 4b-24(4) and 4b-57 of the CGS require the Commissioner of Public Works to invite competitive bids for consultant services and projects in one or more newspapers.

  These statutes should be expanded to stipulate electronic requests for competitive consultant and project bid proposals on a Public Works website shall not be used as a substitute for the requirement to publish the request for proposals in local and/or county newspapers.

- Section 4b-56(h) of the CGS should be modified to prohibit oversight of the Construction Services Selection Panel or service on such panels by any person who has a beneficial interest in any of the proposing or bidding entities or whose family members, by blood or marriage, have a beneficial interest or are an employee of any of the proposing or bidding entities.

- Section 4b-58 of the CGS should be revised to provide any person involved in the selection process for consultant services, that are exempt from the requirement to advertise for such services, shall not have a beneficial interest in any of the consultant firms long or short listed for consideration by the Commissioner of Public Works, or be related by blood or marriage to any principal, officer, manager or any other key employee of such consultant firms.

- Section 13a-80 of the CGS should be revised, as shown below in italics, to provide that the Commissioner of Transportation, with the advice and consent of the Secretary of the Office of Policy Management and State Properties Review Board, may sell, lease, and convey, in the name of the State, or otherwise dispose of, or enter into agreements concerning any land or buildings owned by the State obtained for or in connection with highway purposes *or other purposes of mass transit*, or for the efficient accomplishment of the foregoing purposes.....

- Section 13a-80(a) of the CGS should be modified, as italicized below, to provide that the Commissioner of Transportation, with the advise and consent of the Secretary of the Office of Policy and Management *and State Properties Review Board*, may in the name of the State, sell, lease and convey, or otherwise dispose of, or enter into agreements concerning, any interest the State may have on, above or below any State highway right-of-way.

- Subdivision 12-806(b)(16) of the CGS and PA 96-212(16) should be revised to provide that real property leases, sales and acquisitions by the Connecticut Lottery Corporation are not only subject to Board review but also, its approval.

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TESTIMONY OF
ATTORNEY GENERAL RICHARD BLUMENTHAL
BEFORE THE GOVERNMENT ADMINISTRATION AND ELECTIONS COMMITTEE
FEBRUARY 27, 2004

I appreciate the opportunity to speak on Senate Bill 392, An Act Concerning the State Contract Review Process.

Even as my investigation continues, we already have irrefutable evidence that the current contracting system is fundamentally flawed, that some contractors have gamed and exploited it and that abuses have involved massive misspending and criminal wrongdoing. Clearly, the defects must be remedied. The contracting process must be more consistent and resistant to abuse. Particularly as to large construction and procurement contracts, there must be independent oversight and searching, strict scrutiny.

Senate Bill 392 would establish a State Contract Review Board to evaluate all construction and procurement contracts in excess of $100,000. This independent board would operate much as the State Properties Review Board does already for certain agreements like leases. It would help ensure that the selection process is proper and open -- accountable and transparent -- and that contracts are cost-effective and fiscally prudent. In short, another pair of eyes reviewing such contracts -- eyes with expertise and independence -- would deter unethical or unwise decisions.

Greater scrutiny and oversight are particularly necessary for contracts involving privatization -- where services currently performed by state employees are transferred to a private corporation, potentially leading to job losses and layoffs. Privatization contracts are fraught with danger. Some government officials have adopted a private sector, free market mantra -- taking as an article of faith that the private sector is invariably more efficient in performing public functions. In too many cases, these contracts have diminished accountability and raised private sector profits, without any benefits in cost-efficiency or quality of service. In short, the private sector is no panacea or magic bullet for state government shortcomings.

The legislature should require critical, close scrutiny of any privatization contract and exercise its oversight responsibilities over large privatization contracts.

Certain steps for reviewing privatization contracts would help produce contracts that save the state money and protect the public interest.

- **State Agency Analysis.** Prior to soliciting bids, a state agency must prepare an analysis of all costs associated with the current state service covered by a privatization contract and compare such costs with anticipated expenses projected for privatization. This analysis will include all direct and indirect costs such as insurance and pension costs, income tax and sales tax revenue gains or losses. The state agency shall determine the impact of privatization on the public interest, including health and safety, and on individuals who use the services.

- **State Auditor Review and Conclusion.** The State Auditors shall review the state agency analysis and determine whether the proposal is cost-effective, taking into consideration the impact of privatizing such services on the state residents and on the public interest, including health and safety.

- **State Employee Option to Bid**. If a state agency determines, after receiving the State Auditors' report, that it will solicit bids for privatization, the agency shall notify affected state employee bargaining units and provide any necessary information so the units may develop and submit bids as part of the competitive bidding or negotiation process.

- **Bidding Process.** All bids for a privatization contract shall include full and accurate disclosure of information on employee compensation and training, administrative or legal proceedings against the bidder, affidavits regarding gifts and services to state officials and political contributions to elected state executive and legislative officials.

- **State Contract Review Board**. Upon the state agency selection of a bidder, the contract shall be submitted to the State Contract Review Board, which shall review the state agency analysis, the State Auditors' conclusions and the proposed contract. The Board shall make findings and conclusions whether the contract is cost-effective and fiscally prudent. This review should be completed within 30 days of submission by the state agency.

- **State General Assembly.** Privatization contracts involving more than $5 million raise significant public policy issues. Therefore, such contracts should be reviewed by the state legislature and approved by a majority vote of each house.

While some of these steps are already part of the process, new measures would help ensure that privatization contracts are in the public interest and protect the contracting process from profiteering and abuse. I strongly urge the committee to favorably consider such a system.

RECOMMENDATIONS TO THE LEGISLATURE FOR A COMPREHENSIVE APPROACH TO REFORMING STATE CONTRACTING

JANUARY 22, 2004

RICHARD BLUMENTHAL
ATTORNEY GENERAL

INTRODUCTION

My ongoing investigation has provided powerful evidence of the need to reform the process of awarding and administering state contracts. Citizens of Connecticut deserve and demand a clean, clear, transparent system of public contracting. This report contains my recommendations for reforming our system of public contracting and restoring the reliability and integrity of state contracting agencies and state contracts.

There is strong, persuasive evidence that the current system is fundamentally flawed, that abuses have led to waste and criminal wrongdoing, and that key defects must be remedied. While my investigation is not complete, the information that we have obtained so far shows that the causes and consequences of the current state contracts controversy may not be isolated, occasional or superficial, but instead may be deep-seated, recurrent and systemic. Disclosures so far show that flaws and defects in the present system have permitted it to be gamed and exploited.

Contracting processes must be more consistent and resistant to abuse. The contracting process must be open, accountable and transparent. Ethics and contracting laws must be clarified and extended to close the loopholes that have allowed abusive and corrupt conduct. There should be an independent body to review the selection process for major contracts. Privatization contracts require special scrutiny. The law must clearly prohibit public officials from accepting gifts from anyone doing or seeking to do business with the state – a problematic area not resolved by recent legislative enactments concerning public construction contracting. Agencies that participate in major contracting and procurement must improve their own ethics oversight and training. External oversight by appropriate authorities must also be strengthened, including the provision of greater investigatory and prosecutorial tools to uncover corrupt practices. In addition, existing criminal, administrative and civil sanctions must be swifter and more severe in order to adequately punish and deter corrupt contracting practices. These reforms and others are described in detail below.

SUMMARY OF RECOMMENDATIONS

Highlights of my detailed recommendations for reform include the following:

1. **Review by an independent board of all major state contracts.**

2. **Development of clear procedures and standards for scrutiny and evaluation of bid submissions and performance.**

3. **Stricter and swifter sanctions for unethical or illegal practices.**

4. **Scrutiny of all privatization contracts by the proposed independent contract review body, which will develop standards for approving such contracts to ensure that they achieve actual fiscal savings while maintaining quality of services and protection of public health and safety.**

5. **Strengthened whistleblower protections.**

6. **A strong, legally binding code of ethics for those doing business with the state, including a ban on "revolving door" consultants.**

7. **A broader and stronger ban on misuse of non-public information by consultants or contractors.**

8. **Stronger and broader financial disclosure requirements under the Ethics Code, including required reporting of all gifts to all state officials and employees who can influence the awarding of contracts, and a total ban on most gifts.**

10. **Enactment of a False Claims Act, similar to that in federal law, explicitly providing the state with the right to obtain damages, civil penalties, and injunctive relief against contractors who defraud the state.**

11. **Requirement of sworn affidavits from contractors, subcontractors, consultants and state employees and officials concerning gifts given or received, and use or receipt of non-public information.**

12. **Stronger policies and training in ethics for state employees and officials involved in major contracts.**

13. **Requirement that selection processes maintain full, clear open records of the process, written justification for decisions, and records of communications with members of the selection panel.**

14. **State employees who are convicted of crimes in the performance of their public duties should be subject to loss of their pension benefits.**

STATE OF CONNECTICUT PUBLIC POLICY IS FOR PUBLIC CONTRACTING TO BE DONE IN AN OPEN, FAIR, UNBIASED MANNER.

The State of Connecticut has numerous statutes concerning public contracting by state government as well as municipal governments. Courts have periodically been called upon to interpret and apply these statutes. Illustrative decisions by the Connecticut Supreme Court are: (1) *Unisys Corporation v. Department of Labor*, 220 Conn. 689 (1991); (2) *Ardmore Construction Company, Inc. v. Freedman*, 191 Conn. 497 (1983); (3) *Spiniello Construction Company v. Town of Manchester*, 189 Conn. 539 (1983); (4) *John J. Brennan Construction Corporation, Inc. v. Shelton*, 187 Conn. 695 (1982); and, (5) *Austin v. Housing Authority*, 143 Conn. 338 (1956). These decisions make it very clear that Connecticut's public contracting statutes embody the following public policy principles:

(1) The public policy against fraud, corruption, and favoritism in the contract selection process;

(2) The public policy against discriminatory or inconsistent application of selection requirements for public works projects;

(3) The public policy prohibiting persons and/or entities seeking to build public works projects from acting in bad faith;

(4) The public policy that all persons seeking to build public works projects operate on a level playing field with all parties having equal access to information needed to compete; and

(5) The public policy that goods and services to be procured for public works projects be described in a fashion that does not give one competitor for the project an advantage over other competitors for the project.

The following sections of this report analyze the primary contracting mechanisms used by the State of Connecticut, to determine whether existing statutes and agency practices adequately protect and promote the State's contracting policies. Based on this analysis we conclude that there are many areas in which our laws can and should be strengthened and clarified.

SUMMARY OF EXISTING MAJOR CONTRACTING MECHANISMS

The State of Connecticut utilizes a number of different procedures to select state contractors. The most frequently used are competitive bidding, in which the contract is awarded to the lowest responsible and qualified bidder, and "design to build," in which the state defines the general parameters of the project and, through a competitive process, selects the developer determined to be best able to give the state what it is looking for. This section briefly summarizes the major steps in each of these processes as used by the state's primary contracting agencies: the Department of Public Works, the Department of

Transportation, the Department of Administrative Services and the Department of Information Technology).[1]

(A) COMPETITIVE BIDDING OR "LOW BID"

The first step of the contracting process is the determination that there is a need for the service or project and obtaining authorization for funding the contract.

For a public works project, the agency would generally retain an architect or design consultant, who in turn, would typically retain subcontractors such as engineers. These consultants would prepare the "contract documents" required by the state agencies involved, including the specifications, plans and drawings which form the substantive basis for the project. The "contract documents" will be incorporated into bidding documents which the state agency will supply to firms interested in submitting bids.

Bidding documents are advertised in newspapers and trade publications to solicit interested bidders who are supplied with the bidding documents. A deadline is established for submitting bids to the contracting agency.

On occasion, pre-bid meetings are held by the state agency at which all firms interested in the project can ask questions, and listen to the answers to the questions to clarify any issues with the bid. Sometimes there is an opportunity for a site visit. Important information generated at the pre-bid meeting or any clarifications can be forwarded to all interested firms as an addendum to the bid package.

When bids are submitted they are supposed to be sealed and common practice is for most bidders to submit their bids very close to the filing deadline.

At the bid deadline all bids are opened publicly and all bid submissions are available for public inspection. Unsuccessful bidders can submit bid protests shortly after the bids are opened.

The bid of the low bidder is then reviewed by the state agency for compliance with all of the bid rules. The agency will also ascertain whether the low bidder is a responsible and qualified bidder. The process will end with the agency awarding the bid to the lowest responsible and qualified bidder.

(B) DESIGN TO BUILD PROJECTS.

Generally, the first part of this process is also to determine that there is a need for the project and to obtain the necessary state approvals and funding for the project.

For a public works project, the next step would generally be the retention of a consultant to work with the state agencies involved. This consultant would typically work with the agencies involved to develop a program for the project consisting of a basic design and details and a set of criteria to define the parameters of the project. If critical

[1] While there are other agencies that contract on a regular basis, these four agencies, as a general matter, enter into the most expensive of the state's contracts with outside vendors. In addition, there are some agency-specific variances that are not included in this report.

design elements are important, the program will specify them. This consultant will also work with the agencies to develop a Request for Proposals ("RFP") describing the program.

In some instances that state may wish to limit the number of proposals to be considered and will prequalify firms potentially interested in the project. At times this is done, typically at the Department of Transportation, through a structured prequalification process. Other times this is done through issuing a Request for Qualifications ("RFQ"). When an RFQ is utilized, the consultant will often work with the state agencies to develop the qualifications. Generally an RFQ process and RFP process are similar. An RFQ may be used first to limit competition to firms determined in advance to be qualified.

The RFP (and RFQ if an RFQ is utilized) will be advertised and will request submission of proposals. Competitors for the project may make submissions in response to RFQ and/or RFP documents. These submittals must contain all of the information required by the RFP and RFQ — failure to do so may result in the rejection of the firm from further consideration in the competition.

An agency selection panel will typically review the proposals submitted by the competing entities and develop a "short list" of entities to be interviewed. Where an RFQ is used, the firms deemed to be qualified following the RFQ may be considered to be the "short list" eligible to make submissions in response to the RFP.

A separate selection panel evaluates the proposals on the "short list" and interviews each proposer. This selection panel votes on each proposer based on criteria including cost, design, meeting the program in the RFP, architectural design and qualifications. The selection panel then recommends a specific firm to be awarded the project.

Thereafter, the agency negotiates contract language, final price, final design, and final program, with the successful firm.

RECOMMENDATIONS FOR REFORMING STATE CONTRACTING: A COMPREHENSIVE APPROACH.

The following preliminary reform proposals are important first steps in restoring integrity to the process of awarding and administering state contracts. To the extent possible, state agencies that have the highest cost contracts — DPW, the Department of Administrative Services ("DAS"), the Department of Transportation ("DOT") and the Department of Information Technology ("DOIT") — should consider ways to immediately implement these proposals.

A. RECOMMENDATIONS FOR IMPROVING EXTERNAL OVERSIGHT OF STATE CONTRACTING

The following proposals are designed to improve the ability of ethics regulators, the Attorney General and other law enforcement agencies to monitor state contracting for abuse and to punish corrupt and abusive practices by state officials and private entities and individuals.

1. **There must be an Independent Contract Review Board or, in the alternative, the State Properties Review Board must be empowered to review the awarding of state construction and large scale procurement contracts.**

Presently, there is no independent agency or official that, as part of its explicit statutory responsibilities, reviews the reasonableness and propriety of the process under which state contracts are awarded to construction contractors, construction consultants, and private vendors who provide large quantities of materials or equipment. Certainly, internal review of contract selection by contracting agencies is desirable and should be expanded. However, it is necessary to empower an independent state agency to perform a searching examination of the process under which such contracts are awarded. It may be desirable to create a new state agency specifically to perform this function. In the alternative, the legislature may prefer to expand the authority of an existing agency, such as the State Properties Review Board, to include contract selection review.

In either case, the awarding of all major state contracts for construction, equipment, materials or commodities should be reviewed by an independent agency for issues of fairness, legality, and reasonableness, and such contracts should not become effective without that agency's approval. The agency should have access to all materials relating to the selection process. In addition, the agency should have all necessary resources and authority to investigate potential irregularities, including the authority to obtain and review contractor and agency records and to subpoena other documents and testimony. Each contract should explicitly require full cooperation by the contractor with this independent review agency. If the agency concludes that any applicable law has been violated, it should have the authority to refer the matter to the Chief State's Attorney, the State Ethics Commission and/or the Attorney General for appropriate investigation, litigation and/or prosecution.

2. **There must be established a code of ethics governing private individuals and entities doing business with the state.**

There must be a code of ethics for contractors, vendors, consultants and others who seek to do business with the state (a "Contractor/Consultant/Vendor Code of Ethics"). That code must include, at a minimum, the following provisions:

- A provision forbidding an entity or individual seeking to do business with the state from giving or promising any good(s) or service(s) of value, other than those things exempted from the definition of gift in Conn. Gen. Stat. § 1-79(e)(as revised as suggested herein), to any state official or employee who is directly or indirectly involved in the process of awarding, administering, or overseeing the contract being sought, including state officials, such as the Governor, who have appointing or oversight authority over the contracting state agency. These prohibitions should also apply to prohibit the giving or promising of gifts to the family members of such state officials or employees or to businesses with which the state employee or official is

associated. These provisions would also prohibit offers of employment to state officials and employees directly or indirectly involved in the process of awarding, administering or overseeing contracts sought by those entities, including state officials and employees who have appointing authority over the contracting agency. In appropriate circumstances, this prohibition should extend to the family members of such state employees.

- A provision forbidding any consultant who assists a state agency in planning or designing a construction project from performing any part of the construction of that project either as a general contractor or as part of a general contractor's team of subcontractors and consultants. A construction consultant who assists in planning or designing a construction project must also be prohibited from offering his services or knowledge of the project, or any information he has received about the project in his capacity as consultant to the state agency, to an entity who is competing or likely to compete for the contract to construct that project, unless the contracting agency makes the consultant's information equally available to all competitors.
- A provision forbidding an entity or individual seeking to do business with the state from in any way soliciting non-public or not-yet public information that would provide a competitive advantage in obtaining a state contract where that information is not made equally available to all others seeking the same contract.
- General provisions prohibiting those seeking to do business with the state from attempting in any way to circumvent applicable competitive bidding or other competitive selection processes.
- Provisions forbidding an entity or individual from intentionally or recklessly overcharging the State for work performed or goods or services provided, for example, by charging for work that is not performed or goods or services not provided, submitting "change orders" that increase the contract price in bad faith, charging rates that are unjustifiable, or falsifying invoices or bills.

Compliance with the Contractor/Consultant/Vendor Code of Ethics should be incorporated as a standard contract clause into all procurement, consultant or construction contracts between the state and private entities or individuals. Contractors must also be required to incorporate the code into their contracts with subcontractors.

There must be multi-pronged enforcement of the Contractor/Consultant/Vendor Code of Ethics. Contracting state agencies must be empowered to void contracts when they determine that a contractor has violated any applicable ethical restriction. Contracting agencies must also be permitted to designate violators of ethics laws as nonresponsible contractors or vendors or to refuse to prequalify violators as eligible for

state contracts. The State Ethics Commission must be empowered to investigate violations of contractor/consultant/vendor ethical codes and when appropriate to impose administrative sanctions, including fines, disgorgement of ill-gotten gains, and appropriate injunctive relief. The State Ethics Commission must have the authority and resources to refer such violations to the Attorney General for civil litigation for recovery of civil penalties and other appropriate relief. In addition, the violation of contractor/consultant/vendor ethics requirements must be punishable by criminal sanctions. Finally, any violation should, by statute, be deemed a per se violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), thereby providing for civil penalties and other CUTPA relief.

3. The Code of Ethics for state employees and officials must be strengthened and clarified

Not only must ethical requirements be codified for those doing business with the state, but the existing ethics laws governing state employees and officials must be strengthened and clarified.[2] The following reforms to the Code Of Ethics For Public Officials, Conn. Gen. Stat. § 1-79 et seq., should be instituted:

- Annual statements of financial interest ("SFIs"), required by Conn. Gen. Stat. §1-83(a)(1) should be required of a greater range of public officials. Currently only certain specified classes of officials are explicitly required to file SFIs, and the Governor has discretion to identify additional classes who must do so. The Governor should have no involvement in defining the discretionary coverage of the SFI requirement. Rather, that function should be exercised by the State Ethics Commission. At a minimum, SFIs should be required of all state officials who play a significant role in awarding state contracts.
- Currently, the SFI calls for disclosure of sources of income in excess of $1,000. This limit is too high and should be significantly reduced to $500 or lower.
- The SFI requirement should be clarified to require disclosure of gifts as income if their value meets or exceeds the threshold for other forms of income that must be disclosed (currently $1,000). Currently, neither the SFI form nor ethics regulations of the State Ethics Commission governing the SFI requirement make clear that gifts are to be considered income that must be disclosed. There should be no doubt that income includes gifts for purposes of the SFI disclosure requirement. Income in the form of gifts as defined in Conn. Gen. Stat. §1-79(e) (as revised as suggested herein) received from those having done, doing or seeking to do business with a state agency or department with which the official is or was employed, or over which

[2] Current events have made clear the crucial role of the State Ethics Commission. As a general matter, the legislature must give serious consideration to measures that would preserve the independence of the State Ethics Commission and protect it from political pressures, including pressures applied through the budgeting process.

the official has or had appointment or oversight authority, should be reported regardless of value.

- The Code of Ethics should be revised to make clear that submitting a falsified SFI or one with material omissions is punishable by criminal sanctions. The State Ethics Commission should have the authority to impose administrative sanctions under such circumstances or to refer the matter to the Attorney General for commencement of litigation to recover civil penalties and other appropriate relief.

- The exception to the definition of "gift" in Conn. Gen. Stat. § 1-79(e)(12) for gifts to an individual state official for the celebration of a major life event must be substantially revised and limited. There is currently no dollar value limit to this exception. The major life event exception should be limited to gifts under $100 in value.

- In addition to the SFIs currently required under Conn. Gen. Stat. §1-83, annual sworn ethical filings should be required of agency officials and employees who play significant roles in awarding state contracts. Those filings should disclose gifts (as defined under Conn. Gen. Stat. §1-79(e) as revised as suggested herein) from persons or entities who sought or obtained state contracts or who sought or obtained any prequalification status for purposes of seeking state contracts. The disclosure should include gifts for major life events. Submitting a falsified filing or one with material omissions should be punishable by criminal sanctions. The State Ethics Commission should have the authority to impose administrative sanctions or to refer the matter to the Attorney General for commencement of litigation to recover civil penalties and other appropriate relief.

- The three year statute of limitations contained in Conn. Gen. Stat. § 1-82(d) for violations of the Code of Ethics should be extended to five years. Moreover, §1-82(d) should make clear that fraudulent concealment of ethics violations — by falsifying or omitting information from an SFI, other required forms or declarations, or state or federal tax filings — tolls the statute of limitations. Finally, there should be no statute of limitations prohibiting the State Ethics Commission or Attorney General from seeking disgorgement of ill-gotten gains (as opposed to civil penalties, fines and other relief).

- The provisions of Conn. Gen. Stat. §1-84(m)(1) currently prohibit a public official from accepting directly or indirectly a gift if the official knows or has reason to know that the giver is doing or seeking to do business with the department or agency in which the official is employed. This provision should be clarified to make explicit that the Governor, his staff and officials of Office of Policy and Management are prohibited from accepting gifts from those doing or seeking to do business with the state.

- The provisions of Conn. Gen. Stat. §1-84(c) currently prohibit public officials from disclosing for financial gain confidential information acquired in the course of their official duties. A similar prohibition for former public officials is contained in Conn. Gen. Stat. §1-84a. These provisions should be clarified to make clear that they prohibit any official involved or previously involved in the process of awarding state business from disclosing confidential information if the communication is likely to result in the recipient being advantaged in a competitive bidding process over other competitors. This prohibition should not be dependent on receiving financial gain for such disclosures.

4. The Whistleblower Statute Should Be Strengthened and Whistleblowers Should be Given Additional Protection.

The whistleblower statute should be strengthened to provide a greater ability to ferret out corruption and mismanagement, to permit legal action to be initiated, as well as providing greater protection for whistleblowers. This is described in part V of this report below.

5. Require stricter standards and scrutiny of contracts to privatize significant functions performed by state employees.

Contracting abuses exposed to date stem substantially from large profits made on state contracts. Career state employees do not have a comparable personal financial stake in projects they supervise or operate, greatly reducing the likelihood of problematic contract practices. State employees have high level skills which the state should utilize. Close, critical scrutiny is necessary to prevent abuse or waste, especially when privatization will prove less cost effective and less efficient. Accordingly, legislation should require that all privatization contracts be reviewed by the independent contract review body recommended here. The legislature should establish standards for approving such contracts to ensure they achieve actual fiscal savings while maintaining the quality of services and protecting public healthy and safety.

B. RECOMMENDATIONS FOR IMPROVING INTERNAL AGENCY OVERSIGHT OF CONTRACTING

The following proposals are designed to create effective internal structures and mechanisms under which state agencies can monitor and control their contracting practices.

1. Certain agencies should designate a single high level official responsible for ethics oversight and training.

Most state agencies do not have a single designated official responsible for ethics oversight. Agencies that routinely engage in construction contracting and large scale commodities or equipment procurement, particularly the DPW, DOT, DAS, and DOIT, should create an Ethics Compliance Officer position, whose mission is the development of ethics policies, ethics training programs and materials, reporting and monitoring of

ethics compliance. The Ethics Compliance Officer should be divorced from the process of awarding or administering particular contracts, but rather should scrutinize the ethics aspects of such processes in general and as applied in particular instances. This officer would be tasked with annually reviewing agency policies for ethical problems and coordinating the development or revision of ethics-related policies. The Ethics Compliance Officer would also be responsible for developing training programs and materials on ethics for agency employees and contractors. He or she would also be empowered to receive and investigate ethics complaints involving agency employees and outside contractors. Construction and procurement contracts should, and often already do, include language permitting the agency to access and review contractors' records for purposes of auditing performance. These clauses should be redrafted to require cooperation with inquiries concerning ethics issues in both obtaining and performing the contract. The Ethics Compliance Officer should report directly to the agency head or, if appropriate, to bypass the agency head to report concerns to appropriate external authorities, such as the Auditors of Public Accounts, the Ethics Commission, the Attorney General or the Chief State's Attorney. Agencies should devote sufficient resources and staff to the Ethics Compliance Officer so that he or she can effectively accomplish the purposes of the position. While smaller agencies or agencies that do relatively little or no construction or large scale commodities or equipment contracting should not be required to devote a staff member exclusively to ethics oversight, such agencies should designate an employee to serve as liaison to the State Ethics Commission. The State Ethics Commission should serve as a resource for such agencies, providing training resources, advice, and other ethics-related support as necessary.

2. All agencies engaged in construction or large scale commodities or equipment procurement must promulgate written selection criteria and procedures that are fair, consistent and open to public scrutiny.

To ensure that the awarding of state business is fair and to restore public confidence in the fairness of the process, state agencies must develop, publicize and apply objective, impartial and even handed criteria and procedures to the selection of construction contractors, construction consultants, and vendors of commodities or equipment on a large scale. Some agencies engaged in such contracting already have established comprehensive written policies and procedures governing contractor selection, which are made widely available through the internet and otherwise. Remarkably, other major contracting agencies, including DPW, have not yet codified their selection policies in written form[3] The promulgation of such written policies, including contractor selection criteria applicable to selection of construction contractors, construction consultants, and vendors of commodities or equipment on a large scale must

[3] Section 7(a) of Public Act 03-215 requires the Commissioner of Public Works to adopt regulations that include "objective criteria for evaluating the qualifications of bidders and the procedures for evaluating bids after the prequalification status of the bidder has been verified." The new act does not, however, explicitly require DPW to develop objective criteria for evaluating proposals, as opposed to the evaluation of the qualifications of bidders.

be a top priority for all other major contracting agencies that have yet to do so.[4] In developing selection criteria to apply to competitive contract bidding, agencies must strive for objectivity, focusing on issues of qualification, cost, experience, responsibility and integrity. The criteria and the procedures used to apply them must be in written form, developed with meaningful opportunities for public participation. Once established, these criteria and procedures must be made widely available to the public through written and electronic means. Criteria and procedures must be applied consistently and never, except under the most unusual and necessary circumstances, changed midstream.

3. State employees involved in contracting or procurement must receive adequate training and information on ethics requirements.

It is imperative that all state employees involved in construction contracting and large scale materials procurement know the ethics requirements and restrictions of their jobs. There is currently no requirement, however, that such state employees undergo ethics training. Agencies that routinely engage in large scale construction contracting and commodities/equipment procurement, particularly the DPW, DOT, DAS, and DOIT, should, with the assistance of the Ethics Commission and the Attorney General, develop and provide ethics training materials and programs for their employees. Annual training on ethics should be mandatory for all employees of agencies who participate in such contracting or procurement, and ethics updates and bulletins should be provided to those employees as often as necessary.

4. Contractors doing business with the state must be educated about the ethics requirements of their activities.

There appears to be no systemic effort on the part of agencies to educate contractors about the ethics aspects of seeking and performing state contracts. While some of this information is available from various sources, agencies can and should systematically communicate ethics information to those seeking the state's business. To that end, any contractor or consultant seeking prequalification status should be required to review all applicable ethics laws, including the proposed Contractor/Consultant/Vendor Code of Ethics (see above). No applicable prequalification status should be granted absent a certification by the company that its principals and key contracting personnel have received and read such materials. In addition, all bids or proposals for contracts competitively awarded for construction, construction consulting services, and large procurements of commodities or equipment should include a similar sworn certification that all members of the bidding or proposing firm or team, including key employees of listed subcontractors, have received and reviewed state ethics materials. No bidder should be deemed qualified or responsible if it cannot make such a certification, and its bid should be rejected on these grounds.

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[4] The selection of personal service providers, consultants (other than contracting consultants assisting in the development of large scale construction contracts) and small materials vendors may require somewhat different safeguards.

5. General contractors should obtain ethics certifications from their subcontractors.

As a standard requirement of state construction contracts, construction contractors must be required to provide state ethics materials to their subcontractors and to obtain certifications from those subcontractors that they have received and read such materials. In addition, subcontractors should also certify that they have provided no gifts or promises of gifts as defined in Conn. Gen. Stat. § 1-79(e) (as revised as suggested herein), loans or other items or services of value to state officials or employees of the contracting agency or of a state agency or department which has supervisory or appointing authority over the contracting agency during the previous ten years. General contractors should gather and retain such subcontractor certifications and provide them upon request to the contracting agency or any state agency or official with oversight of the contracting process.

6. Certain state officials must be required to report suspected unethical or illegal conduct in state contracting.

It is essential that high level state officials report conduct that they suspect to be unethical or illegal. Thus, if the head of a contracting state agency or the highest official of such agency having responsibility for ethics oversight has substantial reason to believe that unethical or illegal conduct has been committed by any person in connection with the awarding or performance of a state contract, he should be required by statute to report the matter to all of the following: the Auditors of Public Accounts, the State Ethics Commission, the Chief State's Attorney and the Attorney General.

C. RECOMMENDATIONS FOR INCREASING THE CIVIL AND CRIMINAL SANCTIONS APPLICABLE TO CONTRACTING FRAUD AND ABUSE

In addition to the new or increased criminal or civil sanctions discussed in connection with the proposals recommended throughout this report, the following sanctions should be available by statute to punish and deter fraud, corruption and abuse in state contracting.

1. Ethics violations by contractors should result in the forfeiture of the bid bond.

Currently, a bid bond is required of individuals or entities bidding on certain state contracts. On DPW construction projects, bid bonds must equal ten percent of the bid. See Conn. Gen. Stat. § 4b-92. Under current law, failure by a contractor to execute a contract as awarded results in the forfeiture of its bid bond. The agency should also have the statutory authority to retain a bid bond to the extent of the agency's additional costs caused by a contractor's violation of applicable ethics laws.

2. Any state employee or official who is convicted of a crime or serious ethics violation in connection with his public duties should lose pension benefits.

Connecticut law does not automatically revoke a public official's pension benefits when he is convicted of a crime in connection with his official duties. While certain legal theories and causes of action exist for seeking disgorgement of pension benefits under such circumstances, the law must be clarified to make this remedy more easily and widely available. The State Ethics Commission should have statutory authority to revoke pension benefits as one of its available remedies when it finds that a state official has committed a serious ethics violation in connection with his official duties. Moreover, the Ethics Commission should have statutory authority to refer matters to the Attorney General for purposes of initiating litigation to recover or revoke pension benefits from unethical state employees. Finally, when a state official is convicted criminally of violating state law in connection with his public duties, the sentencing judge should have explicit authority to revoke pension benefits. The amount of pension revocation under any of these scenarios should be not less than the amount attributable to any year in which the ethical misconduct occurred.

D. RECOMMENDATIONS APPLICABLE TO LOW BID, DESIGN TO BUILD AND CONSTRUCTION CONSULTANT SELECTION PROCESSES

The following reform proposals pertain to low-bid, design to build and construction consultant selection processes.

1. The requirement of sworn affidavits concerning gifts must become a permanent prerequisite for approval of all state contracts over $100,000

Recently, the Attorney General instituted a requirement that all entities and individuals seeking a state lease or contract having an original or amended value in excess of $100,000 submit a sworn affidavit disclosing any gifts, loans or other items of value given by them or their employees to state officials or employees of the contracting agency or of a state agency or department which has supervisory or appointing authority over the contracting agency during the previous ten years.[5] A similar policy now requires state employees and officials involved with the selection of contractors to disclose any gifts received within ten years from individuals or entities selected for a contract. The Attorney General will not review or approve any contracts unless such affidavits are provided. State agencies have been asked to voluntarily assist in implementing and facilitating this policy. This policy should be codified in legislation as a permanent prerequisite to contract approval. Moreover, legislation should be passed providing for specific criminal sanctions for the falsification of such affidavits.

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[5] The $100,000 threshold should apply to both individual contracts in excess of that amount and to multiple contracts granted to a single agency or individual during a single biennial budget cycle that in the aggregate exceed $100,000.

2. Additional certifications and sworn statements should be required of contractors and state officials involved in the contracting process.

One potential opportunity for abuse in the contracting process is the selective provision of beneficial, non-public or not-yet public information to some contract bidders, while withholding that information from others. These sorts of disclosures create uneven playing fields, providing unfair advantages to the bidding contractor who receives such information. Public Act 03-215, which will become effective on October 1, 2004, addresses this issue in part, establishing that "[n]o employee of the Department of Public Works, the joint committee or a constituent unit with decision making authority concerning the award of a contract may communicate with any bidder prior to the award of the contract if the communications results in the bidder receiving information about the contract that is not available to other bidders[.]" Public Act 03-215 §1(b).[6] The new act also requires that "[a]ny person who receives information from a public official that is not available to the general public concerning any construction, reconstruction, alteration, remodeling, repair or demolition on a public building prior to the date that an advertisement for bids on the project is published shall be disqualified from bidding on the project." P.A. 03-215 §1(f).

These requirements should be extended to apply not just to Department of Public Works projects, but to all state contracts awarded on a competitive basis. Moreover, approval of such contracts should be conditioned on provision of sworn affidavits by employees and officials of both the contracting agency, any outside consultants working for the agency in the design or planning of the project, and the outside contractor that no such non-public or not-yet public information concerning the project was given, received or solicited during the contract selection process. If such communications have occurred, they should be disclosed so that their propriety may be evaluated before the contract is approved. Specific criminal sanctions should be available for the falsification of such affidavits. In addition, the State Ethics Commission should have authority to sanction such a falsification or refer the matter to the Attorney General for litigation to recover civil penalties, fines and other appropriate relief.

3. Additional procedures must be instituted to ensure that information is provided on an equal basis to all bidders.

In order to avoid the reality or appearance of favoritism, all agencies must make certain that information concerning projects or procurements is equally available to all interested bidders. It is unacceptable, for example, for an agency employee to provide a single bidder with potentially advantageous information or clarification on contract specifications without simultaneously providing it to all bidders. Some agencies have not created written policies to ensure that information is fairly and equally provided during the contractor selection process. All agencies that award contracts on a competitive basis must have such policies, which should provide at a minimum that any pre-bid inquiries concerning the specifications of an advertised project are made in writing only. Similarly,

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[6] State agencies are encouraged to enforce and comply with Public Act 03-215 as soon as practicable rather than waiting until October 1, 2004 to do so. The legislature should also consider advancing the effective date of the act.

all answers to such inquiries should be in written form simultaneously communicated to all competitors for the contract, with the exception of oral communications made at pre-bid meetings to which all interested parties are invited. Records of such meetings must be maintained and information provided therein must be made available in written form to parties not present at the meetings.

Requests for information or clarification of project specifications made during the period between the advertisement of a competitive bid project and the bid deadline, however received, should be entered in a log maintained by the contracting agency, to include the identity of the party inquiring, the date of the inquiry, the general nature of the inquiry, the employee or official responding to it, and the manner in which it was responded to. This kind of communication log should be maintained both by the agency doing the contracting and the agency for which the contract is being performed. For example, where DPW is developing a building on behalf of another state agency, both DPW and the other state agency should maintain such communication logs.

4. All bids and proposals must include sworn certifications concerning certain ethics matters.

Section (1)(e) of Public Act 03-215 requires that any person bidding on a public building project must certify at the conclusion of the bidding process that information contained in the bid is accurate and up to date and that the bid was made without collusion with or fraud by any person. This provision applies only to Department of Public Works projects involving the construction or alteration of public buildings. The requirement is therefore too narrow in its application and should be extended to all state construction contracts or large scale materials or equipment procurement contracts awarded pursuant to competitive selection processes. Moreover, the required submission should include additional certifications that the individual or entity seeking the contract, and employees or relatives of such individual or entity, have not (a) given or promised any gifts as defined in the ethics code (with suggested revisions detailed above) to state officials or employees of the contracting agency, to public officials having input into the contracting process or to officials with oversight or appointing authority over the contracting agency and its officials; or (b) obtained any non-public or not-yet public information concerning the project/procurement before the acceptance of his/its bid from a state employee or official that was not equally available to other bidders. Submitting a falsified or materially incomplete certification should be punishable by criminal sanctions. In addition, the State Ethics Commission should have authority to sanction such a submission or refer the matter to the Attorney General for litigation to recover civil penalties, fines and other appropriate relief.

5. Failure to comply with all ethics requirements or to provide sufficient information to determine compliance must be a ground for rejections of bids or proposals.

No state contract should be awarded to an entity or individual who violates applicable ethics laws or where the ethics, integrity or responsibility of such an entity or individual are lacking. Nor should a state agency award any contract to an individual or entity when there exist significant unresolved questions concerning the ethics, integrity or responsibility of that individual or entity. Finally, entities or individuals who fail to

provide sufficient information to evaluate their ethics, integrity or responsibility should not receive contracts. Statutes governing the awarding and rejection of bids and proposals (see, e.g., Conn. Gen. Stat. § 4b-94) should explicitly permit contracting state agencies to reject bids or proposals when any of these scenarios exists, even where the bid or proposal in question is the lowest or best bid under other criteria.

E. RECOMMENDATIONS TO REFORM THE DESIGN TO BUILD CONSTRUCTION SELECTION PROCESS

Because design to build selection processes are inherently more subjective than low-bid selections, they raise heightened concerns with regard to favoritism, corruption and abuse. The following proposals seek to create greater transparency and reliability in design to build selection processes.

1. Selection panel members must explain their votes.

As described above, most design to build and many construction consultant selections are decided by selection panels, whose members typically rate proposals by order of preference. Currently, no explanation of a panelist's ranking is required. There should be a requirement that all panelists submit a narrative explanation of how they arrived at their top choice. These narratives should be forwarded to the agency head with the panel's rankings. The narratives should be maintained as part of the selection record, reviewable by any agency or official with oversight of the contracting process.[7]

2. The Commissioner must explain in writing when he deviates from a selection panel's recommendation and must certify that such deviations are not the product of unlawful considerations.

Currently, agency heads are not required to follow selection panel recommendations. Nor are they required by law to explain in writing their reasons for deviating from a panel's recommendation. Public Act 03-215(8)(e) requires the Commissioner of DPW to prepare a memorandum indicating how he applied the applicable selection criteria in choosing among the firms recommended by the selection panel. This should be required of all agency heads when they select a contractor from a list proposed by a selection panel, and the law should be clarified that the agency head must make particularized findings explaining any deviation from a selection panel's recommendation and how the deviation is in the best interests of the state. Moreover, when such a deviation occurs, the agency head should certify under oath that the selection was not the product of any collusion, gift, promise, compensation, fraud, favoritism, undue pressure from any person, or request from any person other than or outside the normal selection process. Submitting such a certification containing falsehoods or material omissions should be punishable by criminal sanctions. In addition, the State Ethics Commission should have authority to sanction such a false or materially

[7] Section 8(e) of Public Act 03-215 requires DPW's Construction Selection Award Panel to prepare a joint memorandum explaining the panel's application of objective selection criteria. This provision does not apply to selection panels of agencies other than DPW. Moreover, it would be more helpful for each individual panelist to prepare his or her own selection narrative.

incomplete certification or refer the matter to the Attorney General for litigation to recover civil penalties, fines and other appropriate relief.

3. Selection panel members must submit ethics certifications with their ballots.

Similarly, selection panelists should submit with their ballots a sworn certification that their votes were not the product of any collusion, gift, promise, compensation, fraud, undue pressure from any person, favoritism, or requests by persons outside of the normal contractor selection process (i.e., other than deliberative discussions among the panelists and bidder presentations). In addition, the panelists should certify that (1) they have no familial or business relationships with any firm or person seeking the contract or with any relatives or business associates of any such firm or person; (2) that they have not provided any material information to any person concerning the selection process or project at issue other than that which was made equally available to all interested parties; and (3) no solicitations of such information occurred. Submitting such a certification containing falsehoods or material omissions should be punishable by criminal sanctions. In addition, the State Ethics Commission should have authority to sanction such a false or materially incomplete certification or refer the matter to the Attorney General for litigation to recover civil penalties, fines and other appropriate relief.

4. Selection panelists must maintain communications log.

In order to create a record of potentially improper contacts during the selection process, all selection panel members should be required to maintain communications logs. All communications made outside of the formal selection process by any person concerning a selection under consideration occurring between the advertisement of a project and selection balloting must be logged. Routine communications from agency staff concerning the mechanics or logistics of the selection process, as opposed to the outcome of the process or the merits of a competitor, would be excluded. The log must note the date of such communications, the parties to it, and its general subject matter. These communication logs must be certified as true and complete, and they must be maintained in the records of the selection process and made available to any agency or official with review authority over the selection process. Submitting such a certification containing falsehoods or material omissions should be punishable by criminal sanctions. In addition, the State Ethics Commission should have authority to sanction such a false or materially incomplete certification or refer the matter to the Attorney General for litigation to recover civil penalties, fines and other appropriate relief.

5. Selection proceedings and records must be open to publicly scrutiny.

To the maximum extent possible, the records and proceedings of all agencies' selection panels must be open to public scrutiny once a contract is awarded or the process is ended. Written minutes and agendas should be made of all meetings of such panels. Written materials of the selection process, including agendas, minutes, ballots, decision memoranda, proposal materials, communication logs and letters to the panel, should also be available for public scrutiny after the completion of the selection process. Any exceptions to public disclosure of such materials, such as exceptions for protection of trade secrets, must be strictly construed and limited.

F. RECOMMENDATIONS TO REFORM LOW BID SELECTION PROCESSES

1. Agencies must maintain adequate records to permit identification of irresponsible and unethical contractors.

Current law, together with Public Act 03-215 (effective October 1, 2004), provides opportunities for state agencies to identify unreliable or dishonest contractors and vendors and to formally refuse to contract with such entities. For example, the criteria for certain contractor prequalifications encompass considerations of responsibility and integrity. In low bid selections, agencies are required to accept the lowest bid from a *qualified* and *responsible* bidder. Here again, the determination of responsibility and qualification allows an examination of a contractor's ethics and integrity.

Unfortunately, there is great variation in the frequency with which state agencies undertake to formally identify nonresponsible bidders. DOT, for example, has in many instances undertaken the necessary procedural steps to declare a contractor nonresponsible, such that it cannot receive a particular contract. DPW, on the other hand, has no track record of making such determinations. One reported explanation for this disparity is that DPW fails to maintain adequate records of contractor performance. Without sufficient documentation, nonresponsibility determinations or refusals by DPW to pre-qualify contractors will be difficult to establish and/or sustain against legal challenges. DPW, as a matter of policy, should review the record keeping procedures of other agencies in order to adopt those procedures which would permit more aggressive identification and action against nonresponsible contractors.

Section 4 of Public Act 03-215 will require that contractor evaluation forms be completed by state agencies after the completion of building projects. These forms do not, however, require evaluation specifically of ethics and integrity issues. Nor does the new public act require that contemporaneous evaluative records be compiled and maintained during the performance of a contract. As a matter of policy, agencies should maintain and regularly update contractor performance files. Project managers and other agency employees in a position to be familiar with a contractor's performance should periodically file contractor evaluation forms along the lines of those required by P.A. 03-215, but expanded to include any information concerning unethical contractor behavior. Contractor performance files should include any and all necessary supporting documentation. Armed with this level of documentation, agencies can and should be more aggressive in formally designating nonresponsible and unethical contractors, thereby prohibiting such contractors from obtaining future state contracts.

G. RECOMMENDATIONS APPLICABLE TO SPECIAL SELECTION PROCESSES

1. The use of non-competitive selection processes should be avoided to the maximum extent possible.

As noted above, the legislature has authorized certain construction projects by special act, sometimes explicitly exempting such projects from one or more aspects of

competitive contractor selection. As a matter of policy, this procedure should be avoided whenever possible. Moreover, the legislature should create a statutory requirement that, whenever a special construction or large scale purchase act is passed that is silent or unclear on the issue of competitive selection, the agency or agencies having responsibility for that project must apply normal competitive selection processes.

2. Any agency determination that an emergency requires deviation from normal competitive selection processes should be adequately documented.

Agencies should themselves avoid deviation from competitive processes in contracting for construction, construction consultant services and large purchases of materials or equipment. Currently, certain agencies are permitted to award such contracts outside the normal selection processes in the event of emergencies.

Public Act 03-215(1)(g), which is applicable to construction projects performed on behalf of any agency by DPW, requires that any agency seeking to have a project awarded without competitive bidding must certify to the General Assembly that the project is of such an emergent nature that an exception to normal bidding requirements is necessary. Information detailing the nature of the emergency must accompany the certification. This requirement is sensible and should apply to all construction, construction consulting and large scale procurement contracts, including those awarded by agencies other than DPW.

H. Recommendations for Reducing Abuses in the Performance of Contracts

The following recommendations are intended to curb abuses that occur or come to light after the awarding of a contract or that relate to the performance of contracts.

1. All state construction and procurement contracts must contain termination for convenience and ethics termination clauses.

In order to provide state agencies with the ability to extricate themselves from contracts with unethical contractors or contractors of questionable ethics, all state construction and procurement contracts should contain termination for convenience and ethics termination clauses. Termination for convenience clauses simply allow the agency to terminate for any reason at any time, paying the contractor for its costs but not profits up to the date of the termination. These clauses can be useful when questions arise as to the ethics and integrity of a contractor such that continuing the contract is not in the best interests of the state. Contracts should also include standard clauses incorporating by reference all state laws governing state contracting ethics and permitting the state to terminate contracts when an ethics violation has occurred in the awarding or performance of the contract or when there is sufficient reason for the agency in its sole discretion to conclude that such a violation has occurred and that it would be in the public interest to void the contract.

2. Change orders that significantly increase the costs of projects must be closely monitored and avoided whenever possible.

After the awarding of a construction contract, unforeseen circumstances often arise that increase the overall costs of construction. These occurrences typically result in the proposal of a contract revision, or "change order," that increases the project's total construction costs. When change orders occur, the cost of the project can significantly exceed the cost stated in the contractor's bid or proposal. Certainly, change orders are often necessary and proper. Troubling questions arise, however, when significant change orders are proposed immediately or shortly after awarding of a contract and before substantial work is performed or when change orders constitute a substantial percentage of the total project cost. For example, if a change order is proposed by a contractor soon after its bid, was the bid artificially low? Consequently, procedures are necessary to encourage good faith bidding and limit change order abuse.

Contracts should be drafted such that any substantial change order proposed before significant work has commenced should void the contract and the project should be amended and rebid after payment to the original contractor of its legitimate costs. Substantial change orders should be defined as those equaling or exceeding a certain amount of the total contract price. Whatever newly discovered circumstances required the change order should be incorporated into the revised project advertisement. Of course, agencies should retain discretion to continue with a project without rebidding if time pressures so require. In this instance, agencies should document why rebidding is inappropriate.

Additional procedures are required to monitor change orders that arise after the commencement of work on a project, i.e., where it would be impracticable to rebid the project given the amount of work already performed. Agencies should develop mechanisms for review of substantial change orders and should have the discretion to cancel and rebid contracts when it appears that a contractor is proposing excessive or unjustified change orders.

V. THE EXISTING WHISTLEBLOWER STATUTE SHOULD BE SIGNIFICANTLY STRENGTHENED.

Substantive reforms designed to minimize corruption in public contracting, such as the recommendations in this report, should also be accompanied by expanded tools for identifying wrongdoing and mismanagement, as well as better protecting whistleblowers. Important enhancements to the existing whistleblower statute are summarized below.

(A) THE WHISTLEBLOWER STATUTE SHOULD BE AMENDED TO PROVIDE GENERAL AUTHORITY TO INVESTIGATE WRONGDOING AND MISMANAGEMENT IN STATE GOVERNMENT.

Connecticut law concerning investigations with respect to fraud and mismanagement in state government is too narrow. This needs to change. There should

always be a state official who is fully empowered to investigate fraud and mismanagement.

The provisions of Conn. Gen. Stat. §4-61dd, commonly known as the "Whistleblower Statute," split limited investigative responsibilities between the Auditors of Public Accounts and the Attorney General. These provisions are not broad enough to fully protect the public interest.

The beginning point of an investigation under Conn. Gen. Stat. §4-61dd(a) is someone having knowledge of "any matter involving corruption, unethical practices, violations of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety ..." actually reporting such information. While there have been numerous whistleblower complaints that have led us to investigate aspects of the current public contracting scandal,[8] there is no certainty that future wrongdoing in state government that needs to be exposed and corrected will be accompanied by a whistleblower actually providing information. It has been argued that in the absence of an individual providing such information, the current whistleblower statute may not provide clear authority for exposing the wrongdoing. Section 61-dd, therefore, should be clarified to implicitly allow investigations to proceed without a specific complaining "Whistleblower."

There is also a major gap in the scope of Conn. Gen. Stat. §4-61dd. When this statute was expanded in 1998 to cover "large state contracts" the legislation incorporated a significant loophole. The definition of "large state contract" in Conn. Gen. Stat. §4-61dd(g)(1) specifically exempts "a contract for the construction, alteration or repair of any public building or public work..." While this provision does not in any way limit the authority to procure information material to an investigation of misconduct by state officials, it could well limit investigations that arise solely as a result of complaints about state contractors for construction contracts.[9]

There is presently a public concern that contractors were able to inappropriately manipulate the State of Connecticut's selection process for very large public works projects. This possibility is surely more than ample justification to eliminate the construction contract loophole for large state contracts under the whistleblower statute.

Finally, the current whistleblower statute is an "investigate and report" statute. Under Conn. Gen. Stat. §4-61dd the Attorney General is empowered to "make such investigation as he deems proper" following receipt of a report from the Auditors of Public Accounts. "Upon the conclusion of his investigation, the Attorney General shall where necessary, report his findings to the Governor, or in matters involving criminal

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[8] Under Conn. Gen. Stat. §4-61dd we are required to keep the identities of such whistleblowers confidential.

[9] It can also cause substantial delay in investigations. Several Tomasso Group companies have filed motions to quash subpoenas issued to them by the Attorney General. Among other things they argue that the construction contract exception to the definition of large state contracts eliminates them from the reach of subpoenas under Conn. Gen. Stat. §4-61dd. While we are confident that the Superior Court will see through this obvious delaying tactic, that does not cure the delay. Under the strengthened whistleblower statute suggested here, it would have been much more difficult for the Tomasso Group companies to delay our investigation.

activity, to the Chief State's Attorney." Conn. Gen. Stat. §4-61dd(a). The whistleblower statute does not itself contain any civil or administrative remedies.[10]

A report to the Governor[11] about wrongdoing can be very hollow if that report is not explicitly backed by the authority to initiate appropriate legal action arising from the wrongdoing that is reported on. For example, if a whistleblower investigation reveals that the State of Connecticut was defrauded, then the report should be followed by a civil action against the wrongdoer. An important step in this direction would be accomplished by enacting a False Claims Act, as recommended below.

(B) THE WHISTLEBLOWER STATUTE SHOULD PROVIDE INCREASED PROTECTION TO WHISTLEBLOWERS.

The General Assembly has recently been moving in a positive direction by increasing protections for whistleblowers. Some additional steps would be very beneficial.

The provisions of Conn. Gen. Stat. §4-61dd were modified by Public Act 02-91 to permit whistleblowers who felt they were retaliated against to notify the Attorney General and, following the conclusion of the Attorney General's investigation, to file retaliation complaints with Human Rights Referees at the Commission on Human Rights and Opportunities ("CHRO"). This statute could be improved in two important respects. First, this protection against retaliation should be expanded to cover retaliation for providing information to the employing agency or anywhere else, rather than limited to retaliation for providing information to the Auditors of Public Accounts or Attorney General. In addition, a person who is the victim of retaliation for blowing the whistle should not have to await the conclusion of the Attorney General's investigation before being able to invoke the remedial mechanism of Conn. Gen. Stat. §4-61dd. Such a person should be able to seek relief immediately.

Also, no state employee, employee of a private contractor or other citizen should hesitate to report unethical or illegal conduct relating to state contracting out of a fear of being sued. Nor should corrupt officials or contractors be permitted to use lawsuits or the threat of lawsuits to squelch reporting or criticism of their misconduct. There should be a broad statutory immunity that protects any person from civil liability for commenting on, reporting, evaluating or otherwise making any statement about the conduct of any private or public individual or entity relating to state contracting. The immunity should apply in all instances except where the statement at issue was false and made with malicious intent and actual knowledge of falsity. This immunity should not be in lieu of any common law immunity or witness immunity providing greater protection.

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[10] Under current Connecticut law the Chief State's Attorney has sufficient authority to commence a criminal prosecution if the evidence rises to the level of establishing criminal liability. The Chief State's Attorney has wisely formed a Public Integrity Bureau to deal with such issues. However, not all misconduct rises to the level of being criminal wrongdoing. Other remedies should be available in such circumstances.

[11] In addition, the whistleblower statute does not make any provision for reporting to someone other than the Governor in the event that the report addresses issues that may involve the Governor.

(C) THE STATE OF CONNECTICUT NEEDS A FALSE CLAIMS ACT.

Nowhere in state law is there a general provision allowing state officials to initiate legal action based upon false claims being submitted to the State of Connecticut. Enacting a False Claims Act, like the federal government and several other states,[12] would provide a clear legal remedy.

Current law does not provide effective civil remedies to deter fraudulent activity. Under the whistleblower statute, there is no provision for recovery of damages or civil penalties and no provision for injunctive relief to protect the state. A False Claims Act would remedy this weakness.

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[12] The Commonwealth of Massachusetts, our neighbor, enacted a state False Claims Act as a result of the "Big Dig" scandal and massive cost overruns in that huge public works project.

Nancy A.
For your records
CKQ

RECEIVED
MAY 26 2004

State of Connecticut

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Hartford

May 24, 2004

Honorable James T. Fleming
Commissioner
Department of Public Works
165 Capitol Avenue
Hartford, CT 06106

Dear Commissioner Fleming:

I write in response to your letter of March 31, 2004, asking several questions regarding the bid submitted by Worth Construction Company, Inc. (Worth) for the Naugatuck Valley Community College project (Project). You have advised this office that Worth is the apparent low bidder on the Project pursuant to Conn. Gen. Stat. § 4b-91 and that Worth has listed Claywell Electric (Claywell) as its electrical contractor pursuant to Conn. Gen. Stat. § 4b-93.

You have expressed concerns about both Worth and Claywell. You state that Worth's president, Joseph Pontoriero, is reportedly under investigation in New Jersey for alleged ties to organized crime and that Worth and Mr. Pontoriero have been linked to improprieties committed by former Waterbury Mayor Philip Giordano. You have also provided documentation demonstrating that Kurt Claywell, owner of Claywell Electric, was convicted in 2000 on federal charges of pension embezzlement, and has recently pleaded guilty to insurance and tax fraud. You note that press reports also indicate that Claywell may have violated the state ethics laws. On March 26, 2004, the Project was removed from the agenda of the Bond Commission in order for the Department of Public Works (DPW) to complete its due diligence obligation pursuant to Conn. Gen. Stat. § 4b-91.

In light of these facts, you have asked the following three questions:

1. Are the facts sufficient to consider the disqualification of Worth and Claywell pursuant to Conn. Gen. Stat. § 31-57c?

2. If not, do the facts warrant consideration at a proceeding to determine whether Worth and Claywell meet the standard of "responsible and qualified" pursuant to Conn. Gen. Stat. § 4b-92?

3. Bid prices are generally good for ninety days. Assuming the bonding for this project is not in place on day ninety, can DPW re-bid these projects?

The Commissioner of Public Works has a statutory obligation to make determinations with respect to the "responsibility" of apparent low bidders; see e.g. Conn. Gen. Stat. § 4b-91 and § 4b-92 ("lowest, responsible and qualified bidder" defined); and the disqualification of contractors. See Conn. Gen. Stat. § 31-57c (requirements for disqualification). Such determinations must be made after a complete and thorough due diligence investigation by DPW and must be supported by reliable evidence accumulated as part of such investigation.

1. Responsibility Determination

Prior to awarding a contract, under Conn. Gen. Stat. § 4b-91 DPW must make a determination as to whether an apparent low bidder is also qualified and responsible as defined by Conn. Gen. Stat. § 4b-92. "' [L]owest responsible and qualified bidder' shall mean the bidder whose bid is the lowest of those bidders possessing the skill, ability and integrity necessary to faithful performance of the work based on objective criteria considering past performance and financial responsibility." Id. "Public authorities are given the discretionary power to pass upon the honesty and integrity of the bidder necessary to a faithful performance of the contract." 64 Am Jur 2d, Public Works and Contracts § 70.

"[D]iscretion does enter into the selection of the bidder to whom the contract shall be awarded." 24 Atty. Gen. Op. 329 (July 23, 1946) (attached for your convenience). Characteristics beyond pecuniary ability are to be considered -- including, for example, a bidder's "general ability and capacity to carry on the work, his equipment and facilities, his promptness, and the quality of work previously done by him, his suitability to particular tasks, and other qualities. '[R]esponsible' contemplates promptness, faithfulness, and capacity and ability to do work according to plans and specifications." Id.

"'Lowest responsible bidder' within a provision of a city charter providing that the award of contracts on public letting must be made to the lowest responsible bidder does not mean ... one who is only pecuniarily responsible but one who also possesses moral worth." Dairymen's League Co-op. Ass'n, Inc. v. Perrini, 282 N.Y.S 2d 887, 889, 54 Misc.2d 400. See also, City of Inglewood-Los Angeles County Civic Center Auth. V. Superior Court, 7 Cal. 3d 861, 103 Cal.Rptr. 689, 692, 500 P.2d 601, 604 (1972)(defining term 'responsible' as trustworthiness, quality, fitness, and capacity of low bidder to satisfactorily perform proposed work); Appeal of Associated Sign & Post 485 N.E.2d 917, 924 (Ind.Ct.App. 1985)(enumerating relevant factors in determining lowest responsible bidder: financial responsibility, capital, character and reputation, competency and efficiency, energy,

experience, facilities, faithfulness and fidelity, fraud or unfairness in previous conduct, honesty, judgment, promptness, quality of previous work and suitability to particular task).

Under Connecticut law, it is well established that bidders have no protectable interest in the award of a State contract. See e.g., Austin v. Housing Authority, 143 Conn. 338, 122 A.2d 399 (1956); 10 McQuillin, Municipal Corporations § 299.77 (3d Ed. Rev.). Instead, "a bid, even the lowest responsible one, submitted in response to an invitation for bids is only an offer which, until accepted by [the government contracting authority], does not give rise to a contract between the parties." Ardmare Construction Company Inc. v. Freedman, 191 Conn. 497, 501-502 (1983). However, this does not mean the government can "act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts." Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d. 953, 964 (D.C. Cir. 1980).

Accordingly, DPW should conduct a due diligence investigation in accordance with these standards. I understand that you are in the midst of such an investigation at present. If you conclude after investigation that there is evidence that Worth is not a "responsible" bidder within the meaning of the statute, you should provide Worth with notice, detailing the reasons why you are prepared to reach this conclusion, and give Worth an opportunity to respond to DPW's concerns at an informal conference. We will be happy to discuss such actions with you at that time.

2. Disqualification

"Disqualification of a contractor is a serious action that shall be used only in the public interest and for the state government's protection and not for purposes of punishment or in lieu of other applicable enforcement or compliance procedures." Conn. Gen. Stat. § 31-57c (b). Section 31-57c(c) provides that "the Commissioner of Public Works may disqualify any contractor, for up to two years, from bidding on, applying for, or participating as a subcontractor under, contracts with the state..." for certain enumerated actions.

The causes for disqualification are enumerated in Conn. Gen. Stat. §31-57c(d), and include, among others: "(1) [c]onviction or entry of a plea of guilty or nolo contendere for or admission to commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract; (2) [c]onviction or entry of a plea of guilty or nolo contendere for or admission to the violation of any state or federal law for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty which affects responsibility as a state contractor."

The statute requires notice and an opportunity for a hearing held in conformance with the procedures specified in the Administrative Procedures Act, chapter 54 of the Connecticut General Statutes.

3. Investigation

Because of the serious nature of the allegations, DPW must act carefully to ensure that its decisions regarding responsibility and disqualification are based on complete and accurate information. DPW must undertake a substantive and thorough due diligence investigation of the allegations made and concerns raised. While newspaper articles may provide a starting point for DPW to pursue its investigation, DPW cannot base its decisions solely upon these reports without confirming their accuracy.

In this regard, I note that the articles you mention pertain to alleged illegal activities involving Worth in New York and New Jersey. I understand that you are pursuing evidence from those states' investigations regarding Worth's activities, including possible debarment actions in other states, as part of your due diligence investigation, and will reexamine the debarment disclosures made by Worth in its bid submission on the Project, as well as bid submissions on other DPW projects, in light of your findings.

In regard to Claywell, you have attached documents related to pleas entered by Claywell in federal court. These documents demonstrate that on May 19, 2000, in federal district court in Connecticut, Kurt Claywell pled guilty to one count of Pension Embezzlement, in violation of 18 U.S.C. § 664, admitting therein that he knowingly and willfully embezzled, stole, or converted to his own use or to the use of another monies or assets of an employee welfare benefit plan or employee pension benefit plan. Further, on September 8, 2003, Kurt C. Claywell pled guilty to one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, in connection with a number of allegations related to, among others, withholding and nonpayment of employment taxes, personal and corporate tax liabilities, and mail and bank fraud. He has not yet been sentenced in this second indictment. These pleas, and the admissions they contain, may satisfy the disqualification standards enumerated in Conn. Gen. Stat. § 31-57c. My staff and I are available to discuss this further with you.

You have also inquired whether DPW can reject all bids on the Project because bonding may not be in place ninety days after the bids were opened.[1] Conn. Gen. Stat. § 4b-94 expressly sets forth four reasons for DPW to reject all bids, including that: "(4) the awarding authority

[1] Conn Gen. Stat. § 4b-91 provides that the award of a construction contract shall be made within sixty days after opening of such bids. We will assume therefore that your inquiry relates to the statutory sixty day period and not a ninety day period.

finds cause to reject such bids." Failure of the Bond Commission to approve funding for the project appears to be an appropriate "cause" for rejection of bids. If you decide that you have cause to reject all bids on the Project, the statute requires DPW to notify "each affected bidder, in writing, of the reasons for such rejection." Id.

On the other hand, you may also decide not to reject all bids until DPW has sufficient time to thoroughly conduct its due diligence regarding the apparent low bidder. While Conn. Gen. Stat. § 4b-91 provides that the award of a construction contract shall be made within sixty days after opening of bids,[2] I understand that DPW in the past occasionally has obtained extensions of time to assure that the contractor will hold its price after the expiration of the sixty day period. It would therefore be consistent with its past practice if DPW were to choose to do so here until DPW concludes its due diligence as to Worth's responsibility.

If you determine that action is warranted against either or both of these contractors, my staff will assist you in determining the appropriate procedures that should be followed to comply with the law.

My staff and I are available to discuss all of these very important matters further if you wish.

Very truly yours,

RICHARD BLUMENTHAL

[2] This time requirement is directory and not mandatory because as a practical matter the procedure for determining bidders' qualifications can take longer than sixty days. "[T]he time requirement is not a matter of substance but rather one of convenience." Rudolph Netsch Construction Co. Inc. v. State of Connecticut, Department of Public Works et al, No CV 98-0583698 S, slip op. at 13, JD Hartford at Hartford, Jan. 12, 2000 (Satter, J.)

24 Atty. Gen. Op. 329

COMPTROLLER — BIDS — LOWEST QUALIFIED RESPONSIBLE BIDDER

The term "lowest qualified responsible bidder" in Section 59g of the 1943 Supplement to the General Statutes means a bidder who has complied with all the conditions and requirements of the bidding; who possesses the qualifications of fitness, ability and capacity to do and perform the particular work, and whose bid is the lowest among the bids of those possessing the foregoing qualifications.

It is entirely within the discretion of the comptroller to decide who is or who is not a responsible bidder.

The comptroller's decision is final unless he abused his discretion.

Definitions of "lowest responsible bidder."

Hartford, July 23, 1946

HONORABLE RAYMOND S. THATCHER,
STATE COMPTROLLER,
STATE CAPITOL,
HARTFORD, CONNECTICUT.

Dear Sir:

This is in response to your letter of June 27, in which you say:

"Section 59g of the 1943 Supplement to the General Statutes provides in part as follows:

'The comptroller .... and shall, within five days after the opening of such bids, award such contract to the lowest qualified responsible bidder.'

"In connection with this sentence I would like at this time to request an opinion from you on the following questions:

1. What do the words 'lowest qualified responsible bidder' mean as used in this statute?

2. Is it entirely within the discretion of the comptroller to decide who is or who is not a 'responsible' bidder?

3. Having decided on the responsibility of a bidder, is the comptroller's decision final?"

It might appear that the term "responsible" used in the clause quoted above referred solely to financial responsibility: that the contract must be awarded to the bidder whose bid is the lowest and who is financially responsible for the performance of the work by bond or otherwise; and that, therefore, no discretion is vested in the comptroller in the selection of the bidder.

However, a study of Section 59g in the light of the well-established definitions of the phrase "lowest responsible bidder" leads us to the conclusion that discretion does enter into the selection of the bidder to whom the contract shall be awarded. A perusal of the definitions of the said

phrase in "Words and Phrases" discloses that the term "responsible" when used in connection with "lowest bidder" means something more than financial responsibility.

We select herewith a few of the definitions which are typical of the many definitions therein.

"The term 'lowest responsible bidder,' used in section 7623, par. 6, General Code, does not mean the lowest bidder. A bidder is not necessarily a responsible bidder because he can give a construction bond. The term 'responsible' is not limited to pecuniary ability, but pertains to many other characteristics of bidder, such as his general ability and capacity to carry on the work, his equipment and facilities, his promptness, and the quality of work previously done by him, his suitability to particular task, and other qualities which are found necessary to consider in order to determine whether contract could be performed strictly. A board of education has a right in determining this responsibility to consider the character of work done by such bidder on other contracts performed for the same board. Hudson v. Board of Education of Wheelersberg Rural School Dist., 179 N.E. 701, 703, 41 Ohio App. 402."

"In awarding a contract for the construction of a drainage ditch, the county auditor, in determining who is the lowest responsible bidder, is not limited to an inquiry as to financial responsibility, but may, in the exercise of the discretion vested in him, inquire also as to the fitness and ability of the bidders to do and perform the particular work. Kelling v. Edwards, 134 N.W. 221, 223, 116 Minn. 484, 38 L.R.A., N.S. 668."

"'Lowest responsible bidder' does not mean that such bidder is merely pecuniarily responsible to carry on work, but word 'responsible' contemplates promptness, faithfulness, and capacity and ability to do work according to plans and specifications. One assailing municipal contract not let to lowest bidder must show lowest bidder is 'responsible,' and that municipal officers abused discretion (53 PS § 10965). Wilson v. City of New Castle, 152 A. 102, 103, 301 Pa. 358."

Words and Phrases, Vol. 25, pp. 714, 715, 716.

In applying the foregoing definitions to the phrase in our statute it becomes apparent that more than the lowest bid and financial responsibility is required for the awarding of a contract to a bidder by the comptroller; that besides the lowest bid and compliance with conditions and terms of the bidding, the bidder must also possess the qualifications of fitness, ability and capacity to do and perform the work under the contract; and that determination of such qualifications rests within the sound discretion of the comptroller.

In view of the foregoing it is therefore our opinion that:

1. The term "lowest qualified responsible bidder" in Section 59g of the 1943 Supplement to the General Statutes means a bidder who has complied with all the conditions and requirements of the bidding; who possesses the qualifications of fitness, ability and capacity to do and perform the

particular work and whose bid is the lowest among the bids of those possessing the foregoing qualifications.

2. It is entirely within the discretion of the comptroller to decide who is or who is not a responsible bidder.

3. The comptroller's decision is final unless he abused his discretion.

Very truly yours,

WILLIAM L. HADDEN,
Attorney-General.

By JOSEPH A. HOFFENBERG,
Assistant Attorney-General.

OLD LYME — OLD SAYBROOK — BRIDGE

The demolition expense of the existing bridge, in compliance with Section 362h of the 1945 Supplement to the General Statutes, should be paid for out of the proceeds derived from the sale of the bonds issued "to meet the cost of construction of the bridge".

The removal of the existing bridge is so closely related to and contingent upon the construction of the new bridge as to be regarded as a part of one ~~and~~ the same project and for all practical purposes as a part of the construction of the new bridge.

July 26, 1946.

HONORABLE E. LEA MARSH, JR., CHAIRMAN,
OLD LYME-OLD SAYBROOK BRIDGE COMMISSION,
DEEP RIVER, CONNECTICUT.

Dear Sir:

I refer to your letter of June 11th which was the subject of a conference at this office and in connection with which an oral opinion had been given you, which opinion it is the purpose of this letter to confirm.

You present the question whether upon completion of the projected Old Lyme-Old Saybrook Bridge, the demolition of the existing bridge, in compliance with Section 362h of the 1945 Supplement, should be paid for out of the proceeds derived from the sale of bonds or whether this cost should be met out of other State funds.

Section 362h is included in Part III, Chapter 80A of the 1945 Supplement, which part deals specifically with the construction of the Old Lyme-Old Saybrook Bridge and matters incidental thereto. Section 356h of Part III directs the Commission to issue bonds, not to exceed $6,000,000, "to meet the cost of construction of the bridge as determined by the com-

Board for State Academic Awards

Charter Oak State College
Connecticut Distance Learning Consortium

To: State Senator Donald DeFronzo
Commissioner, James Fleming
Co-Chairmen, Task Force on Contracting Reform

From: Merle W. Harris
Executive Director, Board for State Academic Awards
President, Charter Oak State College

RECEIVED
AUG 3 - 2004
Dept. of Public Works
Commissioner's Of

Date: July 30, 2004

I am writing for Charter Oak State College and the Connecticut Distance Learning Consortium regarding the important work you are doing on contract reform. My comments state the obvious, but I believe it is important to raise to your attention the issue of adequate staffing in the conduct of the contract process.

The number of College and Consortium contracts has increased during the past few years as both organizations have grown. We are careful to comply with current state statutes and regulations and work closely with the Attorney General's Office. However, we have found that there are some roadblocks that often make it difficult for us to carry out our responsibilities in a timely manner.

The major problem we confront is that there is insufficient staffing in the Attorney General's Office for the number of contracts that need review and approval. I want to emphasize that this comment is not a reflection on the people we work with in that office. They are excellent and try to respond in a timely manner. However, this is not always possible.

Therefore, as you review contracting procedures and recommend changes, I urge that you not compound this problem. If changes require additional oversight, please recommend the funding needed for positions necessary to ensure that contracts can be finalized in a timely manner. When it is not possible to complete a task, implement a program or carry out a key responsibility due to the time it takes to get a contract approved, some people attempt to circumvent important procedures. Adequate staffing should eliminate such frustration and ensure that all state employees comply with current and future contracting procedures.

55 Paul J. Manafort Drive, New Britain, CT 06053-2142 Telephone: 860.832.3876 Fax: 860.832.3999
E-mail: mharris@charteroak.edu Websites: www.charteroak.edu www.ctdlc.org
An Equal Opportunity Employer

interstate

RECENT / CURRENT BIDS FOR MEDIUM OR HEAVY TRUCKS

2/5/04	#04PSX0001	DOT (14) 37,000 GVW CAB & CHASSIS Written around I/H. Exclusive to all others. Awarded to I/H despite us being $ 1,975. low per unit. Only I/H and Sterling (under protest) bids received. Freightliner didn't bid due to I/H specs.
3/31/04	#04PSX0056	DOT (12) 54,000 GVW CAB & CHASSIS Written around I/H. Exclusive to Sterling and Freightliner. We didn't bid. Freightliner didn't bid. (Mack bid, but was high). Awarded to I/H.
5/31/04	#04PSX0081	DOT Bodies for 37,000 GVW Trucks. Written around product sold by Hine Bros. I/H body company - called Park City Truck Equipment. Awarded to Park City.
6/9/04	#04PSX0110	PUBLIC SAFETY (SPEC INFLUENCED BY DOT) (34) TRUCKS FOR MASS CASUALTY TRAILERS. Written around I/H, exclusive to all others. We didn't bid. Was RFP - No public bid opening. Is being handled behind closed doors - no information on bids/bidders available to public. No award yet. *Will* be awarded to a vendor with an I/H chassis.
8/2/04	#04PSX0183	DOT Bodies for 54,000 GVW Trucks. Written exclusively around product sold by Hine Bros. I/H body company - called Park City Truck Equipment. Bid not due yet, but *Will* be awarded to Park City.
8/3/04	#04PSX0183	DEP (1) Truck/Tractor (truck portion of a tractor/trailer) Bid not due yet, but good, clean, generic spec - as it should be - fair to all manufacturers. This is DEP, not DOT.

Ford TRUCKS STERLING HINO

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interstate

CONTRACT CANCELLATION

Our Contract # 012-A-11-0400-C for 37,000 GVW and 39,000 GVW Trucks was awarded in May 2002, and cancelled in November of 2003. It was supposed to last thru 9/30/04. International had also (fairly) won the 58,000 GVW trucks that were in this same bid. When the contract was cancelled, I/H's portion had to be cancelled as well. This bid was the *last* DOT bid for medium/heavy trucks that was written using non-proprietary specs.

The recent awards to International *which replace the above cancelled contract* cost substantially more:

37,000 GVW Cab & Chassis -	$ 8,430. more per truck!
58,000 / 54,000 GVW Cab & Chassis -	$ 21,510. More per truck!

interstate

April 8, 2004

Ms. Jill Belisle, Contract Specialist
State of Connecticut
Department of Administrative Services
Procurement Services
165 Capitol Avenue
Hartford, CT 06115

✓Cc: Mr. Alan Mazzola, Deputy Commissioner, DAS

RE: Bid #04PSX0056 for 54,000lb. GVW Dump Truck Cab & Chassis

Dear Ms. Belisle:

Please accept our response of *"NO BID"* for this invitation to bid.

As with the previous bid, #04PSX0001, certain aspects of the specifications have been written, with intent, to the exclusion of our Sterling trucks, as well as those of certain other manufacturers. This causes us to be unable to comply with the specifications.

In fact, the bid documents state that *OUR TRUCKS WILL BE REJECTED* due to Sterling's usage of Meritor / Wabco as the manufacturer of the ABS portion of the truck's brake system.

This "rejection clause" is in violation of the Connecticut General Statutes, Chapter 58, Section 4a-52, which states: "The Commissioner of Administrative Services shall adopt regulations for the following purposes": (#13) "To establish policies and procedures for use by state agencies in preparing specifications *which will ensure that such specifications shall not be unreasonably restrictive and shall encourage competition".*

Such rejection of the Meritor / Wabco system is illegal, unfair, biased, and discriminatory, as the Meritor / Wabco system is an industry-standard, *federally approved* system meeting all federal and state motor vehicle safety standards.

There are also other specification items that have been written to our exclusion, which we may address separately as part of further communication that you may receive from us regarding this bid.

Sincerely,

Daniel Rawson
Municipal Manager

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ROBERT J. CARRICK
GENERAL MANAGER
NORTHEAST REGION

Sterling Truck Corporation
4420 SHERWIN RD
WILLOUGHBY, OH 44094
440.269.5584 Phone
440.269.5970 Fax
610.517.9148 CELLULAR
BOBCARRICK@STERLINGTRUCKS.COM

March 22, 2004

Mr. Devin Marquez, Staff Counsel
State of Connecticut
Dept of Administrative Service
165 Capitol Avenue
Hartford, CT 06106-1658

Re: Brake ABS system on Sterling units delivered to State of Connecticut

Dear Mr. Marquez:

I would like to address an issue that you may have with out last contract. The trucks in question were specified and ordered correctly by our dealer Interstate Ford, to include the Bendix ABS system that was in the state's bid specifications.

The DOT personnel will recall that prior to production of any of the trucks, a spec review meeting was held at the DOT office with Sterling personnel present. The specs reviewed by all parties included the Bendix system.

When the pilot model review was held at our factory in Ontario, DOT personnel observed that the pilot truck had the Bendix system installed.

Due to a system input error, some of the subsequent units were incorrectly built with the Wabco brake system, our standard. No Dealership personnel were aware of this error until the units were delivered.

After the problem was discovered on these units, we offered to replace the incorrect system or provide a discounted price to the State of Connecticut. The state opted to accept the discounted price.

We hope this has clarified your concerns. If you have any questions, please call me anytime

Sincerely,

Robert J. Carrick
General Manager
Northeast Region

RJC:dll

interstate

March 23, 2004

Mr. Devin Marquez, Staff Counsel
State of Connecticut
Dept. of Administrative Services
165 Capitol Avenue
Hartford, CT 06106-1658

Cc: Mr. Robert Gordon, President, Interstate Ford
Mr. Jeffrey Vita, Esq.

RE: Charges by Mr. Richard Baron, State of Connecticut DOT, against Daniel Rawson

Dear Mr. Marquez:

I believe you are in receipt of a letter from Sterling Truck Corporation (copy attached) addressing any concerns regarding the ABS system on certain trucks previously delivered to the DOT. The letter clearly explained the situation and its resolution of many months ago.

Sterling's recounting of events illustrates just how ludicrous and unfounded the charges by Mr. Baron are. As additional evidence to refute Mr. Baron's claims, after the ABS problem was discovered, his staff asked for and received a copy of the order for the trucks in question which revealed that the correct Bendix ABS system was ordered. He also had much conversation with Sterling personnel who acknowledged that the problem was with Sterling, *not* myself or Interstate Ford. Subsequently, his staff has even acknowledged to *me* that both myself or Interstate Ford apparently did nothing wrong. At the time the problem was discovered, his concerns were directed at Sterling, and nothing was alleged as done wrong by myself or Interstate Ford.

It is only now, long after discovery of the ABS problem that Mr. Baron has apparently "forgotten" all of the above, as well as the sequence of events and resolution of the problem as outlined in the letter from Sterling, and chooses to surface with his allegations.

What really speaks volumes is the fact that Mr. Baron chooses *right now,* many months after the resolution of the ABS problem to act as he has. As, *right now,* DAS is in receipt of a formal bid protest package from Interstate Ford regarding a current bid and subsequent award that are in violation of specific Connecticut General Statutes. Mr. Baron well knows that the protest focuses directly on him. We need say nothing more regarding both the reason for, and timing of the charges by Mr. Baron.

It is particularly alarming that Mr. Baron charges me with *deceptive* practices. The only *deception* taking place is Mr. Baron's very transparent attempts to discredit those who name him in the bid protest. Again, the timing of his actions are most telling.

STERLING HINO
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Integrity and accuracy in bidding are of paramount importance to both myself and Interstate Ford...and we practice the same to the best of our ability. We have provided numerous vehicles to the state of Connecticut both before and after the previously mentioned trucks, without issue.

Mr. Baron's charges are regarded in the extreme as complete fabrications that are malicious, slanderous and with intended defamation of my character, both personally and professionally. If Mr. Baron continues in this direction, or if I hear echoes of this from any other parties, I will be left with no option but to vigorously seek legal remedy.

Please feel free to call me at (203) 876-9934 if you would like to discuss any aspects of this.

Sincerely,

Daniel Rawson

Daniel Rawson
Municipal Manager
Interstate Ford Truck Sales, Inc.

PROTEST OF AWARD FOR BID #04PSX0001 FOR 37,000 GVWR DUMP TRUCK CAB & CHASSIS

OUR POSITION:

Our position is that DAS and/or DOT have violated the Connecticut General Statutes via spec writing that is both EXCLUSIVE and PROPRIETARY, and by the subsequent award and purchase order to Nutmeg International Trucks for this bid.

THE VIOLATIONS:

Chapter 58: Section 4a-52 "Regulations", Item 13.

Section 4a-65 "Unlawful Purchases"

(Pass out copies of statutes and read them)

BACKGROUND:

In January, BEFORE the bid was due, after recognizing the proprietary aspects of the specs, we made MANY attempts to communicate our concerns in writing and by phone to both DAS and DOT.

1) We asked for a meeting to discuss our concerns...and we were denied that opportunity.

2) We asked that the specs be changed to not be exclusive and proprietary...and our request went on deaf ears...nothing was done.

3) We asked that the bid be "put on hold" pending resolution of our concerns...and nothing was done.

4) We stated prior to the bid that the way the specs were written would produce a compliant bid response from ONE manufacturer only...International. And that is exactly what happened.

5) After the bid opening where it was clear that we had presented the low bid, we asked that the award be "put on hold" pending resolution of our concerns...and nothing was done.

6) After the bid award to Nutmeg International, we again asked that the purchase be "put on hold" pending resolution of our concerns...and nothing was done.

7) After we filed this bid protest, we asked that the *NEXT BID* for the 54,000 GVW trucks be changed or put on hold...as it contained the *EXACT SAME LANGUAGE* regarding the ABS system, stating that our trucks would be rejected!...and nothing was done. In other words you forged right ahead with full knowledge of our protest on the very same issue.

Any answers that we did get were totally ambiguous, and didn't clarify or change anything. Basically, the State ignored our concerns and proceeded "full steam" ahead just as if we hadn't raised any issues at all. No accommodations were made whatsoever.

HISTORY:

There are currently (3) manufacturers that produce trucks of the type and configuration asked for in this bid: Sterling, Freightliner, and International. The state has all (3) in its fleet.
Both the content of your fleet and your own bid history supports that the bid process previously has been fair...and that the award was always made to whichever manufacturer's product was low bid at the time...in other words, you have a "mixed fleet", and there were never any PROPRIETARY issues.

A letter written to the Attorney General prior to the bid summarizes the current situation.

(Pass out copies of letter and read it)

THE PROPRIETARY SPEC ISSUES: (not a product debate)

1) Brand name of ABS system:

* The specs request BENDIX ABS...NO SUBSTITUTE, "TRUCKS WITHOUT BENDIX ABS WILL BE REJECTED". *(why this language?)*

* Bendix and our Meritor/Wabco - both federally mandated and federal DOT approved. Used by Sterling and Freightliner.

* Electronic components - not maintenance, service, or failure prone. Low parts usage. NOT the mechanical "moving parts" aspects of the brakes.

* Make engine analogy: Caterpillar, Cummins, International...all in your fleet.

2) 3-Piece Hood: New item proprietary to I/H only for this class of truck.

* Little or none in the fleet. No history to support it's claimed superiority.

3) ENGINE WARRANTY:

* 10 year engine warranty requested.

* Our Caterpillar engine does offer a 10 year warranty, with a 7 year ceiling on 3 components only...the turbocharger, the fuel injectors, and the water pump.

* The Caterpillar C-9 engine in our bid is a completely new engine, and has not been bid previously. It is not available with 10 years on the 3 components.

* 10 years is proprietary to I/H for *their own* engine, for size of engine specified.

* If I/H were to use Caterpillar or Cummins (as they can), they would have the same warranty as us.

* State specs for other trucks where the engine size dictates that I/H can't offer their own engine *don't* require the 10 year warranty, only 7 years instead. The 10 year requirement is *only* put in the specs when it *favors* I/H. Notice that it wasn't in the recent bid for the larger 54,000 GVW trucks...as I/H doesn't offer their own engine in that size truck!

Each of these items, ABS...Hood Design...Engine Warranty...are not a matter of us "choosing not to offer them" as implied by DOT. They are instead what is currently offered by each manufacturer.

It is not determined by DOT or ourselves as the dealer to demand what the manufacturer will offer. The product evolves and changes over the years, and is not always the same as previous product. Our truck offered is a new generation truck with numerous changes from the previous Sterlings in the DOT fleet.

DOT's WRITTEN REJECTION OF OUR BID:

Dick Baron's memorandum to Janice Snyder on Feb. 18th rejects our bid and recommends International *ONLY for the exact 3 items of non-compliance that are proprietary to I/H* that we raised issue with from day one...The ABS system, 3-Piece Hood, and Engine Warranty. These are the same items that NO OTHER manufacturer can comply with, and items that have been changed in your recent bids. With the stance that the state had taken at this point, this was 100% predictable.

HOWEVER: We need to point out that Mr. Baron has incorrectly stated our engine warranty in his reasons for rejecting our bid. He states that we offer only a 7 year warranty with *no* coverage on three components. Our bid was crystal clear on this point. Mr. Baron's misinformation has been used as a reason to reject our bid. This was erroneous, and as such was wrongful factor in the decision to reject our bid.

(Pass out Dick Baron's letter)

NO CHECKS AND BALANCES:

With this bid there appears to have been no checks and balances in the DAS system to prevent the proprietary spec-writing. The specs were printed and issued exactly as they had been provided by DOT. There appears to be no one at DOT in the absence of Jim Lewis and Peter Marchand to oversee and prevent this illegal method of spec-writing from being employed.

Despite all of our complaints, there was also no one at DAS who was concerned enough to change or challenge the specs, or who concerned themselves with the obligation to prepare specifications as per the statutes that have now been violated.

This is why we are now here today and you have this situation to straighten out. This bid protest is the apparently the only "check and balance" there is to cause DAS to adhere to the statutes as they relate to this bid.

BID SCORING:

The current bid scoring is wrong. There can only be one top score for the low bid category. This score for Nutmeg International and Interstate Ford needs to be reversed, as we are rightfully the low bidder meeting what would be the correct, legally written, non-proprietary specs. We were low bid by $ 1,688. per unit with the options selected, vs. Nutmeg International.

Even if the other scoring categories remain unchanged, Interstate Ford would now correctly have the top score of 2.60, and Nutmeg International would have 2.50

(Pass out copies of scoring)

However, the other scoring categories are questionable as well. You have *two* categories in which to give low scores regarding vendor past performance / delivery. You've given us the lowest scores of all bidders on both. A "Zero" is essentially a punitive rating. Given some problems we previously had, it seems the scoring system for this bid has been set up with additional, duplicative categories especially to give DOT additional opportunity to give us low ratings to offset the possibility of us being low bid. In other words...develop a scoring system that is virtually guaranteed to keep us from achieving the top score.

Also, Hine Brothers International's score for low bid should be lower than Interstate Ford *or* Nutmeg International, as they were the *Highest Bid* by a wide margin *and* included a wrong transmission in their bid!

This system is highly manipulative and deceptive at best.

REMEDY:

Statute #4a-65 'Unlawful Purchases" states that "Such order or contract shall be void and of no effect".

We don't ask that you cancel what you have already ordered, as we don't intend any harm to the state or Nutmeg International.

Additionally, we don't ask that any trucks that Nutmeg may have sold to municipalities off of the state contract thus far be cancelled, as we don't intend any harm to those customers.

However, *we* are the party that has been harmed and wronged. Accordingly, we ask per the statute, that the award and contract for this bid be immediately cancelled with Nutmeg International, and re-awarded to Interstate Ford for the remainder of the contract period. This would put things as close as possible to what they should have been at the time of the original bid award, without additional harm to any party.

****

FUTURE BID: HOMELAND SECURITY VEHICLES

UNRELATED TO OUR PROTEST , BUT RELATED TO THE "PROPRIETARY SPEC" PROBLEM:

(Pass out copies of the specs)

Page 26 of the specs:	"SMOKE GRAY" interior items???
	"DRAWBRIDGE GRAY" interior items???
	"Printed cloth headliner"???
	Interior dome light with "tinted theater dimming"???
Page 25 of the specs:	"LANG MEKRA styled mirrors, 7.09" x 15.75"???

These descriptions are pure I/H, right from their own spec print-outs. Why would such references to proprietary colors, brands and dimensions be in the specs? Please be aware that all manufacturers offer appropriate colors, materials, and mirrors. Etc.

Why should all manufacturers other than International have to take exceptions to the specs for such items? How does this encourage competition? As the specs are written, all it does is "favor" I/H, as they don't have to check any of the "NO" boxes on the spec compliance sheets, while all other manufacturers must!

If you are genuinely sincere about cleaning up biased "proprietary spec-writing" and the appearance of favoritism, and restoring integrity to the process, you will install the appropriate "checks and balances" in your bid preparation system, and "fix" these bid specs immediately, even if it means delaying the bid. I don't think the terrorists that these trucks are designed to respond to, will care one bit about the cloth or colors of the interiors!

ALL WE ASK FOR IS A PROPER AND LEVEL PLAYING FIELD AS PROVIDED FOR IN THE CONNECTICUT GENERAL STATUTES.

CHAPTER 58*
PURCHASES AND PRINTING

*See note at end of sections 4c-1 to 4c-3, inclusive, re former use of this chapter number.

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Sec. 4a-66. (Formerly Sec. 4-25). Acquisition of federal property. Contracts with federal agencies concerning health services. Exemption from statutes or municipal charter. Purchasing from federal contractors.
Sec. 4a-67. (Formerly Sec. 4-120a). Acquisition of federal surplus property.
Sec. 4a-67a. Plan to increase state purchase of goods containing recyclable materials and goods capable of being recycled or remanufactured.

addiction services, effective July 1, 1993; P.A. 95-257 replaced Commissioner and Department of Public Health and Addiction Services with Commissioner and Department of Public Health, effective July 1, 1995; June 18 Sp. Sess. P.A. 97-9 amended Subdiv. (1) by deleting proviso that data processing and telecommunications purchases, leases and contracts be made in consultation with the executive director of the Office of Information and Technology, effective July 1, 1997.
See Sec. 31-237(b) re purchase of supplies and equipment by Employment Security Division of Labor Department.
Annotations to former section 4-110:
Cited. 190 C. 212, 216.
Subsec. (f):
Cited. 190 C. 212, 217.

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Sec. 4a-52. (Formerly Sec. 4-111). Regulations. Not later than January 1, 1995, the Commissioner of Administrative Services shall adopt regulations for the following purposes: (1) To authorize any agency to purchase directly specified supplies, materials, equipment and contractual services under prescribed conditions and procedure; (2) to authorize, in writing, any state agency to purchase, in the open market without filing a requisition or estimate, specified supplies, materials or equipment for immediate delivery to meet emergencies arising from unforeseen causes, including delays by contractors, delays in transportation and an unanticipated volume of work, provided a report of any such purchase, with a record of the competitive quotations upon which it was based and a full account of the circumstances of the emergency, shall be submitted at once to said commissioner by the administrative head of the agency concerned and provided such report shall be entered by him on a record and shall be open to public inspection; (3) to prescribe the manner in which supplies, materials and equipment shall be purchased, delivered, stored and distributed; (4) to prescribe the manner of making requisitions and estimates, the future periods which they are to cover, the form in which they shall be submitted and the manner of their authentication; (5) to prescribe the manner of inspecting all deliveries of supplies, materials and equipment and of making chemical and physical tests of samples submitted with bids or proposals and samples of deliveries to determine whether or not the specifications are being complied with; (6) to provide for the transfer to or between such state agencies of supplies, materials and equipment which are surplus with one such agency but which may be needed by another or others, and for the disposal by sale of supplies, materials and equipment which are obsolete or unusable; (7) to prescribe the amount of deposit or bond to be submitted with a bid or a contract and the amount of deposit or bond to be given for the faithful performance of a contract; (8) to carry out the provisions of section 4a-59a; (9) to specify the categories of purchases which are not subject to the competitive bidding requirements of section 4a-57; (10) to indicate the types of objective criteria that may be used by the commissioner in determining "lowest responsible qualified bidder" for the purposes of section 4a-59; (11) to define the term "minor irregularities" for the purposes of section 4a-59, provided such term shall not include (A) variations in the quality, unit price or date of delivery or completion of supplies, materials, equipment or contractual services or (B) exceptions to programs required under the general statutes; (12) to provide for any other matters necessary to effect the provisions of this chapter and the regulations promulgated in pursuance thereof; (13) to establish policies and procedures for use by agencies in preparing specifications which will ensure that such specifications shall not be unreasonably restrictive and shall encourage competition; (14) to determine when the commissioner or his designee may cancel a procurement; (15) to establish guidelines governing the use of "brand name or equal" specifications; (16) to establish procedures by which a bidder or proposer may request reconsideration of an award determination; (17) to establish guidelines governing the use of remanufactured goods and circumstances under which remanufactured goods must be used by requesting agencies; and (18) to determine when the

six months or be both fined and imprisoned.
(March, 1950, S. 94d; 1959, P.A. 258, S. 8; P.A. 77-614, S. 97, 610; P.A. 90-201, S. 5, 11; P.A. 95-285, S. 6, 9.)
History: 1959 act substituted "director" for "supervisor"; P.A. 77-614 substituted commissioner of administrative services for director of purchases; Sec. 4-116 transferred to Sec. 4a-64 in 1989; P.A. 90-201 added the chief executive officers of the constituent units of the state system of higher education and of the institutions within the constituent units, and members of their office staffs, as persons not to be interested in contracts; P.A. 95-285 applied section to executive heads of state agencies to whom purchasing authority is delegated pursuant to Sec. 4a-52 and any members of their office staff, effective July 1, 1995.

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Sec. 4a-65. (Formerly Sec. 4-115). Unlawful purchases. When any state agency purchases or contracts for any supplies, materials, equipment or contractual services contrary to the provisions of this chapter or the regulations promulgated in pursuance thereof, such order or contract shall be void and of no effect. The administrative head of such agency shall be personally liable for the costs of such order or contract and, if already paid for out of state funds, the amount thereof may be recovered from such administrative head by the state in a civil action.
(1949 Rev., S. 254; 1959, P.A. 258, S. 7.)
History: 1959 act made no change in section; Sec. 4-115 transferred to Sec. 4a-65 in 1989.
Cited. 220 C. 689, 697. Cited. 233 C. 254, 277, 278.

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Sec. 4a-66. (Formerly Sec. 4-25). Acquisition of federal property. Contracts with federal agencies concerning health services. Exemption from statutes or municipal charter. Purchasing from federal contractors. (a) The state, through the Commissioner of Administrative Services, or any political subdivision thereof, through the officer or agent legally authorized to make purchases on its behalf, may enter into any contract with the United States government or any federal agency for the purchase, lease or other acquisition of any equipment, supplies, materials or other property or for the purchase, sale or exchange of, or other cooperation concerning, services related to medicine or health. No provision of the statutes or of any municipal charter concerning the inviting of competitive bids, public advertising for bids or of expenditures, the delivery of purchases before payment, or any other provision which may result in disadvantage or loss of opportunity to such state agency or subdivision in such transactions with the federal government, shall apply to transactions made under the provisions of this subsection. Any municipality desiring to enter into any such contract may do so only after the acceptance of the applicable provisions of this section at a meeting of such municipality warned and held for the purpose.
(b) The state, through the Commissioner of Administrative Services and pursuant to Public Law 103-355, may purchase equipment, supplies, materials or other property from a person who has a contract to sell such property to a department, agency or instrumentality of the United States government, in accordance with the terms and conditions of said contract.
(1949 Rev., S. 263; P.A. 77-111, S. 1, 2; 77-614, S. 135, 610; P.A. 96-176, S. 3.)
History: P.A. 77-111 allowed contracting with federal agencies for services related to medicine or health; P.A. 77-614 replaced director of purchases with commissioner of administrative services; Sec. 4-25 transferred to Sec. 4a-66 in 1989; P.A. 96-176 designated existing provisions as Subsec. (a), inserted "Government" in Subsec. (a) and added Subsec. (b) re purchasing from federal contractors.

BID SCORING

Instructions:

1. Weight each category (first column)
2. Evaluate each vendor and give them a rating (based on their proposal and findings from the visit.
3. Multiply the weight times the rating to get your score
4. Total the score for each vendor

Ratings:

0 = Vendor does not meet Requirements (and/or no respon
1 = Uncertain if vendor meets Requirements
2 = Vendor meets some of the Requirements
3 = Vendor Meets Requirements
4 = Vendor Exceeds Requirements

CATEGORY: OVERALL SCORES

Bid #04PSX001 - 37,000 GVWR Dump Trucks-Cab and Chassis

	WEIGHTED CATEGORIES	Bridge Haven Ford Truck Sales		Hine Brothers		PROPOSER SCORES: Interstate Ford Truck		Nutmeg International	
		Scores	Weighted Results	Scores	Weighted Results	Scores	Weighted Results	Scores	Weighted Results
Base Price of Unit + Selected Options = LOW BID	50%	1.00	0.50	2.00	1.00	~~2.00~~ 3.00	~~1.00~~ 1.50	~~3.00~~ 2.00	~~1.50~~ 1.00
Warranty Histories	20%	3.00	0.60	3.00	0.60	3.00	0.60	3.00	0.60
Radiator Design	5%	0.00	0.00	3.00	0.15	3.00	0.15	3.00	0.15
VENDOR PAST PERFORMANCE with regard to delivery and equipment built in compliance with the detailed and special bid terms and conditions.	10%	3.00	0.30	4.00	0.40	0.00	0.00	3.00	0.30
Past warranty histories on the cab and chassis, manufacturer's problems and delivery of orders may be an important factor in determining the award.	10%	3.00	0.30	3.00	0.30	2.00	0.20	3.00	0.30
Time required to build the pilot truck for review after receipt of the purchase order.	5%	3.00	0.15	3.00	0.15	3.00	0.15	3.00	0.15
TOTAL SCORE	100%	13.00	1.85	18.00	2.60	12.00	2.10	18.00	3.00

SHOULD BE 2.60 2.50

We are in agreement with the evaluation criteria above.

Janice Snyder, Asst. Dir. Purch & Mat. Mgmt. (ACT)* Department of Transportation	Janice Snyder	2/24/04
Richard Baron, Tr. Equipment Repair Manager (ACT) Department of Transportation	R. Baron	2/24/04
Jill Belisle, Contract Specialist Department of Administrative Services	Jill Belisle	2/24/04

203 876 9934

* *Evaluation Criteria established prior to bid review*

Dated 2/4/2004

interstate

July 1, 2004

Ms. Barbara A. Waters
Commissioner of Administrative Services
State of Connecticut
165 Capitol Avenue
Hartford, CT 06106

Cc: Jeffrey Vita, Esq.

Re: Appeal of protest decision for bid award - Contract #04PSX0001AA

Dear Ms. Waters:

We have been informed via letter from Carol Wilson that our protest of this bid award has been denied. Your Staff Counsel, Devin Marquez, has informed us that we may appeal this decision directly to you. Please consider this letter to be our formal appeal.

The reason for our appeal is that DAS has not responded whatsoever to our claims of statutory violations. Specifically, there has been *no* illustration of how DAS is *not in violation* of the statutes that we have invoked. We were instructed by DAS that the sole scope of the bid protest procedure was to be limited to our finding of statutory violations...*not* a product debate, etc. We complied. DAS has not responded in kind, has avoided addressing the statutes, and instead has done nothing more than to restate their original reasons for the bid award being made to Nutmeg International Trucks.

This is a completely unsatisfactory response, and "dodges" the statutory violations in their entirety. The fact remains that the specifications for this bid were written in a *biased, restrictive, non-competitive, and proprietary fashion...so* that no manufacturer other than *International* was able to comply with the specs. The lack of bids from other manufacturers and the actual bid results have proven this, and we have supplied ample documentation and presentation (including presentation from our truck and component manufacturers) to this effect. We also made DAS and DOT well aware of our inability to meet the *proprietary* aspects of the specifications well before the bid was due and asked that the specifications be modified to accommodate manufacturers other than just International, but this went on deaf ears. The bid specifications, as written, remain in violation of CGS Chapter 58, Section 4a-52, #13 which states:

The Commissioner of Administrative Services shall..."establish policies and procedures for use by state agencies in preparing specifications which will ensure that such specifications shall not be unreasonably restrictive and shall encourage competition".

Additionally, CGS Chapter 58, Section 4a-65 "Unlawful Purchases" has been violated by DAS's subsequent contract with Nutmeg International Trucks.

Apparently DAS has not been able to defend their decision in relation to the statutory violations (or they would have), so our status as a "wrongfully harmed" bidder and taxpayer is unchanged, and our damages continue to mount. Our industry knowledge as to the bid specifications being *proprietary* is accurate and absolute. This *proprietary* nature of your specs is common knowledge to *all* related industry parties, but not yet admitted to by DAS / DOT.

Our *Sterling* trucks are completely comparable to *International* trucks in all respects as evidenced by the many in use in Connecticut municipalities for the same dump/plow truck application. Of course there are minor differences due to the inherent nature of different manufacturer's products, but to disallow those differences is clearly to violate state statute, and to ignore the principles, spirit, and nature of competitive bidding.

In Carol Wilson's letter she even states that because Sterling uses a different brand name of ABS components, this "could put peoples lives in jeopardy". This is a ludicrous statement, and is a real "stretch". All ABS systems are approved by the federal DOT, and contain virtually no moving, maintenance oriented parts as has been misrepresented by DOT. ("ABS" or "Anti-Lock Brake System" is only the *electronic* portion of the truck's brakes). In fact, almost all of the *moving, normally replaceable* parts of the brake system are made by the same manufacturer for both Sterling and International. That manufacturer is Meritor/Wabco...which is also the manufacturer of our ABS system. The fact that Sterling offered Bendix ABS on a previous generation of chassis is irrelevant, as it is simply not offered on our current generation of chassis which incorporates many improvements and changes. We made this very clear both before and after the bid.

ABS certainly isn't the applicable issue...adherence to the applicable statutes for preparation of bid specifications is the issue which needs addressing. Obviously, when specs are written so that only *one* manufacturer can comply, the bid is *not* competitive, and that manufacturer has been handed a "free ride" that results in higher purchase costs to the state and its' taxpayers...as was the case for this bid.

As a first step in this appeal, we would appreciate being able to meet with you in person. Delegating this matter to other persons within DAS has thus far resulted in nothing but a dead end. We truly need to discuss this directly with you. We will be happy to make ourselves available at your convenience. I can be reached at (203) 876-9934, and look forward to hearing from you.

Sincerely,

Daniel Rawson

Daniel Rawson
Municipal Manager

Subject: [Fwd: Contracting reform task force]
From: John Russotto <John.Russotto@po.state.ct.us>
Date: Thu, 05 Aug 2004 16:44:15 -0400
To: marisa.dephillips@po.state.ct.us

-------- Original Message --------
Subject: Contracting reform task force
Date: Thu, 5 Aug 2004 10:53:48 -0400
From: Harold R. Burke
<hburke@cadetlaw.com>
To:<john.russotto@po.state.ct.us>

John,
Thank you for your letter and call. I look forward to seeing you on Friday at 1:00.

Attached are materials that you may find helpful: several recent Federal DOJ press releases addressing the sucess of the federal False Claims Act; copies of several states' statutes; copies of a few state cases reflecting the types of cases which have been prosecuted; and, a copy of the federal act.

I note that many states' acts are limited to Medicaid claims only. California, Massachuetts and Florida, for example, cover all types of government claims. Its my view that a Connecticut statute should include all claims at the state and municipal level.

I should also point out that in this current environment the focus appears to be on construction contractors. While for purposes of getting a law enacted it might be good to have a "face" associated with the corruption, its my view that there are much bigger fish in the pond. The patterns of fraud nationally demonstrate that Medicaid is rife with abuse by hospitals, doctors and product suppliers, schools systems are being taken by suppliers and consultants, and Wall Street has been abusing municipal and state bonding programs for years. I have every reason to believe that the corruption occurring nationally is also occurring in Connecticut yet on a smaller scale.

When we met earlier this week I mentioned that I am drafting a legislative proposal modelled after the federal act with a number of improvements. I recognize that the system in Connecticut to a certain extent bifurcates criminal investigation and prosecution from civil enforcement through the AG's office. In order for a Connecticut False Claims Act to work, however, it must contain both components integrated in such a manner that investigations are coordinated. For example, your office can get search warrants, the AG cannot, and in the some cases if the evidence is not grabbed it is shredded shortly after the subpoena is served. One way of dealing with this would be through the creation of a government fraud working group comprised of individuals from your department and the AG's office that would jointly investigate and prosecute these cases.

Harold R. Burke
Casper & de Toledo, LLC
1458 Bedford Street
Stamford, Connecticut 06902
tele: (203) 325-8600
fax: (203) 323-5970

Department of Justice

FOR IMMEDIATE RELEASE
MONDAY, NOVEMBER 10, 2003
WWW.USDOJ.GOV

CIV
(202) 514-2007
TDD (202) 514-1888

JUSTICE DEPT. CIVIL FRAUD RECOVERIES TOTAL $2.1 BILLION FOR FY 2003 FALSE CLAIMS ACT RECOVERIES EXCEED $12 BILLION SINCE 1986

WASHINGTON, D.C. - Recoveries in suits and investigations of fraud against the United States for the fiscal year ending September 30, 2003, tallied a record $2.1 billion, the Justice Department announced today. This is a 75 percent increase over the prior year's recoveries ($1.1 billion) and brings total recoveries to over $12 billion since Congress substantially strengthened the civil False Claims Act in 1986.

"The record recoveries in civil fraud cases demonstrate this Administration's unwavering commitment to combat fraud and to ensure that tax dollars are well spent," said Peter D. Keisler, Assistant Attorney General for the Department's Civil Division. "It also attests to the contributions of whistle-blowers who report fraud and the extraordinary and tireless efforts of the civil servants from Justice's Civil Division, the United States Attorneys' Offices and other agencies that investigate and prosecute these cases."

Mr. Keisler also paid tribute to Senator Charles Grassley of Iowa and Representative Howard L. Berman of California who sponsored the 1986 amendments to the False Claims Act, the government's primary weapon to fight fraud against the government. "Without this important legislation strengthening the act and, in particular, the qui tam provisions that give everyone who comes in contact with a federally funded program a stake in reporting fraud, such recoveries would not have been possible."

Of the $2.1 billion, $1.48 billion is associated with suits initiated by whistle-blowers under the qui tam provisions of the False Claims Act. The qui tam provisions authorize individuals, known as "relators," to file suit on behalf of the United States against those who have falsely or fraudulently claimed federal funds. Such cases run the gamut of federally funded programs from Medicare and Medicaid to defense contracts, gas leases and agricultural subsidies. If the United States intervenes in the action, the person filing the suit can recover from 15 to 25 percent of any settlement or judgment attributable to the fraud identified by the whistle-blower. The percentage increases up to 30 per cent if the United States declines to intervene and the whistleblower

pursues the action alone. In the fiscal year just ended, whistle-blowers recovered over $319 million in rewards under the Act.

As in the last several years, health care fraud accounted for the lion's share of recoveries-$1.7 billion. This number includes both whistleblower claims and those initiated by the United States in independent fraud investigations. The Department of Health and Human Services (HHS) reaped the biggest recoveries, largely attributable to its Medicare and Medicaid programs. Substantial recoveries were also made for the Office of Personnel Management which administers the Federal Employees Health Benefits Program, the Department of Defense for its TRICARE insurance program, the Department of Veterans Affairs and the Railroad Retirement Board.

Outside the health care arena, defense procurement fraud accounted for $299 million in recoveries and fraud in connection with gas leases with the Department of the Interior totaled another $49 million.

Among the Department's largest recoveries in fiscal year 2003 were:

•$641 million from HCA Inc. (formerly known as Columbia/HCA and HCA - The Healthcare Company) for cost report fraud, the payment of kickbacks to physicians and overbilling Medicare for HCA's wound care centers. This settlement concluded litigation in numerous qui tam lawsuits as well as separate investigations initiated by the government. Along with an earlier civil settlement and criminal guilty plea reached in 2000, as well as a related administrative settlement with HHS, HCA has paid the United States $1.7 billion, with whistleblowers receiving a combined share of $154 million-by far, record recoveries both by the United States and whistle-blowers.

•$382 million from Abbott Laboratories and its Ross Products Division. Abbott is the first combined civil settlement and criminal conviction arising from "Operation Headwaters," an undercover investigation by the Federal Bureau of Investigation, the U.S. Postal Inspection Service and the Office of the Inspector General for HHS, in which federal agents created a fictitious medical supplier known as Southern Medical Distributors. During its operation, various manufacturers, including Ross, offered kickbacks to undercover agents to purchase the manufacturers' products and then advised them how to fraudulently bill the government for those items. In addition to federal Medicare and Medicaid recoveries, the states recovered $18 million in state Medicaid funds in connection with the federal government's claims and an additional $14.5 million on claims the states pursued alone. Abbott subsidiary C G Nutritionals also paid $200 million in criminal fines.

•$280 million from AstraZeneca Pharmaceuticals, LP, to resolve allegations that AstraZeneca conspired with health care providers to charge Medicare, Medicaid and other federally funded insurance programs for free samples of its prostate cancer drug, Zoladex, and for otherwise inflating the price of the drug in violation of the Prescription Drug Marketing Act. The whistleblower's share of this settlement was $47.7 million.

•$191 million from Northrop Grumman to resolve three separate fraud investigations. In the first, Northrop Grumman Space & Mission Systems Corporation paid $111 million as successor to TRW Inc. to resolve allegations that TRW fraudulently overcharged the government on Department of Defense and National Aeronautics and Space Administration contracts. The whistleblower's share of this settlement was $27.2 million. In the second and third, Northrop Grumman Corporation paid $60 million and $20 million, respectively, to resolve allegations of mischarging and selling the Navy defective military equipment. The former settlement involved Newport News Shipbuilding which Northrop Grumman acquired in November 2001.

•$143 million from Bayer Corporation to resolve a whistleblower's allegations that Bayer defrauded the Medicaid and Public Health Service programs by relabeling products sold to a health maintenance organization at deeply discounted rates and then concealing the discounts to avoid paying rebates, in violation of the Medicaid Rebate program. In addition, Bayer paid $108 million to reimburse state Medicaid programs for the same conduct.

•$47 million from SmithKline Beecham Corporation, doing business as GlaxoSmithKline, to settle claims similar to those against Bayer. GlaxoSmithKline paid an additional $40 million to reimburse state Medicaid programs and Public Health Service entities.

•$51 million from Tenet Healthcare Corporation and Tenet HealthSystems Hospitals, Inc. to settle government allegations that Tenet's Redding, California facility performed unnecessary cardiac procedures that were then billed to Medicare, Medicaid and TRICARE. In addition, Tenet paid nearly $3 million to reimburse California's Medicaid funds.

•$49 million from Endovascular Technologies, Inc., a subsidiary of Guidant Corp., to settle the government's allegations that Endovascular Technologies failed to report to the Food and Drug Administration thousands of adverse incidents involving its "Ancure" cardiac device. The failure resulted in the submission of tens of millions of dollars of false claims for Medicare, Medicaid and VA benefits for procedures involving the device. In several instances, the device was linked to patient injuries and deaths. Endovascular Technologies also paid $43.4 million in criminal fines and forfeitures.

•$49 million from Shell Oil Company to settle allegations that Shell improperly vented and flared gas from various offshore leases with the Interior Department. The suit also alleged that Shell underreported and underpaid royalties on the vented and flared gas. In 2000 and 2001, Shell paid the United States $56 million and $110 million to settle two earlier cases involving underpaid royalties owed the United States on natural gas and oil, respectively.

•$38 million from Lockheed Martin Corporation to settle claims that Lockheed Martin failed to provide complete, accurate and current cost and pricing data as required by the Truth in Negotiations Act, when it bid on a foreign military sales contract under the Air Force's Low Altitude Navigation and Targeting Infrared for Night program, known as LANTIRN. The United States' complaint alleged that the inaccurate data concealed a scheme to create additional profit which could be used to offset overruns on another Air Force contract.

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Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, JUNE 11, 2003
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PHARMACEUTICAL COMPANY, DEY, INC. TO PAY U.S. & TEXAS $18.5 MILLION TO SETTLE ALLEGATIONS OF MEDICAID FRAUD

WASHINGTON, D.C.- Dey, Inc., a manufacturer of prescription drugs for the treatment of allergies and respiratory diseases, has agreed to pay the United States and the state of Texas $18.5 million to settle allegations of health care fraud, the Justice Department and the Attorney General of the State of Texas, announced today.

The government alleged that the company submitted false pricing information and caused providers to submit fraudulently inflated reimbursement claims to the state and federally funded Texas Medicaid program. The United States claimed the Napa, California-based company submitted false pricing information to the Texas Vendor Drug Program, which resulted in inflated reimbursement for the Dey drugs at issue, which are primarily used to treat asthma and other respiratory conditions.

"The Medicaid program was created to help ensure that those least able to afford healthcare receive medical treatment - not to enrich drug companies," said Robert D. McCallum, Jr., Assistant Attorney General for the Justice Department's Civil Division. "The reporting of false pricing information by certain drug manufacturers has adversely impacted not only the federal health care programs, but also our most vulnerable citizens."

The Civil Medicaid Fraud Section of the Texas Attorney General's Office sued Dey and two other drug manufacturers in 2000 as part of its ongoing effort to combat Medicaid Fraud in Texas. The remaining defendants are scheduled for trial in August of this year.

Dey, a wholly owned subsidiary of Merck KGaA in Germany, reached the agreement with the Justice Department, the Office of Inspector General for the Department of Health and Human Services and Texas Attorney General Greg Abbott. The United States is continuing to investigate Dey's activities with respect to other states' Medicaid programs.

The California False Claims Act,
Cal. Gov't Code §§ 12650-12655 (1992)

Article 9

FALSE CLAIMS ACTIONS

Section

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§ 12650 Definitions

For purposes of this article:

(a) "Claim" includes any request or demand for money, property, or services made to any employee, officer, or agent of the state or of any political subdivision, or to any contractor, grantee, or other recipient, whether under contract or not, if any portion of the money, property, or services requested or demanded issued from, or was provided by, the state (hereinafter "state funds") or by any political subdivision thereof (hereinafter "political subdivision funds").

(b) "Knowing" and "knowingly" mean that a person, with respect to information, does any of the following:

(1) Has actual knowledge of the information.

(2) Acts in deliberate ignorance of the truth or falsity of the information.

(3) Acts in reckless disregard of the truth or falsity of the information.

Proof of specific intent to defraud is not required.

(c) "Political subdivision" includes any city, city and county, county, tax or assessment district, or other legally authorized local governmental entity with jurisdictional boundaries.

(d) "Prosecuting authority" refers to the county counsel, city attorney, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, a particular political subdivision.

(e) "Person" includes any natural person, corporation, firm, association, organization, partnership, business, or trust.

§ 12651 Acts subjecting person to treble damages, costs and civil penalties; exceptions

(a) Any person who commits any of the following acts shall be liable to the state or to the political subdivision for three times the amount of damages which the state or the political subdivision sustains because of the act of that person. A person who commits any of the following acts shall also be liable to the state or to the political subdivision for the costs of a civil action brought to recover any of those penalties or damages, and may be liable to the state or political subdivision for a civil penalty of up to ten thousand dollars ($10,000) for each false claim:

(1) Knowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim for payment or approval.

(2) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision.

(3) Conspires to defraud the state or any political subdivision by getting a false claim allowed or paid by the state or by any political subdivision.

(4) Has possession, custody, or control of public property or money used or to be used by the state or by any political subdivision and knowingly delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt.

(5) Is authorized to make or deliver a document certifying receipt of property used or to be used by the state or by any political subdivision and knowingly makes or delivers a receipt that falsely represents the property used or to be used.

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property.

(7) Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state or to any political subdivision.

(8) Is a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim.

(b) Notwithstanding subdivision (a), the court may assess not less than two times and not more than three times the amount of damages which the state or the political subdivision sustains because of the act of the person described in that subdivision, and no civil penalty, if the court finds all of the following:

(1) The person committing the violation furnished officials of the state or of the political subdivision responsible for investigating false claims violations with all information known to

that person about the violation within 30 days after the date on which the person first obtained the information.

(2) The person fully cooperated with any investigation by the state or a political subdivision of the violation.

(3) At the time the person furnished the state or the political subdivision with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

(c) Liability under this section shall be joint and several for any act committed by two or more persons.

(d) This section does not apply to any controversy involving an amount of less than five hundred dollars ($500) in value. For purposes of this subdivision, "controversy" means any one or more false claims submitted by the same person in violation of this article.

(e) This section does not apply to claims, records, or statements made pursuant to Division 3.6 (commencing with Section 810) of Title I or to workers' compensation claims filed pursuant to Division 4 (commencing with Section 3200) of the Labor Code.

(f) This section does not apply to claims, records, or statements made under the Revenue and Taxation Code.

§ 12652 Attorney general investigations and prosecutions; powers of prosecuting authority; civil actions by individuals as qui tam plaintiff; jurisdiction of courts

(a)(1) The Attorney General shall diligently investigate violations under Section 12651 involving state funds. If the Attorney General finds that a person has violated or is violating Section 12651, the Attorney General may bring a civil action under this section against that person.

(2) If the Attorney General brings a civil action under this subdivision on a claim involving political subdivision funds as well as state funds, the Attorney General shall, on the same date that the complaint is filed in this action, serve by mail with "return receipt request[ed]" a copy of the complaint on the appropriate prosecuting authority.

(3) The prosecuting authority shall have the right to intervene in an action brought by the Attorney General under this subdivision within 60 days after receipt of the complaint pursuant to paragraph (2). The court may permit intervention thereafter upon a showing that all of the requirements of Section 387 of the Code of Civil Procedure have been met.

(b)(1) The prosecuting authority of a political subdivision shall diligently investigate violations under Section 12651 involving political subdivision funds. If the prosecuting authority finds that a person has violated or is violating Section 12651, the prosecuting authority may bring a civil action under this section against that person.

(2) If the prosecuting authority brings a civil action under this section on a claim involving state funds as well as political subdivision funds, the prosecuting authority shall, on the

same date that the complaint is filed in this action, serve a copy of the complaint on the Attorney General.

(3) Within 60 days after receiving the complaint pursuant to paragraph (2), the Attorney General shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the Attorney General shall assume primary responsibility for conducting the action and the prosecuting authority shall have the right to continue as a party.

(B) Notify the court that it declines to take over the action, in which case the prosecuting authority shall have the right to conduct the action.

(C)(1) A person may bring a civil action for a violation of this article for the person and either for the State of California in the name of the state, if any state funds are involved, or for a political subdivision in the name of the political subdivision, if political subdivision funds are exclusively involved. The person bringing the action shall be referred to as the qui tam plaintiff. Once filed, the action may be dismissed only with the written consent of the court, taking into account the best interest of the parties involved and the public purposes behind this act.

(2) A complaint filed by a private person under this subdivision shall be filed in superior court in camera and may remain under seal for up to 60 days. No service shall be made on the defendant until after the complaint is unsealed.

(3) On the same day as the complaint is filed pursuant to paragraph (2), the qui tam plaintiff shall serve by mail with "return receipt requested" the Attorney General with a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses.

(4) Within 60 days after receiving a complaint alleging violations which involve state funds but not political subdivision funds. the Attorney General shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the seal shall be lifted.

(B) Notify the court that it declines to take over the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(5)(A) Within 15 days after receiving a complaint alleging violations which exclusively involve political subdivision funds, the Attorney General shall forward the complaint and written disclosure to the appropriate prosecuting authority for disposition and shall notify the qui tam plaintiff of the transfer.

(B) Within 45 days after the Attorney General forwards the complaint and written disclosure pursuant to subparagraph (A), the prosecuting authority shall do either of the following:

(i) Notify the court that it intends to proceed with the action, in which case the seal shall be lifted.

(ii) Notify the court that it declines to take over the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(6)(A) Within 15 days after receiving a complaint alleging violations which involve both state and political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure to the appropriate prosecuting authority, and shall coordinate its review and investigation with those of the prosecuting authority.

(B) Within 60 days after receiving a complaint alleging violations which involve both state and political subdivision funds, the Attorney General shall do either of the following:

(i) Notify the court that it intends to proceed with the action, in which case the seal shall be lifted.

(ii) Notify the court that it declines to take over the action but that the prosecuting authority of the political subdivision involved intends to proceed with the action, in which case the seal shall be lifted and the action shall be conducted by the prosecuting authority.

(iii) Notify the court that both it and the prosecuting authority decline to take over the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(C) If the Attorney General proceeds with the action pursuant to clause (i) of subparagraph (B), the political subdivision shall be permitted to intervene in the action within 60 days after the Attorney General notifies the court of its intentions. The court may authorize intervention thereafter upon a showing that all the requirements of Section 387 of the Code of Civil Procedure have been met.

(7) Upon a showing of good cause and reasonable diligence in its investigation, the Attorney General or the prosecuting authority of a political subdivision may move the court for extensions of the time during which the complaint remains under seal, but in no event may the complaint remain under seal for longer than 90 days.

(8) When a person brings an action under this subdivision, no other person may bring a related action based on the facts underlying the pending action.

(d)(1) No court shall have jurisdiction over an action brought under subdivision (c) against a member of the State Senate or Assembly, a member of the state judiciary, an elected official in the executive branch of the state, or a member of the governing body of any political subdivision if the action is based on evidence or information known to the state or political subdivision when the action was brought.

(2) In no event may a person bring an action under subdivision (c) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the state or political subdivision is already a party.

(3)(A) No court shall have jurisdiction over an action under this article based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing, or audit conducted by or at the request of the Senate, Assembly, auditor, or governing body of a political subdivision, or from the news media, unless the action is brought by the Attorney General or the prosecuting authority of a

political subdivision, or the person bringing the action is an original source of the information.

(B) For purposes of subparagraph (A), "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based, who voluntarily provided the information to the state or political subdivision before filing an action based on that information, and whose information provided the basis or catalyst for the investigation, hearing, audit, or report which led to the public disclosure as described in subparagraph (A).

(4) No court shall have jurisdiction over an action brought under subsection (c) based upon information discovered by a present or former employee of the state or a political subdivision during the course of his or her employment, unless that employee first in good faith exhausted existing internal procedures for reporting and seeking recovery of such falsely claimed sums through official channels and unless the state or political subdivision failed to act on the information provided within a reasonable period of time.

(e)(1) If the state or political subdivision proceeds with the action, it shall have the primary responsibility for prosecuting the action. The qui tam plaintiff shall have the right to continue as a full party to the action.

(2)(A) The state or political subdivision may seek to dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified by the state or political subdivision of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity to oppose the motion and present evidence at a hearing.

(B) The state or political subdivision may settle the action with the defendant notwithstanding the objections of the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances.

(f)(1) If the state or political subdivision elects not to proceed, the qui tam plaintiff shall have the same right to conduct the action as the Attorney General or prosecuting authority would have had if it had chosen to proceed under subdivision (c). If the state or political subdivision so requests, and at its expense, the state or political subdivision shall be served with copies of all pleadings filed in the action and supplied with copies of all deposition transcripts.

(2)(A) Upon timely application, the court shall permit the state or political subdivision to intervene in an action with which it had initially declined to proceed if the interest of the state or political subdivision in recovery of the property or funds involved is not being adequately represented by the qui tam plaintiff.

(B) If the state or political subdivision is allowed to intervene under paragraph(A), the qui tam plaintiff shall retain principal responsibility for the action and the recovery of the parties shall be determined as if the state or political subdivision had elected not to proceed.

(g)(1)(A) If the Attorney General initiates an action pursuant to subdivision (a) or assumes control of an action initiated by a prosecuting authority pursuant to subparagraph (A) of paragraph (3) of subdivision (b), the office of the Attorney General shall receive a fixed 33

percent of the proceeds of the action or settlement of the claim, which funds shall be used to support its ongoing investigation and prosecution of false claims.

(B) If a prosecuting authority initiates and conducts an action pursuant to subdivision (b), the office of the prosecuting authority shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which funds shall be used to support its ongoing investigation and prosecution of false claims.

(C) If a prosecuting authority intervenes in an action initiated by the Attorney General pursuant to paragraph (3) of subdivision (a) or remains a party to an action assumed by the Attorney General pursuant to subparagraph (A) of paragraph (3) of subdivision (b), the court may award the office of the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery under subparagraph (A), taking into account the prosecuting authority's role in investigating and conducting the action.

(2) If the state or political subdivision proceeds with an action brought by a qui tam plaintiff under subdivision (c), the qui tam plaintiff shall, subject to paragraphs (4)and (5), receive at least 15 percent but not more than 33 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the qui tam plaintiff substantially contributed to the prosecution of the action. When it conducts the action, the Attorney General's office or the office of the prosecuting authority of the political subdivision shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which funds shall be used to support its ongoing investigation and prosecution of false claims made against the state or political subdivision. When both the Attorney General and a prosecuting authority are involved in a qui tam action pursuant to subparagraph (C) of paragraph (6) of subdivision (c), the court at its discretion may award the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery, taking into account the prosecuting authority's contribution to investigating and conducting the action.

(3) If the state or political subdivision does not proceed with an action under subdivision (c), the qui tam plaintiff shall, subject to paragraphs (4) and (5), receive an amount which the court decides is reasonable for collecting the civil penalty and damages on behalf of the Government. The amount shall be not less than 25 percent and not more than 50 percent of the proceeds of the action or settlement and shall be paid out of such proceeds.

(4) Where the action is one provided for under paragraph (4) of subdivision (d), the present or former employee of the state or political subdivision shall not be entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff those sums from the proceeds as it considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision goes forth with the action or 50 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, and the scope of, and response to, the employee's attempts to report and gain recovery of such falsely claimed funds through official channels.

(5) Where the action is one which the court finds to be based primarily on information from a present or former employee who actively participated in the fraudulent activity, the employee shall not be entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff such sums from the proceeds as it considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision goes forth with the action or 50 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the

role of the qui tam plaintiff in advancing the case to litigation, the scope of the present or past employee's involvement in the fraudulent activity, said employee's attempts to avoid or resist such activity, and all other circumstances surrounding the activity.

(6) The portion of the recovery not distributed pursuant to paragraphs (1) to (5), inclusive, shall revert to the state if the underlying false claims involved state funds exclusively and to the political subdivision if the underlying false claims involved political subdivision funds exclusively. If the violation involved both state and political subdivision funds, the court shall make an apportionment between the state and political subdivision based on their relative share of the funds falsely claimed.

(7) For purposes of this section, "proceeds" include civil penalties as well as double or treble damages as provided in Section 12651.

(8) If the state, political subdivision, or the qui tam plaintiff prevails in or settles any action under subdivision (c), the qui tam plaintiff shall receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable costs and attorneys' fees. All expenses, costs, and fees shall be awarded against the defendant and under no circumstances shall they be the responsibility of the state or political subdivision.

(9) If the state or political subdivision does not proceed with the action and the qui tam plaintiff conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the qui tam plaintiff was clearly frivolous, clearly vexatious, or brought solely for purposes of harassment.

(h) The court may stay an act of discovery of the person initiating the action for a period of not more than 60 days if the Attorney General or local prosecuting authority show that the act of discovery would interfere with an investigation or a prosecution of a criminal or civil matter arising out of the same facts, regardless of whether the Attorney General or local prosecuting authority proceeds with the action. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Attorney General or local prosecuting authority has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(i) Upon a showing by the Attorney General or local prosecuting authority that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Attorney General's or local prosecuting's authority prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, including the following:

(1) Limiting the number of witnesses the person may call.

(2) Limiting the length of the testimony of such witnesses.

(3) Limiting the person's cross-examination of witnesses.

(4) Otherwise limiting the participation by the person in the litigation.

12653 Employer interference with employee disclosures, etc.; liability of employer, remedies of employee

(a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed under Section 12652.

(b) No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against, an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652.

(c) An employer who violates subdivision (b) shall be liable for all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, compensation for any special damage sustained as a result of the discrimination, and, where appropriate. punitive damages. In addition, the defendant shall be required to pay litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate superior court of the state for the relief provided in this subdivision.

(d) An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the state or a political subdivision shall be entitled to the remedies under subdivision (c) if, and only if, both of the following occur:

(1) The employee voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed.

(2) The employee had been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place.

§ 12654 Limitation of actions; activities antedating this article; burden of proof

(a) A civil action under Section 12652 may not be filed more than three years after the date of discovery by the official of the state or political subdivision charged with responsibility to act in the circumstances or, in any event, no more than 10 years after the date on which the violation of Section 12651 is committed.

(b) A civil action under Section 12652 may be brought for activity prior to the effective date of this article if the limitations period set in subdivision (a) has not lapsed.

(c) In any action brought under Section 12652, the state, the political subdivision, or the qui tam plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, a guilty verdict rendered in a criminal proceeding charging false statements or fraud, whether upon a verdict after trial or upon a plea of guilty or nolo contenders, except for a plea of nolo contenders made prior to January 1, 1988, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subdivision (a), (b), or (c) of Section 12652.

§ 12655 Remedies under other laws; severability of provisions; liberality of article construction

(a) The provisions of this article are not exclusive, and the remedies provided for in this article shall be in addition to any other remedies provided for in any other law or available under common law.

(b) If any provision of this article or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the article and the application of the provision to other persons or circumstances shall not be affected thereby.

(c) This article shall be liberally construed and applied to promote the public interest.

Nevada Submission of False Claims to State or Local Government

NRS 357.010 Definitions. As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 357.020 and 357.030 have the meanings ascribed to them in those sections.

(Added to NRS by 1999, 824)

NRS 357.020 "Claim" defined. "Claim" means a request or demand for money, property or services made to:

1. An officer, employee or agent of this state or of a political subdivision of this state; or

2. A contractor, grantee or other recipient of money from the state or a political subdivision of this state if any part of the money, property or services requested or demanded was provided by the state or political subdivision.

(Added to NRS by 1999, 824)

NRS 357.030 "Political subdivision" defined. "Political subdivision" means a county, city, assessment district or any other local government as defined in NRS 354.474.

(Added to NRS by 1999, 824)

LIABILITY

NRS 357.040 Liability for damages and civil penalty for certain acts.

1. Except as otherwise provided in NRS 357.050, a person who, with or without specific intent to defraud, does any of the following listed acts is liable to the state or a political subdivision, whichever is affected, for three times the amount of damages sustained by the state or political subdivision because of the act of that person, for the costs of a civil action brought to recover those damages and for a civil penalty of not less than $2,000 or more than $10,000 for each act:

(a) Knowingly presents or causes to be presented a false claim for payment or approval.

(b) Knowingly makes or uses, or causes to be made or used, a false record or statement to obtain payment or approval of a false claim.

(c) Conspires to defraud by obtaining allowance or payment of a false claim.

(d) Has possession, custody or control of public property or money and knowingly delivers or causes to be delivered to the state or a political subdivision less money or property than the amount for which he receives a receipt.

(e) Is authorized to prepare or deliver a receipt for money or property to be used by the state or a political subdivision and knowingly prepares or delivers a receipt that falsely represents the money or property.

(f) Knowingly buys, or receives as security for an obligation, public property from a person who is not authorized to sell or pledge the property.

(g) Knowingly makes or uses, or causes to be made or used, a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the state or a political subdivision.

(h) Is a beneficiary of an inadvertent submission of a false claim and, after discovering the falsity of the claim, fails to disclose the falsity to the state or political subdivision within a reasonable time.

2. As used in this section, a person acts knowingly with respect to information if he:

(a) Has knowledge of the information;

(b) Acts in deliberate ignorance of whether the information is true or false; or

(c) Acts in reckless disregard of the truth or falsity of the information.

(Added to NRS by 1999, 824)

NRS 357.050 Limitation of damages and waiver of penalty for cooperation of defendant.

In a civil action pursuant to this chapter, the court may give judgment for not less than twice or more than three times the amount of damages sustained, and no civil penalty, if it finds that:

1. The person against whom the judgment is entered:

(a) Furnished all information known to him concerning the act, within 30 days after becoming aware of the information, to the attorney general; and

(b) Fully cooperated with any investigation of the act by the state or political subdivision; and

2. At the time the information was furnished, no criminal prosecution or civil or administrative proceeding had commenced with respect to the act and the person had no knowledge of the existence of any investigation with respect to the act.

(Added to NRS by 1999, 825)

NRS 357.060 Joint and several liability.

Liability pursuant to this chapter is joint and several for an act done by two or more persons.

(Added to NRS by 1999, 825)

CIVIL ACTIONS

NRS 357.070 Investigation and action by attorney general.

The attorney general may investigate any alleged liability pursuant to this chapter and may bring a civil action pursuant to this chapter against the person liable.

(Added to NRS by 1999, 825)

NRS 357.080 Maintenance of action by private plaintiff; limitations; complaint under seal; copy of complaint and written disclosure of evidence to be sent to attorney general.

1. Except as otherwise provided in this section and NRS 357.090 and 357.100, a private plaintiff may maintain an action pursuant to this chapter on his own account and that of the state if money, property or services provided by the state are involved, or on his own account and that of a political subdivision if money, property or services provided by the political subdivision are involved, or on his own account and that of both the state and a political subdivision if both are involved. After such an action is commenced, it may be dismissed only with leave of the court, taking into account the public purposes of this chapter and the best interests of the parties.

2. If a private plaintiff brings an action pursuant to this chapter, no other person may bring another action pursuant to this chapter based on the same facts.

3. An action may not be maintained by a private plaintiff pursuant to this chapter:

(a) Against a member of the legislature or the judiciary, an elected officer of the executive department of the state government, or a member of the governing body of a political subdivision, if the action is based upon evidence or information known to the state or political subdivision at the time the action was brought.

(b) If the action is based upon allegations or transactions that are the subject of a civil action or an administrative proceeding for a monetary penalty to which the state or political subdivision is already a party.

4. A complaint filed pursuant to this section must be placed under seal and so remain until the attorney general has elected whether to intervene. No service may be made upon the defendant until the complaint is unsealed.

5. On the date the private plaintiff files his complaint, he shall send a copy of the complaint to the attorney general by mail with return receipt requested. He shall send with each copy of the complaint a written disclosure of substantially all material evidence and information he possesses.

(Added to NRS by 1999, 825)

NRS 357.090 Action based on information public employee discovered during public employment prohibited in certain circumstances.

No action may be maintained pursuant to NRS 357.080 that is based upon information discovered by a present or former employee of the state or a political subdivision during his employment, unless he first in good faith exhausted internal procedures for reporting and seeking recovery of the proceeds of the fraudulent activity through official channels and the state or political subdivision failed to act on the information provided for at least 6 months.

(Added to NRS by 1999, 828)

NRS 357.100 Action based upon certain public disclosures may only be brought by attorney general or original source of information.

1. No action may be maintained pursuant to this chapter that is based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in an investigation, report, hearing or audit conducted by or at the request of a house of the legislature, an auditor or the governing body of a political subdivision, or from the news media, unless the action is brought by the attorney general or an original source of the information.

2. As used in this section, ôoriginal sourceö means a person:

(a) Who has direct and independent knowledge of the information on which the allegations were based;

(b) Who voluntarily provided the information to the state or political subdivision before bringing an action based on the information; and

(c) Whose information provided the basis or caused the making of the investigation, hearing, audit or report that led to the public disclosure.

(Added to NRS by 1999, 828)

NRS 357.110 Attorney general may elect to intervene in action by private plaintiff; motion to extend time for election; unsealing of complaint.

1. Within 120 days after receiving a complaint and disclosure, the attorney general may intervene and proceed with the action or he may, for good cause shown, move the court to extend the time for his election whether to proceed. The motion may be supported by affidavits or other submissions in chambers.

2. If the attorney general elects to intervene, the complaint must be unsealed. If the attorney general elects not to intervene, the private plaintiff may proceed and the complaint must be unsealed.

(Added to NRS by 1999, 826)

NRS 357.120 Effect of intervention of attorney general in action by private plaintiff; motion to dismiss; settlement.

1. If the attorney general intervenes, the private plaintiff remains a party to an action pursuant to NRS 357.080.

2. The attorney general may move to dismiss the action for good cause. The private plaintiff must be notified of the filing of the motion and is entitled to oppose it and present evidence at the hearing.

3. Except as otherwise provided in this subsection, the attorney general may settle the action. If the attorney general intends to settle the action, he shall notify the private plaintiff of that fact. Upon the request of the private plaintiff, the court shall determine whether settlement of the action is consistent with the public purposes of this chapter and shall not approve the settlement of the action unless it determines that such settlement is consistent with the public purposes of this chapter.

(Added to NRS by 1999, 826)

NRS 357.130 Effect of declination of attorney general to intervene in action by private plaintiff; authority for and effect of election by attorney general to intervene subsequently in such action.

1. If the attorney general elects not to intervene in an action pursuant to NRS 357.080, the private plaintiff has the same rights in conducting the action as the attorney general would have had. A copy of each pleading or other paper filed in the action, and a copy of the transcript of each deposition taken, must be mailed to the attorney general if the attorney general so requests and pays the cost thereof.

2. Upon timely application, the attorney general may intervene in an action in which he has previously declined to intervene, if the interest of the state or a political subdivision in recovery of the money or property involved is not being adequately represented by the private plaintiff.

3. If the attorney general so intervenes, the private plaintiff retains primary responsibility for conducting the action and any recovery must be apportioned as if the attorney general had not intervened.

(Added to NRS by 1999, 826)

NRS 357.140 Response by defendant.

The defendant is entitled to 30 days in which to respond after a complaint filed pursuant to NRS 357.080 is unsealed and served upon him.

(Added to NRS by 1999, 826)

NRS 357.150 Stay of discovery by private plaintiff; extension.

1. The court may stay discovery by a private plaintiff for not more than 60 days if the attorney general shows that the proposed discovery would interfere with the investigation or prosecution of a civil or criminal matter arising out of the same facts, whether or not the attorney general participates in the action.

2. The court may extend the stay upon a further showing that the attorney general has pursued the civil or criminal investigation or proceeding with reasonable diligence and the proposed discovery would interfere with its continuation. Discovery may not be stayed for a

total of more than 6 months over the objection of the private plaintiff, except for good cause shown by the attorney general.

3. A showing made pursuant to this section must be made in chambers.

(Added to NRS by 1999, 828)

NRS 357.160 Court-imposed limitation upon participation of private plaintiff in action.

Upon a showing by the attorney general that unrestricted participation by a private plaintiff would interfere with or unduly delay the conduct of an action, or would be repetitious, irrelevant or solely for harassment, the court may limit his participation by, among other measures, limiting:

1. The number of witnesses he may call;

2. The length of the testimony of the witnesses; or

3. His cross-examination of witnesses.

(Added to NRS by 1999, 828)

NRS 357.170 Limitation of actions; standard of proof; effect of certain findings of guilt in criminal proceeding on action.

1. An action pursuant to this chapter may not be commenced more than 3 years after the date of discovery of the fraudulent activity by the attorney general or more than 5 years after the fraudulent activity occurred, whichever is earlier. Within those limits, an action may be based upon fraudulent activity that occurred before October 1, 1999.

2. In an action pursuant to this chapter, the standard of proof is a preponderance of the evidence. A finding of guilt in a criminal proceeding charging false statement or fraud, whether upon a verdict of guilty or a plea of guilty or nolo contendere, estops the person found guilty from denying an essential element of that offense in an action pursuant to this chapter based upon the same transaction as the criminal proceeding.

(Added to NRS by 1999, 829)

NRS 357.180 Award of expenses and attorney's fees.

1. If the attorney general or a private plaintiff prevails in or settles an action pursuant to NRS 357.080, the private plaintiff is entitled to a reasonable amount for expenses that the court finds were necessarily incurred, including reasonable costs, attorney's fees and the fees of expert consultants and expert witnesses. Those expenses must be awarded against the defendant, and may not be allowed against the state or a political subdivision.

2. If the defendant prevails in the action, the court may award him reasonable expenses and attorney's fees against the party or parties who participated in the action if it finds that the action was clearly frivolous or vexatious or brought solely for harassment.

(Added to NRS by 1999, 828)

DISTRIBUTION OF RECOVERY

NRS 357.190 "Recovery" defined.

As used in NRS 357.190 to 357.230, inclusive, "recovery" includes civil penalties and does not include any allowance of expenses or attorney's fees.

(Added to NRS by 1999, 827)

NRS 357.200 Distribution to special account in state general fund if attorney general initiated action.

If the attorney general initiates an action pursuant to this chapter, 33 percent of any recovery must be paid into the state general fund to the credit of a special account, for use by the attorney general as appropriated or authorized by the legislature in the investigation and prosecution of false claims.

(Added to NRS by 1999, 827)

NRS 357.210 Distribution to private plaintiff in certain actions.

1. If the attorney general intervenes at the outset in an action pursuant to NRS 357.080, the private plaintiff is entitled, except as otherwise provided in NRS 357.220, to receive not less than 15 percent or more than 33 percent of any recovery, according to the extent of his contribution to the conduct of the action.

2. If the attorney general does not intervene in the action at the outset, the private plaintiff is entitled, except as otherwise provided in NRS 357.220, to receive not less than 25 percent or more than 50 percent of any recovery, as the court determines to be reasonable.

(Added to NRS by 1999, 827)

NRS 357.220 Distribution to private plaintiff in action based upon information obtained by public employee during public employment.

1. If the action is one described in NRS 357.090, the present or former employee of the state or political subdivision is not entitled to any minimum percentage of any recovery, but the court may award him no more than 33 percent of the recovery if the attorney general intervenes in the action at the outset, or no more than 50 percent if the attorney general does not intervene, according to the significance of his information, the extent of his contribution to the conduct of the action and the response to his efforts to report the false claim and gain recovery through other official channels.

2. If the private plaintiff is a present or former employee of the state or a political subdivision and benefited financially from the fraudulent activity, he is not entitled to any minimum percentage of any recovery, but the court may award him no more than 33 percent of the recovery if the attorney general intervenes in the action at the outset, or no more than 50 percent if the attorney general does not intervene, according to the significance of his information, the extent of his contribution to the conduct of the action,

the extent of his involvement in the fraudulent activity, his attempts to avoid or resist the activity and the other circumstances of the activity.

(Added to NRS by 1999, 827)

NRS 357.230 Distribution of unapportioned portion to general fund of state or political subdivision, or both.

The portion of any recovery not apportioned pursuant to NRS 357.200, 357.210 and 357.220 must be paid into the state general fund if the money, property or services were provided only by the state, or into the general fund of the political subdivision if they were provided only by a political subdivision. If the action involved both the state and a political subdivision, the court shall apportion the remaining portion of any recovery between them according to the respective values of the money, property or services provided by each.

(Added to NRS by 1999, 827)

MISCELLANEOUS PROVISIONS

NRS 357.240 Employer prohibited from forbidding employee from making certain disclosures or acting in furtherance of action relating to false claim and from taking any retaliatory action against employee for such disclosures or actions.

1. An employer shall not adopt or enforce any rule or policy forbidding an employee to disclose information to the state, a political subdivision or a law enforcement agency or to act in furtherance of an action pursuant to this chapter, including investigation for, bringing or testifying in such an action.2. An employer shall not discharge, demote, suspend, threaten, harass, deny promotion to or otherwise discriminate against an employee in the terms or conditions of his employment because of lawful acts done by him on his own behalf or on behalf of others in disclosing information to the state, a political subdivision or a law enforcement agency in furtherance of an action pursuant to this chapter, including investigation for, bringing or testifying in such an action.

(Added to NRS by 1999, 829)

NRS 357.250 Liability of employer for violations of NRS 357.240; entitlement of employee to remedies.

1. An employer who violates subsection 2 of NRS 357.240 is liable to the affected employee in a civil action for all relief necessary to make him whole, including, without limitation, reinstatement with the same seniority as if the discrimination had not occurred or damages in lieu of reinstatement if appropriate, twice the amount of lost compensation, interest on the lost compensation, any special damage sustained as a result of the discrimination and punitive damages if appropriate. The employer is also liable for expenses recoverable pursuant to NRS 357.180, costs and attorney's fees.

2. An employee is entitled to the remedies provided in subsection 1 only if:

(a) He voluntarily disclosed information to the state or a political subdivision or voluntarily acted in furtherance of an action pursuant to this chapter; and

(b) He was harassed, threatened with termination or demotion, or otherwise coerced by his employer into any participation in fraudulent activity.

(Added to NRS by 1999, 829)

Massachusetts False Claims Act

General Court, 2000 Second Annual Session

CHAPTER 159

H.B. No. 5300

APPROPRIATIONS--FISCAL YEAR 2001

Ch. 159, s 18

SECTION 18. Chapter 12 of the General Laws is hereby amended by inserting after section 5 the following 15 sections:--

Section 5A. (a) For the purposes of this section, the following words shall, unless the context clearly requires otherwise, have the following meaning:--

"Claim", any request or demand, whether pursuant to a contract or otherwise, for money or property which is made to an officer, employee, agent or other representative of the commonwealth, political subdivision thereof or to a contractor, subcontractor, grantee, or other person if the commonwealth or any political subdivision thereof provides any portion of the money or property which is requested or demanded, or if the commonwealth or any political subdivision thereof will reimburse directly or indirectly such contractor, subcontractor, grantee, or other person for any portion of the money or property which is requested or demanded.

"False claims law", pursuant to sections 5B to 5O, inclusive.

"False claims action", an action filed by the office of the attorney general or a relator pursuant to this section.

"Knowing and knowingly", possessing actual knowledge of relevant information, acting with deliberate ignorance of the truth or falsity of the information or acting in reckless disregard of the truth or falsity of the information and no proof of specific intent to defraud is required.

"Original source", an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the attorney general, without public disclosure, before filing an action under this section which is based on such information.

"Person", any natural person, corporation, partnership, association,

trust or other business or legal entity.

"Political subdivision", any city, town, county or other governmental entity authorized or created by state law, including public corporations and authorities.

"Relator", an individual who brings an action under paragraph (2) of section 5C.

Section 5B. Any person who:

(1) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to obtain payment or approval of a claim by the commonwealth or any political subdivision thereof;

(3) conspires to defraud the commonwealth or any political subdivision thereof through the allowance or payment of a fraudulent claim;

(4) has possession, custody, or control of property or money used, or to be used, by the commonwealth or any political subdivision thereof and knowingly delivers, or causes to be delivered to the commonwealth, less property than the amount for which the person receives a certificate or receipt with the intent to willfully conceal the property;

(5) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the commonwealth or any political subdivision thereof and with the intent of defrauding the commonwealth or any political subdivision thereof, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the commonwealth or any political subdivision thereof, knowing that said officer or employee may not lawfully sell or pledge the property;

(7) enters into an agreement, contract or understanding with one or more officials of the commonwealth or any political subdivision thereof knowing the information contained therein is false;

(8) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or to transmit money or property to the commonwealth or political subdivision thereof; or

(9) is a beneficiary of an inadvertent submission of a false claim to

the commonwealth or political subdivision thereof, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the commonwealth or political subdivision within a reasonable time after discovery of the false claim shall be liable to the commonwealth or political subdivision for a

civil penalty of not less than $5,000 and not more than $10,000 per violation, plus three times the amount of damages, including consequential damages, that the commonwealth or political subdivision sustains because of the act of that person. A person violating sections 5B to 5O, inclusive, shall also be liable to the commonwealth or any political subdivision for the expenses of the civil action brought to recover any such penalty or damages, including without limitation reasonable attorney's fees, reasonable expert's fees and the costs of investigation, as set forth below. Costs recoverable under said sections 5B to 5O, inclusive, shall also include the costs of any review or investigation undertaken by the attorney general, or by the state auditor or the inspector general in cooperation with the attorney general.

(10) Notwithstanding the provisions of paragraphs (1) to (9), inclusive, if the court finds that:

(i) the person committing the violation of said paragraphs (1) to (9) furnished an official of the office of the attorney general responsible for investigating false claims law violations with all the information known to such person about the violation within 30 days after the date on which the person first obtained the information;

(ii) such person fully cooperated with any commonwealth investigation of such violation; and

(iii) at the time such person furnished the commonwealth with the information about the violation, no civil action or administrative action had commenced under sections 5B to 5O, inclusive, or no criminal prosecution had commenced with respect to such violation, and such person did not have actual knowledge of the existence of an investigation into such violation, the court may reduce the assessment of damages to the amount of damages, including consequential damages, that the commonwealth or any political subdivision thereof sustains because of the act of a person.

(11) A corporation, partnership or other person is liable to the commonwealth under sections 5B to 5O, inclusive, for the acts of its agent where the agent acted with apparent authority, regardless of whether the agent acted, in whole or in part, to benefit the principal and regardless of whether the principal adopted or ratified the agent's claims, representation, statement or other action or conduct.

(12) Sections 5B to 5O, inclusive shall not apply to claims, records or statements made or presented to establish, limit, reduce, or evade liability for the payment of tax to the commonwealth, or any other

governmental authority.

(13) A person who has engaged in conduct described in paragraphs (1) to (9), inclusive, prior to payment shall only be entitled to payment from the commonwealth of the actual amount due less the excess amount falsely or fraudulently claimed.

Section 5C. (1) The attorney general shall investigate violations under sections 5B to 5O, inclusive, involving state funds or funds from any political subdivision. If the attorney general finds that a person has violated or is violating said sections 5B to 5O, inclusive, the attorney general may bring a civil action in superior court against the person.

(2) An individual, hereafter referred to as relator, may bring a civil action in superior court for a violation of said sections 5B to 5O, inclusive, on behalf of the relator and the commonwealth or any political subdivision thereof. The action shall be brought in the name of the commonwealth or the political subdivision thereof. The action may be dismissed only if the attorney general gives written reasons for consenting to the dismissal and the court approves the dismissal. Notwithstanding any general or special law to the contrary, it shall not be a cause for dismissal or a basis for a defense that the relator could have brought another action based on the same or similar facts under any other law or administrative proceeding.

(3) When a relator brings an action pursuant to said sections 5B to 5O, inclusive, a copy of the complaint and written disclosure of substantially all material evidence and information the relator possesses shall be served on the attorney general pursuant to Rule 4(d)(3) of the Massachusetts Rules of Civil Procedure. The complaint shall be filed under seal and shall remain so for 120

days. Notwithstanding any other general or special law or procedural rule to the contrary, service on the defendant shall not be required until the period provided in paragraph (5). The attorney general may, for good cause shown, ask the court for extensions of no more than 90 days during which the complaint shall remain under seal. Any such motions may be supported by affidavits or other submissions under seal. The court shall not grant more than two requests for extensions unless the attorney general can demonstrate extraordinary circumstances requiring a further extension. The attorney general may elect to intervene and proceed with the action on behalf of the commonwealth or political subdivision within the 120 day period or during any extension, after he receives both the complaint and the material evidence and information. Any information or documents furnished by the relator to the attorney general in connection with an action or investigation under said sections 5B to 5O, inclusive, shall be exempt from disclosure under section 10 of chapter 66.

(4) Before the expiration of the initial 120 day period or any 90 day extensions obtained under paragraph (3), the attorney general shall;

(i) assume control of the action, in which case the action shall be conducted by the attorney general; or (ii) notify the court that he declines to take over the action, in which case the relator shall have the right to conduct the action.

(5) If the attorney general decides to proceed with the action, the complaint shall be unsealed and served promptly thereafter. The defendant shall not be required to respond to any complaint filed under said sections 5B to 5O, inclusive, until 20 days after the complaint is unsealed and served upon the defendant pursuant to rule 4 of the Massachusetts rules of civil procedure.

(6) When a relator brings an action pursuant to this section, no person other than the attorney general may intervene or bring a related action based on the facts underlying the pending action.

Section 5D. (1) If the attorney general proceeds with the action, he shall have primary responsibility for prosecuting the action, and shall not be bound by any act of the relator. The relator shall have the right to continue as a party to the action, subject to the limitations in sections 5B to 5O, inclusive.

(2) The attorney general may dismiss the action notwithstanding the objections of the relator if the relator has been notified by the attorney general of the filing of the motion and the court has provided the relator with an opportunity for a hearing on the motion. Upon a showing of good cause, such hearing may be held in camera.

(3) The attorney general may settle the action with the defendant notwithstanding the objections of the relator if the court determines, after a hearing, that the proposed settlement is fair, adequate and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(4) Upon a showing by the attorney general that unrestricted participation during the course of the litigation by the relator initiating the action would interfere with or unduly delay the attorney general's prosecution of the case, or would be repetitious, irrelevant or for purposes of harassment, the court may, in its discretion, impose limitations on the relator's participation, including but not limited to: (i) limiting the number of witnesses the relator may call; (ii) limiting the length of the testimony of such witnesses; (iii) limiting the relator's cross examination of witnesses; or (iv) otherwise limiting the participation by the relator in the litigation.

(5) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the relator would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the relator in the litigation.

(6) If the attorney general elects not to proceed with the action, the relator who initiated the action shall have the right to conduct the action. If the attorney general so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts at the attorney general's expense. When a relator proceeds with the action, the court, without limiting the status and rights of the relator initiating the action, may nevertheless permit the attorney general to intervene at a later date upon a showing of good cause.

(7) Whether or not the attorney general proceeds with the action, upon a showing by the attorney general that certain acts of discovery by the relator initiating the action would interfere with the attorney general's investigation or prosecution of a criminal or civil matter arising out of the same or similar facts, the court may stay such discovery for a period of not more than 60 days. Such showing by the attorney general shall be conducted in camera. The court may extend the 60 day period upon a further showing in camera that the attorney general has pursued the criminal or civil investigation or proceedings with reasonable diligence and may stay any proposed discovery in the civil action that will interfere with the ongoing criminal or civil investigations or proceedings.

Section 5E. Notwithstanding the provisions of section 5C, the attorney general may elect to pursue its claim through any alternate remedy available to the attorney general, including any administrative proceeding, to determine a civil penalty. If any such alternate remedy is pursued in another proceeding, a relator shall have the same rights in such proceeding as said relator would have had if the action had continued under said section 5C. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under sections 5B to 5O, inclusive. For purposes of this section, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the commonwealth, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

Section 5F. (1) If the attorney general proceeds with an action brought by a relator pursuant to section 5C, the relator shall receive at least 15 per cent but not more than 25 per cent of the proceeds recovered and collected in the action or in settlement of the claim depending upon the extent to which the relator substantially contributed to the prosecution of the action.

(2) Where the action is one which the court finds to be based primarily on disclosures of specific information, other than information provided by the relator, relating to allegations or transactions in a criminal, civil, or administrative hearing; in a legislative, administrative, auditor or inspector general hearing, audit, or investigation; or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 per

cent of the proceeds, taking into account the significance of the information and the role of the relator bringing the action in advancing the case to litigation.

(3) Any payment to a relator pursuant to this section shall be made only from the proceeds recovered and collected in the action or in settlement of the claim. Any such relator shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, including reasonable attorney's fees and costs. All such expenses, shall be awarded against the defendant.

(4) If the attorney general does not proceed with an action pursuant to section 5C, the relator bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages on behalf of the commonwealth or any political subdivision thereof. The amount shall be not less than 25 per cent nor more than 30 per cent of the proceeds recovered and collected in the action or settlement of the claim, and shall be paid out of such proceeds. The relator shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, including reasonable attorney's fees and costs. All such expenses shall be awarded against the defendant.

(5) Whether or not the attorney general proceeds with the action, if the court finds that the action was brought by a relator who planned, initiated or knowingly participated in the violation of sections 5B to 5O, inclusive, then the court may, to the extent the court considers appropriate, reduce or eliminate the share of the proceeds of the action which the relator would otherwise receive pursuant to paragraphs (1) to (4), inclusive, taking into account the role of the relator in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the relator bringing the action is convicted of criminal conduct arising from his role in the violation of this section, the relator shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the attorney general to continue the action.

Section 5G. (1) No court shall have jurisdiction over an action brought pursuant to section 5C against the governor, lieutenant governor, the attorney general, the treasurer, secretary of state, the auditor, a member of the general court, the inspector general or a member of the judiciary, if the action is based on evidence or information known to the commonwealth when the action was brought.

(2) An individual may not bring an action pursuant to paragraph (2) of said section 5C that is based upon allegations or transactions which are the subject of a civil suit or an administrative proceeding in which the commonwealth or any political subdivision thereof is already a party.

(3) No court shall have jurisdiction over an action pursuant to sections 5B to 5O, inclusive, based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing; in a legislative, administrative, auditor's or inspector general's report, hearing, audit or investigation; or from the news media, unless the action is brought by the attorney general, or the relator is an original source of the information. No court shall have jurisdiction over an action pursuant to said sections 5B to 5O, inclusive, brought by a person who knew or had reason to know that the attorney general, the state auditor or the inspector general already had knowledge of the situation.

(4) An individual who is or was employed by the commonwealth or any political subdivision thereof as an auditor, investigator, attorney, financial officer, or contracting officer who otherwise performed such functions for the commonwealth or who discovered or learned of the allegations or the underlying facts from such persons, may not bring an action pursuant paragraph (2) of section 5C that is based upon allegations or transactions that the relator discovered or learned of in such capacity. For the purposes of this paragraph, the term "in such capacity" shall refer to any matter within the scope of such person's duties or job description.

Section 5H. (1) All money recovered by the commonwealth, as a result of actions brought by the attorney general or a person pursuant to sections 5B to 5O, inclusive, other than costs and attorney's fees awarded pursuant to paragraph (2), shall be credited by the state treasurer to the False Claims Prosecution Fund, established by section 2YY of chapter 29.

(2) Costs and attorney's fees awarded to a relator by final judicial order in an action under this section shall be paid directly by the defendant to the relator.

Section 5I. (1) If the attorney general initiates an action or assumes control of an action brought by a person pursuant to sections 5B to 5O, inclusive, the attorney general shall be awarded his reasonable attorney's fees and expenses incurred in the litigation, including costs, if he prevails in the action. Any such award shall be deposited in the False Claims Prosecution Fund established by said section 2YY of said chapter 29.

(2) If the attorney general does not proceed with an action pursuant to sections 5B to 5O, inclusive, and the defendant is the prevailing party, the court may award the defendant reasonable attorneys' fees and costs against the relator upon a written finding that such action was pursued in bad faith or was wholly insubstantial, frivolous, and advanced for the purpose of causing the defendant undue burden, unnecessary expense or harassment.

(3) No liability shall be incurred by the commonwealth, the affected agency or the attorney general for any expenses, attorney's fees or

other costs incurred by any person in bringing or defending an action under said sections 5B to 5O, inclusive.

Section 5J. (1) No employer shall make, adopt or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting to further a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed pursuant to said sections 5B to 5O, inclusive. No employer shall require as a condition of employment, during the term of employment, or at the termination of employment, that any employee agree to, accept or sign any agreement that limits or denies the employee's rights to bring an action or provide information to a government or law enforcement agency pursuant to said sections 5B to 5O, inclusive. Any such agreement shall be void.

(2) No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against an employee in the terms or conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed pursuant to sections 5B to 5O, inclusive.

(3) Notwithstanding any general or special law to the contrary, an employer who violates paragraph (2) shall be liable for such damages or equitable relief as a court shall deem appropriate, including: reinstatement with the same seniority status such employee would have had but for the employer's violation of sections 5B to 5O, inclusive, two times the amount of back pay, interest on the back pay, and compensation for any special damage sustained as a result of the employer's violation of said sections 5B to 5O, inclusive. In addition, the defendant shall be required to pay litigation costs and reasonable attorney's fees. An employee may bring an action in the appropriate superior court or the superior court of the county of Suffolk for the relief provided in this section.

(4) An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the commonwealth or a political subdivision thereof shall be entitled to the remedies pursuant to paragraph (3) only if both of the following occurred:

(i) the employee has been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place; and

(ii) the employee voluntarily disclosed information prior to being dismissed to a government or law enforcement agency or acts in

furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed.

Section 5K. (1) A civil action pursuant to sections 5B to 5O, inclusive, for a violation of section 5B may not be brought (i) more than six years after the date on which the violation occurred; or (ii) more than three years after the date when facts material to the right of action are known or reasonably should have been known by the official within the office of the attorney general charged with responsibility to act in the circumstances, but in no event more than ten years after the date on which the violation is committed, whichever occurs last. A civil action pursuant to sections 5B to 5O, inclusive, may be brought for acts or omissions that occurred prior to the effective date of this section, subject to the limitations period set forth in this section.

(2) Notwithstanding any other law or rule of procedure or evidence, a final judgment rendered in favor of the commonwealth in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same act, transaction or occurrence as in the criminal proceedings and which is brought under section 5B.

Section 5L. In any action brought pursuant to sections 5B to 5O, inclusive, the party bringing the action shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

Section 5M. The attorney general may promulgate any rules, regulations or guidelines that, in the attorney general's judgment, are necessary and appropriate to the effective administration of this chapter.

Section 5N. (1) Notwithstanding any general or special law, procedural rule or regulation to the contrary, the attorney general, whenever he has reason to believe that any person may be in possession, custody or control of any documentary material or information relevant to a false claims law investigation, may, before commencing a civil proceeding under sections 5B to 5O, inclusive, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person (i) to produce such documentary material for inspection and copying; (ii) to answer written interrogatories, in writing and under oath; (iii) to give oral testimony under oath; or (iv) to furnish any combination of such material, answers or testimony.

(2) Service of any such demand may be made by (i) delivering a copy thereof to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of

process on behalf of such person; (ii) delivering a copy thereof to the principal place of business in the commonwealth of the person to be served; or (iii) mailing by registered or certified mail a copy thereof addressed to the person to be served at the principal place of business in the commonwealth or, if said person has no place of business in the commonwealth, to his principal office or place of business.

(3) Each such demand requesting documentary material or oral testimony shall (i) state the time and place of the taking of testimony or the examination and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs; (ii) state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated; (iii) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified; (iv) prescribe a return date within which the documentary material is to be produced; (v) identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying; and (vi) if such demand is for the giving of oral testimony, notify the person receiving the demand of the right to be accompanied by an attorney and any other representative, prescribe a date, time and place at which oral testimony shall be commenced, identify the assistant attorney general who shall conduct the examination and to whom the transcript of such examination shall be submitted, specify that such attendance and testimony are necessary to the conduct of the investigation, and describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand. Notice of the time and place of taking oral testimony shall be given by the attorney general at least ten days prior to the date of such taking of testimony or examination, unless the attorney general or an assistant attorney general designated by the attorney general determines that exceptional circumstances are present which warrant such taking of testimony within a lesser period of time.

(4) The oral examination of all persons pursuant to sections 5B to 5O, inclusive, shall be conducted before a person duly authorized to administer oaths by the law of the commonwealth. Rule 30(e) of the Massachusetts Rules of Civil Procedure shall be applicable to oral examinations conducted pursuant to said sections 5B to 5O, inclusive.

(5) Any person compelled to appear for oral testimony under a civil investigative demand issued under said sections 5B to 5O may be accompanied, represented and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record

the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a motion may be filed for an order compelling such person to answer such question.

(6) The production of documentary material in response to a civil investigative demand served under sections 5B to 5O, inclusive, shall be made under a sworn certificate, in such form as the demand designates, by (i) in the case of a natural person, the person to whom the demand is directed, or (ii) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person. The certificate shall state that all of the documentary material required by the demand and in the possession, custody or control of the person to whom the demand is directed has been produced and made available to the members of the attorney general's staff identified in the demand.

(7) Each written interrogatory served under sections 5B to 5O, inclusive, shall be answered separately and fully in writing under the penalties of perjury. The person upon whom the interrogatories have been served shall serve the answers and objections, if any, upon the attorney general within 14 days after service of the interrogatories.

(8) Any documentary material or other information produced by any person pursuant to sections 5B to 5O, inclusive, shall not, unless otherwise ordered by a justice of the superior court for good cause shown, be disclosed to any person other than the authorized agent or representative of the attorney general and any officer or employee of the commonwealth who is working under their direct supervision with respect to the false claims law investigation, unless with the consent of the person producing the same. Such documentary material or information may be disclosed by the attorney general in court proceedings or in papers filed in court. Nothing in this section shall preclude the attorney general from disclosing information and evidence secured pursuant to sections 5B to 5O, inclusive, to officials of the United States, the commonwealth or any political subdivision thereof charged with responsibility for enforcement of federal, state or local laws respecting fraud or false claims upon federal, state or local governments. Prior to any such disclosure the attorney general shall obtain a written agreement from such officials to abide by the restrictions of this section.

(9) At any time prior to the date specified in the civil investigative demand, or within 21 days after the demand has been served, whichever period is shorter, the court may, upon motion for good cause shown, extend such reporting date or modify or set aside such

demand or grant a protective order in accordance with the standards set forth in Rule 26(c) of the Massachusetts Rules of Civil Procedure. The motion may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county.

(10) Whenever any person fails to comply with any civil investigative demand issued under sections 5B to 5O, inclusive, the attorney general may file, in the superior court of the county in which such person resides, is found, or transacts business, a motion for the enforcement of the civil investigative demand. The Massachusetts Rules of Civil Procedure shall apply to any such motion. Any final order entered pursuant to such petition may also include the assessment of a civil penalty of not more than $5,000 for each act or instance of noncompliance.

(11) All such information and documentary materials as are obtained by the attorney general pursuant to sections 5B to 5O, inclusive, shall not be public records and are exempt from disclosure under section 10 of chapter 66 or any other law.

(12) For purposes of sections 5B to 5O, inclusive, "documentary material" shall include the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart or other document or graphic representation, or data stored in or accessible through a computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data.

(13) Nothing in sections 5B to 5O, inclusive, shall be construed to authorize the attorney general to compel the production of information or documents from the state auditor or from the inspector general, unless otherwise authorized by law. Nothing in this chapter shall bar the attorney general from referring matters or disclosing information or documents to the state auditor or to the inspector general for purposes or any review or investigation they may deem appropriate.

Section 5O. Nothing in sections 5B to 5M, inclusive, shall be construed to relieve an agency of its reporting requirements regarding matters within that agency under chapter 647 of the acts of 1989.

Illinois Whistleblower Reward and Protection Act

Section

- 175/1. Short title.
- 175/2. Definitions.
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175/1 Short title

§ 1. This Act may be cited as the Whistleblower Reward and Protection Act.

175/2 Definitions

§ 2. Definitions. As used in this Act:

(a) "State" means the State of Illinois.

(b) "Guard" means the Illinois National Guard.

(c) "Investigation" means any inquiry conducted by any investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of this Act.

(d) "Investigator" means a person who is charged by the Department of State Police with the duty of conducting any investigation under this Act, or any officer or employee of the State acting under the direction and supervision of the Department of State Police, through the Division of Criminal Investigation or the Division of Internal Investigation, with an investigation.

(e) "Documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation. chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery.

(f) "Custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1) of Section 6.

(g) "Product of discovery" includes:

(1) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property. examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(2) any digest, analysis, selection, compilation, or derivation of any item listed in paragraph (1); and

(3) any index or other manner of access to any item listed in paragraph (I)

1.75/3 False claims

§ 3. False claims.

(a) Liability for certain acts. Any person who:

(1) knowingly presents, or causes to be presented, to an officer or employee of the State or a member of the Guard a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the State:

(3) conspires to defraud the State by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the State and, intending to defraud the State or willfully to conceal the property. delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the State and, intending to defraud the State, makes or delivers the receipt without completely knowing that the information on the ,receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the State, or a member of the Guard, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the State, is liable to the State for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the State sustains because of the act of that person. A person violating this subsection (a) shall also be liable to the State for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. As used in this Section, the terms "knowing" and "knowingly" mean that a person, with respect to information:

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information: or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. As used in this Section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the State provides any portion of the money or property which is requested or demanded, or if the State will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exclusion. This Section does not apply to claims, records, or statements made under the Illinois Income Tax Act.'

Civil actions for false claims

§ 4. Civil actions for false claims.

(a) Responsibilities of the Attorney General and the Department of State Police. The Department of State Police shall diligently investigate a civil violation under Section 3. If the Department of State Police finds that a person has violated or is violating Section 3, the Attorney General may bring a civil action under this Section against the person.

(b) Actions by private persons. (1) A person may bring a civil action for a violation of Section 3 for the person and for the State. The action shall be brought in the name of the State. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the State. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The State may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The State may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this Section until 20 days after the complaint is unsealed and served upon the defendant.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the State shall:

(A) proceed with the action, in which case the action shall be conducted by the State, or

(B) notify the court that if declines to take over the action, in which case the person bringing the action shall have the fight to conduct the action.

(5) When a person brings an action under this subsection (b), no person other than the State may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to Qui Tam actions. (1) If the State proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by

an act of the person bringing the action. Such person shall have the fight to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The State may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the State of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The State may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the State that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the State's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as

(i) limiting the number of witnesses the person may call,

(ii) limiting the length of the testimony of such witnesses

(iii) limiting the person's cross-examination of witnesses: or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the State elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the State so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the State's expense). When a person proceeds with the action, the court. without limiting the status and rights of the person initiating the action, may nevertheless permit the State to intervene at a later date upon a showing of good cause.

(4) Whether or not the State proceeds with the action, upon a showing by the State that certain actions of discovery by the person initiating the action would interfere with the State's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the State has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the State may elect to pursue its claim through any alternate remedy available to the State, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this Section. Any finding of

fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this Section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam plaintiff. (1) If the State proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15% but not more than 25% of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a legislative, administrative, or Auditor General's report, hearing, audit, or investigation, or from the news media. the court may award such sums as it considers appropriate, but in no case more than 10% of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph (I) shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. The State shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred by the Attorney General, including reasonable attorneys' fees and costs, and the amount received shall be deposited in the Whistleblower Reward and protection Fund created under this Act. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the State does not proceed with an action under this Section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25% and not more than 30% of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the State proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of Section 3 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection (d), taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of Section 3, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the State to continue the action.

(4) If the State does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred. (1) No court shall have jurisdiction over an action brought by a former or present member of the Guard under subsection (b) of this Section against a member of the Guard arising out of such person's service in the Guard.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a member of the General Assembly, a member of the judiciary, or an exempt official if the action is based on evidence or information known to the State when the action was brought.

(B) For purposes of this paragraph (2), "exempt official" means any of the following officials in State service: directors of departments established under the Civil Administrative Code of Illinois, the Adjutant General, the Assistant Adjutant General, the Director of the State Emergency Services and Disaster Agency, members of the boards and commissions, and all other positions appointed by the Governor by and with the consent of the Senate.

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the State is already a party.

(4)(A) No court shall have jurisdiction over an action under this Section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a legislative, administrative, or Auditor General's report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph (4), "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the State before filing an action under this Section which is based on the information.

(f) State not liable for certain expenses. The State is not liable for expenses which a person incurs in bringing an action under this Section.

(g) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this Section. including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this Section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate circuit court for the relief provided in this subsection (g).

False claims procedure

§ 5. False claims procedure.

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under Section 4 of this Act may be served at any place in the State.

(b) A civil action under Section 4 may not be brought:

(1) more than 6 years after the date on which the violation of Section 3 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the State charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed.

whichever occurs last.

(c) In any action brought under Section 4, the State shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, a final judgment rendered in favor of the State in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of Section 4.

175/6 Civil investigative demands

§ 6. Civil investigative demands.

(a) In general. (1) 4ssuance and service. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to an investigation, the Attorney General may, before commencing a civil proceeding under this Act, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person:

(A) to produce such documentary material for inspection and copying,

(B) to answer, in writing, written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General shall delegate the authority to issue civil investigative demands under this subsection (a) to the Department of State Police. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, an Assistant Attorney General or the delegate of the Department of State Police shall cause to be served, in any manner authorized by this Section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines. (A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting an alleged violation which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall:

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall:

(i) set forth with specificity the written interrogatories to be answered:

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall:

(i) prescribe a date, time, and place at which oral testimony shall be commenced

(ii) identify an investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the fight to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this Section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this Section shall be a date which is not less than 7 days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General or the delegate of the Department of State Police determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General or the delegate of the Department of State Police shall not authorize the issuance under this Section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the

Attorney General or the delegate of the Department of State Police, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General shall authorize the performance by the delegate of the Department of State Police by any function vested in the Attorney General under this subparagraph (G).

(b) Protected material or information. (1) In general. A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers. or testimony would be protected from disclosure under:

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of this State to aid in a grand jury investigations or

(B) the standards applicable to discovery requests under the Code of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this Section.

(2) Effect on other orders, rules, and laws. Any such demand which is an express demand for any product of discovery supersedes any inconsistent order. rule, or provision of law (other than this Section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person make such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) Service; jurisdiction. (1) By whom served. Any civil investigative demand issued under subsection (a) may be served by an investigator, or by any person authorized to serve process on individuals within Illinois.

(2) Service in foreign countries. Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within Illinois in such manner as the Code of Civil Procedure prescribes for service of process outside Illinois. To the extent that the courts of this State can assert jurisdiction over any such person consistent with due process, the courts of this State shall have the same jurisdiction to take any action respecting compliance with this Section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) Service upon legal entities and natural persons. (1) Legal entities. Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by:

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, general agent, or registered agent of the partnership, corporation, association or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity as its principal office or place of business.

(2) Natural person. Service of any such demand or petition may be made upon any natural person by:

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) Proof service. A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary material. (1) Sworn certificates. The production of documentary material in response to a civil investigative demand served under this Section shall be made under a sworn certificate, in such form as the demand designates, by:

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the investigator identified in the demand.

(2) Production of materials. Any person upon whom any civil investigative demand for the production of documentary material has been served under this Section shall make such material available for inspection and copying to the investigator identified in such demand at the principal place of business of such person, or at such other place as the investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the investigator may prescribe in writing. Such person may, upon written agreement between the person and the investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories. Each interrogatory in a civil investigative demand served under this Section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates by:

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom

the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not fumished.

(h) Oral examinations. (1) Procedures. The examination of any person pursuant to a civil investigative demand for oral testimony served under this Section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the State or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Code of Civil Procedure.

(2) Persons present. The investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the State, any person who may be agreed upon by the attorney for the State and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken. The oral testimony of any person taken pursuant to a civil investigative demand served under this Section shall be taken in the county within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the investigator conducting the examination and such person.

(4) Transcript of testimony. When the testimony is fully transcribed, the investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the investigator, **with** a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness. unless the witness in writing waives the signaling, is ill. cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or investigator shall sign it and state on the record the fact of the waiver, illness. absence of the witness, or the refusal to sign, together with the reasons. if any, given therefor.

(5) Certification and delivery to custodian. The officer before whom the testimony is taken shall certify on the transcript that the witness was swom by the officer and that the transcript is a true record of the testimony given by the witness. and the officer or investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness. Upon payment of reasonable charges therefor, the investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, an Assistant Attorney General or employee of the Department of State Police may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

Conduct of oral testimony. (A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person. in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question. in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. If such person refuses to answer any question, a petition may be filed in circuit court under subsection (j)(I) for an order compelling such person to answer such question.

(B) If such person refuses any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with Article 106 of the Code of Criminal Procedure of 1963.

(8) Witness fees and allowances. Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the circuit court.

(i) Custodians of documents, answers, and transcripts.

(1) Designation. The Attorney General shall designate the Department of State Police to serve as custodian of documentary material, answers to interrogatories. and transcripts of oral testimony received under this Section, and shall designate additional employees of the Department of State Police as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure. (A) An investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this Section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any investigator, or other officer or employee of the Attorney General or employee of the Department of State Police who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized investigator or other officer or employee in connection with the taking of oral testimony under this Section.

(C) Except as otherwise provided in this subsection (i), no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than an investigator or other officer or employee of the Attorney General or employee of the Department of State Police authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the General Assembly, including any

committee or subcommittee of the General Assembly, or to any other State agency for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a circuit court. showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe:

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative for that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings. Whenever any attorney of the office of the Attorney General, or State's Attorney upon a referral has been designated to appear before any court, grand jury, or State agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this Section may deliver to such attorney such material. answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material. If any documentary material has been produced by any person in the course of any investigation pursuant to a civil investigative demand under this Section and:

(A) any case or proceeding before the **court** or grand jury arising out of such investigation, or any proceeding before any State agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the investigator under subsection (f)(2) or made for the Attorney General or employee of the Department of State Police under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians. In the event of the death, disability, or separation from service in the Department of State Police of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this Section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly:

(A) designate another employee of the Department of State Police to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph (5) shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this Section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) Judicial proceedings. (1) Petition for enforcement. Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the circuit court of any county in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand. (A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the circuit court of any county within which such person resides, is found, or transacts business, and serve upon the investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the circuit court of the county in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph (A) must be filed:

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this Section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portion of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery. (A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the circuit court of the county in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph (A) must be filed:

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief upon subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this Section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed from compliance with the demand.

(4) Petition to require performance by custodian of duties. At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the circuit court of the county within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this Section.

(5) Jurisdiction. Whenever any petition is filed in any circuit court under this subsection (j), such court shall have jurisdiction to hear and determine the matter so presented, and to enter such orders as may be required to carry out the provisions of this Section. Any final order so entered shall be subject to appeal in the same manner as appeals of other final orders in civil matters. Any disobedience of any final order entered under this Section by any court shall be punished as a contempt of the court.

(k) Disclosure exemption. Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under the Illinois Administrative Procedure Act.

175/7 Procedure

§ 7. Procedure. The Code of Civil Procedure shall apply to all proceedings under this Act, except when that Code is inconsistent with this Act.

175/8 Funds-Grants

§ 8. Funds; Grants.

(a) There is hereby created the Whistleblower Reward and Protection Fund as a special fund in the State Treasury. All proceeds of an action or settlement of a claim brought under this Act shall be deposited in the Fund.

(b) Monies in the Fund shall be allocated, subject to appropriation, as follows: One-sixth of the monies shall be paid to the Attorney General and one-sixth of the monies shall be paid to the Department of State Police for State law enforcement purposes. The remaining two-thirds of the monies in the Fund shall be used for payment of awards to Qui Tam plaintiffs, for attorneys' fees and expenses, and as otherwise specified in this Act. The Attorney

General shall direct the State Treasurer to make disbursement of funds as provided in court orders setting those awards, fees, and expenses. The State Treasurer shall transfer any fund balances in excess of those required for these purposes to the General Revenue Fund.

Virginia Fraud Against Taxpayers Act

CHAPTER 842

An Act to amend the Code of Virginia by adding in Chapter 3 of Title 8.01 an article numbered 19.1, consisting of sections numbered 8.01-216.1 through 8.01-216.19, relating to the Virginia Fraud Against Taxpayers Act.
[S 445]

Approved April 17, 2002

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 3 of Title 8.01 an article numbered 19.1, consisting of sections numbered 8.01-216.1 through 8.01-216.19, as follows:

Article 19.1.
Virginia Fraud Against Taxpayers Act.

§ 8.01-216.1. Citation.

This article may be cited as the Virginia Fraud Against Taxpayers Act.

§ 8.01-216.2. Definitions.

As used in this article, unless the context requires otherwise:

"Attorney General" means the Attorney General of Virginia, the Chief Deputy, other deputies, counsels or assistant attorneys general employed by the Office of the Attorney General and designated by the Attorney General to act pursuant to this article.

"Claim" means any request or demand, whether under a contract or otherwise, for money or property that is made to a contractor, grantee, or other recipient if the Commonwealth provides any portion of the money or property that is requested or demanded, or if the Commonwealth will reimburse such contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded.

"Commonwealth" means the Commonwealth of Virginia, any agency of state government, and any political subdivision of the Commonwealth.

"Documentary material" means the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery.

"Investigation" means any inquiry conducted by an investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of this article.

"Person" includes any natural person, corporation, firm, association, organization, partnership, limited liability company, business or trust.

"Product of discovery" means (i) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature; (ii) any digest, analysis, selection, compilation, or derivation of any item listed in clause (i); and (iii) any index or other manner of access to any item listed in clause (i).

§ 8.01-216.3. False claims; civil penalty.

A. Any person who:

1. Knowingly presents, or causes to be presented, to an officer or employee of the Commonwealth a false or fraudulent claim for payment or approval;

2. Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Commonwealth;

3. Conspires to defraud the Commonwealth by getting a false or fraudulent claim allowed or paid;

4. Has possession, custody, or control of property or money used, or to be used, by the Commonwealth and, intending to defraud the Commonwealth or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

5. Authorizes to make or deliver a document certifying receipt of property used, or to be used, by the Commonwealth and, intending to defraud the Commonwealth, makes or delivers the receipt without completely knowing that the information on the receipt is true;

6. Knowingly buys or receives as a pledge of an obligation or debt, public property from an officer or employee of the Commonwealth who lawfully may not sell or pledge the property; or

7. Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Commonwealth;

shall be liable to the Commonwealth for a civil penalty of not less than $5,000 and not more than $10,000, plus three times the amount of damages sustained by the Commonwealth.

B. If the court finds that (i) the person committing the violation of this section furnished officials of the Commonwealth responsible for investigating false claims violations with all information known to the person about the violation within thirty days after the date on which the defendant first obtained the information; (ii) such person fully cooperated with any Commonwealth investigation of such violation; (iii) at the time such person furnished the Commonwealth with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to such violation, and (iv) the

person did not have actual knowledge of the existence of an investigation into such violation, the court may assess not less than two times the amount of damages that the Commonwealth sustains because of the act of the person. A person violating this section shall also be liable to the Commonwealth for the costs of a civil action brought to recover any such penalty or damages.

C. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

D. This section shall not apply to claims, records or statements relating to income taxation as set forth in Title 58.1.

§ 8.01-216.4. Attorney General; investigation, civil action.

The Attorney General shall investigate any violation of § 8.01-216.3. If the Attorney General finds that a person has violated or is violating § 8.01-216.3, the Attorney General may bring a civil action under this section.

§ 8.01-216.5. Civil actions filed by private persons; Commonwealth may intervene.

A. A person may bring a civil action for a violation of § 8.01-216.3 for the person and for the Commonwealth. The action shall be brought in the name of the Commonwealth. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

B. A copy of the motion for judgment and written disclosure of substantially all material evidence and information the person possesses shall be served on the Commonwealth. The motion for judgment shall be filed in camera, shall remain under seal for at least 120 days, and shall not be served on the defendant until the court so orders. The Commonwealth may elect to intervene and proceed with the action within 120 days after it receives both the motion for judgment and the material evidence and information.

C. The Commonwealth may, for good cause shown, move the court for extensions of the time during which the motion for judgment remains under seal. Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any motion for judgment filed under this section until twenty-one days after the motion for judgment is unsealed and served upon the defendant.

D. Before the expiration of the 120-day period or any extensions obtained under subsection C, the Commonwealth shall proceed with the action, in which case the action shall be conducted by the Commonwealth, or notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to prosecute the action.

E. When a person brings an action under this section, no person other than the Commonwealth may intervene or bring a related action based on the facts underlying the pending action.

§ 8.01-216.6. Rights of private plaintiff and Commonwealth.

A. If the Commonwealth proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations of this section.

B. The Commonwealth may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Commonwealth of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

C. The Commonwealth may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera. The Commonwealth may, for good cause shown, move the court for a partial lifting of the seal to facilitate the investigative process or settlement.

D. Upon a showing by the Commonwealth that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Commonwealth's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as (i)limiting the number of witnesses the person may call; (ii) limiting the length of the testimony of such witnesses; (iii) limiting the person's cross-examination of witnesses; and (iv) otherwise limiting the participation by the person in the litigation.

E. Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

F. If the Commonwealth elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Commonwealth so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts at the Commonwealth's expense. When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Commonwealth to intervene at a later date upon a showing of good cause.

G. Whether or not the Commonwealth proceeds with the action, upon a showing by the Commonwealth that certain actions of discovery by the person initiating the action would interfere with the Commonwealth's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than sixty days. Such a showing shall be conducted in camera. The court may extend the sixty-day period upon a further showing in camera that the Commonwealth has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

H. Notwithstanding the provisions of subsection B of § 8.01-216.5, the Commonwealth may elect to pursue its claim through any alternate remedy available to the Commonwealth, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this article. For purposes of this subsection, a finding or conclusion is final if it has been finally determined on appeal to a court of competent jurisdiction of the Commonwealth, if the time for filing an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

§ 8.01-216.7. Award to private plaintiff.

A. Except as hereinafter provided, if the Commonwealth proceeds with an action brought by a person under § 8.01-216.5, such person shall receive at least fifteen percent but not more than twenty-five percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one that the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the action, relating to allegations or transactions in a criminal, civil, or administrative hearing, in a legislative, administrative, or Auditor of Public Accounts' report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than ten percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under this section shall be made from the proceeds of the award. Any such person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

B. If the Commonwealth does not proceed with an action, the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than twenty-five percent and not more than thirty percent of the proceeds of the award or settlement and shall be paid out of the proceeds. Such person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

C. Whether or not the Commonwealth proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of § 8.01-216.3 upon which the action was brought, or if the person bringing the action is convicted of criminal conduct arising from his role in the violation of § 8.01-216.3, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the Commonwealth to continue the action.

D. If the Commonwealth does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

§ 8.01-216.8. Certain actions barred.

No court shall have jurisdiction over an action brought under § 8.01-216.5 based on information discovered by a present or former employee of the Commonwealth during the course of his employment unless that employee first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and unless the Commonwealth failed to act on the information provided within a reasonable period of time.

No court shall have jurisdiction over any action brought under this article by an inmate incarcerated within a state or local correctional facility as defined in § 53.1-1.

No court shall have jurisdiction over an action brought under this article against any department, authority, board, bureau, commission, or agency of the Commonwealth, any political subdivision of the Commonwealth, a member of the General Assembly, a member of the judiciary, or an exempt official if the action is based on evidence or information known to the Commonwealth when the action was brought. For purposes of this section, "exempt official" means the Governor, Lieutenant Governor, Attorney General and the directors or members of any department, authority, board, bureau, commission or agency of the Commonwealth or any political subdivision of the Commonwealth.

In no event may a person bring an action under this article that is based upon allegations or transactions that are the subject of a civil suit or an administrative proceeding in which the Commonwealth is already a party.

No court shall have jurisdiction over an action under this article based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a legislative, administrative, or Auditor of Public Accounts' report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. For purposes of this section, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Commonwealth before filing an action under this article that is based on the information.

The Commonwealth shall not be liable for expenses a person incurs in bringing an action under this article.

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his employer because he has opposed any practice referenced in § 8.01-216.3 or because he has initiated, testified, assisted, or participated in any manner in any investigation, action or hearing under this article, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in a court of competent jurisdiction for the relief provided in this section.

§ 8.01-216.9. Procedure; statute of limitations.

A subpoena requiring the attendance of a witness at a trial or hearing conducted under this article may be served at any place in the Commonwealth.

A civil action under § 8.01-216.5 may not be brought (i) more than six years after the date on which the violation is committed or (ii) more than three years after the date when facts material to the right of action are known or reasonably should have been known by the official of the Commonwealth charged with responsibility to act in the circumstances, but in that event no more than ten years after the date on which the violation is committed, whichever occurs last.

In any action brought under § 8.01-216.5, the Commonwealth shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

Notwithstanding any other provision of law, a final judgment rendered in favor of the Commonwealth in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action that involves the same transaction as in the criminal proceeding and which is brought under § 8.01-216.5.

§ 8.01-216.10. Civil investigative demands; issuance.

A. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under this article, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person (i) to produce such documentary material for inspection and copying, (ii) to answer in writing written interrogatories with respect to such documentary material or information, (iii) to give oral testimony concerning such documentary material or information, or (iv) to furnish any combination of such material, answers, or testimony.

B. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General shall cause to be served, in any manner authorized by this article, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

§ 8.01-216.11. Civil investigative demand; contents and deadlines.

Each civil investigative demand issued under this article shall state the nature of the conduct constituting the alleged violation of a false claims law that is under investigation, and the applicable provision of law alleged to be violated.

If such demand is for the production of documentary material, the demand shall (i) describe each class of documentary material to be produced with such definiteness and certainty as

to permit such material to be fairly identified; (ii) prescribe a return date for each such class that will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and (iii) identify the false claims law investigator to whom such material shall be made available.

If such demand is for answers to written interrogatories, the demand shall (i) set forth with specificity the written interrogatories to be answered; (ii) prescribe dates at which time answers to written interrogatories shall be submitted; and (iii) identify the false claims law investigator to whom such answers shall be submitted.

If such demand is for the giving of oral testimony, the demand shall (i) prescribe a date, time, and place at which oral testimony shall be commenced; (ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted; (iii) specify that such attendance and testimony are necessary to the conduct of the investigation; (iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and (v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry that will be taken pursuant to the demand.

Any civil investigative demand that is an express demand for any product of discovery shall not be returned or returnable until twenty-one days after a copy of such demand has been served upon the person from whom the discovery was obtained.

The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this article shall be a date that is not less than seven days after the date on which the demand is received, unless the Attorney General determines that exceptional circumstances are present that warrant the commencement of such testimony within a lesser period of time.

The Attorney General shall not authorize the issuance of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

§ 8.01-216.12. Civil investigative demands; protected material or information.

A civil investigative demand issued under this article shall not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under (i) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of this Commonwealth to aid in a grand jury investigation or (ii) the standards applicable to discovery requests under the Rules of the Supreme Court of Virginia, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this article.

Any such demand that is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law, other than this section, preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege that the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

§ 8.01-216.13. Civil investigative demands; service and jurisdiction.

Any civil investigative demand issued under this article may be served by an investigator, or by any person authorized to serve process on individuals in the Commonwealth.

Any such demand or any petition filed under this article may be served upon any person who is not found within Virginia in such manner as the Rules of the Supreme Court of Virginia or the Code of Virginia prescribe for service of process outside Virginia. To the extent that the courts of this Commonwealth can assert jurisdiction over any such person consistent with due process, the courts of this Commonwealth shall have the same jurisdiction to take any action respecting compliance with the provisions of this article by any such person that the court would have if such person were personally within the jurisdiction of the court.

Service of any civil investigative demand issued under this article or of any petition filed under this article may be made upon a partnership, corporation, association, or other legal entity by (i) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity; (ii) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or (iii) depositing an executed copy of such demand or petition in the United States mail by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

Service of any such demand or petition may be made upon any natural person by (i) delivering an executed copy of such demand or petition to the person, or (ii) depositing an executed copy of such demand or petition in the United States mail by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

A verified return by the individual serving any civil investigative demand issued under this article or any petition filed under this article setting forth the manner of such service shall be proof of service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

§ 8.01-216.14. Civil investigative demands; documentary material.

The production of documentary material in response to a civil investigative demand served under this article shall be made under a sworn certificate, in such form as the demand designates, by (i) in the case of a natural person, the person to whom the demand is directed, or (ii) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person. The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the investigator identified in the demand.

Any person upon whom any civil investigative demand for the production of documentary material has been served shall make such material available for inspection and copying to

the investigator identified in such demand at the principal place of business of such person, or at such other place as the investigator and the person thereafter may agree and prescribe in writing, or as the court may direct. Such material shall be made available on the return date specified in such demand, or on such later date as the investigator may prescribe in writing. Such person may, upon written agreement between the person and the investigator, substitute copies for originals of all or any part of such material.

§ 8.01-216.15. Civil investigative demands; interrogatories.

Each inquiry in a civil investigative demand served under this article shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by (i) in the case of a natural person, the person to whom the demand is directed, or (ii) in the case of a person other than a natural person, the person or persons responsible for answering each inquiry. If any inquiry is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

§ 8.01-216.16. Civil investigative demands; oral examinations.

A. The examination of any person pursuant to a civil investigative demand for oral testimony served under this article shall be taken before an officer authorized to administer oaths under the laws of this Commonwealth or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the Attorney General. This section shall not preclude the taking of testimony by any means authorized by and in a manner consistent with the Rules of the Supreme Court of Virginia.

B. The investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Commonwealth, any person who may be agreed upon by the attorney for the Commonwealth and the person giving the testimony, the officer before whom the testimony is to be taken, and any court reporter taking such testimony.

C. The oral testimony of any person taken pursuant to a civil investigative demand served under this article shall be taken in the county or city within which such person resides, is found, or transacts business or in such other place as may be agreed upon by the investigator conducting the examination and such person.

D. When the testimony is fully transcribed, the investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and

reading are waived by the witness. Any changes in form or substance that the witness desires to make shall be entered and identified upon the transcript by the officer or the investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within thirty days after being afforded a reasonable opportunity to examine it, the officer or the investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

E. The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the Attorney General.

F. Upon payment of reasonable charges therefor, the investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

G. Any person compelled to appear for oral testimony under a civil investigative demand may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the circuit court for an order compelling such person to answer such question. If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with applicable law.

H. Any person appearing for oral testimony under a civil investigative demand issued under this article shall be entitled to the same fees and allowances paid to witnesses in the circuit court.

§ 8.01-216.17. Civil investigative demands; custodian of documents; answers.

A. The Attorney General shall serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this article.

B. An investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the Attorney General. The Attorney General shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material.

C. The Attorney General may cause the preparation of such copies of documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any investigator, or other officer or employee of the Attorney General or employee of

the Department of State Police, who is authorized for such use by the Attorney General. Such material, answers, and transcripts may be used by any authorized investigator or other officer or employee in connection with the taking of oral testimony under this article.

D. Except as otherwise provided in this section, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the Attorney General, shall be available for examination by any individual other than an investigator or other officer or employee of the Attorney General or employee of the Department of State Police authorized by the Attorney General. The prohibition on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subsection is intended to prevent disclosure to the General Assembly, including any committee or subcommittee of the General Assembly, or to any other state agency for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a circuit court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

E. While in the possession of the Attorney General and under such reasonable terms and conditions as the Attorney General shall prescribe, (i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers, and (ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony or by a representative of that person authorized by that person to examine such transcripts.

F. Any attorney employed by the Office of the Attorney General designated to appear before any court, grand jury, or state agency in any case or proceeding may use any documentary material, answers to interrogatories, or transcripts of oral testimony in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered that have not passed into the control of the court, grand jury, or agency through introduction into the record of such case or proceeding.

G. If any documentary material has been produced by any person in the course of any investigation pursuant to a civil investigative demand under this article, and (i) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any state agency involving such material, has been completed, or (ii) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation, the Attorney General shall, upon written request of the person who produced such material, return to such person any material, other than copies furnished to the investigator, or made for the Attorney General that has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

§ 8.01-216.18. Civil investigative demands; judicial proceedings for noncompliance.

A. Whenever any person fails to comply with any civil investigative demand issued under this article, or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender the material, the Attorney General may file in the appropriate circuit court for the county or city in which such person resides, is found, or transacts business, and serve upon such person a petition for a court order for the enforcement of the civil investigative demand.

B. Any person who has received a civil investigative demand issued under this article may file, in the circuit court of any county or city within which such person resides, is found, or transacts business, and serve upon the investigator identified in such demand a petition for an order of the court to modify or set aside the demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the circuit court of the county or city in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this section shall be filed (i) within twenty-one days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or (ii) within such longer period as may be prescribed in writing by any investigator identified in the demand.

C. The petition shall specify each ground upon which the petitioner relies in seeking relief, and may be based upon any failure of the demand to comply with the provisions of this article or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

D. In the case of any civil investigative demand issued under this article that is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the circuit court of the county or city in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any investigator identified in the demand and upon the recipient of the demand a petition for a court order to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subsection shall be filed (i) within twenty-one days after the date of service of the civil investigative demand or at any time before the return date specified in the demand, whichever date is earlier, or (ii) within such longer period as may be prescribed in writing by any investigator identified in the demand.

E. The petition shall specify each ground upon which the petitioner relies in seeking relief and may be based upon any failure of the demand from which relief is sought to comply with the provisions of this article, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

F. At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given by any person in compliance with any civil investigative demand issued under this article, such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the circuit court of the county or city within which the office of such custodian is situated, and serve upon such custodian a petition for a court order to require the performance by the custodian of any duty imposed upon the

custodian by this section. Whenever any petition is filed in any circuit court under this section, the court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal in the same manner as appeals of other final orders in civil matters. Any disobedience of any final order entered under this section by any court shall be punished as contempt of the court.

G. Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under this article shall be exempt from disclosure under the Virginia Administrative Process Act (§ 2.2-4000 et seq.).

§ 8.01-216.19. Application of the Rules of the Supreme Court.

The Rules of the Supreme Court of Virginia shall apply to all proceedings under this article, except when those Rules are inconsistent with this article.

2. That the provisions of this act shall become effective January 1, 2003.

Delaware False Claims and Reporting Act

§ 1201. Liability for certain acts.

(a) Any person who:

(1) Knowingly presents, or causes to be presented, directly or indirectly, to an officer or employee of the Government a false or fraudulent claim for payment or approval;

(2) Knowingly makes, uses or causes to be made or used, directly or indirectly, a false record or statement to get a false or fraudulent claim paid or approved;

(3) Conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) Has possession, custody or control of property or money used or to be used by the Government and, intending to defraud the Government or willfully to conceal the property, delivers or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) Is authorized to make or deliver a document certifying receipt of property used or to be used by the Goverment and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government who the person knows may not lawfully sell or pledge the property; or

(7) Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, increase or decrease an obligation to pay or transmit money or property to or from the Government

shall be liable to the Goverment for a civil penalty of not less than $5,500 and not more than $11,000 for each act constituting a violation of this section, plus 3 times the amount of actual damages which the Government sustains because of the act of that person.

(b) Notwithstanding the foregoing, the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person, if:

(1) The person committing the violation of this subsection furnished officials of the Government responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(2) Such person fully cooperated with any government investigation of such violations; and

(3) At the time such person furnished the Government with the information about the violation, no criminal prosecution, civil action, investigation or administrative action had

commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violations.

A person violating this subsection shall also be liable for the costs of a civil action brought to recover any such penalty or damages, including payment of reasonable attorneys fees and costs.

(c) The Superior Court shall have jurisdiction of all offenses under this chapter. (72 Del. Laws, c. 370, § 1.)

§ 1202. Definitions.

As used in this chapter:

(1) "Knowing" and "knowingly" mean that a person, with respect to information:

a. Has actual knowledge of the information;

b. Acts in deliberate ignorance of the truth or falsity of the information; or

c. Acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(2) "Claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee or other recipient where the Government provides, directly or indirectly, any portion of the money or property which is requested or demanded, or where the Government will, directly or indirectly, reimburse such contractor, grantee or other recipient for any portion of the money or property which is requested or demanded.

(3) "Government" includes all departments, boards or commissions of the executive branch of the State, all political subdivisions of the State, the Delaware Department of Transportation and all state and municipal authorities, all organizations created by or pursuant to a statute which declares in substance that such organization performs or has for its purpose the performance of an essential governmental function, and all organizations, entities or persons receiving funds of the State where the act complained of pursuant to this act relates to the use of such funds of the State.

(4) "Affected person, entity or organization" includes an employee or former employee of a person who is liable under § 1201 of this title, or a "labor organization" as defined by § 1107A(d) of Title 19. (72 Del. Laws, c. 370, § 1.)

§ 1203. Civil actions for false claims.

(a) Responsibilities of the Attorney General. -- The Attorney General shall diligently investigate suspected violations under this chapter. If the Attorney.General finds that a person has violated or is violating the provisions of this chapter, the Attorney General may bring a civil action under this section against the person.

(b) Private actions. --

(1) A private civil action may be brought by any affected person, entity or organization (hereinafter "private party" or "party") for a violation of this chapter on behalf of the party bringing suit and for the Government. The action shall be brought in the name of the Government. Unless dismissed pursuant to paragraph (2) of this subsection, the action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the private party possesses shall be served on the Attorney General pursuant to Rules 4 and 5 of the Superior Court Civil Rules. The complaint shall be filed in camera and shall remain under seal for at least 60 days. The complaint shall not be served on the defendant until the expiration of 60 days or any extension approved under paragraph (3) of this subsection. Within 60 days after receiving a copy of the complaint, the Attorney General shall conduct an investigation of the factual allegations and legal contentions made in the complaint, shall make a written determination of whether there is substantial evidence that a violation of this chapter has occurred, and shall provide the affected person, entity or organization, and the Government, with a copy of the determination. The Government may elect to intervene and proceed with the action within 60 days after it receives the complaint, the material evidence and information, and the written determination of the Attorney General. If the Attorney General determines that there is not substantial evidence that a violation of this chapter occurred, then the complaint shall be dismissed.

(3) The Government or the Attorney General may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2) of this subsection. Any such motion may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Superior Court Civil Rules. The complaint shall be deemed unsealed at the expiration of the 60-day period in the absence of a court approved extension of the time frame.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3) of this subsection, the Govermnent shall:

a. Proceed with the action, in which case the action shall be conducted by the Government; or

b. Notify the court that it declines to take over the action, in which case the private party bringing the action shall have the right to conduct the action if, pursuant to paragraph (2) of this subsection, the Attorney General determined that there is substantial evidence that a violation of this chapter has occurred.

(5) When a party brings an action under this subsection, no party other than the Government may intervene or bring a related action based on the facts underlying the pending action. (72 Del. Laws, c. 370, § 1.)

§ 1204. Rights of the parties to qui tam actions.

(a) If the Government proceeds with the action, it shall have the exclusive responsibility for prosecuting the action, and shall not be bound by an act of the party bringing the action. Such party shall have the right to continue as a nominal party to the action, but, except as

provided in subsections (b) and (c) of this section, such party shall not have the right to participate in the litigation except as a witness.

(b) The Government may dismiss the action notwithstanding the objections of the party initiating the action if the party has been notified by the Government of the filing of the motion and the court has provided the party with an opportunity for a hearing on the motion.

(c) The Government may settle the action with the defendant notwithstanding the objections of the party initiating the action if the court determines after a hearing that the proposed settlement is fair, adequate and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(d) If the Government elects not to proceed with the action, the party who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of the pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a party proceeds with the action, the court, without limiting the status and rights of the party initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(e) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the party initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings. (72 Del. Laws, c. 370, § 1.)

§ 1205. Award to qui tam plaintiff.

(a) If the Government proceeds with an action brought by a party under § 1203(b) of this title, such party shall, subject to the 2nd sentence of this subsection, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the party substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the party bringing the action) relating to allegations or transactions in a criminal, civil or administrative hearing, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the party bringing the action in advancing the case to litigation. Any payment to a party under the 1st or 2nd sentence of this paragraph shall be made from the proceeds. Any such party shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. In determining the amount of reasonable attorneys' fees and costs, the court shall consider, without limitation, whether such fees and costs were necessary to the prosecution of the action, were incurred for activities which were duplicative of the activities of the Government in prosecuting the case, or were repetitious, irrelevant or for purposes of harassment, or caused the defendant undue burden

or unnecessary expense. All such expenses, fees and costs shall be awarded against the defendant.

(b) If the Government does not proceed with an action under this chapter, the party bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such party shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. In determining the amount of reasonable attorneys' fees and costs, the court shall consider, without limitation, whether such fees and costs were necessary to the prosecution of the action, were incurred for activities which were repetitious, irrelevant or for purposes of harassment, or caused the defendant undue burden or unnecessary expense. All such expenses, fees, and costs shall be awarded against the defendant.

(c) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a party who planned and initiated the violation upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the party would otherwise receive under subsection (a) or (b) of this section, taking into account the role of that party in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the party bringing the action is convicted of criminal conduct arising from his or her or its role in the violation of this chapter, that party shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the State to continue the action, represented by the Attorney General's Office.

(d) If the Government does not proceed with the action and the party bringing the action conducts the action, the court may award to the defendant its reasonable attorneys fees and expenses if the defendant prevails in the action and the court finds that the claim of the party bringing the action was:

(1) Filed for any improper purpose, such as to harass or to vex;

(2) Not warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law; or

(3) Based on allegations or factual contentions not supported by the evidence of record. (72 Del. Laws, c. 370, § 1.)

§ 1206. Certain actions barred.

(a) No court shall have jurisdiction of an action brought pursuant to this chapter against a State Government official if the action is substantially based on evidence or information known to the Government when the action was brought.

(b) In no event may a party bring an action under this chapter which is substantially based upon allegations or transactions which are the subject of a civil suit or an administrative proceeding in which the Government is already a party.

(c) No court shall have jurisdiction over an action under this chapter substantially based upon the public disclosure of allegations or actions in a criminal civil or administrative hearing, or from the news media, unless the action is brought by the Attorney General or the party bringing the action is an original source of this information.

For purposes of this subsection, "original source" means the party bringing suit who has independent knowledge, including knowledge based on its own investigation of the defendant's conduct, of the information on which the allegations are based and has voluntarily provided or verified the information on which the allegations are based or has voluntarily provided the information to the Government before filing an action under this section which is based on the information. (72 Del. Laws, c. 370, § 1.)

§ 1207. Government not liable for certain expenses.

No Government shall be liable for expenses which a party incurs in bringing an action under this chapter. (72 Del. Laws, c. 370, § 1.)

§ 1208. Employee protection.

Any employee who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this chapter, including investigation for, initiation of, testimony for or assistance in an action filed or to be filed under this chapter, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys" fees. An employee may bring an action in the appropriate court of the State for the relief provided in this subsection. (72 Del. Laws, c. 370, § 1.)

§ 1209. False claims and reporting procedure.

(a) A civil action under this act may not be brought:

(1) More than 6 years after the date on which the violation is committed; or

(2) More than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the Government charged with responsibility to act in the circumstances,

but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(b) In any action brought under this chapter, the Government or the private party shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(c) Notwithstanding any other provision of law, the Delaware Rules of Criminal Procedure, or the Delaware Rules of Civil Procedure, a final judgment rendered in favor of the Government in any criminal proceeding charging fraud or false statements, whether upon a verdict after

trial or upon a plea of guilty, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under this chapter. (72 Del. Laws, c. 370, § 1.)

10 Cal.Rptr.3d 456, 185 Ed. Law Rep. 698, 4 Cal. Daily Op. Serv. 1909, 2004 Daily Journal D.A.R. 2802
Review Granted
Previously published at: 116 Cal.App.4th 515
(Cal.Const. art. 6, s 12; Cal. Rules of Court, Rules 28, 976, 977, 979)

Court of Appeal, Third District, California.
Joey WELLS, a Minor, etc., et al., Plaintiffs and Appellants,
v.
ONE2ONE LEARNING FOUNDATION et al., Defendants and Respondents;
State of California, Real Party in Interest and Respondent.
No. C042504.
March 3, 2004.
Review Granted June 23, 2004.

Background: Charter school students and their parents sued charter schools, operators of schools, and chartering school districts, asserting causes of action for violation of **False Claims Act**, violation of unfair competition law (UCL), intentional misrepresentation, negligent misrepresentation, and breach of contract. The Superior Court, Sierra County, No. S46-CV-5844, William W. Pangman, J., sustained defendant's demurrers without leave to amend and dismissed complaint. Plaintiffs appealed.

Holdings: The Court of Appeal, Robie, J., held that:
(1) charter schools, their operators, and chartering school districts were public entities exempt from UCL;
(2) causes of action for breach of contact and misrepresentation were barred by doctrine of educational malfeasance;
(3) plaintiffs stated cause of action under **False Claims Act**; and
(4) Tort Claims Act filing requirements did not apply to False Claim Act cause of action.

Reversed and remanded with directions.
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Gordon & Rees, Dion N. Cominos, Mark C. Russell, San Francisco, for Defendant and Respondent One2One Learning Foundation.
Seyfarth Shaw, James M. Nelson, Kurt A. Kappes, Sacramento, William S. Jue for Defendant and Respondent Charter School Resource Alliance.
California Education Legal Services, Thomas M. Griffin, David E. Robinett for Defendant and Respondent Camptonville Elementary School District.
Parks, Dingwall & Associates, Linda Rhoads Parks, Walnut Creek; Law Offices of Jon Webster and Jon Webster, Concord, for Defendant and Respondent Camptonville Academy, Inc.
Needham, Davis, Kirwan & Young, Mark E. Davis, Marc J. Cardinal for Defendant and Respondent Mattole Unified School District.
Duncan, Ball & Evans, Mathew D. Evans, Sacramento, James B. Carr for Defendants and Respondents Sierra Summit Academy, Inc., and Sierra Plumas Joint Unified School District.
Bill Lockyer, Attorney General, Christopher Ames, Senior Assistant Attorney General, Larry G. Raskin, Supervising Deputy Attorney General, Mark R. Soble, Deputy Attorney General for Real Party in Interest.

ROBIE, J.
How to properly educate our children in the public schools is a complex question with no simple answer. Ultimately, the ***460** resolution of this question is for the parents of those children, their teachers, their school boards, and the Legislature, not the courts. (See *Peter*

W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal.App.3d 814, 824-825, 131 Cal.Rptr. 854 (*Peter W.*).)

One way our Legislature has chosen to address concerns over the public education of our children is to enact the Charter Schools Act of 1992. [FN1] (Ed.Code, [FN2] § 47600 et seq.) The Charter Schools Act allows "teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure." (§ 47601.) By enacting this statute, the Legislature hoped to improve pupil learning, increase learning opportunities, encourage innovation in our public schools, create professional opportunities for teachers, provide expanded choices of educational opportunities, hold schools accountable for their performance, and "[p]rovide vigorous competition within the public school system." (§ 47601.)

FN1. Hereafter the Charter Schools Act.

FN2. All further statutory references are to the Education Code unless otherwise indicated.

In this opinion, we hold charter school students and their parents may not sue their public charter schools for violation of Business and Professions Code section 17200 et seq., misrepresentation, or breach of contract based on allegations that their charter schools failed to deliver a proper public education.

The Charter Schools Act, however, is not a license for a charter school to fraudulently obtain state funds free from judicial review. Thus, we conclude the plaintiffs here have stated a cause of action under the California **False Claims Act** [FN3] against several charter schools and their chartering school districts based on the allegation those schools "request[ed] funding from ... the STATE OF CALIFORNIA, knowing that their ADA [average daily attendance] records did not accurately reflect the students enrolled in and receiving instruction, educational materials, or services from their schools."

FN3. Government Code section 12650 et seq.

Accordingly, we shall reverse the judgment in favor of defendants and remand the matter for further proceedings on the **False Claims Act** cause of action.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Joey Wells and the other child plaintiffs enrolled in three different California charter schools--Sierra Summit Academy, Inc., Mattole Valley Charter School, and the Camptonville Academy (collectively the charter schools). The charters for these schools were approved, respectively, by defendants Sierra Plumas Joint Unified School District (Sierra Plumas JUSD), Mattole Unified School District (Mattole USD) and Camptonville Unified Elementary School District (Camptonville UESD). Plaintiffs allege the charter schools are under the control of defendants One2One Learning Foundation and its alleged alter ego Charter School Resource Alliance.

The plaintiff school children and their parents (collectively Wells) sued the charter schools, the operators of these schools, and the school districts that authorized their charters. Wells sought damages, equitable relief, and declaratory relief, asserting causes of action for: (1) violation of the **False Claims Act**; (2) violation of Business and Professions Code section 17200 et seq.; (3) intentional misrepresentation; (4) ***461** negligent misrepresentation; and (5) breach of contract. [FN4] Wells also alleged this was a class action lawsuit filed on behalf of all similarly situated students and parents.

FN4. Wells's complaint also alleged separate causes of action for: (1) injunctive relief as a taxpayer action; (2) a writ of mandate; (3) violation of state constitutional provisions; and (4) declaratory relief. These causes of action are not the subject of this appeal.

At the core of this lawsuit, Wells alleges defendants "engage[ ] in a practice of defrauding parents, school districts, and the State by collecting more than $20 million annually in educational funds to run charter schools without providing instruction and educational materials for which the funds were intended, and by overcharging for its services."
More specifically, Wells alleges defendant One2One [FN5] and Charter School Resource Alliance operate the charter schools as "distance learning schools." In a "distance learning school," the students study at home and lessons are typically completed by computer and sent to the school via the Internet. Students are also tested in this manner. Wells alleges the charter schools' method of providing education includes providing students with a computer, educational software, textbooks, and reimbursement for money spent on educational materials. Charter school funding is based upon the average daily attendance or ADA of the pupils who attend the schools. The manner in which it is calculated is provided for in sections 46300 and 46301. Charter schools receive their funding from the state based upon their ADA. (§ 47633.)

FN5. Now known as Axis 4 Learning.

Wells alleges the charter schools use "educational facilitators" (who may or may not be credentialed teachers) to administer their programs. Wells alleges the charter schools and the educational facilitators made a number of promises to the children and their parents about delivering at-home education to their children but failed to provide instructors, computers, and educational materials.
For example, plaintiff Joey Wells enrolled at Sierra Summit Academy from October 1998 to June 1999. Joey Wells's educational facilitator promised him and his parents a computer, textbooks, on-line tests, reimbursement for sports team involvement, and part-time instruction. According to Wells, Sierra Summit Academy never delivered a computer or textbooks. The only thing the educational facilitator did for him was to provide computer software that was available free on the Internet and to come by regularly to obtain Wells's parents' signatures on school attendance records. Wells alleges his father provided all of Joey Wells's education at his own expense. Although Joey Wells had not received a computer, textbooks, software, instruction and his father spent the year home schooling his son, Sierra Summit Academy collected the state ADA-based money for his "schooling."
Plaintiffs Katie, Karen, and Joey Pell also enrolled at Sierra Summit Academy from June to September 1998. Plaintiff Merlyn Adams enrolled in the Mattole Valley Charter School from August to October 1999. Plaintiffs Chris, Audrey, and David Crescenti enrolled in the Camptonville Academy from August through December 1999. Their stories were similar to that of Joey Wells.
Wells alleges the school districts turn a blind eye to the charter schools' abuses of the system because they are poor rural districts that need the money. Wells alleges the school districts receive significantly ***462** more of the state ADA payment for the students than the Charter School Act allows. Wells alleges the school district defendants have failed to properly monitor the charter schools.
Pursuant to the requirements of the **False Claims Act**, Wells filed the complaint under seal. Upon the Attorney General's request, the complaint was unsealed. Several of the defendants filed three separate demurrers to the first amended complaint.
After hearing, the trial court concluded the charter schools were public entities. The trial court further concluded the gravamen of each of the causes of action at issue here was a challenge to the quality of the education the plaintiff children received from these public schools. Based upon the rule that bars claims for educational malfeasance against public schools (*Peter W., supra,* 60 Cal.App.3d 814, 131 Cal.Rptr. 854), the court concluded each of Wells's causes of

action at issue here was barred and sustained defendants' demurrers to these causes of action without leave to amend. The trial court also sustained defendants' demurrers to these causes of action without leave to amend based on other theories and with leave to amend based upon the failure of Wells to properly plead compliance with the California Tort Claims Act. [FN6] Wells appeals. [FN7]

FN6. Government Code section 810 et seq.

FN7. After the demurrers were sustained without leave to amend as to the causes of action at issue here, plaintiffs dismissed the remaining causes of action by stipulation, and the trial court entered judgment in favor of defendants on October 4, 2002.

DISCUSSION

I

Standard of Review

[1][2][3][4] "A demurrer tests the legal sufficiency of the complaint, and the granting of leave to amend involves the trial court's discretion. Therefore, an appellate court employs two separate standards of review on appeal. [Citations.] First, the complaint is reviewed de novo to determine whether it contains sufficient facts to state a cause of action. [Citation.] In doing so, we accept as true the properly pleaded material factual allegations of the complaint, together with facts that may be properly judicially noticed. Reversible error exists only if facts were alleged showing entitlement to relief under any possible legal theory. [Citations.]" (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497, 57 Cal.Rptr.2d 406.)
[5] "Second, where the demurrer is sustained without leave to amend, reviewing courts determine whether the trial court abused its discretion in doing so. [Citations.] On review of the trial court's refusal to grant leave to amend, we will only reverse for abuse of discretion if we determine there is a reasonable possibility the pleading can be cured by amendment. Otherwise, the trial court's decision will be affirmed for lack of abuse." (*Hernandez v. City of Pomona, supra,* 49 Cal.App.4th at pp. 1497-1498, 57 Cal.Rptr.2d 406.)

II

Business and Professions Code Section 17200 et seq.
The Unfair Competition Law (UCL)

Wells argues the trial court erred in dismissing his cause of action under the UCL. We disagree.

A

The UCL does not Apply to Public Entities

The trial court sustained defendants' demurrers to Wells's UCL cause of action ***463** based on the conclusion defendants were all public entities and thus exempt from the UCL. We conclude the trial court did not err.
Business and Professions Code section 17203 provides that "[a]ny person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction." Civil penalties may also be imposed on "[a]ny person who engages, has engaged, or proposes to engage in unfair competition." (Bus. & Prof.Code, § 17206.)
Business and Professions Code section 17201 provides the term "person" "shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons."
In *Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 208, 56 Cal.Rptr.2d 732, Division Six of the Second District Court of Appeal concluded a county was not a person within this definition and thus the UCL did not apply to the county. The court started with the proposition that the term "county" was not listed within the express words of the statute. (*Id.* at p. 209, 56 Cal.Rptr.2d 732.) Further, the court noted a county "is neither a person, nor a corporation, nor a municipal corporation; it is a subdivision of the state." (*Ibid.*) The court explained, " '[I]n the absence of express words to the contrary, neither the

state nor its subdivisions are included within the general words of a statute. [Citations.] But this rule excludes governmental agencies from the operation of general statutory provisions only if their inclusion would result in an infringement upon sovereign governmental powers. "Where ... no impairment of sovereign powers would result, the reason underlying this rule of construction ceases to exist and the Legislature may properly be held to have intended that the statute apply to governmental bodies even though it used general statutory language only." [Citations.]' [Citations.]." (*Id.* at p. 210, 56 Cal.Rptr.2d 732.) The court concluded, "There can be no dispute that guarding the public health is within the County's sovereign powers. The operation of a public hospital, even one that accepts paying patients, is simply a means of implementing that power. Thus, inclusion of the County in the [UCL] as it relates to the operation of its hospital would result in an infringement on its sovereign powers." (*Ibid.*) In *Trinkle v. California State Lottery* (1999) 71 Cal.App.4th 1198, 1204, 84 Cal.Rptr.2d 496, we concluded the State Lottery Commission was not a person for purposes of the UCL. We noted, "Nowhere in the [UCL] is there a provision imposing governmental liability for violations of the act. Because there is no statute making public entities liable under the [UCL], the general rule of governmental immunity must prevail." (*Id.* at p. 1202, 84 Cal.Rptr.2d 496.)

Other courts have similarly concluded public entities are not persons for purposes of the UCL. (*California Medical Assn. v. Regents of University of California* (2000) 79 Cal.App.4th 542, 551, 94 Cal.Rptr.2d 194 [University of California at Los Angeles]; *Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 831, 80 Cal.Rptr.2d 549 [State Lottery Commission]; *Santa Monica Rent Control Bd. v. Bluvshtein* (1991) 230 Cal.App.3d 308, 318, 281 Cal.Rptr. 298 [city-chartered rent control board].)

[6] In light of the purposes underlying the UCL, we conclude these courts correctly decided governmental agencies are not subject to that statutory scheme. The UCL is designed to preserve fair competition among business competitors and protect ***464** the public from nefarious and unscrupulous business practices. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527.) The government is not in business. Thus, logically, it is not a person for purposes of the UCL.

[7] The rationale of these cases applies to causes of action against our public schools. Schools and school districts are not listed in the UCL's list of entities that are "persons" and subject to that statutory scheme. Just as guarding the public health is an inherent part of the sovereign's power (*Community Memorial Hospital v. County of Ventura, supra,* 50 Cal.App.4th at p. 210, 56 Cal.Rptr.2d 732), so too is providing for the education of our children. (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1115, 100 Cal.Rptr.2d 289.) Thus, public schools and public school districts are exempt from the UCL.

B

The Defendants are Public Entities

[8] The conclusion that public schools and public school districts are not "persons" for purposes of the UCL takes us to the next question. Are charter schools and their operators public entities and, therefore, likewise not "persons" under the UCL? Like the trial court, we conclude they are.

" 'Charter schools are grounded in private-sector concepts such as competition-driven improvement ..., employee empowerment and customer focus. But they remain very much a public-sector creature, with in-bred requirements of accountability and broad-based equity. Simple in theory, complex in practice, charter schools promise academic results in return for freedom from bureaucracy.' " (*Wilson v. State Bd. of Education* (1999) 75 Cal.App.4th 1125, 1129, 89 Cal.Rptr.2d 745 (*Wilson*).)

The enabling legislation for charter schools evidences the Legislature's intent that charter schools are part of the public school system, and hence public entities. In its list of the goals for the charter school system, the Legislature stated charter schools would "[p]rovide vigorous competition *within the public school system* to stimulate continual improvements in all public schools." (§ 47601, subd. (g), italics added.)

Moreover, from cradle to grave, charter schools derive their existence, operating restrictions,

and funding from the public entities charged with the education of our children. Initially, charter schools are formed by the approval of a petition submitted to the governing board of the local school district, a county board of education, or the State Board of Education. (§§ 47605, 47605.5, 47605.6 & 47605.8.) These authorities may grant the school an initial charter for a period of not more than five years. (§ 47607.) Further, these public entities may renew the charter for additional five-year periods. (§ 47607.)
As far as their daily operations are concerned, charter schools may "elect to operate as, or be operated by, a nonprofit public benefit corporation, formed and organized pursuant to the Nonprofit Public Benefit Corporation Law." (§ 47604, subd. (a).) For any charter school that elects to operate in this manner, the "governing board of a school district that grants a charter ... shall be entitled to a single representative on the board of directors of the nonprofit public benefit corporation." (§ 47604, subd. (b).) [FN8]

FN8. The chartering authority, however, is not liable for the debts and liabilities of the nonprofit public benefit corporation. (§ 47604, subd. (c).) Wells argues this is evidence charter schools cannot be public entities. We disagree. This subdivision only establishes charter schools are separate from their chartering authorities in terms of fiscal responsibility. It does not prevent us from concluding these schools are public entities for purposes of the UCL.

***465** We reject Wells's contention that charter schools are not public entities because they are not subject to public oversight or accountable to the public school boards or the State Department of Education. Once a charter is granted, it may be revoked by the authorizing agency or the State Board of Education for a number of reasons, including: (a) violations of the conditions, standards, or procedures in the charter; (b) failure to meet or pursue any of the pupil outcomes in the charter; (c) failure to meet generally accepted accounting principles; (d) fiscal mismanagement; or (e) violation of any provision of law, which obviously includes all of the provisions of the Charter Schools Act. (§§ 47607, 47604.5.)
Importantly, charter schools are required to promptly respond to all reasonable inquiries of their chartering authority, the county office of education, or the state superintendent of public instruction and to consult with them concerning these inquiries. (§ 47604.3.) Charter schools are specifically required to respond to inquiries from these public entities regarding their financial records. (*Ibid.*) Upon the written complaints of parents, or other information that justifies an investigation, the county superintendent of schools may investigate a charter school. (§ 47604.4.)
To effectuate the public funding for charter schools, the Legislature provided, "[a] charter school shall be deemed to be under the exclusive control of the officers of the public schools for purposes of Section 8 of Article IX of the California Constitution, with regard to the appropriation of public moneys to be apportioned to any charter school, including, but not limited to, appropriations made for the purposes of this chapter." (§ 47612, subd. (a).) Further, the Legislature declared, "[a] charter school shall be deemed to be a 'school district' for purposes of Article 1 (commencing with Section 14000) of Chapter 1 of Part 9, Section 41301, Section 41302.5, Article 10 (commencing with Section 41850) of Chapter 5 of Part 24, Section 47638, and Sections 8 and 8.5 of Article XVI of the California Constitution." (§ 47612, subd. (c).)
If the public attributes of their funding and oversight were not enough, the Legislature explicitly stated, "(1) Charter schools are part of the Public School System, as defined in Article IX of the California Constitution. [¶] (2) Charter schools are under the jurisdiction of the Public School System and the exclusive control of the officers of the public schools, as provided in this part." (§ 47615, subd. (a).)
These statutory provisions establish the Legislature created a *public* entity educational alternative to the existing public schools.
Wilson, supra, 75 Cal.App.4th 1125, 89 Cal.Rptr.2d 745, further supports this conclusion. In a facial challenge to the Charter Schools Act, the plaintiffs argued the Charter Schools Act "spun off a separate system of charter public schools that has administrative and operational

independence from the existing school district structure." (*Id.* at p. 1136, 89 Cal.Rptr.2d 745.) They also argued the Charter Schools Act violated the "constitutional provisions calling for public schools to be under the exclusive control of officers of the public school system, as well as under ***466** the jurisdiction of that system." (*Id.* at p. 1138, 89 Cal.Rptr.2d 745.) Division Four of the First District Court of Appeal rejected these challenges and concluded charter schools are part of the public school system under that school system's jurisdiction. (*Wilson, supra,* 75 Cal.App.4th at pp. 1136-1141, 89 Cal.Rptr.2d 745.) In holding the charter schools were part of the system of common schools provided for in the California Constitution, the appellate court drew on the statutory language we have cited above which designates that charter schools are part of the public school system, under its jurisdiction, and entitled to full public funding. (*Id.* at pp. 1136-1137, 89 Cal.Rptr.2d 745.) The court also concluded charter schools are part of this single public school system because they are free, nonsectarian, open to all students, and may not discriminate based on ethnicity, national origin, gender, or disability. (*Ibid.*) While free of some of the bureaucratic apron strings of other public schools, charter schools must meet statewide standards and conduct pupil assessments applicable to pupils in public schools, must hire credentialed teachers, and are subject to state and local supervision and inspection. (*Id.* at pp. 1137-1138, 89 Cal.Rptr.2d 745.) The court concluded that "charter schools *are* public schools because, as explained above, charter schools are part of the public school system." (*Id.* at p. 1139, 89 Cal.Rptr.2d 745.)

[9] We find further support for the conclusion charter schools and their operators are public entities in the Tort Claims Act definition of public entities. Under Government Code section 811.2, public entities are defined to "include[ ] the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State." School districts are public entities under this definition. (*Wright v. Compton Unified Sch. Dist.* (1975) 46 Cal.App.3d 177, 181-182, 120 Cal.Rptr. 115.) Obviously, the school district defendants here--Sierra Plumas JUSD, Mattole USD, and Camptonville UESD--are school districts and therefore public entities under the explicit language of this section. Similarly, charter schools are also defined as " 'school districts.' " (§ 47612, subd. (c).) Thus, these defendants and the nonprofit public benefit corporations that run them are also public entities for purposes of the UCL.

[10] Finally, we reject Wells's claim the charter schools are not public entities because they are not listed on the "Roster of Public Agencies" kept by the Secretary of State's Office. (Gov.Code, § 53051.) While they are independently operated, we conclude the charter schools are subdivisions of their chartering authorities both because their existence and funding derives from those entities, and because they must answer to those entities to remain in existence. A subdivision of another public agency is not separately required to register with the Secretary of State. (*Hoyd v. Hayward Unified Sch. Dist.* (1977) 74 Cal.App.3d 470, 472, 141 Cal.Rptr. 527.)

For the foregoing reasons, we conclude all of the defendants--the charter schools, their operators, and their chartering school districts--are public entities. Consequently, they are not subject to the reach of the UCL. The trial court did not err in sustaining the demurrer to this cause of action without leave to amend.

III

Peter W. and the Bar of "Educational Malfeasance"

We next turn to plaintiffs' causes of action for breach of contract and misrepresentation. We conclude these causes of ***467** action are barred by the doctrine of educational malfeasance. The starting point is the seminal case of *Peter W.,* supra, 60 Cal.App.3d 814, 131 Cal.Rptr. 854, and its conclusion that educational malfeasance is not actionable. In *Peter W.,* the plaintiff was a high school graduate of the San Francisco Unified School District. (*Id.* at p. 817, 131 Cal.Rptr. 854.) He sued the district claiming he was inadequately educated and graduated from school with only a fifth-grade reading ability. (*Ibid.*) He alleged the district violated its mandatory duty to educate him. (*Id.* at pp. 818, 826, 827, 131 Cal.Rptr. 854.) Because the defendant was a public entity, the court started with the premise that a "public entity may be held vicariously liable for the conduct of its employee, under Government Code section 815.2, subdivision (a) ... only if it is established that the employee would be

personally liable for the conduct upon some 'acceptable theory of liability.' [Citation.]" (*Peter W., supra,* 60 Cal.App.3d at p. 819, 131 Cal.Rptr. 854.) The court rejected the plaintiff's claims he had stated a duty of care under the theory that the assumption of the function of education imposed the duty to exercise reasonable diligence in its discharge. (*Id.* at p. 820, 131 Cal.Rptr. 854.) Further, the court rejected the plaintiff's special relationship theory of liability, and his theory that educational institutions have a duty to exercise reasonable care in the supervision of children under their care. (*Id.* at pp. 820-821, 131 Cal.Rptr. 854.)
The court turned to the oft-cited factors of *Rowland v. Christian* (1968) 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561 to determine whether schools had a legally enforceable duty of care to the plaintiff. (*Peter W., supra,* 60 Cal.App.3d at pp. 822-823, 131 Cal.Rptr. 854.) The court stated, "On occasions when the Supreme Court has opened or sanctioned new areas of tort liability, it has noted that the wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework. [Citations.] This is simply not true of wrongful conduct and injuries allegedly involved in educational malfeasance. Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might--and commonly does--have his own emphatic views on the subject. The 'injury' claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified." (*Id.* at p. 824, 131 Cal.Rptr. 854.) The court continued, "[w]e find in this situation no conceivable 'workability of a rule of care' against which defendants' alleged conduct may be measured [citation], no reasonable 'degree of certainty that ... plaintiff suffered injury' within the meaning of the law of negligence [citation], and no such perceptible 'connection between the defendant's conduct and the injury suffered,' as alleged, which would establish a causal link between them within the same meaning." (*Id.* at p. 825, 131 Cal.Rptr. 854.)
Thus, the court concluded, "[t]hese recognized policy considerations alone negate an actionable 'duty of care' in persons and agencies who administer the academic ***468** phases of the public educational process.... To hold them to an actionable 'duty of care,' in the discharge of their academic functions, would expose them to the tort claims--real or imagined--of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. [Citations.] The ultimate consequences, in terms of public time and money, would burden them--and society--beyond calculation." (*Peter W., supra,* 60 Cal.App.3d at p. 825, 131 Cal.Rptr. 854.) The court found the school district had no duty of care toward its students. (*Ibid.*) The court also concluded the plaintiff failed to state a cause of action for negligence. (*Ibid.*)
For these same policy reasons, the court also rejected the plaintiff's cause of action for negligent misrepresentation based upon the plaintiff's allegations the school district " 'falsely and fraudulently represented to plaintiff's mother and natural guardian that plaintiff was performing at or near grade level in basic academic skills such as reading and writing.' " (*Peter W., supra,* 60 Cal.App.3d at p. 827, 131 Cal.Rptr. 854.) The *Peter W.* court concluded the plaintiff's intentional misrepresentation claim was barred by Government Code section 818.8 and also because of additional pleading deficiencies. (*Ibid.*)
The courts have uniformly applied the logic and bar of *Peter W.* to cases where plaintiffs have sued their public schools for educational malfeasance. (See, e.g., *Brown v. Compton Unified School Dist.* (1998) 68 Cal.App.4th 114, 80 Cal.Rptr.2d 171; *Chevlin v. Los Angeles Community College Dist.* (1989) 212 Cal.App.3d 382, 260 Cal.Rptr. 628 (*Chevlin*); *Tirpak v. Los Angeles Unified School Dist.* (1986) 187 Cal.App.3d 639, 232 Cal.Rptr. 61 (*Tirpak*).)
In *Tirpak,* the court extended the holding of *Peter W.* to the complete withholding of any educational services when a child was allegedly unlawfully suspended from school. (*Tirpak, supra,* 187 Cal.App.3d at pp. 641-642, 644- 645, 232 Cal.Rptr. 61.) The court held the "wrongful total deprivation of education" was not actionable because the court could find no

principled distinction between a bad education and no education at all under the rule announced in *Peter W.* (*Id.* at p. 645, 232 Cal.Rptr. 61.)
In *Chevlin,* the plaintiff attempted an end run around the holding of *Peter W.* by alleging a breach of contract in her claim against a community college when she was terminated from its nuclear medicine training program. (*Chevlin, supra,* 212 Cal.App.3d at pp. 386-387, 390, 260 Cal.Rptr. 628.) In concluding her contract cause of action was barred under the educational malfeasance doctrine, the court stated, "We think it obvious that to permit Chevlin to recover under a breach of contract theory based on educational nonfeasance would be tantamount to permitting her to sue for negligence which is precluded under the *Peter W.* decision. Whether framed as a negligence or breach of contract theory the harm which Chevlin seeks to redress is the same." (*Id.* at p. 390, 260 Cal.Rptr. 628.) The *Chevlin* court also concluded the plaintiff's misrepresentation claim under Government Code section 818.8 was barred. (*Ibid.*)
[11] We draw two lessons from these cases. First, a public school student may not sue a public school because that school failed to properly teach that student. Ultimately, the students, parents, teachers, school boards, and the Legislature must work together in the political and social arenas to resolve the problems within the educational system arising from the quality and manner in which education is delivered ***469** to our children. While that "avenue" of redress may have some "potholes" or " 'closed for repair signs' " as suggested by Wells, it is the basis for our democracy and the appropriate place for the resolution of these issues.
The second lesson we draw from these cases is no matter what the cause of action, if a plaintiff is suing a public school for damages based upon the quality of education or lack of education, that cause of action is barred.

A

Breach of Contract

[12] Wells argues the trial court erred in dismissing the breach of contract cause of action. We disagree.
Wells asserted breach of contract causes of action against the charter schools, but not the school district defendants. The complaint alleges the charters, oral representations, and individual agreements signed by each of the child and parent plaintiffs with these charter schools form a contract between them. The charters are attached as exhibits to the complaint and generally discuss the governance structure of the charter schools, their education philosophy, the method of education the schools would provide, the objectives for the students, the method by which students would be evaluated, and the areas of study. The individual agreements consist of enrollment application documents welcoming the children to the schools, describing the enrollment process, the strengths of the education process, and the expectations for the parents and for the schools. The individual agreements also contain courses of study, percentages of involvement for students, teachers and parents, and learning goals generally. Wells alleges the charter schools made additional oral promises to provide computers, software, Internet access, textbooks, curriculum, a learning plan, assessment, instruction, testing and evaluation, and reimbursement for educational expenses. Wells alleges the charter schools breached these agreements by failing to fulfill these promises.
As should be evident from our discussion of *Peter W., supra,* 60 Cal.App.3d 814, 131 Cal.Rptr. 854 and *Chevlin, supra,* 212 Cal.App.3d at pages 386-387, 390, 260 Cal.Rptr. 628, a claim for educational malfeasance that is pled in the form of a breach of contract claim is barred by the educational malfeasance doctrine. Here, the gravamen of Wells's breach of contract claim is that the charter schools failed to provide plaintiffs with an education. For this breach of contract, plaintiffs seek monetary damages.
Whether this claim is phrased as a partial failure or a complete failure to educate these children, we conclude this claim is barred by the doctrine of educational malfeasance. It calls into play all of the issues identified by *Peter W.* that led the court to refuse to allow a plaintiff to allege a cause of action for damages against his school for failing to teach him: the lack of readily acceptable standards of care, causation, or injury. (*Peter W., supra,* 60 Cal.App.3d at p. 824, 131 Cal.Rptr. 854.) It challenges the propriety of the educational method and raises

the other unknowable factors that might have interfered with each of these children's ability to learn. (*Id.* at p. 824, 131 Cal.Rptr. 854.) It raises the issue of the inability to place a measure of damages on these claims for lost learning or to even determine whether the educational method was the basis for any hypothetical "educational injury." (*Id.* at pp. 824-825, 131 Cal.Rptr. 854.) As a result, we conclude Wells's cause of action is barred.
[13][14] Even if we were persuaded Wells's breach of contract cause of action ***470** did not state a claim for educational malfeasance, we would not allow this cause of action to go forward. It is axiomatic that in order to plead a cause of action for breach of contract, there must be a contract between the parties. (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49, 275 Cal.Rptr. 17.)
"[I]t bears underscoring that charter schools are *strictly* creatures of statute. From how charter schools come into being, to who attends and who can teach, to how they are governed and structured, to funding, accountability and evaluation--the Legislature has plotted all aspects of their existence." (*Wilson, supra,* 75 Cal.App.4th at p. 1135, 89 Cal.Rptr.2d 745.) The requirements for the petition for a charter and the requirement that the schools have and follow their charter are dictated by sections 47605 and 47610. Moreover, the particular individual agreements between the students and the schools concerning their independent study programs are also creatures of statute. (§§ 46300.7, 51745, 51746; Cal.Code Reg., tit. 5, § 11702.)
As defendants point out, these agreements are fundamentally different from ordinary contracts because charter schools could not sue their students for breach of contract for failing to do their homework. Likewise, charter school students cannot sue their schools for doing a bad job in educating them. Wells's breach of contract cause of action fails.

B

Intentional and Negligent Misrepresentation

[15] Wells also repackaged the barred educational malfeasance claim as intentional and negligent misrepresentation causes of action. These claims also fail under the *Peter W.* analysis.
Wells's complaint alleges the charter school defendants made promises to Wells with the intent to induce Wells to enroll in their educational programs. At the time defendants made these representations, they knew they were false, or they acted in reckless disregard for the truth or falsity of these statements. As a result of Wells's actual and reasonable reliance on these promises, Wells has been damaged. Wells's damages include the parents' out-of-pocket expenses for educating their children, loss of educational experiences for the children, lost opportunity costs, and emotional distress.
These allegations are no more than a claim for monetary damages based on the contention the charter schools failed to provide the educational experience these children and their parents wanted. A misrepresentation claim is implicit in *Peter W.'s* analysis of the duty of public schools. It is expected that charter schools will provide books, teachers, and a quality education to the children they enroll. The charter schools' failure to provide these things constitutes educational malfeasance whether the expectations were raised explicitly or implicitly. Whether in tort, contract, or fraud, this claim is barred by the doctrine of educational malfeasance. (*Brown v. Compton Unified School Dist., supra,* 68 Cal.App.4th 114, 80 Cal.Rptr.2d 171; *Chevlin supra,* 212 Cal.App.3d 382, 260 Cal.Rptr. 628; *Tirpak, supra,* 187 Cal.App.3d 639, 232 Cal.Rptr. 61; *Peter W., supra,* 60 Cal.App.3d 814, 131 Cal.Rptr. 854.) The trial court correctly sustained the demurrer without leave to amend as to this cause of action.

IV

False Claims Act

Wells contends the trial court also erred in concluding *Peter W.* barred Wells's ***471** cause of action under the **False Claims Act.** Accepting as true Wells's allegation the charter schools and school districts submitted ADA funding requests to the State of California knowing they did not accurately reflect the students enrolled in and receiving instruction, educational materials, or services from these schools, we conclude Wells's False Claim Act cause of action is not for educational malfeasance and the trial court erred in sustaining the demurrer without leave to amend as to this claim.

[16][17][18] The **False Claims Act** provides for civil penalties against anyone who "[k]nowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim for payment or approval." (Gov.Code, § 12651, subd. (a)(1).) A private citizen may pursue a **False Claims Act** cause of action on behalf of the state or a political subdivision: "A person may bring a civil action for a violation of this article for the person and either for the State of California in the name of the state, if any state funds are involved, or for a political subdivision in the name of the political subdivision, if political subdivision funds are exclusively involved. The person bringing the action shall be referred to as the qui tam plaintiff." (Gov.Code, § 12652, subd. (c)(1).) These lawsuits are commonly referred to as *qui tam* actions. The **False Claims Act** is designed to protect the public fisc from those who would defraud the government. (*LeVine v. Weis* (1998) 68 Cal.App.4th 758, 765, 80 Cal.Rptr.2d 439 (*LeVine I*).) "The **False Claims Act** must be construed broadly so as to give the widest possible coverage and effect to the prohibitions and remedies it provides in Government Code section 12653." (*Id.* at p. 764, 80 Cal.Rptr.2d 439.)
In *LeVine I, supra,* the plaintiff brought an action for wrongful discharge against the Ventura County Superintendent of Schools. (68 Cal.App.4th at pp. 760-761, 80 Cal.Rptr.2d 439.) The plaintiff was a teacher at juvenile hall responsible for four locked classrooms covering between 40 and 80 students. (*Id.* at p. 761, 80 Cal.Rptr.2d 439.) In his complaint, the plaintiff alleged he had been discharged in violation of Government Code section 12653 [FN9] of the **False Claims Act** because he had complained that the school district had failed to adequately staff the classrooms for which it was receiving state educational money. (*Id.* at pp. 761-762, 764, 80 Cal.Rptr.2d 439.)

FN9. Under Government Code section 12653, subdivision (b), "No employer shall discharge ... an employee ... because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action."

The Ventura County Superintendent of Schools claimed the **False Claims Act** did not apply to it because it was a governmental entity and not a "person" as defined under the **False Claims Act**, citing cases that conclude public entities are not persons under similar definitions. (*LeVine I, supra,* 68 Cal.App.4th at p. 764, 80 Cal.Rptr.2d 439.) Under the **False Claims Act**, a person "includes any natural person, corporation, firm, association, organization, partnership, business, or trust." (Gov.Code, § 12650, subd. (e).)
The court held the Ventura County Superintendent of Schools could fall within the definition of a "person" as an "association" or "organization." (*LeVine I, supra,* 68 Cal.App.4th, at p. 764, 80 Cal.Rptr.2d 439.) "The definition of 'person' must be read in light of the context and purpose of the statute. There is no reason to conclude the Legislature intended that the protection afforded to the public treasury ***472** by the [**False Claims Act**] be denied merely because the entity raiding the treasury is a governmental entity." (*Id.* at p. 765, 80 Cal.Rptr.2d 439.)
[19] The *LeVine I* court distinguished *Community Memorial Hospital v. County of Ventura, supra,* 50 Cal.App.4th 199, 56 Cal.Rptr.2d 732, which as we have already stated, concluded the UCL does not apply to a county hospital. The *LeVine I* court concluded, "A county may have the sovereign power to fulfill its duty to guard the public health free from regulations that govern ordinary business. But no governmental agency has the power, sovereign or otherwise, knowingly to present a false claim. The very notion is repugnant to how government should operate by and for the people." (*LeVine I, supra,* 68 Cal.App.4th at p. 765, 80 Cal.Rptr.2d 439.) Thus, the appellate court held the **False Claims Act** applies to public entities. We agree. [FN10]

FN10. Sierra Summit Academy argues the public entities at issue here are not subject to the **False Claims Act** because they are arms of the
state. The *LeVine I* court rejected this claim. (*LeVine I, supra,* 68 Cal.App.4th at p. 765-766, 80 Cal.Rptr.2d 439.) Moreover, the United States Supreme

Court has held municipalities are persons subject to the federal **False Claims Act** despite the fact that they are considered arms of the state. (*Cook County v. United States ex rel. Chandler* (2003) 538 U.S. 119, 132-134 [155 L.Ed.2d 247, 259-260].) We reject this argument for the same reasons.

Defendants urge this court to conclude *LeVine I* is not instructive here because it was a "wrongful termination" action, and had nothing to do with educational malfeasance. We reject this argument. It is true *LeVine I* concerned the wrongful termination of an employee who reported false claims. (68 Cal.App.4th 760, 80 Cal.Rptr.2d 439.) But the court relied on the purpose behind the law--protecting the public fisc--to conclude the **False Claims Act** applied to public entities. (*Id.* at pp. 764-765, 80 Cal.Rptr.2d 439.) That purpose distinguishes a **False Claims Act** cause of action (where public entities are included) from the UCL cause of action (where public entities are excluded). Moreover, the reasons for applying the logic of *LeVine I* to the facts of this case are even more compelling. Here, Wells seeks reimbursement for the state (not for Wells), thus fulfilling the fundamental purposes of the **False Claims Act** of protecting the public fisc.

We must now turn to the substance of the claims pled by Wells to determine whether they constitute claims for educational malfeasance, i.e., claims for damages for the failure of the schools to educate them. Wells's **False Claims Act** cause of action asserts two bases for recovery--obtaining ADA funds to which the charter schools were not entitled and specific violations of section 51747.3.

A

Receipt of Funds to Which they are not Entitled

[20] We first turn to Wells's allegation the charter schools violated the **False Claims Act** because they "request[ed] funding from [school district defendants] and/or the STATE OF CALIFORNIA, knowing that their ADA records did not accurately reflect the students enrolled in and receiving instruction, educational materials, or services from their schools, the actual cost of the materials and services to defendants, or the amounts that defendants were actually paying to parents/guardians or third parties to reimburse parents/guardians' for their out-of-pocket educational expenses." Wells further claims the school district defendants "claimed funds from the STATE OF CALIFORNIA ***473** on behalf of" the charter schools. Wells pled the school districts "knew or deliberately or recklessly disregarded whether the public funds were being used for wrongful purposes." [FN11] Further, Wells alleged the school districts wrongfully claimed funds in excess of what they were entitled under the Charter Schools Act.

FN11. Sierra Plumas JUSD contends it cannot be liable for Sierra Summit Academy's **False Claims Act** liabilities because section 47604, subdivision (c), shields the public chartering entities from the debts of their charter schools. While this is true, the allegations of the complaint demonstrate that Wells seeks to hold Sierra Plumas JUSD liable for its own misdeeds, not those of its charter school.

Defendants attempt to characterize these allegations as challenging the adequacy of the educational experience received by the students and argue they raise only a claim of educational malfeasance that is barred by *Peter W.* We disagree. We conclude these allegations are susceptible to the interpretation that these defendants have made false statements to the state to obtain state ADA funds.

As we noted above, claims for educational malfeasance are barred because the wrongs and injuries are not comprehensible and assessable within our existing judicial framework. (*Peter W., supra,* 60 Cal.App.3d at p. 824, 131 Cal.Rptr. 854.) Classroom methodology poses no readily acceptable standards of care, or for causation, or for injury. (*Ibid.*) Other unrelated and unquantifiable factors may interfere with learning. (*Ibid.*) Reasonable people can and do disagree on the proper methods for education. For these reasons, the courts have declined to allow students and teachers to burden the school system with expensive and time-consuming

litigation.
Here, none of these policy considerations enter the calculus of resolving Wells's **False Claims Act** cause of action. By this first theory, Wells has simply alleged defendants have submitted false claims for ADA funds for children to whom they have provided nothing more than the "service" of the timely collection of attendance sheet signatures. A charter school that seeks money from the State of California for doing nothing more than collecting attendance sheets from children has submitted a false claim to the state when it asserts it has provided those children with education. The gravamen of the wrong and injury alleged here is straightforward and comprehensible--the defrauding of the state. The duty is to submit honest claims. The breach is submitting a false claim. The measure of the injury to the state is the funds the defendants obtained based upon their fraud. These are bread-and-butter issues of the judicial system which are litigated on a daily basis, not the amorphous problems of an educational malfeasance claim.
Importantly, the issues raised by a False Claim Act cause of action are independent from classroom methodology, the quality of the learning, whether a particular child or group of children learned anything from the method in which they were taught, and any damage that an ineffective teaching program may inflict on the children who attend it. Those issues have nothing to do with the claim the state is being defrauded by a charter school operator. In short, none of the factors the *Peter W.* court relied upon to conclude there existed no cause of action for educational malfeasance is present in this cause of action. (*Peter W., supra,* 60 Cal.App.3d at 825, 131 Cal.Rptr. 854.) This claim has everything to do with protecting state and local government fisc. Such a lawsuit does not infringe on any sovereign power of the schools to teach because they ***474** do not have the sovereign power to fraudulently obtain state funds.
Furthermore, as we have mentioned, under this cause of action, Joey Wells and his coplaintiffs do not seek to recover damages for themselves for their failed educations. Instead, in their representative capacity as the *qui tam* plaintiffs, they seek to return *to the government* money Wells alleges these defendants wrongfully obtained. In this sense, a **False Claims Act** cause of action is markedly different from an educational malfeasance claim where a plaintiff seeks to recover damages for the failure of the school to educate him or her.
We thus conclude the educational malfeasance doctrine of *Peter W.* has no application to Wells's **False Claims Act** cause of action. The trial court's conclusion to the contrary was erroneous.

B

Restrictions on Enrollment of Independent Study Students

[21] Wells also alleges in the **False Claims Act** cause of action that: 1) the charter schools "claimed funds for students participating in independent study and residing outside of the county in which their school was chartered or an adjacent county"; and 2) they submitted ADA funding requests " for [students to whom they] provided funds or other things of value to students and their parents or guardians [*sic*], while such funds and things are not provided for students who attend regular classes." Wells alleges these actions violate section 51747.3, subdivisions (a) and (b). The trial court found no claim stated because section 51747.3, subdivision (b) did not apply to charter schools before January 2000 and all of Wells's allegations predated that. We agree.
As originally enacted in 1993, section 51747.3 provided, in relevant part: "(a) No local education agency may claim state funding for the independent study of a pupil, whether characterized as home study or otherwise, if the agency has provided any funds or other thing of value to the pupil or his or her parent or guardian that the agency does not provide to students who attend regular classes or to their parents or guardians. [¶] (b) Notwithstanding any other provision of law, community school and independent study average daily attendance shall be claimed by school districts and county superintendents of schools only for pupils who are residents of the county in which the apportionment claim is reported, or who are residents of a county immediately adjacent to the county in which the apportionment claim is reported." [FN12] (Stats. 1993, ch. 66, § 32, p. 923.)

FN12. This section also contained language identical to the current statute that stated, "The provisions of this section are not subject to waiver by the State Board of Education, by the State Superintendent of Public Instruction, or under any provision of [the Charter Schools Act.]" In 1995, the Attorney General concluded this portion of the statute meant that charter schools were subject to the terms of section 51747.3. (78 Ops.Cal.Atty.Gen. 253, 257-258 (1995).) In light of our conclusion that the law in effect prior to January 1, 2000, did not apply to charter schools (see *post*), we conclude this portion of the Attorney General's opinion is erroneous.

The Charter Schools Act [FN13] has always provided that admission to a charter school may not be based upon the residence of the child. (§ 47605, former subdivision (d) [now subdivision (d)(1)].) Further, section 47610 originally stated, "A charter school shall comply with all of the provisions set forth in its charter petition, but is otherwise ***475** exempt from the laws governing school districts except as specified in Section 47611." (Stats. 1992, ch. 781, § 1.) [FN14]

FN13. The Charter Schools Act is codified at part 26.8 of division 4 of title 2.

> FN14. Now that provision reads, "A charter school shall comply with this part and all of the provisions set forth in its charter, but is otherwise exempt from the laws governing school districts except all of the following: [¶] (a) As specified in Section 47611.[¶] (b) As specified in Section 41365.[¶] (c) All laws establishing minimum age for public school attendance." (§ 47610.)

When section 51747.3 was enacted in 1993, it was placed in a separate part of division 4 of title 2. It was codified as part of an article of the Education Code concerning independent study. [FN15]

FN15. Article 5.5 of chapter 5 of part 28 of division 4 of title 2.

Thus, given the exemption of charter schools (contained in Section 47610) from following other statutory mandates and the separation of the law on independent study from the Charter School Act within the Education Code, the prohibitions related to independent study programs codified in section 51747.3 did not apply to charter schools.
The Legislature recognized this when it amended the independent study laws in 1999. At that time, section 51747.3 was amended specifically to include charter schools. As explained by the Legislative Counsel's Digest that accompanied the 1999 law: "Existing law requires community school and independent study average daily attendance to be claimed by school districts and county superintendents of schools only for pupils who are residents of the county in which the apportionment claim is reported or pupils who are residents of a county immediately adjacent to the county in which the apportionment claim is reported. [¶] This bill would apply this provision also to charter schools." (Stats. 1999, ch. 162, p. 1.) Similarly, it wrote, "Existing law prohibits a local education agency from claiming state funding for the independent study of a pupil, whether characterized as home study or otherwise, if the agency has provided any funds or other thing of value to the pupil or his or her parent or guardian that the agency does not provide to pupils who attend regular classes or to their parents or guardians. [¶] This bill would make this prohibition applicable to charter schools." (Stats. 1999, ch. 162, p. 1; see also, Sen. Ed. Comm., Bill Analysis of Sen. Bill No. 434 (1999-2000 Reg. Sess.) as amended June 28, 1999.)
All of the allegations contained in the complaint predate January 1, 2000, the effective date of the amendment. Since section 51747.3 did not apply to charter schools before that date,

the trial court did not err in concluding Wells failed to state any cause of action under this statute.

C

The Tort Claims Act does not Apply to the ***False Claims Act***

[22] The trial court also concluded Wells failed to properly plead compliance with the Tort Claims Act and sustained the demurrer with leave to amend on that basis. [FN16] We agree with Wells and the Attorney General that the Tort Claims Act does not apply to *qui tam* actions brought ***476** on behalf of the state against public entities.

FN16. Here, Wells's pleading alleges Wells has "presented claims for money or damages to the public entity defendants pursuant to the requirements of Government Code 945.4, which have been denied, and/or have sought relief from the claims presentation requirements." The pleading fails to state Wells had obtained relief from the claims presentation requirements and actually presented a tort claim for those claims which had subsequently been denied by the public agency.

[23] Government Code sections 905, 910, and 911.2 require a plaintiff to file a timely tort claim with a public entity as a jurisdictional prerequisite to filing a suit for damages. (*Watson v. State of California* (1993) 21 Cal.App.4th 836, 843-844, 26 Cal.Rptr.2d 262.) A claim relating to any cause of action other than injury to person or personal property shall be presented no later than one year after the accrual of the cause of action. (Gov.Code, § 911.2.)

However, Government Code section 905, subdivision (i) provides an exemption from the claims presentment requirement for "[c]laims by the State or by a state department or agency or by another local public entity."

The **False Claims Act** places a *qui tam* plaintiff in the shoes of the state. As we have already noted, a private person may bring a *qui tam* action in the name of the state or the public entity whose funds are involved. (Gov.Code, § 12652, subd. (c)(1).) "Once filed, the action may be dismissed only with the written consent of the court, taking into account the best interests of the parties involved and the public purposes behind this act." (*Ibid.*) "If the state or political subdivision elects not to proceed, the qui tam plaintiff shall have the same right to conduct the action as the Attorney General or prosecuting authority would have had if it had chosen to proceed under subdivision (c)." (Gov.Code, § 12652, subd. (f)(1).)

Reading the **False Claims Act** and the Tort Claims Act sections in harmony, we conclude a *qui tam* plaintiff who is pursuing a **False Claims Act** cause of action on behalf of the state falls within the Tort Claims Act exception to the presentment requirement of Government Code section 905, subdivision (i).

[24] This holding furthers important policy considerations of the **False Claims Act.** A plaintiff must file a *qui tam* complaint in camera where it remains under seal. (Gov.Code, § 12652, subd. (c)(2.) [FN17] A *qui tam* plaintiff must also forward a copy of the complaint to the Attorney General's Office. (Gov.Code, § 12652, subd.(c)(3).) [FN18] The Attorney General must "diligently investigate violations under Section 12651 involving state funds." (Gov.Code, § 12652, subd. (a)(1).) The seal requirement "allow[s] the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action." (*U.S. ex rel. Lujan v. Hughes Aircraft Co.* (9th Cir.1995) 67 F.3d 242, 245.) [FN19] By filing the lawsuit under seal, the potential subject is not alerted to an ongoing or future government investigation. (See *id.* at p. 246 [government's investigation could not have been hampered by violation of seal ***477** requirement if defendant knew of the allegations of the *qui tam* action before plaintiff improperly disclosed the nature of the allegations of the lawsuit].)

FN17. Government Code section 12652, subdivision (c)(2) provides, "A complaint filed by a private person under this subdivision shall be filed in superior court in camera and may remain under seal for up to 60 days."

FN18. Government Code section 12652, subdivision (c)(3) provides, "On the same day as the complaint is filed pursuant to paragraph (2), the qui tam plaintiff shall serve by mail with 'return receipt requested' the Attorney General with a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses."

FN19. "The California **False Claims Act** is patterned on similar federal legislation. [Citation.] Accordingly, federal decisions are persuasive on the meaning of the act." (*Laraway v. Sutro & Co.* (2002) 96 Cal.App.4th 266, 274-275, 116 Cal.Rptr.2d 823.)

If the plaintiff in a *qui tam* action were required to present a claim to the offending agency, this would defeat the purpose of filing the complaint under seal and interfere with the Attorney General's ability to investigate fraud and corruption.
[25] On the other hand, " '[t]he "purpose of the [statutory requirements for presenting claims against the state or a local public entity] is to facilitate early investigation of disputes and settlement without trial if appropriate, as well as to enable the public entity to engage in fiscal planning for potential liabilities and to avoid similar liabilities in the future." ' [Citation.]" (*Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 763, 120 Cal.Rptr.2d 550.) Prior to the decision of the Attorney General to intervene, a *qui tam* plaintiff has no authority to settle a claim without court review or the participation of the injured party, i.e., the state. (Gov.Code, § 12652, subd. (c)(1) & (c)(4).) Once the government intervenes, it may settle the action over the objections of the *qui tam* plaintiff provided the *qui tam* plaintiff has received notice and an opportunity to be heard. (Gov.Code, § 12652, subd. (e)(2)(B).) Thus, requiring a claim to be presented to the school districts would not allow for early settlement and would not serve a key purpose of the claims presentment statute.
We therefore hold a plaintiff need not file a tort claim with a public entity prior to filing a complaint under the **False Claims Act**.

DISPOSITION

The judgment is reversed and remanded for further proceedings. [FN20] The trial court is directed to vacate that part of its order sustaining the demurrers without leave to amend as to the first cause of action for violations of the **False Claims Act** and directed to overrule the demurrer as to that cause of action. Plaintiffs shall recover their costs on appeal. (Cal. Rules of Court, rule 27(a).) [FN21]

FN20. We, of course, express no opinion on the merits of the claims in the complaint.

FN21. We deny Wells's motion to strike the appendix of respondent Charter School Resource Alliance.

We concur: NICHOLSON, Acting P.J., and RAYE, J.
Cal.App. 3 Dist.,2004.
Wells v. One2One Learning Foundation
10 Cal.Rptr.3d 456, 185 Ed. Law Rep. 698, 4 Cal. Daily Op. Serv. 1909, 2004 Daily Journal D.A.R. 2802 Review Granted, Previously published at: 116 Cal.App.4th 515, (Cal.Const. art. 6, s 12; Cal. Rules of Court, Rules 28, 976, 977, 979)
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866 So.2d 103, 29 Fla. L. Weekly D304

District Court of Appeal of Florida,
First District.
Mindy MYERS, Appellant,
v.
STATE of Florida, R. Brent Maggio, Emerald Healthcare, Inc., Emerald Coast Healthcare, Inc., Crestview Investments, Inc., d/b/a Crestview Nursing and Convalescent Home, Ft. Walton Beach Investments, Inc., d/b/a Ft. Walton Beach and Rehabilitation Center, Emerald Landmark, Inc., d/b/a Landmark Health & Rehabilitation Center, Emerald-Cedar Hills, Inc., d/b/a Cedar Hills Nursing Center, Emerald-Golfcrest, Inc., d/b/a Golfcrest Nursing Home, Emerald-Golfview, Inc., d/b/a Golfview Nursing Home, and Emerald-Southern Pines, Inc. d/b/a Southern Pines Nursing Center, Appellees.
No. 1D03-0541.
Jan. 29, 2004.

Background: Individual brought qui tam action against nursing homes and their operator for violation of **False Claims Act.** State intervened and reached proposed settlement with nursing homes and operator. The Circuit Court, Leon County, P. Kevin Davey, J., entered judgment approving the settlement. Individual appealed.

Holding: The District Court of Appeal, Ervin, J., held that trial court failed to apply the proper criteria in approving settlement.
Reversed and remanded.

West Headnotes

KeyCite Notes

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k61 k. Particular Applications. Most Cited Cases

Trial court failed to apply the proper criteria in approving proposed settlement of qui tam action brought under **False Claims Act**; statute required consideration of whether settlement was fair, adequate, and reasonable under the circumstances, and trial court only considered whether settlement was obtained through fraud. West's F.S.A. § 68.084(2)(b).
*103 David L. McGee and Terrie L. Didier of Beggs & Lane, Pensacola, for Appellant.
Charles J. Crist, Jr., Attorney General, Tallahassee, for Appellee State of Florida.
John R. Hamilton and Christi R. Adams of Foley & Lardner, Orlando, for Appellees R. Brent Maggio, et al.

ERVIN, J.
Appellant, Mindy Myers, appeals a final judgment approving a settlement agreement brought under the Florida **False Claims Act,** [FN1] which authorizes civil actions by individuals and the state against persons who file false claims for payment or approval with a state agency. Myers complains that the trial court's approval failed to take into proper consideration the requirements that settlements be fair, adequate and reasonable. [FN2] We agree and reverse *104 and remand with directions for the lower court to reconsider the proposed settlement in accordance with the statutory criteria.

FN1. Sections 68.081-68.09, Fla. Stat. (2002).

FN2. Specifically, section 68.084(2)(b) provides, in part:
"[N]othing in this act shall be construed to limit the authority of the department or the qui tam plaintiff to compromise a claim brought in a complaint filed under this act if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances."

Myers filed a *qui tam* action [FN3] for damages and civil penalties against appellees, R. Brent Maggio and numerous nursing homes he owns and manages, alleging fraudulent practices in violation of the **False Claims Act**. While the proceeding was pending, appellee, the State of Florida, intervened pursuant to section 68.083(6)(a), filing a complaint seeking damages and civil penalties arising from false claims and reports submitted to the Medicaid program for nursing home services and for care to persons in certain nursing homes.

FN3. A *qui tam* (Latin for "who as well") action is filed under a statute that allows a private person to sue for a penalty, part of which the government will receive. *See Black's Law Dictionary* 1262 (7th ed.1999).

After the trial court had granted summary judgment for Maggio on five out of seven counts, the state and the defendants entered into a proposed settlement agreement, and, over Myers' objection, the state thereafter moved for the court's approval of it. At the hearing conducted on the motion, Myers presented evidence showing that the proposed settlement failed to comply with the statutory criteria of reasonableness, *etc.* The lower court, in approving the agreement, never determined whether the stipulation was reasonable, because it concluded only that the settlement had not been obtained through fraud. This was error. Initially, we observe that our review standard is *de novo,* because this appeal involves essentially an issue regarding the correct interpretation of a statute. Section 68.084(2)(b) is modeled after 31 U.S.C. § 3730(c)(2)(B), which also requires that a proposed settlement agreement be "fair, adequate, and reasonable under all the circumstances." We have uncovered no case law in Florida construing subsection 68.084(2)(b), nor have we found federal cases interpreting the parallel provision. We have thus found it useful to consider federal case law wherein courts have construed Federal Rule of Civil Procedure 23(e), which permits settlements of class actions with court approval, as similarly requiring trial courts to determine whether a proposed settlement agreement is fair, adequate and reasonable. [FN4] *See Officers for Justice v. Civil Service Comm'n,* 688 F.2d 615, 625 (9th Cir.1982). In making such determination, courts have assessed a multiplicity of factors in cases we find to be highly persuasive in reaching our own construction of the Florida statute. *Cf. Bennett v. Behring Corp.,* 737 F.2d 982, 986 (11th Cir.1984) (approving six components for determining whether a settlement is fair, adequate and reasonable, *i.e.,* (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point over or below the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the complexity, expense and duration of the litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved); ***105** *Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir.1975) (recommending the following nine factors: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation). *See also Officers for Justice,* 688 F.2d at 625 (suggesting eight factors).

FN4. Rule 23(e) was amended to provide, after December 1, 2003: "The court may approve a settlement, voluntary dismissal, or compromise

> that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate."

Because the court below, in its order of approval, appears to have considered only that the agreement was not tainted by fraud, it did not decide whether the criteria demanded by section 68.084(2)(b) had been satisfied. In our judgment, the statute clearly requires a more thorough review than that given the agreement by the trial court. The final judgment of approval is therefore reversed, and the case is remanded for the court to evaluate explicitly whether "the proposed settlement is fair, adequate, and reasonable under all the circumstances." The court may, in its discretion, conduct another hearing and consider additional evidence in making such determination. [FN5]

FN5. In reaching our decision, we have not overlooked appellees' argument that this court lacks jurisdiction over the appeal because, after the settlement agreement was proposed and before the entry of the judgment of approval, the state had filed a notice of voluntary dismissal of the case with prejudice, and, as a consequence, the lower court lacked jurisdiction to enter its order. The state previously raised the same

> argument in its motion to dismiss the appeal, and another panel of the court rejected the argument. We see no reason to disturb that ruling.

REVERSED and REMANDED.

BARFIELD and POLSTON, JJ., concur.
Fla.App. 1 Dist.,2004.
Myers v. State
866 So.2d 103, 29 Fla. L. Weekly D304
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West Reporter Image (PDF)

Appellate Court of Illinois,
First District, Fifth Division.
CITY OF CHICAGO ex rel. Raymond G. SCACHITTI, Patrick J. Houlihan, and Robert F. Rifkin, on behalf of itself and all other municipal and governmental entities similarly situated, Plaintiffs-Appellants,
v.
PRUDENTIAL SECURITIES, INC., Everen Securities, Inc., Deloitte & Touche, Altschuler, Melvoin & Glasser L.L.P., Defendants-Appellees.
County of Dupage ex rel. Adriana DiPaolo, on behalf of itself and all other municipal and governmental entities similarly situated, Plaintiffs-Appellants,
v.
William Blair & Company, L.L.C., Defendant-Appellee (Jerry L. Lacy, Defendant).
Nos. 1-01-0851, 1-01-2111.
June 28, 2002.

City and county taxpayers brought statutory and common-law claims, on behalf of city and county, against securities underwriters and accounting firms for alleged "yield-burning" in advance-refunding transactions for municipal bonds. The Circuit Court, Cook County, Julia M. Nowicki and Stephen A. Schiller, JJ., dismissed the actions in part. Taxpayers appealed. The Appellate Court, Campbell, P.J., held that: (1) the doctrine of nullum tempus occurrit regi ("time does not run against the king") was applicable; (2) taxpayers lacked common-law taxpayer derivative standing to pursue common-law claims of fraud, breach of contract, breach of fiduciary duty, and accountant malpractice; and (3) settlement in prior litigation involving one of city's advance-refunding transactions did not make action against underwriter moot.
Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] KeyCite Notes

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)2 Grounds in General
307Ak561 Affirmative Defenses, Raising by Motion to Dismiss
307Ak561.1 k. In General. Most Cited Cases

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)4 Pleading, Defects In, in General
307Ak621 k. Defects and Objections Ground for Dismissal in General. Most Cited Cases

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak686 Matters Deemed Admitted
307Ak686.1 k. In General. Most Cited Cases

A motion for involuntary dismissal based on defects in the complaint or defenses admits the legal sufficiency of the plaintiff's cause of action. S.H.A. 735 ILCS 5/2-619.

[2] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Involuntary dismissals based on defects in the complaint or defenses are reviewed de novo. S.H.A. 735 ILCS 5/2-619.

[3] KeyCite Notes

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k11 Limitation as Against State, Municipality, or Public Officers
241k11(1) k. Government, State or Officer Thereof. Most Cited Cases

The doctrine of nullum tempus occurrit regi ("time does not run against the king") is supported by policy judgments that the public should not suffer as a result of the negligence of its officers and agents in failing to promptly assert causes of action which belong to the public.

[4] KeyCite Notes

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k11 Limitation as Against State, Municipality, or Public Officers
241k11(1) k. Government, State or Officer Thereof. Most Cited Cases

The test for the doctrine of nullum tempus occurrit regi ("time does not run against the king") is whether the right that plaintiff governmental unit seeks to assert is in fact a right belonging to the general public or whether it belongs only to the government or to some small and distinct subsection of the public at large.

[5] KeyCite Notes

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k11 Limitation as Against State, Municipality, or Public Officers

241k11(2) k. County or Officers Thereof. Most Cited Cases

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k11 Limitation as Against State, Municipality, or Public Officers
241k11(3) k. Municipality or Officers Thereof. Most Cited Cases

Lawsuits relating to transactions for advance-refunding of bonds issued by city and county involved a right belonging to the general public, as paramount element weighing in favor of finding that the doctrine of nullum tempus occurrit regi ("time does not run against the king") applied in the actions brought by city and county taxpayers, on behalf of city and county, against securities underwriters and accounting firms for alleged "yield-burning" in advance-refunding transactions; the transactions involved the essential municipal power to incur debt and involved state statutory authority of municipalities to issue advance-refunding obligations, the bonds to be refunded were issued to finance activities benefitting the general public, and recovery of funds allegedly fraudulently obtained from a local government was in the public interest, even if a local government official declined to pursue such action. S.H.A. 30 ILCS 350/11; 735 ILCS 5/20-101 et seq.

[6] KeyCite Notes

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k11 Limitation as Against State, Municipality, or Public Officers
241k11(2) k. County or Officers Thereof. Most Cited Cases

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k11 Limitation as Against State, Municipality, or Public Officers
241k11(3) k. Municipality or Officers Thereof. Most Cited Cases

Allegation that city and county had not been required by law to advance-refund their bonds did not necessarily preclude the doctrine of nullum tempus occurrit regi ("time does not run against the king") from applying in actions brought by city and county taxpayers, on behalf of city and county, against securities underwriters and accounting firms for allegedly fraudulent "yield-burning" in advance-refunding transactions; the paramount consideration was whether the actions involved a right belonging to the general public.

[7] KeyCite Notes

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k11 Limitation as Against State, Municipality, or Public Officers
241k11(2) k. County or Officers Thereof. Most Cited Cases

241 Limitation of Actions
241I Statutes of Limitation

241I(A) Nature, Validity, and Construction in General
241k11 Limitation as Against State, Municipality, or Public Officers
241k11(3) k. Municipality or Officers Thereof. Most Cited Cases

The size of the aggregate amount of the alleged overcharges to city and county in transactions for advance-refunding of municipal bonds was an element weighing in favor of finding that the doctrine of nullum tempus occurrit regi ("time does not run against the king") applied in actions brought by city and county taxpayers, on behalf of city and county, against securities underwriters and accounting firms for allegedly fraudulent "yield-burning" in advance- refunding transactions; the alleged overcharges exceeded $1.445 million.

[8] KeyCite Notes

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k11 Limitation as Against State, Municipality, or Public Officers
241k11(2) k. County or Officers Thereof. Most Cited Cases

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k11 Limitation as Against State, Municipality, or Public Officers
241k11(3) k. Municipality or Officers Thereof. Most Cited Cases

Fact that the plaintiff city and county taxpayers were qui tam relators did not preclude them from invoking the doctrine of nullum tempus occurrit regi ("time does not run against the king") in their actions on behalf of city and county, brought against securities underwriters and accounting firms for allegedly fraudulent "yield-burning" in transactions for advance-refunding of municipal bonds.

[9] KeyCite Notes

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k11 Limitation as Against State, Municipality, or Public Officers
241k11(2) k. County or Officers Thereof. Most Cited Cases

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k11 Limitation as Against State, Municipality, or Public Officers
241k11(3) k. Municipality or Officers Thereof. Most Cited Cases

The doctrine of nullum tempus occurrit regi ("time does not run against the king") applied in actions brought by city and county taxpayers, on behalf of city and county, against securities underwriters and accounting firms for allegedly fraudulent "yield-burning" in transactions for advance-refunding of municipal bonds, though the underwriters and accounting firms asserted defenses that were based on statutes of repose rather than statutes of limitations. S.H.A. 735 ILCS 5/13-214.2(b); 815 ILCS 5/13, subd. D.

[10] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)1 In General
30k1025 Prejudice to Rights of Party as Ground of Review
30k1026 k. In General. Most Cited Cases

A reviewing court generally looks at the judgment itself in deciding whether to reverse it, not at the trial court's reasoning for its judgment.

[11] KeyCite Notes

104 Counties
104X Taxpayers' Suits or Actions
104k196 Rights and Remedies of Taxpayers
104k196(1) k. Nature and Grounds of Action in General. Most Cited Cases

268 Municipal Corporations
268XIV Taxpayers' Suits and Other Remedies
268k991 Restraining Action by Municipality or Officers
268k992 k. In General. Most Cited Cases

Actions brought by city and county taxpayers, on behalf of city and county, against securities underwriters and accounting firms for allegedly fraudulent "yield-burning" in transactions for advance-refunding of municipal bonds did not allege breach of duty by a public officer, and thus, the taxpayers lacked common-law taxpayer derivative standing to pursue common-law claims of fraud, breach of contract, breach of fiduciary duty, and accountant malpractice. S.H.A. 735 ILCS 5/20-104(b).

[12] KeyCite Notes

104 Counties
104X Taxpayers' Suits or Actions
104k196 Rights and Remedies of Taxpayers
104k196(7) k. Pleading and Evidence. Most Cited Cases

268 Municipal Corporations
268XIV Taxpayers' Suits and Other Remedies
268k1000 Actions
268k1000(5) k. Pleading and Evidence. Most Cited Cases

City and county taxpayers adequately alleged an injury to city and county, as element for standing to bring action, on behalf of city and county, against securities underwriters and accounting firms for allegedly fraudulent "yield-burning" in transactions for advance-refunding of municipal bonds; taxpayers alleged that city and county were overcharged by more than $1.445 million, even though the city and county might be required to turn the

overcharges over to the Internal Revenue Service (IRS).

[13] KeyCite Notes

268 Municipal Corporations
268XIV Taxpayers' Suits and Other Remedies
268k1000 Actions
268k1000(.5) k. In General. Most Cited Cases

Settlement of prior litigation regarding city's refunding bonds, in which Internal Revenue Service (IRS) agreed that it would consider United States Treasury obligations sold in connection with the refunding to have been sold at fair market value for purposes of the federal tax exemption of the bonds, did not render moot city taxpayers' action, on behalf of city, against securities underwriter for allegedly fraudulent "yield-burning" in transaction for advance-refunding of municipal bonds; settlement did not require the conclusion that the IRS found no violation of the fair market-value rule, and taxpayers' allegations were not wholly based on violations of federal tax law.
**908 *355 ***537 Krislov & Associates, Ltd., Chicago (Clinton A. Krislov, Robert J. Stein III and Michael R. Karnuth, of counsel), for Appellant.
Ungaretti & Harris, Chicago (Miriam G. Bahcall and Rawn Howard Reinhard, of counsel), for Appellee, Prudential Securities, Inc.
**909 ***538 Foley & Lardner, Chicago (Douglas M. Hagerman, of counsel), for Appellees, Everen Securities, Inc. and William Blair & Co., LLC.
Mayer, Brown & Platt, Chicago (Alan Salpeter, Michele Odorizzi and Jonathan C. Medow, of counsel), for Appellee, Deloitte & Touche LLP.
Piper, Marbury, Rudnick & Wolfe, Chicago (Lawrence A. Wojcik and Dennis J. Powers, of counsel), for Appellee, Altschuler, Melvoin and Glasser, LLC.

Presiding Justice CAMPBELL delivered the opinion of the court:
In appeal number 1-01-0851, plaintiffs Raymond G. Scachitti, Patrick J. Houlihan and Robert F. Rifkin (Scachitti plaintiffs), residents and taxpayers of the City of Chicago (City), filed a lawsuit on behalf of the City against defendants Prudential Securities, Inc. (Prudential), Everen Securities, Inc. (Everen) [FN1], Deloitte & Touche (Deloitte), and *356 Altschuler, Melvoin, and Glasser, L.L.P. (Altschuler), alleging that all of these defendants breached a fiduciary duty and breached a contract. The Scachitti plaintiffs' complaint also seeks recovery of allegedly fraudulently obtained public funds from Prudential and Everen, pursuant to Article XX of the Illinois Code of Civil Procedure (735 ILCS 5/20-101 *et seq.* (West 1998)) (Code). The Scachitti Complaint further accuses Prudential and Everen of committing common-law fraud, and Deloitte and Altschuler of malpractice. The Scachitti plaintiffs appeal orders of the circuit court of Cook County dismissing the claim of breach of fiduciary duty for failing to state a claim pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 1998)), and dismissing the remaining claims as time-barred, pursuant to section 2-619 of the Code (735 ILCS 5/2-619(a)(5) (West 1998)).

FN1. Everen is the corporate successor to Kemper Securities Group, Inc. As Everen was named in the Scachitti Complaint, and is one of the appellees, this opinion will refer to Everen, though the firm was known under the prior name during the time period at issue in this case.

In appeal number 1-01-2111, plaintiff Adriana DiPaolo, a resident and taxpayer of the County of DuPage (County), filed a lawsuit on behalf of the County, making substantially similar claims against William Blair & Co., L.L.C. (Blair) and Jerry L. Lacy. DiPaolo appeals orders of

the circuit court of Cook County with respect to Blair, dismissing the claim of breach of fiduciary duty for failing to state a claim, dismissing the Article XX and common-law fraud claims as not alleging the type of injury that those claims could redress, that all of the claims against Blair were time-barred, and finding no just reason to delay enforcement or appeal of the dismissal as to Blair. [FN2] The cases were consolidated on appeal. As a convenience, this opinion refers to Everen, Prudential and Blair collectively as the Underwriter defendants, and to Deloitte and Altschuler collectively as the Accountant defendants.

FN2. According to the plaintiffs, Lacy, whose place of business was allegedly in Arizona, apparently could not be located and served. The record shows that the dismissal orders did not apply to Lacy, who is not a party to this appeal.

The record on appeal discloses that both complaints were filed in the trial court on April 3, 2000, and assigned to different judges. Both complaints generally allege that in order to finance public projects, such as roads, schools, hospitals, bridges and the like, local governments borrow money by issuing bonds to investors. Plaintiffs also alleged that, to assist local governments in such efforts, federal law ***910 ****539 generally exempts interest on such bonds from federal income taxation.

Plaintiffs alleged that the City and County were victims of a practice sometimes called "yield-burning" by underwriters and accountants who handled various aspects of advance-refunding transactions in 1992 and 1993. Plaintiffs' complaints discuss the mechanics of *357 advance-refunding transactions and "yield-burning" at some length. An advance-refunding transaction can result in substantial debt-service savings to issuers in a declining interest-rate environment. Such transactions may be used where the original local governmental bonds paying a high rate of interest cannot be redeemed prior to a specified "call" date in the future.

In an advance-refunding transaction, new local governmental bonds are issued and the proceeds are used to purchase open market securities which are similar or identical to the original bonds in terms of the interest, principal and call date. The open market securities, generally U.S. Treasury obligations, are held in an irrevocable escrow account. This account, also called a defeasance escrow, must be fully invested throughout the defeasance period and used only to pay the interest, principal and redemption premium, if any, on the original refunded bonds.

Plaintiffs allege that federal law does not permit a local governmental issuer to profit from the investment of the proceeds of tax-exempt bonds. Accordingly, plaintiffs allege, federal law restricts the overall yield that local governments can earn on securities placed in a defeasance escrow. If a municipal issuer invests the defeasance escrow in securities that earn a higher yield than that paid to the holders of the advance-refunding bonds, a positive arbitrage would be created; profits from such arbitrage would be required to be paid to the U.S. Treasury at the risk of losing the tax-exempt status of the advance-refunding bonds. Generally, a municipal issuer must certify that the yield restriction was materially satisfied, along with a statement of the factual basis for the certification. Plaintiffs allege that for advance-refunding bonds, the investment rate of the proceeds cannot exceed the borrowing rate by more than one thousandth of a percentage point. A municipal issuer may satisfy the yield restriction by investing in special State and Local Government Series Bonds (SLGS) from the U.S. Treasury at or below the restricted rate. Alternatively, a municipal issuer may invest in a portfolio comprised of higher yielding open-market securities and zero-interest SLGS that produces a yield at or below the restricted rate.

"Yield burning" may occur where a securities dealer overcharges an issuer for bonds. Because a bond's yield rate moves inversely to the price of the principal, an overcharge decreases the effective yield of the instrument. This practice, colloquially known as "burning" the yield, may also enhance the profits of firms that construct such portfolios for municipal issuers. However, it seems undisputed that U.S. Treasury regulations require defeasance escrow investments to be priced at fair market value, in order to prevent arbitrage.

*358 The Scachitti Complaint alleged that in March 1992, the City issued a $ 48,070,000

advance-refunding bond series ("1992 City Refunding Bonds") to retire an outstanding 1987 bond issue, on which the City was obligated to pay a higher interest rate than on the 1992 rates. However, the 1987 issue could not be redeemed until January of 1997, so the proceeds from the sale of the 1992 City Refunding Bonds were used to purchase U.S. Treasury Bonds to be held in a defeasance escrow ***911 ****540 account, which would be used to pay principal and interest, and to redeem the 1987 bonds in 1997.

The Scachitti Complaint avers that Everen served as the lead underwriter for the 1992 City Refunding Bonds. Everen was allegedly hired by negotiation, rather than by competitive bidding. Everen allegedly sold the City U.S. Treasury Bonds that were held in a defeasance escrow. The Scachitti Complaint further alleged that Everen provided various advisory services to the City that rendered Everen an investment adviser to the City, and that a confidential relationship existed between the two, in which the City placed trust and reliance in Everen.

The Scachitti Complaint also alleged that the City retained Deloitte to verify the mathematical accuracy of Everen's yield computations. Plaintiffs allege that Deloitte should have verified the yields according to the fair market value of the escrow securities, and by failing to do so, understated the true yield of the escrow securities, thereby creating a positive arbitrage. The Scachitti Complaint alleges that this knowing oversight permitted Everen to conceal an excessive markup on the bonds and burn the yield by $221,697.06.

Similarly, the Scachitti Complaint alleges that in March 1993, the City issued a $232,880,000 advance-refunding bond series ("1993 City Refunding Bonds") to retire prior outstanding issues. In this transaction, Prudential served as the lead underwriter and is alleged to be in a fiduciary relationship with the City. Like Deloitte, the accounting firm of Altschuler was retained to verify the mathematical accuracy of Prudential's yield computations. The Scachitti Complaint avers that Altschuler should have used the fair market value of the securities in verifying the yield computations, and by knowingly failing to do so, allowed Prudential to conceal $516,554.63 in yield-burned markups.

The DiPaolo Complaint alleges that in April 1993, the County issued a $161,590,000 advance-refunding bond series ("1993 County Refunding Bonds") to retire prior outstanding issues from 1987 and 1991. In this transaction, Blair served as the lead underwriter and is alleged to be in a fiduciary relationship with the County. Lacy was retained to verify the mathematical accuracy of Blair's yield computations. The DiPaolo Complaint claims that Lacy should have used the *359 fair market value of the securities in verifying the yield computations, and by knowingly failing to do so, allowed Blair to conceal at least $707,747 in yield-burned markups.

In both cases, the defendants filed combined motions to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2000)). The arguments raised by the defendants were substantially similar in a number of respects. The motions argued that the Underwriter defendants did not have a fiduciary relationship with the City or the County; the complaints failed to identify the terms of the contracts allegedly breached; and that the City and the County suffered no damages. The motions also argued that the claims against the Underwriter defendants were barred by a five-year statute of repose found in section 13(D) of the Illinois Securities Act (815 ILCS 5/13(D) (West 1992)), and that the claims against the Accountant defendants were barred by the five-year statute of repose for actions brought against public accountants (735 ILCS 5/13-214.2(b) (West 1992)).

In addition, Prudential argued that the Scachitti Complaint's claims against it were barred by a settlement agreement in *United States ex rel. Lissack v. Prudential Securities, Inc.*, 95 Civ. 1363, a suit brought pursuant to the federal **False** **912 ***541 **Claims Act** in the Federal District Court for the Southern District of New York, involving a number of municipal advance-refunding transactions across the country, including the 1993 City Refunding Bonds. The settlement agreement provided in part that the Internal Revenue Service (IRS) would consider the U.S. Treasury Obligations sold in the transactions listed therein to have been sold at fair market value.

The plaintiffs responded to the various motions to dismiss, arguing in part that the statutes of limitations and repose could not be asserted against the City or County in the performance of public acts under the doctrine of *nullum tempus occurrit regi* ("time does not run against the

king"). The plaintiffs also argued that if a statute of limitations was applicable, the Article XX claims would be governed by section 13-205 of the Code (735 ILCS 5/13-205 (West 2000)) and the time for brining them would be tolled due to fraudulent concealment; the complaints properly pleaded that the City and County suffered damages; and that the breach of contract and fiduciary duty claims were properly pleaded. In addition, the Scachitti plaintiffs argued that the City's interests were not represented in the settlement of the federal lawsuit.

On September 26, 2000, the trial court dismissed the DiPaolo Complaint's claim of breach of fiduciary duty for failure to state a ***360** claim. The trial court's order also dismissed the DiPaolo Complaint's Article XX and common-law fraud claims on the ground that they did not allege the type of injury these claims could redress; the order granted DiPaolo leave to replead as to these later claims. The transcript of proceedings shows that the trial court also ruled that the *nullum tempus* doctrine did not insulate the DiPaolo complaint against a statute of limitations, which the trial court determined to be section 13-205 of the Code.

On January 31, 2001, the trial court issued a memorandum and opinion as to the Scachitti Complaint. The order states that the trial court had previously ruled during hearings on the motions to dismiss that: the *nullum tempus* doctrine did not apply to the claims at issue; the five-year statute of repose found in section 13(D) of the Illinois Securities Act could not be tolled by allegations of fraudulent concealment; that the motion to dismiss claims of breach of fiduciary duty for failure to state a claim was granted as to all defendants; and Accountant defendants' motions to dismiss based on the five-year statute of repose for actions brought against public accountants was granted. The order then discussed section 13(D) of the Illinois Securities Act, concluding that it applied to and barred the Article XX and breach of contract claims.

On May 10, 2001, after DiPaolo amended her complaint, the trial court entered an order ruling that the claims against Blair were barred by section 13(D) of the Illinois Securities Act, and finding no just reason to delay enforcement or appeal of the dismissal as to Blair. The plaintiffs filed Notices of Appeal to this court, which consolidated the cases for appeal.

I

[1] [2] The issue on appeal in both cases is whether the trial court erred in dismissing plaintiffs' complaints. The complaints were dismissed pursuant to section 2-619 of the Illinois Code of Civil Procedure, which provides a means of obtaining summary disposition of issues of law or easily proved issues of fact. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill.2d 112, 115, 189 Ill.Dec. 31, 619 N.E.2d 732, 735 (1993). Section 2-619(a)(5) provides that an action may dismissed where ****913 *****542** it "was not commenced within the time authorized by law." 735 ILCS 5/2- 619(a)(5) (West 2000). A section 2-619 motion to dismiss admits the legal sufficiency of the plaintiffs' cause of action, much as a section 2-615 motion to dismiss admits a complaint's well-pleaded facts. See *Kedzie*, 156 Ill.2d at 115, 189 Ill.Dec. 31, 619 N.E.2d at 735. Section 2-619 dismissals are reviewed *de novo*. *Owens v. McDermott, Will & Emery*, 316 Ill.App.3d 340, 344, 249 Ill.Dec. 303, 736 N.E.2d 145, 150 (2000).

***361** II

[3] Plaintiffs initially contend that the trial courts erred in ruling that the *nullum tempus* doctrine did not apply to these cases. The plaintiffs argue that the *nullum tempus* doctrine exempts the State from the operation of a statute of limitations, unless by its terms the statute expressly includes the State, county, municipality, or other governmental agency. *Clare v. Bell*, 378 Ill. 128, 130-31, 37 N.E.2d 812, 814 (1941). Historically, the *nullum tempus* doctrine emerged from concepts of sovereign power and prerogative; following the abolition of sovereign immunity in the Illinois Constitution of 1970, the doctrine is supported by policy judgments that the public should not suffer as a result of the negligence of its officers and agents in failing to promptly assert causes of action which belong to the public. See *Board of Education v. A, C & S, Inc.*, 131 Ill.2d 428, 472, 137 Ill.Dec. 635, 546 N.E.2d 580, 600-01 (1989); *City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill.2d 457, 461, 71 Ill.Dec. 720, 451 N.E.2d 874, 876 (1983).

[4] The test is whether the right that plaintiff governmental unit seeks to assert "is in fact a right belonging to the general public or whether it belongs only to the government or to some small and distinct subsection of the public at large." *Shelbyville,* 96 Ill.2d at 462, 71 Ill.Dec. 720, 451 N.E.2d at 876-77; see, *e.g., Winakor v. Annunzio,* 409 Ill. 236, 249, 99 N.E.2d 191 (1951) (belated change of variable contribution rate by Department of Labor permitted because it was in aid of the public purpose of relieving unemployment); *Clare,* 378 Ill. at 130-32, 37 N.E.2d at 814 (action to collect penalties on delinquent property taxes allowed to proceed because the right to collect them was "public"); *People ex rel. City of Chicago v. Commercial Union Fire Insurance Co.,* 322 Ill. 326, 332-34, 153 N.E. 488, 491 (1926) (action to impose city license fee on a foreign fire insurance company held "public" because the proceeds would benefit city's fire department); *Greenwood v. Town of LaSalle,* 137 Ill. 225, 229, 26 N.E. 1089, 1090 (1891) (municipality's right to collect local property taxes ruled "public" because the "taxes may be levied for purposes in which the public, generally, are directly interested, such as 'constructing or repairing roads, bridges or causeways' within the town"). Specifically, our supreme court has focused on "the effects of the interest on the public, the governmental entities [sic] obligation to act on behalf of the public and the extent to which public funds must be expended." *A, C & S, Inc.,* 131 Ill.2d at 476, 137 Ill.Dec. 635, 546 N.E.2d at 602.

In this case, defendants rely heavily on *Champaign County Forest Preserve Dist. v. King,* 291 Ill.App.3d 197, 225 Ill.Dec. 477, 683 N.E.2d 980 (1997), which affirmed the dismissal of a claim by the Champaign County Forest Preserve District (District) seeking to recover alleged overcharges ***362** for insurance premiums totaling $140,000. The *King* court concluded that the purchase of liability insurance had no effect on the public at large, as it did not make the public safer, or reduce the likelihood of ****914 *****543** injury on the District's property. *King,* 291 Ill.App.3d at 201, 225 Ill.Dec. 477, 683 N.E.2d at 983. The *King* court noted that the District was legally required to indemnify and protect its commissioners and employees against various claims and suits, but was not legally required to purchase insurance, which was only one of several alternatives the District could have chosen as protection against claims and suits. *King,* 291 Ill.App.3d at 201-02, 225 Ill.Dec. 477, 683 N.E.2d at 983. The court then stated that the fact that public funds were used to purchase insurance does not necessarily render it a public act; otherwise, any use of public funds would always be considered a public act. *King,* 291 Ill.App.3d at 202, 225 Ill.Dec. 477, 683 N.E.2d at 983. The transactions at issue in the cases on appeal do not involve the purchase of liability insurance. Thus, *King* seems no more or less useful in deciding these cases than the cases which *King* cites, *e.g., Shelbyville* and *A, C & S, Inc.* Accordingly, this court will apply the principles announced by our supreme court to the transactions here without giving undue weight to *King.*

A

[5] The question of who would benefit by the government's action and who would lose by its inaction is of "paramount importance" in our analysis. *Shelbyville,* 96 Ill.2d at 462, 71 Ill.Dec. 720, 451 N.E.2d at 877. The defendants characterize plaintiffs' acts as "the forays of the City and the County into the markets to buy U.S. Treasury securities * * *." However, in *A, C & S, Inc.,* our supreme court *rejected* the argument "that in determining whether a governmental entity is pursuing a public interest, review should be made of the nature of the transaction and not the consequences flowing from the transaction." *A, C & S, Inc.,* 131 Ill.2d at 475, 137 Ill.Dec. 635, 546 N.E.2d at 602.

Plaintiffs argue that the advance-refunding transactions should be deemed a public act because the City and County ordinances authorizing these transactions generally state that they are being undertaken for a public purpose and in the public interest. In *Shelbyville,* the court stated that it did *not* "find any logic in allowing the designation of the city's action as 'public' or 'private' to be controlled by the origin of the city's rights in a private contract or local ordinance * * *." *Shelbyville,* 96 Ill.2d at 465- 66, 71 Ill.Dec. 720, 451 N.E.2d at 878. The *A, C & S, Inc.* court performed its own analysis of the issue, but also found support for its

ruling that a public right was involved in the state Asbestos Abatement Act. A, C & S, Inc., 131 Ill.2d at 475, 137 Ill.Dec. 635, 546 N.E.2d at 602.
*363 Plaintiffs argue that in this case, "the underlying activities being financed-providing a jail, a courthouse, and a storm water system--are all important public functions * * *." Defendants have not disputed this, but respond that examining the public purposes for which the plaintiffs originally issued the bonds is a diversion from the question of whether the advance-refunding transactions benefit the public. Defendants argue that the public already received the benefit of the underlying activities in the original bond issue, and that King takes great pains to emphasize that a benefit to overall public finances is insufficient to establish a public right.
None of the parties has cited case law specifically addressing the question of whether benefit of the underlying activities in the original bond issue should be considered when analyzing whether the advance-refunding of those bonds benefits the public. Our supreme court has stated that "[t]he issuance of refunding and funding **915 ***544 bonds does not create additional indebtedness, but merely evidences existing debts." Kocsis v. Chicago Park Dist., 362 Ill. 24, 35, 198 N.E. 847, 853 (1935); see also People ex rel. City of Rock Island v. Rudgren, 378 Ill. 408, 413, 38 N.E.2d 723, 726 (1941) (power to issue refunding bonds is implied in statute authorizing issuance of bonds to construct a bridge). In these cases, the transactions were designed to substitute lower-interest debt for the original high-interest debt financing public projects. Accordingly, the advance-refunding transactions should not be considered separately from the original bonds and, by extension, the purpose for which they were issued.
Contrary to defendants' argument, King does not emphasize that a benefit to public finances does not create a public act. The King court *did* state that "the fact that public funds were used to purchase insurance does not necessarily render it a public act." King, 291 Ill.App.3d at 202, 225 Ill.Dec. 477, 683 N.E.2d at 983. However, the King court stated this in analyzing the *third* factor extracted from Shelbyville, not the first factor. It cannot be doubted that the third "prong of Shelbyville must be given a realistic application." A, C & S, Inc., 131 Ill.2d at 476, 137 Ill.Dec. 635, 546 N.E.2d at 602. However, defendants have cited no authority stating that the analysis of the third prong may be imported into the analysis of the first prong.
The King court *did* consider, as a separate matter, whether the District asserted a public right in filing a lawsuit against defendants for excessive insurance premiums. King, 291 Ill.App.3d at 202-04, 225 Ill.Dec. 477, 683 N.E.2d at 984-85. The King court concluded that such a suit did not assert a public right, despite the alleged loss of tax revenue, as the expenditure of funds did not serve a public purpose, such as increasing public safety. King, 291 Ill.App.3d at 203-04, 225 Ill.Dec. 477, 683 N.E.2d at 984-85. *364 The King court thus distinguished A, C & S, Inc., as involving not only a loss of tax revenue, but a threat to public health. King, 291 Ill.App.3d at 203, 225 Ill.Dec. 477, 683 N.E.2d at 984.
As noted above, Illinois law treats refunding bonds, and the power to issue such bonds, as related to the original debt, and the power to incur said debt. Moreover, the Illinois Constitution of 1970 recognizes that certain powers are generally considered essential to government, *i.e.*, to regulate for public welfare, to license, to tax and to incur debt. See Ampersand, Inc. v. Finley, 61 Ill.2d 537, 539-40, 338 N.E.2d 15, 17 (1975) (and authorities cited therein). A review of *nullum tempus* cases shows that our supreme court generally holds that *nullum tempus* may be invoked by a local government when the suit relates to these essential powers of government. The police power was implicated in A, C & S, Inc., Shelbyville and Winakor; the taxing power was implicated in Greenwood and Clare; the licensing and taxing powers were implicated in Commercial Union Fire Insurance Co. This case involves the essential power to incur debt.
Furthermore, as long ago as the 19th Century, our supreme court stated in Greenwood that it "entertained no doubt" that a municipality's right to collect a property tax was a public right because the "taxes *may* be levied for purposes in which the public, generally, are directly interested, such as 'constructing or repairing roads, bridges or causeways' within the town." Greenwood, 137 Ill. at 228-9, 26 N.E. at 1089-90 (emphasis added). Our supreme court did not *require* the local government to show that sums so collected would be applied to those

purposes. This case is stronger than *Greenwood,* as the alleged overcharges relate to debts already ***916 ****545* incurred, and defendants have not disputed that the original debts were incurred for the benefit of the general public.
Defendants also cite *People for the Use of the Town of New Trier v. Hale,* 320 Ill.App. 645, 52 N.E.2d 308 (1943), in which a relator sued Hale and various sureties on bonds given by him as town collector of the Town of New Trier, alleging that Hale retained commissions on collections as compensation in excess of that permitted by statute. This court held that the rights in controversy concerned the Town of New Trier only, not the public at large. *Hale,* 320 Ill.App. at 652, 52 N.E.2d at 311. Defendants cite *Hale* as rejecting a claim that a local government can invoke *nullum tempus* to redress the skimming of public monies.
Defendants' reliance on *Hale* does not account for our supreme court's decision in *A, C & S, Inc.,* which rejected a similar argument based on *Brown v. Trustees of Schools,* 224 Ill. 184, 187-188, 79 N.E. 579, 580 (1906), one of the primary cases cited in *Hale. A, C & S, Inc.,* 131 Ill.2d at 474-75, 137 Ill.Dec. 635, 546 N.E.2d at 602. The *A, C & S, Inc.* court did ****365* so in part because multiple claims were involved. The consolidated cases here show that, unlike *Hale* or *King,* we are not confronted with an isolated claim. The *A, C & S, Inc.* court's rejection of this sort of argument was also based in part on the magnitude of the cost to be borne by the plaintiffs, which for the reasons discussed below, also favors the plaintiffs in this appeal.
The conclusion that a public right or act is implicated in these cases also finds support in state statutory law. The Local Government Debt Reform Act specifically authorized advance-refunding of the sort at issue in these cases. Ill.Rev.Stat.1990, ch. 17, ¶ 6911; see 30 ILCS 350/11 (West 2000). This authorization was granted in light of findings by the General Assembly that inconsistent and outdated provisions of Illinois law resulted in additional costs for the citizens of the State of Illinois residing in local governmental units because of the sale and issuance of bonds at higher rates than would otherwise be necessary, and it was in the best interests of said residents to provide supplemental authority regarding the issuance and sale of bonds to accommodate market practices and the provisions of current federal income tax law. Ill.Rev.Stat.1990, ch. 17, ¶ 6902; see 30 ILCS 350/2 (West 2000). In addition, this case involves claims brought pursuant to Article XX of the Code, which reflects a determination by the General Assembly that the recovery of funds fraudulently obtained from a local government is in the public interest, even when a local government official declines to pursue such action. See 735 ILCS 5/20-101 *et seq.* (West 2000).
In sum, the advance-refunding transactions and suits to recover sums fraudulently obtained from the City and the County benefit the public.

B

[6] Plaintiffs argue that the City and County were obliged to act as they did by the language authorizing the advance-refunding transactions in the relevant City and County ordinances. However, the ordinances are acts of the plaintiffs themselves; cases such as *A, C & S, Inc.* refer to obligations imposed on local governments by state statutes. The home rule status of the City arguably might change the analysis as to the City, but such analysis would not apply to the County. Plaintiffs cite the Local Government Debt Reform Act, but that statute merely authorizes advance-refunding transactions; it does not require them. Plaintiffs' argument that the details of the transaction ***917 ****546* were largely governed by restrictions of federal law fails for the same reason, as federal law did not require the refunding transactions in the first instance. Plaintiffs claim that the underlying activities being financed ****366* are all functions they are obliged to undertake, but the plaintiffs were not required to advance-refund them.
The question arises as to whether plaintiffs' failure to show that they were obliged to act precludes application of the *nullum tempus* doctrine. While *Shelbyville* and its progeny establish the factors to be considered, defendants have cited no authority holding that all of the factors or prongs must be satisfied for *nullum tempus* to apply. As the question of who benefits from the government's action is of paramount importance, it can be inferred that the

factors are not equally important. Thus, plaintiffs' failure to show that they were obliged to act is not fatal.

C

[7] Plaintiffs contend that a "vast amount" of public revenue is being expended in their issuance and ultimate retirement of advance-refunding bonds. For example, plaintiffs note that the 1993 County Refunding Bonds alone were issued in the amount of $161,590,000, and claim that it will cost substantially more to retire those bonds. Defendants respond that the total debt service is not the proper measure of the public funds expended, as purpose of the advance-refunding transaction is to reduce the ultimate expense to the plaintiffs. Defendants also rely on *King,* in which the court relied in part on the lack of evidence indicating the total amount of money plaintiff paid for the insurance, and as to plaintiff's overall budget and whether the alleged overpayment amounted to a significant portion of the budget. *King,* 291 Ill.App.3d at 202, 225 Ill.Dec. 477, 683 N.E.2d at 983-84. [FN3] An examination of the cost at issue in relation to a plaintiff's overall budget might be useful, but *King* appears to be the only case using that analysis. The *A, C & S, Inc.* court merely observed that "the cost of these abatement projects will run into the millions," without any mention, let alone analysis, of the overall budgets of the plaintiffs. *A, C & S, Inc.,* 131 Ill.2d at 476, 137 Ill.Dec. 635, 546 N.E.2d at 602.

FN3. Defendants' reliance on *King* in this regard is somewhat contrary to their position that this court should not look at the total debt service.

The *Shelbyville* court had been even more general, stating only that "the inability of the city of Shelbyville to enforce its annexation agreement or compel payment by the defendant will affect the city's finances * * *." *Shelbyville,* 96 Ill.2d at 464, 71 Ill.Dec. 720, 451 N.E.2d at 878. However, *A, C & S, Inc.* requires that this factor "be given a realistic application." *A, C & S, Inc.,* 131 Ill.2d at 476, 137 Ill.Dec. 635, 546 N.E.2d at 602. Nevertheless, the *A, C & S, Inc.* court aggregated the cost of the asbestos abatement ***367** projects to be borne by the plaintiff school districts. See *A, C & S, Inc.,* 131 Ill.2d at 476, 137 Ill.Dec. 635, 546 N.E.2d at 602.

Harmonizing the case law, it appears that the relevant amount of public revenue being expended is that representing the potential damages to the plaintiffs. Accordingly, this court's analysis will be based on the amount of the overcharges, instead of the total debt service. However, the alleged overcharges also may be considered as an aggregate amount.

In this case, plaintiffs allege yield-burning occurred in the amounts of $221,697.06, $516,554.63, and at least $707,747, for a total of $1,445,998.69. This sum is approximately 10 times the alleged overcharges ****918 *****547** at issue in *King,* but less than the "millions" in costs potentially borne by the plaintiffs in *A, C & S, Inc.* However, the latter costs were to be borne by 34 school district plaintiffs, as opposed to the two plaintiffs here. See *A, C & S, Inc.,* 131 Ill.2d at 436, 137 Ill.Dec. 635, 546 N.E.2d at 584. Thus, whether the potential damages are considered in the aggregate or by the amount alleged by each plaintiff, the third prong of the *Shelbyville* analysis is satisfied.

In sum, while the plaintiffs failed to show that they were legally required to engage in the advance-refunding transaction, their decision to do so, and their suits to recover the alleged overcharges benefit the public and involve a magnitude of injury such that the *Shelbyville* test is satisfied for the application of the *nullum tempus* doctrine.

D

[8] Defendants assert in the alternative that plaintiffs cannot invoke the *nullum tempus* doctrine because they are *qui tam* relators, not the local governments themselves. This is apparently a question of first impression in Illinois. Plaintiffs rely on *Oklahoma ex rel. Schones v. Town of Canute,* 858 P.2d 436, 438-39 (Ok.1993), which held that such plaintiffs could assert *nullum tempus* to the same extent as the government, had the government

brought the case.
Defendants note that Schones was superseded by statute. The fact that Schones was superseded by statute does not mean that its rationale was incorrect. Both *nullum tempus* and *qui tam* serve the same general policy, which is to protect the public when public officials fail to pursue claims for the public benefit.
Defendants note that *qui tam* relators, unlike public officials, may be motivated by monetary gain. *Qui tam* is an abbreviation of *qui tam pro domino rege quam pro se ipso in hac parte sequitur,* which translates as "who as well for the king as for himself sues in this matter." *E.g.,* Black's Law Dictionary (7th ed.1999) at 1262. *Qui tam* plaintiffs ***368** are generally likened to private attorneys general. See Lyons v. Ryan, 324 Ill.App.3d 1094, 1107-08, 258 Ill.Dec. 414, 756 N.E.2d 396, 406 (2001) (discussing relators under the federal **False Claims Act**). Defendants' argument is not an attack on the ability of *qui tam* relators to invoke *nullum tempus* as much as it is an attack on the *qui tam* concept itself. This court cannot ignore Article XX of the Code, which permits certain *qui tam* suits. Defendants have not shown that plaintiffs entitled to assert a government's claims are not entitled to assert its defenses or its responses to an opponent's defenses.

E

[9] Defendants argue that even if the plaintiffs may invoke the *nullum tempus* doctrine against statutes of limitations, they cannot invoke it against statutes of repose. Defendants argue that a statute of limitations is merely procedural, giving a time limit for bringing a cause of action beginning when the action has accrued, whereas a repose statute is substantive, extinguishing any right of bringing the cause of action, regardless of whether it has accrued. See Highland v. Bracken, 202 Ill.App.3d 625, 632, 148 Ill.Dec. 104, 560 N.E.2d 406, 411 (1990). The Fourth District of this court rejected this same argument against *nullum tempus* in People v. Asbestospray Corp., 247 Ill.App.3d 258, 261-63, 186 Ill.Dec. 462, 616 N.E.2d 652, 654-55 (1993).
Defendants rely on In re Estate of Bird, 410 Ill. 390, 397, 102 N.E.2d 329, 333 (1951), in which the supreme court held that the time limitations in a nonclaim ****919 *****548** probate statute ran against the government. The Asbestospray court distinguished Bird, by stating that "[a] general statute of repose cannot be equated with the nonclaim probate statute enacted as part of a comprehensive probate code creating and circumscribing rights to claim against a decedent's estate and facilitating the expeditious administration of estates." Asbestospray, 247 Ill.App.3d at 261, 186 Ill.Dec. 462, 616 N.E.2d at 654. The Underwriter defendants argue that section 13(D) of the Illinois Securities Act *is* part of a comprehensive scheme, making these cases more like Bird than Asbestospray.
The flaw in this argument is that Bird held that the nonclaim provision was *not* a statute that totally barred untimely claims. Bird, 410 Ill. at 394-97, 102 N.E.2d at 332-33. The Bird court noted that even if a claim was filed after the statutory period, it could be asserted against after-discovered assets, or heirs and distributees of the estate, or other security. Bird, 410 Ill. at 396-97, 102 N.E.2d at 333. In this case, the Underwriter defendants are attempting to assert the five-year statute of repose found in section 13(D) of the Illinois Securities Act (815 ILCS 5/13(D) (West 1992)), which may totally bar a variety of causes of action, even in cases where the plaintiff has not pleaded ***369** them as arising under the Illinois Securities Act. See, *e.g.,* Tregenza v. Lehman Bros., 287 Ill.App.3d 108, 222 Ill.Dec. 607, 678 N.E.2d 14 (1997). The five-year statute of repose for actions brought against public accountants (735 ILCS 5/13-214.2(b) (West 1992)) asserted by the Accountant defendants similarly acts as a total bar to suit. [FN4] The nature of these statutes distinguish this case from Bird.

FN4. Moreover, the statute of repose for actions against public accountants is not part of a comprehensive statutory scheme of the sort mentioned in Asbestospray. We also note that the Accountant defendants moved to strike a portion of plaintiffs' reply brief that challenged the trial courts' rulings that the five-year statute of repose for actions brought against public accountants applied in these cases. This court now denies that motion, the disposition of which does not affect the reasoning in this opinion.

In sum, the trial courts erred in dismissing the complaints as barred by the repose statutes.

III

[10] The question remains as to whether the dismissals may be sustained on some other basis appearing on the face of the record. A reviewing court generally looks at the judgment itself in deciding whether to reverse it, not at the trial court's reasoning for its judgment. *Material Service Corp. v. Department of Revenue*, 98 Ill.2d 382, 387, 75 Ill.Dec. 219, 457 N.E.2d 9, 12 (1983).

A

[11] In these cases, plaintiffs are suing on behalf of the City and County pursuant to section 20-104(b) of the Code, which authorizes citizen lawsuits to recover compensation, benefits or remuneration, treble damages, fines, costs and litigation expenses, where certain threshold criteria are met. See 735 ILCS 5/20-104(b) (West 2000). Plaintiffs' complaints also assert common law claims of fraud, breach of contract and fiduciary duty and accountant malpractice, claiming "common law derivative standing [as] taxpayers to bring an action for a public entity to recover or enjoin a misuse of public funds."
Lack of standing may be raised as a basis for dismissal under section 2- 619. *Glisson v. City of Marion*, 188 Ill.2d 211, 220, 242 Ill.Dec. 79, 720 N.E.2d 1034, 1039 (1999). Our supreme court has held that a taxpayer may maintain a suit in equity to ****920 *****549** enjoin the misappropriation or waste of public funds by public officials. *E.g.*, *Reid v. Smith*, 375 Ill. 147, 149, 30 N.E.2d 908, 910 (1940). Our supreme court also has held that a constructive trust may be imposed against third parties that benefit from a public officer's breach of his or her fiduciary duty. *People ex rel. Daley v. Warren Motors, Inc.*, 114 Ill.2d 305, 315, 102 Ill.Dec. 400, 500 N.E.2d 22, 26 (1986).
***370** In these cases, however, plaintiffs' complaints allege no breach of duty *by a public officer*. To the contrary, plaintiffs' complaints cast the City and the County as the unknowing victims of private third parties. Plaintiffs do not allege that these private third parties benefitted from a public officer's breach of duty. In sum, plaintiffs' complaints do not contain allegations that support their assertion of common law taxpayer derivative standing to pursue common law claims of fraud, breach of contract and fiduciary duty and accountant malpractice. [FN5]

FN5. Plaintiffs also conceded at oral argument that they waived their claim of breach of fiduciary duty against the accountant defendants by failing to address it in their appellate brief.

B

[12] Defendants argue that plaintiffs have failed to show they have standing because they cannot show injury. Defendants rely on *Greer v. Illinois Housing Development Authority*, 122 Ill.2d 462, 492-93, 120 Ill.Dec. 531, 524 N.E.2d 561, 575 (1988), which generally held that a plaintiff must claim an injury, whether actual or threatened, that is: (1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief. Defendants argue that because "[p]laintiffs concede that any overcharge would have to be paid to the IRS," the City and County were not injured.
Defendants cite paragraph 82 of the Scachitti Complaint for the purported "concession." Although not cited by defendants, similar language appears in paragraph 76 of the DiPaolo Complaint. A reading of both paragraphs shows that plaintiffs alleged that the markups on the U.S. Treasury securities pocketed by the Underwriter defendants should not have existed,

but if it did exist, belonged to the City and County who were responsible for turning a markup over to the IRS to avoid having the refunding bonds deemed taxable.
In these cases, assuming the allegations of the complaints to be true, as this court must in reviewing a dismissal, the Underwriter defendants fraudulently overcharged the City and County for U.S. Treasury securities by approximately $1,445,998.69. Such allegations clearly meet the criteria set forth in Greer. The possibility that the City or County may be or may have been required to pay these funds to the IRS would not defeat this argument, but would support it. The Underwriters cannot argue that the City or County may be required to pay the IRS funds out of their coffers, while the Underwriters retain the alleged overcharges.

*371 C

[13] Finally, Prudential argues that the claims against it are barred by its settlement in the federal lawsuit. Paragraph 6(b) of the settlement agreement among Prudential, the United States and the IRS provides in part that upon receipt of the settlement amount, the IRS would consider the United States Treasury Obligations sold in connection with government securities sales specified in an addendum **921 ***550 to the agreement to have been sold at fair market value. The 1993 City Refunding Bonds are listed in that addendum. In paragraph 7(b), the IRS agreed that it would not impose any tax, penalty, adjustment or addition against any of the issuers with respect to the sales listed in the addendum. In paragraph 13 of the agreement, the IRS further agreed that while the settlement agreement shall be construed as being for the benefit of the parties thereto, the issuers and holders of said bonds shall be entitled to enjoin the IRS from taking action inconsistent with the agreement. Paragraph 14 of the agreement states in part that nothing in the agreement should be treated as indicating a determination by the IRS that any bond issue was or is exempt under the provisions of sections 103 and 141-150 of the Code, except that the relevant sales of the United States Treasury Obligations shall have no effect on the tax exempt status of the bonds listed in an addendum to the agreement which includes the 1993 City Refunding Bonds.
Prudential argues that the settlement agreement bars the claims against it because the City is no longer threatened with the loss of tax-exempt status for the 1993 City Refunding Bonds. The cases cited by Prudential are readily distinguishable on their facts from the cases now on appeal. See Dixon v. Chicago and North Western Transportation Co., 151 Ill.2d 108, 115-17, 176 Ill.Dec. 6, 601 N.E.2d 704, 707-08 (1992); Wheatley v. Board of Educ. of Tp. High School Dist. 205, 99 Ill.2d 481, 484-85, 77 Ill.Dec. 115, 459 N.E.2d 1364, 1366 (1984); First Nat. Bank of Waukegan v. Kusper, 98 Ill.2d 226, 233, 74 Ill.Dec. 505, 456 N.E.2d 7, 9 (1983); People ex rel. Newdelman v. Weaver, 50 Ill.2d 237, 241, 278 N.E.2d 81, 83 (1972). However, these cases are based on the general rule that an issue is moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief. E.g., Dixon, 151 Ill.2d at 116, 176 Ill.Dec. 6, 601 N.E.2d at 708. The question is whether this rule applies to the cases on appeal.
Prudential argues that its settlement with the United States and the IRS renders the claims against Prudential moot, because the Scachitti Complaint is "wholly based on an IRS rule, and the IRS has now *372 found no violation of that rule." However, the terms of the settlement agreement, as summarized above, while protecting the City from adverse action by the IRS, do not require the conclusion that the IRS found no violation of the fair market value rule. Moreover, the allegations of the Scachitti Complaint are not wholly based on alleged federal tax law violations. Paragraph 119 of the Scachitti Complaint alleges in part that the markups charged by Prudential also were grossly excessive and unreasonable in light of prevailing market rates, as measured against markups on the winning offer in municipal bond refunding transactions where dealers competed to sell Treasury securities to an escrow. While the Scachitti Complaint also alleges that Prudential was hired by negotiation, rather than by competitive bidding, taking the allegations to be true, and drawing all inferences favorable to the plaintiffs, this court cannot conclude that the typical markup in a competitive bidding setting is an improper measure of fair market value. Nor have the parties discussed the

specific terms of the negotiated hiring of Prudential relating to amounts that could be retained by Prudential in return for its services. [FN6]

FN6. After oral argument in these cases, Everen and Blair filed a Joint Motion to Advise the Court of Recent Federal Settlements. Attached to the motion is a settlement among First Union Securities (the successor to Everen), the United States and the IRS, in the federal **False Claims Act** lawsuit. The relevant language of this settlement agreement is substantially similar to the Prudential settlement. Also attached to the motion is an agreement between the IRS and Blair. The language of this agreement is not substantially similar to the other settlements,

> particularly insofar as it does not expressly state that the issuers may assert the agreement as against the IRS, though paragraphs 3 and 9 may make the issuers intended third-party beneficiaries.
>
> Objections were filed to the Joint Motion. A Motion to File a Reply Brief was filed in response to the Objections. This court grants the Joint Motion over objection, and denies the motion to file a reply. However, the settlements are no more helpful to Everen and Blair than the settlement raised by Prudential. We also note that ¶ 77 of the DiPaolo Complaint alleges that the markups charged by Blair also were grossly excessive and unreasonable in light of prevailing market rates. Accordingly, the settlements attached to the Joint Motion do not support dismissals in this case, for the same reasons discussed in the main body of this opinion regarding Prudential.

For all of the aforementioned reasons, the orders of the circuit court of Cook ***922 ****551* County are affirmed, except for the dismissal counts I and II of each complaint, which are brought against the Underwriter defendants pursuant to Article XX of the Code. The dismissal of counts ***373* I and II of each complaint are reversed and the cases are remanded to the circuit court for further proceedings consistent with this opinion.
Affirmed in part, reversed in part, and remanded.

QUINN and REID, JJ., concur.
Ill.App. 1 Dist.,2002.
City of Chicago ex rel. Scachitti v. Prudential Securities, Inc.
332 Ill.App.3d 353, 772 N.E.2d 906, 265 Ill.Dec. 535

Briefs and Other Related Documents (Back to top)

- 2002 WL 32255501 (Appellate Brief) Brief of Defendants-Appellees Deloitte & Touche LLP and Altschuler, Melvoin and Glasser, LLP (Jan. 25, 2002)Original Image of this Document (PDF)
- 2002 WL 32255503 (Appellate Brief) Brief of Defendants-Appellees Prudential Securities Incorporated, Everen Securities Inc., and William Blair & Company, LLC (Jan. 25, 2002)Original Image of this Document (PDF)
- 2001 WL 34316187 (Appellate Brief) Opening Brief of Plaintiffs-Appellants (Nov. 21, 2001)Original Image of this Document (PDF)

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TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

| 3729.False claims

(a) Liability for certain acts. Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986 [Title 26, USCS].

TITLE 31. MONEY AND FINANCE SUBTITLE III. FINANCIAL MANAGEMENT CHAPTER 37. CLAIMS SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT 31 USCS | 3730 (1994)

| 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the

court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to *qui tam* actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to *qui tam* plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been

necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing,

in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

TITLE 31. MONEY AND FINANCE

SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT
31 USCS | 3731 (1994)

| 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title [31 USCS | 3730] may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought--

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

TITLE 31. MONEY AND FINANCE SUBTITLE III. FINANCIAL MANAGEMENT CHAPTER 37. CLAIMS SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT 31 USCS | 3732 (1994)

| 3732. False claims jurisdiction

(a) Actions under section 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under state law. The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

TITLE 31. MONEY AND FINANCE
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SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT
31 USCS | 3733 (1994)

| 3733. Civil investigative demands

(a) In general.

(1) Issuance and service. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person--

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony. The Attorney General may not delegate the authority to issue civil investigative demands under this

subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines.

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall--

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall--

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall--

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) Protected material or information.

(1) In general. A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under--

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws. Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) Service; jurisdiction.

(1) By whom served. Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries. Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District

Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) Service upon legal entities and natural persons.

(1) Legal entities. Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by--

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons. Service of any such demand or petition may be made upon any natural person by--

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) Proof of service. A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary material.

(1) Sworn certificates. The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by--

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person. The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials. Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories. Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by--

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) Oral examinations.

(1) Procedures. The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present. The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken. The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such

other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony. When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian. The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness. Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony.

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances. Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) Custodians of documents, answers, and transcripts.

(1) Designation. The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure.

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe--

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings. Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material,

answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material. If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and--

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians. In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly--

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated. Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) Judicial proceedings.

(1) Petition for enforcement. Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts

business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand.

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery.

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the

petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties. At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction. Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) Disclosure exemption. Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) Definitions. For purposes of this section--

(1) the term "false claims law" means--

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section [enacted Oct. 27, 1986] which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes--

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

Federal Suspension and Debarment
Competition, Compliance and Consequences Conference
Oconomowoc, Wisconsin
March 23, 2004

Julie C. Trunk
Federal Highway Administration

Let me begin by sharing with you some of the recent activities that are the foundation for the current Federal suspension and debarment (S/D) environment. Federal Highway Administrator, Ms. Mary Peters, has clearly made S/D a high priority of the agency. It was almost a year ago, April 1st, when the Associate Administrator for Infrastructure and designated Debarring Official, Mr. King Gee, emphasized to FHWA field offices the importance of utilizing S/D actions to protect against fraud in the Federal-Aid Highway Program. And, at the same time, I began initiating other activities to strengthen our S/D process – improving communications, coordination, and knowledge.

There have been Executive Orders – President Reagan in 1986 and President Bush in 1989 – to strengthen Federal S/D actions to curb fraud, waste, and abuse in Federal program. The Interagency Committee on Suspension and Debarment was created to monitor and foster uniformity in Federal S/D processes. A major accomplishment of the Committee occurred on November 26, 2003, when the final rule on government-wide suspension and debarment for non-procurement became effective.

There are two (2) regulations governing FHWA S/D – the 48 CFR applies to procurement contracts (when the Federal government is the contracting agency) and the 49 CFR applies to non-procurement (when a Federal-aid recipient (e.g. state transportation department) is the contracting agency). The S/D actions and procedures are similar but I will focus my presentation on the non-procurement regulations.

Suspension and debarment are discretionary actions taken to protect the Federal government by excluding certain persons and firms form participating in Federal programs. S/D actions ensure that the Federal government does business with persons and firms with integrity and business ethics. Exclusion from any procurement or non-procurement program initiated on or after August 25, 1995, means exclusion from both programs. S/D actions are:

- Administered government-wide; consequently, persons and firms excluded by one Federal agency are excluded from doing business with all Federal agencies. The GSA maintains a government-wide list of excluded parties. This list is available on the web at http://epls.arnet.gov. Note that a contractor is certifying when he signs the Federal-aid contract that all firms conducting work on that project are not excluded from doing business with the Federal government;

- Administrative actions NOT taken to punish persons and firms;
- Prospective, meaning they do not apply to existing contracts.

S/D actions apply to covered transactions:

- Primary covered transactions – transactions between FHWA and Federal-aid recipient (STA, local governments, etc.)
- Lower tier covered transactions are those covered under the primary covered transaction:
  - Non-procurement contract between a participant and a person providing goods and services
  - Procurement contracts for goods and services => small purchase threshold of $25,000.
  - Procurement contract between a participant and a person for goods and services, regardless of the amount, under which that person will have a critical influence on or substantial control over that covered transaction

Suspension actions are taken to protect the Federal government by excluding persons and firms proposed for debarment from participation in the Federal assistance programs while debarment action is in process. An indictment is adequate evidence that a cause for debarment exists and suspension actions can be taken. Suspension actions are temporary and generally imposed for a period of one (1) year or less but can be extended if the need arise.

Debarment actions are generally for three (3) years or less, but can be longer, even permanent, if the cause for debarment is severe enough. Conviction is deemed adequate cause for debarment. Debarment periods generally begin retroactive from the date of suspension action. Within 6 months of knowledge of cause for debarment, S/D actions will be initiated.

The purpose of the FHWA Order 2000.2A, "FHWA Nonprocurement Suspension and Debarment Process (Federal-Aid Program)," is to prescribe policy and guidelines for processing suspension and debarment actions. The order lays out how we are implementing the regulations on S/D.

The S/D process begins with the FHWA Division Administrator becoming aware of the possible causes for debarment of a person and/or firm. There are many different sources where this information can come from:

- State-level S/D actions.
- OIG investigative reports.
- DOG/USA investigations.
- Civil and/or criminal court actions.
- Any king of media reports.
- Debarring official or coordinator.

Once the Division Administrator becomes aware of possible causes for debarment of a person and/or firm, he or she will coordinate the investigation of all information and provide a report to the Resource Center Assistant Counsel.

The assistant counsel will further investigate the possible causes of debarment and identify if any warrant S/D action. Within 6 months of knowledge of cause for debarment, S/D actions will be initiated.

The next step in the process is the headquarter-level review. This begins with the Debarring Official receiving an S/D package from the Division Administrator. The S/D package contains:

- The Division Administrator's S/D recommended action including length of action;
- The impact of the S/D action on the Federal-Aid Highway Program (e.g. impact on competition);
- And, detailed documentation of cause for debarment.

Some Federal agencies notify the persons and firms that S/D actions are being considered. FHWA is not in the practice of doing this.

At this point, our S/D legal advisor and I begin reviewing and assessing the information in the S/D package. Processing delays can occur if further information is needed to make a thorough assessment. Working together, we determine what S/D action to recommend to the debarring official. This recommendation along with the S/D package and any additional pertinent information is submitted to the debarring official.

After reviewing the recommendation and supporting information, the debarring official decides on what S/D action to implement. Persons and firms being considered for S/D action are notified of the Debarring Official's decision if an action is being taken. If this is the case, the persons and/or firms and the action will also promptly be posted on the GSA Excluded Parties Listing (http://epls.arnet.gov).

Persons and firms have 30 calendar days to appeal the debarring official's decision. The appeal process is informal and can be submitted in person, in writing, or through a representative, or a combination of the aforementioned. A final decision will be made by the Debarring Official 45 calendar days after the appeal is completed

At any time while a person and/or firm is debarred, they can request a reconsideration of the decision. Of course, they need to provide adequate information supporting their reason for reconsideration (e.g. changed conditions, new information, etc.). Reconsideration requests are processed similar to appeals

In closing, let me emphasize a few points. S/D actions are:

- Discretionary.
- Possible decisions - No action, suspension, debarment, negotiated agreements.
- Based on a preponderance of the evidence.

- NOT taken to punish persons and firms.
- NOT always for the same duration as a State's S/D action.

Suspension and debarment is an ongoing priority in FHWA. We will continue the strengthening initiatives to improve communication, coordination, and education that we began a year ago. We have already seen improvements. Our field offices have submitted about 15 recommendations for S/D actions this last year compared to maybe receiving 1-2 recommendations per year before. So we are making progress on strengthening our S/D process and will continue to do so.

Federal Highway Administration

Federal Suspension & Debarment

Julie Trunk

Competition, Compliance and Consequences Conference
Oconomowoc, Wisconsin
March23, 2004

Introduction

- Priority of FHWA Administrator
- Debarring Official strengthening suspension and debarment process
- Executive Orders 12549 and 12689
- Interagency Suspension and Debarment Committee (ISDC)
- Common Rule November 26, 2003

Federal Highway Administration Suspension and Debarment Regulations

- 48 CFR Subpart 9.4, Federal Acquisition Regulations (FARS)
- 49 CFR Part 29, Government-wide Debarment and Suspension (Nonprocurement)

Suspension & Debarment . . .

- Discretionary administrative actions
- Protect the interest of the government
- Government-wide
- Not punitive

Suspension

- Action taken immediately to protect the public's interest
- For a temporary period, pending the completion of a debarment process
- An indictment is cause for suspension

Debarment

- Generally, 3 years or less, but a longer period may be imposed
- Conviction is cause for debarment
- Debarment period generally begins retroactive from the date of suspension

FHWA Suspension and Debarment Process

FHWA Order 2000.2A

"FHWA Nonprocurement Suspension and Debarment Process (Federal-Aid Program)"

June 19, 2000

Federal Highway Administration

Awareness of Cause for Debarment

- Division Administrator becomes aware of possible cause for debarment
- Some sources of information include . . .
  - State-level S/D actions
  - OIG investigative reports
  - DOJ/USA investigations
  - Civil and/or criminal court actions
  - Any kind of media reports
  - Debarring Official or Coordinator

Investigate Causes for Debarment

- Division Administrator will coordinate the investigation of all information and provide a report to the Resource Center Assistant Counsel
- Assistant Counsel will identify any of the causes warranting S/D action
- S/D actions will be initiated within 6 months of knowledge of cause for debarment

Recommendation for S/D Action

- Debarring Official receives S/D package from Division Administrator
- S/D package contains:
  - Recommended S/D action and length of action
  - Impact on the Federal-Aid Highway Program
  - Detailed documentation of cause for debarment

Assess S/D Recommendation

- S/D Coordinator and S/D legal advisor promptly review and assess information in the S/D package
- Delays can occur if further information is needed to make a thorough assessment
- The Debarring Official receives the S/D package with a review/recommendation memorandum from the S/D legal advisor

Decision of S/D Action

- Debarring Official makes a decision based on the review and assessment of the S/D recommendation package
- Persons and/or firms being considered for S/D action are notified of Debarring Official's decision
- If a S/D action is being made, it will be promptly posted on the GSA Excluded Parties Listing (http://epls.arnet.gov).

Appeal of S/D Action

- Suspended, proposed for debarment, and debarred persons and/or firms have 30 calendar days to appeal the decision
- The appeal can be submitted in person, in writing, or through a representative
- A final decision will be made by the Debarring Official 45 calendar days after the appeal

Reconsideration of S/D Action

- At any time during a debarment, the person and/or firm can request a reconsideration
- Information supporting a cause for reconsideration should be provided
- The information is assessed by the Debarring Official and advisors
- Debarring Official makes a decision to maintain, modify or rescind the initial S/D action

Conclusion

- S/D is an ongoing FHWA priority
- Continue to improve the process through
  - Education
  - Communication
  - Coordination
  - Partnerships

Thank You

Federal Highway Administration

OLR RESEARCH REPORT

October 31, 2001 2001-R-0761

FALSE CLAIMS ACT

By: Sandra Norman-Eady, Chief Attorney

You asked us to look into the (1) feasibility of changing Connecticut's whistleblower laws in light of a proposal you received for a state False Claims Act and (2) effectiveness of False Claims Acts adopted in other states.

We have responded to your question by (1) comparing major provisions of state false claims acts of general application (including the Connecticut proposal) to the federal act, (2) contacting states to determine the number of cases filed under their acts and the recoveries received, and (3) summarizing the proposal and current statutory provisions on whistleblower protections.

SUMMARY

The federal False Claims Act of 1986 allows the federal government to bring civil actions to recover damages and civil penalties for false claims made to the federal government. The act also provides for *qui tam* suits, that is, suits brought by a private informant in the name of the government charging fraud on the part of people who receive or use government funds. The federal False Claims Act covers fraud involving any federally funded contract or program, except tax fraud.

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Between 1986 and the third quarter of 2000 the federal government recovered $4.174 billion in false claims actions involving *qui tam* plaintiffs, $3.962 billion in cases the government pursued on its own, and $211 million in *qui tam* cases where the government declined to be involved, according to a September 2000 Department of Justice report.

After passage of the federal act, states began enacting their own false claim acts to address problems of fraud in state and local programs, which are not covered under the federal law. The first to act was California. The California False Claims Act, which was enacted in 1987, is patterned directly after the federal act. It differs from the federal act in four primary ways: it (1) is narrower in its application (e.g., it is inapplicable to controversies involving less than $300, workers' compensation claims, tax claims, and claims against public entities and employees), (2) bars *qui tam* suits in a somewhat broader variety of circumstances (e.g., state employees cannot bring certain suits), and (3) allows *qui tam* plaintiffs to receive a larger share of proceeds generated by false claims actions under certain circumstances. Also, the act may be applied retroactively so long as the limitation period has not lapsed.

The states that followed California with a false claims act of general application are Delaware (adopted in 2000), Florida (1994), Hawaii (2000), Illinois (1987), Massachusetts (2000), and Nevada (1999). The District of Columbia also adopted a code (1998). Like California's act, the acts adopted in these states are modeled after the federal law. Arkansas, Louisiana, Tennessee, and Texas have adopted acts to address medical assistance or Medicaid fraud only (we do not discuss these states in this report). So far we have not found statistics in any of the eight states (including the district) on the number of cases filed or monies recovered, but we are still waiting for some calls to be returned. In states likes Delaware, Hawaii, Massachusetts, and Nevada where the act was adopted just recently, it may be too soon to tell. We will forward to you any information we receive subsequently.

The proposal that you received for a Connecticut False Claims Act is of general application and greatly resembles California's False Claims Act. There are however, minor differences in penalties, qui tam procedures, how proceeds are divided, and whistleblower protections.

The most obvious distinction between the proposal and the state's whistleblowers statutes is that the former contains *qui tam* provisions and the latter does not. In addition, the proposal places more restrictions on employers and imposes harsher penalties.

Connecticut has three whistleblower statutes of general application. The first is designed to protect reporters of mismanagement, waste, or illegal activities taking place in public and quasi-public agencies. It allows people who are aware of illegal, corruptive, or unethical practices to report such practices to the state auditors.

The second was enacted to protect private employees. It prohibits an employer from penalizing an employee who reports violation of a state or federal law; state, federal, or municipal regulation; or municipal ordinance to a public body.

The third generally makes employers liable to employees who are disciplined or discharged because they exercised (1) any right guaranteed by the First Amendment to the federal constitution or (2) their right to freedom of religion, speech and press, or to assembly for redress of grievances under Article First of the state constitution.

Two whistleblower statutes govern disclosures by employees and contractors of information regarding wrongdoing by public service companies or contractors or Nuclear Regulatory Commission licensees. This report describes the first three statutes in detail.

COMPARISON OF FALSE CLAIM ACTS

Seven states plus the District of Columbia have adopted false claim acts. Table 1 compares these acts and the Connecticut proposal to the federal False Claims Act.

CONNECTICUT FALSE CLAIMS ACT PROPOSAL

False Claim Acts and Penalties

With limited exceptions, this proposal makes anyone who defrauds or attempts to defraud the state or its political subdivisions (cities, cities and counties, counties, districts, other authorized local governmental entities, or the Connecticut State University System or University of Connecticut) liable for damages, civil penalties, and court costs. The proposal must be liberally construed and applied to promote the public interest. Its provisions are not exclusive, and the remedies it provides are in addition to any other remedies provided for in any other law or under common law. Actions for proposal violations have precedence for trial over all other civil actions.

The proposal does not apply to workers' compensation claims; claims, records, or statements made under the Revenue and Tax Code; or any false claim covered by the proposal involving less than $500.

A person defrauds or attempts to defraud the state or a political subdivision by:

1. knowingly (actually knows, deliberately ignores, or recklessly disregards the truth or falsity of information) presenting or causing to be presented a false claim for payment or approval to a state or political subdivision officer or employee;

2. knowingly making, using, or causing to be made or used a false record or statement to get a state or political subdivision to pay or approve a false claim, including submitting an uncertified contract for payment when the contract requires certification;

3. conspiring to get the state or a political subdivision to allow or pay a false claim;

4. having possession, custody, or control of public property or money and knowingly delivering or causing to be delivered less property than the amount for which the person receives a certificate or receipt;

5. knowingly makes or delivers a receipt that falsely represents the state's or political subdivision's receipt of property it allegedly used or is supposed to use;

6. knowingly buys or receives public property as a pledge of an obligation or debt from someone who could not lawfully sell or pledge it;

7. knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state or to any political subdivision; or

8. failing to disclose to the state or a political subdivision, within a reasonable time, a false claim he discovers, which inadvertently benefits him.

When construing alleged violations of the proposal, courts must be guided by federal court interpretations of the Food and Drug Act, Social Security Act, and Federal False Claims Act.

A person who defrauds or attempts to defraud a governmental entity as provided under this act is jointly and severally liable for treble damages, attorney's fees, and court costs. If damages are proved, the person is subject to a civil penalty of $2,000 to $10,000 for each false claim. A "claim" includes any request or demand for money, property, or services presented to any state or political subdivision employee, officer, or agent for payment or reimbursement from public funds. A court can eliminate the penalty and reduce the damages to between two and three times the damages the state or political subdivision sustains if it finds that the violator:

1. gave all the information he knew about the violation within 30 days after he first received it to state or political subdivision officials responsible for investigating false claims violations,

2. fully cooperated with the state's or political subdivision's investigation into the violation, or

3. did not have actual knowledge of an investigation into the violation and there was no criminal prosecution or civil or administrative action when he furnished the information.

A defendant who is found guilty (including a guilty plea or *nolo contendere*) in a criminal action for false statements or fraud cannot deny the essential elements of the offense in any action that involves the same transaction or series of transactions as the civil case brought under the proposal.

Investigations and Civil Action Filed by the State or a Political Subdivision

The attorney general and political subdivision prosecuting authority must diligently investigate violations of the act that involve state or political subdivision funds, respectively, and may bring a civil action against any violator. If either brings an action on a claim involving both funding sources, he must mail (return receipt requested) a copy of the complaint to the other on the date it is filed. The political subdivision has the right to intervene within 60 days after receipt of any complaint filed by the attorney general. If a political subdivision files the complaint, the attorney general has the same 60 days, to either assume primary responsibility for conducting the action (with the political subdivision as a party) or notify the court of his intention to decline to proceed with the action, leaving the political subdivision with the right to conduct the action.

Actions By Qui Tam Plaintiffs

An individual may bring a civil action for violation of the act in his name and in the name of the state or a political subdivision, depending on the funds involved. The individual must be referred to as the *qui tam* plaintiff. Once filed, the action may be dismissed only with the court's consent, taking into account the parties' best interests and the public purposes behind the act. Once a person files the complaint, no one else may bring a related action based on the same facts.

The *qui tam* plaintiff must file his complaint in Superior Court *in camera* (in private) and it can remain under seal for up to 60 days (or longer if the attorney general requests an extension for cause *see below*). The complaint may not be served on a defendant until after it is unsealed. The defendant is not required to respond to the complaint until 30 days after he receives it. The statute of limitations for bringing the action must be tolled during the period the complaint remains under seal plus 30 days.

Involving State Funds. On the date he files the complaint, the *qui tam* plaintiff must mail (return receipt requested) a copy of it and a written disclosure of all the material evidence he has to the attorney general. Within 60 days after receipt of any complaint involving state funds, the attorney general must notify the court of his intention to (1) proceed with the action, in which case he must conduct the action and the seal must be lifted or (2) decline to proceed with the action, in which case the court must lift the seal and the *qui tam* plaintiff has the right to conduct the action.

Involving Political Subdivision Funds. Within 15 days after receipt of any complaint involving political subdivision funds (in whole or part), the attorney general must decide whether to prosecute or defer to the political subdivision and notify the *qui tam* plaintiff and political subdivision of his decision. Within 45 days of the attorney general's decision to defer to a prosecuting authority, the authority must take the same action as the attorney general regarding his decision whether to proceed with the action. Like the attorney general, he may request an extension of the seal on the complaint. But, unlike the attorney general, his motion must be supported by affidavits or other submissions *in camera*.

Involving State and Political Subdivision Funds. Within 15 days after receiving a complaint alleging a violation involving state and political subdivision funds, the attorney general must send copies of it and written disclosure to, and coordinate his review and investigation with, the appropriate political subdivision. Within 60 days after receiving the materials, the attorney general must notify the court (1) of his intention to proceed with the action, in which case the seal must be lifted; (2) that he will not proceed but that the political subdivision will, in which case the seal must be lifted; or (3) that both he and the political subdivision decline to proceed, in which case the *qui tam* plaintiff has the right to conduct the action. Within 60 days after the attorney general notifies the court that he will proceed with the action, the political subdivision can move to intervene.

Court Jurisdiction over Qui Tam Actions. No court has jurisdiction over a *qui tam* action based on:

1. evidence or information known to the state or political subdivision against a legislator, judge, executive branch elected officials, or member of a political subdivision's governing body;

2. allegations or transactions publicly disclosed in a criminal or civil action; administrative hearing; or investigation, report, hearing, or audit conducted by or at the request of the House or Senate, state auditors, governing body of a political subdivision, or news media (does not include actions brought by the attorney general, a political subdivision, or an "original source" (see definition below)); or

3. information discovered by a present or former state or political subdivision employee during the course of his employment, unless he, in good faith, first exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and the state or political subdivision failed to act within a reasonable time.

An "original source" is an individual who has direct and independent knowledge of the information that forms the basis of the allegations; provided the information to the proper public entity before filing the action; and whose information was the basis for the investigation, hearing, audit, or report that led to the public disclosure.

A person cannot bring a *qui tam* action based on allegations or transactions that are the subject of a civil suit or an administrative civil damage proceeding where the state or political subdivision is already a party.

Rights of Parties to Qui Tam Actions. The state or political subdivision is primarily responsible for prosecuting any action it elects to continue, but the *qui tam* plaintiff has the right to continue as a full party to the action. However, if the attorney general or political subdivision can show that the *qui tam* plaintiff's unrestricted participation in the litigation would interfere with or unduly delay prosecution or would be repetitious, irrelevant, or harassing, the court may (1) limit the number of witnesses he can call, (2) limit the length of his witnesses' testimony, (3) limit his cross-examinations, or (4) otherwise limit his participation.

In cases where a governmental entity is the primary party, it may seek to dismiss the action for good cause even if the *qui tam* plaintiff objects if the entity notifies the plaintiff of the motion and the court gives him the opportunity to oppose the motion and present evidence at a hearing. They may settle the action despite the plaintiff's objection if the court determines, after a hearing where the plaintiff could present evidence, that the proposed settlement is fair, adequate, and reasonable under all circumstances.

The *qui tam* plaintiff has the same right to conduct the action as the state or political subdivision would have if it had chosen to proceed. The plaintiff must provide the state or political subdivision, upon request, with copies of all filed pleadings and deposition transcripts at the entity's expense.

The state or political subdivision can intervene, if it makes a timely request, in an action that it declined to bring if the *qui tam* plaintiff is not adequately representing its interest in the recovery of property or funds involved. In the case of such an intervention, the *qui tam* plaintiff retains principal responsibility for the action and the parties' recovery is determined as if the state or political subdivision elected not to proceed. The party bringing the action (attorney general, political subdivision, or *qui tam* plaintiff) must prove all essential elements of the action by a preponderance of the evidence.

Awarding Proceeds in False Claim Actions

Any proceeds (civil penalties or double or treble damages) recovered in a false claims action must be distributed as follows.

If the attorney general brings the action or takes over an action brought by a political subdivision, he gets 33% of the proceeds, including settlement of the claim. If a political subdivision initiates and conducts the action it gets 33% of the proceeds. They must each use the proceeds to support ongoing false claims investigations and prosecutions.

If a political subdivision intervenes in an action brought by the attorney general or remains a party to an action the attorney general assumes, the court may award it a portion of the attorney general's 33% recovery, taking into account the subdivision's role in investigating and conducting the action.

If the state or a political subdivision intervenes in an action brought by a *qui tam* plaintiff, the plaintiff can recover between 15% and 33% of the proceeds, depending on his contribution. The state or political subdivision gets 33%, which must be used to support ongoing false claims investigations and prosecutions. If both the state and a political subdivision are involved in a *qui tam* action, the court may award the political subdivision a portion of the attorney general's 33%, taking into account its contribution to the investigation or prosecution.

In a *qui tam* action where the government does not intervene, the court must award the plaintiff between 25% and 50% of the proceeds, based on reasonableness. However, a *qui tam* plaintiff is not guaranteed a minimum recovery from the proceeds when he is a present or former government employee who (1) initiated an action without first exhausting internal procedures or (2) actively participated in the fraudulent activity.

The court may, instead, award any sum it deems appropriate, but in no case more than 33% if the state or a political subdivision takes over the *qui tam* action or 50% if they do not. The court must consider, as appropriate, (1) the significance of the information the plaintiff provided; (2) his role in advancing the case to litigation; (3) the scope of, and response to, his attempts to report and gain recovery of the falsely claimed funds through official channels; (4) the scope of his involvement in the fraudulent activity; (5) his attempts to avoid or resist the activity; and (6) surrounding circumstances.

Proceeds remaining after distribution must revert to the governmental entity whose funds were exclusively involved in the action. If more than one entity's funds were involved, the court must apportion the proceeds based on the relative share of the funds falsely claimed.

False Claims Fund

The act establishes a False Claims Act Fund in the state treasury for proceeds of actions or settlements by the attorney general. The legislature may appropriate fund proceeds to the attorney general for support of ongoing false claims investigations and prosecutions.

Costs and Attorney's Fees

In a successful false claims action or settlement, the court must order the defendant to pay any *qui tam* plaintiff's reasonable, necessary expenses; and attorney's fees. If the defendant prevails and the court finds that the claim was clearly frivolous or vexatious or brought solely to harass, it may order the *qui tam* plaintiff to pay the defendant reasonable attorney's fees and expenses.

Whistleblower Protection

Under the act, all employees have a right to (1) disclose activities that violate the act to a government or law enforcement agency and (2) bring a false claims action. Employers cannot make, adopt, or enforce any rule, regulation, or policy preventing the disclosure or action, including investigating initiating, testifying, or assisting in an action filed or intended to be filed under the act.

The act also prohibits an employer from discharging, demoting, suspending, threatening, harassing, coercing, denying a promotion to, or otherwise discriminating or retaliating against an employee who exercises his rights. Under limited circumstances, an employer who violates the act is liable for all relief necessary to make the employee whole, including reinstatement at the seniority level the employee would have had but for the discrimination; two times the amount of back pay plus interest; special damages; and, where appropriate, front pay and punitive damages. In addition it must pay court expenses, litigation costs, and reasonable attorney's fees. An employer is only liable to an employee as stated above if the employee (1) voluntarily gave a government or law enforcement agency information concerning or otherwise acted in furtherance of a false claim action (participated in investigation, provided testimony, or initiated an action) and (2) was

harassed, threatened with termination or demotion, or otherwise coerced by his employer or management into engaging in fraudulent activity.

Employees may bring an action for discrimination or retaliation under the act in Superior Court. The action has precedence over all other civil actions.

An employee seeking relief under the act must prove by a preponderance of the evidence that an activity protected by the act was a contributing factor in the alleged retaliatory action. Once proved, the employer must prove by clear and convincing evidence that the alleged action occurred for legitimate, independent reasons. If the employer fails to meet this burden of proof, the employee has a complete and affirmative defense in any adverse action against him.

As further protection of *qui tam* plaintiffs, the court may stay discovery of the *qui tam* plaintiff for up to 60 days if the attorney general or political subdivision shows, *in camera*, that discovery would interfere with a criminal or civil investigation or prosecution arising out of the same facts, regardless of whether either brings an action. The court may extend the stay upon further showing *in camera* that the attorney general or political subdivision has pursued the investigation or proceedings with reasonable diligence and that discovery would interfere in ongoing proceedings.

The rights provided under this act are in addition to and do not diminish the rights, privileges, or remedies employees have under federal or state law, employment contract, or collective bargaining agreement.

Limitations Period

Civil actions brought under the act must be filed within six years after the violation occurred or within three years after it is discovered but not more than 10 years after the violation. The act applies retroactively if the limitation period has not expired.

Severability and Other Remedies

If any provision of the act or its application to certain people or circumstances is held to be unconstitutional, the remaining provisions and the affected provision's application to other people or circumstances are not affected.

CONNECTICUT WHISTLEBLOWER STATUTES

Whistleblower Law for Public Employees

Anyone who knows of any corruption, unethical practices, state law or regulation violations, mismanagement, gross waste of funds, abuse of authority, or danger to public safety occurring in any state department or agency or quasi-public agency may send information to the state auditors. The auditors must review the matter and report their findings and recommendations to the attorney general, who must conduct any investigation he deems proper. The auditors may assist with the investigations. After his investigation, the attorney general must, when necessary, report his findings to the governor. If the matter involves a crime, he must report it to the chief state's attorney. Neither the auditors nor the attorney general may reveal the name of their informant without his consent, except where it is unavoidable during the course of the investigation (CGS § 4-61dd(a)).

State officers, employees, and appointing authorities are prohibited from taking or threatening to take any personnel action against a state employee in retaliation for his disclosure of information to the auditors or the attorney general. A state employee who believes he has been retaliated against may file an appeal to the employees' review board within 30 days or, if he is covered by a collective bargaining agreement, may appeal in accordance with that agreement. Any employee who knowingly or maliciously makes false charges can be disciplined or discharged (CGS § 4-61dd (b) and (c)).

By September 1 annually, the auditors must give the House and Senate clerk a report of the number of whistleblower matters transmitted to their office (CGS § 4-61dd (d)).

Whistleblower Protection for Private Employees

Employers cannot discharge, discipline, or otherwise penalize an employee because the employee or someone acting on his behalf reports a violation or suspected violation of federal, state, or municipal law, ordinance, or regulation to a public body. These employers are also prohibited from penalizing the employee because the public body asks him to participate in an investigation, hearing, or inquiry, or court action. No municipal employer can subject an employee to any such action because he reported the employer's unethical practices, mismanagement, or abuse of authority. Employers do not violate the law if they discipline employees who knowingly make a false report.

Any employee who is so discharged, disciplined, or penalized in violation of the law may, after exhausting all administrative remedies, bring a civil action within 90 days of the violation or final administrative decision in the Superior Court for the judicial district where the violation occurred or the employer has its principal office. The court may (1) order the employer to reinstate the employee, pay him back wages, or reestablish his benefits, as the case may be, and (2) award the prevailing party his costs and reasonable attorney's fees (CGS § 31-51m).

Protecting Employees' First Amendment Rights

Employers, including the state and its political subdivisions, are liable to any employee who is disciplined or discharged because he exercised any right guaranteed by the First Amendment to the federal constitution (i.e., freedom of speech, press, religion, and assembly) or Sections 3, 4, or 14 (i.e., religion, speech and press, and assembly, respectively) of Article First of the state constitution. The employers are liable for damages, including punitive damages, and reasonable attorneys' fees. A court may also award employers costs and reasonable attorneys' fees if it determines that the lawsuit was filed without substantial justification.

The law does not prohibit employers from disciplining or discharging employees whose involvement in these activities interferes with their job performance or the working relationship between employer and employee (CGS § 31-51q).

CURRENT STATUTES

FEDERAL	CALIFORNIA	NEVADA	D.C.	FLORIDA	ILLINOIS	MASS.	DELAWARE	HAWAII
31 U.S.C. §§ 3729 et seq.	Gov. Code §§ 12650 et seq.	Nev. Rev. Stat. Ch. 357	D.C. Code § 1-(188.13) et seq.	Fl. St. 68.081 et seq.	740 ILCS 175/3 et seq.	Mass. Gen Laws C. 12(c)	Del. Code Ch. 12 § 1201	HRS § 661
3729 (a) (1) knowingly presenting or causing to be presented a false or fraudulent claim for payment or approval; (2) knowingly making, using, or causing to be made or used, a false record or statement to get a false or fraudulent claim paid or approved; (3) conspiring to defraud by getting a false or fraudulent claim allowed or paid; (4) delivering or causing to be delivered less property than the amount for which the person receives a certificate or receipt; (5) with intent to defraud, making or delivering a receipt without completely knowing that the information on the receipt is true; (6) knowingly buying public property from a government employees who does not have the legal right to sell the property; and (7) knowingly making or using a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.	12651 (a) Acts prohibited by federal statute, plus (b) Being a beneficiary of an inadvertent submission of a false claim, subsequently discovering the falsity of the claim, and failing to disclose the false claim within a reasonable time.	357.040 Acts prohibited by federal statute, plus (b) Being a beneficiary of an inadvertent submission of a false claim and, after discovering the falsity of the claim, failing to disclose the falsity within a reasonable time.	1-1188.14(a) Acts prohibited by Federal statute, plus (8) Being a beneficiary of an inadvertent submission of a false claim, subsequently discovering the falsity of the claim, and failing to disclose the false claim within a reasonable time; and (9) Being a beneficiary of an inadvertent payment or overpayment of monies not due and knowingly failing to repay the inadvertent payment or overpayment	68.082 (2) Substantively similar to federal statute	175/3 § 3(a) Substantively similar to federal statute.	§ 2(d) Substantively similar to federal statute except: Fourth enumerated prohibition includes money as well as property. § 2(g) Adds contracting knowing the information in the contract is false as a separate prohibition	Substantively similar to federal statute.	§ 661-21 Substantively similar to California Statute.
3729(c) Any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.	12650(a)(1) Substantively similar to federal statute, but "claims" include requests or demands for "money, property, or services."	357.020 Substantively similar to federal statute, but "claims" include requests or demands for "money, property, or services."	1-1188.13(1) Substantively similar to federal statute, but "claims" include requests or demands for "money, property, or services."	68.082(1)(b) Substantively similar to federal statute, but "claims" include requests or demands for "money, property, or services."	175/3 § 3(c) Substantively similar to federal statute.	§ 1(b) Substantively similar to federal statute.	Substantively similar to federal statute.	§ 661-21 Substantively similar to federal statute.
3729(b) "Knowing" and "knowingly" mean that a person, with respect to information- (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.	12650(a)(2) Substantively similar to federal definition.	357.040(2) Substantively similar to federal definition.	1-1188.13(j) Substantively similar to federal statute.	68.082(1)(e) Substantively similar to federal statute; provides that "innocent mistake" is a defense.	75/3 § 3(b) Substantively similar to federal statute.	§ 1 (b) Substantively similar to federal statute.	§ 1202 (1) Substantively similar to federal statue.	§ 661-21 Substantively similar to federal statute

	FEDERAL	CALIFORNIA	NEVADA	D.C.	FLORIDA	ILLINOIS	MASS.	DELAWARE	HAWAII
	3733 (k)(4) The term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;	12650(b)(3) Political entities not included in definitions or "person."	"Person" not defined.	1-1188.13(4) Substantively similar to federal statute, but does not include political entities	"Person" not defined, but section 68.087(6) specifically exempts local governments from liability.	"Person" not defined.	§ 1 (c) Same as California	"Person" not defined. "Affected person" includes labor organization. § 1202(4) An "entity or organization" may bring the action. § 1203	"Person" not defined.
	3729(a)(7) $5,500 to $11,000, plus treble damages, except: Not less than double damages if the person committing the violation furnished all known information within 30 days after obtaining it and fully cooperated with any investigation, but only if no action was pending and the person was unaware of any investigation at the time of disclosure.	12651(a) Substantively similar to federal statute, except no minimum penalty. No civil penalties for violators who fully cooperate as set forth in language paralleling federal statute.	357.040(1) Substantively similar to federal statute, except minimum penalty is $2,000. No civil penalties for violator who fully cooperate as set forth in language paralleling federal statute.	1-1188.14(a) Substantively similar to federal statute, but a violator who fully cooperates as set forth in language paralleling federal statute incurs not more than double damages and no civil penalty.	68.082(2) Substantively similar to federal statute.	155/3 § 3(a) Substantively similar to federal statute.	Mass. § 2 Same as federal statute except no reduction in civil penalties. §2 Damages include consequential damages. §3 recognizes right to receive payment of actual amount due less the excess amount falsely claimed.		§661-21(a) Substantively similar to federal statute.
	3730(b)(1) a person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government.	12652(c)(2) Substantively the same as the federal statute but distinguishes between actions on behalf of the State and actions on behalf of political subdivisions. § 12652(d)(4) Jurisdiction condition if the *qui tam* plaintiff is a public employee. He is required to "first in good faith exhaust existing internal procedures" and wait a reasonable time for the public entity to take action.	357.080(1) Substantively the same as the federal statute, but distinguishes between action on behalf of the State and actions on behalf of political subdivisions. If the *qui tam* plaintiff is a public employee, he is required to "first in good faith exhaust existing internal procedures" and wait a reasonable time, not less than six months, for the public entity to take action.	1-1188.15 § (c) Substantively the same as the federal statute, except: If the qui tam plaintiff is a public employee, he or she is required to "first in good faith exhaust existing internal procedures" and wait a reasonable time for the public entity to take action. Voluntary disclosures may not form the basis of a false claims action. No person may sell or assign an interest in a qui tam action.	68.083(2) Substantively similar to federal statute, except: No present or former state employee may bring a false claims action based upon information obtained in the course of employment, and no other person may bring an action based upon such information obtained from a state employee unless the employee provided the information in the course of his or her employment.	175/4 § 4(b) Substantively similar to federal statute.	§ 10(d) Specific public employees (attorney, mediator, investigator, financial or contracting officers) are excluded for information within scope of employment. § 4(b) Substantially similar to California but no provision specific to public employees except above.	§ 1203 Substantively similar to federal statute except labor organizations expressly may bring suit.	§ 664-25 Substantively similar to federal statute. Dismissal only with consent of court in the best interest of the parties. § 661-27 If a public employee or former employee, provisions similar to California.
O C E	3730(b) Complaint filed in camera. Complaint and statement of facts served on Government. Complaints sealed for 60 days, and not served until court so orders. Government may elect to interview within 60 days of service. Government may move in camera for extensions of the time during which the complaint remains under seal. Defendant is not required to respond to complaint until 20 days after unsealing and service. Before the complaint is unsealed, the Government must elect to: proceed with the action, in which case the action shall be	12652(b) Substantively similar to federal procedure, except defendant is not required to respond to complaint until 30 days after it is unsealed and served. Period that complaint may remain under seal is limited to 90 days. Either the Attorney General or a local prosecuting authority may prosecute the case on behalf of the state. The Attorney general or the	357.080 Substantively similar to federal procedure except the Attorney General has 120 days to decide whether to intervene.	1-1188.15(b)(2) Substantively similar to federal statute, but Corporation Counsel has 180 days to investigate. The qui tam plaintiff may sue in his own name and "either for the District or in the name of the District." Upon timely application, the court shall permit the District to intervene, and the District shall have primary responsibility for	68.083 Substantively the same as the federal statute, but action must be filed in Leon County, and Attorney General has 90 days to investigate. The court, "without limiting the rights" of the qui tam plaintiff, may permit the government upon a showing of good cause to "intervene and take over the action" after having initially declined to do so.	175/4 § (b) Substantively similar to federal statute.	Mass. § 4(b) Substantially similar to federal procedure except complaint sealed for 120 days subject to 90 day extension. Attorney General decision on intervention in same period. Dismissal requires Attorney Generals written reasons and court approval. No provision for local agency prosecution. Settlement authorized over	§ 1203(b) Substantively similar to federal statute-except after investigation of sealed complaint the Attorney General must determine if substantial evidence of a violation exists and must provide the relator a copy. Dismissal is mandatory if the Attorney General finds no substantial	§ 661-25 Substantively similar to federal statute. § 661-26(f or b77) Court approval of settlement is required. § 661-26(a)(2)

	FEDERAL	CALIFORNIA	NEVADA	D.C.	FLORIDA	ILLINOIS	MASS.	DELAWARE	HAWAII
DURE	conducted by the Government; or notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action. No person other that the government may intervene as a party to a pending qui tam action. Basis for intervention not discussed.	local prosecuting authority may intervene after having initially decline to conduct the case upon a showing that the qui tam plaintiff is not adequately representing the State's interests; the *qui tam* plaintiff retains primary responsibility for prosecuting the action. The Attorney General may dismiss the action only upon affording notice and hearing to the qui tam plaintiff. § 12652(a)(1) Attorney General required to "diligently" investigate.		prosecuting the action.	The Attorney General has the right to dismiss the action "not withstanding the objections" of the qui tam plaintiff. Notice and hearing are not expressly required.		relator objection. Hearing on settlement may be in camera. Both defendant and Attorney General may seek limits on relator participation.	evidence. Relator may only prosecute the action if Attorney General finds substantial evidence and elects not to proceed.	Must be "fair adequate and reasonable."
	3730(d) If the Government proceeds with the action, the relators receive 15% to 25% of the proceeds. If the action is based upon public information, the court may award up to 10% of the proceeds. If the Government does not proceed with an action under this section, the relator receives 25% to 30% of the proceeds. Relators may recover expenses, costs and attorney's fees from defendant. If the qui tam plaintiff "planned and initiated" the violation, there is no minimum recovery. If convicted of a crime arising from the presentation of the false claim, the qui tam plaintiff must be dismissed as a party, and may receive none of the proceeds.	12652(g)(1) (A) It the State of political subdivision proceeds with an action brought by a qui tam plaintiff, the qui tam plaintiff receives 15% to 33% and the prosecuting authority a fixed 33% of the proceeds. If the State or political subdivision does not proceed with an action the qui tam plaintiff receives as amount between 25% to 50% of the proceeds. A present or former employee of the State or political subdivision is not entitled to any minimum guaranteed recovery. *Qui tam* plaintiff my recover expense, costs, and attorney's fees from defendant.	Substantively similar to California statute, but no exception for governmental employee plaintiffs.	1-1188.15(i) If Corporation Counsel conducts the action, the qui tam plaintiff receives 10% to 20%. If Corporation Counsel declines to conduct the action, the qui tam plaintiff receives 25% to 40%. A *qui tam* plaintiff who was substantially involved in the fraudulent activity on which the action based is not entitled to any minimum recovery from the proceeds of the action.	1-1188.15(f) Substantively similar to federal statute. The injured agency may be awarded a portion of the proceeds not to exceed its compensatory damages.	175/4 § 4(d) Substantively similar to federal statute. The court has discretion to award part of the proceeds to the injured agency.	Mass. § 9 Substantially similar to federal except relator is limited to no more than 10% share if action is based "primarily on publicly available information." Share depends on role in prosecuting case.	§ 1205 Substantively similar to federal statute except the award of attorneys fees may consider if fees were necessary to prosecution, repetitious, irrelevant, or for harassment of caused undue burden on defendant. § 1205(d) Defendant may recover attorney feeds and costs if action was for an improper purpose or not warranted by existing law.	§ 661-27 Substantively similar to federal statute.
	3730(c)(3) In no event may a person bring an action under subsection	12652(d)(3)(A) "Public disclosure" limitation	357.100 Substantively similar to	1-1188.15 (c) Substantively similar to	68.087 Substantively similar to	175/4 § 4e)(3)-4 (c)(4)	§ 10 Substantially similar to federal	§ 1206 Substantively similar to federal statute.	§ 661-28 Substantively

FEDERAL	CALIFORNIA	NEVADA	D.C.	FLORIDA	ILLINOIS	MASS.	DELAWARE	HAWAII
(b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party. (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the new media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this action which is based on the information.	is jurisdictional: "No court shall have jurisdiction over an action under this article based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing, or audit." "Original source" is substantively similar to federal statute.	federal statute.	federal statute.	federal statute.	Substantively similar to federal statute.	statute. "Original source" same as federal definition.	Definition of "original source" does not require "direct" knowledge of facts, and expressly includes knowledge based on relator's own investigation.	similar to federal statue.
3730(h) Provides cause of action for reinstatement, double back-pay, and special damage, including litigation costs and attorney's fees, for whistleblower who is "discharge, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment by his employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section. "No provision for punitive damages.	12653 Substantively similar to federal statute; in addition, provides for punitive damages where appropriate, and prohibits employers from making rules or policies preventing employees from "disclosing information to a government or law enforcement agency or from acting in furtherance of a false claims action."	357.240 Substantively similar to California statute.	1-1188.16 Substantively similar to California statute.	68.088 An employer who retaliates against a participating employee is liable under FSA § 112.3187.	175/4 § 4(g) Substantively similar to federal statute.	§ 1.3 Substantially similar to federal statute. Prohibits adopting regulations preventing employees from disclosing information. Prohibits and voids any agreement which prevents an employee from disclosing information or pursuing false claim action.	§ 1208 Substantively similar to federal statute.	(No Apparent coverage.)
3731 Within: -6 years after violation, or -3 years after material facts are known or reasonably should have been know, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.	12654 Within 3 years after material facts are know or reasonably should have been known, but in no event more than 10 years after the date on which the violation is committed. Statute applies retroactively to prior "activity," subject to statute of limitations.	357.170(1) Within 3 years after the date of discovery of the fraudulent activity, or within 5 years after the fraudulent activity occurred, whichever is earlier. Statute applies retroactively, subject to statute of limitations.	No act-specific statute of limitations.	68.089 Within: -5 years after violation, or -2 years after material facts are known or reasonably should have been known, but in no event more than 7 years after the date on which the violation is committed, -whichever occurs last.	175/5 § 5 Substantively similar to feral statute.	§ 14 Substantively similar to federal statue. Statute applies retroactively to prior "acts or omissions."	§ 1208 Substantively similar to federal statute.	§ 661-24 Action must be brought within six years after the false claim is discovered, or should, through the exercise of reasonable care, have been discovered. In no

	FEDERAL	CALIFORNIA	NEVADA	D.C.	FLORIDA	ILLINOIS	MASS.	DELAWARE	HAWAII
									event more than 10 years after violation is committed.
	No provision of joint and several liability.	12651 Statute expressly provides for joint and several liability.	357.060 Statute expressly provides for joint and several liability.	1-1188.14(c) Statute expressly provides for joint and several liability.	No provision of joint and several liability.	No provision of joint and several liability.	No provision of joint and several liability.	No provision of joint and several liability.	§ 661-2(c) Substantively similar to California statue.
	No minimum jurisdictional limit.	12651 $300 minimum. Inapplicable to workers' compensation claims, claims made under the Revenue and Taxation Code, and claims and actions against public entities and public employees.	No minimum jurisdictional limit.	No minimum jurisdictional limit. Inapplicable to workers' compensation claims, unemployment insurance claims, and claims related to taxation.	No minimum jurisdictional limit.	No minimum jurisdictional limit. Inapplicable to claims made related to the Income Tax Act.	Similar to Illinois		§ 661-21(d) $500 minimum, jurisdictional limit.

SOURCE:

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OFFICE OF LEGISLATIVE RESEARCH

February 5, 1993 93-R-0206

TO:

FROM: Sandra Norman-Eady, Senior Attorney

RE: Debarment of Contractors

You wanted us to explore the idea of establishing a list of companies or contractors who have violated state or federal law and as such should be barred from entering into contractual agreements with the state.

SUMMARY

Connecticut law currently prohibits the state and its political subdivisions from awarding contracts to an agency, firm, or company that has violated the National Labor Relations Act (NLRA) or the federal or state Occupational Safety and Health Act (OSHA). The labor commissioner is required to compile a list of all NLRA violators. Agencies, firms, and companies are required to certify that they are not in violation of OSHA standards as a condition of bidding for state contracts.

We researched the law in Florida, Illinois, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, and Vermont to see if they have similar law. Of these states, Florida, Illinois, Maine, and Massachusetts have debarment laws. Other states, Vermont for example, prohibit the state from contracting with agencies that fail to pay state taxes.

CONNECTICUT LAW

NRLA Violation

The labor commissioner is required to compile a list of those persons or firms in violation of the NLRA. The list must be compiled from the records of the National Labor Relations Board (NLRB). On or before June 30th of each year, the commissioner is required to distribute the list to all state departments. The state is prohibited from contracting with anyone or any firm on the list for three years. The prohibition also applies to contracts with subcontractors and suppliers for merchandise produced or service provided by a "barred" person or firm. The prohibition does not apply if the labor commissioner determines that a contract with a company is in the best interests of the state or if the commissioner of the Department of Administrative Services certifies to the labor commissioner that there is no other source for the merchandise or service.

A company or individual is barred from contracting with the state if, within three of the five preceding calendar years, it or he has been found (1) in violation of the NLRA by the NLRB and a final decision of a federal court or (2) in contempt by a federal court for failure to correct a NLRA violation (CGS Sec. 31-57a(a)).

OSHA Violations

By law, agencies or firms bidding on state contracts must certify that they comply with OSHA standards. The law prohibits the state and its political subdivisions from awarding contracts of any kind to firms with poor worker safety records. The prohibition applies to any person or firm that: (1) has been cited for three or more wilful or serious violations of the federal or any state's occupational safety and health act (OSHA) or of any federal or state OSHA standard order, or regulation during the three years preceding its bid; or (2) has been convicted of a crime relating to the injury or death of an employee during the same period. The ban extends to firms, corporations, partnerships, or associations in which people or firms that meet one of the two conditions have an interest. The latter condition applies only to violations that have not been abated within the time specified in the citation or set aside on appeal.

The law subjects those who deliberately give false information about their OSHA citations or criminal convictions when bidding on public contracts to a fine of between $500 and $5,000. It also disqualifies them from bidding or participating in any such contracts for five years.

The law requires any political subdivision or state agency that receives false information from a bidder concerning his safety record to notify the commissioner of administrative services. The commissioner must hold a hearing and, if he determines false information was provided, must impose the fine. Fines must be paid either to the state treasurer or to an official of the political subdivision, whichever is appropriate, and may be collected by going to court.

THE LAW IN OTHER STATES

Florida

The law requires a person or affiliate to certify that he has not been convicted of a public entity crime prior to entering a contract with the state, any of its departments or agencies, or any political subdivision (public entities). A "public entity crime" means a violation of any state or federal law directly related to a business transaction with any public entity, any other state, or the United States.

The Department of General Services is required to adopt a standard sworn statement for use of all public entities and maintain a list of all convicted vendors. The list must be updated quarterly. The list and its updates must be published in the Florida Administrative Weekly.

A person placed on the convicted vendor list may not transact business with any public entity in excess of $10,000 for three years. Additionally, he may not: (1) submit a bid or a contract to provide any goods or services to a public entity; (2) submit a bid on a contract with a public entity for the construction or repair of a public building or public work; (3) submit bids on leases of real property to a public entity; or (4) be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a contract with a public entity. Likewise, a public entity may not accept any bid from, award any contract to, or transact any business in excess of $10,000 with any person on the convicted vendor list (FGS Sec. 287.133).

Illinois

The law prohibits the state from entering into a contract for or making a grant of more than $5,000 with any individual unless the contract or grant includes a certification by the individual that he will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract (Ill. Stat. Ann., Sec. 127-132.314).

A contractor who was awarded a state contract or the recipient of a state grant may be suspended or debarred if the head of a state agency determines that: (1) a false certification was made, (2) the certification was violated, (3) appropriate remedial action was not taken against employees convicted of drug offenses, or (4) as a result of the large number of its employees being convicted of offenses, a contractor or grantee failed to make a good faith effort to provide a drug free workplace (Ill. Stat. Ann. Sec. 127-132.316).

An agency head may waive the suspension or debarment if he determines that such action would severely disrupt the agency's operation to the detriment of the general public or would not be in the public interest (Ill. Stat. Ann., Sec. 127-132.319). A contractor or grantee who has been debarred is ineligible for a state contract or grant for at least one but not more than five years as specified in the decision (Ill. Stat. Ann. Sec. 127-132.318).

Maine

After a hearing, the law requires the Department of Labor to debar any person, partnership, corporation, or other entity found to have committed a serious, willful violation or serious, repeated violations of state or federal OSHA standards from participating in state contracts for two years. A "repeated violation" means a violation of any legal requirement where a previous violation of the same requirement was found. A "serious violation" means one where there is a substantial probability that death or serious physical harm could result from a condition that exists, or from one or more practices that have been adopted or are in use in that place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the violation. A "willful violation" means one committed intentionally or knowingly with an intentional disregard of, or plain indifference, to OSHA legal requirements.

The department may not debar an entity until the time for filing an appeal of the violation determination has expired or the appeals process has been exhausted. A department may refrain from debarring an entity if the condition giving rise to a violation has been abated (MSA Sec. 26-1402).

Massachusetts

A person may be debarred under Massachusetts law for a number of different reasons, including (1) conviction of a criminal offense involving moral turpitude involving a private or public contract, (2) a violation of state or federal labor laws, (3) a violation of state or federal antitrust laws arising out of the submission of bids or

proposals, (4) a violation of discrimination laws, (5) repeated or aggravated violations of state or federal laws regulating OSHA standards, and (6) any other cause affecting the responsibility of a contractor that the commissioner of the Division of Capital Planing and Operations determines to be of such serious and compelling nature as to warrant debarment. Anyone so debarred is prohibited from public contracting or subcontracting for a period of time commensurate with the seriousness of the offense.

The Secretary of Administration is required to establish and maintain a list of contractors to whom public contracts may not be awarded and from whom offers, bids, or proposals may not be solicited. The list must be published on a periodic basis in the Goods and Services Bulletin and the Central Register published by the secretary of the state.

No contractor may be debarred unless he has first been notified by the secretary of the intent to debar and given an opportunity to be heard. In determining whether to debar a contractor or the period of a debarment, the secretary must take into consideration all mitigating facts and circumstances. The secretary must notify a contractor of his debarment and his right to judicial review (MGLA, Sec. 29-29f).

A copy of the Florida, Illinois, Maine, and Massachusetts statutes is attached for your information.

SNE:lav

Illinois

132.314. Requirement for individuals

§ 4. Requirement for individuals. The State shall not enter into a contract for more than $5,000 or make a grant of more than $5,000 with any individual unless the contract or grant includes a certification by the individual that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract.

P.A. 86–1459, § 4, eff. Jan. 1, 1992.

132.315. Employee sanctions and remedies

§ 5. Employee sanctions and remedies. A grantee or contractor shall, within 30 days after receiving notice from an employee of a conviction of a violation of a criminal drug statute occurring in the workplace:

(a) Take appropriate personnel action against such employee up to and including termination; or

(b) Require the employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a federal, State, or local health, law enforcement, or other appropriate agency.

P.A. 86–1459, § 5, eff. Jan. 1, 1992.

132.316. Suspension, termination or debarment of the contractor or grantee

§ 6. Suspension, termination or debarment of the contractor or grantee. Each contract or grant awarded by the State shall be subject to suspension of payments or termination, or both, and the contractor or grantee thereunder or the individual who entered the contract with or received the grant from the State shall be subject to suspension or debarment in accordance with the requirements of this Section if the head of the agency determines that:

(a) the contractor, grantee, or individual has made a false certification under Section (2) or (4)[1];

(b) the contractor or grantee violates such certification by failing to carry out the requirements of Section (3);

(c) The contractor or grantee does not take appropriate remedial action against employees convicted on drug offenses as specified in Section (5)[2]; or

(d) Such a number of employees of the contractor or grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the contractor or grant recipient has failed to make a good faith effort to provide a drug free workplace as required by this Act.

P.A. 86–1459, § 6, eff. Jan. 1, 1992.

[1] Paragraph 132.313 or 132.314 of this chapter.

[2] Paragraph 132.315 of this chapter.

132.317. Suspension, termination or debarment proceedings

§ 7. Suspension, termination or debarment proceedings. Any determination proceedings for suspension of payments, termination, or debarment pursuant to this Act shall be conducted in accordance with The Illinois Administrative Procedure Act.[1]

P.A. 86–1459, § 7, eff. Jan. 1, 1992.

[1] Paragraph 1001 et seq. of this chapter.

132.318. Effect of debarment

§ 8. Effect of debarment. Upon issuance of any final decision under this Act requiring debarment of a contractor, grantee or individual, such contractor, grantee or individual shall be ineligible for award of any contract or grant by the State for at least one year but not more than 5 years, as specified in the decision.

P.A. 86–1459, § 8, eff. Jan. 1, 1992.

132.319. Waiver

§ 9. Waiver. A termin
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the public interest.

P.A. 86–1459, § 9, eff. Jan.

132.320. Notice of appli

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P.A. 86–1459, § 10, eff. Jan.

132.321. Rebuttable pres

§ 11. Any actions underta
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Illinois Human Rights Act.[1]

P.A. 86–1459, § 11, eff. Jan.

[1] Chapter 68, ¶ 1–101 et seq.

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132.400. Short title

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P.A. 79–1182, § 0.01, added by

132.401. Application of A

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132.319. Waiver

§ 9. Waiver. A termination, suspension of payments, or suspension or debarment under this Act may be waived by the head of an agency with respect to a particular contract or grant if the head of the agency determines that suspension of payments, termination of the contract or grant, or suspension or debarment of the contractor, grantee, or individual, as the case may be, would severely disrupt the operation of such agency to the detriment of the general public or would not be in the public interest.

P.A. 86–1459, § 9, eff. Jan. 1, 1992.

132.320. Notice of application of Act and necessity of compliance

§ 10. At the time of entering into a contract or issuing a grant that results in the application of this Act, the State agency letting the contract or issuing the grant must notify the corporation, partnership, or other entity with 25 or more employees or the department, division, or unit of the corporation, partnership, or other entity of the application of this Act and of the necessity of compliance.

P.A. 86–1459, § 10, eff. Jan. 1, 1992.

132.321. Rebuttable presumption of good faith compliance

§ 11. Any actions undertaken by a contractor or grantee in compliance with this Act and in establishing a drug-free workplace shall create a rebuttable presumption of good faith compliance with this Act and shall not be considered a violation of the Illinois Human Rights Act.[1]

P.A. 86–1459, § 11, eff. Jan. 1, 1992.

[1] Chapter 68, ¶ 1–101 et seq.

STATE PROMPT PAYMENT ACT

132.400. Short title

§ 0.01. Short title. This Act may be cited as the State Prompt Payment Act.

P.A. 79–1182, § 0.01, added by P.A. 86–1324, § 993, eff. Sept. 6, 1990.

132.401. Application of Act

§ 1. This Act applies to any State official or agency authorized to provide for payment from State funds, by virtue of any appropriation of the General Assembly, for goods or services furnished to the State.

Except as provided in Section 2.1,[1] for purposes of this Act, "goods or services furnished to the State" include but are not limited to covered health care provided to eligible members and their covered dependents in accordance with the State Employees Group Insurance Act of 1971,[2] including coverage through a physician-owned health maintenance organization under Section 6.1 of that Act;[3] however, "goods or services furnished to the State" do not include medical assistance provided to public aid recipients prior to July 1, 1992 and reimbursed from State funds under Articles V, VI and VII of the Illinois Public Aid Code.[4]

For the purposes of this Act, "appropriate State official or agency" is defined as the Director or Chief Executive or his designee of that State agency or department or facility of such agency or department. With respect to covered health care provided to eligible members and their dependents in accordance with the State Employees Group Insurance Act of 1971, "appropriate State official or agency" also includes an administrator of a program of health benefits under that Act.

As used in this Act, "eligible member" means a member who is eligible for health benefits under the State Employees Group Insurance Act of 1971, and "member" and "dependent" have the meanings ascribed to those terms in that Act.

Amended by P.A. 82–918, § 2, eff. Aug. 16, 1982; P.A. 85–1159, § 2–5, eff. Aug. 4, 1988; P.A. 86–1388, § 1, eff. Sept. 10, 1990; P.A. 87–14, Art. 2, § 2–17, eff. July 24, 1991.

287.132. Legislative intent with respect to integrity of public contracting and purchasing process

Recognizing that the preservation of the integrity of the public contracting and purchasing process of the state is vital and is a matter of interest to all the people of the state, the Legislature determines and declares that:

(1) The procedures of public entities for determining with whom they transact business exist to secure for the public the benefits of free, fair, and open competition among those persons whose conduct reflects good citizenship.

(2) The opportunity to bid on public entity contracts or to supply goods and services to public entities or to otherwise transact business with public entities is a privilege, not a right.

(3) In order to preserve the integrity of the public contracting and purchasing process, the privilege of transacting business with public entities should be denied to persons involved in certain crimes.

(4) Persons involved in certain crimes should be denied the privilege of transacting business with public entities and the opportunity of obtaining economic benefit through the transaction of business of any kind with public entities.

To these ends, it is the intent of the Legislature to provide sufficient authority to the state, its departments and agencies, and political subdivisions to ensure the integrity of public contracting and purchasing.

Historical and Statutory Notes

Derivation:

Laws 1989, c. 89-114, § 1.

Law Review Commentaries

Rights and duties of vendors and government agencies under Florida's new public contracting law. David L. Powell, 17 Fla.St.U.L. Rev. 481 (1990).

287.133. Public entity crime; denial or revocation of the right to transact business with public entities

[illegible]

(a) "Affiliate" means:

1. A predecessor or successor of a person convicted of a public crime; or

2. An entity under the control of any natural person who is active in management of the entity and who has been convicted of a public crime. The term "affiliate" includes those officers, directors, partners, shareholders, employees, members, and agents who are active in management of an affiliate. The ownership by one person of shares constituting a controlling interest in another person, or a pooling of controlling interest among persons when not for fair market value under an arm's length agreement, shall be a prima facie case that one person con[illegible]

person. A person who knowingly enters into a joint venture with a person who has been convicted of a public entity crime in Florida during the preceding 36 months shall be considered an affiliate.

(b) "Convicted" or "conviction" means a finding of guilt or a conviction of a public entity crime, with or without an adjudication of guilt, in any federal or state trial court of record relating to charges brought by indictment or information after July 1, 1989, as a result of a jury verdict, nonjury trial, or entry of a plea of guilty or nolo contendere.

(c) "Convicted vendor list" means the list required to be kept by the department pursuant to paragraph (3)(d).

(d) "Department" means the Department of General Services.

(e) "Person" means any natural person or any entity organized under the laws of any state or of the United States with the legal power to enter into a binding contract and which bids or applies to bid on contracts let by a public entity, or which otherwise transacts or applies to transact business with a public entity. The term "person" includes those officers, directors, executives, partners, shareholders, employees, members, and agents who are active in management of an entity.

(f) "Public entity" means the State of Florida, any of its departments or agencies, or any political subdivision.

(g) "Public entity crime" means a violation of any state or federal law by a person with respect to and directly related to the transaction of business with any public entity or with an agency or political subdivision of any other state or with the United States, including, but not limited to, any bid or contract for goods or services, any lease for real property, or any contract for the construction or repair of a public building or public work, involving antitrust, fraud, theft, bribery, collusion, racketeering, conspiracy, or material misrepresentation.

(2)(a) A person or affiliate who has been placed on the convicted vendor list following a conviction for a public entity crime may not submit a bid on a contract to provide any goods or services to a public entity, may not submit a bid on a contract with a public entity for the construction or repair of a public building or public work, may not submit bids on leases of real property to a public entity, may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a contract with any public entity, and may not transact business with any public entity in excess of the threshold amount provided in s. 287.017 for CATEGORY TWO for a period of 36 months from the date of being placed on the convicted vendor list.

(b) No public entity shall accept any bid from, award any contract to, or transact any business in excess of the threshold amount provided in s. 287.017 for CATEGORY TWO with any person or affiliate on the convicted vendor list for a period of 36 months from the date that person or affiliate was placed on the convicted vendor list unless that person or affiliate has been removed from the list pursuant to paragraph (3)(f). No public entity which was transacting business with a person at the time of the commission of a public

entity crime which resulted in that person being placed on the convicted vendor list shall accept any bid from, award any contract to, or transact any business with any other person who is under the same, or substantially the same, control as the person whose name appears on the convicted vendor list so long as that person's name appears on the convicted vendor list.

(3)(a) Prior to entering into a contract with a public entity for the provision of goods or services, the lease of real property, or the construction or repair of a public building or public work, in excess of the threshold amount provided for in s. 287.017 for CATEGORY TWO, a person shall file a sworn statement with the contracting officer of that public entity for the calendar year. The department shall adopt by rule a standard sworn statement for use by all public entities in complying with the provisions of this subsection. The form shall include:

1. The name of the person.
2. The business address of the person.
3. A statement of whether the person, or an affiliate of that person, was convicted of a public entity crime after July 1, 1989, unless a determination has been made pursuant to either paragraph (e) or paragraph (f) that it is not in the public interest for the name of that person or affiliate to appear on the convicted vendor list.
4. Notice that the person is required to inform the public entity prior to entering a contract in excess of the threshold amount provided in s. 287.017 for CATEGORY TWO of any change affecting the correctness of the information contained in the sworn statement.

(b) Any person must notify the department within 30 days after a conviction of a public entity crime applicable to that person or to an affiliate of that person. Any public entity which receives information that a person has been convicted of a public entity crime shall transmit that information to the department in writing within 10 days.

(c) If the department has reason to believe that a person or an affiliate has been convicted of a public entity crime, the department may issue a written demand upon that person or affiliate, concerning any such conviction or affiliation, to appear and be examined under oath, to answer interrogatories under oath, or to produce documents or other tangible evidence for inspection and copying. The department shall conduct any such inquiry in accord with applicable provisions of the Florida Rules of Civil Procedure.

(d) The department shall maintain a list of the names and addresses of those who have been disqualified from the public contracting and purchasing process under this section. The department shall publish an initial list on January 1, 1990, and shall publish an updated version of the list quarterly thereafter. The initial list and revised quarterly lists shall be published in the Florida Administrative Weekly. Notwithstanding this paragraph, a person or affiliate disqualified from the public contracting and purchasing process pursuant to this section shall be disqualified as of the date the final order is entered.

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receiving reasonable information from any source that a per- [illegible] the department shall investigate the information and [illegible] person on the convicted vendor list. [illegible] notify the person or affiliate in writing of its intent to place the name of person or affiliate on the convicted vendor list, and of the person's or iate's right to a hearing, the procedure that must be followed, and the able time requirements. If the person or affiliate does not request a ing, the department shall enter a final order placing the name of the on or affiliate on the convicted vendor list. No person or affiliate may be d on the convicted vendor list without receiving an individual notice of t from the department.

Within 21 days of receipt of the notice of intent, the person or affiliate ile a petition for a formal hearing pursuant to s. 120.57(1) to determine ter it is in the public interest for that person or affiliate to be placed on nvicted vendor list. A person or affiliate may not file a petition for an al hearing under s. 120.57(2). The procedures of chapter 120 shall to any formal hearing under this section except where they are in ict with the following provisions:

a. The petition shall be filed with the department. The department shall party to the proceeding for all purposes.

b. Within 5 days after the filing of the petition, the department shall notify the Division of Administrative Hearings of the request for a formal hearing. The director of the Division of Administrative Hearings shall, within 5 days after receipt of notice from the department, assign a hearing officer to preside over the proceeding. The hearing officer, upon request by a party, may consolidate related proceedings.

c. The hearing officer shall conduct the formal hearing within 30 days after being assigned, unless otherwise stipulated by the parties.

d. Within 30 days after the formal hearing or receipt of the hearing transcript, whichever is later, the hearing officer shall enter a final order, which shall consist of findings of fact, conclusions of law, interpretation of agency rules, and any other information required by law or rule to be contained in the final order. Such final order shall place or not place the person or affiliate on the convicted vendor list.

e. The final order of the hearing officer shall be final agency action for purposes of s. 120.68.

f. At any time after the filing of the petition, informal disposition may be made pursuant to s. 120.57(3). In that event, the hearing officer shall enter a final order adopting the stipulation, agreed settlement, or consent order.

3. In determining whether it is in the public interest to place a person or affiliate on the convicted vendor list, the hearing officer shall consider the following factors:

a. Whether the person or affiliate committed a public entity crime.

b. The nature and details of the public entity crime.

c. The degree of culpability of the person or affiliate proposed to be placed on the convicted vendor list.

d. Prompt or voluntary payment of any damages or penalty as a result of the conviction.

e. Cooperation with state or federal investigation or prosecution of any public entity crime, provided that a good faith exercise of any constitutional, statutory, or other right during any portion of the investigation or prosecution of any public entity crime shall not be considered a lack of cooperation.

f. Disassociation from any other persons or affiliates convicted of the public entity crime.

g. Prior or future self-policing by the person or affiliate to prevent public entity crimes.

h. Reinstatement or clemency in any jurisdiction in relation to the public entity crime at issue in the proceeding.

i. Compliance by the person or affiliate with the notification provisions of paragraph (a) or paragraph (b).

j. The needs of public entities for additional competition in the procurement of goods and services in their respective markets.

k. Mitigation based upon any demonstration of good citizenship by the person or affiliate.

4. In any proceeding under this section, the department shall be required to prove that it is in the public interest for the person to whom it has given notice under this section to be placed on the convicted vendor list. Proof of a conviction of the person or that one is an affiliate of such person shall constitute a prima facie case that it is in the public interest for the person or affiliate to whom the department has given notice to be put on the convicted vendor list. Prompt payment of damages or posting of a bond, cooperation with investigation, and termination of the employment or other relationship with the employee or other natural person responsible for the public entity crime shall create a rebuttable presumption that it is not in the public interest to place a person or affiliate on the convicted vendor list. Status as an affiliate must be proven by clear and convincing evidence. If the hearing officer determines that the person was not convicted or is not an affiliate of such person, that person or affiliate shall not be placed on the convicted vendor list.

5. Any person or affiliate who has been notified by the department of its intent to place his name on the convicted vendor list may offer evidence on any relevant issue. An affidavit alone shall not constitute competent substantial evidence that the person has not been convicted or is not an affiliate of a person so convicted. Upon establishment of a prima facie case that it is in the public interest for the person or affiliate to whom the department has given notice to be put on the convicted vendor list, that person or affiliate may prove by a preponderance of the evidence that it would not be in the

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public interest to put him on the convicted vendor list, based upon evidence addressing the factors in subparagraph 3.

(f)1. A person on the convicted vendor list may petition for removal from the list no sooner than 6 months from the date a final order is entered disqualifying that person from the public purchasing and contracting process pursuant to this section, but may petition for removal at any time if the petition is based upon a reversal of the conviction on appellate review or pardon. The petition shall be filed with the department, and the proceeding shall be conducted pursuant to the procedures and requirements of this subsection.

2. A person may be removed from the convicted vendor list subject to such terms and conditions as may be prescribed by the hearing officer upon a determination that removal is in the public interest. In determining whether removal would be in the public interest, the hearing officer shall give consideration to any relevant factors, including, but not limited to, the factors identified in subparagraph (e)3. Upon proof that a person's conviction has been reversed on appellate review or that he has been pardoned, the hearing officer shall determine that removal of the person or an affiliate of that person from the convicted vendor list is in the public interest.

3. If a petition for removal is denied, the person or affiliate may not petition for another hearing on removal for a period of 9 months after the date of denial, unless the petition is based upon a reversal of the conviction on appellate review or a pardon. The department may petition for removal prior to the expiration of such period if, in its discretion, it determines that removal would be in the public interest.

(4) The conviction of a person for a public entity crime, or placement on the convicted vendor list, shall not affect any rights or obligations under any contract, franchise, or other binding agreement which predates such conviction or placement on the convicted vendor list. However, the hearing officer in a proceeding instituted under this section may declare voidable any specific contract, franchise, or other binding agreement entered into after July 1, 1989, by a person placed on the convicted vendor list and a public entity, but only if the presiding officer finds as fact that the person to be placed on the list has not satisfied the criteria set forth in sub-subparagraphs (3)(e)3.d., f., and g.

(5) The provisions of this section do not apply to any activities regulated by the Florida Public Service Commission or to the purchase of goods or services made by any public entity from the Department of Corrections, from the nonprofit corporation organized under chapter 946, or from any accredited nonprofit workshop certified under ss. 413.032–413.037.

Historical and Statutory Notes

Derivation:

Laws 1990, c. 90–268, § 32.
Laws 1990, c. 90–33, § 1.
Laws 1989, c. 89–114, § 2.

Laws 1990, c. 90–33, § 2, provides:

"This act shall apply to offenses committed on or after October 1, 1990."

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OLR RESEARCH REPORT

June 26, 2002 2002-R-0577

CONTRACTOR DEBARMENT LISTS

By: Jennifer Gelb, Research Attorney

You asked about a Connecticut debarment list for contractors who fail to perform on municipal school construction projects or state contracts. You also wanted to know if any neighboring states have such debarment lists and how they work.

SUMMARY

No Connecticut agency or entity maintains a debarment list for contractors who fail to perform on municipal school construction projects or state contracts. The statutes authorize the departments of Transportation and Public Works to keep a debarment list for contractors who fail to perform on their contracts, but the agencies do not currently do so. The only state debarment list concerns contractors who violate prevailing wage laws. But Massachusetts law specifies grounds for suspension and debarment, suspension and debarment procedures, the hearing process, and activities from which debarred contractors are prohibited.

CONNECTICUT

Connecticut does not keep a debarment list for contractors who fail to perform on construction projects. We contacted the departments of Transportation (DOT), Public Works (DPW), Administrative Services (DAS), and Labor (DOL), none of which track or penalize contractors who fail to perform on state contracts. Although the statutes allow DOT and

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DPW to put such contractors on debarment lists for a history of failure to perform or unsatisfactory performance on a public contract, these agencies have not chosen to do so (CGS §§ 31-57c, d). Despite requests from DOT and DPW, DAS has refused to create a list. DAS considered the issue in 1994, and determined that it would be preferable to license contractors rather than to create a list or database. DOL maintains a debarment list of contractors who violate the prevailing wage laws, but it does not include other causes of disqualification. The State Department of Education does not keep any type of debarment list.

We contacted the Attorney General's Office, the Connecticut Conference of Municipalities, and the Foundation for Fair Contracting of Connecticut, none of which knew of or kept a Connecticut debarment list for failure to perform.

MASSACHUSETTS

Massachusetts statutes explicitly require the heads of state agencies or their designees to establish and maintain debarment lists. These lists must include: (1) the suspended or debarred party's name or names; (2) the basis of authority for the suspension or debarment, including the official who imposed it; (3) the extent of the restrictions imposed; (4) the date the suspension or debarment ends; and (5) for a suspension, a hearing date, if applicable, for debarment proceedings.

Massachusetts requires agency chiefs to send contractors written notice of any proposed suspension or debarment before acting against them. The notice must inform the contractor of (1) the reasons for the proposed suspension or debarment and (2) his right to request a hearing, in writing, within 14 days. The hearing must be held (1) for a suspension, within 30 days after the suspension starts or (2) for a debarment, within 60 days of the agency's receipt of the request. A suspension may not exceed 12 months. The law does not specify the maximum length of a debarment, but rather allows the penalty to be imposed for "a reasonable, specified period of time commensurate with the seriousness of the offense."

The law requires each agency chief or his designee to keep the debarment list current by issuing notices of additions and deletions. The list must be published periodically in certain publications, and the chief or his designee must forward the list to the inspector general, attorney general, and state auditor.

Massachusetts law allows agencies to impose debarment for several offenses, including a criminal conviction, willful submission of materially false information to obtain a public contract, or history of failure to perform or unsatisfactory performance on a public contract. It also calls for contractors suspended or debarred by any federal agency to be automatically suspended or debarred from entering into Massachusetts contracts. Massachusetts imputes an act or offense justifying suspension or debarment to any entity with which an individual was involved when he committed the act or offense, if it was performed on the entity's behalf or with the entity or its principal's knowledge or approval.

Massachusetts requires agency chiefs to consider all mitigating facts and circumstances when deciding whether to debar a contractor or the debarment period. During a contractor's suspension or debarment, he may not submit offers, bids, or proposals to any public agency, nor may any public agency solicit or consider his offers, bids, or proposals. Public agencies also may not execute, renew, or extend contracts with suspended or debarred contractors, and contractors may not contract with any suspended or debarred subcontractors on public contracts (Mass. General Laws Ch. 29 § 29F, copy enclosed).

JG:eh

Attachment 1

Historical and Statutory Notes

St.1989, c. 653, § 33 was approved Jan. 4, 1990, and by § 2 was made effective upon passage.

St.1991, c. 6, § 18, approved March 22, 1991, and by § 96 made effective upon enactment, in the first sentence, in three places, deleted "federal" preceding "reimbursement", inserted "and other" preceding "programs", substituted "projects" for "project costs" preceding "shall be made" and deleted "state" preceding "comptroller".

Code of Massachusetts Regulations

Contingent contracts for non-tax revenue maximization, comptroller's division, see 815 CMR 8.01 et seq.

§ 29F. Debarment from bidding; definitions; lists; notice; affiliates; mitigating circumstances

(a) As used in this section the following words shall, unless the context requires otherwise, have the following meanings:—

"Affiliates", entities which are affiliates of each other when either directly or indirectly one concern or individual controls or has the power to control another, or when a third party controls or has the power to control both.

"Commissioner", the commissioner of the division of capital asset management and maintenance or his designee within such division.

"Contractor", any person that has furnished or seeks to furnish supplies or services under a contract with a public agency or with a person under a contract with a public agency.

"Debarment", an exclusion from public contracting or subcontracting for a reasonable, specified period of time commensurate with the seriousness of the offense.

"Public agency", a department, agency, board, commission, authority, activity or instrumentality of the commonwealth, or of any political subdivision of the commonwealth, or of two or more subdivisions thereof.

"Person", any natural person, business, partnership, corporation, union, committee, club or other organization, entity or group of individuals.

"Public contract", a contract for the furnishing of supplies or services to any public agency.

"Secretary", the head of an executive office established under chapter six A or his designee within such executive office, or the secretary of administration appointed pursuant to section four of chapter seven or his designee within the executive office.

"Suspension", the temporary disqualification of a contractor who is suspected upon adequate evidence of engaging or having engaged in conduct which constitutes grounds for debarment.

(b) The secretary of administration shall establish and maintain a consolidated list of contractors to whom public contracts shall not be awarded and from whom offers, bids, or proposals shall not be solicited.

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The list shall show at a minimum the following information: (1) the names of those persons debarred or suspended in alphabetical order with appropriate cross reference where more than one name is involved in a single debarment or suspension; (2) the basis of authority for each debarment or suspension, including the secretary or other official who imposed the debarment or suspension; (3) the extent of restrictions imposed; (4) the termination date of each debarment or suspension; and (5) in the case of a suspension, the hearing date, if and when set, for debarment proceedings.

The secretary of administration shall cause the list to be kept current by the issuance of notices of additions and deletions. The list shall be published on a periodic basis, together with notices of additions and deletions therefrom, in the goods and services bulletin and the central register published by the state secretary and in such other publications as the secretary of administration shall designate. The secretary of administration shall also forward said list to the inspector general, the attorney general, and the state auditor. A secretary or the commissioner, as the case may be, upon imposing a debarment or suspension or removing a suspension shall forthwith notify the secretary of administration of all information required for inclusion on such list.

(c) Debarment may be imposed for the following causes:

(1) conviction or final adjudication by a court or administrative agency of competent jurisdiction of any of the following offenses: (i) a criminal offense incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract; (ii) a criminal offense involving embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty which seriously and directly affects the contractor's present responsibility as a public contractor; (iii) a violation of state or federal antitrust laws arising out of the submission of bids or proposals; (iv) a violation of state or federal laws regulating campaign contributions; (v) a violation of chapter two hundred and sixty-eight A; (vi) a violation of any state or federal law regulating hours of labor, prevailing wages, minimum wages, overtime pay, equal pay, child labor, or worker's compensation; (vii) a violation of any state or federal law prohibiting discrimination in employment; or (viii) repeated or aggravated violation of any state or federal law regulating labor relations or occupational health or safety; or

(2) substantial evidence, as determined by a secretary or the commissioner, of any of the following acts: (i) willfully supplying materially false information incident to obtaining or attempting to obtain or performing any public contract or subcontract; (ii) willful failure to comply with record-keeping and accounting requirements prescribed by law or regulation; (iii) a record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more public contracts, provided that such failure to perform or unsatisfactory performance has occurred within a reasonable period of time preceding the determination to debar and provided further that such failure to perform or unsatisfactory performance was not caused by factors beyond the contractor's control; (iv) a record of health and safety violations of a sufficient frequency

and severity so as to evidence a pattern of noncompliance with existing state and federal laws, or any rules and regulations applicable thereto; (v) any other cause affecting the responsibility of a contractor which the secretary or the commissioner determines to be of such serious and compelling nature as to warrant debarment. Notwithstanding any other provision of this section, any contractor debarred or suspended by any agency of the United States shall by reason of such debarment or suspension be simultaneously debarred or suspended under this section, with respect to non-federally aided contracts; the secretary or the commissioner may determine in writing that special circumstances exist which justify contracting with the affected contractor. The secretary or the commissioner shall give written notice to the secretary of administration of any such determination.

(d) No contractor may be suspended unless a secretary or the commissioner has first informed the contractor by written notice of the proposed suspension mailed by registered or certified mail to the contractor's last known address, except when the secretary or the commissioner determines that immediate suspension is necessary to prevent serious harm to the commonwealth, in which case the suspension shall take effect immediately upon signing by the secretary or the commissioner of an order of suspension, and notice shall be mailed to the contractor at the earliest opportunity. The notice shall inform the contractor of the reasons for the proposed suspension and shall state that the contractor may within fourteen days respond in writing and may in such response request a hearing. The secretary or the commissioner may extend the period for response at the request of the contractor. The secretary or the commissioner shall determine whether to impose the suspension or, in the case of an emergency suspension imposed prior to notice to the contractor, whether to continue the suspension after reviewing the contractor's response, if any, and making such investigation as the secretary or the commissioner determines is necessary and appropriate. An indictment, or any information or other filing by a public agency charging a criminal offense, for any of the offenses listed in paragraph (1) of subsection (c) shall constitute adequate evidence to support a suspension.

If the contractor requests a hearing, and the suspension is not based on an indictment, the secretary or the commissioner shall conduct a hearing according to the rules for the conduct of adjudicatory hearings established by the secretary of administration pursuant to chapter thirty A. Such hearing shall be initiated within thirty days of the imposition of the suspension, unless the contractor requests that the hearing be delayed. Officers and employees of the office of the inspector general and records of said office shall not be subject to subpoena for such hearing, if in the opinion of the inspector general production of records or testimony would prejudice any pending investigation by said office.

A suspension shall not exceed twelve months unless a pending administrative or judicial proceeding in which the contractor is a party may result in a conviction or final adjudication of an offense listed in paragraph (1) of subsection (c).

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(e) No contractor may be debarred under this section unless a secretary or the commissioner proposing the debarment has first informed the contractor by written notice of the proposed debarment mailed by registered or certified mail to the contractor's last known address. The notice shall inform the contractor of the reasons for the debarment and shall state that the contractor will be accorded an opportunity for a hearing if the contractor so requests within fourteen days of receipt of the notice. A hearing requested under this paragraph shall be conducted by the secretary or the commissioner within sixty days of receipt of the request, unless the secretary or the commissioner grants additional time therefor at the request of the contractor. The hearing shall be conducted according to the rules for the conduct of adjudicatory hearings established by the commissioner of administration pursuant to chapter thirty A. A debarment shall not be imposed until (i) fourteen days after receipt by the contractor of notice of the proposed debarment if no hearing is requested, or (ii) the issuance of a written decision by the secretary or the commissioner which makes specific findings that there is sufficient evidence to support the debarment and that debarment for the period specified in the decision is required to protect the integrity of the public contracting process. A contractor shall be notified forthwith of the decision by registered or certified mail, and of the contractor's right to judicial review in the event that the decision is adverse to the contractor. If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(f) A debarment or suspension may include all known affiliates of a contractor. The decision to include a known affiliate within the scope of a debarment or suspension shall be made on a case-by-case basis, after giving due regard to all relevant facts and circumstances. The offense or act of an individual justifying suspension, or the evidence justifying a suspension, may be imputed to the entity with which the individual is connected when such offense or act occurred in connection with the individual's performance of duties for or on behalf of the entity or with the knowledge, approval, or acquiescence of the entity or one or more of its principals. The entity's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence. The offense or act of an entity justifying debarment, or the evidence justifying a suspension, may be imputed to any officer, director, shareholder, partner, employee or other individual associated with the entity who participated in, knew of, or had reason to know of the entity's act. An entity or individual may not be suspended or debarred except in accordance with the procedures set forth in this section, provided that a public agency may reject a bid or proposal from any contractor when the public agency reasonably determines that such contractor is not responsible or eligible.

(g) In determining whether to debar a contractor, or the period of a debarment, all mitigating facts and circumstances shall be taken into consideration. Except as precluded by statute, a debarment may be removed or the period thereof may be reduced by the secretary or the commissioner who imposed the debarment or suspension upon the submission of an application supported by documentary evidence setting forth appropriate grounds for the granting of relief, such as newly discovered material evidence, reversal of a judgment or

conviction, bona fide change of ownership or management, or the elimination of the cause for which the debarment was imposed.

(h) During the period for which a person has been debarred or suspended, that person shall not submit or cause to be submitted offers, bids, or proposals to any public agency, nor shall any public agency solicit or consider offers, bids, or proposals from, nor execute, renew, or extend any contract with, a debarred or suspended contractor, and a contractor shall not contract for supplies or services from a debarred or suspended subcontractor on any public contract.

(i) The secretary of administration shall by regulation drawn up in consultation with each secretary and the commissioner provide for, upon the request of any secretary or the commissioner the timely commencement by, the removal to, or consolidation at the executive office of administration and finance of debarment or suspension proceedings. Such regulations also shall provide that the contractor against whom debarment or suspension proceedings have been initiated may apply to the secretary of administration for consolidation of such proceedings at the executive office of administration. Such proceedings shall be conducted by the secretary of administration or his designee in accordance with the provision of this section.

Added by St.1991, c. 550, § 1; St.1998, c. 194, § 100.

Historical and Statutory Notes

St.1991, c. 550, § 1, was approved Jan. 9, 1992.

Section 5 of St.1991, c. 550, provides:

"The provisions of this act shall apply only to contracts solicited or entered into after the effective date of this act. Any renewal, extension, modification, or exercise of any option under any contract after the effective date of this act shall be subject to the provisions of this act. Any debarment imposed prior to the effective date of this act shall continue in effect."

St.1998, c. 194, § 100, an emergency act, approved July 30, 1998, and by § 443 made effective July 1, 1998, in the definition of Commissioner, substituted "asset management and maintenance" for "planning and operations".

Library References

Comments.

Contracts and purchasing, debarment, see Randall and Franklin, 18B Massachusetts Practice § 1280.

§ 29G. Utility expenses of commonwealth; recoupment of overcharges

Notwithstanding the provisions of any general or special law to the contrary, the officer having charge of a state agency is hereby authorized to retain the services of private persons, companies, associations or corporations for the purpose of recoupment of overcharges to the commonwealth for utility expenses including, but not limited to, electric, gas, water and sewer expenses, pursuant to agreements between the operational services division within the executive office for administration and finance and any such private persons, companies, associations or corporations. The state purchasing agent of the operational services division shall, from time to time, enter into agreements with private persons, companies, associations or corporations for the provision

Connecticut Statutes

Connecticut Statutes
TITLE 31 LABOR
CHAPTER 557 EMPLOYMENT REGULATION
PART III STATE CONTRACTS

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Sec. *31≥-≤57c*. Disqualification of certain contractors from bidding on, applying for or participating in public works contracts with the state: Disqualification by Commissioner of Public Works; procedure; causes. Exception permitting disqualified contractor to participate in contract or subcontract.

(a) As used in this section, the term "contractor" shall mean any person, firm or corporation which has contracted or seeks to contract with the state, or to participate in such a contract, in connection with any public works of the state or a political subdivision of the state.

(b) Disqualification of a contractor is a serious action that shall be used only in the public interest and for the state government's protection and not for purposes of punishment or in lieu of other applicable enforcement or compliance procedures. The causes for and consequences of disqualification under this section shall be separate from and in addition to causes for and consequences of disqualification under sections 4b-95, 31-53a, 31-57a and 31-57b.

(c) The Commissioner of Public Works may disqualify any contractor, for up to two years, from bidding on, applying for, or participating as a subcontractor under, contracts with the state, acting through any of its departments, commissions or other agencies, except the Department of Administrative Services, the Department of Transportation and the constituent units of the state system of higher education, for one or more causes set forth under subsection (d) of this section. The commissioner may initiate a disqualification proceeding only after consulting with the contract awarding agency, if any, and the Attorney General and shall provide notice and an opportunity for a hearing to the contractor who is the subject of the proceeding. The hearing shall be conducted in accordance with the contested case procedures set forth in chapter 54. The commissioner shall issue a written decision within ninety days of the last date of such hearing and state in the decision the reasons for the action taken and, if the contractor is being disqualified, the period of such disqualification. The existence of a cause for disqualification shall not be the sole factor to be considered in determining whether the contractor shall be disqualified. In determining whether to disqualify a contractor, the commissioner shall consider the seriousness of the contractor's acts or omissions and any mitigating factors. The commissioner shall send the decision to the contractor by certified mail, return receipt requested. The written decision shall be a final decision for the purposes of sections 4-180 and 4-183.

(d) Causes for disqualification from bidding on, or participating in, contracts shall include the following:

(1) Conviction or entry of a plea of guilty or nolo contendere for or admission to commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or

in the performance of such contract or subcontract;

(2) Conviction or entry of a plea of guilty or nolo contendere or admission to the violation of any state or federal law for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty which affects responsibility as a state contractor;

(3) Conviction or entry of a plea of guilty or nolo contendere or admission to a violation of any state or federal antitrust, collusion or conspiracy law arising out of the submission of bids or proposals on a public or private contract or subcontract;

(4) A wilful failure to perform in accordance with the terms of one or more public contracts, agreements or transactions;

(5) A history of failure to perform or of unsatisfactory performance of one or more public contracts, agreements or transactions; or

(6) A wilful violation of a statutory or regulatory provision or requirement applicable to a public contract, agreement or transaction.

(e) For purposes of a disqualification proceeding under this section, conduct may be imputed as follows:

(1) The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor and the contractor knew of or had reason to know of such conduct. The term "other seriously improper conduct" shall not include advice from an attorney, accountant or other paid consultant if it was reasonable for the contractor to rely on such advice.

(2) The fraudulent, criminal or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee or other individual associated with the contractor who participated in, knew of or had reason to know of the contractor's conduct.

(3) The fraudulent, criminal or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement and these contractors knew of or had reason to know of such conduct.

(f) The commissioner may reduce the period or extent of disqualification, upon the contractor's request, supported by documentation, for the following reasons:

(1) Newly discovered material evidence;

(2) Reversal of the conviction upon which the disqualification was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the disqualification

was imposed; or

(5) Other reasons the commissioner deems appropriate.

(g) The commissioner may grant an exception permitting a disqualified contractor to participate in a particular contract or subcontract upon a written determination by the head of the contract awarding agency that there is good cause, in the interest of the public, for such action.

(P.A. 93-220, S. 1, 3.)

History: P.A. 93-220 effective July 2, 1993; (Revisor's note: In 1997 references in Subsec. (e) and Subsec. (e)(2) to "inputed" were changed editorially by the Revisors to "imputed").

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Connecticut Statutes

Connecticut Statutes
TITLE 4b STATE REAL PROPERTY
CHAPTER 60 CONSTRUCTION AND ALTERATIONS OF STATE BUILDINGS
PART II BIDDING AND CONTRACTS

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Sec. *4b>-<92*. (Formerly Sec. *4-137b*). "Lowest responsible and qualified bidder" defined. Bid bonds, certified checks, when forfeited.
****Update notice:** This section has been amended by P.A. 03-215.

As used in this chapter and except as otherwise provided, the words "lowest responsible and qualified bidder" shall mean the bidder whose bid is the lowest of those bidders possessing the skill, ability and integrity necessary to faithful performance of the work based on objective criteria considering past performance and financial responsibility. Essential information in regard to such qualifications shall be submitted with the bid in such form as the awarding authority may require by specification in the bid documents and on the bid form. Every general bid shall be accompanied by a bid bond or a certified check in an amount which shall be ten per cent of the bid, provided no such bid bond or certified check shall be required in relation to any general bid in which the total estimated cost of labor and materials under the contract with respect to which such general bid is submitted is less than fifty thousand dollars. Failure to execute a contract awarded as specified and bid shall result in the forfeiture of such bid bond or certified check. In considering past performance the awarding authority shall evaluate the skill, ability and integrity of bidders in terms of the bidders' fulfillment of contract obligations and of the bidders' experience or lack of experience with projects of the size of the project for which the bids are submitted.

(P.A. 73-528, S. 2, 12; P.A. 74-246, S. 2, 11; P.A. 79-490; P.A. 82-358, S. 8, 10; 82-447, S. 2; P.A. 99-75, S. 9.)

History: P.A. 74-246 deleted provision that bidder certify labor to be employed can work harmoniously with others, required objective criteria for judging bidders' qualifications and raised bid bond from five to ten per cent of bid; P.A. 79-490 exempted sub-bidders bidding less than ten thousand dollars in labor and materials costs from bid bond requirement; P.A. 82-358 provided that bid bond or certified check is not required for general bids with estimated cost of labor and materials of less than ten thousand dollars and raised estimated cost relative to sub-bids from ten thousand to twenty thousand dollars; P.A. 82-447 amended section to eliminate all reference to sub-bidding process and to specify factors for evaluation in considering a contractor's past performance; Sec. 4-137b transferred to Sec. 4b-92 in 1989; P.A. 99-75 substituted "fifty thousand dollars" for "ten thousand dollars".

Annotation to former section 4-137b:

Cited. 191 Conn. 497, 502.

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Revocation, Debarrment, Suspension, and Disqualification

Comparison of key statutes:

§ 20-341gg, as amended by P.A. 03-215	The Department of Consumer Protection may **revoke** any registration held by a "Major contractors" (construction activity exceeding threshold limits), if the holder of such registration : (a) is convicted of a felony; (b) is grossly incompetent; (c) is disqualified, pursuant to section 2 of P.A. 04-141; (d) has had its prequalification certificate revoked pursuant to section 2 of P.A. 04-141; (e) engages in malpractice or unethical conduct; (f) knowingly makes false, misleading or deceptive representations regarding his work; or (g) violates any regulations adopted by the Commissioner of Consumer Protection.
§ 4a-63	The Commissioner of DAS may **disqualify** any person, firm or corporation for up to two years from bidding on contracts with DAS pursuant to § 4a-57, for supplies, materials, equipment and contractual services required by any state agency for any reason set forth below, or, pending the hearing for such disqualification, may **suspend** such person, firm or corporation for three months from being considered for the award of such a contract, where probable cause exists for disqualification. The reasons for disqualification are: (a) conviction or entry of a plea of guilty for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract; (b) conviction or entry of a plea of guilty under state or federal law for embezzlement, theft, forgery, bribery, falsification or destruction or records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty which affects responsibility as a state contractor; (c) conviction or entry of a plea of guilty under state or federal antitrust, collusion or conspiracy statutes arising out of the submission of bids or proposals; (d) noncompliance with contract provisions, of a character

	regarded by the commissioner to be of such gravity as to indicate a lack of responsibility to perform as a state contractor, including deliberate failure, without good cause, to perform in accordance with specifications or time limits provided in a contract; (e) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, unless such failure to perform or unsatisfactory performance was caused beyond the control of the contractor or supplier; or (f) any other cause the commissioner determines to be so serious or compelling as to affect responsibility as a state contractor, including disqualification by another governmental entity, having caused financial loss to the state or having caused serious delay or inability of state officials to carry out their duties on a past contract or contracts.
§ 4a-52a	The chief executive officer of each constituent unit of the state system of higher education or, in the case of the CSU system, the chief executive officer of a state university may disqualify any person, firm or corporation, for up to two years, from bidding on contracts with such unit, system, or institutions under their jurisdiction, for supplies, materials, equipment and contractual services for any of the reasons set forth below, or, pending the hearing for such disqualification, may **suspend** such person, firm or corporation for not more than three months from being considered for the award of such a contract, where probable cause exists for disqualification. The reasons for disqualification are the same as set forth in § 4a-63.
§ 2-71r	The Joint Committee on Legislative Management may disqualify any person, firm or corporation, for up to two years from bidding on contracts with the Legislative Department for supplies, materials, equipment and contractual services required by the Legislative Department, for the reasons set forth below, or, pending the hearing for such disqualification, may suspend such person, firm or corporation for not more than three months from being considered for the award of such contract, where probable cause exists for disqualification.

	The reasons for disqualification are the same as set forth in § 4a-63.
§ 31-53a	The Labor Commissioner may debar any person or firm who violates that fails to pay its mechanics, laborers, and workers pursuant to § 31a-53. Debarment can be for a period of up to three years. A civil penalty of $1000.00 per day can be assessed for working on public contracts while on the Labor Commissioner's list of those who have failed to comply with § 31-53.

Q & A: False Claims Act

31 USC § 3729-3733

Warning regarding litigation under the False Claims Act:

The False Claims Act has one of the strongest whistleblower protection provisions in the United States. However, it has many complicated components and requirements which can harm any person that pursues such a claim without counsel. Due to the potential for a significant financial recovery, it is usually possible to retain an attorney for such an action. If, after reviewing this section, you believe that you may have an action arising under the False Claims Act and need an attorney, please visit our Attorney Referral Service.

What is the False Claims Act (Qui tam)?

The False Claims Act is 31 U.S.C. Sections 3729 through 3733. Qui tam, under the False Claims Act, allows persons and entities with evidence of fraud against federal programs or contracts to sue the wrongdoer on behalf of the United States Government. In Qui tam actions, the government has the right to intervene and join the action. If the government declines, the private plaintiff may proceed on his or her own. Some states have passed similar laws concerning fraud in state government contracts.

What Actions Are Considered Violations under the False Claims Act?

Actions which are considered violations of the False Claims Act include: 1)knowingly presenting (or causing to be presented) to the federal government a false or fraudulent claim for payment; 2) knowingly using (or causing to be used) a false record or statement to get a claim paid by the federal government; 3) conspiring with others to get a false or fraudulent claim paid by the federal government; and 4) knowingly using (or causing to be used) a false record or statement to conceal, avoid, or decrease an obligation to pay money or transmit property to the federal government.

Who Can File a Qui tam Action?

Any persons or entities with evidence of fraud against federal programs or contracts may file a Qui tam lawsuit. If the government or a private party has already filed a False Claims Act lawsuit based on the same evidence as you, you cannot bring a lawsuit.

Giving the information to the government does not bar you from filing an action. However, if the government files a lawsuit based on the False Claims Act before you, you lose your right to file.

Where Should a Qui tam Action Be Filed?

A qui tam action must be filed in federal district court in accordance with the Federal Rules of Civil Procedure. A copy of the complaint, with a written disclosure statement of substantially all material evidence and information in the plaintiff's possession, must be served on the U.S. Attorney General and the U.S. Attorney General for the district in which the complaint is brought. An action under the False Claims Act must be filed, in camera and under seal. The complaint and its contents must be kept confidential until the seal is lifted. If the plaintiff violates the provisions of the seal, his or her complaint could be dismissed.

What Are the Civil Penalties Under the False Claims Act?

Violators of the False Claims Act are liable for three times the dollar amount that the government is defrauded and civil penalties of $5,000 to $10,000 for each false claim.

A qui tam plaintiff can receive between 15 and 30 percent of the total recovery from the defendant, whether through a favorable judgment or settlement. To be eligible to recover money under the Act, you must file a qui tam lawsuit. Merely informing the government about the violation is not enough. You only receive an award if, and after, the government recovers money from the defendant as a result of your suit.

What Are the Statutes Of Limitations?

Under the False Claims Act, an action must be filed within the later of the following two time periods: 1) six years from the date of the violation of the Act; or 2) three years after the government knows or should have known about the violation, but in no event longer than ten years after the violation of the Act. (One Circuit Court has interpreted the second provision as requiring that the action be filed not later than three years after the qui tam plaintiff rather than the government knows, or should have known about the violation.)

What Are the Whistleblower Protection Provisions in the False Claims Act?

Under Section 3730(h) of the False Claims Act, any employee who is discharged, demoted, harassed, or otherwise discriminated against because of lawful acts by the employee in furtherance of an action under the Act is entitled to all relief necessary to make the

employee whole. Such relief may include reinstatement, double back pay, and compensation for any special damages including litigation costs and reasonable attorneys' fees. You should be aware, however, that the scope of whistleblower protection under Section 3739(h) is an issue that currently divides the courts.

Many states have wrongful discharge or other employment laws that may provide remedies for such discrimination. **More information.**

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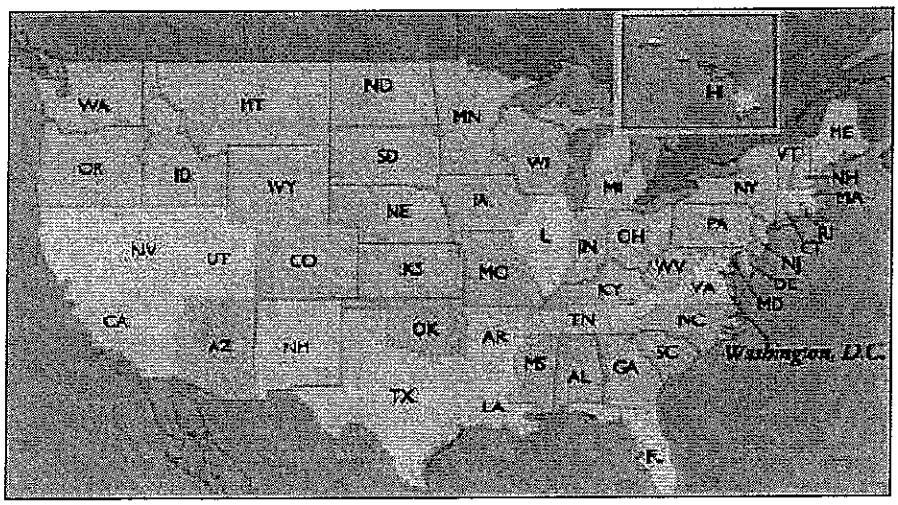
State False Claims Acts

The following states have their own versions of the False Claim Act with *qui tam* provisions, enabling them to recover money at the state level.

Click on the yellow states on the map below to go to copies of that state's FCA text.



Note: *The text of the state FCA laws on this web site are believed to be up-to-date and complete, but we urge lawyers and relators filing* qui tam *cases to rely on the most up-to-date version of their respective state codes.*

State False Claims Act Cases Citations *= Medicaid only False Claims Act	
Arkansas*	ARK. CODE ANN. Sec 20-77-901 et seq. (2000). [Medicaid]
California	CAL. Gov't Code Sec 12650 et seq. (DEERING 2000). [General]
Delaware	DEL. CODE. ANN. tit. 6, Sec 1201 et seq. (2000). [General]
District of Columbia	D.C. CODE ANN. Sec 1-1188.13 et seq. (2000). [General]
Florida	FLA. STAT. 68.081 et seq. (2000) [General]
Hawaii	HAW. REV. STAT. Sec661-22 et seq. (2000).

	[General]
Illinois	740 ILL. COMP. STAT. ANN. Sec 175/1 et seq. (2000). [General]
Louisiana*	LA. REV. STAT. ANN. Sec 46:439.1 et seq. (2000). [Medical Assistance]
Massachusetts	MASS ANN. LAWS CH. 12, Sec5(A)-(O)
New Mexico	Signed by Governor *Effective May 19, 2004*
Nevada	NEV. REV. STAT. Sec357.010 et seq. (1999). [General]
Tennessee*	TENN. CODE. ANN. Sec 71-5-181 et seq. (2000). [Medicaid]
Texas	TEX. HUM. RES. CODE Sec 36.001-36.117
Utah	UTAH CODE ANN. Sec 26-20-1 et seq. (2000). [Medicaid]
Virginia	VIRGINIA Fraud Against Taxpayers Act,signed April 17, 2002; effective Jan. 1, 2003

Sample of State False Claims Act Cases

State and Date	**Company**	**Fraud**	**Settlement or Judgement**
California, 1998	BankAmerica	Improperly retained unclaimed municipal bonds	$187 million
California, 2000	Toshiba	Knowingly sold defective computers to the State and its political divisions.	$30 million
California, 2001	Tutor-Saliba-Perini JV	Fraudulent billing during construction of Los Angeles Subway system	$31.9 million
California, 2003	Mandated Cost Systems Inc.	Submission of inflated and false bills.	$3.4 million
Florida, 1996	CareFlorida Health Plan Inc	Submission of fraudulent Medicaid enrollments.	$ 1.75
Hawaii,	Bergen	Wrongfully	$4 million

2001	Brunswig Corp.	recycled and repackaged unused drugs from nursing homes facilities	
Texas, 2001	Driscoll Children's Hospital and Foundation	Filing false expense reports, reporting inflated charity work, and engaging in kickbacks.	$14.5 million

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Memorandum

TO: Working Group Members

FROM: Christopher L. Morano, Chairman
Subcommittee on Contracting Enforcement, Investigation and Compliance

DATE: August 2, 2004

SUBJECT: Schedule

Enclosed please find materials my office has put together concerning some of the potential issues we may wish to consider at our first Subcommittee meeting scheduled for August 4, 2004, at 10:00 a.m. The meeting will take place at the Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT, 1st Floor. We will likely need to schedule additional meetings, so please keep your schedules as flexible as possible.

In anticipation for our first meeting, I am requesting that all working group members prepare a 1-2 page written summary of where they believe problems exist within the system, the cause of these problems and any suggested improvements. These written submissions will be attached to the workgroup report's appendix. You may submit any support documentation you wish at this meeting. Attached to this memorandum at TAB A is a matrix prepared by the co-chairs' staff. This matrix includes the areas the co-chairs would like our group to focus on. Of course the themes laid out in the matrix are not meant to be exclusive.

Finally, it is my hope to have all of the user agencies make their presentations at the August 4th meeting. Please keep in mind that a draft of our report is due to the co-chairs by Monday, August 16, 2004. I look forward to seeing you all on August 4th.

CLM/md
Enclosure

APPENDICES

TAB A	MATRIX
TAB B	FALSE CLAIMS ACT
TAB C	CONNECTICUT WHISTLE BLOWER STATUTE
TAB D	PUBLIC ACT REGARDING ETHICS LAWS
TAB E	INFORMATION REGARDING STATE PROPERTIES REVIEW BOARD

DRAFT
Workgroup Assignments
(July 27, 2004)

	1	2	3	4	5	6	7
Governor Rell's themes	*Leasing*	*Construction procedures*	*Investigation/ Enforcement/ Compliance*	*Personal Services Agreement*	*Property Management*	*Procurement*	*Ethics and Integrity*
Adopting **clear and consistent procedures** to evaluate bids and contractor performance	X	X		X	X	X	
Requiring agencies to maintain complete, clear and open **records** of the contractor selection process, including written justification for decisions by those involved in the selection process	X	X		X	X	X	
Establishing a binding and enforceable **code of ethics** for all those conducting business with the state	Incorporate	Incorporate	Incorporate	Incorporate	Incorporate	Incorporate	X
* Authorizing the **suspension of contractors** engaged in wrong doing related to existing state contracts	Incorporate	Incorporate	X	Incorporate	Incorporate	Incorporate	Incorporate
* Establishing a **permanent oversight board** for all major state contracts to ensure consistency and adherence to all contracting requirements		X	X				

	1	2	3	4	5	6	7
Governor Rell's themes (continued)	*Leasing*	*Construction procedures*	*Investigation/ Enforcement/ Compliance*	*Personal Services Agreement*	*Property Management*	*Procurement*	*Ethics and Integrity*
Requiring all contractors, not only those with large state contracts, to adhere to laws concerning **disclosure of gifts** to state employees	Incorporate	Incorporate	Incorporate	Incorporate	Incorporate	Incorporate	X
Reviewing the role of the **State Properties Review Board** to ensure appropriate oversight of all state leases		X					
Implementing provisions of the **Governor's Executive Order #1** and recent contracting reform **legislation.**	Incorporate	Incorporate	Incorporate	Incorporate	Incorporate	Incorporate	X
Enacting a **False Claims Act**, modeled after the federal statute, providing for damages and penalties against contractors who defraud the state		X	X				

*

	1	2	3	4	5	6	7
	Leasing + Property Acquisition	*Construction procedures*	*Investigation/ Enforcement/ Compliance*	*Personal Services Agreement*	*Property Management*	*Procurement*	*Ethics and Integrity*
Priority Issues	• Lessor input • Streamlining the procedure • Application of DPW 10 steps • Statewide centralization of function	• SPRB (possible mutation to oversight board or change in role) • Contract oversight board • Standardization of procedures • False Claims Act	• Suspension of contractors • False Claims Act • Disqualification with protection of rights • Tools /authority required to be effective	• Standardization of procedures • Statutory authority for guidelines • Integration of DPW 10 steps	TBD	• Small and minority/ women owned businesses • CORE CT	• Gifts • Education • Culture • Consequences

	1	2	3	4	5	6	7
	Leasing + Property Acquisition	*Construction procedures*	*Investigation/ Enforcement/ Compliance*	*Personal Services Agreement*	*Property Management*	*Procurement*	*Ethics and Integrity*
Chair	Mr. Mallory, Adm. Of Leasing and Property Transfer, DPW	Dep. Comm. O'Hearn, DPW + Mr. Boice, DOT	Chief State's Attorney Morano Mr. Murray, Dep. Chief St's Atty. Mr. Russotto, Dep. Chief St's. Atty.	Mr. Bye, Director of Legal Affairs, OPM Mr. Lazzaro, Dep. Director of Legal Affairs, OPM	Dep. Comm. Holmes, DPW	Mr. Passier, Director of Procurement, DAS	Ms. Rubin, Governor's Special Counsel for Ethics Compliance
Members	Mr. Cox Mr. Pepe	Ms. Blackwell Mr. Griebel Mr. Koeniger Lt. Col. Lukowski Mr. O'Brien Ms. Vazquez-Bzdyra St. Auditors	Rep. Belden Mr. Pavia Mr. Pepe Ms. Rubin (CHECK) Mr. Shubert St. Auditors	Mr. Pavia Sen. Roraback	Ms. Blackwell Rep. Floren	Ms. Reuben Rep. O'Rourke	Lt. Col. Lukowski Rep. O'Rourke Mr. O'Brien Dr. McKinney Mr. Larsen St. Auditors
Suggested users	DOL UCONN Judicial 1-2 additional TBD	DEP CSU CTC UCONN Judicial	DPW AG FOI	3 to be designated by OPM	Judicial Public Safety CSU	DOIT 2-3 additional TBD	Ethics Commission Elec. Enfrc. Comm. Attorney General
DPW presence	TBD	Denise Rodosevich CHECK	Anna Ficeto CHECK	Bruce Cornish	TBD	TBD	TBD

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What is the False Claims Act & Why is it Important?

The False Claims Act is the single most important tool U.S. taxpayers have to recover the billions of dollars stolen through fraud by U.S. government contractors every year.

Under the False Claims Act, 31 U.S.C. §§ 3729-3733, those who knowingly submit, or cause another person or entity to submit, false claims for payment of government funds are liable for three times the government's damages plus civil penalties of $5,500 to $11,000 per false claim.

The False Claims Act explicitly excludes tax fraud. Section 3729(e) states that the Act "does not apply to claims, records, or statements made under the Internal Revenue Code." If you wish to report tax fraud, please call the IRS Fraud Hotline at 800-829-0433.

Qui Tam Whistleblower Provisions

The False Claims Act contains *qui tam*, or whistleblower, provisions. *Qui tam* is a unique mechanism in the law that allows citizens with evidence of fraud against government contracts and programs to sue, on behalf of the government, in order to recover the stolen funds. In compensation for the risk and effort of filing a *qui tam* case, the citizen whistleblower or "relator" may be awarded a portion of the funds recovered, typically between 15 and 25 percent. A *qui tam* suit initially remains under seal for at least 60 days during which the Department of Justice can investigate and decide whether to join the action

A Public-Private Partnership

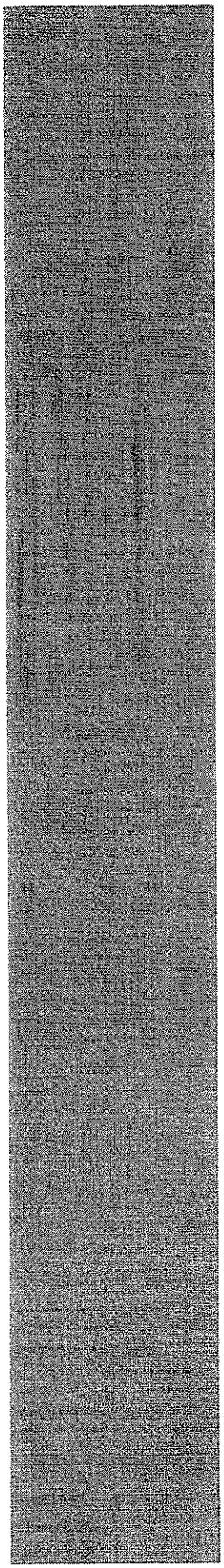
Congress recognized that the Government alone, with its limited resources, was overmatched in the fight against rampant fraud. In response to widespread reports that the U.S. Treasury was being repeatedly bilked, in 1986 Congress rejuvenated a Civil War-era law—the False Claims Act. The 1986 amendments strengthened the False Claims Act's qui tam provisions, creating incentives for private citizens with evidence of fraud to commit their time and resources to supplement the Government's efforts. By doing so, Congress put into play a powerful public-private partnership for uncovering fraud against the federal fisc and obtaining the maximum recovery for American taxpayers.

Changing the Culture of Fraud

The False Claims Act is about more than money. It is also about discouraging fraud and changing the culture of corporate America. As Sen. Charles Grassley (R-IA) and Rep. Howard Berman (D-CA) have noted:

"Studies estimate the fraud deterred thus far by the qui tam *provisions runs into the hundreds of billions of dollars. Instead of encouraging or rewarding a culture of deceit, corporations now spend substantial sums on sophisticated and meaningful compliance programs. That change in the corporate culture -- and in the values-based*

decisions that ordinary Americans make daily in the workplace -- may be the law's most durable legacy."



Who the Law Applies To

In general, the False Claims Act covers fraud involving any federally funded contract or program, with the exception of tax fraud.

While many *qui tam* actions in the late 1980s and early 1990s involved Department of Defense contracts, in recent years most *qui tam* actions have been used to fight Medicare fraud and fraud against other federally funded health care programs. A broad array of scenarios can constitute FCA violations. Some examples include the following:

- A contractor falsifies test results or other information regarding the quality or cost of products it sells to the Government;
- A health care provider bills Medicare for services that were not performed or were unnecessary, or;
- A grant recipient charges the Government for costs not related to the grant.

Types of Fraud Prosecuted Under the FCA

It is impossible to list all of the frauds that have been prosecuted under the False Claims Act, but the following list gives some idea of the scope of the false claims on the Government that have been uncovered to date:

- Billing for goods and services that were never delivered or rendered.
- Billing for marketing, lobbying or other non-contract related corporate activities.

- Submitting false service records or samples in order to show better-than-actual performance.
- Presenting broken or untested equipment as operational and tested.
- Performing inappropriate or unnecessary medical procedures in order to increase Medicare reimbursement.
- Billing for work or tests not performed.
- Billing for premium equipment but actually providing inferior equipment.
- Automatically running a lab test whenever the results of some other test fall within a certain range, even though the second test was not specifically requested.
- Defective testing - Certifying that something has passed a test, when in fact it has not.
- "Lick and stick" prescription rebate fraud and "marketing the spread" prescription fraud, both of which involve lying to the government about the true wholesale price of prescription drugs.
- Unbundling - Using multiple billing codes instead of one billing code for a drug panel test in order to increase remuneration.
- Bundling -- Billing more for a panel of tests when a single test was asked for.
- Double billing - Charging more than once for the same goods or service.
- Upcoding - Inflating bills by using diagnosis billing codes that suggest a more expensive illness or treatment.
- Billing for brand -- Billing for brand-named drugs when generic drugs are actually provided.
- Phantom employees and doctored time slips: Charging for employees that were not actually on the job, or billing for made-up hours in order to maximize reimbursements.
- Upcoding employee work: Billing at doctor rates for work that was actually conducted by a nurse or resident intern.
- Yield burning -- skimming off the profits from the sale of municipal bonds.
- Falsifying natural resource production records -- Pumping, mining or harvesting more natural resources from public lands that is actually reported to the government.
- Being over-paid by the government for sale of a good or service, and then not reporting that overpayment.
- Misrepresenting the value of imported goods or their country of origin for tariff purposes.
- False certification that a contract falls within certain guidelines (i.e. the contractor is a minority or veteran).
- Billing in order to increase revenue instead of billing to reflect actual work performed.
- Failing to report known product defects in order to be able to continue to sell or bill the government for the product.
- Billing for research that was never conducted; falsifying research data that was paid for by the U.S. government.
- Winning a contract through kickbacks or bribes.
- Prescribing a medicine or recommending a type of treatment or

diagnosis regimen in order to win kickbacks from hospitals, labs or pharmaceutical companies.

- Billing for unlicensed or unapproved drugs.
- Forging physician signatures when such signatures are required for reimbursement from Medicare or Medicaid.

Limits on the False Claims Act

Though the False Claims Act is a powerful tool to combat fraud, it is a tool that is sharply constrained by both the law and economics of litigation.

- Tax issues are not covered by the False Claims Act.
- For a civil case to be filed, the fraud has to reach a certain size, otherwise it is generally not worth it for the relator to risk his or her career to file suit, nor is it worth it for a law firm to take on the case and risk the loss of the enormous time and expense that a False Claims Act represents.
- A defendant in a False Claims Act has to have relatively deep pockets. Many of the smaller companies that may be defrauding the government are liable to declare bankruptcy if faced with the triple damages that can be levied under the False Claims Act.
- A law firm that take on a False Claims Act case must believe it has a very strong case in order to proceed. Not only can a firm be out time and money, but if the government does not take the case and the whistleblower proceeds, he or she can be forced to pay the defendants attorney's fees if the court finds that the claim was frivolous or brought primarily for purposes of harassment.

State False Claims Acts

In addition to the Federal False Claims Act, a number of states also have False Claims Acts that work to discourage frauds perpetrated against state governments. States with False Claims Acts include: Arkansas, California, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Louisiana, Massachusetts, Nevada, Tennessee, Texas, Utah, and Virginia.

9-42.010 Coordination of Criminal and Civil Fraud Against the Government Cases

A. The United States has both statutory (e.g., the False Claims Act, 31 U.S.C. §§ 3729-3733) and common law rights of action arising from fraud against the government and from the corruption of its officials. Every report of fraud or official corruption should be analyzed for its civil potential before the file is closed. In the first instance, this review should be conducted by an Assistant United States Attorney or Departmental Trial Attorney assigned to the initial referral. Claims of fraud against the government involving more than $1,000,000 in single damages plus civil penalties also should be referred to the Civil Division's Commercial Litigation Branch.

B. The Federal Bureau of Investigation has been directed to furnish both the Fraud Section of the Criminal Division and the Commercial Litigation Branch of the Civil Division with copies of all reports in all matters involving fraud against the government, or bribery or conflict of interest involving a public employee. Other federal investigative agencies are required to forward similar reports of investigation to the Branch Director or appropriate United States Attorney.

C. Cases pursued criminally must also be analyzed for civil potential. This analysis should be conducted at the earliest possible stage. Criminal dispositions by plea bargain should not waive or release the government's civil interests, except in return for adequate consideration, as measured by the Department's standards for civil settlements generally. Proposed civil dispositions involving over $1,000,000 in single damages plus civil penalties must be referred to the Commercial Litigation Branch for approval. *See* 28 C.F.R. § 0.160, § 0.164, and Civil Division Directive No. 14-95, 60 Fed. Reg. 17457 (April 6, 1995), *reprinted in* 28 C.F.R. Pt. 0, Subpart Y,

Appendix.

D. As to cases referred to it, the Commercial Litigation Branch notifies the appropriate United States Attorney and other interested offices within the Department of Justice of potential civil actions that come to the Branch's attention. The Branch coordinates its cases with the appropriate United States Attorney to ensure the pursuit of both civil and criminal redress. Cases are similarly coordinated within the United States Attorneys' offices. This coordination may include the simultaneous initiation of civil and criminal proceedings in cases in which the monetary recovery to the government and the deterrent effect will be enhanced, giving due consideration to the risks to the criminal case and the availability of protective orders and stays.

E. The attorney from the Commercial Litigation Branch or Assistant United States Attorney assigned to the matter follows the investigation as it develops and, where necessary, requests, in coordination with other interested offices of the Department of Justice, that an investigation be conducted relating to areas such as damages, which are particularly pertinent to civil actions. It is the policy of the Department to coordinate jointly the investigation of criminal and civil actions. Pursuant to this policy, an Attorney General memorandum to the United States Attorneys dated July 16, 1986 states that "where possible, documents should be obtained by methods other than grand jury subpoenas." This Attorney General memorandum encourages the use of Inspector General subpoenas as an alternative to grand jury subpoenas in those cases where an Inspector General has determined that such usage is appropriate.

F. The Branch attorney or AUSA assigned to the matter, should give consideration at the earliest possible date to the initiation of civil action and advise other interested offices in the Department or United States Attorneys' offices of any contemplated civil action. Absent a specific, detailed statement that there is a strong likelihood that institution of a civil action would materially prejudice contemplated criminal prosecution of specific subjects, the decision to institute civil action is governed solely by the standards specified in 38 Op. Att'y Gen. 98 (1934). That is, the suit is instituted unless there is

1. doubt as to collectibility

   or

2. doubt as to the facts or law.

G. Provisional relief may be sought in cases in which the investigation warrants the conclusion that dissipation of any substantial amounts of assets is likely, notwithstanding the degree to which the criminal aspects of the matter have been concluded. The Commercial Litigation Branch and/or assigned Assistant United States Attorney should advise other interested offices of the Department or United States Attorneys' offices of any provisional action. Such provisional relief is sought unless there is a clear likelihood that efforts to prevent dissipation of assets would materially prejudice criminal prosecution of specific subjects. Where there is a possible criminal component to the case, the criterion for determining "substantial assets" is set at $50,000, which is the minimum debt that must exist for the United States to obtain discovery in connection with a request for provisional relief under the Federal Debt Collection Procedures Act, 28 U.S.C. § 3015(b). In cases in which assets of $50,000 or more may be dissipated, efforts at provisional relief to secure recovery on behalf of a client agency should, if a conflict exists, be resolved within the Department at the appropriate level.

H. The Commercial Litigation Branch and the United States Attorneys offices are accorded significant latitude in urging client agencies to withhold payment of claims presented by any subject known to have engaged in fraudulent conduct. The Branch will advise the appropriate United States Attorney's Office and other interested offices of the Department when taking such actions. Absent a specific, detailed statement that withholding action would materially prejudice contemplated criminal prosecution of specific subjects, the decision to withhold is governed by the usual Department standards. The government's common law right to withhold payment by setoff has been upheld by the United States Supreme Court. *United States v. Munsey Trust Co.*,

332 U.S. 234 (1947). Withholding is an important tool for effecting civil redress, and in recent years the government has successfully defended a number of cases in which client agencies have employed this self-help remedy. *See, e.g., Peterson v. Weinberger*, 508 F.2d 45 (5th Cir. 1975); *Brown v. United States*, 524 F.2d 693 (Cl. Ct. 1975), *as amended*, (1976); *Continental Management, Inc. v. United States*, 527 F.2d 613 (Cl. Ct. 1975). The negotiation of favorable settlements in unliquidated matters also may be enhanced by the bargaining leverage which withholding affords. Client agencies also should be urged to withhold pay and retirement benefits to Federal employees separated because of evidence of wrongdoing. The current regulations regarding the withholding or setoff of backpay are found at 4 C.F.R. § 102.3, 5 C.F.R. §§ 550.805(e)(2), 845.206(b). The current regulations regarding the withholding or setoff of retirement benefits are found at 4 C.F.R. § 102.4 and 5 C.F.R. §§ 179.213(a)(4), 831.1306, 831.1801, 845.206(a).

I. The existing delegations of authority to file suit, settle or close civil fraud claims are set forth in 28 C.F.R. § 0.160, § 0.164, and Civil Division Directive No. 14-95, 60 Fed. Reg. 17457 (April 6, 1995), *reprinted in* 28 C.F.R. Pt. 0, Subpart Y, Appendix. They provide for redelegation of the authority of the Civil Division's Assistant Attorney General over fraud claims (set out in 28 C.F.R. § 0.45(d)) to the Division's Branch Directors and United States Attorneys in certain circumstances. Under Directive 14-95, the United States Attorneys are authorized to file suit, close a case, or "take any other action necessary to protect the interests of the United States," wherever "the gross amount of the original claim does not exceed" $1,000,000. Directive No. 14-95, § 1(c). Agencies are also authorized to refer matters directly to United States Attorneys involving "[m]oney claims by the United States, except claims involving penalties and forfeitures, where the gross amount of the original claim does not exceed $1,000,000." *Id.* § 4(a)(1).

In the following instances, cases within the monetary range normally within the authority of the United States Attorneys shall not be delegated and shall be submitted to the Assistant Attorney General:

1. where a proposed action "will control or adversely influence the disposition of other claims totaling more than" the amount within the United States Attorney's authority, *id.* § 1(e)(1);
2. where "a novel question of law or a question of policy is presented," *id.* § 1(e)(2);
3. where the "agencies involved are opposed to the proposed action," *id.* § 1(e)(3); and
4. where, "for any other reason, the proposed action should * * * receive the personal attention of the Assistant Attorney General, Civil Division," *id.* § 1(e)(2).

The Directive also provides that "[a]ny case involving bribery, conflict of interest, breach of fiduciary duty, breach of employment contract, or exploitation of public office" will "normally" not be delegated to United States Attorneys for handling. *Id.* § 4(c)(4).

Similarly, "[a]ny fraud or False Claims Act case where the amount of single damages, plus civil penalties, if any, exceeds $1,000,000" will "normally" not be delegated to United States Attorneys. *Id.* § 4(c)(5). Nevertheless, upon the recommendation of the Director, Commercial Litigation Branch, "the Assistant Attorney General, Civil Division may delegate to United States Attorneys suit authority involving any claims or suits where the gross amount of the original claim does not exceed $5,000,000 where the circumstances warrant such delegations." *Id.* § 4(b). Any authority exercised by the United States Attorneys under Directive No. 14-95 may be redelegated to Assistant United States Attorneys who supervise other Assistant United States Attorneys handling civil litigation. *Id.* § 1(d).

Where the matter was originally within their authority, United States Attorneys may accept any offer in compromise where either the gross amount of the original claim or the principal amount of the proposed settlement does not exceed $1,000,000, *id.* §§ 1(b)(2)(a) & (b). In cases where the gross amount of the original claim is more than $1 million but less than $5 million, the United States Attorney may accept any settlement in which "the difference between the gross amount of the original claim and the proposed settlement does not exceed $1,000,000." *Id.* § 1(b)(2)(a)(ii).

Inquiries should be directed to: Director, Commercial Litigation Branch, Civil Division, and Chief, Fraud Section, Criminal Division.

J. Each United States Attorney's Office has an Affirmative Civil Enforcement (ACE) coordinator, who should be consulted on issues arising from parallel criminal and civil cases.

9-42.160 False Statements to a Federal Criminal Investigator

It is the Department's policy not to charge a Section 1001 violation in situations in which a suspect, during an investigation, merely denies guilt in response to questioning by the government. This policy is to be narrowly construed, however; affirmative, discursive and voluntary statements to Federal criminal investigators would not fall within the policy. Further, certain false responses to questions propounded for administrative purposes (e.g., statements to border or United States Immigration and Naturalization Service agents during routine inquiries) are also prosecutable, as are untruthful "no's" when the defendant initiated contact with the government in order to obtain a benefit. See the Criminal Resource Manual at 916 for a brief discussion of the case law.

Prior consultation with the Criminal Division is not required before initiating prosecutions for false statements to Federal investigators; however, the Fraud Section is available for consultation on cases involving these principles.

9-42.191 Application of Appropriate Statute

It is the policy of the Department that in those instances in which the United States Attorney (USA) has a choice of statutes, charges normally should be brought pursuant to the more specific statute. In those cases in which special aggravating circumstances exist, the USA retains the discretion to charge a violation of the more serious general statute. *See also* the Criminal Resource Manual at 920 (General versus Specific Statutes).

9-42.420 Federal Procurement Fraud Unit

In August 1982, the Attorney General and the Secretary of Defense established the Defense Procurement Fraud Unit in the Criminal Division's Fraud Section to help concentrate and coordinate the law enforcement resources of the Department in prosecuting significant procurement fraud cases involving the Department of Defense's ("DOD") multi-billion dollar procurement of equipment and services. That unit is now called the Federal Procurement Fraud Unit (Unit), and handles a variety of fraud cases affecting both civilian and defense agency procurements, including product substitution, false testing, cost mischarging, defective pricing, and kickback cases. In addition to conducting major procurement investigations, the Unit provides expertise and guidance on procurement fraud issues to investigative agencies and United States Attorneys' Offices that request their assistance.

9-42.430 Department of Defense Voluntary Disclosure Program

In July 1986, the Department of Defense initiated its Voluntary Disclosure Program which is designed to encourage self-policing and voluntary disclosure by Defense contractors of procurement-related problems. The Fraud Section's Federal Procurement Fraud Unit (Unit) is the contact point in the Department of Justice to oversee voluntary disclosure matters. See the Criminal Resource Manual at 931 for a listing of the Unit's responsibilities and procedures.

9-42.440 Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act

In 1986, Congress amended the False Claims Act, 31 U.S.C. § 3729 *et seq.*, *see generally* False Claims Act Amendments of 1986, Pub.L. 99-562, 100 Stat. 3153 (October 27, 1986), *reprinted in*, 10A USCCAN (December 1986). One of the Congress's objectives in modifying the Act was to encourage the use of qui tam actions in which citizens are authorized to bring, as "private Attorneys General," lawsuits on behalf of the United States alleging frauds upon the government.

When United States Attorneys receive information about a qui tam action, they should promptly

forward a copy of the complaint and statement of evidence to the Commercial Litigation Branch of the Civil Division, particularly because relators frequently fail to serve the Attorney General or delay in doing so. The Commercial Litigation Branch will contact the agency involved, the Criminal Division, and, frequently, the Inspector General of the agency, to determine if the allegations are known to them and to obtain an assessment of the material evidence furnished by the relator. The Criminal Division will, in turn, check with appropriate United States Attorneys' offices USAOs and investigative agencies to determine if the allegations relate to a pending criminal investigation. Because of the 60-day deadline, it must be emphasized that a prompt response is required to these inquiries.

See the Criminal Resource Manual at 932 for an additional discussion of this issue.

9-42.451 Plea Bargaining in Medicare-Medicaid Frauds

A potential problem area has been identified regarding the practice of plea bargaining as it relates to administrative sanctions available to the Health Care Financing Administration, United States Department of Health and Human Services (HHS), in Medicare-Medicaid fraud cases.

Specifically, provision 229 of Pub.L. No. 92-603, enacted on October 30, 1972, amended Sections 1862 and 1866(b) of the Social Security Act to enable the Secretary of HHS to deny payment under Title XVIII of the act upon determining that a provider or person has committed fraud or abuse against the Medicare program. Subsequent to such determinations, Section 1903(i)(2) of the act also prohibits Federal financial participation (FFP) for payments to these providers or persons in the Medicaid program. In addition, the legislation (Pub.L. No. 95-142, Medicare-Medicaid Anti-Fraud and Abuse Amendments) enacted on October 25, 1977, contains a provision (Section 7) that requires the Secretary of HHS to suspend program participation for a physician or individual practitioner convicted of a criminal offense involving the Medicare or Medicaid programs. Suspension from program participation is immediate and applicable to both programs. The Section 7 provision is incorporated in the Code of Federal Regulations at 42 C.F.R. § 405.315-2 for Title XVIII and at 42 C.F.R. § 450.85 for Title XIX.

Since the administrative sanction would generally be effectuated after any criminal proceedings, plea bargains that include commitments to forego or restrict administrative remedies, which the HHS may elect to pursue under the aforementioned provisions, should be rare and made only after obtaining prior explicit approval from the Criminal Division.

See USAM 9-16.000 et seq. and 9-27.000 et seq. for additional guidance regarding plea agreements.

See the Criminal Resource Manual at 933 for further discussion of the Medicaid/Medicare Programs and statutes that can be used to prosecute fraud against these programs. *See also* USAM 9-44.000 *et seq.* (Health Care Fraud).

9-42.500 Referral Procedures -- Relationship and Coordination With the Statutory Inspectors General

A. **Policy Statement of the Department of Justice on its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States:** The investigation and prosecution of fraud and corruption in federal programs is a major priority of the Department of Justice. On June 3, 1981, the Deputy Attorney General issued a "Policy Statement of the Department of Justice on its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States." This statement is summarized in the Criminal Resource Manual at 934. The statement was first announced at a meeting of the President's Council on Integrity and Efficiency (Inspectors General group) and was the result of a combined effort of the Criminal Division, the Federal Bureau of Investigation (FBI) and the Executive Office for United States Attorneys.

The policy statement has two principal purposes: an early alert system for prosecutors relative to ongoing investigations and increased emphasis on coordination and cooperation between the FBI and the Inspectors General. Several particular provisions deserve special

emphasis. Consistent with an Inspector General's obligation to "report to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of law," the Inspector General is to report to "the United States Attorney in the District where the crime occurred." Simultaneously, the Inspector General is expected to notify the appropriate FBI field office. The FBI is committed to investigating every criminal violation which the prosecutor determines will be prosecuted, if proved.

The timing of the report to the prosecutor is discussed in the policy statement. In an ordinary investigation involving completed events, the policy statement simply tracks the Inspector General legislation and requires a report whenever there are reasonable grounds, i.e., some evidence to believe that a Federal crime has occurred. Immediate reporting is required for crimes of an ongoing nature and organized crime allegations. Such urgent and sensitive matters often require use of sophisticated investigative techniques, and the Inspector General is to make an immediate report upon receipt of the information. The policy statement requires the FBI to advise the appropriate Inspector General when it initiates an investigation and to keep the Inspector General regularly informed of its progress.

B. **Implementation of the Policy Statement:** Since the Department of Justice issued the June 3, 1981 policy statement, there have been discussions over its meaning, with requests from various Inspectors General and the FBI for further clarification of their respective investigative responsibilities.

The Department is concerned about the allocation of limited investigative resources and the possibility of competitive and, at times, redundant and unproductive relationships among law enforcement agencies. The policy statement addresses these issues and establishes a structure for early reporting of instances of criminality to the prosecutor. As a further refinement, to set out more clearly the Department's expectations regarding the use of the limited investigative resources in both the FBI and the Offices of individual Inspectors General, the policy statement has been supplemented by a February 19, 1982 statement on the implementation of the policy statement (see the Criminal Resource Manual at 935), which allocates investigative responsibility between the Inspectors General and the FBI with respect to four types of crime in which both have an investigative interest:

1. bribery
2. significant allegations of fraud involving federal employees
3. organized crime matters and
4. fraud against the government.

Implementation of the policy statement requires the cooperation and support of the USAs, the FBI, and the Inspectors General. The Fraud Section of the Criminal Division is charged with overseeing the operations of the policy and resolving any uncertainties or differing interpretations which arise in its implementation. Any questions or information should be directed to the Fraud Section.

9-42.510 Social Security Fraud

Pursuant to an agreement reached between the Department of Justice and the Social Security Administration (SSA) in April 1977, the SSA will not refer matters in which one or more of the factors below is present unless additional aggravating circumstances are present:

A. The suspect is 75 or more years old;

B. The suspected violation did not result in improper payment. This exception does not apply in criminal misuse cases such as conversion by a representative payee, SSN misuse or improper disclosure;

C. There is evidence that the suspect has an illness expected to result in his/her death in the near future; or

D. The suspected violation is solely a failure to disclose an increase in a pension amount.

The SSA has discontinued its procedure of summarizing each case involving one or more of the aforementioned factors and recommending against further action. The SSA will, however, continue to take administrative action directed toward recovering any overpayments in those cases not warranting criminal prosecution. Matters in which the factors cited above are either not present or not compelling will be referred with an appropriate recommendation.

Each referral with a recommendation for prosecution contains the name and telephone number of the SSA Regional Integrity Specialist familiar with the facts of the case. You are invited to contact that individual for discussion or additional investigation.

For additional discussion of Social Security Numbers and criminal violations involving misuse of Social Security Numbers, see the Criminal Resource Manual at 936.

9-42.530 Department of Defense Memorandum of Understanding

In August 1984, the United States Attorney General and the Secretary of Defense signed a Memorandum of Understanding ("MOU") between the Departments of Justice and Defense relating to the investigation and prosecution of certain crimes. Special attention is directed to the treatment of investigative jurisdiction of corruption, fraud and theft cases. The prosecutor has the responsibility to

1. concur before Department of Defense can initiate any corruption investigation;
2. confer to determine investigative jurisdiction in all fraud and theft matters; and
3. concur before the Department of Defense initiates any administrative investigation or actions during the pendency of any criminal investigation.

The MOU was developed with the expectation that the more complex cases require the joint efforts of the Departments of Defense and Justice. In this regard a repeated theme of the MOU is the prosecutor's responsibility for coordinating and effectuating the various interests of the United States. The Federal Procurement Fraud Unit, Fraud Section, Criminal Division, of the Department of Justice has developed substantial expertise in these investigations and can assist in structuring and conducting the investigations requiring expertise from the FBI and Department of Defense. Questions concerning the MOU should be directed to the Justice Department's Fraud Section, Criminal Division.

See the Criminal Resource Manual at 938 for the text of the MOU.

1-12.000
Coordination of Parallel Criminal, Civil, and Administrative Proceedings

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The Attorney General issued a Memorandum on July 28, 1997, requiring a system for coordinating the criminal, civil and administrative aspects of all white-collar crime matters within every United States Attorney's office and each Department Litigating Division. The system should contain management procedures to address issues of parallel proceedings including:

- timely assessment of the civil and administrative potential in all criminal case referrals, indictments, and declinations;
- timely assessment of the criminal potential in all civil case referrals and complaints;
- effective and timely communication with cognizant agency officials, including suspension and debarment authorities, to enable agencies to pursue available remedies;
- early and regular communication between civil and criminal attorneys regarding *qui tam* and other civil referrals, especially when the civil case is developing ahead of the criminal prosecution; and
- coordination, when appropriate, with state and local authorities.

The Attorney General has further directed that appropriate staff in each office receive comprehensive training regarding parallel proceedings utilizing a course of instruction and training materials to be developed by the Council on White-Collar Crime and the Office of Legal Education.

The full text of this Memorandum is in the DOJ Organization and Functions Manual at 27.

June 1998 **USAM Chapter 1-12**

LEXSTAT 31 US NITA $S 3729

COMMENTARY
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TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3729. False claims

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PART I. ELEMENTS OF A VIOLATION OF THE ACT

Although it covers many fraudulent schemes, the False Claims Act *(31 USCS § § 3729*-3733) is not a federal fraud statute. The Act does not require a finding of fraudulent intent, reliance, or other elements of common law fraud. Instead, § 3729(a) lists seven specific acts that may provide a basis for liability under the False Claims Act. If the plaintiff proves by a preponderance of the evidence that the defendant committed one of these seven prohibited acts, then the defendant is liable for damages and penalties.

The Act imposes liability on "any person" who violated § 3729(a). Although a "person" includes corporations and other legal entities as well as natural persons, it does not include the states. *Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 146 L.Ed.2d 836, 120 S. Ct. 1858 (2000).*

Congress substantially amended the False Claims Act in 1986, and sent a strong message to the courts that the Act has a remedial purpose and should be broadly construed. Decisions applying the pre-1986 Act, therefore, are generally of limited utility.

Section 3729(a)(1) & (a)(2)

These are the most important and frequently used liability provisions in the False Claims Act. Under subsection *31 USCS § 3729*(a)(1), the government or the whistle-blower must show (1) that the defendant presented or caused to be presented a claim for payment to an agent of the United States, (2) the claim was false or fraudulent, and (3) the defendant knew or should have known that it was false or fraudulent.

Note that a claim may be fraudulent even if it does not contain false information, so liability may be imposed even if the claim presented to the government is accurate on its face. Also, because the claim may be presented indirectly to the government, liability may be imposed on defendants who have no direct contact with any government official, provided that the defendants knowingly assisted in causing the submission of a false claim or statement. *United States ex rel. Marcus v. Hess, 317 U.S. 537, 87 L.Ed. 443, 63 S. Ct. 379 (1943).* The False Claims Act reaches anyone who knowingly participates in causing the federal government to pay a false claim.

Unlike most fraud statutes, the False Claims Act does not require the government or the whistle-blower to allege that the defendant's misconduct caused any damage. Even when the government did not suffer a financial loss, the Act allows an award of penalties up to $ 10,000 for each false or fraudulent claim presented in violation of § 3729.

Under subsection (a)(2), the government or the whistle-blower must show (1) the defendant made or used, or caused someone else to make or use, a false statement, (2) to get a claim paid or approved by the government, and (3)

the defendant knew or should have known that the statement was false. Under this test, the defendant need not have presented the claim, but the statement made or used to obtain payment must be false.

For example, it is a violation of § 3729(a)(1) when a doctor knowingly submits to the government incorrect bills for treatment purportedly provided to Medicare patients. It is a violation of § 3729(a)(2) when a military contractor submits a request for payment supported by a false certification and other false statements that are intended to demonstrate that munitions were manufactured in compliance with the contract.

Sections 3729(a)(1) and (a)(2) can be applied to countless situations. Aside from the obvious case of government contractors who submit invoices for work that they failed to do, the False Claims Act also applies to individuals who make false statements in their applications for loans or insurance from government agencies, and storeowners who accept food stamps for ineligible products. Plaintiffs often allege violations of both § 3729(a)(1) and (a)(2), since many schemes to defraud the government include both the presentation of false or fraudulent claims and the use of false statements to get those claims paid.

The knowledge requirement of § 3729(b) applies to both of these liability provisions. To establish a False Claims Act violation, the plaintiff need not prove intent to defraud, but only that the violations were committed knowingly with willful blindness to existence of a fact or reckless disregard for the truth.

Section 3729(a)(3)

In addition, § 3729(a)(3) prohibits conspiracies to defraud the government into paying a false claim. For example, contractors are often asked to compete against each other to submit the lowest bid for a government contract. When they enter into a bid-rigging scheme to obtain a higher price, each participant in the conspiracy may be liable under the False Claims Act. The statute does not require that a conspirator present a claim or false statement to the government.

Section 3729(a)(4), (a)(5) and (a)(6)

Sections 3729(a)(4), (a)(5) and (a)(6) are rarely used, but each presents a different fraudulent pattern that may apply to a specific case.

Section 3729(a)(7)

Section 3729(a)(7) prohibits "reverse false claims." These are claims made by parties who owe money to the government for services or benefits they receive, such as money due to the Postal Service for a bulk mailing, or to the Customs Service for import duties. If a defendant makes a false statement to avoid or reduce the payment due to the government, he may be liable under the Act.

Section 3729(b) -- The Knowledge Requirement

The only intent or scienter provision in the False Claims Act is § 3729(b). Liability may be imposed on a person who "knowingly" violates § 3729(a), and "knowingly" is defined to include actual knowledge, deliberate indifference, and reckless disregard.

Unlike most antifraud laws, the False Claims Act does not require that the defendant specifically intended to defraud the government. However, innocent mistakes and ordinary negligence are not actionable.

The Act is concerned only with the defendant's knowledge about information provided to or withheld from the government. Knowledge of legal requirements, contractual provisions, and other aspects of the defendant's conduct are irrelevant. If the defendant submitted a claim for payment when he knew that information contained in the claim was false and should have disqualified him from receiving that payment, then he acted "knowingly."

Most often, the government alleges that the defendant knew or should have known that the claim contained false statements. However, a claim may be fraudulent under § 3729(a)(1) even if the information contained in it is perfectly true. In that case, § 3729(b) requires knowledge of information that, if disclosed to the appropriate government official, would have caused the claim to be rejected.

Defendants often argue that the government knew, or should have known, the allegedly false or undisclosed information. But the government's knowledge of such information does not bar suit under the False Claims Act. A defendant who knew that his claim was false under § 3729(b) is not automatically exonerated by any overlapping

knowledge of government officials. On the other hand, if a defendant can show that he has fully disclosed all information to the government, the court or jury may conclude that he did not "knowingly" submit a false claim.

Section 3729(c)

The definition of a "claim" set forth in § 3729(c) also applies to the liability provisions of § 3729(a). Other than claims made under the Internal Revenue Code, which are excluded by § 3729(e), the definition is broad enough to cover nearly any kind of document or other communication that could be reasonably expected to cause the United States to make or approve a payment. The definition also includes claims to third parties who are paid or reimbursed by the government.

Proving Liability -- Certifications

Many government forms include certifications. For example, hospitals seeking Medicare reimbursement are often required to certify that the medical services identified in their cost reports complied with the laws and regulations dealing with the provision of those services. Postal mailing statements include a certification that the mail given to the Postal Service for delivery is eligible for the postage rates claimed by the mailer. In some cases, the certifications state that the party signing the statement may be held liable under the False Claims Act if the statement is false.

A false certification of compliance creates liability under the False Claims Act when the certification is a prerequisite to obtaining a government benefit. It is usually difficult for the party making the certification to argue that he did not know it was false, since the courts will presume that he undertook a reasonable inquiry before signing the certification. The whistle-blower's counsel should carefully examine all documents signed by the defendant to find any express or implied certifications relating to contractual requirements or legal compliance. These documents could be critical parts of the plaintiff's proof of liability.

Proving Liability -- Violations of Other Statutes

Another common method for proving liability under the False Claims Act is to show that the defendant violated a separate statute. Claims submitted to the government in connection with a scheme to violate another law will nearly always be "false claims" under the Act. In military procurement cases, contractors are often subject to strict disclosure requirements under the Truth In Negotiation Act (TINA), *10 USCS § 2306a.* If a contractor wins government business by concealing information in violation of TINA, his claims for payment may provide a basis for liability under the False Claims Act. Similarly, the Medicare-Medicaid Fraud Abuse Act, *42 USCS § 1320a,* imposes special obligations on health care providers, and failure to meet those obligations may make their reimbursement claims "false or fraudulent" under § 3729(a).

Proving Liability -- Criminal Convictions

Section 3730(d) states that a defendant who is guilty of a criminal violation for the same conduct is estopped from denying the essential elements of his conviction. In cases of egregious misconduct, the government will prosecute those parties who make false statements or submit false claims to the government under *18 USCS § 278* or § 1001 and other statutes. A conviction or guilty plea will establish the elements of liability under § 3729, and the only remaining issue will be the calculation of damages and penalties. However, the civil complaint is likely to be broader than the criminal indictment, including additional acts and allegations, and the court should carefully limit the estoppel provision of § 3730(d) to the scope of the indictment.

Pleading Requirements

Although the False Claims Act is not a fraud statute, many courts hold that the pleading requirement of Rule 9(b) of the Federal Rules of Civil Procedure applies to False Claims Act complaints. An action may be dismissed if the plaintiff fails to allege precisely when the allegedly false statements were made or the false claims presented; who made the statements or presented the claims to the government; and what information was falsely provided or fraudulently withheld.

PART II. CALCULATION OF DAMAGES AND PENALTIES

Penalties

Because the calculation of penalties depends on the number of false claims presented to the government, the definition of a claim is often a critical aspect of litigation under the False Claims Act. In general, each separate bill, voucher, or other payment demand is a separate claim. Often the government will supply a standard form for requesting payment, and each such form submitted by the defendant will be treated as a claim for calculating penalties. Moreover, when a contract was procured by fraud, each demand for payment under the contract is a false claim, even if the contract is perfectly performed.

When the definition of a claim is uncertain, the court should look at the alleged scheme and determine whether the document has the practical purpose and effect of inducing the government to make a payment. For example, when a doctor submitted forms that listed codes identifying various services provided to a single Medicare patient, the court found that each form constituted a separate claim because the doctor calculated the total amount due on each form, and the government used that calculation when it issued payment. In a Social Security scam, each check deposited by the defendant for payment by the government is a separate claim.

The False Claims Act requires the court to award a minimum of $ 5,000 per claim. However, the court has the discretion to award up to $ 10,000 per claim, and the Act does not say how the court should determine the appropriate amount. The court should consider the statutory purpose of making the government whole, so higher penalties are appropriate when the award of treble damages does not cover the cost of the government's investigation. Higher penalties may also be appropriate when the defendant is guilty of extreme misconduct. In most cases, the court will award the minimum of $ 5,000 per claim if the government and the whistle-blower fail to present evidence justifying a higher amount.

Following *Hudson v. United States, 522 U.S. 93, 139 L.Ed.2d 450, 118 S. Ct. 488 (1997),* civil penalties imposed under the False Claims Act do not trigger any double jeopardy concerns, even when the defendant has already paid criminal penalties for the same offense.

Damages

There is no simple rule for calculating the government's damages under the False Claims Act. The purpose of the statute is to make the government whole, and once liability is established most courts will look favorably on efforts by the government and the whistle-blower to include damages that are reasonably related to the defendant's conduct. Calculation of damages is not an exact science. Plaintiff's goal is to prove damages with sufficient specificity to permit a jury to make a reasonable estimate.

The False Claims Act permits the court to find liability even when the government has sustained no damages. The Act requires only that the claim be false or fraudulent, not excessive. Therefore, an action may proceed to judgment when, for example, a contractor provides goods or services of good quality at a fair market price but violates some contractual or legal requirement in performing the contract. In that case, the government and whistle-blower can seek penalties for each payment claim under the contract, but may not be able to recover the price of the contract as damages.

Section 3729(a) provides for double damages in rare circumstances when a defendant voluntarily brings information about a violation to the government within thirty days of obtaining the information. In most cases, however, the jury will determine the amount of damages, and the court will then treble that amount. The jury is not to be told that damages will be trebled, since the jurors may be tempted to reduce their award. After calculating treble damages, the court may subtract any amount already recovered by the government and any offsets due to the defendants. Prejudgment interest is not awarded under the False Claims Act, since the award of treble damages is generally sufficient to compensate the government for the time lost in obtaining the judgment.

In government contract cases, the most common method of calculating damages under the False Claims Act is to determine the amount paid by the government under the contract and then to subtract the amount that the government would have paid if there had been no fraud. *United States v. Bornstein, 423 U.S. 303, 46 L.Ed.2d 514, 96 S. Ct. 523 (1976).* The presumption is that the government was injured "dollar-for-dollar" by the defendant's misstatements. If the defendant exaggerated the manufacturing cost of his widgets by one dollar per widget, then the government's damages are one dollar per widget. Evidence that the government would have paid the higher price in the absence of any misstatement is generally irrelevant. Moreover, evidence that the defendant's costs increased during performance of the contract so that he did not benefit from his fraud is also irrelevant. If the government was induced to enter into the contract by fraudulent statements, then damages are calculated as of the time the contract was signed, not the time when the contract was performed.

When a contract would not have been awarded but for false statements made by the contractor, the government may be able to recover all funds disbursed under the contract as damages. For example, if an insurance company won a government contract to provide Medicare claim payment services by promising to reduce administrative costs, proof that those promises were knowingly false might entitle the government to rescind the contract and recover three times the amount paid to the insurance company.

In non-contract cases, the government and the whistle-blower are often able to prove damages equal to the entire amount paid to the defendant. In health care fraud cases, for example, the government may have reimbursed doctors or hospitals for ineligible medical services, and the full amount paid for such services will constitute damages.

For additional NITA Commentary regarding the False Claims Act, see:

NITA Commentary, Title 31, preceding § 3721 (Overview)

NITA Commentary, Title 31, § 3730 (Civil actions for false claims)

(7) The Labor Department.

(b) The committee shall:

(1) Advise, and develop written guidelines for, the Commissioner of Administrative Services and the executive heads of other state agencies regarding the adaptation of employment examinations and alternative hiring processes for, and the reasonable accommodation of, persons with disabilities; and

(2) Review the program established under subsection (b) of section 4-61u and compliance with the provisions of section 46a-70 concerning persons with physical disabilities.

(P.A. 98-205, S. 4.)

Secs. 4-61bb and 4-61cc. Reserved for future use.

Sec. 4-61dd. Disclosure of information to Auditors of Public Accounts. Investigation by Attorney General. Report to General Assembly. (a) Any person having knowledge of any matter involving corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department or agency or any quasi-public agency, as defined in section 1-120, or any person having knowledge of any matter involving corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in any large state contract, may transmit all facts and information in his possession concerning such matter to the Auditors of Public Accounts. The Auditors of Public Accounts shall review such matter and report their findings and any recommendations to the Attorney General. Upon receiving such a report, the Attorney General shall make such investigation as he deems proper. At the request of the Attorney General or on their own initiative, the auditors shall assist in the investigation. The Attorney General shall have power to summon witnesses, require the production of any necessary books, papers or other documents and administer oaths to witnesses, where necessary, for the purpose of investigation. Upon the conclusion of his investigation, the Attorney General shall where necessary, report his findings to the Governor, or in matters involving criminal activity, to the Chief State's Attorney. The Auditors of Public Accounts and the Attorney General shall not, after receipt of any information from a person under the provisions of this section, disclose the identity of such person without his consent unless the Auditors of Public Accounts or the Attorney General determine that such disclosure is unavoidable during the course of the investigation.

(b) No state officer or employee, as defined in section 4-141, no quasi-public agency officer or employee, no officer or employee of a large state contractor and no appointing authority shall take or threaten to take any personnel action against any state or quasi-public agency employee or any employee of a large state contractor in retaliation for such employee's disclosure of information to the Auditors of Public Accounts or the Attorney General under the provisions of this section. A state or quasi-public agency employee alleging that such action has been threatened or taken may file an appeal within thirty days of knowledge of the specific incident giving rise to such claim with the Employees' Review Board under section 5-202, or, in the case of a state or quasi-public agency employee covered by a collective bargaining contract, in accordance with the procedure provided by such contract. An employee of a large state contractor alleging that such action has been threatened or taken may, after exhausting all available administrative remedies, bring a civil action in accordance with the provisions of subsection (c) of section 31-51m.

(c) Any employee of a state or quasi-public agency or large state contractor, who is found to have knowingly and maliciously made false charges under subsection (a) of this section shall be subject to disciplinary action by his appointing authority up to and including dismissal. In the case of a state or quasi-public agency employee, such action shall be subject to appeal to the Employees' Review Board in accordance with section 5-202, or in the case of state or quasi-public agency employees included in collective bargaining contracts, the procedure provided by such contracts.

(d) On or before September first, annually, the Auditors of Public Accounts shall submit to the clerk of each house of the General Assembly a report indicating the number of matters for which facts and information were transmitted to the auditors pursuant to this section during the preceding state fiscal year and the disposition of each such matter.

(e) Each contract between a state or quasi-public agency and a large state contractor shall provide that, if an officer, employee or appointing authority of a large state contractor takes or threatens to take any personnel action against any employee of the contractor in retaliation for such employee's disclosure of information to the Auditors of Public Accounts or the Attorney General under the provisions of this section, the contractor shall be liable for a civil penalty of not more than five thousand dollars for each offense, up to a maximum of twenty per cent of the value of the contract. Each violation shall be a separate and distinct offense and in the case of a continuing violation each calendar day's continuance of the violation shall be deemed to be a separate and distinct offense. The executive head of the state or quasi-public agency may request the Attorney General to bring a civil action in the superior court for the judicial district of Hartford to seek imposition and recovery of such civil penalty.

(f) Each large state contractor shall post a notice of the provisions of this section relating to large state contractors in a conspicuous place which is readily available for viewing by the employees of the contractor.

(g) As used in this section:

(1) "Large state contract" means a contract between an entity and a state or quasi-public agency, having a value of five million dollars or more, except for a contract for the construction, alteration or repair of any public building or public work; and

(2) "Large state contractor" means an entity that has entered into a large state contract with a state or quasi-public agency.

(P.A. 79-599, S. 1, 2; P.A. 83-232; P.A. 85-559, S. 5; P.A. 87-442, S. 1, 8; P.A. 89-81, S. 3; P.A. 97-55; P.A. 98-191, S. 1, 2.)

History: P.A. 83-232 amended Subsec. (a) to authorize a former state employee or state employee bargaining representative to disclose information and to require the attorney general to report to the complainant his findings and any actions taken, amended Subsec. (b) to prohibit retaliatory action by "any state officer or employee" and to provide that an employee may file an appeal if retaliatory action is threatened or taken, and added Subsec. (c) re sanctions for an employee who makes false charges; P.A. 85-559 required that state employees report to inspector general rather than to attorney general and that findings be reported in accordance with Sec. 2-104(b) rather than to governor or chief state's attorney as was previously the case; P.A. 87-442, in Subsec. (a), substituted "person" for "state employee, former state employee or state employee bargaining representative acting on behalf of any state employee or former state employee or on his own behalf", authorized any such person to transmit facts and information to auditors of public accounts, instead of to inspector general, required auditors to review matter and report to attorney general, required attorney general to make investigation and auditors to assist at his request, required attorney general, instead of inspector general, to report findings to governor or chief state's attorney, instead of to complainant, and applied provisions re nondisclosure of identity of person to auditors

and attorney general instead of to inspector general and limited applicability of such provisions to receipt of information under this section, instead of this section or Subsec. (b) of Sec. 1-19 and, in Subsec. (b), substituted "auditors of public accounts or attorney general" for "inspector general" and limited applicability of provisions of Subsec. to disclosure of information under provisions of this section instead of this section and Subsec. (b) of Sec. 1-19; P.A. 89-81 added Subsec. (d) requiring annual report by auditors to general assembly on matters transmitted to them under this section; P.A. 97-55 applied section to quasi-public agencies; P.A. 98-191 applied section to large state contractors, effective July 1, 1998 (Revisor's note: P.A. 88-230, 90-98, 93-142 and 95-220 authorized substitution of "judicial district of Hartford" for "judicial district of Hartford-New Britain" in public and special acts of the 1998 session of the General Assembly, effective September 1, 1998).

Secs. 4-61ee to 4-61gg. Reserved for future use.

Sec. 4-61hh. Volunteers in state government. Definitions. As used in sections 4-61hh to 4-61mm, inclusive:

(1) "Volunteer" means any individual who provides goods or services to any state agency without compensation therefor;

(2) "Regular service volunteer" means any volunteer engaged in specific service activities on an ongoing or continuous basis;

(3) "State agency" shall include any agency, authority, board, commission, council, department, institution or other instrumentality of the state.

(P.A. 79-385, S. 1.)

Sec. 4-61ii. Volunteer programs within state agencies. Any state agency utilizing or contemplating the utilization of volunteers shall be responsible for the development, continuation or expansion of volunteer programs within the agency. Each state agency may, for the purposes of fulfilling its responsibilities under sections 4-61hh to 4-61mm, inclusive, do any or all of the following: (1) Utilize qualified salaried professional staff to develop meaningful opportunities for volunteers involved in carrying out the functions of the agency; (2) develop written rules governing the recruitment, screening, training, responsibility, utilization, supervision and evaluation of its volunteers, but such rules shall not be deemed to be regulations as defined in subsection (13) of section 4-166; (3) take such actions as are necessary to ensure that volunteers and paid employees understand their respective duties and responsibilities toward one another and their respective roles in fulfilling the functions of the agency; (4) develop and implement orientation and training programs for volunteers and (5) contract with other state agencies, as it deems necessary.

(P.A. 79-385, S. 2; P.A. 88-317, S. 45, 107; June Sp. Sess. P.A. 91-14, S. 21, 30.)

History: P.A. 88-317 amended Subdiv. (3) by substituting "subsection (13)" for "subsection (7)", effective July 1, 1989, and applicable to all agency proceedings commencing on or after that date; June Sp. Sess. P.A. 91-14 deleted authority of state agencies to consult with and enlist assistance of council on voluntary action to reflect elimination of council by said public act.

Sec. 4-61jj. Incidental benefits. Fulfillment of experience or training requirements. (a) Each state agency, with the approval of the Commissioner of Administrative Services, may (1) provide for the recognition of volunteers who have served the agency and paid employees who have worked with the volunteers, and (2) provide volunteers with such incidental benefits or reimbursements as are consistent with section 4-61ll.

(b) The Commissioner of Administrative Services shall adopt regulations in accordance with chapter 54 to provide for the recognition of volunteer service as partial fulfillment of state employment requirements of training or experience.

(P.A. 79-385, S. 3.)

Sec. 4-61kk. Exemption from title 5. Compliance with regulations. (volunteer recruited, trained or utilized by any state agency shall, to the exten voluntary services, be exempt from the provisions of title 5, except as provided in 4-61ll.

(b) Volunteers shall comply with applicable agency rules and regulations. N teer shall displace a paid employee of this state.

(P.A. 79-385, S. 4.)

Sec. 4-61ll. Benefits or reimbursements to volunteers. Each state agen provide benefits or reimbursements to volunteers, within the limits of its availabl priations, as follows: (1) Meals may be furnished without charge; (2) lodging furnished temporarily to regular service volunteers without charge; (3) transp reimbursements, including parking fees, automobile mileage, bus and taxi far be furnished. Such reimbursements, when provided, shall be furnished at the sa as provided for state employees in accordance with section 5-141c; (4) use vehicles for the performance of official state agency duties; (5) liability insuran chased through the State Insurance and Risk Management Board, to cover all vo to the same extent as may be provided for its salaried employees; and (6) optio development training to enhance individual skills.

(P.A. 79-385, S. 5; P.A. 99-51, S. 6, 9; 99-145, S. 19, 23.)

History: (Revisor's note: In 1993 obsolete reference to repealed Sec. 5-141a was deleted editorially by the P.A. 99-51, effective May 27, 1999, and P.A. 99-145, effective June 8, 1999, both changed Subsec. designators designators and substituted "State Insurance and Risk Management Board" for "State Insurance Purchasing E

Sec. 4-61mm. Evaluation of volunteer program to be included in an port. (a) Each state agency, as part of its annual report to the General Assem the Governor, shall include an evaluation of its volunteer program which de following information: (1) The total number, location and duties of all volunt the total number of annual hours of service provided by all volunteers; and (benefits analysis of volunteer services for the preceding year based on guideline lished by the Council on Voluntary Action. Such guidelines shall not be deem regulations as defined in subsection (13) of section 4-166.

(b) Each state agency shall furnish, at the time of filing such annual report of such evaluation to the Council on Voluntary Action.

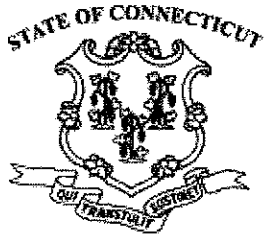
(P.A. 79-385, S. 6; P.A. 88-317, S. 46, 107.)

History: P.A. 88-317 amended Subsec. (a) by substituting "subsection (13)" for "subsection (7)", effective J and applicable to all agency proceedings commencing on or after that date.

See Sec. 5-219a re recognition of volunteer experience in state employment practices and reporting of same t

Sec. 4-61nn. Adaptation of administration of tests to needs of perso disabilities. Not later than July 1, 1992, the commissioner of each state agency professional examining board which tests individuals shall develop and impl procedure to adapt the administration of such tests to the needs of persons with ties, provided any such adaptation shall not interfere with the validity of the tes the assessment of bona fide occupational qualifications. Such procedure shall a method of informing persons with disabilities of the opportunity to request adaptation.

(P.A. 91-87.)



Substitute House Bill No. 5025

Public Act No. 04-245

AN ACT STRENGTHENING ETHICS LAWS CONCERNING FINANCIAL DISCLOSURE, GIFTS AND STATE CONTRACTORS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 1-83 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) (1) All state-wide elected officers, members of the General Assembly, department heads and their deputies, members of the Gaming Policy Board, the executive director of the Division of Special Revenue within the Department of Revenue Services, members or directors of each quasi-public agency, members of the Investment Advisory Council, state marshals and such members of the Executive Department and such employees of quasi-public agencies as the Governor shall require, shall file, under penalty of false statement, a statement of financial interests for the preceding calendar year with the commission on or before the May first next in any year in which they hold such a position. Any such individual who leaves his or her office or position shall file a statement of financial interests covering that portion of the year during which such individual held his or her office or position. The commission shall notify such individuals of the requirements of this subsection within thirty days after their departure from such office or position. Such individuals shall file such statement within sixty days after receipt of the notification.

(2) Each state agency, department, board and commission shall develop and implement, in cooperation with the Ethics Commission, an ethics statement as it relates to the mission of the agency, department, board or commission. The executive head of each such agency, department, board or commission shall be directly responsible for the development and enforcement of such ethics statement and shall file a copy of such ethics statement with the Department of Administrative Services and the Ethics Commission.

(b) (1) The statement of financial interests, except as provided in subdivision (2) of this subsection, shall include the following information for the preceding calendar year in regard to the individual required to file the statement and the individual's spouse and dependent children residing in the individual's household: (A) The names of all businesses with which associated; (B) the category or type of all sources of income in excess of one thousand dollars, without specifying amounts of income; (C) the name of securities in excess of five thousand dollars at fair market value owned by such individual, spouse or dependent children or held in the name of a corporation, partnership or trust for the benefit of such individual, spouse or dependent children; (D) the existence of any known blind trust and the names of the trustees; (E) all real property and its location, whether owned by such

individual, spouse or dependent children or held in the name of a corporation, partnership or trust for the benefit of such individual, spouse or dependent children; (F) the names and addresses of creditors to whom the individual, the individual's spouse or dependent children, individually, owed debts of more than ten thousand dollars; [and] (G) any leases or contracts with the state held or entered into by the individual or a business with which he or she was associated; and (H) a description of any partnership, joint ownership or similar business affiliation between (i) a business included under subparagraph (A) of this subdivision with which the individual filing the statement, the individual's spouse or a dependent child of the individual is associated, and (ii) a lobbyist, a person that the individual filing the statement knows or has reason to know is doing business with or seeking to do business with the state or is engaged in activities that are directly regulated by the department or agency in which the individual is employed, or a business with which such lobbyist or person is associated.

(2) The statement of financial interests filed by state marshals shall include only amounts and sources of income earned in their capacity as state marshals.

(c) The statement of financial interests filed pursuant to this section shall be a matter of public information, except the list of names, filed in accordance with subparagraph (F) of subdivision (1) of subsection (b) of this section shall be sealed and confidential and for the use of the commission only after a complaint has been filed under section 1-82 and such complaint has been determined by a vote of the commission to be of sufficient merit and gravity to justify the unsealing of such list or lists and not open to public inspection unless the respondent requests otherwise. If the commission reports its findings to the Chief State's Attorney in accordance with subsection (c) of section 1-88, the commission shall turn over to the Chief State's Attorney such relevant information contained in the statement as may be germane to the specific violation or violations or a prosecutorial official may subpoena such statement in a criminal action. Unless otherwise a matter of public record, the Ethics Commission shall not disclose to the public any such subpoena which would be exempt from disclosure by the issuing agency.

(d) Any individual who is unable to provide information required under the provisions of subdivision (1) of subsection (b) of this section by reason of impossibility may petition the commission for a waiver of the requirements.

Sec. 2. (NEW) (*Effective from passage*) As used in sections 2 to 4, inclusive, of this act:

(1) "Gift" has the same meaning as provided in section 1-79 of the general statutes, except that the exclusion in subdivision (12) of subsection (e) of said section 1-79 for a gift for the celebration of a major life event shall not apply;

(2) "Quasi-public agency", "public official" and "state employee" have the same meanings as provided in section 1-79 of the general statutes;

(3) "State agency" means any office, department, board, council, commission, institution or other agency in the executive, legislative or judicial branch of state government;

(4) "Large state contract" means an agreement or a combination or series of agreements between a state agency or a quasi-public agency and a person, firm or corporation, having a total cost to such state agency or quasi-public agency of more than five hundred thousand dollars in a calendar or fiscal year, for (A) a project for the construction, alteration or repair of any public building or public work, (B) services, including, but not limited to, consulting and professional services, (C) the procurement of supplies, materials or equipment, (D) a lease, or (E) a licensing arrangement. The term "large state

contract" shall not include a contract between a state agency or a quasi-public agency and a political subdivision of the state;

(5) "Principals and key personnel" means officers, directors, shareholders, members, partners and managerial employees; and

(6) "Participated substantially" means participation that is direct, extensive and substantive, and not peripheral, clerical or ministerial.

Sec. 3. (NEW) (*Effective from passage*) (a) Between the effective date of this section and June 30, 2006, no state agency or quasi-public agency shall execute a large state contract unless the state agency or quasi-public agency obtains:

(1) An affidavit from each person, firm or corporation submitting a bid or proposal for such contract. Each such affidavit shall be submitted with the bid or proposal and shall be signed by the official of the person, firm or corporation that submits such bid or proposal. Such affidavit shall attest to whether or not (A) such person, firm, corporation, (B) any principals and key personnel of the person, firm or corporation, who participated substantially in preparing the bid or proposal, or (C) any agent of such person, firm, corporation or principals and key personnel, who participated substantially in preparing the bid or proposal, provided a gift during the two-year period preceding the submission of such bid or proposal, to (i) any public official or state employee of the state agency or quasi-public agency soliciting bids or proposals for the contract, who participated substantially in the preparation of the bid solicitation or request for proposals for the contract, or (ii) any public official or state employee of any other state agency, who has supervisory or appointing authority over such state agency or quasi-public agency. The affidavit shall also attest that no such principals and key personnel of the person, firm or corporation or agent of such person, firm, corporation or principals and key personnel knows of any action by the person, firm or corporation to circumvent the requirements of this subdivision by providing for any other principals and key personnel, official, employee or agent of the person, firm or corporation to provide a gift to any such public official or state employee. If any gift described in this subdivision was provided, the affidavit shall include the name of the recipient, a description of the gift and the value and approximate date of the gift;

(2) An affidavit from the person, firm or corporation awarded the contract, at the time the contract is executed, and signed by the official of the person, firm or corporation executing the contract. The affidavit shall attest to whether or not gifts were provided by (A) such person, firm, corporation, (B) any principals and key personnel of the person, firm or corporation, who participated substantially in preparing the bid or proposal or the negotiation of the contract, or (C) any agent of such person, firm, corporation or principals and key personnel, who participated substantially in preparing the bid or proposal or the negotiation or award of the contract, between the date of the affidavit under subdivision (1) of this subsection and the date of execution of the contract, to (i) any public official or state employee of the state agency or quasi-public agency soliciting bids or proposals for the contract, who participated substantially in the preparation of the bid solicitation or request for proposals for the contract or the negotiation or award of the contract, or (ii) any public official or state employee of any other state agency, who has supervisory or appointing authority over such state agency or quasi-public agency. If any such gift was provided, the affidavit shall include the name of the recipient, a description of the gift and the value and approximate date of the gift; and

(3) A certification by the official or employee of such state agency or quasi-public agency who is authorized to execute said contract that the selection of the most qualified person, firm or corporation was not the result of collusion, the giving of a gift or the promise of a gift, compensation, fraud or inappropriate influence from any person.

(b) Each affidavit or certification required under subsection (a) of this section shall be sworn as true to the best knowledge and belief of the person signing the affidavit, subject to the penalties of false statement.

(c) No municipal official or employee shall be required to submit an affidavit under subdivision (1) or (2) of subsection (a) of this section.

(d) Any bidder or proposer that does not submit an affidavit required under subdivision (1) or (2) of subsection (a) of this section shall be disqualified and the state agency or quasi-public agency shall award the contract to the next highest ranked proposer or the next lowest responsible qualified bidder or seek new bids or proposals.

(e) Notwithstanding the provisions of subsection (a) of this section, a person, firm or corporation seeking a large state contract between July 1, 2004, and June 30, 2006, which submits a gift affidavit in accordance with the policy adopted by the Attorney General on January 8, 2004, shall be deemed to comply with the requirements of subdivisions (1) and (2) of subsection (a) of this section.

Sec. 4. (NEW) (*Effective from passage*) (a) On and after July 1, 2006, no state agency or quasi-public agency shall execute a large state contract unless the state agency or quasi-public agency obtains the written certifications described in this section. Each such certification shall be sworn as true to the best knowledge and belief of the person signing the certification, subject to the penalties of false statement.

(b) The official or employee of such state agency or quasi-public agency who is authorized to execute said contract shall certify that the selection of the most qualified or highest ranked person, firm or corporation was not the result of collusion, the giving of a gift or the promise of a gift, compensation, fraud or inappropriate influence from any person.

(c) The official of the person, firm or corporation awarded the contract, who is authorized to execute the contract, shall certify:

(1) That no gifts were made between the date that the state agency or quasi-public agency began planning the project, services, procurement, lease or licensing arrangement covered by the contract and the date of execution of the contract, by (A) such person, firm, corporation, (B) any principals and key personnel of the person, firm or corporation, who participated substantially in preparing the bid or proposal or the negotiation of the contract, or (C) any agent of such person, firm, corporation or principals and key personnel, who participated substantially in preparing the bid or proposal or the negotiation of the contract, to (i) any public official or state employee of the state agency or quasi-public agency soliciting bids or proposals for the contract, who participated substantially in the preparation of the bid solicitation or request for proposals for the contract or the negotiation or award of the contract, or (ii) any public official or state employee of any other state agency, who has supervisory or appointing authority over such state agency or quasi-public agency;

(2) That no such principals and key personnel of the person, firm or corporation, or agent of such person, firm or corporation or principals and key personnel, knows of any action by the person, firm or corporation to circumvent such prohibition on gifts by providing for any other principals and key personnel, official, employee or agent of the person, firm or corporation to provide a gift to any such public official or state employee; and

(3) That the person, firm or corporation made the bid or proposal without fraud or collusion with any person.

(d) Any bidder or proposer that does not make the certifications required under subsection (c) of this section shall be disqualified and the state agency or quasi-public agency shall award the contract to the next highest ranked proposer or the next lowest responsible qualified bidder or seek new bids or proposals.

(e) Each state agency and quasi-public agency shall include in the bid specifications or request for proposals for a large state contract (1) the date that the state agency or quasi-public agency began planning the project, services, procurement, lease or licensing arrangement to be covered by the contract, and (2) a notice of the certification requirements of subsections (c) and (d) of this section.

Sec. 5. Subsection (m) of section 1-84 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

(m) No public official or state employee shall knowingly accept, directly or indirectly, any gift, as defined in subsection (e) of section 1-79, from any person the official or employee knows or has reason to know: (1) Is doing business with or seeking to do business with the department or agency in which the official or employee is employed or (2) is engaged in activities which are directly regulated by such department or agency. No person shall knowingly give, directly or indirectly, any gift or gifts in violation of this provision. For the purposes of this subsection, the exclusion to the term "gift" in subdivision (12) of subsection (e) of section 1-79 for a gift for the celebration of a major life event shall not apply.

Sec. 6. Subsection (m) of section 1-84 of the general statutes, as amended by section 5 of public act 03-215, and section 146 of public act 03-6 of the June 30 special session, is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(m) No public official or state employee shall knowingly accept, directly or indirectly, any gift, as defined in subsection (e) of section 1-79, from any person the official or employee knows or has reason to know: (1) Is doing business with or seeking to do business with the department or agency in which the official or employee is employed; (2) is engaged in activities which are directly regulated by such department or agency; or (3) is prequalified under section 3 of [this act] public act 03-215. No person shall knowingly give, directly or indirectly, any gift or gifts in violation of this provision. For the purposes of this subsection, the exclusion to the term "gift" in subdivision (12) of subsection (e) of section 1-79 for a gift for the celebration of a major life event shall not apply.

Sec. 7. (NEW) (*Effective from passage*) The State Ethics Commission shall develop a plain language summary of state ethics laws concerning (1) persons, firms and corporations submitting bids or proposals for state contracts, and (2) state contractors. The commission shall publish said summary on the commission's web site.

Approved June 1, 2004

or before October first of each year, the board shall submit such report with recommendations, comments, conclusions or other pertinent information to the Governor and the members of the joint standing committees of the General Assembly having cognizance of matters relating to appropriations and the budgets of state agencies and to state finance, revenue and bonding.

(b) Consult and cooperate with professional bodies and groups concerning the purposes of sections 2-90, 4b-2 to 4b-5, inclusive, 4b-23, 4b-24, 4b-26, 4b-27 and 4b-32.

(c) Keep and maintain proper financial records with respect to real estate acquisition activities for use in calculating the costs of his operation.

(P.A. 75-425, S. 5, 57; P.A. 77-614, S. 73, 610; P.A. 82-314, S. 11, 63; P.A. 87-496, S. 23, 110; June 18 Sp. Sess. P.A. 97-11, S. 34, 65.)

History: P.A. 77-614 substituted commissioner of administrative services for public works commissioner; P.A. 82-314 changed committee names; P.A. 87-496 substituted public works commissioner for administrative services commissioner; Sec. 4-26e transferred to Sec. 4b-2 in 1989; June 18 Sp. Sess. P.A. 97-11 amended Subsec. (a) by changing deadline for commissioner to submit annual report to board from August first to September first and changing deadline for board to submit report to Governor and General Assembly from September first to October first, effective July 1, 1997.

Sec. 4b-2a. Council to monitor construction management policies and practices of the Department of Public Works established. Advisory groups. Section 4b-2a is repealed, effective October 1, 2000.

(P.A. 96-235, S. 17, 19; P.A. 00-66, S. 32.)

Sec. 4b-3. (Formerly Sec. 4-26a). State Properties Review Board established. Commissioner of Public Works' powers in state realty transactions. Review by board of transactions and contracts. Acquisition of development rights subject to approval of board. (a) There is established a State Properties Review Board which shall consist of six members appointed as follows: The speaker of the House and president pro tempore of the Senate shall jointly appoint three members, one of whom shall be experienced in matters relating to architecture, one experienced in building construction matters and one in matters relating to engineering; and the minority leader of the House and the minority leader of the Senate shall jointly appoint three members, one of whom shall be experienced in matters relating to the purchase, sale and lease of real estate and buildings, one experienced in business matters generally and one experienced in the management and operation of state institutions. No more than three of said six members shall be of the same political party. One of the members first appointed by the speaker and the president pro tempore shall serve a two-year term, one shall serve a three-year term and one shall serve a four-year term. One of the members first appointed by the minority leaders of the House and Senate shall serve a two-year term, one shall serve a three-year term and one shall serve a four-year term. All appointments of members to replace those whose terms expire shall be for a term of four years and until their successors have been appointed and qualified. If any vacancy occurs on the board, the appointing authorities having the power to make the initial appointment under the provisions of this section shall appoint a person for the unexpired term in accordance with the provisions hereof.

(b) The chairman of the board shall be compensated two hundred dollars per diem up to a maximum of thirty thousand dollars annually. Other members of the board shall be compensated two hundred dollars per diem up to a maximum of twenty-five thousand dollars annu[illegible] The members of the board shall choose their own chairman. No person shall serve c[illegible] s board who holds another state or municipal governmental position

and no person on the board shall be directly involved in any enterprise which does business with the state or directly or indirectly involved in any enterprise concerned with real estate acquisition or development.

(c) The board may adopt such rules as it deems necessary for the conduct of its internal affairs, in accordance with section 4-167, and may employ a secretary, a clerk, and within its budget, such employees as it shall deem necessary.

(d) Notwithstanding any other statute or special act to the contrary, the Commissioner of Public Works shall be the sole person authorized to represent the state in its dealings with third parties for the acquisition, construction, development or leasing of real estate for housing the offices or equipment of all agencies of the state or for the state-owned public buildings or realty hereinafter provided for in section 2-90, sections 4b-1 to 4b-5, inclusive, 4b-21, 4b-23, 4b-24, 4b-26, 4b-27, 4b-30 and 4b-32, subsection (c) of section 4b-66, sections 4b-67 to 4b-69, inclusive, 4b-71, 4b-72, 10-95, 10a-72, 10a-89, 10a-90, 10a-114, 10a-130, 10a-144, 17b-655, 22-64, 22a-324, 26-3, 27-45, 32-1c, 32-39, 48-9, 51-27d and 51-27f, except that the Joint Committee on Legislative Management may represent the state in the planning and construction of the Legislative Office Building and related facilities, in Hartford; the board of trustees of a constituent unit of the state system of higher education may represent the state in the leasing of real estate for housing the offices or equipment of such constituent unit provided no lease payments for such realty are made with funds generated from the general revenues of the state; the Labor Commissioner may represent the state in the leasing of premises required for employment security operations as provided in subsection (c) of section 31-250; the Commissioner of Mental Retardation may represent the state in the leasing of residential property as part of the program developed pursuant to subsection (b) of section 17a-218, provided such residential property does not exceed two thousand five hundred square feet, for the community placement of persons eligible to receive residential services from the department and the Connecticut Marketing Authority may represent the state in the leasing of land or markets under the control of the authority, and, except for the housing of offices or equipment in connection with the initial acquisition of an existing state mass transit system or the leasing of land by said Marketing Authority for a term of one year or more in which cases the actions of the Department of Transportation and the Marketing Authority shall be subject to the review and approval of the State Properties Review Board. Said commissioner shall have the power to establish and implement any procedures necessary for him to assume his responsibilities as said sole bargaining agent for state realty acquisitions and shall perform the duties necessary to carry out such procedures. He may appoint, within his budget and subject to the provisions of chapter 67, such personnel deemed necessary by him to carry out the provisions hereof, including experts in real estate, construction operations, financing, banking, contracting, architecture and engineering. The Attorney General's office, at the request of the commissioner, shall assist the commissioner in contract negotiations regarding the purchase, lease or construction of real estate.

(e) The State Properties Review Board shall be an independent body within the Executive Department.

(f) The State Properties Review Board shall review real estate acquisitions proposed by the Commissioner of Public Works, and the acquisition, other than by condemnation, or the sale or lease of any property by the Commissioner of Transportation under subdivision (12) of section 13b-4, subject to section 4b-23 and subsection [illegible] of section 13a-73. Such review shall consider all aspects of the proposed actions, [illegible] ling feasibility

and method of acquisition and the prudence of the business method proposed. The board shall also cooperate with and advise and assist the Commissioner of Public Works and the Commissioner of Transportation in carrying out their duties. The board shall have access to all information, files and records, including financial records, of the Commissioner of Public Works and the Commissioner of Transportation, and shall, when necessary, be entitled to the use of personnel employed by said commissioners. The board shall approve or disapprove any acquisition of development rights of agricultural land by the Commissioner of Agriculture under section 22-26cc.

(P.A. 75-425, S. 1, 57; P.A. 76-116, S. 2; 76-253, S. 1, 6; P.A. 77-614, S. 73, 610; P.A. 80-349, S. 3, 5; P.A. 81-384, S. 9, 13; 81-421, S. 4, 9; P.A. 82-446, S. 1, 4; P.A. 83-570, S. 2, 17; P.A. 84-98, S. 1; P.A. 85-301, S. 7, 13; 85-567, S. 4, 6; 85-613, S. 84, 154; P.A. 87-496, S. 20, 110; P.A. 88-28, S. 5, 8; P.A. 89-260, S. 3, 41; P.A. 91-124, S. 1; 91-174, S. 2, 16; 91-256, S. 9, 69; P.A. 92-154, S. 3, 23; P.A. 93-262, S. 75, 87; 93-293, S. 5, 11; P.A. 97-247, S. 2, 27; P.A. 98-235, S. 9, 10.)

History: P.A. 76-116 conditionally exempted labor commissioner from provisions of Subsec. (d) regarding real estate acquisition, construction or leasing; P.A. 76-253 conditionally exempted transportation department from provisions of Subsec. (d) regarding real estate, made attorney general's participation in contract negotiations under Subsec. (d) conditional upon commissioner's request and made state properties review board an independent body; P.A. 77-614 replaced public works commissioner with commissioner of administrative services; P.A. 80-349 gave properties review board power to approve or disapprove agriculture department's acquisition of development rights of agricultural land; P.A. 81-384 removed reference to Sec. 32-23e from Subsec. (d); P.A. 81-421 amended Subsec. (d) by deleting some references to sections dealing with matters transferred to the jurisdiction of the commissioner of transportation; P.A. 82-446 required the state properties review board to review certain acquisitions and contracts by the department of transportation; P.A. 83-570 amended section to make reference to exemption for certain acquisitions and settlements by department of transportation under Sec. 13a-73; P.A. 84-98 amended Subsec. (d) to permit the Connecticut marketing authority to represent the state in the leasing of land or markets under the control of the authority; P.A. 85-301 amended Subsec. (d) by adding provision that the legislative management committee may represent the state in the planning and construction of the legislative office building and related facilities; P.A. 85-567 amended Subsec. (b) to increase maximum yearly amount of per diem fees for board members from twelve thousand five hundred to twenty-five thousand dollars and the daily rate from one hundred to one hundred fifty dollars; P.A. 85-613 made technical changes, deleting reference to Secs. 10-325, 10-328 and 10-328a in Subsec. (d); P.A. 87-496 replaced administrative services commissioner with public works commissioner; P.A. 88-28 added the provision allowing the commissioner of mental retardation to represent the state in the leasing of certain property; Sec. 4-26a transferred to Sec. 4b-3 in 1989; P.A. 89-260 in Subsec. (d) deleted reference to Sec. 10a-81 which was repealed by Sec. 40 of the act; P.A. 91-124 in Subsec. (f) deleted the requirement that the properties review board review the selection and contract with any architect or engineer; P.A. 91-174 in Subsec. (d) added the provision concerning the leasing of real estate for the University of Connecticut Health Center; P.A. 91-256 deleted an obsolete reference to Sec. 10a-129; P.A. 92-154 amended Subsec. (d) to change a reference to the board of trustees of The University of Connecticut to the board of trustees of a constituent unit of the state system of higher education and to change a reference to The University of Connecticut Health Center to such constituent unit; P.A. 93-262 removed reference to Sec. 17-3 in Subsec. (d), effective July 1, 1993; P.A. 93-293 deleted reference to repealed Sec. 10a-145 in Subsec. (d), effective July 1, 1993; P.A. 97-247 made a technical change in Subsec. (d), effective July 1, 1997; P.A. 98-235 increased board members' compensation from one hundred fifty dollars per diem to two hundred dollars per diem and raised chairman's maximum annual compensation from twenty-five thousand dollars to thirty thousand dollars, effective July 1, 1998.

See title 2c re termination under "Sunset Law".
See Sec. 16a-38a (c) re leases.

Annotation to former section 4-26a:
Subsec. (f):
Cited. 9 CA 514, 521, 523.

Sec. 4b-4. (Formerly Sec. 4-26f). Restrictions on employees of the Properties Review Board and leasing employees of the Department of Public Works. Financial statements of personnel. (a) No employee of the Properties Review Board shall hold another state or municipal position, nor shall any such employee or any nonclerical employee in the unit in the Department of Public Works which is responsible for acquiring, leasing and selling real property on behalf of the state, be directly involved in any enterprise which does business with the state or be directly or indirectly involved in any enterprise concerned with real estate acquisition or development. Each member and employee of the State Properties Review Board shall file, with the board and with the State Ethics Commission, and each such employee of the department shall file, with the department and with the State Ethics Commission, a financial statement indicating all sources of business income of such person in excess of one thousand dollars, and the name of any business with which he is associated, which shall have the same meaning

as defined in section 1-79. Such statement shall be a public record. Financial statements for the preceding calendar year shall be filed with the commission on or before April fifteenth of each year if the employee or member held such a position during the preceding calendar year.

(b) The provisions of sections 1-82, 1-82a and 1-88 shall apply to any alleged violation of this section.

(P.A. 75-425, S. 6, 57; P.A. 87-570, S. 4, 5; 87-589, S. 75, 87; P.A. 88-109.)

History: P.A. 87-570 applied restrictions to "any person employed by the department of administrative services as a leasing agent or as an immediate supervisor of a leasing agent", required such employees to file with department and state ethics commission, and required state properties review board members and employees to file with state ethics commission instead of secretary of the state's office; P.A. 87-589 made technical change, substituting public works department for administrative services department; P.A. 88-109 deleted the references to leasing agents and substituted nonclerical employee, added requirements concerning the financial statement and added Subsec. (b) re violations of the section; Sec. 4-26f transferred to Sec. 4b-4 in 1989.

Sec. 4b-5. (Formerly Sec. 4-26g). Expenses of personnel of the Properties Review Board. Reasonable expenses of the Properties Review Board and its employees shall be paid from the budget of the board upon the approval of said board.

(P.A. 75-425, S. 7, 57.)

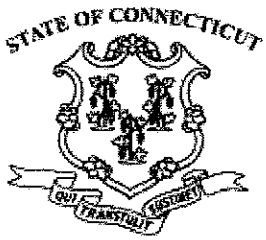
History: Sec. 4-26g transferred to Sec. 4b-5 in 1989.

Secs. 4b-6 to 4b-10. Reserved for future use.

PART II

SUPERVISION AND MAINTENANCE OF STATE REAL PROPERTY

Sec. 4b-11. (Formerly Sec. 4-24). Supervision of state property. The board of trustees of each state institution shall have the supervision, care and control of all property used in connection with such institution; the Commissioner of Public Safety shall have the supervision, care and control of all property used in connection with the Division of State Police and the Division of Fire, Emergency and Building Services within the Department of Public Safety located outside the city of Hartford; the Joint Committee on Legislative Management of the General Assembly shall have the supervision, care and control of the State Capitol building and grounds, the Legislative Office Building and parking garage and grounds and related structures and facilities; the Office of the Chief Court Administrator shall have the supervision, care and control of all property where the Judicial Department is the primary occupant and of the building and grounds of the State Library and Supreme Court and shall establish policies and procedures governing such supervision, care and control. For the purposes of this section, the term "Judicial Department" does not include the courts of probate, the Division of Criminal Justice and the Public Defender Services Commission, except where they share facilities in state-maintained courts. Such board of trustees and said commissioner may make regulations for the maintenance of order on, and the safeguarding and use of, any such property, subject to the direction and supervision of the Commissioner of Public Works. Any person who trespasses upon such property or who violates any of the regulations concerning the use of such property shall be fined not more than one hundred dollars or imprisoned not more than three months or both.



Did Not Get Voted On

General Assembly

File No. 399

February Session, 2004

Substitute Senate Bill No. 392

Senate, April 1, 2004

The Committee on Government Administration and Elections reported through SEN. DEFRONZO of the 6th Dist., Chairperson of the Committee on the part of the Senate, that the substitute bill ought to pass.

AN ACT CONCERNING THE STATE CONTRACT REVIEW PROCESS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) (*Effective October 1, 2004*) As used in sections 2 to 8, inclusive, of this act:

(1) "State agency" means an executive office, department, division, board, commission or other office or officer in the executive branch of state government but does not mean The University of Connecticut or any quasi-public agency;

(2) "Privatization contract" means an agreement or series of agreements between a state agency and a nongovernmental person or entity, in which such person or entity agrees to provide services valued at five hundred thousand dollars or more over the life of the contract that are substantially similar to and in lieu of services provided, in whole or in part, by employees of such agency or by employees of another state agency for such state agency. "Privatization contract" does not include an agreement to provide legal services, litigation support or management consulting only;

(3) "State construction" and "large procurement contracts" means any contract or amendment in excess of five hundred thousand dollars for: (A) The remodeling, alteration, repair or enlargement of any real asset; (B) the construction, alteration, reconstruction, improvement, relocation, widening or changing of the grade of sections of state highways or bridges; or (C) the purchase or lease of all supplies, materials or equipment, as defined in subdivision (2) of section 4a-50 of the general statutes; and

(4) "Board" means the State Properties Review Board, as established in section 4b-3 of the general statutes, as amended.

Sec. 2. (NEW) (*Effective October 1, 2004*) (a) The State Properties Review Board may, within available appropriations, retain the services of consultants, technical assistants, research and other personnel as it may deem necessary to assist in conducting any review pursuant to section 3 of this act.

(b) On or before June 30, 2005, the State Properties Review Board shall adopt regulations, in accordance with chapter 54 of the general statutes, for the implementation of this section, including, but not limited to, criteria to be used in conducting any review pursuant to subsection (a) of section 3 of this act.

Sec. 3. (NEW) (*Effective October 1, 2004*) (a) Notwithstanding any other provision of the general statutes, all state agencies shall submit any proposed privatization, state construction or large procurement contract to the State Properties Review Board for the board's review and approval or disapproval, in accordance with the provisions of section 2 of this act. The State Properties Review Board shall review all proposed state construction or large procurement contracts to determine the legal sufficiency of such contracts both as to substance and to form and to ensure that the process for the selection of the vendor or construction contractor complied with state law and that such contract is cost-effective and fiscally prudent. The State Properties Review Board shall also review and approve or disapprove all privatization contracts in accordance with the provisions of sections 4 to 8, inclusive, of this act. Any contract subject to review pursuant to this section shall be void unless approved by the State Properties Review Board. Nothing in this section shall be construed to require the review of any contract for independent audit services of any agency.

(b) In conducting any review pursuant to subsection (a) of this section, the State Properties Review Board shall have access to all information, files and records, including, but not limited, to financial records, of the applicable state agency, and shall, when necessary, be entitled to the use of personnel employed by the state agency. Each state agency shall keep such information, files and records in a form and by a method that will reasonably enable the board to conduct its review. Each state agency shall make such information, files and records available to the board or any authorized agent of the board, upon demand. In the event that any such information, file or record sought by the board is subject to nondisclosure pursuant to any provision of the general statutes, such nondisclosure requirement and any accompanying penalty for disclosure shall apply to members of the board and the board's authorized agents.

(c) Within thirty days of a state agency's submittal of a proposed privatization, state construction or large procurement contract, to the State Properties Review Board for review, the board shall respond in writing to such agency, either approving the contract or disapproving the contract without prejudice. In the event of a tie vote of the board's members, the proposed contract shall be deemed disapproved. In any case where the board issues a written response disapproving a proposed contract, such response shall include the grounds for disapproval. If, upon expiration of such thirty-day period a decision has not been made by the board, such contract shall be deemed to have been approved.

Sec. 4. (NEW) (*Effective October 1, 2004*) (a) No state agency shall execute a proposed privatization contract and no such contract shall be valid unless such contract is approved by the State Properties Review Board and such agency has complied with the provisions of section 6 of this act.

(b) Prior to any state agency's solicitation of bids for a privatization contract, such agency shall prepare an analysis of the costs and benefits to the agency of (1) privatizing services, and (2)

continuing to provide such services using state employees of the state agency. Such analysis shall include, but not be limited to: (A) An examination of all direct and indirect costs to the state, including health insurance, pension costs of state employees, unemployment compensation costs of state employees terminated as a result of the privatization contract, gain or loss of income tax and sales tax revenue to the state, and (B) an examination of the effect of such proposed privatization on the quality of service, the public health and safety and residents of the state who may utilize such privatized service. In determining the cost of privatizing services, pursuant to this subsection, the state agency shall calculate labor costs for each employee position at a rate no less than the middle range salary of a state employee job class substantially similar to such employee position. Additionally, the state agency shall include in such cost analysis any costs or penalties the state may incur if such contract is terminated by the state prior to the termination date contained in such contract. Each state agency shall transmit such analysis to the Auditors of Public Accounts who shall review such submission and prepare a report to the state agency with an analysis stating whether such privatization contract is cost-effective, taking into consideration all direct and indirect costs to the state and the impact of such privatization contract on the public health and safety and the residents of Connecticut who use the services that are the subject of the privatization contract. Any privatization contract approved pursuant to the provisions of this section shall be subject to an annual performance audit performed by the Auditors of Public Accounts.

Sec. 5. (NEW) (*Effective October 1, 2004)* At least sixty days prior to publishing any notice soliciting bids for a privatization contract, a state agency shall notify each collective bargaining organization representing employees of the agency of such planned solicitation. After consulting with the potentially affected bargaining units, if any, the agency shall provide adequate resources for the purpose of encouraging and assisting present agency employees to organize and submit a bid to provide the services that are the subject of the privatization contract. In determining what resources are adequate for this purpose, the agency shall refer to an existing collective bargaining agreement of a similar employee organization whose members perform the subject services, if available, which agreement provides similar resources in the same or other agencies. If no such collective bargaining agreement exists, the agency shall refer to any existing collective bargaining agreements providing such resources, and shall provide such resources at the minimum level of assistance provided in such agreements. The state agency shall also provide to the state employees its analysis and the report of the Auditors of Public Accounts prepared in accordance with subsection (b) of section 4 of this act. The agency shall consider any such employee bid on the same basis as all other bids. An employee bid may be made as a joint venture with other persons.

Sec. 6. (NEW) *(Effective October 1, 2004)* The state agency soliciting bids for a privatization contract shall require the bidders to include the following information in their bid submission:

(1) The wage rate for each employee covered by the privatization contract;

(2) An agreement by the bidder or contractor to offer available employee positions pursuant to the contract to qualified regular employees of the state agency whose state employment is terminated because of the privatization contract and who satisfy the hiring criteria of the contractor;

(3) An agreement by the bidder or the contractor to refrain from engaging in discriminatory employment practices, as defined in section 46a-51 of the general statutes, and to take affirmative steps to provide such equal opportunity for all such persons;

(4) A report on the length of continuous employment of current employees of the contractor by job classification, without providing individually identifiable information on such employees and information detailing the relevant prior experience of current employees within each job classification. If the positions identified by the bidder are newly created positions, the bid shall identify the minimum requirements for prospective applicants for each such position;

(5) The annual rate of employee turnover;

(6) The number of hours of training planned for each employee in areas directly related to the provision of services to state residents and clients;

(7) Any legal or administrative proceedings pending or concluded adversely against the applicant or any of the applicant's principals or key personnel within the past five years that relate to the procurement or performance of any public or private construction contract, employee safety and health, labor relations or other employment requirements and whether the applicant is aware of any investigation pending against the applicant or any principal or key personnel. Such information shall specify the date of the complaint, citation, court finding or administrative finding, the enforcement agency, rule, law or regulation involved and any additional information the contractor elects to submit;

(8) Any collective bargaining agreements or personnel policies covering the employees that will provide services to the state; and

(9) Any political contributions made by the bidder or any employee who holds a management position with the bidding company, to any elected officer of the state or member of the General Assembly during the four years prior to the due date of the bid.

Sec. 7. (NEW) *(Effective October 1, 2004)* (a) Any state agency selecting a bidder for a privatization contract shall develop a contract that is acceptable to the bidder and the state agency provided such contract shall include the following terms:

(1) The contractor shall be required to submit quarterly payroll records to the agency, listing the name, address, hours worked and hourly wage paid for each employee who is providing work under the privatization contract in the previous quarter;

(2) The contractor shall be required to offer available employee positions pursuant to the contract to qualified regular employees of the agency whose state employment is terminated because of the privatization contract and who satisfy the hiring criteria of the contractor;

(3) The contractor shall be prohibited from engaging in discriminatory employment practices, as defined in section 46a-51 of the general statutes, and shall take affirmative steps to provide such equal opportunity for all such persons; and

(4) The contractor shall be required to submit to an annual performance audit of such contract by the Auditors of Public Accounts.

(b) Prior to signing such contract, the state agency shall submit such contract to the State Properties Review Board for its review and approval or disapproval. Concomitantly, the state agency shall submit to the board the following information:

(1) A certification that the state agency has complied with all the requirements of the state agency contained in the provisions of sections 2 to 6, inclusive, of this act;

(2) The state agency analysis and the report of the Auditors of Public Accounts prepared in accordance with section 4 of this act and a report by the state agency explaining any changes in such analysis and report as a result of the terms of the proposed privatization contract;

(3) A state agency analysis of the quality of the services to be provided by the designated bidder and whether such services are equal to or exceed the quality of services that are provided by regular agency employees;

(4) A certification by the designated bidder that the bidder and its supervisory employees, while in the employ of the designated bidder, have no adjudicated record of repeated wilful noncompliance with any relevant federal or state regulatory law including, but not limited to, laws concerning labor relations, occupational safety and health, nondiscrimination and affirmative action, environmental protection and conflicts of interest; and

(5) A description of why the proposed privatization contract is in the public interest.

(c) The State Properties Review Board shall have the authority granted to it pursuant to section 3 of this act for purposes of reviewing and evaluating the privatization contract and approving or disapproving the contract. In addition to conducting its review in accordance with the provisions of section 3 of this act, the board shall also review the proposed privatization contract to determine the legal sufficiency of such contract both as to substance and to form and to ensure that the process for the selection of the bidder complied with state law and that such contract is cost-effective and fiscally prudent.

Sec. 8. (NEW) *(Effective October 1, 2004)* (a) If the State Properties Review Board approves such privatization contract and such privatization contract has a value of five million dollars or more over the life of the contract, such contract shall not be valid unless approved by the joint standing committees of the General Assembly having cognizance of matters relating to government administration and elections and appropriations in accordance with this section. The state agency shall, within five days of receipt of notice of approval by the State Contract Review Board, file such contract with the clerks of the House of Representatives and the Senate.

(b) Not later than five days after the clerks receive such contract, the speaker of the House of Representatives and the president pro tempore of the Senate shall submit the contract to the joint standing committees of the General Assembly having cognizance of matters relating to government administration and appropriations.

(c) Within twenty-five days after the speaker of the House of Representatives and the president pro tempore of the Senate receive such contract, said committees shall hold a joint public hearing on the contract and shall, by a majority of a joint vote of said committees, approve or disapprove such contract in whole. If disapproved, the contract shall not be valid and shall not be implemented.

Sec. 9. Section 3-125 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*) :

The Attorney General shall appoint a deputy, who shall be sworn to the faithful discharge of his duties and shall perform all the duties of the Attorney General in case of his sickness or absence. He shall appoint such other assistants as he deems necessary, subject to the approval of the Governor. The Attorney General may also appoint not more than four associate attorneys

general who will serve at the pleasure of the Attorney General and will be exempt from the classified service. The Attorney General shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction. He shall appear for the state, the Governor, the Lieutenant Governor, the Secretary, the Treasurer and the Comptroller, and for all heads of departments and state boards, commissioners, agents, inspectors, committees, auditors, chemists, directors, harbor masters, and institutions and for the State Librarian in all suits and other civil proceedings, except upon criminal recognizances and bail bonds, in which the state is a party or is interested, or in which the official acts and doings of said officers are called in question, and for all members of the state House of Representatives and the state Senate in all suits and other civil proceedings brought against them involving their official acts and doings in the discharge of their duties as legislators, in any court or other tribunal, as the duties of his office require; and all such suits shall be conducted by him or under his direction. When any measure affecting the State Treasury is pending before any committee of the General Assembly, such committee shall give him reasonable notice of the pendency of such measure, and he shall appear and take such action as he deems to be for the best interests of the state, and he shall represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes. All legal services required by such officers and boards in matters relating to their official duties shall be performed by the Attorney General or under his direction. All writs, summonses or other processes served upon such officers and legislators shall, forthwith, be transmitted by them to the Attorney General. All suits or other proceedings by such officers shall be brought by the Attorney General or under his direction. He shall, when required by either house of the General Assembly or when requested by the president pro tempore of the Senate, the speaker of the House of Representatives, or the majority leader or the minority leader of the Senate or House of Representatives, give his opinion upon questions of law submitted to him by either of said houses or any of said leaders. He shall advise or give his opinion to the head of any executive department or any state board or commission upon any question of law submitted to him. He may procure such assistance as he may require. Whenever a trustee, under the provisions of any charitable trust described in section 45a-514, is required by statute to give a bond for the performance of his duties as trustee, the Attorney General may cause a petition to be lodged with the probate court of the district in which such trust property is situated, or where any of the trustees reside, for the fixing, accepting and approving of a bond to the state, conditioned for the proper discharge of the duties of such trust, which bond shall be filed in the office of such probate court. The Attorney General shall prepare a topical and chronological cross-index of all legal opinions issued by the office of the Attorney General and shall, from time to time, update the same. Nothing in this section shall be construed to require the Attorney General to determine the legal sufficiency either as to substance or as to form of any proposed state construction, large procurement or privatization contract, as defined in section 1 of this act.

Sec. 10. Subsection (e) of section 4a-59 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*) :

(e) Each bid or proposal, with the name of the bidder, or proposer, shall be entered on a record, and each record, with the successful bid or proposal indicated thereon, shall, after the award of the order or contract, be open to public inspection. All large procurement, state construction and privatization contracts, as defined in section 1 of this act, shall be approved as to form by the State Properties Review Board and any other contracts shall be approved as to form by the Attorney General and a copy of each contract shall be filed with the Comptroller.

Sec. 11. Subsection (a) of section 4b-1 of the general statutes is repealed and the following is

substituted in lieu thereof (*Effective from passage*) :

(a) The Commissioner of Public Works shall (1) be responsible for the administrative functions of construction and planning of all capital improvements undertaken by the state, except (A) highway and bridge construction, the construction and planning of capital improvements related to mass transit, marine and aviation transportation, (B) the Connecticut Marketing Authority, (C) planning and construction of capital improvements to the State Capitol building or the Legislative Office Building and related facilities by the Joint Committee on Legislative Management, (D) any project as defined in subdivision (16) of section 10a-109c, undertaken by The University of Connecticut and (E) construction and planning of capital improvements related to the Judicial Department if such construction and planning do not constitute a project within the meaning of subsection (g) of section 4b-55, as amended by this act, including the preparation of preliminary plans, estimates of cost, development of designs, working plans and specifications, award of contracts and supervision and inspection. For the purposes of this subparagraph (E) , the term "Judicial Department" does not include the courts of probate, the Division of Criminal Justice and the Public Defender Services Commission, except where such agencies share facilities in state-maintained courts; (2) select consultant firms in accordance with the provisions of sections 4b-56 to 4b-59, inclusive, as amended by this act, to assist in the development of plans and specifications when in the commissioner's judgment such assistance is desirable; (3) render technical advice and service to all state agencies in the preparation and correlation of plans for necessary improvement of their physical plants; (4) cooperate with those charged with fiscal programming and budget formulation in the development of a capital program and a capital budget for the state; (5) be responsible for the purchase, lease, sublease, sale and acquisition of property and space to house state agencies and, subject to the provisions of section 4b-21, the sale or exchange of any land or interest in land belonging to the state; (6) maintain a complete and current inventory of all state-owned or leased property and premises, including space-utilization data; (7) supervise the care and control of buildings and grounds owned or leased by the state in Hartford, except the building and grounds of the State Capitol and the Legislative Office Building and parking garage and related structures and facilities and grounds, as provided in section 2-71h, and the Connecticut Marketing Authority and property under the supervision of the Office of the Chief Court Administrator under the terms of section 4b-11; and (8) be responsible for the administrative functions of establishing and maintaining security standards for all facilities housing the offices and equipment of the state except (A) Department of Transportation mass transit, marine and aviation facilities, (B) the State Capitol and the Legislative Office Building and related facilities, (C) facilities under the care and control of The University of Connecticut or other constituent units of the state system of higher education, (D) Judicial Department facilities, (E) Department of Public Safety facilities, (F) Military Department facilities, (G) Department of Correction facilities, (H) Department of Children and Families client-occupied facilities, (I) facilities occupied by the Governor, Lieutenant Governor, Attorney General, Comptroller, Secretary of the State and Treasurer, and (J) facilities occupied by the Board of Parole. As used in this subdivision, "security" has the meaning assigned to it in section 4b-130. Subject to the provisions of chapter 67, said commissioner may appoint such employees as are necessary for carrying out the duties prescribed to said commissioner by the general statutes.

Sec. 12. Subsection (c) of section 4b-3 of the general statutes, as amended by section 146 of public act 03-6 of the June 30 special session, is repealed and the following is substituted in lieu thereof (*Effective from passage*) :

(c) The board may adopt such rules as it deems necessary for the conduct of its internal affairs, in accordance with section 4-167, and may employ an executive director, a real estate appraiser,

an administrative assistant, a secretary, a clerk, and within its budget, such employees as it shall deem necessary.

Sec. 13. Subsection (f) of section 4b-3 of the general statutes, as amended by section 146 of public act 03-6 of the June 30 special session, is repealed and the following is substituted in lieu thereof (*Effective from passage*) :

(f) The State Properties Review Board shall review real estate acquisitions, real property sales and leases, subleases and any such similar agreements proposed by the Commissioner of Public Works, and the acquisition, other than by condemnation, or the sale or lease of any property by the Commissioner of Transportation under subdivision (12) of section 13b-4, as amended, subject to section 4b-23, as amended by this act, and subsection (h) of section 13a-73. Such review shall consider all aspects of the proposed actions, including feasibility and method of acquisition and the prudence of the business method proposed. The board shall also cooperate with and advise and assist the Commissioner of Public Works and the Commissioner of Transportation in carrying out their duties. The board shall have access to all information, files and records, including financial records, of the Commissioner of Public Works and the Commissioner of Transportation, and shall, when necessary, be entitled to the use of personnel employed by said commissioners. The board shall approve or disapprove any acquisition of development rights of agricultural land by the Commissioner of Agriculture and Consumer Protection under section 22-26cc, as amended.

Sec. 14. Subsection (i) of section 4b-23 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*) :

(i) As used in this subsection, (1) "project" means any state program, except the downtown Hartford higher education center project, as defined in subsection (l) of section 4b-55, as amended, requiring consultant services if (A) the cost of such services is estimated to exceed fifty thousand dollars or, in the case of a constituent unit of the state system of higher education, the cost of such services is estimated to exceed three hundred thousand dollars, or (B) (i) the construction costs in connection with such program are estimated to exceed five hundred thousand dollars or, in the case of a constituent unit of the state system of higher education, other than The University of Connecticut, the construction costs in connection with such program are estimated to exceed two million dollars, and (ii) the cost of a consultant services contract for such program exceeds twenty thousand dollars or the cost of an amendment to a consultant services contract makes the total cost of the amendment, all previous amendments to such contract and the contract exceed twenty thousand dollars for the first time; (2) "consultant" means "consultant" as defined in section 4b-55, as amended by this act; and (3) "consultant services" means "consultant services" as defined in section 4b-55, as amended by this act. In no instance shall the estimated costs of consultant services or the estimated construction costs in connection with such program be divided into units for the purpose of decreasing such estimated costs. Any consultant selected by the commissioner, and any contracts entered into by the commissioner with any consultants for employment, on any project under the provisions of this section, shall be subject to the approval of the State Properties Review Board prior to the employment of said consultant or consultants by the commissioner. The State Properties Review Board shall, within thirty days, approve or disapprove the selection of or contract with any consultant made by the Commissioner of Public Works pursuant to sections 4b-1 and 4b-55 to 4b-59, inclusive, as amended by this act. If upon the expiration of the thirty-day period a decision has not been made, the State Properties Review Board shall be deemed to have approved such selection or contract.

Sec. 15. Subsection (g) of section 4b-55 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*) :

(g) "Project" means any state program requiring consultant services if (1) the cost of such services is estimated to exceed fifty thousand dollars or, in the case of a constituent unit of the state system of higher education, the cost of such services is estimated to exceed three hundred thousand dollars, provided in no instance shall such estimated consultant services costs be divided into units for the purpose of decreasing such estimated consultant services costs, and (2) the construction costs in connection with such program are estimated to exceed five hundred thousand dollars; or, in the case of a constituent unit of the state system of higher education, other than The University of Connecticut, the construction costs in connection with such program are estimated to exceed two million dollars, provided in no instance shall such estimated construction costs be divided into units for the purpose of decreasing such estimated construction costs.

Sec. 16. Section 4b-24 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*) :

In acting as the determining authority in fulfilling the needs of the various departments and agencies of state government, except the Legislative Department, and choosing the method of acquisition which shall be pursued in the open competitive market, the commissioner shall:

(1) (A) Compile and maintain comprehensive and complete inventories of all the improved and unimproved real estate available to the state by virtue of ownership or lease. The actual mechanical compilation of such inventories may be handled, at the request of the commissioner, by the Secretary of the Office of Policy and Management; provided such compilation shall be available to the Commissioner of Public Works at all times. Such inventory shall be used by the commissioner as the primary source for meeting state needs, and shall be shared with the review board and with the Secretary of the Office of Policy and Management; (B) prepare an annual inventory of improved and unimproved real estate which is owned by the state and which is unused or underutilized and study and make recommendations concerning the reuse or disposition of such real estate; (C) identify in the inventories required under subparagraphs (A) and (B) of this subdivision, existing buildings that (i) are of historic, architectural or cultural significance, including buildings listed or eligible to be listed in the national register established under the National Historic Preservation Act of 1966, 80 Stat. 915 (1966) , 16 USC 470a and (ii) would be suitable, whether or not in need of repair, alteration or addition, to meet the public building needs of the state or to meet the needs of the public in accordance with the provisions of subsection (m) of section 4b-23.

(2) Whenever realty uses designed uniquely for state use and for periods over five years are concerned, the commissioner shall, whenever practicable, attempt to purchase, lease-purchase or construct on state-owned land. In such cases leases shall be used only when other possibilities have been eliminated as not feasible, in the opinion of the commissioner.

(3) Whenever the commissioner has established specific plans and specifications for new construction on state land or new construction for sale to the state: (A) If it appears to the commissioner that the cost of the project shall be less than five hundred thousand dollars, contracts shall be made, where practicable, through a process of sealed bidding as provided in section 4b-91, as amended, relating to projects in excess of five hundred thousand dollars; (B) if it appears to the commissioner that the space needs of the requesting agency are less than five thousand square feet, the commissioner shall, whenever practicable, carry on advertising, in

accordance with the provisions of section 4b-34 relating to projects in excess of five thousand square feet, in order to allow an equal opportunity for third parties to do business with the state without regard to political affiliation, political contributions or relationships with persons in state, federal or local governmental positions.

(4) The commissioner may designate projects to be accomplished on a total cost basis for (A) new facilities to provide for the substantial space needs of a requesting agency, (B) the installation of mechanical or electrical equipment systems in existing state facilities, or (C) the demolition of any state facility that the commissioner is authorized to demolish under the general statutes. If the commissioner designates a project as a designated total cost basis project, the commissioner may enter into a single contract with a private developer which may include such project elements as site acquisition, architectural design and construction. All contracts for such designated projects shall be based on competitive proposals received by the commissioner, who shall give notice of such project, and specifications for the project, by advertising, at least once, in a newspaper having a substantial circulation in the area in which such project is to be located. Such advertising requirement may not be substituted by the posting of requests for competitive proposals on the web site of the Department of Public Works. The commissioner shall determine all other requirements and conditions for such proposals and awards and shall have sole responsibility for all other aspects of such contracts. Such contracts shall state clearly the responsibilities of the developer to deliver a completed and acceptable product on a date certain, the maximum cost of the project and, as a separate item, the cost of site acquisition, if applicable. No such contract may be entered into by the commissioner without the prior approval of the State Properties Review Board and unless funding has been authorized pursuant to the general statutes or a public or special act.

(5) Whenever a bid is made to the commissioner for any purpose regarding the use of land or whenever any person proposes to sell or lease land to the state, the bidder or such person shall be the owner of the land, or the commissioner shall have the option to void any contract subsequently made with said bidder or third person.

(6) In all dealings with the commissioner the owner of record or beneficial owner shall be disclosed to the commissioner and the bid shall be revealed to the owner of record or beneficial owner or the commissioner shall have the option to void any contract subsequently made concerning any such dealing.

(7) After the authorization of a project under the provisions of section 4b-23, as amended by this act, the public auditors of the state and the auditors or accountants of the Commissioner of Public Works shall have the right to audit the books of any contractor employed by the commissioner pursuant to such authorization, or of any party negotiating with the commissioner for the acquisition of land by lease or otherwise; provided, however, that any such audit shall be limited to the project authorized by the commissioner and the State Properties Review Board, and provided further that in the case of a party negotiating with the commissioner, such audit may also be conducted after the negotiations have ended, if a contract is consummated with the commissioner.

Sec. 17. Subdivision (4) of section 4b-24 of the general statutes, as amended by section 9 of public act 03-215, is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*) :

(4) The commissioner may designate projects to be accomplished on a total cost basis for (A) new facilities to provide for the substantial space needs of a requesting agency, (B) the

installation of mechanical or electrical equipment systems in existing state facilities, or (C) the demolition of any state facility that the commissioner is authorized to demolish under the general statutes. If the commissioner designates a project as a designated total cost basis project, the commissioner may enter into a single contract with a private developer which may include such project elements as site acquisition, architectural design and construction. The commissioner shall select a private developer from among the developers who are selected and recommended by the award panels established in this subdivision. All contracts for such designated projects shall be based on competitive proposals received by the commissioner, who shall give notice of such project, and specifications for the project, by advertising, at least once, in a newspaper having a substantial circulation in the area in which such project is to be located. Such advertising requirement may not be substituted by the posting of requests for competitive proposals on the web site of the Department of Public Works. No contract which includes the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state for which the total cost is estimated to be more than five hundred thousand dollars may be awarded to a person who is not prequalified for the work in accordance with section 3 of [this act] public act 03-215. The commissioner shall determine all other requirements and conditions for such proposals and awards and shall have sole responsibility for all other aspects of such contracts. Such contracts shall state clearly the responsibilities of the developer to deliver a completed and acceptable product on a date certain, the maximum cost of the project and, as a separate item, the cost of site acquisition, if applicable. No such contract may be entered into by the commissioner without the prior approval of the State Properties Review Board and unless funding has been authorized pursuant to the general statutes or a public or special act.

Sec. 18. Subsection (a) of section 4b-57 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*) :

(a) Whenever consultant services are required by the commissioner in fulfilling his responsibilities under section 4b-1, as amended by this act, and in the case of each project, the commissioner shall invite responses from such firms by advertisements inserted at least once in one or more newspapers having a circulation in each county in the state. Such advertising requirement shall not be substituted by the posting of a request for responses for such consultant services on the web site of the Department of Public Works. The commissioner shall prescribe, by regulations adopted in accordance with chapter 54, the advance notice required for, the manner of submission, and conditions and requirements of, such responses.

Sec. 19. Subsection (a) of section 4b-56 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*) :

(a) There shall be established within the Department of Public Works a State Construction Services Selection Panel which shall consist of five members. Four of such members shall be appointed by the commissioner, shall be current or retired employees of the Department of Public Works and shall serve for terms of one year from July first. The remaining member shall be appointed by the head or acting head of the user agency and shall serve only for deliberations involving the project for which he was appointed. If any vacancy occurs on the panel, the commissioner shall appoint a person for the unexpired term in accordance with the provisions of this subsection. No member, family member of a panel member, person in charge of overseeing such panel or family member of a person overseeing such panel shall have a beneficial interest in, or be an employee of, any bidding entity.

Sec. 20. Subsection (a) of section 4b-58 of the general statutes is repealed and the following is

substituted in lieu thereof (*Effective from passage*) :

(a) (1) Except in the case of a project, The University of Connecticut library project, a priority higher education facility project, a project, as defined in subdivision (16) of section 10a-109c, undertaken by The University of Connecticut, a community court project, a correctional facility project, a juvenile detention center project, the Connecticut Juvenile Training School project, and the downtown Hartford higher education center project, the commissioner shall negotiate a contract for consultant services with the firm most qualified, in the commissioner's judgment, at compensation which the commissioner determines is both fair and reasonable to the state. (2) In the case of a project, the commissioner shall negotiate a contract for such services with the most qualified firm from among the list of firms submitted by the panel at compensation which the commissioner determines in writing to be fair and reasonable to the state. If the commissioner is unable to conclude a contract with any of the firms recommended by the panel, the commissioner shall, after issuing written findings of fact documenting the reasons for such inability, negotiate with those firms which the commissioner determines to be most qualified, at fair and reasonable compensation, to render the particular consultant services under consideration. (3) Whenever consultant services are required for The University of Connecticut library project, a priority higher education facility project, a community court project, a correctional facility project, a juvenile detention center project, the Connecticut Juvenile Training School project, or the downtown Hartford higher education center project, the commissioner shall select and interview at least three consultants or firms and shall negotiate a contract for consultant services with the firm most qualified, in the commissioner's judgment, at compensation which the commissioner determines is both fair and reasonable to the state, except that if, in the opinion of the commissioner, the Connecticut Juvenile Training School project needs to be expedited in order to meet the needs of the Department of Children and Families, the commissioner may waive such selection requirement. Except for the downtown Hartford higher education center project, the commissioner shall notify the State Properties Review Board of the commissioner's action within five business days, for its approval or disapproval in accordance with subsection (i) of section 4b-23, as amended by this act, except that if, within fifteen days of such notice, a decision has not been made, the board shall be deemed to have approved such contract. The Connecticut Juvenile Training School project shall be exempt from the State Properties Review Board approval process. In no instance shall the commissioner notify a consulting firm of its selection to provide such consulting services or shall such firm begin to provide such services prior to the board's review and approval of such firm as required under this subsection.

This act shall take effect as follows:	
Section 1	*October 1, 2004*
Sec. 2	*October 1, 2004*
Sec. 3	*October 1, 2004*

Sec. 4	*October 1, 2004*
Sec. 5	*October 1, 2004*
Sec. 6	*October 1, 2004*
Sec. 7	*October 1, 2004*
Sec. 8	*October 1, 2004*
Sec. 9	*October 1, 2004*
Sec. 10	*October 1, 2004*
Sec. 11	*from passage*
Sec. 12	*from passage*
Sec. 13	*from passage*
Sec. 14	*from passage*
Sec. 15	*from passage*
Sec. 16	*from passage*
Sec. 17	*October 1, 2004*
Sec. 18	*from passage*
Sec. 19	*from passage*

Sec. 20	*from passage*

GAE *Joint Favorable Subst.*

The following fiscal impact statement and bill analysis are prepared for the benefit of members of the General Assembly, solely for the purpose of information, summarization, and explanation, and do not represent the intent of the General Assembly or either House thereof for any purpose:

OFA Fiscal Note

State Impact:

Agency Affected	Fund-Effect	FY 05 $	FY 06 $
Prop. Review Bd.	GF - Cost	367, 771	429, 324
Various State Agencies	GF - Cost	Potential Significant	Potential Significant
Transportation, Dept.	FF - Revenue Loss	Potential Significant	Potential Significant
Pub. Works, Dept.	GF - Cost	Potential Significant	Potential Significant
Auditors	GF - Cost	97, 800	95, 600
Legislative Mgmt.	GF - Cost	Potential	Potential
Comptroller Misc. Accounts (Fringe Benefits)	GF - Cost	72, 780	221, 078

Note: GF=General Fund; FF=Federal Fund

Municipal Impact: None

Explanation

State Properties Review Board: The table below summarizes the General Fund impact of expanding the responsibilities of the State Properties Review (SPRB) in FY 05 and FY 06. Additional information on these costs is provided in the "Detail" section below.

Estimated General Fund Impact on SPRB		
	FY 05 (partial year)	FY 06 (full year)
Appropriated Account		
Personal Services	$266, 830	$386, 902
Other Expenses [1]	90, 237	40, 922
Equipment	10,704	1,500
Total Cost	**$367, 771**	**$429, 324**

[1] Includes a one-time cost of $50, 000 to reconfigure SRPB's office space which could be paid for with General Obligation bond funds.

State Properties Review Board Detail

Workload Increase: SPRB's workload will increase from its current average of 623 real estate proposals and consultant contracts per year to in excess of 1, 400 proposals per year. The estimated increase in the number of proposals is based on a telephone survey of the 9 largest agencies (DPW, DMHAS, DCF, DOC, DAS, DOT, DMV, DRS and DPS) and the assumption that these agencies account for approximately 80% of all state contracts.

The scope of SPRB's oversight duties will be expanded to include approval or disapproval of all construction, privatization and procurement contracts with a value in excess of $500, 000 over the term of the contract. For each submittal, SPRB will look at: (1) cost effectiveness, (2) financial prudence, (3) legal sufficiency as to substance and form (the Attorney General's Office is currently responsible for this) , and (4) vendor and contractor compliance with state law. The

review must be performed within 30 days of receipt.

Personal Services Cost: The agency currently has an authorized position count of 5, of which 4 are filled (1 Executive Director, 1 Executive Secretary, 1 Fiscal Administrative Assistant, and 1 Secretary 1.) The agency also has a temporary employee who assists in the review of consultant contracts.

The table below summarizes the 8 positions the SPRB will need to handle the requirements imposed by the bill:

Personal Services Requirements for SPRB[1]		
Position	FY 05 Partial Year	FY 06 Full Year
Assistant Attorney General 2	$48, 679	$70, 584
Contract Specialist General	39, 687	57, 546
Real Estate Examiner	37, 823	54, 843
Architectural Design Reviewer 2	34, 926	50, 643
Construction Specialist General	30, 335	43, 985
Paralegal Specialist 2	31, 973	46, 360
Secretary 1	23, 348	33, 855
Clerk Typist	20,059	29,086
Total Personal Services	**$266, 830**	**$386, 902**
Fringe benefits	$53, 980	$177, 278

Assistant Attorney General 2 and Paralegal Specialist 2: The agency currently has no legal staff to review legal sufficiency and form.

Contract Specialist General, Architectural Design Reviewer 2, and Construction Specialist General: These positions will need to be added because the agency does not currently have permanent staff with expertise in these areas. The Contract Specialist will review all procurement contracts, including the purchases of all materials, equipment, supplies and privatization contracts. The Architectural Design Reviewer 2 will review approximately 200 to 250 architectural and other professional consultant contracts per year. The Construction Specialist General will review all construction contracts and change orders submitted to the Board. DPW currently averages in excess of 35 major construction contracts per year and related change orders (the change order average over the last 6 years has been over 850 per year.)

Real Estate Examiner: SPRB's executive director is currently reviewing real estate proposals and this additional position is needed to handle the increased workload. It should be noted that sHB 5033, the budget as favorably reported by the Appropriations Committee, provides partial year funding for a Real Estate Examiner position that was eliminated in 2002.

Secretary 1 and Clerk Typist: These positions will be needed to handle the increased workload.

Other Expenses: The table below summarizes the Other Expenses costs to SPRB associated with the bill:

Other Expenses Requirements for SRPB		
Item	FY 05 [9]	FY 06
Dues, Subscriptions, Telephone [1]	$2, 000	$2, 060
Equipment Maintenance & Repairs [1]	$2, 150	$2, 215
Board Member Fees [2]	8, 287	8, 287
Mileage Reimbursement - Board members [3]	12, 800	13, 180
Vehicle Rents [4]	500	515

IT Hardware Maintenance & Support [5]	8, 000	8, 000
IT Software [6]	1, 000	1, 000
General Office Supplies [7]	5, 500	5, 665
Reconfigure Existing Space [8]	50,000	0
Total Other Expenses	**$90, 237**	**$40, 922**

[1] Based on historical cost per employee

[2] Assumes that the number of Board meetings will increase, so fee payments will reach the statutory cap of $155, 000

[3] Based on historical experience for Board members

[4] Based on historical cost adjusted for additional site inspections

[5] Based on DoIT contract cost of $1, 000 per computer for 7 personal computers

[6] From DoIT

[7] Based on historical information for number of photocopier pages per employee

[8] One-time cost which could be paid from General Obligation bond funds

[9] Partial year cost

Equipment: The FY 04 equipment cost for SPRB is estimated be $10, 704 (8 personal computers with monitors at a cost of $1, 338 per system.) The FY 05 cost of $1, 500 is based on

historical information about agency costs at the current staffing level.

Various State Agencies: The bill also establishes procedures that executive branch agencies and officials must follow before entering into a contract with a private entity to provide public services valued at $500, 000 or more. This has a potentially significant impact on several state agencies. The bill may also increase the cost of contracting out state service in the future, or increase the costs of contracting out such that the provision of services by state employees would be more cost effective.

This bill requires an agency to submit any proposed privatization contract, state construction or large procurement contract to the State Properties Review Board for the board's review and approval or disapproval.

There will be indeterminate costs of compliance to an agency contracting out services. To the extent that there are savings to be achieved from privatizing state services, there will be a delay and a potential decrease in the savings as a result of the administrative processes established by the bill. An agency is required to compare the costs and benefits, including quality of service provided, of privatizing services with not privatizing them. The agency must then report its cost-benefit analysis to the State Auditors. An agency must also provide notice and assistance to each applicable collective bargaining unit when soliciting bids for a privatization contract. These administrative requirements are anticipated to have a potentially significant impact, which may require additional resources, to any state agency that solicits bids for a privatization contract.

Department of Transportation: There is a potential impact on federal transportation funding because the provisions of the bill require that contracts over $500, 000 be submitted to SPRB for review. Since the majority of Department of Transportation (DOT) construction projects exceed this amount, SPRB would have to review them. If this review process significantly delays project start dates, this could result in the lapsing of unobligated federal transportation funds, which would then be returned to the federal government and could lead to the future loss of federal transportation funding.

Auditors of Public Accounts: The bill requires the Auditors of Public Accounts to review the analyses submitted by agencies and determine the cost effectiveness of privatizing, and requires the auditors to annually audit any approved privatization contract. Depending on the number of reviews and audits, the Auditors of Public Accounts may require two Auditor I positions with FY 05 costs of $92, 800, plus fringe benefits[2], and $5, 000 for equipment. Additionally, the Auditors will require indeterminate Other Expenses funding for potential costs associated with the retention of outside professional services on an as-needed basis.

Office of Legislative Management: The bill requires the committees of Government Administration and Elections and Appropriations to hold a joint public hearing on the privatization contracts valued over $5 million within 25 of receipt of the contract by the General Assembly. The bill requires the joint committees to approve or disapprove it. It is anticipated that Legislative Management may incur increased costs to consider the contracts, such potential costs are contingent on the number of items under consideration and whether these items can be considered during the regular session or will necessitate a special session, which will further increase these potential costs.

OLR Bill Analysis

sSB 392

AN ACT CONCERNING THE STATE CONTRACT REVIEW PROCESS

SUMMARY:

This bill requires the State Properties Review Board (SPRB) to approve most state construction or purchasing contracts valued at $500, 000 or more and privatization contracts valued at over $500, 000. It establishes criteria for the approval.

It prohibits state agencies, other than UCONN and quasi-public agencies, from entering into privatization contracts unless they (1) conduct a cost-benefit analysis; (2) request information from bidders regarding employment, past or present proceedings or investigations involving employment or performance practices, and political contributions; (3) get SPRB's approval; and (4) if the contract will be worth at least $5 million over its life, get the approval of the Government Administration and Elections (GAE) and Appropriations committees.

The bill makes the Department of Public Works commissioner responsible for subleasing and selling state agencies' office space. He is already responsible for purchasing and leasing it. The bill requires the SPRB to review sales, leases, subleases, and similar agreements the commissioner proposes.

By law, the SPRB must approve the (1) commissioner's consultant services contracts estimated at over $50, 000 and (2) contracts for construction projects estimated at over $500, 000 where the services needed are estimated at over $50, 000. The bill prohibits anyone from dividing the cost of services or construction into units to reduce the cost estimates. It also prohibits the commissioner from telling a consulting firm that it has been selected to provide the services before the board reviews and approves the contract.

The bill prohibits the commissioner from substituting advertisements for bids on design-build construction projects or for consultants on the department's website for the newspaper advertisements the law requires.

Lastly, the bill prohibits State Construction Services Selection Panel members, the person responsible for overseeing the panel, or their family members from having a beneficial interest in, or working for, a bidder on a construction project. By law, this six-member panel awards state construction contracts.

EFFECTIVE DATE: Upon passage, except that the contracting provisions are effective October 1, 2004.

SPRB REVIEW AND APPROVAL OF STATE CONTRACTS

The bill requires state agencies, other than UCONN and quasi-public agencies, to submit construction, large procurement, and privatization contracts to the SPRB for review and approval. It covers contracts, valued at over $500, 000, to remodel, alter, or repair state assets; build, alter, improve, relocate, widen, or change the grade of sections of state highways or bridges; or purchase or lease supplies, materials, or equipment. It also covers contracts, valued at $500, 000 or more between a state agency and a nongovernmental person or entity for services similar to, or in lieu of, those currently performed by state employees. These contracts

do not include those for legal services, litigation support, or management consulting.

Review

The bill requires the SPRB to review the construction and purchasing contracts (1) for legal sufficiency of substance and form, (2) to ensure that the contractor or vendor selection process complied with state law, and (3) for cost effectiveness and fiscal prudence. It eliminates a requirement for the attorney general to review these contracts for substance and form.

The bill requires the board to review privatization contracts for compliance with the bill's requirement for (1) a cost-benefit analysis, (2) bidders' employment and performance information and political contribution practices (see Below) , and (3) the GAE Committee's approval if the value of the contract exceeds $5 million.

The bill requires state agencies to give the board, upon demand, access to all information, files, records, and staff necessary to complete its review. When the board is reviewing privatization contracts, the bill specifically requires agencies to give it:

1. a certification that the agency complied with all of the bill's requirements;

2. the agency's cost benefit analysis, the auditors' analysis of it (see below) , and the agency's explanation for any changes in the analysis or report resulting from the terms of the proposed contract;

3. the agency's analysis of the quality of the designated bidder's services and whether they are equal to or exceed the quality of services state employees provided;

4. the bidder's certification that neither he nor his supervisory employees, while in his employment, have an adjudicated record of repeated, willful noncompliance with any relevant federal or state regulatory laws including, those concerning labor relations, occupational safety and health, nondiscrimination and affirmative action, environmental protection, and conflicts of interest; and

5. a description of why the proposed privatization contract is in the public interest.

The bill requires agencies to keep this material in a way that will enable the board to use it. The board and its agents must comply with any confidentiality rules that prohibit disclosing the materials.

Contract Approval

The board has 30 days from the date of submittal to approve or disapprove with prejudice any contract. Its decision must be in writing and include the grounds for disapproval. A tie vote means the contract is disapproved. If the board does not act in the 30-day period, the contract is deemed approved.

SPRB Staffing

The bill allows the SPRB to hire an executive director, real estate appraiser, and an administrative assistant. It also allows the board, within available appropriations, to hire consultants, technical assistants, researchers, and other personnel as needed to help it review covered contracts. It requires the board to adopt regulations to implement this hiring and set out

its contract review criteria.

PRIVATIZATION CONTRACTS

Cost-Benefit Analysis

Before soliciting bids for a privatization contract, the bill requires state agencies to analyze the costs and benefits to the agency of (1) privatizing services and (2) continuing to provide the services using its employees. It requires the analysis to examine: (1) direct and indirect costs to the state, including health insurance, pension costs, unemployment compensation costs resulting from the privatization, and gains or losses in state income or sales revenue and (2) the effect of the proposed privatization on the quality of services and the public health and safety of state residents who may use them.

When determining the cost of privatizing services, the bill requires the agency to calculate employees' labor costs at no less than the mid-range salary for their classification. The cost analysis must also show costs or penalties to the state for the contract's premature termination.

Each agency must submit its analysis to the state auditors, who must review it and determine the cost effectiveness of privatizing. It requires the auditors to audit annually any approved privatization contract.

Notice to Union Representatives

At least 60 days before soliciting bids for a privatization contract, the bill requires the state agency to notify the union representing the employees who will be affected by it. After consulting with the union, the agency must encourage and help the affected employees bid on the contract. It must look at existing or similar collective bargaining agreements for suggestions on how to help them. The bill requires the agency also to give the employees its cost-benefit analysis and the auditor's report. It must consider bids from state employees on the same basis as it considers others. It permits employees to bid as a joint venture with others.

Bid Requirements

The bill requires state agencies soliciting bids for privatization contracts to direct each bidder to include in his bid:

1. the wage rate for each employee the contract covers;

2. his agreement to offer available employee positions to any qualified state employee who will lose his job because of the contract and who satisfies the bidder's hiring criteria;

3. his agreement to refrain from engaging in discriminatory employment practices and to take affirmative steps to be an equal opportunity employer;

4. without providing identifying information a report on how long, by job classification, his current employees have worked for him and their relevant work experience;

5. the minimum requirements for any positions that will be newly created;

6. employees' annual turnover rate;

7. the number of training hours planned for each employee in areas directly related to services provided in Connecticut;

8. any legal or administrative proceedings pending or concluded adversely against him or any of his principals or key personnel within the past five years that relate to the procurement or performance of any public or private construction contract, employee safety and health, labor relations, or other employment requirements and whether the applicant is aware of any investigation pending against him or any principal or key personnel;

9. for any such proceeding, the date of the complaint, citation, or court or administrative finding; the enforcement agency, rule, law or regulation involved; and any additional information he elects to submit;

10. any collective bargaining agreements or personnel policies covering the employees who will provide services to the state; and

11. any political contributions he or any of his managers made to a statewide elected official or legislator during the four years before the bid was due.

Terms Required in Privatization Contracts

The bill requires agencies to make privatization contracts acceptable to the bidder and the state agency. At a minimum, these contracts must:

1. require the contractor to give the agency quarterly payroll records listing the name, address, hours worked, and hourly wage paid for each employee working under the contract in the previous quarter;

2. require him to offer available jobs to qualified regular state employees who lost their job because of the contract and who satisfy the hiring criteria;

3. prohibit him from engaging in discriminatory employment practices and to take affirmative steps to offer all people an equal opportunity; and

4. require him to allow the state auditors to complete an annual performance audit.

GAE COMMITTEE'S APPROVAL OF PRIVATIZATION CONTRACTS

Within five days after the SPRB approves a privatization contract valued at over $5 million, the bill requires the agency requesting it to file the contract with the House and Senate clerks. Not later than five days after they receive the contract, the House speaker and Senate president pro tempore must give it to the GAE and Appropriations committees. The committees must hold a joint hearing on the contract within 25 days after the House speaker and the Senate president pro tempore received it and then, by a majority vote, approve or disapprove it. A contract that is disapproved is not valid and cannot be implemented

BACKGROUND

Related Bill

SHB 5025, also favorably reported by the GAE Committee on March 19, prohibits the SPRB from approving contracts unless it receives affidavits regarding whether gifts were given to the

state officials or employees involved in soliciting or awarding the contracts.

COMMITTEE ACTION

Government Administration and Elections Committee

Joint Favorable Substitute

Yea 10 Nay 7

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[2] The fringe benefit costs for state employees are budgeted centrally in the Miscellaneous Accounts administered by the Comptroller. The total fringe benefit reimbursement rate as a percentage of payroll is 45.82%, effective July 1, 2003. However, first year fringe benefit costs for new positions do not include pension costs lowering the rate to 20.23% in FY 05. The state's pension contribution is based upon the prior year's certification by the actuary for the State Employees Retirement System.

Substitute House Bill No. 6417

Public Act No. 03-215

AN ACT CONCERNING STATE CONSTRUCTION CONTRACTS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 4b-91 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) Every contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state, which is estimated to cost more than five hundred thousand dollars, except (1) a contract awarded by the Commissioner of Public Works for (A) a community court project, as defined in subsection (j) of section 4b-55, (B) the Connecticut Juvenile Training School project, as defined in subsection (k) of section 4b-55, (C) the downtown Hartford higher education center project, as defined in subsection (l) of section 4b-55, (D) The University of Connecticut library project, as defined in subsection (d) of section 4b-55, (E) a correctional facility project, as defined in subsection (m) of section 4b-55, (F) a juvenile detention center project, as defined in subsection (n) of section 4b-55, or (G) a student residential facility for the Connecticut State University system that is a priority higher education facility project, as defined in subsection (f) of section 4b-55, or (2) a project, as defined in subdivision (16) of section 10a-109c, undertaken and controlled by The University of Connecticut in accordance with section 10a-109n, shall be awarded to the lowest responsible and qualified general bidder who is prequalified pursuant to section 3 of this act on the basis of competitive bids in accordance with the procedures set forth in this chapter and section 9 of this act, after the Commissioner of Public Works or, in the case of a contract for the construction of or work on a building under the supervision and control of the Joint Committee on Legislative Management of the General Assembly, the joint committee or, in the case of a contract for the construction of or work on a building under the supervision and control of one of the constituent units of the state system of higher education, the constituent unit, has invited such bids by advertisements inserted at least once in one or more newspapers having a circulation in each county in the state. The Commissioner of Public Works, the joint committee or the constituent unit, as the case may be, shall indicate the prequalification classification and aggregate work capacity rating required for the contract in such advertisement. As used in this section, "prequalification classification" means the prequalification classifications established by the Commissioner of Administrative Services pursuant to section 3 of this act and "aggregate work capacity rating" means the aggregate work capacity ratings established by the Commissioner of Administrative Services pursuant to section 3 of this act.

(b) The Commissioner of Public Works, the joint committee or the constituent unit, as the case may be, shall determine the manner of submission and the conditions and requirements of such bids, and

the time within which the bids shall be submitted, consistent with the provisions of sections 4b-91 to 4b-96, inclusive. Such award shall be made within sixty days after the opening of such bids. If the general bidder selected as the general contractor fails to perform the general contractor's agreement to execute a contract in accordance with the terms of the general contractor's general bid and furnish a performance bond and also a labor and materials or payment bond to the amount specified in the general bid form, an award shall be made to the next lowest responsible and qualified general bidder. [If] No employee of the Department of Public Works, the joint committee or a constituent unit with decision-making authority concerning the award of a contract may communicate with any bidder prior to the award of the contract if the communication results in the bidder receiving information about the contract that is not available to other bidders, except that if the lowest responsible and qualified bidder's price submitted is in excess of funds available to make an award, the Commissioner of Public Works, the Joint Committee on Legislative Management or the constituent unit, as the case may be, [is empowered to] may negotiate with such bidder and award the contract on the basis of the funds available, without change in the contract specifications, plans and other requirements. If the award of a contract on said basis is refused by such bidder, the Commissioner of Public Works, the Joint Committee on Legislative Management or the constituent unit, as the case may be, may negotiate with other contractors who submitted bids in ascending order of bid prices without change in the contract, specifications, plans and other requirements. In the event of negotiation with general bidders as provided [herein] in this section, the general bidder involved may negotiate with subcontractors on the same basis, provided such general bidder shall negotiate only with subcontractors named on such general bidder's general bid form.

(c) On and after October 1, 2004, no person may bid on a contract, except for a project described in subdivision (2) of subsection (a) of this section, for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state or a municipality, which is estimated to cost more than five hundred thousand dollars and is paid for, in whole or in part, with state funds, unless the person is prequalified in accordance with section 3 of this act.

(d) On and after October 1, 2004, each bid submitted for a contract described in subsection (c) of this section shall include a copy of a prequalification statement issued by the Commissioner of Administrative Services showing that the bidder has the prequalification classification and aggregate work capacity ratings required under such contract. The bid shall also be accompanied by an update statement in such form as the Commissioner of Administrative Services prescribes. The form for such update statement shall provide space for information regarding all projects completed by the bidder since the date the bidder's prequalification certificate was issued or renewed, all projects the bidder currently has under contract, including the percentage of work on such projects not completed, the names and qualifications of the personnel who will have supervisory responsibility for the performance of the contract, any significant changes in the bidder's financial position or business organization since the date the certificate was issued or renewed, and such other relevant information as the Commissioner of Administrative Services prescribes. Any bid submitted without a copy of the prequalification certificate and an update statement shall be invalid.

(e) Any person who bids on a contract described in subsection (c) of this section shall certify under penalty of false statement at the conclusion of the bidding process that the information in the bid is true, that there has been no substantial change in the bidder's financial position or corporate structure since the bidder's most recent prequalification certificate was issued or renewed, other than those changes noted in the update statement, and that the bid was made without fraud or collusion with any person.

(f) Any person who receives information from a public official that is not available to the general

public concerning any construction, reconstruction, alteration, remodeling, repair or demolition project on a public building prior to the date that an advertisement for bids on the project is published shall be disqualified from bidding on the project.

[(b)] (g) Notwithstanding the provisions of this chapter regarding competitive bidding procedures, the commissioner may select and interview at least three responsible and qualified general contractors [, and] who are prequalified pursuant to section 3 of this act and selected by the award panel established in section 9 of this act. The commissioner may negotiate with any one of such contractors a contract which is both fair and reasonable to the state for a community court project, as defined in subsection (j) of section 4b-55, the downtown Hartford higher education center project, as defined in subsection (l) of section 4b-55, The University of Connecticut library project, as defined in subsection (d) of section 4b-55, the Connecticut Juvenile Training School project, as defined in subsection (k) of section 4b-55, a correctional facility project, as defined in subsection (m) of section 4b-55, a juvenile detention center project, as defined in subsection (n) of section 4b-55, or a student residential facility for the Connecticut State University system that is a priority higher education facility project, as defined in subsection (f) of section 4b-55. Any general contractor awarded a contract pursuant to this subsection shall be subject to the same requirements concerning the furnishing of bonds as a contractor awarded a contract pursuant to subsection [(a)] (b) of this section. On and after October 1, 2004, any agency that seeks to have a project awarded without being subject to competitive bidding procedures shall certify to the joint committee of the General Assembly having cognizance of matters relating to legislative management that the project is of such an emergency nature that an exception to competitive bidding procedures is required. Such certification shall include input from all affected agencies, detail the need for the exception and include any relevant documentation.

Sec. 2. Section 4b-92 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

As used in this chapter and except as otherwise provided, the words "lowest responsible and qualified bidder" shall mean the bidder who is prequalified pursuant to section 3 of this act, and whose bid is the lowest of those bidders possessing the skill, ability and integrity necessary to faithful performance of the work based on objective criteria considering past performance and [financial responsibility] information contained in the update statement submitted pursuant to section 4b-91, as amended by this act. Essential information in regard to such qualifications shall be submitted with the bid in such form as the awarding authority may require by specification in the bid documents and on the bid form. Every general bid shall be accompanied by a bid bond or a certified check in an amount which shall be ten per cent of the bid, provided no such bid bond or certified check shall be required in relation to any general bid in which the total estimated cost of labor and materials under the contract with respect to which such general bid is submitted is less than fifty thousand dollars. Failure to execute a contract awarded as specified and bid shall result in the forfeiture of such bid bond or certified check. In considering past performance the awarding authority shall evaluate the skill, ability and integrity of bidders in terms of the bidders' fulfillment of contract obligations and of the bidders' experience or lack of experience with projects of the [size] nature and scope of the project for which the bids are submitted.

Sec. 3. (NEW) (*Effective July 1, 2004*) (a) As used in this section: (1) "Prequalification" means prequalification issued by the Commissioner of Administrative Services to bid on a contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state or a municipality; (2) "subcontractor" means any person who performs any of the four classes of work specified in subsection (a) of section 4b-93 of the general statutes with a value in excess of twenty-five thousand dollars; and (3) "principals and key personnel" includes officers, directors, shareholders, members, partners and managerial employees.

(b) (1) Any person may apply for prequalification to the Department of Administrative Services. Such application shall be made on such form as the Commissioner of Administrative Services prescribes and shall be accompanied by a nonrefundable application fee as set forth in subdivision (2) of this subsection. The application shall be signed under penalty of false statement.

(2) The application fee shall be as follows:

Aggregate Work Capacity Rating	Fee
$ 5,000,000. 00 or less	$ 600. 00
$ 5,000,000. 01 - $ 8,000,000. 00	$ 750. 00
$ 8,000,000. 01 - $ 10,000,000. 00	$ 850. 00
$ 10,000,000. 01 - $ 15,000,000. 00	$ 1,000. 00
$ 15,000,000. 01 - $ 20,000,000. 00	$ 1,500. 00
$ 20,000,000. 01 - $ 40,000,000. 00	$ 2,000. 00
$ 40,000,000. 01 or more	$ 2,500. 00

(c) The application form shall, at a minimum, require the applicant to supply information concerning:

(1) The applicant's form of organization;

(2) The applicant's principals and key personnel and any names under which the applicant, principals or key personnel conducted business during the past five years;

(3) The applicant's experience on public and private construction projects over the past five years, or on the applicant's ten most recently-completed projects and the names of any subcontractors used on the projects;

(4) Any legal or administrative proceedings pending or concluded adversely against the applicant or any of the applicant's principals or key personnel within the past five years which relate to the procurement or performance of any public or private construction contract and whether the applicant is aware of any investigation pending against the applicant or any principal or key personnel;

(5) The nature of any financial, personal or familial relationship between the applicant and any public or private construction project owner listed on the application as constituting construction experience;

(6) A statement of whether (A) the applicant has been disqualified pursuant to section 4b-95 of the

general statutes, this section or section 31-57c or 31-57d of the general statutes, (B) the applicant is on the list distributed by the Labor Commissioner pursuant to section 31-57a of the general statutes, (C) the applicant is disqualified or prohibited from being awarded a contract pursuant to section 31-57b of the general statutes, (D) the applicant has been disqualified by another state, (E) the applicant has been disqualified by a federal agency or pursuant to federal law, (F) the applicant's registration has been suspended or revoked by the Department of Consumer Protection pursuant to section 20-341gg of the general statutes, as amended by this act, (G) the applicant has been disqualified by a municipality, and (H) the matters that gave rise to any such disqualification, suspension or revocation have been eliminated or remedied; and

(7) Other information as the commissioner deems relevant to the determination of the applicant's qualifications and responsibilities.

(d) The applicant shall include a statement of financial condition prepared by a certified public accountant which includes information concerning the applicant's assets and liabilities, plant and equipment, bank and credit references, bonding company and maximum bonding capacity, and other information as the commissioner deems relevant to an evaluation of the applicant's financial capacity and responsibility.

(e) Information contained in the application shall be current as of the time of filing except that the statement of financial condition shall pertain to the applicant's most recently-completed fiscal year.

(f) The commissioner shall determine whether to prequalify an applicant on the basis of the application and on relevant past performance according to procedures and criteria set forth in regulations which the commissioner shall adopt, in accordance with chapter 54 of the general statutes. Such criteria shall include, at a minimum, the record of the applicant's performance, including, but not limited to, written evaluations of the applicant's performance on public or private projects within the past five years, the applicant's past experience on projects of various size and type, the skill, ability and integrity of the applicant and any subcontractors used by the applicant, the experience and qualifications of supervisory personnel employed by the applicant, the maximum amount of work the applicant is capable of undertaking as demonstrated by the applicant's financial condition, bonding capacity, size of past projects and present and anticipated work commitments, and any other relevant criteria that the commissioner prescribes. Such regulations shall also (1) provide that the criteria considered shall be assigned separate designated numerical values and weights and that the applicant shall be assigned an overall numerical rating on the basis of all criteria, and (2) establish prequalification classifications and aggregate work capacity ratings. Such prequalification classifications shall be used to establish the types of work a contractor is qualified to perform and the aggregate work capacity ratings shall be used to establish the maximum amount of work a contractor is capable of undertaking.

(g) (1) The applicant shall indicate the prequalification classifications and aggregate work capacity rating that are sought. The commissioner may issue a certificate of prequalification to any applicant who meets the requirements of this section. Such certificate shall be effective for one year from the date issued and shall indicate the contractor's prequalification classifications and aggregate work capacity ratings.

(2) A prequalified contractor may apply at any time for additional prequalification classifications or aggregate work capacity ratings by submitting the applicable increase in fee, a completed update statement, and other information the commissioner requires.

(3) The commissioner may renew a prequalification certificate upon receipt of a completed update

statement, any other material the commissioner requires and a nonrefundable fee in an amount equal to one-half of the application fee for the applicable aggregate work capacity rating as set forth in subsection (b) of this section, except that in no event shall such fee be less than six hundred dollars.

(h) Not later than sixty days after receiving a completed application, the commissioner shall mail a notice to the applicant concerning the commissioner's preliminary determination regarding the conditions of the prequalification certification, a denial of certification, a reduction in the level of certification sought or nonrenewal of certification. Any applicant aggrieved by the commissioner's preliminary determination may request copies of the information upon which the commissioner relied in making the preliminary determination, provided such request is made not later than ten days after the date the notice was mailed as indicated by the postmark on the envelope. Not later than twenty days after said postmark date the applicant may submit additional information to the commissioner with a request for reconsideration. The commissioner shall issue a final determination regarding the application not later than ninety days after the date the commissioner mailed the notice of the preliminary determination, which ninety-day period may be extended for an additional period not to exceed ninety days if (1) the commissioner gives written notice to the applicant that the commissioner requires additional time, and (2) such notice is mailed during the initial ninety-day period.

(i) The commissioner may not issue a prequalification certificate to any contractor (1) who is disqualified pursuant to section 31-57c or 31-57d of the general statutes, or (2) who has a principal or key personnel who, within the past five years, has a conviction or has entered a plea of guilty or nolo contendere for or has admitted to commission of an act or omission that reasonably could have resulted in disqualification pursuant to any provision of subdivisions (1) to (3), inclusive, of subsection (d) of section 31-57c of the general statutes or subdivisions (1) to (3), inclusive, of subsection (d) of section 31-57d of the general statutes, as determined by the commissioner.

(j) The commissioner may revoke a contractor's prequalification or reduce the contractor's prequalification classification or aggregate work capacity ratings, after an opportunity for a hearing, if the commissioner receives additional information that supports such revocation or reduction.

(k) (1) Any materially false statement in the application or any update statement may, in the discretion of the awarding authority, result in termination of any contract awarded the applicant by the awarding authority. The awarding authority shall provide written notice to the commissioner of such false statement not later than thirty days after discovering such false statement. The commissioner shall provide written notice of such false statement to the Commissioner of Public Works and the Commissioner of Consumer Protection not later than thirty days after discovering such false statement or receiving such notice.

(2) The commissioner shall revoke the prequalification of any person, after an opportunity for hearing, if the commissioner finds that the person has included any materially false statement in such application or update statement, has been convicted of a crime related to the procurement or performance of any public or private construction contract or within the past five years or has otherwise engaged in fraud in obtaining or maintaining prequalification. Any person whose prequalification has been revoked pursuant to this subsection shall be disqualified for a period of two years after which the person may reapply for prequalification, except that a person whose prequalification has been revoked on the basis of conviction of a crime or engaging in fraud shall be disqualified for a period of five years after which the person may reapply for prequalification. The commissioner shall not prequalify a person whose prequalification has been revoked pursuant to this subdivision until the expiration of said two or five-year disqualification period and the commissioner is satisfied that the matters that gave rise to the revocation have been eliminated or remedied.

(l) The commissioner shall provide written notice of any revocation, disqualification, reduction in classification or capacity rating or reinstated prequalification to the Commissioner of Public Works and the Commissioner of Consumer Protection not later than thirty days after any final determination.

(m) The provisions of this section and section 4 of this act shall not apply to subcontractors.

(n) The commissioner shall establish an update statement for use by bidders for purposes of renewing or upgrading a prequalification certificate and for purposes of submitting a bid pursuant to section 4b-91 of the general statutes, as amended by this act.

(o) Any applicant aggrieved by the commissioner's final determination concerning a preliminary determination, a denial of certification, a reduction in prequalification classification or aggregate work capacity rating or a revocation or nonrenewal of certification may appeal to the Superior Court in accordance with section 4-183 of the general statutes.

Sec. 4. (NEW) (*Effective October 1, 2004*) (a) The Commissioner of Administrative Services shall adopt regulations, in accordance with chapter 54 of the general statutes, to establish a standard contractor evaluation form. Such form shall include, at a minimum, the following evaluation criteria: (1) Timeliness of performance; (2) quality of performance; (3) cost containment, including, but not limited to, the contractor's ability to work within the contract's allotted cost, the accuracy of the contractor's billing, and the number and cause of change orders and the manner in which the contractor determined the price on the change orders; (4) safety; (5) the quality of the contractor's working relationship with the agency and the quality of the contractor's supervision of the work area; (6) communication with the agency; (7) the quality of the contractor's required documentation; (8) the performance of the contractor's subcontractors, to the extent known by the official who completes the evaluation; and (9) the contractor's and any subcontractor's compliance with part III of chapter 557 of the general statutes, or chapter 558 of the general statutes, or the provisions of the federal Davis-Bacon Act, 40 USC, Sections 276a to 276a-5, inclusive, as from time to time amended, to the extent known by the official who completes the evaluation.

(b) Each public agency shall complete and submit the evaluation form to the commissioner after completion of a building project under the agency's control if the building project is funded, in whole or in part, by state funds. The commissioner shall include the evaluation in the contractor's prequalification file. The official shall mail a copy of the completed evaluation form to the contractor. Any contractor who wishes to contest any information contained in the evaluation form may submit a written response to the commissioner not later than thirty days after the date the form was mailed as indicated by the postmark on the envelope. Such response shall set forth any additional information concerning the building project or the oversight of the contract by the public agency that may be relevant in the evaluation of the contractor's performance on the project. The commissioner shall include any such response in the contractor's prequalification file.

(c) As used in this section, "public agency" means a public agency, as defined in section 1-200 of the general statutes, but does not include The University of Connecticut with respect to any project, as defined in subdivision (16) of section 10a-109c of the general statutes, that is undertaken and controlled by the university, and "subcontractor" means any person who performs any of the four classes of work specified in subsection (a) of section 4b-93 of the general statutes with a value in excess of twenty-five thousand dollars.

(d) Upon fifty per cent completion of any building project under a public agency's control, the agency shall advise the contractor in writing of the agency's preliminary evaluation of the contractor's performance on the project.

Sec. 5. Subsection (m) of section 1-84 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(m) No public official or state employee shall knowingly accept, directly or indirectly, any gift, as defined in subsection (e) of section 1-79, from any person the official or employee knows or has reason to know: (1) Is doing business with or seeking to do business with the department or agency in which the official or employee is employed; [or] (2) is engaged in activities which are directly regulated by such department or agency; or (3) is prequalified under section 3 of this act. No person shall knowingly give, directly or indirectly, any gift or gifts in violation of this provision.

Sec. 6. (NEW) (*Effective January 1, 2004*) (a) Not later than January 1, 2004, and annually thereafter, each awarding authority shall prepare a report on the status of (1) any ongoing project for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building which is estimated to cost more than five hundred thousand dollars and is paid for, in whole or in part, with state funds, or (2) any property management contract awarded by the Department of Public Works which has an annual value of one hundred thousand dollars or more. The awarding authority shall submit the report to the Governor and the joint standing committees of the General Assembly having cognizance of matters relating to government administration and finance, revenue and bonding. The report shall be submitted in accordance with section 11-4a of the general statutes. The first report submitted after a contract is awarded shall indicate: (A) When, where and how the request for bids was advertised; (B) who bid on the projects; (C) the provisions of law that governed the award of the contract and if there were any deviations from standard procedure in awarding the contract; (D) the names of the individuals who had decision-making authority in awarding the contract, including, but not limited to, the individuals who served on any award panel; (E) if an award panel was used, whether the recommendation of the panel was followed and, if applicable, the reason why such recommendation was not followed; (F) whether the awarding authority has any other contracts with the contractor who was awarded the contract, and if so, the nature and value of the contract; and (G) any provisions of law that authorized or funded the project.

(b) The University of Connecticut shall not be required to submit a report pursuant to this section for any project, as defined in subdivision (16) of section 10a-109c of the general statutes, that is undertaken and controlled by the university.

Sec. 7. Section 4b-100 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) The Commissioner of Public Works shall adopt regulations, in accordance with chapter 54, to implement the provisions of sections 4b-91 to 4b-100, inclusive, as amended by this act. Such regulations shall include (1) objective criteria for evaluating the qualifications of bidders, and (2) the procedures for evaluating bids after the prequalification status of the bidder has been verified.

(b) The Commissioner of Public Works shall adopt regulations, in accordance with the provisions of chapter 54, establishing a procedure for promptly hearing and ruling on claims alleging a violation or violations of sections 4b-91 to 4b-100, inclusive, as amended by this act. Such claims may be initiated by the Department of Public Works or any party whose financial interests may be affected by the decision on such a claim.

Sec. 8. (NEW) (*Effective October 1, 2004*) (a) The Department of Public Works shall establish Construction Services Award Panels which shall each consist of six members: Three of whom shall be appointed by the Commissioner of Public Works and shall be current employees of the Department of Public Works; two of whom shall be appointed by the department head of the user agency; and one of

whom who shall be a neutral party appointed by the commissioner. The members of each award panel appointed by the Commissioner of Public Works shall serve for terms of one year from July first. If any vacancy occurs on the panel, the Commissioner of Public Works or the head or acting head of the user agency, as appropriate, shall appoint a person for the unexpired term in accordance with the provisions of this subsection.

(b) A panel established pursuant to this section shall not be deemed to be a board or commission within the meaning of section 4-9a of the general statutes. Such panels shall be the award panels for any contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for the state pursuant to sections 4b-91 to 4b-100, inclusive, of the general statutes, as amended by this act, and section 4b-24 of the general statutes, as amended by this act.

(c) For each applicable contract, the commissioner shall designate one panel to screen all submitted proposals and establish a list of bidders to be interviewed and shall designate a separate panel consisting of different members to interview bidders on the list and submit a list of recommended contractors to the commissioner.

(d) The commissioner shall designate one voting member on each panel to serve as chairperson. The chairperson shall moderate the committee, collect votes and compile the results.

(e) Each award panel shall prepare a memorandum on the selection process indicating how the evaluation criteria were applied to determine the most qualified firms, which shall be available to the public after execution of the contract with the selected contractor. The commissioner shall select a contractor from among the list of firms submitted by the award panel that interviewed the contractors. After the commissioner has made a selection, the names of the contractor firms submitted to the commissioner shall be available to the public upon request. The commissioner shall also prepare a memorandum on the final phase of the selection process, indicating how the commissioner applied the evaluation criteria to determine the most qualified firm. Such memorandum shall be available to the public after execution of the contract with the selected contractor.

(f) The commissioner shall adopt regulations, in accordance with chapter 54 of the general statutes, to implement the provisions of this section.

Sec. 9. Subdivision (4) of section 4b-24 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(4) The commissioner may designate projects to be accomplished on a total cost basis for (A) new facilities to provide for the substantial space needs of a requesting agency, (B) the installation of mechanical or electrical equipment systems in existing state facilities, or (C) the demolition of any state facility that the commissioner is authorized to demolish under the general statutes. If the commissioner designates a project as a designated total cost basis project, the commissioner may enter into a single contract with a private developer which may include such project elements as site acquisition, architectural design and construction. The commissioner shall select a private developer from among the developers who are selected and recommended by the award panels established in section 9 of this act. All contracts for such designated projects shall be based on competitive proposals received by the commissioner, who shall give notice of such project, and specifications for the project, by advertising, at least once, in a newspaper having a substantial circulation in the area in which such project is to be located. No contract which includes the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state for which the total cost is estimated to be more than five hundred thousand dollars may be awarded to a person who is not prequalified for the work in accordance with section 3 of this act. The commissioner shall determine

all other requirements and conditions for such proposals and awards and shall have sole responsibility for all other aspects of such contracts. Such contracts shall state clearly the responsibilities of the developer to deliver a completed and acceptable product on a date certain, the maximum cost of the project and, as a separate item, the cost of site acquisition, if applicable. No such contract may be entered into by the commissioner without the prior approval of the State Properties Review Board and unless funding has been authorized pursuant to the general statutes or a public or special act.

Sec. 10. Subsection (c) of section 4b-52 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2004*):

(c) Whenever the Commissioner of Public Works declares that an emergency condition exists at any state facility, other than a building under the supervision and control of the Joint Committee on Legislative Management, and that the condition would adversely affect public safety or the proper conduct of essential state government operations, or said joint committee declares that such an emergency exists at a building under its supervision and control, the commissioner or the joint committee may employ such assistance as may be required to restore facilities under their control and management, or the commissioner may so act upon the request of a state agency, to restore facilities under the control and management of such agency, without inviting bids as required in subsection (b) of this section. The commissioner shall take no action requiring the expenditure of more than five hundred thousand dollars to restore any facility under this subsection (1) without the written consent of the Governor, and (2) until the commissioner has certified to the joint committee of the General Assembly having cognizance of matters relating to legislative management that the project is of such an emergency nature that an exception to subsection (b) of this section is required. Such certification shall include input from all affected agencies, detail the need for the exception and include any relevant documentation. The provisions of this subsection shall not apply if any person is obligated under the terms of an existing contract with the state to render such assistance. The annual report of the commissioner shall include a detailed statement of all expenditures made under this subsection.

Sec. 11. Subsections (b) to (e), inclusive, of section 4b-55 of the general statutes are repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(b) "Consultant" means (1) any architect, professional engineer, landscape architect, land surveyor, accountant, interior designer, environmental professional or construction administrator, who is registered or licensed to practice such person's profession in accordance with the applicable provisions of the general statutes, or (2) any planner [, construction manager] or financial specialist;

(c) "Consultant services" shall include those professional services rendered by architects, professional engineers, landscape architects, land surveyors, accountants, interior designers, environmental professionals, construction administrators, planners [, construction managers] or financial specialists, as well as incidental services that members of these professions and those in their employ are authorized to perform;

(d) "University of Connecticut library project" means a project to renovate and improve the Homer Babbidge Library at The University of Connecticut;

(e) "Firm" means any individual, partnership, corporation, joint venture, association or other legal entity (1) authorized by law to practice the profession of architecture, landscape architecture, engineering, land surveying, accounting, interior design, environmental or construction administration, or (2) practicing the profession of planning [, construction management] or financial specialization.

Sec. 12. (NEW) (*Effective October 1, 2004*) With respect to any contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building under the supervision and control of the Commissioner of Transportation which contract is estimated to cost more than five hundred thousand dollars and is not subject to section 4b-51 of the general statutes, the Commissioner of Transportation shall award the contract to the lowest responsible and qualified bidder, as defined in section 4b-92 of the general statutes, as amended by this act, in accordance with regulations which the commissioner shall adopt, in accordance with chapter 54 of the general statutes. Such regulations shall establish, at a minimum: (1) Standards for the advertisement of opportunities to bid, (2) objective criteria for evaluating the qualifications of bidders, (3) the procedures for evaluating bids after the prequalification status of a bidder has been verified, and (4) award panels for the purpose of screening submitted proposals, interviewing bidders and making recommendations to the commissioner. Any contract that is subject to section 4b-51 of the general statutes shall be awarded by the Commissioner of Public Works in accordance with chapter 60 of the general statutes.

Sec. 13. Subdivision (12) of section 13b-4 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(12) To provide for the planning and construction of any capital improvements and the remodeling, alteration, repair or enlargement of any real asset that may be required for the development and operation of a safe, efficient system of highway, mass transit, marine and aviation transportation, provided (A) the acquisition, other than by condemnation, or the sale or lease, of any property that is used for such purposes shall be subject to the review and approval of the State Properties Review Board in accordance with the provisions of subsection (f) of section 4b-3, and (B) any contract for the planning, construction, remodeling, alteration, repair or enlargement of any public building which is estimated to cost more than five hundred thousand dollars shall be advertised and awarded in accordance with section 12 of this act.

Sec. 14. Section 13b-42 of the general statutes is amended by adding subsection (h) as follows (*Effective October 1, 2004*):

(NEW) (h) Any lease which involves the construction, reconstruction, alteration, remodeling, repair or demolition of any public building which is estimated to cost more than five hundred thousand dollars shall be advertised and awarded in accordance with section 12 of this act.

Sec. 15. Section 20-341gg of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) As used in this section, "major contractor" means (1) any person engaged in the business of construction, structural repair, structural alteration, dismantling or demolition of a structure or addition that exceeds the threshold limits provided in section 29-276b, or (2) any person who, under the direction of a general contractor, performs or offers to perform any work that impacts upon the structural integrity of a structure or addition, including repair, alteration, dismantling or demolition of a structure or addition that exceeds the threshold limits provided in section 29-276b. Such work includes, but is not limited to, roofing, masonry and structural frame work.

(b) No person shall engage in or offer to perform the work of any major contractor in this state on any proposed structure or existing structure or addition that exceeds the threshold limits contained in section 29-276b unless such person has first obtained a license or certificate of registration as required under the provisions of chapter 539 or a registration from the Department of Consumer Protection in accordance with the provisions of this section. Individuals licensed under chapter 393 shall be exempt from the provisions of this chapter while engaging in work that they are licensed to perform. The

department shall issue a certificate of registration to any person who is prequalified pursuant to section 3 of this act who applies for registration in accordance with this section. Such prequalified person shall not be required to pay a fee for such registration at any time that the person maintains valid prequalification. If the individual or the firm, company, partnership or corporation employing such individual is engaged in work on a structure or addition that exceeds the threshold limits contained in section 29-276b and requires licensure under chapter 393, the firm, company, partnership or corporation shall be exempt from the provisions of this chapter concerning registration of major contractors, if the firm, company, partnership or corporation employs an individual who is licensed as a contractor under chapter 393 to perform such work. The department shall furnish to each qualified applicant a registration certifying that the holder of such registration is entitled to engage in the work for which the person has been issued a registration under this subsection, and the holder of such registration shall carry it on his person while engaging in such work. Such registration shall be shown to any properly interested person upon request. No such registration shall be transferred to or used by any person other than the person to whom the registration was issued. The department shall maintain rosters of registrants and shall update such rosters annually. The department may provide copies of rosters to the public for an appropriate fee. The department may suspend or revoke any registration issued by the department if the holder of such registration is convicted of a felony, is grossly incompetent, is disqualified, pursuant to section 3 of this act or whose prequalification certificate has been revoked pursuant to section 3 of this act, engages in malpractice or unethical conduct or knowingly makes false, misleading or deceptive representations regarding his work or violates any regulation adopted under subsection (c) of this section. Before any registration is suspended or revoked, such holder shall be given notice and an opportunity for hearing as provided in regulations adopted under subsection (c) of this section. The Commissioner of Consumer Protection shall provide written notice of any suspension or revocation of a registration to the Commissioner of Administrative Services not later than ten days after such suspension or revocation.

(c) The Commissioner of Consumer Protection shall adopt regulations, in accordance with chapter 54, to implement the provisions of this section. Such regulations shall (1) establish the registration requirements for major contractors, (2) specify application and registration fees, and (3) establish occupational standards for the preservation of the public safety.

Approved July 9, 2003

OLR Bill Analysis

sHB 6417 (File 513, as amended by House "A" and "B")*

AN ACT CONCERNING STATE CONSTRUCTION CONTRACTS

SUMMARY:

This bill:

1. requires contractors to prequalify to bid on public building construction contracts estimated to cost more than $ 500,000;

2. except as otherwise provided in law, redefines "lowest responsible qualified bidder" to include a prequalified contractor;

3. requires advertisements for bids on these contracts to include the financial capacity, prior experience, and workforce required to do the job;

4. requires the Department of Public Works (DPW) commissioner to disqualify contractors who receive advance information about a project;

5. expands the process for starting emergency restoration on state facilities under the DPW commissioner's control;

6. establishes Construction Services Award Panels within DPW;

7. requires state agencies to evaluate contractors after construction is completed and requires the Department of Administrative Services (DAS) commissioner to place the evaluation in the contractor's prequalification file;

8. requires agencies that award building construction contracts to make annual status reports to the governor and the legislature;

9. requires the DPW commissioner to adopt regulations to implement bidding and contracting procedures for building construction, including the (a) procedures for evaluating bids after a contractor's prequalification status has been verified and (b) objective criteria for evaluating bidder's qualifications;

10. prohibits state officials and employees from accepting gifts from prequalified building contractors;

11. prohibits employees with decision-making authority from communicating with bidders on building construction contracts under certain circumstances;

12. requires the Department of Transportation (DOT) commissioner to award large building construction contracts to the lowest responsible qualified bidder who is prequalified by DAS;

13. requires the Department of Consumer Protection (DCP) to issue any prequalified contractor who applies a certificate of registration as a major contractor and prohibits the department from collecting a registration fee during any period the contractor's prequalification is valid; and

14. changes the requirement for employing construction managers.

*House Amendment "A" eliminates the DPW commissioner's authority under the original bill to disqualify contractors who lie on their prequalification applications; prohibits all state officials and employees, rather than just those with decision-making authority as provided under the original bill, from accepting gifts from prequalified building contractors; establishes multiple Construction Services Award Panels within DPW instead of just one as required under the original bill; requires agencies that award building construction contracts to make annual, rather than semi-annual, status reports as required under the original bill; and adds the provisions on emergency restoration, DOT contracts, DCP registration certificates; and construction managers.

*House Amendment "B" limits the contractors who cannot receive a prequalification certificate because of a principal or key employee's criminal history.

EFFECTIVE DATE: October 1, 2004, except for the provisions permitting contractors to prequalify with DAS and emergency construction, which are effective July 1, 2004, and the provision on status reports, which is effective January 1, 2004.

CONSTRUCTION CONTRACTS OVER $ 500,000

Bidders and Awards

Beginning October 1, 2004, the bill, with one exception, requires contractors to prequalify before they can bid on a contract funded in whole or part by the state for the construction, reconstruction, alteration, remodeling, repair, or demolition ("building construction") of any state or municipal building estimated to cost more than $ 500,000. The requirement does not apply to UCONN 2000.

The authorities authorized by law to award these contracts are the DPW commissioner, the Joint Committee on Legislative Management for work or construction on buildings under its supervision, and public colleges and universities for work or construction on buildings under their supervision or control.

The bill requires the affected awarding authorities to award the contract on the basis of competitive bidding to the lowest responsible qualified bidder who is prequalified. By law, the lowest responsible qualified bidder on the basis of competitive bidding is the person possessing the skill, ability, and integrity necessary for the faithful performance of the work as determined by his past performance, including his experience with projects of the size of the one advertised, and financial ability.

The bill eliminates the requirement for the awarding authority to consider the bidder's financial ability and instead requires the authority to consider information contained in the bidder's update statement (see below). It requires awarding authorities to look at a bidder's past experience with projects of the nature and scope, rather than the size, of the one advertised.

Advertisement

The bill requires advertisements for bids on these contracts that awarding authorities are required by law to place in newspapers that circulate in the state to indicate the prequalification classification and aggregate work ratings required of successful bidders (i. e. , the types of work the contractor must be able to perform and the maximum amount of work he must be capable of undertaking).

Bids

Beginning October 1, 2004, the bill requires each bid on the affected large contracts to include a copy of a prequalification statement from the DAS commissioner showing that the bidder has the prequalification classification and aggregate work capacity ratings required under the contract. The bid must also have an update statement in the form the commissioner prescribes. Any bid submitted without these documents is invalid.

At the end of the bidding process, the bill requires the bidder to certify under penalty of false statement that (1) the bid information is true; (2) there were no substantial changes in his financial position or corporate structure since his most recent prequalification certificate was issued or renewed, other than those noted in the update statement; and (3) he made the bid without fraud or collusion with anyone.

CONTRACTOR PREQUALIFICATION

Prequalification Application

Contractors, but not subcontractors, can seek prequalification to work on any state or municipal construction project by submitting an application to DAS on a form prescribed by the DAS commissioner together with a nonrefundable fee.

The applicant must include information current at the time of filing, except that the statement of financial condition described below must reflect the most recently completed fiscal year. The applicant must sign the application under penalty of false statement.

The application must, at a minimum, require the applicant to disclose:

1. how he is organized;

2. his principals and key personnel and any business names he or his principals or key personnel used during the past five years;

3. his construction experience over the past five years or on the 10 most recently completed projects and the names of any subcontractors used on the projects;

4. any legal or administrative proceedings pending against or concluded adversely to him, or his principals or key personnel in the past five years concerning the procurement or performance of a construction contract;

5. his knowledge of any investigation pending against him or his principals or key personnel;

6. his relationship, whether financial, personal, or familial, with the owner of any construction project he listed as construction experience;

7. whether (a) he has been disqualified from bidding on federal, state, or municipal construction contracts, including those in other states, (b) the Department of Consumer Protection has revoked or suspended his registration, and (c) the matters that gave rise to the disqualification, revocation, or suspension have been remedied or eliminated; and

8. any other information the commissioner deems relevant to determining the applicant's qualifications and responsibility.

The applicant must include in the application a statement of financial condition prepared by an

accountant that shows the applicant's assets and liabilities, plant and equipment, bank and credit references, bonding company and maximum bonding capacity, and any other information the commissioner deems relevant to the determination of the applicant's financial capacity and responsibility.

Application Fee

The amount of the fee depends on the applicant's aggregate work capacity rating. It is a graduated fee starting at $ 600 and capped at $ 2,500.

Aggregate Work Capacity Rating	*Fee*
$ 5,000,000. 00 or less	$ 600
$ 5,000,000. 01 to $ 8,000,000. 00	$ 750
$ 8,000,000. 01 to $ 10,000,000. 00	$ 850
$ 10,000,000. 01 to $ 15,000,000. 00	$ 1,000
$ 15,000,000. 01 to $ 20,000,000. 00	$ 1,500
$ 20,000,000. 01 to 40,000,000. 00	$ 2,000
$ 40,000,000. 01 or more	$ 2,500

Prequalification Classification and Aggregate Work Capacity Rating

Applicants must indicate the prequalification classifications and aggregate work capacity rating they are seeking. Once prequalified, a contractor can apply at any time for additional prequalification classifications or aggregate work capacity ratings by submitting the applicable fee, a complete update statement, and other information the commissioner requires.

The DAS commissioner may issue to any applicant that meets the requirements a certificate of prequalification that includes his classifications and aggregate work capacity ratings (e. g. , the types of work the contractor can perform and the maximum amount of work he is capable of undertaking).

The certificate is effective for one year from the date issued and may be renewed upon receipt of a nonrefundable fee of $ 600 or one-half of the application fee for the applicable aggregate work capacity rating, whichever is greater; a completed update statement; and any other material the commissioner requires. Awarding authorities must use the classifications to determine the types of

work a contractor is qualified to perform and the aggregate work capacity ratings to establish the maximum amount of work he is capable of undertaking.

The commissioner must determine whether to prequalify an applicant based on the application and on relevant past performance in accordance with procedures and criteria that she must adopt in regulations. At a minimum, the criteria must include (1) the applicant's past performance record, including written evaluations on his performance on public or private projects in the past five years; (2) his prior experience on projects of various sizes and types; (3) his supervisory personnel's experience and qualifications; (4) his maximum work capacity as demonstrated by his financial condition, bonding capacity, size, or past projects, and present and anticipated work commitments; (5) the skill, ability, and integrity, of the applicant and any subcontractors he has used; and (6) any other relevant information the commissioner prescribes.

The regulations must also (1) provide that the criteria be assigned different numerical values and weights and that each applicant be assigned an overall numerical rating based on all criteria and (2) establish prequalification classifications and aggregate work capacity ratings.

False Applications

The contract awarding authority may terminate a contract with or disqualify any applicant for making a materially false statement on an application or statement update (see below). The awarding authority must give the DAS commissioner written notice of the false statement within 30 days after discovering it. And the DAS commissioner must, in turn, give the DPW and the consumer protection commissioners written notice of it within 30 days after discovery or after receiving notice from the awarding authority.

Decision on Applications and Review Process

Within 60 days after receiving a complete application, the DAS commissioner must notify applicants by mail of her (1) preliminary determination of the prequalification certification conditions or (2) decision to deny certification, reduce the certification level, or refuse to renew certification.

Any applicant aggrieved by a preliminary determination may, within 10 days after the notice of determination was mailed as indicated by the postmark on the envelope, ask for copies of the information the commissioner relied on to make it. Not later than 20 days after the post-marked date, the applicant can give the commissioner additional information and ask her to reconsider the application.

The commissioner must make a final determination on the application within 90 business days after the date the commissioner mailed her preliminary determination. The initial 90 days may be extended for up to an additional 90 days if the commissioner notifies the applicant, during the initial period, that she needs more time. Any applicant aggrieved by the final determination may appeal to the Superior Court.

Prequalification Revocation

The bill requires the commissioner the revoke a contractor's prequalification, after a hearing, if she finds that he (1) included materially false statements in his application or update statement, (2) has been convicted of a crime related to the procurement or performance of any public or private construction contract, or (3) has otherwise engaged in fraud in obtaining or maintaining prequalification within the past five years. The revocation is effective for two years, unless the

contractor has been convicted of fraud, in which case it is effective for five years. After this time, the commissioner cannot prequalify the contractor until she is satisfied that the revocation has been eliminated or remedied. She must give the DPW and consumer protection commissioners written notice of the revocation or reinstatement within 30 days after the final decision.

The bill permits her to revoke a contractor's prequalification or reduce his classification or aggregate work capacity ratings, after a hearing, if she receives additional information that supports the revocation or reduction.

UPDATE STATEMENTS

The commissioner must establish an update statement for certificate renewals and upgrades and for use by contractors who bid on building construction contracts with an estimated value of over $ 500,000. The statement must provide space for information on (1) all of the projects the bidder has completed since his prequalification certificate was issued or renewed; (2) all projects the bidder has under contract at that time, including the percentage incomplete; (3) the names and qualifications of personnel who will supervise the contract; (4) any significant change in the bidder's financial position or corporate structure since the certificate was issued or renewed; and (5) any other relevant information the commissioner prescribes.

DISQUALIFICATION

The bill prohibits the DAS commissioner from prequalifying any contractor (1) disqualified for labor law violations or (2) who has a principal or key person who within the past five years has been convicted or has entered a plea of guilty or *nolo contendere* for any act or omission that could result in disqualification as determined by the commissioner.

The bill requires the DPW commissioner, presumably, to disqualify from bidding on a public building construction project anyone who receives information that is not available to the general public from a public official about the project before an advertisement for bids is published.

EMERGENCY AND NON-BID PROJECTS

By law, the DPW commissioner can select and interview at least three responsible and qualified general contractors and negotiate with any one of them to complete any of eight special building projects: a community court, Connecticut Juvenile Training School, downtown Hartford higher education center, University of Connecticut library, a correctional facility, a juvenile detention center, and a student residential facility for the Connecticut State University system.

He can also declare an emergency condition at most state facilities and restore them at a cost under of $ 500,000 or less without inviting bids. If restoration costs would exceed $ 500,000, the law requires him to get the governor's written consent before going forward.

In addition to being responsible and qualified, the bill requires non-bid contractors to be prequalified and selected by a construction service award panel (see below). Beginning October 1, 2004, the bill requires any agency seeking to have a project awarded without competitive bidding to certify to the Legislative Management Committee the emergency nature of the project and the need for an exception to competitive bidding. The certification must include input from all affected agencies, detail the need for the exception, and include any relevant documentation.

The bill requires the commissioner to follow the above-described certification process before starting work on emergency projects that currently require the governor's written consent.

CONSTRUCTION SERVICES AWARD PANEL

The bill establishes six-member Construction Services Award Panels within DPW. The commissioner must appoint one neutral member and three other members from among current DPW employees. The agency requesting the construction must appoint the remaining two members. The commissioner's appointees serve for one year, beginning on July 1. The DPW commissioner or head of the requesting agency, as appropriate, must appoint people to fill vacancies for an unexpired term. The commissioner must designate one voting member on each panel to serve as chairperson. The chairperson serves as committee moderator, collects votes, and compiles results. The bill specifies that the panels are not boards or commissions for the purpose of appointments.

The panels must award state construction contracts, including contracts awarded on a total cost basis and contracts for the eight special building projects authorized by law.

Process

For each applicable contract, the commissioner must designate one panel to screen all proposals and establish a list of bidders to be interviewed and a separate panel to interview them and submit a list of recommended contractors to the commissioner. The commissioner must select a contractor from the list of recommended contractors to complete construction projects, including projects where he enters an agreement with a single developer to complete all phases of the contract (total cost basis). After the commissioner makes the selection, the names of the contractors submitted to him must be available to the public upon request.

Each panel and the commissioner must prepare a memorandum on the selection process and the final phase of the selection process, respectively, indicating how the evaluation criteria were used to determine the most qualified firms. The memoranda must be made publicly available after a contract has been entered with the selected contractor.

The bill requires the commissioner to adopt implementing regulations.

CONTRACTOR EVALUATIONS

The DAS commissioner must adopt regulations to establish a standard contractor evaluation form. At a minimum, the form must include the following evaluation criteria:

1. timeliness and quality of performance;

2. cost containment;

3. safety;

4. quality of the contractor's (a) working relationship with the agency, (b) supervision of the work area, and (c) required documentation;

5. communication with the agency;

6. performance of the contractor's subcontractors to the extent known; and

7. the contractor's and any subcontractor's compliance with state preference, prevailing wage, minimum wage, and other related laws or the federal prevailing wage law (Davis-Bacon Act), as from time to time amended to the extent known.

Each public agency, other than UCONN, must complete and submit an evaluation form on each contractor, but not subcontractor, at the conclusion of state-funded work funded on a building under the agency's control. The commissioner must include the evaluation in the contractor's prequalification file. The person certifying the evaluation must mail it to the contractor.

When 50% of the work on the construction project is completed, the agency must give the contractor a written copy of the preliminary evaluation.

A contractor may contest any information in the evaluation by submitting a written response to the DAS commissioner no later than 30 days after the date the evaluation was postmarked. The response must indicate anything that may be relevant to the contractor's performance on the contract. The commissioner must include the response in the contractor's prequalification file.

STATUS REPORTS

By January 1, 2004, and annually thereafter, the bill requires each awarding authority, other than UCONN with respect to projects under its control, to prepare a report on the status of any (1) ongoing building construction contracts estimated to cost more than $ 500,000 that will be paid, in whole or in part, with state funds or (2) DPW-awarded property management contract with an annual value of $ 100,000 or more. They must submit the reports to the governor and the Government Administration and Elections and Finance, Revenue and Bonding committees.

The bill requires the first report submitted after a contract is awarded to indicate:

1. when, where, and how bids were advertised;

2. the bidders;

3. the law governing the contract award and if there was any deviation from standard contract awarding procedures;

4. the people responsible for awarding the contract, including the names of people on any awarding panel;

5. whether an awarding panel was used and its recommendation followed;

6. why any panel recommendations were not followed;

7. the existence and nature of any other contract the authority has with the contractor that is the subject of the report; and

8. the text of any laws authorizing or funding the project.

ETHICS

Gifts to Decision-Makers on Contract Awards

The bill prohibits public officials and state employees from knowingly accepting, either directly or indirectly, a gift from any person they know or have reason to know is a prequalified contractor. It also prohibits these contractors from giving them gifts. Public officials and state employees are already prohibited from accepting gifts from people doing business with or seeking to do business with their agencies. The people seeking to do business with the state are also prohibited from giving

public officials and state employees gifts. The State Ethics Commission can fine violators up to $ 2,000 per violation or issue a cease and desist order.

Prohibited Communications

The bill prohibits certain employees of the awarding authorities from communicating with a bidder on a building contract prior to the contract award, if the communication results in the bidder receiving information about the contract that is not available to other bidders. The prohibition applies to employees with decision-making authority concerning the contract. The prohibition does not apply to negotiations with the lowest responsible qualified bidder when his price exceeds the amount of funds allocated for construction.

DOT CONTRACTS

The bill requires the DOT commissioner to advertise and award building construction contracts under his supervision and control and valued at over $ 500,000 to the lowest responsible and qualified bidder who has been prequalified by the DAS commissioner. The same requirements apply to construction associated with leases at airports under the commissioner's jurisdiction. The commissioner must adopt regulations that, at a minimum, establish:

1. bid advertisement standards;

2. objective criteria for evaluating bidders' qualifications;

3. evaluation procedures after bidders' qualifications are verified; and

4. panels to screen, interview, and make recommendations on bidders.

REGISTRATION AS MAJOR CONTRACTORS

The bill requires DCP to issue any prequalified contractor who applies a certificate of registration as a major contractor and prohibits the department from collecting a registration fee during any period the contractor's prequalification is valid. The bill authorizes the department to revoke the registration of any contractor (1) who cannot receive a prequalification certificate because of disqualification or (2) whose prequalification certificate is revoked.

The commissioner must give the DAS commissioner written notice within 10 days after any registration suspension or revocation.

CONSTRUCTION MANAGERS

The bill eliminates a requirement for (1) agencies to issue request for proposals through newspaper advertisements for construction managers and (2) the construction services selection panel to recommend to the awarding authority the respondent most qualified to do the job. It is unclear, under the bill, whether an agency seeking to hire a construction manager would have to enter a personal service agreement or follow the process the bill establishes for hiring a construction contractor.

BACKGROUND

Bid Disqualifications Under Current Law

A contractor can be disqualified from bidding on, applying for, or participating as a subcontractor

under state contracts for certain specific causes. These include:

1. conviction of, entry of a guilty or nolo contender plea, or admission to a criminal offense incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of one;

2. conviction of, entry of a guilty or nolo contender plea, or admission to a violation of any state or federal law for (a) embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or honesty that affects responsibility as a state contractor or (b) antitrust, collusion, or conspiracy offenses arising from submission of bids or proposals for any public or private contract or subcontract;

3. willful failure to perform according to terms, a history of performance failure, or unsatisfactory performance; or

4. willful violation of statutory or regulatory requirements applicable to a public contract, agreement, or transaction.

The existence of a cause for disqualification cannot be the only factor the commissioners consider. They must also consider the seriousness of the contractor's acts or omission and any mitigating factors when deciding whether to disqualify him.

Legislative History

On May 6, 14, 19, and 21, the House referred the bill (File 513) to the Judiciary, Finance, Revenue and Bonding, Appropriations, and Labor and Public Employees committees, respectively. They reported the bill unchanged on May 13, 15, 20, and 22, respectively.

COMMITTEE ACTION

Government Administration and Elections Committee

Joint Favorable Substitute

Yea 19 Nay 0

Judiciary Committee

Joint Favorable Report

Yea 24 Nay 10

Finance, Revenue and Bonding Committee

Joint Favorable Report

Yea 31 Nay 9

Appropriations Committee

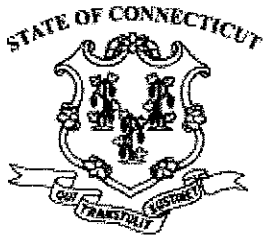
Joint Favorable Report

Yea 46 Nay 0

Labor and Public Employee Committee

Joint Favorable Report

Yea 11 Nay 1



Substitute House Bill No. 5433

Public Act No. 04-141

AN ACT REVISING PREQUALIFICATION REQUIREMENTS FOR STATE CONSTRUCTION CONTRACTS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 4b-91 of the general statutes, as amended by section 1 of public act 03-215, is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) Every contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state, which is estimated to cost more than five hundred thousand dollars, except (1) a contract awarded by the Commissioner of Public Works for (A) a community court project, as defined in subsection (j) of section 4b-55, (B) the Connecticut Juvenile Training School project, as defined in subsection (k) of section 4b-55, (C) the downtown Hartford higher education center project, as defined in subsection (l) of section 4b-55, (D) The University of Connecticut library project, as defined in subsection (d) of section 4b-55, (E) a correctional facility project, as defined in subsection (m) of section 4b-55, (F) a juvenile detention center project, as defined in subsection (n) of section 4b-55, or (G) a student residential facility for the Connecticut State University system that is a priority higher education facility project, as defined in subsection (f) of section 4b-55, or (2) a project, as defined in subdivision (16) of section 10a-109c, undertaken and controlled by The University of Connecticut in accordance with section 10a-109n, shall be awarded to the lowest responsible and qualified general bidder who is prequalified pursuant to section 3 of [this act] public act 03-215, as amended by this act, on the basis of competitive bids in accordance with the procedures set forth in this chapter, [and section 8 of this act,] after the Commissioner of Public Works or, in the case of a contract for the construction of or work on a building under the supervision and control of the Joint Committee on Legislative Management of the General Assembly, the joint committee or, in the case of a contract for the construction of or work on a building under the supervision and control of one of the constituent units of the state system of higher education, the constituent unit, has invited such bids by advertisements inserted at least once in one or more newspapers having a circulation in each county in the state. The Commissioner of Public Works, the joint committee or the constituent unit, as the case may be, shall indicate the prequalification classification [and aggregate work capacity rating] required for the contract in such advertisement. As used in this section, "prequalification classification" means the prequalification classifications established by the Commissioner of Administrative Services pursuant to section 3 of [this act] public act 03-215, as amended by this act. [and "aggregate work capacity rating" means the aggregate work capacity ratings established by the Commissioner of Administrative Services pursuant to section 3 of this act.]

(b) The Commissioner of Public Works, the joint committee or the constituent unit, as the case may be, shall determine the manner of submission and the conditions and requirements of such bids, and the time within which the bids shall be submitted, consistent with the provisions of sections 4b-91 to 4b-96, inclusive, as amended. Such award shall be made within sixty days after the opening of such bids. If the general bidder selected as the general contractor fails to perform the general contractor's agreement to execute a contract in accordance with the terms of the general contractor's general bid and furnish a performance bond and also a labor and materials or payment bond to the amount specified in the general bid form, an award shall be made to the next lowest responsible and qualified general bidder. No employee of the Department of Public Works, the joint committee or a constituent unit with decision-making authority concerning the award of a contract and no public official, as defined in section 1-79, may communicate with any bidder prior to the award of the contract if the communication results in the bidder receiving information about the contract that is not available to other bidders, except that if the lowest responsible and qualified bidder's price submitted is in excess of funds available to make an award, the Commissioner of Public Works, the Joint Committee on Legislative Management or the constituent unit, as the case may be, may negotiate with such bidder and award the contract on the basis of the funds available, without change in the contract specifications, plans and other requirements. If the award of a contract on said basis is refused by such bidder, the Commissioner of Public Works, the Joint Committee on Legislative Management or the constituent unit, as the case may be, may negotiate with other contractors who submitted bids in ascending order of bid prices without change in the contract, specifications, plans and other requirements. In the event of negotiation with general bidders as provided in this section, the general bidder involved may negotiate with subcontractors on the same basis, provided such general bidder shall negotiate only with subcontractors named on such general bidder's general bid form.

(c) On and after October 1, 2004, no person may bid on a contract, except for a project described in subdivision (2) of subsection (a) of this section, for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state or a municipality, which is estimated to cost more than five hundred thousand dollars and is paid for, in whole or in part, with state funds, unless the person is prequalified in accordance with section 3 of [this act] public act 03-215, as amended by this act.

(d) On and after October 1, 2004, each bid submitted for a contract described in subsection (c) of this section shall include a copy of a prequalification [statement] certificate issued by the Commissioner of Administrative Services. [showing that the bidder has the prequalification classification and aggregate work capacity ratings required under such contract.] The bid shall also be accompanied by an update statement in such form as the Commissioner of Administrative Services prescribes. The form for such update statement shall provide space for information regarding all projects completed by the bidder since the date the bidder's prequalification certificate was issued or renewed, all projects the bidder currently has under contract, including the percentage of work on such projects not completed, the names and qualifications of the personnel who will have supervisory responsibility for the performance of the contract, any significant changes in the bidder's financial position or [business organization] corporate structure since the date the certificate was issued or renewed, any change in the contractor's qualification status as determined by the provisions of subdivision (6) of subsection (c) of section 3 of public act 03-215, as amended by this act, and such other relevant information as the Commissioner of Administrative Services prescribes. Any bid submitted without a copy of the prequalification certificate and an update statement shall be invalid.

(e) Any person who bids on a contract described in subsection (c) of this section shall certify under penalty of false statement at the conclusion of the bidding process that the information in the bid is true, that there has been no substantial change in the bidder's financial position or corporate structure

since the bidder's most recent prequalification certificate was issued or renewed, other than those changes noted in the update statement, and that the bid was made without fraud or collusion with any person.

(f) Any person who receives information from a state employee or public official that is not available to the general public concerning any construction, reconstruction, alteration, remodeling, repair or demolition project on a public building prior to the date that an advertisement for bids on the project is published shall be disqualified from bidding on the project.

(g) Notwithstanding the provisions of this chapter regarding competitive bidding procedures, the commissioner may select and interview at least three responsible and qualified general contractors who are prequalified pursuant to section 3 of [this act] public act 03-215, as amended by this act, and [selected by the award panel established in subdivision (4) of section 4b-24] submit the three selected contractors to the construction services award panels process described in section 8 of public act 03-215, as amended by this act and any regulation adopted by the commissioner. The commissioner may negotiate with [any one of such contractors] the successful bidder a contract which is both fair and reasonable to the state for a community court project, as defined in subsection (j) of section 4b-55, the downtown Hartford higher education center project, as defined in subsection (l) of section 4b-55, The University of Connecticut library project, as defined in subsection (d) of section 4b-55, the Connecticut Juvenile Training School project, as defined in subsection (k) of section 4b-55, a correctional facility project, as defined in subsection (m) of section 4b-55, a juvenile detention center project, as defined in subsection (n) of section 4b-55, or a student residential facility for the Connecticut State University system that is a priority higher education facility project, as defined in subsection (f) of section 4b-55. The Commissioner of Public Works, prior to entering any such contract or performing any work on such project, shall submit such contract to the State Properties Review Board for review and approval or disapproval by the board, pursuant to subsection (i) of this section. Any general contractor awarded a contract pursuant to this subsection shall be subject to the same requirements concerning the furnishing of bonds as a contractor awarded a contract pursuant to subsection (b) of this section.

(h) On and after October 1, 2004, any agency that seeks to have a project awarded without being subject to competitive bidding procedures shall certify to the joint committee of the General Assembly having cognizance of matters relating to [legislative management] government administration and elections that the project is of such an emergency nature that an exception to the competitive bidding procedures of this section is required. Such certification shall include input from all affected agencies, detail the need for the exception and include any relevant documentation.

(i) In the event that the General Assembly approves legislation authorizing an exception to the competitive bidding process for a project, the State Properties Review Board shall complete a review of the contract for such project and approve or disapprove such contract no later than thirty days after the Commissioner of Public Works submits such contract to the board. Such review shall be conducted in accordance with the provisions of section 4b-3, as amended by this act. In the event that such review does not occur within the thirty-day period prescribed by this subsection, such contract shall be deemed to be approved.

Sec. 2. Section 3 of public act 03-215 is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) As used in this section: (1) "Prequalification" means prequalification issued by the Commissioner of Administrative Services to bid on a contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state or a municipality; (2)

"subcontractor" means a person who performs work with a value in excess of twenty-five thousand dollars for a contractor pursuant to a contract for work for the state or a municipality which is estimated to cost more than five hundred thousand dollars; [and] (3) "principals and key personnel" includes officers, directors, shareholders, members, partners and managerial employees; (4) "aggregate work capacity rating" means the maximum amount of work an applicant is capable of undertaking for any and all projects; and (5) "single project limit" means the highest estimated cost of a single project that an applicant is capable of undertaking.

(b) (1) Any person may apply for prequalification to the Department of Administrative Services. Such application shall be made on such form as the Commissioner of Administrative Services prescribes and shall be accompanied by a nonrefundable application fee as set forth in subdivision (2) of this subsection. The application shall be signed under penalty of false statement.

(2) The application fee shall be as follows:

Aggregate Work Capacity Rating	Fee
$ 5,000,000. 00 or less	$ 600. 00
$ 5,000,000. 01 - $ 8,000,000. 00	$ 750. 00
$ 8,000,000. 01 - $ 10,000,000. 00	$ 850. 00
$ 10,000,000. 01 - $ 15,000,000. 00	$ 1,000. 00
$ 15,000,000. 01 - $ 20,000,000. 00	$ 1,500. 00
$ 20,000,000. 01 - $ 40,000,000. 00	$ 2,000. 00
$ 40,000,000. 01 or more	$ 2,500. 00

(c) The application form shall, at a minimum, require the applicant to supply information concerning:

(1) The applicant's form of organization;

(2) The applicant's principals and key personnel and any names under which the applicant, principals or key personnel conducted business during the past five years;

(3) The applicant's experience on public and private construction projects over the past five years, or on the applicant's ten most recently-completed projects and the names of any subcontractors used on the projects;

(4) Any legal or administrative proceedings pending or concluded adversely against the applicant or any of the applicant's principals or key personnel within the past five years which relate to the procurement or performance of any public or private construction contract and whether the applicant is aware of any investigation pending against the applicant or any principal or key personnel;

(5) The nature of any financial, personal or familial relationship between the applicant and any public or private construction project owner listed on the application as constituting construction experience;

(6) A statement of whether (A) the applicant has been disqualified pursuant to section 4b-95, this section or section 31-57c or 31-57d, (B) the applicant is on the list distributed by the Labor Commissioner pursuant to section 31-57a, (C) the applicant is disqualified or prohibited from being awarded a contract pursuant to section 31-57b, (D) the applicant has been disqualified by another state, (E) the applicant has been disqualified by a federal agency or pursuant to federal law, (F) the applicant's registration has been suspended or revoked by the Department of Agriculture and Consumer Protection pursuant to section 20-341gg, as amended, (G) the applicant has been disqualified by a municipality, and (H) the matters that gave rise to any such disqualification, suspension or revocation have been eliminated or remedied; and

(7) Other information as the commissioner deems relevant to the determination of the applicant's qualifications and responsibilities.

(d) The applicant shall include a statement of financial condition prepared by a certified public accountant which includes information concerning the applicant's assets and liabilities, plant and equipment, bank and credit references, bonding company and maximum bonding capacity, and other information as the commissioner deems relevant to an evaluation of the applicant's financial capacity and responsibility.

(e) Information contained in the application shall be current as of the time of filing except that the statement of financial condition shall pertain to the applicant's most recently-completed fiscal year.

(f) The commissioner shall determine whether to prequalify an applicant on the basis of the application and on relevant past performance according to procedures and criteria set forth in regulations which the commissioner shall adopt on or before October 1, 2005, in accordance with chapter 54. Such criteria shall include, at a minimum, the record of the applicant's performance, including, but not limited to, written evaluations of the applicant's performance on public or private projects within the past five years, the applicant's past experience on projects of various size and type, the skill, ability and integrity of the applicant and any subcontractors used by the applicant, the experience and qualifications of supervisory personnel employed by the applicant, the maximum amount of work the applicant is capable of undertaking as demonstrated by the applicant's financial condition, bonding capacity, size of past projects and present and anticipated work commitments, and any other relevant criteria that the commissioner prescribes. Such regulations shall also (1) provide that the criteria considered shall be assigned separate designated numerical values and weights and that the applicant shall be assigned an overall numerical rating on the basis of all criteria, and (2) establish prequalification classifications, [and] aggregate work capacity ratings and single project limits. Such prequalification classifications shall be used to establish the types of work a contractor is qualified to perform and the aggregate work capacity ratings shall be used to establish the maximum amount of work a contractor is capable of undertaking.

(g) (1) The applicant shall indicate the prequalification classifications, [and] aggregate work capacity [rating] ratings and single project limits that are sought. The commissioner may issue a certificate of prequalification to any applicant who meets the requirements of this section. Such certificate shall be

effective for one year from the date issued and shall indicate the contractor's prequalification classifications, [and] aggregate work capacity ratings and single project limits. The commissioner may cause the initial certificate of prequalification to be effective for a period not to exceed two years and may require the applicant to remit payment of the application fee, as set forth in subsection (b) of this section, for the first twelve months of certification as well as a prorated application fee, as described in subdivision (3) of this subsection, for any additional period of certification beyond the first twelve months.

(2) A prequalified contractor may apply at any time for additional prequalification classifications, [or] aggregate work capacity ratings or single project limits by submitting the applicable increase in fee, a completed update statement, and other information the commissioner requires.

(3) The commissioner may renew a prequalification certificate upon receipt of a completed update statement, any other material the commissioner requires and a nonrefundable fee in an amount equal to one-half of the application fee for the applicable aggregate work capacity rating as set forth in subsection (b) of this section, except that in no event shall such fee be less than six hundred dollars.

(h) Not later than sixty days after receiving a completed application, the commissioner shall mail or send by electronic mail a notice to the applicant concerning the commissioner's preliminary determination regarding the conditions of the prequalification certification, a denial of certification, a reduction in the level of certification sought or nonrenewal of certification. Any applicant aggrieved by the commissioner's preliminary determination may request copies of the information upon which the commissioner relied in making the preliminary determination, provided such request is made not later than ten days after the date the notice was mailed [as indicated by the postmark on the envelope] or sent by electronic mail to the applicant. Not later than twenty days after [said postmark date] the date the notice was mailed or sent by electronic mail, the applicant may submit additional information to the commissioner with a request for reconsideration. The commissioner shall issue a final determination regarding the application not later than ninety days after the date the commissioner mailed or sent by electronic mail the notice of the preliminary determination, which ninety-day period may be extended for an additional period not to exceed ninety days if (1) the commissioner gives written notice to the applicant that the commissioner requires additional time, and (2) such notice is mailed or sent by electronic mail during the initial ninety-day period.

(i) The commissioner may not issue a prequalification certificate to any contractor (1) who is disqualified pursuant to section 31-57c or 31-57d, [or] (2) who has a principal or key personnel who, within the past five years, has a conviction or has entered a plea of guilty or nolo contendere for or has admitted to commission of an act or omission that reasonably could have resulted in disqualification pursuant to any provision of subdivisions (1) to (3), inclusive, of subsection (d) of section 31-57c or subdivisions (1) to (3), inclusive, of subsection (d) of section 31-57d, as determined by the commissioner.

(j) The commissioner may revoke a contractor's prequalification or reduce the contractor's prequalification classification or aggregate work capacity ratings, after an opportunity for a hearing, if the commissioner receives additional information that supports such revocation or reduction.

(k) (1) Any materially false statement in the application or any update statement may, in the discretion of the awarding authority, result in termination of any contract awarded the applicant by the awarding authority. The awarding authority shall provide written notice to the commissioner of such false statement not later than thirty days after discovering such false statement. The commissioner shall provide written notice of such false statement to the Commissioner of Public Works and the Commissioner of Agriculture and Consumer Protection not later than thirty days after discovering

such false statement or receiving such notice.

(2) The commissioner shall revoke the prequalification of any person, after an opportunity for hearing, if the commissioner finds that the person has included any materially false statement in such application or update statement, has been convicted of a crime related to the procurement or performance of any public or private construction contract or, within the past five years or has otherwise engaged in fraud in obtaining or maintaining prequalification. Any person whose prequalification has been revoked pursuant to this subsection shall be disqualified for a period of two years after which the person may reapply for prequalification, except that a person whose prequalification has been revoked on the basis of conviction of a crime or engaging in fraud shall be disqualified for a period of five years after which the person may reapply for prequalification. The commissioner shall not prequalify a person whose prequalification has been revoked pursuant to this subdivision until the expiration of said two or five-year disqualification period and the commissioner is satisfied that the matters that gave rise to the revocation have been eliminated or remedied.

(l) The commissioner shall provide written notice of any revocation, disqualification, reduction in classification or capacity rating or reinstated prequalification to the Commissioner of Public Works and the Commissioner of Agriculture and Consumer Protection not later than thirty days after any final determination.

(m) The provisions of this section and section 4 of [this act] public act 03-215, as amended by this act, shall not apply to subcontractors.

(n) The commissioner shall establish an update statement for use by bidders for purposes of renewing or upgrading a prequalification certificate and for purposes of submitting a bid pursuant to section 4b-91, as amended by this act.

(o) Any applicant aggrieved by the commissioner's final determination concerning a preliminary determination, a denial of certification, a reduction in prequalification classification or aggregate work capacity rating or a revocation or nonrenewal of certification may appeal to the Superior Court in accordance with section 4-183.

Sec. 3. Section 4 of public act 03-215 is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) [The] On or before October 1, 2005, the Commissioner of Administrative Services shall adopt regulations, in accordance with chapter 54, to establish a standard contractor evaluation form. Such form shall include, at a minimum, the following evaluation criteria: (1) Timeliness of performance; (2) quality of performance; (3) cost containment, including, but not limited to, the contractor's ability to work within the contract's allotted cost, the accuracy of the contractor's billing, and the number and cause of change orders and the manner in which the contractor determined the price on the change orders; (4) safety; (5) the quality of the contractor's working relationship with the agency and the quality of the contractor's supervision of the work area; (6) communication with the agency; (7) the quality of the contractor's required documentation; (8) the performance of the contractor's subcontractors, to the extent known by the official who completes the evaluation; and (9) the contractor's and any subcontractor's compliance with part III of chapter 557, or chapter 558, or the provisions of the federal Davis-Bacon Act, 40 USC, Sections 276a to 276a-5, inclusive, as from time to time amended, to the extent known by the official who completes the evaluation.

(b) Each public agency shall compile evaluation information during the performance of the contract and complete and submit the evaluation form to the commissioner after completion of a building

project under the agency's control if the building project is funded, in whole or in part, by state funds. Such evaluation information shall be available to any public agency for purposes of assessing the responsibility of the contractor during a bid selection and evaluation process. The designated official from such agency shall certify that the information contained in the evaluation form represents, to the best of the certifying official's knowledge, a true and accurate analysis of the contractor's performance record on the contract. The commissioner shall include the evaluation in the contractor's prequalification file. The official shall mail a copy of the completed evaluation form to the contractor. Any contractor who wishes to contest any information contained in the evaluation form may submit a written response to the commissioner not later than thirty days after the date the form was mailed as indicated by the postmark on the envelope. Such response shall set forth any additional information concerning the building project or the oversight of the contract by the public agency that may be relevant in the evaluation of the contractor's performance on the project. The commissioner shall include any such response in the contractor's prequalification file.

(c) As used in this section, "public agency" means a public agency, as defined in section 1-200, but does not include The University of Connecticut with respect to any project, as defined in subdivision (16) of section 10a-109c, that is undertaken and controlled by the university, and "subcontractor" means a person who performs work with a value in excess of twenty-five thousand dollars for a contractor pursuant to a contract for work for the state or a municipality which is estimated to cost more than five hundred thousand dollars.

(d) Upon fifty per cent completion of any building project under a public agency's control, the agency shall advise the contractor in writing of the agency's preliminary evaluation of the contractor's performance on the project.

(e) No public agency, employee of a public agency or certifying official of a public agency shall be held liable to any contractor for any loss or injury sustained by such contractor as the result of the completion of an evaluation form, as required by this section, unless such agency, employee or official is found by a court of competent jurisdiction to have acted in a wilful, wanton or reckless manner.

(f) Any public agency that fails to submit a completed evaluation form, as required by this section, not later than seventy days after the completion of a project, shall be ineligible for the receipt of any public funds disbursed by the state for the purposes of the construction, reconstruction, alteration, remodeling, repair or demolition of any public building or any public works project until such completed evaluation form is submitted.

Sec. 4. Section 6 of public act 03-215 is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) Not later than January 1, [2004] 2006, and annually thereafter, each awarding authority, other than a municipality, shall prepare a report on the status of (1) any ongoing project for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building which is estimated to cost more than five hundred thousand dollars and is paid for, in whole or in part, with state funds, or (2) any property management contract awarded by the Department of Public Works which has an annual value of one hundred thousand dollars or more. [The] Except for a school construction project, the awarding authority shall submit the report to the Governor and the joint standing committees of the General Assembly having cognizance of matters relating to government administration and finance, revenue and bonding. The report shall be submitted in accordance with section 11-4a. The first report submitted after a contract is awarded shall indicate: (A) When, where and how the request for bids was advertised; (B) who bid on the projects; (C) the provisions of law that governed the award of the contract and if there were any deviations from standard procedure in awarding the

contract; (D) the names of the individuals who had decision-making authority in awarding the contract, including, but not limited to, the individuals who served on any award panel; (E) if an award panel was used, whether the recommendation of the panel was followed and, if applicable, the reason why such recommendation was not followed; (F) whether the awarding authority has any other contracts with the contractor who was awarded the contract, and if so, the nature and value of the contract; and (G) any provisions of law that authorized or funded the project.

(b) The University of Connecticut shall not be required to submit a report pursuant to this section for any project, as defined in subdivision (16) of section 10a-109c, that is undertaken and controlled by the university.

Sec. 5. Section 4b-100 of the general statutes, as amended by section 7 of public act 03-215, is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) The Commissioner of Public Works shall adopt regulations, in accordance with chapter 54, to implement the provisions of sections 4b-91 to 4b-100, inclusive, as amended. Such regulations shall include (1) objective criteria for evaluating the qualifications of bidders, [and] (2) objective criteria for evaluating proposals, and (3) the procedures for evaluating bids after the prequalification status of the bidder has been verified.

(b) The Commissioner of Public Works shall adopt regulations, in accordance with the provisions of chapter 54, establishing a procedure for promptly hearing and ruling on claims alleging a violation or violations of sections 4b-91 to 4b-100, inclusive, as amended. Such claims may be initiated by the Department of Public Works or any party whose financial interests may be affected by the decision on such a claim.

Sec. 6. Section 8 of public act 03-215 is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) The Department of Public Works shall establish construction services award panels which shall each consist of six members: Three of whom shall be appointed by the Commissioner of Public Works and shall be current employees of the Department of Public Works; two of whom shall be appointed by the department head of the user agency; and one of whom who shall be a neutral party appointed by the commissioner. The members of each award panel appointed by the Commissioner of Public Works shall serve for terms of one year from July first. If any vacancy occurs on the panel, the Commissioner of Public Works or the head or acting head of the user agency, as appropriate, shall appoint a person for the unexpired term in accordance with the provisions of this subsection.

(b) A panel established pursuant to this section shall not be deemed to be a board or commission within the meaning of section 4-9a, as amended. Such panels shall be the award panels for any contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for the state pursuant to sections 4b-91 to 4b-100, inclusive, as amended, and section 4b-24, as amended.

(c) For each applicable contract, the commissioner shall designate one panel to screen all submitted proposals and establish a list of bidders to be interviewed and shall designate a separate panel consisting of different members to interview bidders on the list and submit a list of recommended contractors to the commissioner ranked in order of preference with the most qualified bidder listed first.

(d) The commissioner shall designate one voting member on each panel to serve as chairperson. The

chairperson shall moderate the committee, collect votes and compile the results.

(e) Each award panel shall prepare a memorandum on the selection process indicating (1) how the evaluation criteria were applied by each panel member to determine the most qualified firms, (2) the ranking of each bidder by each panel member which shall be available to the public after execution of the contract with the selected contractor, and (3) a certification by each panel member that the selection of the most qualified firm was not the result of collusion, the giving of a gift or the promise of a gift, compensation, fraud or inappropriate influence from any person.

(f) The commissioner shall select a contractor from among the list of firms submitted by the award panel that interviewed the contractors. After the commissioner has made a selection, the names of the contractor firms submitted to the commissioner shall be available to the public upon request. In the event the commissioner does not select the most qualified bidder listed by the awards panel, the commissioner shall prepare a written explanation of the commissioner's decision. The commissioner shall also prepare a memorandum on the final phase of the selection process, indicating how the commissioner applied the evaluation criteria to determine the [most qualified firm] successful bidder. Such memorandum shall include a certification by the commissioner that the commissioner's selection of the successful bidder was not the result of collusion, the giving of a gift or the promise of a gift, compensation, fraud or undue pressure from any person and shall be available to the public after execution of the contract with the selected contractor.

[(f)] (g) The commissioner shall adopt regulations, in accordance with chapter 54, to implement the provisions of this section.

Sec. 7. Section 4b-1 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) The Commissioner of Public Works shall (1) be responsible for the administrative functions of construction and planning of all capital improvements undertaken by the state, except (A) highway and bridge construction, the construction and planning of capital improvements related to mass transit, marine and aviation transportation, (B) the Connecticut Marketing Authority, (C) planning and construction of capital improvements to the State Capitol building or the Legislative Office Building and related facilities by the Joint Committee on Legislative Management, (D) any project as defined in subdivision (16) of section 10a-109c, undertaken by The University of Connecticut, and (E) construction and planning of capital improvements related to the Judicial Department if such construction and planning do not constitute a project within the meaning of subsection (g) of section 4b-55, as amended, including the preparation of preliminary plans, estimates of cost, development of designs, working plans and specifications, award of contracts and supervision and inspection. For the purposes of this subparagraph (E), the term "Judicial Department" does not include the courts of probate, the Division of Criminal Justice and the Public Defender Services Commission, except where such agencies share facilities in state-maintained courts; (2) select consultant firms in accordance with the provisions of sections 4b-56 to 4b-59, inclusive, to assist in the development of plans and specifications when in the commissioner's judgment such assistance is desirable; (3) render technical advice and service to all state agencies in the preparation and correlation of plans for necessary improvement of their physical plants; (4) cooperate with those charged with fiscal programming and budget formulation in the development of a capital program and a capital budget for the state; (5) be responsible for the purchase, sale, lease, sublease and acquisition of property and space to house state agencies and, subject to the provisions of section 4b-21, the sale or exchange of any land or interest in land belonging to the state; (6) maintain a complete and current inventory of all state-owned or leased property and premises, including space-utilization data; (7) supervise the care and control of buildings and grounds owned or leased by the state in Hartford, except the building and grounds of the State

Capitol and the Legislative Office Building and parking garage and related structures and facilities and grounds, as provided in section 2-71h, and the Connecticut Marketing Authority and property under the supervision of the Office of the Chief Court Administrator under the terms of section 4b-11; and (8) be responsible for the administrative functions of establishing and maintaining security standards for all facilities housing the offices and equipment of the state except (A) Department of Transportation mass transit, marine and aviation facilities, (B) the State Capitol and the Legislative Office Building and related facilities, (C) facilities under the care and control of The University of Connecticut or other constituent units of the state system of higher education, (D) Judicial Department facilities, (E) Department of Public Safety facilities, (F) Military Department facilities, (G) Department of Correction facilities, (H) Department of Children and Families client-occupied facilities, (I) facilities occupied by the Governor, Lieutenant Governor, Attorney General, Comptroller, Secretary of the State and Treasurer, and (J) facilities occupied by the Board of Parole. As used in this subdivision, "security" has the meaning assigned to it in section 4b-130. Subject to the provisions of chapter 67, said commissioner may appoint such employees as are necessary for carrying out the duties prescribed to said commissioner by the general statutes.

(b) Notwithstanding any other provision of the general statutes, [to the contrary,] except for the property of The University of Connecticut, the commissioner may supervise the care and control of (1) any state-owned or leased office building, and related buildings and grounds, outside the city of Hartford, used as district offices, except any state-owned or leased office building, and related buildings and grounds, used by the Judicial Department, and (2) any other state-owned or leased property, on a temporary or permanent basis, if the commissioner, the Secretary of the Office of Policy and Management and the executive head of the department or agency supervising the care and control of such property agree, in writing, to such supervision.

Sec. 8. Section 4b-3 of the general statutes, as amended by section 146 of public act 03-6 of the June 30 special session, is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) There is established a State Properties Review Board which shall consist of six members appointed as follows: The speaker of the House and president pro tempore of the Senate shall jointly appoint three members, one of whom shall be experienced in matters relating to architecture, one experienced in building construction matters and one in matters relating to engineering; and the minority leader of the House and the minority leader of the Senate shall jointly appoint three members, one of whom shall be experienced in matters relating to the purchase, sale and lease of real estate and buildings, one experienced in business matters generally and one experienced in the management and operation of state institutions. No more than three of said six members shall be of the same political party. One of the members first appointed by the speaker and the president pro tempore shall serve a two-year term, one shall serve a three-year term and one shall serve a four-year term. One of the members first appointed by the minority leaders of the House and Senate shall serve a two-year term, one shall serve a three-year term and one shall serve a four-year term. All appointments of members to replace those whose terms expire shall be for a term of four years and until their successors have been appointed and qualified. If any vacancy occurs on the board, the appointing authorities having the power to make the initial appointment under the provisions of this section shall appoint a person for the unexpired term in accordance with the provisions hereof.

(b) The chairman of the board shall be compensated two hundred dollars per diem up to a maximum of thirty thousand dollars annually. Other members of the board shall be compensated two hundred dollars per diem up to a maximum of twenty-five thousand dollars annually. The members of the board shall choose their own chairman. No person shall serve on this board who holds another state or municipal governmental position and no person on the board shall be directly involved in any

enterprise which does business with the state or directly or indirectly involved in any enterprise concerned with real estate acquisition or development.

(c) The board may adopt such rules as it deems necessary for the conduct of its internal affairs, in accordance with section 4-167, and may employ a secretary, a clerk, and within its budget, such employees as it shall deem necessary.

(d) Notwithstanding any other statute or special act to the contrary, the Commissioner of Public Works shall be the sole person authorized to represent the state in its dealings with third parties for the acquisition, construction, development or leasing of real estate for housing the offices or equipment of all agencies of the state or for the state-owned public buildings or realty hereinafter provided for in section 2-90, as amended, sections 4b-1 to 4b-5, inclusive, 4b-21, 4b-23, 4b-24, as amended, 4b-26, 4b-27, 4b-30 and 4b-32, subsection (c) of section 4b-66, sections 4b-67 to 4b-69, inclusive, 4b-71, 4b-72, 10-95, 10a-72, 10a-89, 10a-90, 10a-114, 10a-130, 10a-144, 17b-655, 22-64, 22a-324, 26-3, as amended, 27-45, 32-1c, 32-39, 48-9, 51-27d and 51-27f, except that the Joint Committee on Legislative Management may represent the state in the planning and construction of the Legislative Office Building and related facilities, in Hartford; the board of trustees of a constituent unit of the state system of higher education may represent the state in the leasing of real estate for housing the offices or equipment of such constituent unit provided no lease payments for such realty are made with funds generated from the general revenues of the state; the Labor Commissioner may represent the state in the leasing of premises required for employment security operations as provided in subsection (c) of section 31-250; the Commissioner of Mental Retardation may represent the state in the leasing of residential property as part of the program developed pursuant to subsection (b) of section 17a-218, provided such residential property does not exceed two thousand five hundred square feet, for the community placement of persons eligible to receive residential services from the department and the Connecticut Marketing Authority may represent the state in the leasing of land or markets under the control of the authority, and, except for the housing of offices or equipment in connection with the initial acquisition of an existing state mass transit system or the leasing of land by said Marketing Authority for a term of one year or more in which cases the actions of the Department of Transportation and the Marketing Authority shall be subject to the review and approval of the State Properties Review Board. Said commissioner shall have the power to establish and implement any procedures necessary for him to assume his responsibilities as said sole bargaining agent for state realty acquisitions and shall perform the duties necessary to carry out such procedures. He may appoint, within his budget and subject to the provisions of chapter 67, such personnel deemed necessary by him to carry out the provisions hereof, including experts in real estate, construction operations, financing, banking, contracting, architecture and engineering. The Attorney General's office, at the request of the commissioner, shall assist the commissioner in contract negotiations regarding the purchase, lease or construction of real estate.

(e) The State Properties Review Board shall be an independent body within the Executive Department.

(f) The State Properties Review Board shall review real estate acquisitions, sales, leases and subleases proposed by the Commissioner of Public Works, [and] the acquisition, other than by condemnation, or the sale or lease of any property by the Commissioner of Transportation under subdivision (12) of section 13b-4, as amended, subject to section 4b-23 and subsection (h) of section 13a-73 and review, for approval or disapproval, any contract for a project described in subsection (h) of section 4b-91, as amended by this act. Such review shall consider all aspects of the proposed actions, including feasibility and method of acquisition and the prudence of the business method proposed. The board shall also cooperate with and advise and assist the Commissioner of Public Works and the Commissioner of Transportation in carrying out their duties. The board shall have access to all

information, files and records, including financial records, of the Commissioner of Public Works and the Commissioner of Transportation, and shall, when necessary, be entitled to the use of personnel employed by said commissioners. The board shall approve or disapprove any acquisition of development rights of agricultural land by the Commissioner of Agriculture and Consumer Protection under section 22-26cc, as amended.

Approved May 21, 2004

OLR Bill Analysis

sHB 5433 (File 674, as amended by House "A" and Senate "A")*

AN ACT REVISING PREQUALIFICATION REQUIREMENTS FOR STATE CONSTRUCTION CONTRACTS

SUMMARY:

This bill makes several changes to the laws governing public construction, including who may work on public construction projects, the requirements for obtaining this work, and reports and evaluations on the quality of the work. Most of these changes are to PA 03-215, which established new procedures for bidding on and awarding public construction contracts most of which become effective on October 1, 2004. That act's prequalification provisions become effective on July 1, 2004 and its status report requirements were effective on January 1, 2004.

Specifically, the bill:

1. expands the Department of Public Works (DPW) commissioner's and State Property Review Board's (SPRB) responsibilities regarding state agencies' office space needs;

2. makes changes to contractor prequalification laws, including requiring new information on prequalification applications, and adding new grounds for disqualification;

3. changes the process for awarding emergency, no-bid contracts beginning October 1, 2004;

4. increases the information that the DPW commissioner and each member of the construction awards panel must prepare on the selection process;

5. makes the contractor evaluations that each state agency must prepare after a construction project is completed available to all agencies for their use in assessing the contractor's fitness for future projects;

6. absolves from liability agencies and their employees who complete the evaluations;

7. delays for two years, from January 1, 2004 to January 1, 2006, awarding authorities' duty to complete status reports on construction projects;

8. eliminates a requirement for municipalities to complete the reports; and

9. requires DPW regulations to include objective criteria for evaluating contract proposals.

*House Amendment "A" eliminates provisions in the original bill that (1) established a contractor's code of ethics, (2) established penalties for failing to complete construction status reports, (3) added additional grounds for rejecting bidders as not responsible, (4) required agencies to adopt policies for disclosing information to bidders, and (5) required agencies to adopt objective criteria for awarding large construction and procurement contracts.

*Senate Amendment "A" (1) specifies that the DPW commissioner must submit the names of contractors to the construction panel before entering or beginning work on an emergency no-bid

contract, (2) requires the SPRB to approve or disapprove these contracts, and (3) removes a requirement for the SPRB to review bids on property selected for demolition.

EFFECTIVE DATE: October 1, 2004

STATE AGENCY SPACE NEEDS

The bill makes the DPW commissioner responsible for the sale or sublease of state agencies' office space. He is already responsible for purchasing, leasing, or acquiring state agencies' property and space. It requires the SPRB to review the commissioner's proposal to sell, lease, or sublease state property in the same way that it currently reviews real estate acquisitions.

PREQUALIFICATION

Applications

The law requires contractors, but not subcontractors, to prequalify before bidding on any state or municipal construction contract valued at $ 500,000 or more. To prequalify, they must submit an application, along with a nonrefundable fee, to the Department of Administrative Services (DAS) commissioner. The law requires the commissioner to adopt prequalification procedures and criteria in regulations.

The bill sets October 1, 2005 as the deadline for the commissioner to adopt regulations on prequalification procedures and criteria. It requires the regulations to include "single-project limits," which are the highest estimated cost of a single project that an applicant is capable of undertaking.

It requires applicants for prequalification, in addition to their aggregate work capacity rating, to include the single-project limits that they are seeking. As they can with aggregate work capacity rating, the bill allows a qualified contractor to apply for additional single project limits at any time. "Aggregate work capacity rating" is the maximum amount of work a contractor is capable of undertaking for any and all projects

Prequalification Certificates

By law, the DAS commissioner can give an applicant that meets the requirement a one-year certificate of prequalification that includes the types of work he can perform and the maximum amount of work he is capable of undertaking. The bill allows the commissioner to make the initial certificate effective for up to two years. It requires the contractor receiving this extended certificate to pay the fee for a one-year certificate plus a prorated fee for the period over one year.

It allows the commissioner to send preliminary determinations on prequalification certificates by e-mail, instead of just by regular mail.

Disqualification

The bill generally prohibits public officials from talking to bidders about a contract before it is awarded if the communication would result in the bidder receiving contract information that is not available to other bidders. Employees of construction contract awarding authorities are already prohibited from having these conversations.

The bill disqualifies bidders who receive non-public information about a contract from state employees prior to the date it is advertised from bidding on the contract. These bidders are already

disqualified if they receive this confidential information from public officials.

CONSTRUCTION ADVERTISING AND BID REQUIREMENTS

By law, authorities responsible for awarding most state contracts must do so on the basis of competitive bidding. Once the bids are in, the authority must award the contract to the lowest responsible qualified bidder who is prequalified by the DAS commissioner.

The bill eliminates a requirement for agencies that award construction contracts to include in their ads for bids the aggregate work capacity rating required to do the job. The law still requires bidders to submit their prequalification certificate, which shows their aggregate work capacity rating, with each bid. The bill requires the DAS commissioner to also include on the certificate the contractor's single-project limit.

The bill expands the information that bidders must report in the update statement they are required to submit with each bid to include changes in their qualification status.

EMERGENCY NO-BID CONTRACTS

By law, the DPW commissioner can select and interview at least three responsible and qualified general contractors and negotiate with any one of them to complete any of seven special building projects: a community court, the Connecticut Juvenile Training School, a downtown Hartford higher education center, the University of Connecticut library, a correctional facility, a juvenile detention center, and a student residential facility for the Connecticut State University system.

The bill requires the commissioner to submit the names of three contractors to the construction services awards panel before entering a contract with any one of them or beginning work on the project. The panels select the contractors who can negotiate with the DPW commissioner to build, alter, or repair state buildings. The panel must select one contractor with whom the commissioner must negotiate the contract. It requires the commissioner to submit the contract to the SPRB for approval or disapproval. If the board does not make a determination within 30 days after the submittal, the contract is deemed approved.

Beginning October 1, 2004, the bill requires agencies seeking to award a contract without competitive bidding to certify to the Government Administration and Elections Committee, rather than the Legislative Management Committee, that an emergency exists that justifies an exception to the competitive bidding process. If the legislature approves the contract, the bill requires the SPRB to review and approve or disapprove within 30 days after the commissioner submits it. If the board does not make a determination within this time period, the contract is deemed approved.

CONTRACT SELECTION PROCESS

The bill requires construction services award panels to rank, by qualification, the list of contractors it submits to the DPW commissioner for possible negotiations. The bill increases the information that each panel must prepare on the selection process. In addition to how the evaluation criteria were used to determine the most qualified firms, it must indicate how each panel member ranked each bidder. The ranking is available for public disclosure after the contract is executed.

The bill requires each panel to prepare a memorandum on the selection process that includes each member's certification that his selection of the most qualified firm was free from collusion, gift giving, compensation, fraud, or other inappropriate influences. It requires the commissioner to include in his memorandum on the process an explanation of his reasoning if he does not award a contract to

the lowest responsible qualified contractor selected by the panel. The bill requires him to make the same certification as panel members.

CONTRACTOR EVALUATIONS

By law, each public agency, other than UConn, must complete and submit to DAS an evaluation on each contractor at the conclusion of his state-funded work on a building under the agency's control. The bill, instead, requires the agencies to complete the evaluation while the work is being done and submit it to DAS once the work is completed.

It makes the evaluation information available to public agencies for assessing a contractor's "responsibility" during the bid selection and evaluation process. A designated agency official must certify that the evaluation information is, to the best of his knowledge, a true and accurate analysis of the contractor's performance on the contract.

The bill protects public agencies and their employees or certifying officials who complete the evaluation from any loss or injury it causes the contractor. The protection does not cover agencies, employees, or certifying officials who complete the evaluation in a willful, wanton, or reckless manner.

The bill makes public agencies that fail to complete the evaluation within 70 days after the job is done ineligible for any state funds to build, remodel, repair, or demolish any public building or public works project until the evaluation is completed.

The law requires the DAS commissioner to adopt regulations establishing a standard contractor evaluation form. The bill sets October 1, 2005 as the deadline for her to adopt these regulations.

STATUS REPORTS

By law, all awarding authorities, other than UConn, must report on any (1) ongoing building construction contract estimated to cost more than $ 500,000 that will be paid, in whole or in part, with state funds or (2) DPW-awarded property management contract with an annual value of $ 100,000 or more. The bill delays for two years, until January 1, 2006, the duty of most awarding authorities to prepare and submit these annual status reports. It also eliminates a requirement for municipalities to complete the report.

BACKGROUND

Legislative History

On April 6 and 15, respectively, the House referred the bill (File 408) to the Judiciary and Legislative Management committees. Both committees reported it favorably without change.

COMMITTEE ACTION

Government Administration and Elections Committee

Joint Favorable Substitute

Yea 17 Nay 0

Judiciary Committee

Joint Favorable Report

Yea 35 Nay 1

Legislative Management Committee

Joint Favorable Report

Yea 21 Nay 0

General Assembly

Raised Bill No. 392

February Session, 2004

LCO No. **1428**

01428_____GAE

Referred to Committee on Government Administration and Elections

Introduced by:

(GAE)

AN ACT CONCERNING THE STATE CONTRACT REVIEW PROCESS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) (*Effective October 1, 2004*) As used in sections 2 to 7, inclusive, of this act:

(1) "State agency" means an executive office, department, division, Board, commission or other office or officer in the executive branch of state government;

(2) "Privatization contract" means an agreement or series of agreements between a state agency and a nongovernmental person or entity, in which such person or entity agrees to provide services valued at five hundred thousand dollars or more over the life of the contract that are substantially similar to and in lieu of services provided, in whole or in part, by employees of such agency or by employees of another state agency for such state agency. "Privatization contract" does not include an agreement to provide legal services, litigation support or management consulting only;

(3) "State construction" and "large procurement contracts" means any contract or amendment in excess of one hundred thousand dollars for: (A) The remodeling, alteration, repair or enlargement of any real asset; (B) the construction, alteration, reconstruction, improvement, relocation, widening or changing of the grade of sections of state highways or bridges; or (C) the purchase or lease of all supplies, materials or equipment, as defined in subdivision (2) of section 4a-50 of the general statutes; and

(4) "Board" means the State Contract Review Board.

Sec. 2. (NEW) *(Effective October 1, 2004)* (a) There is established a State Contract Review Board which shall consist of seven members having expertise in contract and legal matters. One member shall be appointed by the Governor, one member by the speaker of the House of Representatives, one member by the majority leader of the House of Representatives, one member by the minority leader of the House of Representatives, one member by the president pro tempore of the Senate, one member by the majority leader of the Senate, and one member by the minority leader of the Senate. The members first appointed by the Governor, the speaker of the House of Representatives and the minority leader of the Senate shall serve a two-year term. The members first appointed by the president pro tempore of the Senate and the minority leader of the House of Representatives shall serve a three-year term. The members first appointed by the majority leaders of the Senate and the House of Representatives shall serve a four-year term. All appointments to replace members whose terms expire shall be for a term of four years or until their successors have been appointed and qualified. If any vacancy occurs on the State Contract Review Board, the appointing authorities having the power to make the initial appointment under the provisions of this subsection shall appoint a member for the unexpired portion of the term in accordance with the provisions of this subsection. No member of the State Contract Review Board shall hold any other state governmental position nor shall any member or any business with which any member is associated, as defined in subsection (b) of section 1-79 of the general statutes, be a party to a contract, except an employment contract, with the state. Each member of the board shall file with the State Ethics Commission a statement of financial interest in accordance with section 1-83 of the general statutes.

(b) Members of the State Contract Review Board shall be compensated at the rate of one hundred fifty dollars per day for each day they attend a meeting, up to a maximum of twenty-five thousand dollars annually.

(c) The members of the State Contract Review Board shall elect a chairperson who shall preside at meetings of the board and a vice-chairperson to preside in the absence of the chairperson.

(d) The State Contract Review Board may adopt such rules as it deems necessary for the conduct of its internal affairs, in accordance with section 4-167 of the general statutes, and may employ, within available appropriations, such employees as it shall deem necessary. No employee of the State Contract Review Board or any business with which such employee is associated, as defined in subsection (b) of section 1-79 of the general statutes, shall be a party to a contract with the state.

(e) The State Contract Review Board shall be within the Office of Policy and Management for administrative purposes only.

(f) Notwithstanding any other provision of the general statutes, all state agencies shall submit any proposed privatization, state construction or large procurement contract to the State Contract Review Board for the board's review and approval or disapproval, in accordance with the provisions of this section. The State Contract Review Board shall review all proposed state construction or large procurement contracts to ensure that the process for the selection of the vendor or construction contractor complied with state law and that such contract is cost-effective and fiscally prudent. The State Contract Review Board shall also review and approve or disapprove all privatization contracts in accordance with the provisions of sections 3 to 7, inclusive, of this act. Any contract subject to review pursuant to this section shall be void unless approved by the State Contract Review Board.

(g) In conducting any review pursuant to subsection (f) of this section, the State Contract Review Board shall have access to all information, files and records, including, but not limited, to financial

records, of the applicable state agency, and shall, when necessary, be entitled to the use of personnel employed by the state agency. Each state agency shall keep such information, files and records in a form and by a method that will reasonbly enable the board to conduct its review. Each state agency shall make such information, files and records available to the board or any authorized agent of the board, upon demand. In the event that any such information, file or record sought by the board is subject to nondisclosure pursuant to any provision of the general statutes, such nondisclosure requirement and any accompanying penalty for disclosure shall apply to members of the board and the board's authorized agents.

(h) Within thirty days of a state agency's submittal of a proposed privatization, state construction or large procurement contract, to the State Contract Review Board for review, the board shall respond in writing to such agency, either approving the contract or disapproving the contract without prejudice. In the event of a tie vote of the board's members, the proposed contract shall be deemed disapproved. In any case where the board issues a written response disapproving a proposed contract, such response shall include the grounds for disapproval. If, upon expiration of such thirty-day period a decision has not been made by the board, such contract shall be deemed to have been approved.

(i) The State Contract Review Board may, within available appropriations, retain the services of consultants, technical assistants, research and other personnel as it may deem necessary to assist in conducting any review pursuant to this section.

(k) On or before June 30, 2005, the State Contract Reveiew Board shall adopt regulations, in accordance with chapter 54 of the general statutes, for the implementation of this section, including, but not limited to, criteria to be used in conducting any review pursuant to subsection (f) of this section.

Sec. 3. (NEW) (*Effective October 1, 2004*) (a) No state agency shall execute a proposed privatization contract and no such contract shall be valid unless such contract is approved by the State Contract Review Board and such agency has complied with the provisions of section 5 of this act.

(b) Prior to any state agency's solicitation of bids for a privatization contract, such agency shall prepare an analysis of the costs and benefits to the agency of (1) privatizing services, and (2) continuing to provide such services using state employees of the state agency. Such analysis shall include, but not be limited to: (A) An examination of all direct and indirect costs to the state, including health insurance, pension costs of state employees, unemployment compensation costs of state employees terminated as a result of the privatization contract, gain or loss of income tax and sales tax revenue to the state, and (B) an examination of the effect of such proposed privatization on the quality of service, the public health and safety and residents of the state who may utilize such privatized service. In determining the cost of privatizing services, pursuant to this subsection, the state agency shall calculate labor costs for each employee position at a rate no less than the middle range salary of a state employee job class substantially similar to such employee position. Each state agency shall transmit such analysis to the Auditors of Public Accounts who shall review such submission and prepare a report to the state agency with an analysis stating whether such privatization contract is cost-effective, taking into consideration all direct and indirect costs to the state and the impact of such privatization contract on the public health and safety and the residents of Connecticut who use the services that are the subject of the privatization contract.

Sec. 4. (NEW) (*Effective October 1, 2004)* At least sixty days prior to publishing any notice soliciting bids for a privatization contract, a state agency shall notify each collective bargaining organization representing employees of the agency of such planned solicitation. After consulting with the potentially affected bargaining units, if any, the agency shall provide adequate resources for the

purpose of encouraging and assisting present agency employees to organize and submit a bid to provide the services that are the subject of the privatization contract. In determining what resources are adequate for this purpose, the agency shall refer to an existing collective bargaining agreement of a similar employee organization whose members perform the subject services, if available, which agreement provides similar resources in the same or other agencies. If no such collective bargaining agreement exists, the agency shall refer to any existing collective bargaining agreements providing such resources, and shall provide such resources at the minimum level of assistance provided in such agreements. The state agency shall also provide to the state employees its analysis and the Auditors of Public Accounts' report prepared in accordance with subsection (b) of section 3 of this act. The agency shall consider any such employee bid on the same basis as all other bids. An employee bid may be made as a joint venture with other persons.

Sec. 5. (NEW) *(Effective October 1, 2004)* (a) The state agency soliciting bids for a privatization contract shall require the bidders to include the following information in their bid submission:

(1) The wage rate for each employee covered by the privatization contract;

(2) An agreement by the bidder or contractor to offer available employee positions pursuant to the contract to qualified regular employees of the state agency whose state employment is terminated because of the privatization contract and who satisfy the hiring criteria of the contractor;

(3) An agreement by the bidder or the contractor to refrain from engaging in discriminatory employment practices, as defined in section 46a-51 of the general statutes, and to take affirmative steps to provide such equal opportunity for all such persons;

(4) A report on the length of continuous employment of current employees of the contractor by job classification, without providing individually identifiable information on such employees and information detailing the relevant prior experience of current employees within each job classification. If the positions identified by the bidder are newly created positions, the bid shall identify the minimum requirements for prospective applicants for each such position;

(5) The annual rate of employee turnover;

(6) The number of hours of training planned for each employee in areas directly related to the provision of services to state residents and clients;

(7) Any legal or administrative proceedings pending or concluded adversely against the applicant or any of the applicant's principals or key personnel within the past five years that relate to the procurement or performance of any public or private construction contract, employee safety and health, labor relations or other employment requirements and whether the applicant is aware of any investigation pending against the applicant or any principal or key personnel. Such information shall specify the date of the complaint, citation, court finding or administrative finding, the enforcement agency, rule, law or regulation involved and any additional information the contractor elects to submit;

(8) Any collective bargaining agreements or personnel policies covering the employees that will provide services to the state; and

(9) Any political contributions made by the bidder or any employee who holds a management position with the bidding company, to any elected officer of the state or member of the General Assembly during the four years prior to the due date of the bid.

Sec. 6. (NEW) *(Effective October 1, 2004)* (a) Any state agency selecting a bidder for a privatization contract shall develop a contract that is acceptable to the bidder and the state agency provided such contract shall include the following terms:

(1) The contractor shall be required to submit quarterly payroll records to the agency, listing the name, address, hours worked and hourly wage paid for each employee who is providing work under the privatization contract in the previous quarter;

(2) The contractor shall be required to offer available employee positions pursuant to the contract to qualified regular employees of the agency whose state employment is terminated because of the privatization contract and who satisfy the hiring criteria of the contractor; and

(3) The contractor shall be prohibited from engaging in discriminatory employment practices, as defined in section 46a-51 of the general statutes, and shall take affirmative steps to provide such equal opportunity for all such persons.

(b) Prior to signing such contract, the state agency shall submit such contract to the State Contract Review Board for its review and approval or disapproval. Concomitantly, the state agency shall submit to the board the following information:

(1) A certification that the state agency has complied with all the requirements of the state agency contained in the provisions of sections 2 to 5, inclusive, of this act;

(2) The state agency analysis and the Auditors of Public Accounts' report prepared in accordance with section 3 of this act and a report by the state agency explaining any changes in such analysis and report as a result of the terms of the proposed privatization contract;

(3) A state agency analysis of the quality of the services to be provided by the designated bidder and whether such services are equal to or exceed the quality of services that are provided by regular agency employees;

(4) A certification by the designated bidder that the bidder and its supervisory employees, while in the employ of the designated bidder, have no adjudicated record of substantial or repeated wilful noncompliance with any relevant federal or state regulatory law including, but not limited to, laws concerning labor relations, occupational safety and health, nondiscrimination and affirmative action, environmental protection and conflicts of interest; and

(5) A description of why the proposed privatization contract is in the public interest.

(c) The State Contract Review Board shall have the authority granted to it pursuant to section 2 of this act for purposes of reviewing and evaluating the privatization contract and approving or disapproving the contract. In addition to conducting its review in accordance with the provisions of section 2 of this act, the board shall also review the proposed privatization contract to ensure that the process for the selection of the bidder complied with state law and that such contract is cost-effective and fiscally prudent.

Sec. 7. (NEW) *(Effective October 1, 2004)* (a) If the State Contract Review Board approves such privatization contract and such privatization contract has a value of five million dollars or more over the life of the contract, such contract shall not be valid unless approved by the General Assembly in accordance with this section. The state agency shall, within five days of receipt of notice of approval by the State Contract Review Board, file such contract with the clerks of the House of Representatives and the Senate.

(b) Within five days after the clerks receive such contract, the speaker of the House of Representatives and the president pro tempore of the Senate shall submit the contract to the joint standing committees of the General Assembly having cognizance of matters relating to government administration and appropriations.

(c) Within twenty-five days after the speaker of the House of Representatives and the president pro tempore of the Senate receive such contract, said committees shall hold a public hearing on the contract and shall report their recommendations to the House of Representatives and the Senate concerning the approval or rejection of the contract.

(d) The General Assembly may approve the contract, in whole, by a majority vote of each house or may reject the contract, in whole, by a majority vote of either house. If rejected, the contract shall not be valid and shall not be implemented. The contract shall be deemed rejected if the General Assembly fails to vote to approve or reject the contract (1) prior to the adjournment of the regular session of the General Assembly during which the contract is filed, (2) prior to the adjournment of the next regular session of the General Assembly following the date on which the contract is filed if the General Assembly is not in regular session on such date, or (3) prior to the adjournment of a special session convened before the next regular session of the General Assembly for the purpose of considering the contract if the General Assembly is not in regular session on the date on which the contract is filed. However, if the contract is filed less than thirty days before the end of a regular session, the General Assembly may vote to approve or reject the contract (A) within thirty days after the first day of a special session convened before the next regular session of the General Assembly for the purpose of considering the contract, or (B) within thirty days after the first day of the next regular session of the General Assembly.

This act shall take effect as follows:	
Section 1	*October 1, 2004*
Sec. 2	*October 1, 2004*
Sec. 3	*October 1, 2004*
Sec. 4	*October 1, 2004*
Sec. 5	*October 1, 2004*
Sec. 6	*October 1, 2004*
Sec. 7	*October 1, 2004*

Statement of Purpose:

To create a State Contract Review Board for the review of state privatization, construction and large procurement contracts.

[Proposed deletions are enclosed in brackets. Proposed additions are indicated by underline, except that when the entire text of a bill or resolution or a section of a bill or resolution is new, it is not underlined.]

August 21, 2000 Edition

STATE OF CONNECTICUT
DEPARTMENT OF TRANSPORTATION

CONSTRUCTION CONTRACT
BIDDING AND AWARD MANUAL

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I. GENERAL STATEMENT OF PURPOSE

The purpose of this manual is to try to ensure that all parties involved or interested in the Department's construction contract bidding and awards will know and understand the Department's rules, requirements, policies, procedures, and practices regarding those matters. In this manual, the Department has brought together provisions concerning Department bidding and awards from various other documents (such as the Department's Administrative Memorandum No. 108 and portions of the Department's Standard Specifications) in order to establish a single document which interested parties may consult to learn about those subjects. This manual will supersede Administrative Memorandum No. 108, and if provisions of this manual conflict with provisions of other Department documents (not including statutes or regulations), the provisions of this document will govern.

This manual will also provide the Department with a vehicle for regularly updating the public's knowledge of any modifications that the Department makes in its bidding or award policies and practices. At all times, copies of the current version of this manual will be available from the Department's Transportation Manager of Contracts (the "Manager). The effective date of each edition of the manual will appear at the top of the first page of each such copy.

Modifications of rules set forth in this manual will not be applied retroactively, but only prospectively.

II. LIMITATIONS OF THIS MANUAL

It should be understood that there will be no point in time when this manual can be comprehensive. Circumstances are constantly arising with respect to bidding and awards which the Department has never confronted before, and often those circumstances will require the establishment of a new principle, or the modification of an existing one. On occasion, the

Department may also find cause to reconsider and reverse a past position. Any such change in practice or policy will, however, become effective from the time of its first application, and will remain in effect for all pending bids and awards until such time as the practice or policy may be changed again. In addition, the Department will make its best effort to record any such changes in policy or practice in the edition of this manual which is printed after such change is made.

It should be also understood that while bidders are required to know and to obey all applicable laws and other legal authorities that affect the bidding and award matters discussed in this Manual, the Department has not attempted to include or to cite in this Manual all of the applicable legal authorities; by their nature, such authorities already are matters of public, and published, information.

III. DEFINITIONS

"Affiliate" means a company over which another company has significant control, i.e., (1) one of the companies owns at least five percent (5%) of the voting stock of the other; (2) a director or officer of one of the companies owns at least five percent (5%) of the voting stock of the other; or (3) the two companies have at least one director or officer in common.

"Bid proposal form" means a document provided by the Department, on which a contractor is to make, in writing and figures, its bid to perform construction or demolition work in accordance with an advertised Department contract.

"Bidding capacity" means the monetary value of construction work, in the aggregate, which the Department deems itself reasonably assured that a particular contractor is capable of executing and completing successfully at a given time. This value is determined by applying a standard Department formula (provided in Section V[G][5]][b] of this manual) to certain financial information required and received from the bidder.

"Classification of work" means a type of construction work for which the Department may prequalify contractors to bid, such as, but not limited to, highway construction; bridge construction, rehabilitation and painting;

building construction, demolition and relocation; paving; landscaping; electrical work; other painting; line-striping; and fencing.

"Commissioner" means the Commissioner of Transportation of the State of Connecticut.

"Contractor" means any individual, partnership, corporation, joint venture, association or other legal entity which is engaged in the business of performing construction services.

"Contractor's prequalification statement" or "prequalification application" means a set of documents which satisfies or is intended by a contractor to satisfy the requirements of Section IV(G)(2) of this manual, which set of documents consists of a completed set of the documents commonly known as parts A and B of Department Form CON-16.

"Department" means the Department of Transportation of the State of Connecticut.

"Manager" means the Transportation Manager of Contracts for the State of Connecticut Department of Transportation.

"Prequalification" means (1) the review process by which the Department determines which contractors shall be deemed qualified to receive awards of Department construction contracts, and, more particularly, (a) the classifications of work for which each such contractor shall be deemed qualified and eligible to be awarded a contract, and (b) the bidding capacity of each such contractor; or (2) the status of having been prequalified, which enables a contractor to receive awards of Department construction contracts within the classifications of work and the bidding capacity determined by the Department.

"Project bid limit" means a monetary amount which may be set by the Department as an upper limit on the size of the contracts which a particular bidder shall be eligible to be awarded within a given classification of work; that is, a contractor may not be awarded a project contract if the Department engineer's estimate of the cost of the project exceeds the contractor's project bid limit for that classification of work.

IV. ORGANIZATION OF THE DEPARTMENT WITH RESPECT TO BIDDING AND AWARD ACTIVITIES

The Department's Contracts Section controls the advertising and award, through the public competitive bidding system, of contracts involving the construction of roads, bridges, buildings, transportation-related public works projects, demolition, supply of materials, or other transportation-related matters. The Transportation Manager of Contracts is the head of the Contracts Section. The Contracts Section is contained within the Department's Division of Contract Administration, and the latter is contained within the Department's Bureau of Finance and Administration. The Bureau Chief of the Bureau of Finance and Administration reports directly to the Commissioner.

The Contracts Section is divided into three operating units: (1) the Prequalification Unit, (2) the Pre-Bid Unit, and (3) the Post-Bid Unit. All three units function under the direction of the Manager, who reports directly to the Director of Contract Administration.

The Prequalification Unit is responsible for the prequalification of businesses that desire to bid as general contractors for Department contracts, and for the issuance of bid proposal forms.

The Pre- Bid Unit is responsible for the coordination and administration of all activities associated with pre-bid procedures such as solicitation of bids, the preparation and sale of plans and specifications, the issuance of contract addenda, and the bidding process. Technically, the responsibility of this unit ends with the opening of bids.

After the bids are publicly opened, checked for responsiveness in various respects, and read, they are turned over to the Post-Bid Unit for further processing. The Post-Bid Unit is responsible for the coordination of all post-bid activities, and for ensuring that all requirements necessary for the award of the contract are met.

Requests for prequalification applications or bid proposal forms; inquiries concerning the completion of prequalification applications or bid proposals forms; and inquiries concerning other bidding or award matters, should be submitted to the Manager. Any questions regarding the project requirements, bid conditions or proceedings, contract terms, or other matters related to a project contract for which bids have not yet been opened must be addressed in writing to the Manager.

V. REQUIRED USE OF FORMS PROVIDED BY THE DEPARTMENT

In those cases in which the Department provides a form on which a particular submission is to be made (such as the bid proposal form, the non-collusion affidavit, or the bid bond), only that form will be accepted. Altered versions of the form, or electronically-reproduced (as opposed to merely photocopied) versions of the form, will not be accepted and will not be considered valid for bidding purposes.

Privately-owned bidding and information services that provide such forms, or information regarding Department bid solicitations, via the Internet or other media have not been given authority to do so by the Department. It is possible that if such persons or entities publish or provide inaccurate, incomplete, or unacceptable forms or information to potential bidders, the former could be liable to the latter for damages incurred as a result of such actions.

VI. PREQUALIFICATION OF CONTRACTORS TO BID FOR DEPARTMENT CONSTRUCTION CONTRACTS

In accordance with the provisions of the Department's Standard Specification for Roads, Bridges and Incidental Construction (as revised) (the "Standard Specifications"), and pursuant to the duties and powers of the Commissioner as provided for in Section 13a-95 of the Connecticut General Statutes (as revised), and with few exceptions, only contractors prequalified by the Department are eligible to receive awards of Department construction contracts. (The current editions of the Standard Specifications are known as the Forms 814A [for non-metric projects] and 815 [for metric projects].) The only exceptions to this requirement are for projects that do not require prequalified bidders; in such cases, this will be noted in the bid specifications for the project contract.

The Department's process of prequalification is not a means for determining which contractors may receive bid proposal forms, or which contractors may submit bid proposals, or which contractors may have their bid proposals considered by the Department. It is, rather, a process designed to ensure that the Department can determine, on a timely basis, the

qualifications and responsibility of contractors who may be considered for contract awards. The Department would not have ample time to make those determinations, without undue delay and disruption of award and construction schedules, if it waited to begin the evaluation process until after a bidder was found to be the apparent lowest bidder for a Department contract. As a practical matter, therefore, bidders should understand that if they have not been prequalified prior to the bid opening for a contract award, they will not be awarded the subject contract.

Awards will be made only to bidders prequalified to perform the type of work required by the subject contract, and only if they have sufficient bidding capacity remaining after taking into account all outstanding work to be completed by the bidder. Contractors whose current Parts B and C as of the time of the bid opening for a given contract do not show that the contractor has sufficient bidding capacity to be eligible for award of that contract may be subject to a finding of nonresponsibility if the contractor becomes the apparent low bidder for that contract.

A. PREQUALIFICATION OF ORGANIZATIONS OR INDIVIDUALS OTHER THAN CONSTRUCTION COMPANIES

No individual as such, and no entity that is not itself a bona fide construction company, will be prequalified to bid for Department construction contracts either individually or as a joint venturer (except as provided in the following paragraph); nor will such an individual or entity be eligible for award of such a contract.

The one exception to this rule is that if at least one of the participants in a proposed joint venture is a heavy highway construction contractor, and is prequalified by the Department as such, that contractor may joint venture with one or more of its wholly-owned subsidiaries, provided that the majority of each such subsidiary's assets (equipment, materials, etc.), as reflected in the subsidiary's most recent certified financial statement prepared by an independent accountant, are assets that are or may be used in heavy highway construction; provided that the heavy highway construction contractor assumes responsibility for the performance and completion of at least fifty percent (50%) of the project work required to be done by the general contractor, under the terms of the required letter that accompanies the joint venture's request for a bid proposal (described in VIII [A] below).

The provisions of this subsection A shall apply to vertical construction

work as well, except that with regard to such work, the phrase "vertical construction" should be substituted for the phrase "heavy highway construction" in the two preceding paragraphs.

B. MINIMUM PERIOD OF PREVIOUS CONSTRUCTION ACTIVITY

To be eligible for prequalification, applicants must have been engaged in active business as a construction contractor for a minimum of one year under the name of the firm applying for prequalification, and must provide to the Manager a current one-year financial statement for that business.

NOTE:

This prohibition may not be absolute. If, for instance, a prequalified company that has one year of satisfactory construction experience merely changes its name, but maintains the same corporate structure, managers, and assets, that company will not likely be denied prequalification merely because of its name change. The same might be true for a family business which changes its name when one member of management leaves the business, provided that the departing manager's services had not been essential to the prior granting of Department prequalification.

If, however, a family construction business has, for instance, been divided into two new companies with new names and reduced or altered resources, the Department would likely require each to accumulate a year's experience in the construction business before prequalifying them individually, in order to gain knowledge and assurances regarding the competence and capabilities of each firm. If a contractor is not prequalified under its present or intended new name, and if any significant change has occurred in the corporate structure, financing, managerial staff, or assets of that contractor, the Department will likely require that the company accumulate a year's construction experience before the Department will grant or "renew" its prequalification.

This is necessarily a question of degree. The Department must, in its sole discretion, determine when it has sufficient assurance that a contractor has the competence and wherewithal to perform a given type and volume of Department work.

C. PREQUALIFICATION OF INTER-RELATED ENTITIES

Corporations related to each other through ownership interests or an interlocking directorate or in other significant respects, may not seek prequalification in combination, and may not submit consolidated financial statements in seeking prequalification. The legal independence of a corporation or joint venturer must be reflected in the presentation of information about its finances; e.g., in presenting the assets of an applicant corporation, one may include the value of the stock owned by the applicant in a wholly-owned corporate subsidiary, but not, for instance, the value of equipment owned by the subsidiary corporation. In addition, only organizations which the Department deems to be true construction contractors with respect to a classification of work for which they seek prequalification (i.e., organizations having sufficiently-experienced personnel, sufficient equipment and finances, etc. to perform construction work within that classification) may seek or be granted prequalification to bid for work within that classification. If the Department deems that a substantial portion of the resources of an organization seeking prequalification is devoted to activities other than construction work within the pertinent classification(s), the Department may make what it deems to be an appropriate adjustment of the organization's bidding capacity or of the classification(s) of work for which it is prequalified.

If a subsidiary of a contractor wants to bid as an independent entity, that subsidiary must furnish to the Manager a contractor's prequalification statement based on the discrete finances and experience of that subsidiary. No so-called consolidated financial statements will be accepted for such subsidiaries, or for companies having a common owner.

D. THE PREQUALIFICATION APPLICATION PROCESS

In order to become prequalified, a contractor must obtain from the Manager a prequalification application form, known as the Form CON-16. Detailed instructions for completing the application form are included within the CON-16, and are repeated below.

1. Time for Filing Contractor's Prequalification Statement

In order to help ensure that they may become prequalified in time for

the bid opening for a given contract, contractors should be certain to return the form with all necessary information, signatures and notarizations to the Manager at least thirty (30) calendar days before requesting a bid proposal form for that contract.

2. The Contractor's Prequalification Statement

a. Contents of the Prequalification Application

The prequalification application form (the CON-16) requires, among other items, the following information:

-- A statement as to the contractor's financial condition and resources, which statement shall set forth in detail the contractor's current assets and current liabilities, and shall include third-party verifications of any unsecured lines of credit extended to the contractor by banks or other financial institutions. The financial statement must be accompanied by a certified audited financial statement or, if the Department deems it acceptable, a certified public accountant's review of financial statements. Such financial statements shall provide information covering a one-year accounting cycle. The financial statements must be complete, with a balance sheet, and with a related statement of income, retained earnings, and cash flows. The financial statement must be certified by an independent certified public accountant, in a form prescribed or provided by the Department, and must conform with generally-accepted accounting principles.

-- A statement as to the contractor's plant and equipment, which shall give complete details as to the identity, age, condition, cost, and current book value of each piece of the contractor's construction equipment. In addition, the statement shall set forth the value of any outstanding loans for equipment identified therein.

-- A statement describing in detail the contractor's organization, setting forth the identity of the contractor's officers, principals, and owners, and the qualifications and prior experience of the firm and each of its officers, principals, and other key personnel.

-- A statement as to the contractor's prior construction experience, which shall indicate the length of time for which the contractor has been engaged in the construction business, and the nature of the contractor's

construction experience during that period. In addition, the statement shall include a complete record of all construction work completed in the five (5) prior years and shall identify, for each project undertaken in that period, the type of work performed, the project location, the contract price for work actually performed by the applicant firm itself rather than by subcontractors, and the name, address and current telephone number of the owner's project engineer or project manager in charge of each listed project.

-- A statement describing in detail any financial interest which the contractor has in any other construction-related business, as well as any financial interest which any of the contractor's officers, directors, or principal shareholders (i.e., those shareholders holding at least [5%] of either the common or the preferred shares of the company's stock) have in the contractor or in any other construction-related business. The statement shall also include the name, address, and relation to the contractor of any affiliated or subsidiary firms (as opposed to internal divisions) of the contractor.

-- A statement describing, in detail, for the five (5) previous calendar years, the circumstances of

(i) any criminal violation by, and any criminal indictment or conviction of, and any civil debarment or suspension of, the contractor or any of its officers or affiliates, or of any officer of such an affiliate, by a governmental entity in any jurisdiction;

(ii) any finding by a governmental entity in any jurisdiction that the contractor or an affiliate of the contractor was nonresponsible as a low bidder; or

(iii) any formal charge or proceeding concerning the possibility of any such debarment, suspension, or finding of nonresponsibility by a governmental entity in any jurisdiction.

In addition, the statement shall identify any liens, default notices or claims filed by or against, or any penalties or liquidated damages assessed against, the contractor with regard to any project performed by the contractor within the previous five (5) calendar years. The statement shall also disclose the details of any formal complaints by or against the contractor with respect to its alleged noncompliance with any federal labor laws or the labor laws of

any state.

-- A statement of the classifications of Department work for which the contractor wishes to be eligible for award of a contract, and a detailed description of the experience of the contractor and its key personnel in performing such types of work.

-- For corporations, a current Certificate of Incorporation (for domestic corporations) or current Certificate of Authority (for foreign corporations), whichever is applicable, from the Connecticut Secretary of the State. For limited liability companies (LLC's), certified documentation from the Secretary of State showing that the LLC has been legally formed and organized in accordance with the Connecticut General Statutes, and that the LLC is not in default for failure to have filed a proper annual report with the Connecticut Secretary of the State.

-- A current Society for Protective Coatings (SSPC) certification, if the applicant is seeking prequalification in surface preparation and painting classifications.

-- Documentation of the applicant's possession of a current Connecticut demolition license, if the applicant is seeking prequalification for demolition work.

The contractor's prequalification statement shall be based upon information which is current at the time of filing, except that the financial portion of the statement may be based upon the contractor's most recently-completed fiscal year for which data is available, provided that the ending date of that fiscal year is not more than six (6) months prior to the date on which the contractor's prequalification statement is received by the Department.

The contractor's prequalification statement and all amendments thereto shall be accompanied by a properly-notarized affidavit from an officer or principal of the contractor, attesting that all statements contained in the statement are true and accurate. All required signatures in the contractor's prequalification statement shall be provided by individuals duly-authorized to sign for the contractor in the pertinent capacity.

Any contractor's prequalification statement which is not accurate,

responsive, and complete may be rejected by the Department. Further, any contractor who makes, or causes to be made, a false, deceptive or fraudulent statement in the contractor's prequalification statement may be deemed a nonresponsible bidder and may be subject to disqualification from bidding for Department contracts for a period of no more than two (2) years, as the Commissioner deems appropriate.

If at any time the Department obtains information concerning a prequalified contractor which, had that information been disclosed in the contractor's last statement, would, in the Commissioner's judgment, have led him or her to establish a different prequalification status for the contractor, the Department may modify the contractor's prequalification status accordingly. This shall be true even if the new information did not exist or was not known when the contractor submitted its last statement to the Manager.

b. Directions for Completing the Prequalification Application

PART A

DETAILS OF ORGANIZATION AND EXPERIENCE - On pages 2-4 of the CON-16, the applicant must answer all questions and provide all items of information requested pertaining to the organization and experience of the firm.

EQUIPMENT OWNERSHIP - On page 5 of the CON-16, the applicant must list and identify all construction equipment owned by the applicant, indicating equipment age, condition, purchase price, and book value. For purposes of prequalification, the book value is defined as the purchase price minus the total accumulated depreciation.

PREQUALIFICATION WORK CLASSIFICATIONS - On page 6 of the CON-16, the applicant must mark the type(s) of work for which prequalification is sought. Specific project experience related to the work classifications indicated on page 6 must be listed on page 4.

PART B

CONTRACTOR'S FINANCIAL STATEMENT - On pages 7 - 9 of the CON-16, the applicant must complete the entire contractor's financial

statement for its latest fiscal period.

In addition, the applicant must submit a separate audited or reviewed financial statement prepared by an independent Certified Public Accountant (CPA) for the same fiscal period. The financial statement shall include at minimum, the CPA's opinion statement, balance sheet, profit and loss statement and all related notes.

ATTESTATION REPORTS - On pages 10 or 11 of the CON-16, the appropriate report must be signed by the independent CPA who completed the report. These forms may not be altered or substituted for without the consent of the Department's Office of External Audits. The applicant's CPA must attest that the information contained on pages 7-9 of the application is fairly stated in all material respects in relation to the financial statements taken as a whole.

CERTIFICATION OF CONTRACTOR'S PREQUALIFICATION STATEMENT - On page 12 of the CON-16, the statement must be properly completed and signed by a duly-authorized representative of the applicant; must bear the Corporate Seal, if applicable; and must be properly notarized.

CERTIFICATE OF AUTHORITY - On page 13 of the CON-16, the statement must be properly completed and must identify those individuals in the contractor's organization who have the authority to sign bonds, legal documents and contracts on behalf of the applicant organization. The individuals given such authority must affix their signatures and indicate their titles, if applicable, on page one of the CON-16 application. This form may not be altered or substituted for; must bear the Corporate Seal, if applicable; and must be properly notarized.

PART C

PROPOSAL REQUEST OR SUBMISSION FORM (PART C), page 14 - The Part C, Bid Proposal Request or Submission Form, must be completed and submitted for the project contract for which the contractor intends to bid. In order to be eligible for award of a given contract, a bidder must have an approved CON-16 on file with the Department at the time of the bid opening for that contract. The Part C form must list ALL outstanding private and public work, both bonded and unbonded, in-State and out-of-State, in any jurisdiction, and must be signed by individuals

authorized to sign on behalf of the bidder as indicated in the approved CON-16 on file for that firm. Bidders that fail to provide all requested information, or that misrepresent such information, may have their bid rejected as nonresponsive and, if they become the apparent low bidder for a contract, may be deemed nonresponsible as such.

The Department reserves the right to request any additional information deemed necessary to substantiate the information and documentation submitted in the CON-16.

3. Requests by the Department for Additional Information

The Department may at any time request that a contractor provide it with additional information pertaining to any of the matters addressed, whether directly or indirectly, in the CON-16. The Department shall have the right to prescribe the amount of time that the contractor will be allowed in which to provide such additional information. The provisions of this paragraph shall also apply to any requests that the Department may make for corrections in the form or contents of a contractor' s statement. In addition, the contractor's prequalification statement shall include such additional information pertaining to the contractor's responsibility and qualifications as the Manager may request in writing.

4. Questions about the Prequalification Application

Contractors should address any questions concerning the prequalification application to Mr. Francis Maerz at (860) 594-3123.

5. Evaluation of the Contractor's Prequalification Statement: Bidding Capacity and Approved Classifications of Work

Each contractor filing a contractor's prequalification statement with the Department will be prequalified according to the classifications of work which the Contractor is approved to perform, and according to its bidding capacity.

a. Classifications of Work

The Manager shall review the contractor's prequalification statement and shall determine, in consultation with the Department's Construction

Division, the classification or classifications of work which the contractor is qualified to undertake, based upon its record of construction work, the experience and expertise of its personnel, the adequacy of its plant and equipment, its past performance, and such other factors as may be deemed pertinent by the Department. Representatives of the Department may request, and must be allowed, to visit and inspect the applicant's home office, job sites, and storage sites as the Department deems necessary in order to verify information contained in the contractor's prequalification statement. If the Department deems it appropriate, the Department may prequalify a contractor for Department work within a particular classification of work, but establish a project bid limit for the contractor with respect to that classification of work, to be based on the complexity and monetary values of the projects which the contractor has previously performed within that classification.

b. Bidding Capacity

Based on the information provided, the Department will establish a bidding capacity for the applicant, and determine the classifications of work for which the applicant is prequalified to bid. That bidding capacity shall be determined by the Department according to the formula set forth in the following paragraph, and in accordance with other considerations which the Department may deem to be appropriate. The applicant will be notified in writing of this determination.

The Department will determine the contractor's Maximum Capacity Rating (i.e., bidding capacity) according to the following formula:

$$M=F(SE+50\% \text{ TAD})$$

IN WHICH:

M = Maximum Capacity Rating

F = Ability Factor, 10 is used for all contractors

SE = Total Owner's/Stockholder's Equity

TAD = Total Accumulated Depreciation

c. Revisions of Work Classifications or Bidding Capacity

The Department may reduce or revoke the contractor's prequalification status based on the contractor's performance record with regard to quality of work, timely completion, debarment by other public agencies, changed financial status, or other pertinent factors.

If, after filing a contractor's prequalification statement, changes occur in the contractor's organization, finances, other resources or experience, which a reasonable person would believe had significantly affected the classifications or amount of work for which the Department ought to prequalify the contractor, the contractor shall promptly give detailed written notice of said changes to the Manager. The Department may then alter the contractor's prequalification in any way which the Manager believes is warranted by said changes, and the Manager will notify the contractor of the Department's decisions regarding those matters.

A prequalified contractor that desires, in light of such changes, to have the Department change the classifications of work or bidding capacity for which it has been prequalified, may file a new or revised statement, and may then request reconsideration of its prequalification status. Such a revised statement and request for reconsideration may not, however, be submitted any earlier than six (6) months after the contractor's last submittal of a prequalification statement acceptable to the Department.

The Department may waive this six-month waiting period if, in the opinion of the Manager, changes have occurred in the applicant's circumstances which warrant such an exception. So that the Department has time to consider such a request prior to a scheduled bid opening, the Department asks that additional information supporting such a request be submitted to the Department a minimum of twenty (20) days prior to requesting a bid proposal for the subject contract.

In any event, the contractor's bidding capacity will be adjusted, if appropriate, whenever the contractor files a new Part B with its bid proposal. But bidders will not be allowed to increase their bidding capacity by infusing additional capital into the bidder, or by other means, for the purpose of becoming eligible for award of a contract being bid, once the bidding for that contract has been closed.

E. EFFECTIVE PERIOD OF PREQUALIFICATION

Once a contractor has submitted a prequalification statement and the Department has determined its bidding capacity and the classifications of work for which the contractor is deemed to be prequalified, the contractor's prequalification remains in effect for a period of sixteen (16) months beginning with the contractor's close-of-business date for the contractor's most recently completed fiscal year, as that date is identified in the contractor's initial CON-16 for that 16-month period.

F. TIME TO FILE APPLICATION FOR RENEWAL OF PREQUALIFICATION

Any application for renewal of prequalification must be submitted to the Manager at least thirty (30) days prior to the expiration date of the current prequalification, in order to allow the Department sufficient time for evaluating and processing the renewal application.

VII. BID SOLICITATION

A. ADVERTISING OF BID SOLICITATIONS

The Pre-Bid Unit's responsibility begins with the receipt of tracings, design reports and proposed estimates. Once received, the information needed for advertising is compiled, and work orders are initiated for advertising costs, personnel expenses, and costs for printing the plans and specifications. Once the work orders are completed, they are forwarded to the Fiscal Services Unit for processing. During this same period, bid proposal forms and plans and specifications are prepared and forwarded to printing services for reproduction. In addition, checks are made on the status of any related Rights-of Way or utility agreements, and required permits such as environmental or Army Corp of Engineers permits. If the subject project is a federal participation project (that is, a project that is funded in part by a federal agency), the Department makes inquiries to the applicable federal funding agency or agencies (usually the Federal Highway Administration ["FHWA"]) to determine the status of any necessary

concurrence or authorization to proceed. At this time, the Department also inquires about any necessary PS & E approval (plans, specifications and estimate) by the federal agency, and requests wage schedules from the Department of Labor pursuant to Section 31-53 of the Connecticut General Statutes, as revised.

Once any necessary authorization to advertise is received from each federal funding agency, advertisements soliciting bids are placed in local newspapers, as well as in newspapers having State-wide circulation, pursuant to Section 4a-57 of the Connecticut General Statutes, as revised. In addition, advertising space is purchased in various construction industry publications such as those of the Construction Industry of Massachusetts and the Connecticut Construction Industry Association. Advertisements are also placed in Brown's Letter, the Dodge Report, and Northeast Minority News, Inc.

B. NOTICE TO CONTRACTORS SUBSCRIPTION PROGRAM

The Pre-bid Unit also encourages interested parties to enroll in a unique program called the "Notice to Contractors Subscription Program," which is run by the Unit. This program provides its subscribers with a continuous flow of information about Department construction contracts for which bids are being solicited. The information provided through the program includes the date, time and place of bid openings, as well as pertinent project information which may help a contractor determine if it wants to bid for any of the listed project contracts. Contractors may enroll in this program by calling (860) 594-3390 or writing to the Manager.

C. ISSUANCE OF PLANS AND SPECIFICATIONS

After the Pre-Bid Unit advertises a contract for bidding, the Unit begins the process of issuing, distributing and selling plans and specifications to interested parties. The Unit often receives inquiries regarding recently-advertised contracts. In many instances, general inquiries can be and are answered over the telephone, but in any instance in which the response will provide the contractor with information that has not been given and is not available in public documents, the inquiry must be made to the Manager in writing. It will then be necessary for the Department to issue a notice or addendum to all bidders in order to clarify or resolve any related issue or problems.

Plans and specifications are sold in two (2) sizes, a large size which is drawn to scale and a small size which is not. The purchase price for the plans varies and is determined by the number of plan sheets for the particular project. Interested parties can order plans and specifications by mailing to the Department a completed order form (available from the Contracts Section) along with a check made out for the full amount, payable to the Treasurer, State of Connecticut. Plans and Specifications may also be purchased at our Plans and Specifications Sales Office, located at 160 Pascone Place, Newington, CT 06111.

D. REQUESTS FOR BID PROPOSAL FORMS

Contractors may submit to the Manager a request for bid proposal form, on a request form provided by the Department (referred to by the Department as Part C of the CON-l6), in which the contractor shall specify, among other things, the project contract for which it expects to bid and for which it is seeking bid proposal forms.

Each request for a bid proposal form shall also list the then-current total dollar value and the percent-of-work-to-be-completed (both of these to be measured by contract dollar value of the work) of all private and public work, whether inside or outside of the State of Connecticut, (a) which the contractor has contracted to perform (including all work by the contractor as a subcontractor and all subcontractor work to be performed under the contractor's contracts) and which has not yet been completed; and (b) for which the contractor is the apparent low bidder, but for which no contract has yet been awarded.

In addition, the contractor shall provide with its request for a bid proposal form a written description of any suspension, debarment, or other adverse government action taken against the contractor which has occurred since the date of the contractor's last prequalification statement.

The information provided on the Part C shall be sworn to by an officer or principal of the contractor. If, however, the contractor has already provided such a written description of particular changes to the Manager, it need not submit that information to the Department with its request for a bid proposal form.

VIII. BIDDING

A. BIDDING AS A JOINT VENTURE

A lawful combination of contractors each of which is prequalified individually in accordance with the provisions of this manual, shall be permitted to bid jointly as a joint venture; but contractors prequalified only as an identified member of a particular joint venture shall be allowed to bid only as a member of that joint venture. Such combination shall be limited to a maximum of three participants, unless otherwise allowed by the Department. Equal shares of the value of any joint bid, or such other percentages of responsibility for the project as may be specified by the joint venturers in their jointly-made request for a proposal, shall be charged against the current bidding capacity of each joint venturer. Each participant in a joint venture must submit a letter with the venture's bid proposal request, stating the participant's agreement to bid as a joint venture with the other named joint venturer(s), and indicating the percentage(s) of the project work which is to be the responsibility of each of the joint venturers. With respect to joint ventures, the bidding capacity of the joint venture as such will be the total of the bidding capacities of the joint venturers.

If a joint venture submits a bid proposal, it shall be considered to be a proposal by each of the joint venturers, jointly and severally, for the performance of the entire contract as a joint venture in accordance with the terms and conditions of the contract.

B. BIDDING BY RELATED ENTITIES

No bidders that have mutual financial interests, or common ownership, directors, officers or principal shareholders (i.e., shareholders holding at least [5%] of either the common or the preferred shares of the company's stock) may bid for the same Department contract. Such proscribed bidders shall include, but not be limited to, affiliates and subsidiaries of each other. If any non-bidding party has an ownership interest in more than one bidder that is bidding for a given contract, either directly or through the former's ownership interests in another company, no matter how removed in a vertical or horizontal chain of ownership that party might be from the bidders, the bids of those bidders shall not be accepted. In

addition, with respect to any given Department contract that is advertised for bidding, no bidder owned by, or in the chain of ownership of, a bonding company may bid against a bidder for whom a bond has been or will be provided by that bonding company for the given contract bidding.

C. BIDDING BY DISADVANTAGED BUSINESS ENTERPRISES AND SMALL BUSINESSES

The Department hereby notifies all bidders that it will act affirmatively to ensure that for any Department contract DBE's, Small Contractors, and Small Contractor Minority Business Enterprises that have been prequalified as a prime contractor by the Department will be afforded full opportunity to submit bids in response to the bid solicitation, and that they will not be discriminated against on the grounds of race, color, national origin, sex, sexual orientation, mental retardation or physical disability, including but not limited to blindness, in the Department's award of the subject contract.

D. REQUIREMENT THAT BID BE SUBMITTED BY THE CONTRACTOR THAT WAS ISSUED THE BID PROPOSAL FORM BY THE DEPARTMENT

Bid proposal forms are nontransferable. Any prospective bidder that has been issued a proposal form and transfers the form to any other person, party or corporation may be found nonresponsible as an apparent low bidder for any pending Department bids, or may, subject to statutory requirements, be disqualified for up to two (2) years from bidding for Department or State contracts. Any bid proposal from a bidder who was not issued a proposal form directly by this Department may be rejected.

E. BID PROPOSAL CONTENTS AND SUBMISSIONS

The Department's bid proposal form states the location and description of the work to be done, the estimated quantities of the work to be performed and materials to be furnished, the number of calendar days in which (or the date by which) the construction work must be completed, and the scheduled date and time for the opening of bids for the subject contract. The bidder will be furnished with any special provisions or requirements which vary from or are not contained in the Standard Specifications.

F. EXAMINATION OF PLANS, SPECIFICATIONS, SPECIAL PROVISIONS AND SITE OF WORK

The bidder is required to examine carefully the site of work, and the proposal form, plans, special provisions, specifications, supplemental specifications, Contract form and other Contract documents for the work contemplated; and it will be assumed that the bidder has judged for and satisfied itself as to the conditions to be encountered, as to the character, quality and quantities of the work to be performed, materials to be furnished, and as to the requirements of the above documents, and in particular, but not limited to, what is required under each Contract item, or under the general cost of the work, or under another or more general Contract item in the absence of particular items.

The subsurface information furnished is based on the interpretation by the Department of investigations made only at the specific locations indicated, and no assurance is given that these conditions are necessarily typical of other locations or that they have remained unchanged since the field data were obtained. No assurance is given that the presence or absence of water in subsurface explorations at the time of these explorations will be representative of actual conditions at the time of construction. Such subsurface information as was obtained by the Department for its use in the design of the Project will be available for inspection by bidders through the Division of Contracts. Also, if available, samples of the materials encountered in the subsurface explorations may be examined by bidders at a location specified by the Department under advance arrangements made through the Division of Contracts. The contractor shall be solely responsible for all assumptions, deductions, or conclusions it may make or derive from its examination of any Department subsurface information, document or sample. In furnishing or making available such information, the Department makes no warranty or representation as to the actual conditions that may be encountered or actual quantities or distribution of quantities of work which will be required.

G. BIDDERS' KNOWLEDGE OF APPLICABLE LAWS

Bidders shall be deemed to know and understand all federal, state and local laws, ordinances and regulations and municipal bylaws which in any

manner apply to projects for which they bid; such legal requirements shall include but not necessarily be limited to those which apply to the conduct of the Project work, the equipment and materials to be used on the Project, or the treatment of individuals or classes of individuals in relationship to their involvement with the Project. A Contractor's ignorance of such requirements shall not, in any internal Department proceeding or in any claims or other legal proceeding, constitute justification for the Contractor's failure to consider such requirements in formulating a bid proposal, or for the Contractor's failure to ensure that such legal requirements are met with regard to any Department project in which that Contractor participates.

H. PREPARATION OF PROPOSALS

The bidder must submit its proposal on the forms furnished by the Department. The blank spaces in the proposal must be filled in correctly where indicated, for each and every item given; and the bidder must state, both in words and in numerals, written or printed in ink, or typewritten, the unit prices for which the bidder proposes to do each item of the work contemplated. In case of a discrepancy between the words and the numerals, the words shall govern. Ditto marks are not considered writing, printing or typewriting, and shall not be used. The bidder shall also show the total amount of its bid in the space provided in the proposal form. In case of any discrepancy, the unit prices expressed in words shall govern in determining the correct amount of the bid (except under certain exceptional circumstances; see X[F][2]below). The bidders shall sign their proposal correctly. If the proposal is made by an individual, his or her name and post office address must be shown. If the proposal is made by a firm, partnership or corporation, the proposal must be signed by an official of the firm, partnership or corporation authorized to sign contracts, and must also show the post office address of the firm, partnership or corporation.

I. ADHERENCE TO THE BID PROPOSAL FORM AND ITS REQUIREMENTS

Proposals may be rejected if they show any irregularities, omissions, alteration of form or additions not called for, or do not comply with instructions to bidders, or contain conditional or alternate bids, unless alternate bids or bids on alternate materials are specifically called for in the proposal form.

J. ESTIMATED QUANTITIES IN BID PROPOSAL FORMS

The quantities shown on the proposal form are approximate only and are given as a basis of calculation upon which the award of the contract is to be made. The Department does not assume any responsibility that these quantities shall remain unchanged in the actual construction, and the contractor shall not plead misunderstanding or deception because of any variation between estimated and final quantities. The Department reserves the right to increase or decrease any or all of the quantities shown on the proposal form as may be necessary to properly complete the contract project.

K. BIDDER'S OBLIGATIONS IF IT DISCOVERS AN ERROR IN THE CONTRACT

Any bidder that discovers an error in the bid proposal or contract documents, including but not limited to the plans, must report that error in a letter to the Manager within two (2) business days of discovering the error. A failure to do so may result in the Commissioner's finding the contractor to be nonresponsible as the low bidder for one or more Department contracts, and may be subject to other adverse action by the Department.

L. SWORN STATEMENT BY BIDDER

The bidder submitting a proposal shall file with the Department a sworn statement executed by, or on behalf of, the person, firm, association, partnership or corporation submitting the proposal, certifying that such person, firm, association, partnership or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such proposal.

This sworn statement shall be an affidavit on a form supplied by the Department, executed and sworn to before a person who is authorized by the laws of the State to administer oaths, and shall be filed with the Department at the time of bidding.

M. REQUIRED CERTIFICATION OF ELIGIBILITY TO BID

Except as a bidder may explain in a writing attached to its bid proposal, the signature on behalf of the bidder on its bid shall constitute certification that the bidder and all persons associated with it in the capacity of owner, partner, director, officer, manager, internal auditor, or in any position involving the control or use of funds received from a federal or state agency in connection with construction activities:

(a) are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in contracts or other programs by any state or federal department or agency;

(b) have not, within a three-year period preceding preparation of the bid proposal, been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining or attempting to obtain a government contract, or performing under the terms of a government or quasi-governmental transaction or contract; and have not violated any laws concerning antitrust practices, embezzlement, theft, forgery, bribery, falsification or destruction of records, the making of false statements, or receiving of stolen property;

(c) have not been indicted for or otherwise charged by a governmental entity with commission of any of the types of offenses described in paragraph (b) above; and

(d) have not within a three-year period preceding the preparation of the bid proposal, had a government transaction or contract to which it was a party terminated for cause or default:

If a bidder is unable to make the certification described above, the bidder shall attach to its proposal a detailed explanation of the extent and reason for that inability.

Any bidder submitting a proposal shall ensure that each of the bidder's lower-tier participants in the project (including, among any others, each subcontractor, supplier, materialman, lessor and vendor) prior to each lower-tier party's participation in the project, makes the same certification that is required of bidders under the preceding provisions of this article. A

copy of the required certification shall be provided by the bidder to each of its proposed lower-tier participants.

If any such proposed lower-tier participant is unable to make the full required certification, it shall submit to the bidder a detailed explanation of the extent and reason for that inability and the bidder shall submit a copy of said explanation to the Manager. If no such explanation from any proposed lower-tier participant is submitted by a bidder, the bidder shall be deemed to have thereby certified that all of its proposed lower-tier participants in the project have made the full required certification as required under this article. By virtue of federal regulations, no person currently suspended, debarred or voluntarily excluded under 49 C.F.R. or otherwise determined to be ineligible, as defined by said regulations, will be eligible to bid for or participate in any federal-aid project administered by the Department. By submitting a proposal to the Department, the bidder agrees that if it should be awarded the contract for such a federal-aid project it will not knowingly enter into any lower-tier transaction on that project with a person (including entities) who, by virtue of federal law or regulation, or by voluntary agreement, is currently ineligible to participate in such a project, unless after disclosure of such ineligibility, such participation is authorized by appropriate federal and State authorities.

N. DELIVERY OF BID PROPOSALS

Each proposal must be submitted in a sealed envelope, furnished by the Department. The blanks showing the name of the town and the description of the work to be done must be correctly filled in, and the envelope must be delivered to the Contracts Section, on or before the hour and date set forth in the bid advertisement for the opening of proposals, unless the bidder is otherwise directed.

O. WITHDRAWAL OF BID PROPOSALS

A bidder will be given permission to withdraw any proposal after it has been deposited with the Manager, provided the bidder makes its request in writing to the Manager before the related bids are opened. At the time of the opening of the proposals, when such proposal is reached, it will be returned to the bidder unopened. All requests pertaining to the withdrawal of proposals must be presented to the Manager prior to the time of opening any proposals for the project in question.

P. CONFIDENTIALITY OF PREQUALIFICATION APPLICATIONS AND BID PROPOSALS

Contractors' statements and requests for bid proposal forms submitted to the Department will be treated as confidential, for official Department use only, and will not be open to public inspection, except as may be required by law. It is the Department's position that pursuant to Connecticut General Statutes Section 1-210(b) (5) such documents are exempt from disclosure under the Connecticut Freedom of Information Act, and that the Department will not disclose such documents in response to requests made under that Act. (Contractors should understand, however, that such documents could be subject to disclosure in the unlikely event that they are responsive to a proper discovery request made in a court proceeding or arbitration.)

Q. QUESTIONS ABOUT THE BIDDING OR THE CONTRACT

Contractors must exercise some judgment in deciding how and to whom they address questions concerning the bidding for, or the terms of, a particular contract, or regarding the contract project, prior to the bid opening. If the question concerns general matters or procedures, it may be answered over the telephone by a member of the Contracts Section staff. If, however, the question asks for information that is not a matter of public record already, or for information or a clarification concerning the terms of the advertised contract or the underlying project, the question must be posed to the Manager in writing. It will then be necessary for the Department to issue a written notice or contract addendum to all bidders in order to clarify or resolve any related issue or problem.

IX. BID OPENING

On the date and at the time and place designated in the bid advertisement and in the related Notice to Contractors or addendum notice, the sealed bid proposals are publicly opened, read and posted in the Bid Record Book. Unit prices of the apparent low bidder and the second and third bidders are read publicly. At the time that a bid proposal is opened, it is checked for "responsiveness" in various respects, to determine if it complies with applicable statutes, regulations, and the Department's Standard Specifications. Each bidder is required to include with its bid

proposal the following documents: the completed bid proposal form, the required bid bond, an employer report of staffing in compliance with all applicable affirmative action and nondiscrimination requirements, a non-collusion affidavit, an updated Part C, and any other information required by the bid documents or by the Manager.

X. REVIEW OF BID PROPOSALS AND AWARD OF CONTRACTS

After the proposals are opened and read, the quantities will be extended and totaled in accordance with the written bid prices of the various bidders; and the bids will be verified or corrected. These results will be made public. As required by the project specifications or as directed by the Manager, but in no case more than fourteen (14) calendar days after the bid opening, the low bidder shall furnish to the Manager all required pre-award submittals, properly executed on the forms provided by the Department, such as, but not limited to: Disadvantaged Business Enterprises or Small Business Enterprises documentation; a schedule of progress or a time chart for the project work, in triplicate; and a complete statement of the origin and manufacture of any manufactured materials to be used in construction of the project, in quadruplicate. If requested, samples of such materials will be furnished at the bidder's expense. They may be subjected to the tests provided for in the contract to determine their quality and fitness for the work.

The Department may reject a bid as nonresponsive if the bidder does not make all required pre-award submittals within the time designated by the Department.

Charts or listings shall be on forms either furnished by or approved by the Department. The schedule of progress or time charts will show the plan of construction and the proposed method of carrying out this work, including a full statement of the equipment to be used. Such charts and listing may be used in consideration of the bids, and after award of the contract may be used by the Department as a check on the actual progress.

The Commissioner reserves the right to do any of the following without liability: a) waive technical defects in bid proposals as he or she may deem best for the interests of the State; b) reject any or all bids; c)

cancel the award or execution of any contract prior to the issuance of the "Notice to Proceed;" and d) advertise for new bids.

A. RULES FOR AWARD OF CONTRACTS IF THE AGGREGATE AMOUNTS OF THE BIDS FOR WHICH A GIVEN BIDDER IS THE APPARENT LOWEST BIDDER ON A GIVEN DAY WOULD PLACE THAT BIDDER OVER ITS BIDDING CAPACITY

A contractor may be issued and may submit proposals for more than one bid to be opened on the same day, but any and all bids which place the contractor in the position of exceeding its bidding capacity may be rejected. If the contractor is found to be the apparent lowest bidder for a project, and its bid for that project does not place the contractor over its bidding capacity or project bid limit, the contractor may be awarded a contract for that project; but any and all subsequent bids opened on the same day which would place the contractor in the position of exceeding its bidding capacity will be rejected. Any contractor submitting more than one bid proposal to be opened on a given day must submit with each such proposal a written statement that if the contractor is found to be the low bidder for a project on that day, and if its bidding for that project places it over its bidding capacity, it shall be deemed to have withdrawn from that bid and from any and all further bids to be opened that day which would place the contractor over its bidding capacity. If a bidder proves to be the apparent low bidder for more than one contract on a given day, but its capacity is adequate only for the award of one of the contracts, the bidder shall not have the power to choose which contract to accept; the bidder will be awarded the contract(s) in the order in which the bids for them were opened, until the bidder's bid capacity is insufficient to cover the "next" contract.

If a bidder proves to be the apparent low bidder for more than one contract for which bids are opened on a given day, and if that bidder has sufficient bidding capacity to be awarded more than one of those contracts, **but** the bidder believes that it will not have sufficient other resources to perform all of its obligations under more than one of those contracts, it may submit a written request to the Manager, explaining its lack of adequate resources and asking to withdraw from consideration for the award of more than one of those contracts. The decision to grant or deny such a request will lie in the sole discretion of the Department, and such a request will not

likely be granted, except under unusual circumstances of understandable mistake, improbable events, or other exceptional cause. The contractor may not, in any event, choose which of the contracts it will enter into from that day's bidding; it must accept them in the order of the bidding until its available resources are insufficient to meet the obligations of the "succeeding" contract.

B. NON-COLLUSION AFFIDAVITS

An affidavit of non-collusion on the form provided by CONNDOT (which complies with the requirements of Title 23, CFR Part 635.112) must be completed and returned with the submitted bid. Failure to return a properly-executed affidavit of non-collusion with the proposal will result in rejection of the bid as nonresponsive.

C. ADDITIONAL PART C

The Part C statement of outstanding work required when requesting a bid package for bids must still be submitted as a pre-bid requirement. In addition, a current Part C must be submitted with the bid proposal. The information in the Part C submitted with the bid must have been gathered or produced no more than two (2) weeks prior to the submission of the bid proposal.

It is understood that some bidders' record-keeping and accounting systems may not generate, or be able to generate, reports of outstanding work frequently enough to produce "new," up-to-date information within that time frame, in which case the bidder should submit the most recent information or report generated by its "system." The latter will be acceptable to the Department, however, only if the information submitted with the bid (a) was "pulled from the system" within two weeks prior to submission of the bid, and (b) the underlying information was accurately updated by the bidder's "system" no more than one-month before the bid submission. The Part C must be completed, notarized and signed by an individual authorized to sign legal documents and contracts on behalf of the bidder.

Failure to comply with these requirements will result in the bid being rejected as nonresponsive. If the Commissioner deems that a failure to provide timely and accurate information about its outstanding work was

intentional on a contractor's part, and was designed to deceive the Department as to the contractor's true bidding capacity or in some other respect, the Commissioner may deem that failure to be sufficient cause for finding the contractor nonresponsible if it should become the apparent low bidder for a Department contract.

In submitting a Part C, a contractor may, in lieu of providing on the Part C itself all of the information required under "NOTE" in the Part C, provide that information on a spreadsheet or other such supplemental form which shall be attached to the Part C. Such a supplement must, however, provide all of the information required under "NOTE" in the Part C, and the Part C must contain a statement specifically incorporating the contents of the attached supplement. In addition, the totals on the supplement must also be entered in the "Total" columns of the Part C, and the Part C itself still must be completed, notarized, sealed and signed by a duly-authorized representative of the contractor.

A photocopy of the Part C may be used for a submission, provided that it is a clear and complete reproduction of the Department's form. Prospective bidders that submit an altered original or altered photocopy of the form, or that submit some other type of reproduction of the form (produced by computer or other means), however, may have their bids rejected as nonresponsive, and may, if they become the apparent low bidder for a contract, be deemed nonresponsible as such.

D. BONDING

Except when otherwise specified, no proposal will be considered unless accompanied by a proposal guaranty in the form of a bond from a surety company, satisfactory to the Commissioner, on the form furnished by the Department, in an amount equal to at least 1/3 of the amount of the bid (rounded upward to the nearest penny), or unless the bidder has on file in the Contract Section an annual bid bond in the proper amount. If a bid proposal is not accompanied by a properly completed bid bond that meets all Department requirements for such, the bid proposal will be rejected as nonresponsive.

1. Bid Bonds and the United States Treasury Listing

No bid bond will be accepted by the Department unless: (a) it is

written by a bonding company that appears in the United States Department of the Treasury's current listing of sureties approved to issue bonding for federal construction projects, and (b) the bond is written for an amount that does not exceed the bonding company's underwriting limitation as stated in the current edition of said listing. Any bid proposal which includes a bid bond that does not meet these requirements will be rejected as nonresponsive.

2. Annual Bid Bonds

In lieu of submitting a bid bond for each individual contract project for which a contractor bids, the contractor may file with the Manager, on the form provided by the Department, an annual bid bond to cover any Department contracts for which the contractor becomes the apparent low bidder during the year covered by the bond. If the unused amount of an annual bid bond is insufficient to meet the bonding requirement for a given bid, the bidder must submit with its bid proposal a separate bid bond in the full amount required for that bid; the remaining portion of the annual bid bond may not be applied toward the bid bond requirement for the subject bid.

3. Defects in Bid Bonds

Any defect in a bid bond submitted with a bid proposal may result in the rejection of the related bid proposal. Any defect in the bond which the Department deems to be material will result in the automatic rejection of the bid. No such material defect may be cured once the bid is opened, since the desired coverage must take effect at the moment the bid is opened.

4. Reinsurance and Coinsurance

No reinsurance or comparable offering or arrangement will be accepted in connection with bid, payment, or performance bonds. Neither will coinsurance be acceptable with respect to bid bonds. Coinsurance will be acceptable, however, for payment and performance bonds, subject to the following limitations:

(a) For contracts with a bid price of less than ten million dollars ($10,000,000), no coinsurance will be accepted.

(b) For contracts with a bid price of between ten million dollars ($10,000,000) and fifty million dollars ($50,000,000), a maximum of two (2) insurers may provide the bonding as coinsurers.

(c) For contracts with a bid price of more than fifty million dollars ($50,000,000), a maximum of three (3) insurers may provide the bonding as coinsurers.

Proposed coinsurers must understand and agree that the Department will be entitled to hold all sureties which execute Payment and Performance Bonds as coinsurers jointly and severally liable for the entire obligation set forth by the bonds which they provide as coinsurers. Sureties will not be allowed to limit their individual obligations under such bonds to anything less than liability for the full amount of the bond.

E. UNBALANCED BIDS

While it is often impossible to designate precisely the dividing line between a balanced bid and an unbalanced bid, contractors should be aware that in some cases the Department may regard the unbalancing of a bid as so extreme, undeniable, or detrimental to the interests of the State that it may question the contractor about the apparent unbalancing of the bid proposal, and may, if the contractor cannot provide a satisfactory explanation of the apparent unbalancing, reject the bid as nonresponsive.

F. BIDS WITH ERRORS REGARDING STATEMENT OF PRICES

1. Bid Proposals in Which the Bidder Has Left One or More Spaces Blank in the Listing of Unit and Total Prices for Contract Line Items.

With respect to such bids, it has been the Department's practice to reject any bid proposal in which the bidder has neglected to fill in a unit price for more than one line item. The reason for this is that it is not the proper business of the Department to formulate bid prices for bidders who neglect to submit them. If more than one such price is missing from a bid proposal, we cannot use the provided figures to calculate what each of the missing figures would "need" to be. If only one unit price or total line item price is missing, however, one can calculate what the missing figure must be in order for the sum of the line item prices to equal the total bid price. Such

calculation provides at least a very strong indication of what the bidder intended.

But when both the unit and total price for more than one line item is missing, the Department has no reliable evidence of what each of the bidder's intended prices were at the time of the bidding. It is not enough to have the total bid price, since the Department needs to know what to pay for each unit or line item, particularly since the estimated quantities are likely to vary from the final, actual quantities.

In those instances in which the price for only one unit or line item is missing, and in which the missing figure seemingly can be derived by an arithmetical calculation from the figures given, the Department has looked at certain factors in deciding whether or not to recommend that the bid be rejected. (In doing so, the Department has borne in mind [a] that the law does not require a government contracting authority to accept <u>any</u> nonresponsive bid, no matter how minor or technical the defect which makes it nonresponsive; and [b] that such an authority <u>may</u> accept a defective bid if the defect is merely technical and therefore waiveable. <u>See</u> Department Standard Specifications § 1.03.01(a). The following are questions and factors that the Department has considered in such instances:

(a) If the missing figure can be calculated from the supplied figures, does that calculation provide a line item price that is mathematically consistent with the total bid price?

(b) Is the figure which is derived arithmetically from the supplied figures consistent with market prices for the subject item? In considering this question, the Department usually (i) compares the derived price to the prices for that item that were provided by the other bidders, and (ii) asks people in the Construction Division if, based on their experience, the derived price would be reasonable for the item in question.

(c) If the answers to the questions in (a) and (b) above are affirmative, the Department then asks the bidder to answer the following questions in writing: (i) Had the bidder intended to fill in the blank(s) that it left in the listing of proposed prices? (ii) If so, what figure(s) had the bidder intended to place in the blank(s)? (iii)

If the bidder had intended to supply the missing figure(s), why did it fail to do so?

If the bidder (i) answers the questions in (a) and (b) in the affirmative, (ii) confirms in writing that it had intended to provide the missing price information in its bid, (iii) identifies in writing an intended price that is the same as the price(s) that we derived arithmetically from the supplied information, and (iv) provides in writing a plausible and excusable reason for having failed to supply the missing information at the time of bid, then the Department will likely waive the defect and accept the bid – barring the presence of some other factor which would make it inappropriate or unfair to do so.

2. Bid Proposals in Which the Unit Price Provided in Words for a Contract Line Item and the Unit Price Provided in Numbers for That Item Conflict with Each Other or with the Total Price Given for That Line Item.

In some instances, the Department has made decisions that might seem to conflict with this provision of § 1.02.05 of the Standard Specifications: "In case of a discrepancy between the words and the numerals [provided by the bidder for unit prices], the words shall govern."

In many instances, the Department would apply this provision strictly as written. The exceptions have been for instances in which (a) the unit price given in words or the total price for the line item is not consistent with the estimated quantity and the unit price given in numbers; (b) the price which is inconsistent with the other figures is indisputably unreasonable as an estimate of the unit or item's cost; (c) the bidder, in writing, confirms that it made a mistake in supplying the inconsistent number, explains how the mistake was made, and informs the Department what the bidder intended the price to be; (d) the figure provided in that writing is arithmetically consistent with the other figures provided for the line item in question and for the total bid price; and (e) the figure provided is reasonable in light of the market price of the item, as reflected in the other bidders' prices for the item and in the experience of the Department's construction personnel.

When the price apparently and allegedly provided by mistake would be an outlandish price for the item in question, and when the difference between the bidder's total bid price using the mistaken figure and its total

bid price using the presumed, corrected figure would not make a difference in the bid order, the Department likely will use the corrected price in reviewing the bid, and will not reject the bid because of the discrepancy. If, however, the decision as to which figure to use could change the bid order, so that the identity of the low bidder depends upon it, the Department scrutinizes the bid even more strictly, and rejects it if there is any significant doubt about its acceptability.

If, in the judgment of the Department, the difference between the words and the numbers is not outlandish, is not plainly the result of a mistake, or would not make a difference in the identity of the low bidder, or if the totality of the circumstances do not, in the Department's opinion, establish the clear intent of the bidder, then the effective bid price or prices will be determined according to the rules set forth in Article 1.02.05 of the Standard Specifications, even if the bidder claims, after the bid opening, that the price or prices in question were supplied by mistake.

The pertinent portion of Article 1.02.05 provides: "... In case of a discrepancy [in the listing of unit prices in a bid proposal] between the words and the numerals, the words shall govern. Ditto marks are not considered writing, printing or typewriting, and shall not be used. The bidder shall also show the total amount of its bid in the space provided in the proposal form. In case of any discrepancy, the unit prices shall govern in determining the correct amount of the bid."

G. REJECTION OF BIDS OR BIDDERS

1. Nonresponsive Bids

The Commissioner may reject a **bid** proposal as **nonresponsive** if, for instance:

(a) the contractor's project bid limit, if any, is not greater than or equal to the Department's Engineer's estimate of the cost of the proposed work; or if the contractor's bidding capacity is not equal to or greater than the estimated project cost combined with the value of all other work

(i) which the contractor has undertaken but not yet completed and

(ii) for which the contractor is the apparent low bidder, but for which the contractor has not yet been awarded a contract;

(b) the contractor has failed to file with the Department a current contractor's prequalification statement and request for proposal which comply with this manual;

(c) the contractor, since its last submittal of a contractor's prequalification statement to the Department, has failed to provide the Department with revised information required under the provisions of this manual within such time as may have been prescribed by the Department for that purpose;

(d) the contractor has failed in some other way to provide accurate information or documents as and when requested by the Department (if, however, the Department deems a failure of this kind to have been designed to conceal or falsify the truth of a pertinent matter, that failure may constitute cause for finding the bidder);

(e) the bid bond or the non-collusion affidavit submitted with the bid proposal is defective or incomplete;

(f) the contractor has not submitted to the Department an affirmative action plan which is currently acceptable to the Department;

(g) the contractor has altered the bid proposal without the written consent of the Manager to do so;

(h) the contractor submits an alternate bid when the bid solicitation and proposal form do not call for one;

(i) the contractor has submitted a bid which the Department regards as unbalanced in a way that is extreme, undeniable, or detrimental to the interests of the State; or

(j) the contractor has submitted a bid proposal which in some way fails to make a full commitment to satisfy all requirements of the subject contract, including all applicable plans and specifications (such failures would include, but is not limited to, any alteration by the bidder of the terms of the bid proposal, the submission of a defective or unenforceable bond,

and the failure to provide pricing or other information required by the Department's bid proposal form).

2. Nonresponsible Bidders

The Commissioner may reject an apparent low **bidder** as **nonresponsible** if, for instance:

(a) in the opinion of the Commissioner, the contractor should not, for other reasons, be deemed to be qualified to receive an award of the pending contract under applicable laws and regulations;

(b) in the opinion of the Commissioner, the contractor does not have a satisfactory record of compliance with federal, state and local laws and regulations, including, but not limited to, those pertaining to the environment, discrimination, affirmative action obligations, occupational safety and health standards, labor and employment, and the prompt payment of subcontractors and suppliers;

(c) the contractor, or one or more individuals among the contractor's personnel, has been involved in acts of unethical business conduct, criminal conduct, or other wrongdoing;

(d) the contractor or an affiliate of the contractor is currently suspended or debarred by a government entity from bidding for contracts in a jurisdiction within this state or in any other jurisdiction;

(e) in the opinion of the Commissioner, the contractor lacks the necessary and sufficient organization, experience, equipment, skilled employees or agents, or the ability to obtain such equipment or personnel in a timely manner, which would enable the contractor to complete the project in accordance with the contract;

(f) in the opinion of the Commissioner, the contractor does not have a satisfactory record on one or more of its previous projects with any owner

(i) of performance in accordance with contract provisions, and

(ii) of cooperation with parties for or with whom it has worked, whether those projects were inside or outside of the State of

Connecticut, and whether those parties were public or private entities;

(g) in the opinion of the Commissioner, the contractor lacks the financial strength, resources or liquidity necessary to prosecute and complete the project in a timely and satisfactory manner;

(h) in the opinion of the Commissioner, the contractor lacks managers with the experience, knowledge, and good judgment in financial, business, and construction matters which the Commissioner deems necessary to ensure the satisfactory and timely completion of the project;

(i) in the opinion of the Commissioner, the contractor has made significant misrepresentations of fact to or about the Department; or

(j) the Commissioner deems, in his sole discretion, that there is reason to doubt that the contractor will fulfill all requirements of the contract and the law; that the contractor has the financial, managerial, and other resources necessary to do so; or that the contractor will exhibit integrity, honesty, cooperativeness, professionalism, and skill in all dealings related to the performance of the contract, and in all dealings that would arise from or relate to the contract or the underlying project.

XI. AWARD OF CONTRACTS

A. PERFORMANCE CONTRACT BOND AND PAYMENT BOND

The successful bidder, at the time of the execution of the contract, must deposit with the Transportation Manager of Contracts a surety company bond for the satisfactory completion of the work and surety company bond for the payment of debts pertaining to materials, rental of equipment, and labor used or employed in its performance under the Contract. These bonds shall each be in an amount equal to the amount of the Contract award. The forms of the bonds shall be those provided by the Department.

The surety must be a corporate surety licensed to sign surety bonds in the State of Connecticut. The costs of these bonds shall be included in the general costs of the Project, and the State shall not reimburse the Contractor for them under any listed Contract item.

B. FAILURE TO EXECUTE CONTRACT

Any bidder that fails, after ten (10) calendar days notice being given of acceptance of its bid, to enter into the contract and furnish the required surety bonds and insurance, shall forfeit its claim to the work; and its proposal guaranty shall be retained and used by the State, not as a penalty, but as liquidated damages.

XII. WITHDRAWALS OF CONTRACTS OR PROJECTS

As bidders should understand, the Department will also not award the subject contract to an apparent low bidder in those cases in which the Department decides to reject all bids and solicit new bids for the contract, or else to withdraw the project with no current plans to readvertise it. Possible reasons for withdrawing a project include, but are not limited to: losses of anticipated project funding, failure to obtain a necessary permit prior to bid or award, discovery of a mistake in estimated bid quantities or a defect in project design, pre-bid or pre-award design changes that significantly change the project, failure to include a necessary contract item in the bid proposal form, elimination of the first two or three lowest bids, failure to receive a bid price within the available funding limits, or failure to receive enough bids to assure the Department that it has received a competitive or reasonable proposal. In cases of such withdrawals for the best interests of the State or for purposes of maintaining the integrity of the bidding process, complaining bidders may or may not be afforded a meeting with Department representatives to discuss the Department's decision.

In some instances, events may have occurred which delayed the award of the contract for so long that it would not make economic sense for the Department to award the pending contract; **i.e.,** to do so would almost certainly result eventually in the contractor's filing a claim against the Department for substantial delay damages. Such a situation may arise, for instance, because the Department has had unexpected difficulty in obtaining a permit which is necessary for the project. In such instances, as an alternative to its withdrawing and readvertising the project contract, the Department may offer a responsible low bidder the opportunity to sign an agreement waiving all possible claims that might be based in part on the delay of the contract signing.

XIII. SUBMISSION AND REVIEW OF COMPLAINTS REGARDING BIDDING OR AWARDS

Connecticut law does not require the Department to provide for bid protests concerning its contract bid and award decisions, and the following does not establish any formal or enforceable right on the part of bidders to hearings on or appeals from the Department's bid and award decisions. Nonetheless, the Department is concerned that all such decisions be made on a sound, fair, and consistent basis. The Department gives, and will continue to give, serious consideration to all complaints from bidders concerning construction contract bids and awards. As most bidders know, the following describes the Department's longstanding practice regarding such complaints.

Any complaints regarding bids or proposed awards should be addressed in writing to the Transportation Manager of Contracts, Contracts Section, 2800 Berlin Turnpike, Room Number 1319, Newington, CT 06111. Such complaints must identify the pertinent project contract, and must state clearly and fully the nature of the complaint, all reasons for the complaint, and any action or remedy sought by the complainant.

Bids are reviewed initially by the staff of the Department's Contracts Section. Any decision to reject a bid as nonresponsive will be reviewed, in addition, by the Manager. If the Manager affirms such a decision, he or she will send (by mail and facsimile transmission) a letter to the bidder in question, informing it that its bid has been rejected, and explaining the reason(s) for said rejection.

If the bidder wishes to persuade the Department that its bid ought not to be rejected, or wishes to discuss related matters with Department representatives, the bidder must, within five (5) business days following the date of the Department's rejection letter, send to the Manager (by mail and facsimile transmission) a letter stating (1) the bidder's reasons, if any, for believing that its bid ought not to be rejected; (2) any questions that the bidder wants to pose to Department representatives regarding the matter; and (3) the bidder's request, if any, for a meeting with Department representatives to discuss the matter. Following receipt of such a letter, the contents of the letter will be examined and considered by the Director of the Division of Contract Administration, or some higher Department official.

The Department will then either (1) respond in writing to the complainant's letter, affirming or elaborating upon the Manager's initial decision, or modifying or reversing that decision, with an explanation of the reason(s) for doing so; or (2) offer the complainant a meeting with Department representatives at Department headquarters in Newington, at a specified time on a specified date. The complainant may bring legal counsel to such meeting. At such meeting, the complainant may make to Department officials whatever presentation it reasonably deems appropriate, and the complainant should submit copies of any documents that it wants the Department to consider in reviewing pertinent matters or requests.

An apparent low bidder may also be denied award of the subject contract if the Commissioner deems the bidder unqualified or otherwise nonresponsible as such. Causes for nonresponsibility may include, but shall not be limited to, those described in Section X(G)(2) above.

In any instance in which Department representatives believe that there is reason to be concerned about the responsibility of an apparent lowest bidder, one or more internal meetings to inquire into and discuss the causes for that concern will be held among officials from the Department's Bureau of Finance and Administration, and other affected Department bureaus or divisions. If the consensus of those in attendance is that there is good cause for such concern, a letter will be sent to the bidder by the Bureau Chief (the "Bureau Chief") of the Bureau of Finance and Administration, identifying the subject contract, stating the nature and cause of the Department's concerns, and inviting the bidder to a meeting ("nonresponsibility meeting") with Department representatives. If the bidder wishes to persuade the Department that the Commissioner should not deem it nonresponsible, or wishes to question Department officials as to what the bidder needs to do in order to avoid being found nonresponsible as the apparent lowest bidder for any future Department contracts, the bidder should accept the invitation in the manner prescribed in the Bureau Chief's letter.

Such a nonresponsibility meeting will be presided over by the Bureau Chief or by the Bureau Chief's delegee, and will be attended by other Department officials or employees involved with the causes for concern. Officials or employees from the bidder who have knowledge of matters related directly to the Department's concerns must attend the meeting. The bidder may also be represented at the meeting by any other individuals of its

choosing, including legal counsel. (Depending on the circumstances, the Bureau Chief may decide that more than one such meeting is necessary or appropriate.)

Subsequent to such meeting, the Bureau Chief, in consultation with other Department representatives, will make a decision as to whether or not to recommend to the Commissioner that the bidder should be deemed nonresponsible. If the Bureau Chief recommends such a finding, he or she will transmit to the Commissioner a memorandum setting forth the recommendation and specifying the reasons and support for that recommendation. The Commissioner will then review the recommendation and findings with other Department officials, and will inform the bidder of the Commissioner's decision by letter, either adopting the Bureau Chief's memorandum of recommendation and findings (which, in such case, shall be attached to the Commissioner's letter), or directing the Bureau Chief to continue the process of awarding the subject contract to the bidder.

If (1) the causes for the Department's concern regarding the bidder's responsibility have been the subject of prior meetings or correspondence between the Department and the bidder, (2) the Commissioner deems that the bidder has already had ample notice of those concerns and an ample opportunity to be heard in that connection, and (3) time constraints (such as those imposed by funding deadlines, public safety hazards, or scheduling sequences) make it impracticable to hold a nonresponsibility meeting of the kind described above, the Department may choose not to hold such a nonresponsibility meeting with representatives of the bidder before the Bureau Chief recommends a finding to the Commissioner.

If a bidder for a contract, although it was not itself an apparent lowest bidder for that contract, desires to pursue a complaint about the Department's decision **not** to reject another bidder's bid as nonresponsive, or **not** to find another bidder nonresponsible as the apparent low bidder for that contract, the complaining bidder should follow the same procedures described above for the complaints of apparent low bidders who are refused an award.

STATE OF CONNECTICUT

DEPARTMENT OF ADMINISTRATIVE SERVICES

CONTRACTOR PREQUALIFICATION PROGRAM

APPLICATION

Mailing Address:
Department of Administrative Services (DAS)
Contractor Prequalification Program
165 Capitol Ave., 5th Floor East
Hartford, CT 06106
Telephone: (860) 713-5280
Fax: (860) 713-7439
Web Address: www.das.state.ct.us

Please contact us at the number above if you need this application in an alternate format.

Department of Administrative Services

CONTRACTOR PREQUALIFICATION PROGRAM

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Department of Administrative Services

CONTRACTOR PREQUALIFICATION PROGRAM

SECTION I: APPLICANT CHECKLIST

This checklist is provided as a courtesy only to help you achieve a COMPLETE application. It is the responsibility of the applicant to make sure all application requirements and/or documentation noted throughout this application have been included. THE APPLICATION IS NOT COMPLETE UNTIL ALL REQUIRED DOCUMENTATION IS RECEIVED.

L = LIMITED LIABILITY COMPANY (LLC) S = SOLE PROPRIETORSHIP P = PARTNERSHIP C = CORPORATION

Business Type				Description
L	S	P	C	
X	X	X	X	**Financial Statement** Company's most current fiscal year financial statement prepared by a certified public accountant. This financial statement must be reviewed or audited by a certified Public Accountant who conforms with generally-accepted principles, and shall include all supporting schedules, all contracts in progress, all contracts completed and all footnotes. In addition, it must indicate your company's current assets, current liability, total assets, total liability, and net worth.
X	X	X	X	**Letter from Bonding Company** Indicating date of letter, company name, company address, Aggregate Work Capacity (the maximum amount of work company is capable of undertaking), single limit capacity (the estimated cost of a single project that your company is capable of undertaking), and contact information for bonding company's representative.
X	X	X	X	**Copies of all Licenses, Permits, Registrations, and/or PUC Leases**
X	X	X	X	**Signature Sheet** Signed by an authorized person identified in the on-line application
	X			**Trade Name Certificate** For the Town Clerk's Office (If out of state provide documentation used by your State, City or Town to register Sole-Proprietorships).

SECTION I: APPLICANT CHECKLIST (Continued)

This checklist is provided as a courtesy only to help you achieve a COMPLETE application. It is the responsibility of the applicant to make sure all application requirements and/or documentation noted throughout this application have been included. THE APPLICATION IS NOT COMPLETE UNTIL ALL REQUIRED DOCUMENTATION IS RECEIVED.

L = LIMITED LIABILITY COMPANY (LLC) S = SOLE PROPRIETORSHIP P = PARTNERSHIP C = CORPORATION

Business Type				Description
X	X	X	X	**Letter of Good Standing from DRS (Dept of Revenue Services)** For information pertaining to this letter, you must submit your request to the State of Connecticut's Department of Revenue Services, 25 Sigourney St, Hartford, CT 06106. Your request must be submitted on your company's letterhead indicating the purpose of the request (Contractor Prequalification Program), Connecticut Tax Identification Number, company name, company physical address, address where the letter must be sent (State of Connecticut Department of Administrative Services, Contractor Prequalification Unit, 165 Capitol Avenue, 5th Floor East, Hartford, CT 06106, and signature of one of your company's officials.
X	X	X	X	**Payment** **Bank check or money order** for the appropriate fee. Make checks payable to Treasurer's Office, State of Connecticut
X	X	X	X	**Prequalification Classification(s)** Identify prequalification classification(s). For each classification, provide information on the applicant's experience on public and private construction projects over the past five (5) years, OR, the applicant's ten (10) most recently completed projects.
X	X	X	X	**Contractor Performance Evaluation(s)** Must use the Department of Administrative Services' Contractor Evaluation on-line form. Provide a performance evaluation for each project listed to document experience for EACH classification requested
X	X	X	X	**Principal(s) and Key Personnel** Information regarding the applicant's principals and key personnel pertaining to experience and qualifications (includes officers, directors, shareholders, members, partners, and managerial personnel).
X	X	X	X	**Safety Manual Table of Contents** Provide a copy of the table of contents for your company's Safety Manual.
X	X	X	X	**Signature Page** Signed by an authorized person identified in the on-line application

Department of Administrative Services

CONTRACTOR PREQUALIFICATION PROGRAM

SECTION II. PREQUALIFICATION PROCESS

- ***READ THE FOLLOWING CAREFULLY BEFORE COMPLETING THIS APPLICATION.***
- ***INCORPORATED BY REFERENCE TO THIS APPLICATION ARE APPLICABLE PROVISIONS OF CONNECTICUT PUBLIC ACT 03-215. THE PROVISIONS REFERRED TO IN THIS SECTION ARE, AS THEY EXIST ON THE DATE OF THIS APPLICATION. THOSE PROVISIONS MAY BE AMENDED DURING THE PREQUALIFICATION PERIOD.***
- ***THE DAS CONTRACTOR PREQUALIFICATION PROGRAM RESERVES THE RIGHT TO CORRECT INACCURACIES RESULTING FROM CLERICAL AND/OR ADMINISTRATIVE ERRORS AND TO MAKE CHANGES IN FORMS, PROCESSES, AND/OR DETERMINATIONS AS DEEMED TO BE IN THE BEST INTEREST OF THE STATE.***

I. Getting Started – What you need to complete your application.

Before starting, we recommend reading Section "II" below titled "Ineligibility" prior to beginning the application process

1. Most current fiscal year **reviewed or audited** financial statement prepared by a licensed Certified Public Accountant who conforms with generally accepted accounting principals and shall include all supporting schedules, all contracts in progress, all contracts completed and all footnotes. The statement must include your company's current assets, current liability, total assets, total liability, and net worth.
2. Letter from Bonding Company (on bonding company's letterhead) indicating date of letter, your company's name, company address, company's aggregate work capacity (the maximum amount of work your company is capable of undertaking for any and all projects), single limit (the estimated cost of a single project that your company is capable of undertaking), and contact information for bonding company's representative.
3. Copies of your company's licenses, registrations, and/or certifications.
4. Signature Sheet signed by an authorized person identified in the on-line application.
5. Letter of good standing from the State of Connecticut's Department of Revenue Services. For information pertaining to this letter, you must submit your request to the State of Connecticut's Department of Revenue Services, 25 Sigourney Street, Hartford, CT 06106, ATTN: Ms. Bardge - Collection and Enforcement Unit 6th floor. Your request must be submitted on your company's letterhead indicating the purpose of the request (Contractor Prequalification Program), Connecticut Tax Identification Number, company name, company physical address, address where the letter must be sent (State of Connecticut Department of Administrative Services, Contractor Prequalification Unit, 165 Capitol Avenue, 5th Floor East, Hartford, CT 06106, and signature of one of your company's officials.
6. **Bank check or money order** for the appropriate fee. Make checks payable to Treasurer's Office State of Connecticut.
7. Identify prequalification classifications requested (for each classification, be prepared to provide information on 3 projects that demonstrate experience for each classification).
8. Performance Evaluations – using the Department of Administrative Services' Contractor Prequalification Evaluation found under section titled "Request Evaluation" of the on-line application. Provide a Performance Evaluation for each project listed to document experience for each prequalification classification requested.
9. Information regarding your company's Principals and Key Personnel (includes officers, directors, shareholders, members, partners and managerial personnel) experience and qualifications.

SECTION II. PREQUALIFICATION PROCESS (continued)

II. Ineligibility

The following represent, but is not limited to, circumstances where DAS may find ineligibility:

1. Applicant is presently disqualified from bidding on state construction projects for violating any of the general form requirements set forth in C.G.S. 4b-95
2. Within the past two (2) years (from the date of application), the applicant's prequalification certificate (under P.A. 03-215, Section 3) was revoked after a finding that the applicant has included a materially false statement in the prequalification application and/or update statement.
3. Within the past five (5) years (from the date of application), the DAS has revoked the applicant's prequalification certificate (under P.A. 03-215, Section 3) after a finding that the applicant has been convicted of a crime related to the procurement or performance of any public or private contract, or has otherwise engaged in fraud in obtaining or maintaining prequalification.
4. Applicant is presently disqualified by the Department of Public Works from bidding on, applying for, or participating as a subcontractor under contracts with the state under C.G.S. 31-57c.
5. Applicant is presently disqualified by the Department of Transportation from bidding on, applying for, or participating as a subcontractor under contracts with the state under C.G.S. 31-57d.
6. Applicant is presently listed on the Department of Labor's list of contractors in violation of labor laws under C.G.S. 31-57a.
7. Within the past three (3) years (from the date of application), applicant, or any person or firm that has an interest in the applicant, has been cited (pursuant to C.G.S. Section 31-57b) for three (3) or more willful or serious violations of any occupational safety and health act or of any standard order of regulation promulgated pursuant to such act.
8. Within the past three (3) years (from the date of application), the applicant or any person or firm that has interest in the applicant, ever received one (1) or more criminal convictions related to the injury or death of any employee.
9. Applicant is presently disqualified from being awarded a state contract from any other state.
10. Applicant is presently disqualified from being awarded government contracts by any federal agency or pursuant to federal law.
11. Applicant's registration is presently suspended/revoked to perform work by the Department of Consumer Protection pursuant to C.G.S. 20-341gg.
12. Within the past two (2) years (from the date of application), the Connecticut State Ethics Commission has issued the applicant a fine for, or ruled that the applicant has given a gift pursuant to C.G.S. 1-84(m).
13. Within the past two (2) years (from the date of application), the Connecticut State Ethics Commission has issued the applicant a fine for, or ruled that the applicant has used its relationship with the State for the purpose of private gain pursuant to C.G.S. 1-84(e).
14. Within the past two (2) years (from the date of application), the applicant has knowingly given, directly or indirectly, a gift (as defined by C.G.S. 1-79(e) in violation of C.G.S. 1-84.
15. Applicant presently owes (overdue) money to any Connecticut State Agency.
16. Within the past five (5) years (from the date of application), any of the applicants contracts have been taken over (called in) by the surety company.
17. The applicant currently has a pending investigation(s), or legal or administrative proceeding(s) of a serious illegal activity related to the procurement or performance of any public or private construction contract(s).
18. On two (2) or more occasions, the applicant knowingly used any subcontractor(s) that have, in the past two (2) years, been on any disqualification list (identified in Section V of this application), or have been in violation of one (1) of the integrity questions (identified in Section V of this application).
19. The applicant has had a legal or administrative proceeding of a serious illegal activity related to procurement or performance of any public or private construction contract(s) concluded adversely against the applicant.
20. Within the past two (2) years (from the date of application), the applicant performed work with or for a public official that resulted in his/her family obtaining personal, financial, or material gain.
21. Applicant has less than three (3) successfully completed public or private construction projects in the past five (5) years within each prequalification classification requested.
22. Applicant has a score of 66.6% or less on the required written evaluations of applicant's performance on public or private projects completed within the past five (5) years.
23. Within the past five (5) years (from the date of application), any of the company's principals/key personnel that have served as principals/key personnel in another company whose bond(s) have been called in (while they were serving as principals/key personnel).
24. Within the past five (5) years, any of the applicant's principals or key personnel have been convicted of, entered a plea of guilty or nolo contendre for, or admitted to the commission of a criminal offense as an incident to obtain or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract pursuant to C.G.S. 31-57c and/or C.G.S. 31-57d.
25. Within the past five (5) years (from the date of application), any of the applicant's principals or key personnel have been convicted of, entered a plea of guilty or nolo contendre for, or admitted to the commission of any state or federal law(s) for embezzlement, theft, forgery, bribery, falsification or destruction of records, received stolen property or any other offense indicating a lack of business honesty pursuant to C.G.S. 31-57c and/or C.G.S. 31-57d.
26. Within the past five (5) years (from the date of application), any of the company's principals/key personnel have been convicted of, entered a plea of guilty or nolo contendre for, or admitted to the commission of any state or federal antitrust, collusion, or conspiracy law(s) arising out of the submission of bids or proposals on a public or private contract or subcontract pursuant to C.G.S. 3157c and/or C.G.S 3157d.

SECTION II. PREQUALIFICATION PROCESS (continued)

27. The applicant currently has a pending investigation(s), or legal or administrative proceeding(s) against any of the applicant's principals/key personnel that relate to a serious illegal activity related to the procurement or performance of any public or private construction contract(s).
28. The applicant has an investigation(s), or legal or administrative proceeding(s) concluded adversely against any of the applicant's principals/key personnel that relate to a serious illegal activity related to the procurement or performance of any public or private construction contract(s).
29. Within the past two (2) years (from the date of application), anyone within the applicant's company has ever performed work with or for a public official that resulted in the public official or anyone in his/her family obtaining personal, financial or material gain.
30. Applicant's Experience Modification Rate (EMR) is greater than 1.5

III. Responsibility of Contractor

1. It is the responsibility of each contractor to ensure that pre-qualification has been approved prior to submitting a bid.
2. It is the responsibility of each contractor to ensure that pre-qualification does not lapse. DAS will notify contractors as a courtesy via e-mail approximately ninety (90) days prior to expiration of pre-qualification.
3. It is the responsibility of each contractor to maintain current information regarding prequalification.
4. Contractors are required to notify DAS within five (5) business days of ANY material changes to information contained in this application. **Failure to do so may result in the suspension and/or revoking of prequalification and loss of bidding privileges.**

IV. Application Submittal

A. This application MUST be completed and signed by an individual duly authorized to respond and sign on behalf of the Applicant Company.
B. Signatures must be original and provided in ink. Applications signed in pencil, stamped, and/or unsigned will be rejected.
C. Applicant(s) should retain a copy of the completed application for reference.
D. The application must be completed in its entirety, as formatted.
E. Applications that are incomplete will have thirty (30) calendar days to be remedied. After thirty (30) days, any pending information not received will indicate an "Incomplete" status and the application will be cancelled. Once an application has been identified with an "Incomplete" status, a new application for Prequallification will need to be submitted along with the applicable fee.
F. If a question does not apply, insert "N/A" for Not Applicable.
G. Do not include attachments as replacements for State of Connecticut format.
H. Do not attach supplemental information unless specifically requested on the application.
I. The application shall be signed under penalty of false statement.
J. A prequalified contractor may apply at any time for additional prequalification classification(s), single limit and aggregate work capacity ratings by submitting the applicable increase in fee and a completed update statement.

V. Applicable Fees

A. **All fees are nonrefundable.**
B. **Fees are based on an Aggregate Work Capacity Rating**

1.	**$ 5,000,000.00 or less**	**$ 600.00**
2.	**$ 5,000,000.01 – $ 8,000,000.00**	**750.00**
3.	**$ 8,000,000.01 – $10,000,000.00**	**850.00**
4.	**$ 10,000,000.01 – $15,000,000.00**	**1,000.00**
5.	**$ 15,000,000.01 - $20,000,000.00**	**1,500.00**
6.	**$ 20,000,000.01 - $ 40,000,000.00**	**2,000.00**
7.	**$ 40,000,000.01 or more**	**2,500.00**

C. **Renewal fees shall be in an amount equal to one-half of the Application Fee for the applicable Aggregate Work Capacity Rating except that no fee shall be less than $600.00**
D. P.A. 03-215 establishes that any contractor certified as a prequalified contractor, does not have to pay the five hundred dollar ($500) Department of Consumer Protection (DCP) major contractor license fee.

SECTION II. PREQUALIFICATION PROCESS (continued)

VI. Bonding Company - Aggregate Work Capacity (AWC) Rating and Single Limit (SL)

A. Prequalification is contingent upon the applicant submitting a letter from a bonding company having at least an "A-" (A-minus) rating by the A.M. Best Company, and be authorized to transact business of the relevant type(s) of insurance in Connecticut.
B. A letter from Bonding Company indicating date of letter, your company's name, company's address, company's aggregate work capacity (the maximum amount of work your company is capable of undertaking for any and all projects), company's single limit capacity (the estimated cost of a single project that your company is capable of undertaking), and contact information for bonding company's representative must be submitted with application(s).

VII. Contractor Performance Evaluations (The link for Contractor Performance Evaluation Form can be found on the Prequalification Home Page)

A. P.A. 03-215 requires information from contractors on specific experience and performance for each prequalification classification requested. New applications must include Contractor Performance Evaluation(s) for each project identified for each of the prequalification classification(s) requested. As part of the application process, contractors will be required to coordinate Performance Evaluations for each project listed from the Project Owner indicated.
B. P.A. 03-215 also requires that each agency (project owner) submit a Contractor Performance Evaluation at 50% completion. This evaluation is shared between the Awarding Authority and the Contractor; and after 100% completion the evaluation is shared between the contractor the Awarding Authority and the DAS Contractor Prequalification Unit. (Note: The 100% evaluation must be provided to the DAS Contractor Prequalification Unit within 70 of the completion of the project).
C. Evaluation Criteria
1. Timeliness of Performance
2. Quality of Performance
3. Cost Containment (e.g., work within contract's allotted cost, accuracy of billing number & cause of change orders,
4. Safety
5. Contractor's working relationship with the agency and contractor's supervision of work.
6. Communication with the agency
7. Quality of the contractor's required documentation
8. Performance of the contractor's subcontractors
9. Contractor's any subcontractor's compliance with C.G.S. Part III of the Chapter 557 or C.G.S. Chapter 558 or the Federal Davis-Bacon Act, 40 USC, Sections 276a to 276a-5, inclusive

D. Contractor's Right to Contest: Any contractor who wishes to contest any information contained in the evaluation form may submit a written response to DAS Prequalification Unit not later than thirty (30) days after the date the form was mailed (as indicated by the postmark on the envelope) or emailed (as indicated on the dated email). Such responses shall set forth any additional information concerning the building project or the oversight of the contract by the public agency that may be relevant in the evaluation of the contractor's performance on the project. DAS Prequalification Unit shall include any such response in the Contractor's prequalification file.

VIII. Application Evaluation Criteria

P.A. 03-215 requires that applications be reviewed and evaluated based on the following criteria:
A. Applicant Information
B. Prequalification Classifications Requested, Aggregate Work Capacity Rating (AWC) and Single Limit (SL)
C. Integrity
D. Personnel
E. Capacity and Experience
F. Financial
G. Safety

IX. Application Review Process

A. Once a complete (an application is considered complete when all required supporting documentation is received by the DAS) application is received by the DAS Contractor Prequalification Unit the file will be assigned to an Analyst.
B. The Analyst has sixty (60) days to provide the applicant a preliminary determination.
C. The preliminary determination may be one of the following:
1. The contractor is prequalified for the prequalification classification(s), aggregate work capacity rating and single limit request in the application.
2. A denial of certification (see Appeal Procedures below)
3. A reduction in the level of certification sought (see Appeal Procedures below).
4. Non-renewal of certification (see Appeal Procedures below).
D. A Contractor Prequalification Certificate issued by the DAS, indicates the company name, prequalification classification(s), aggregate work capacity rating and single limit rating. Please retain this certificate for reference. The certification shall be effective for one (1) year from the date issued (note: Some expiration dates will go beyond one year. This staggering will assist in addressing administrative needs).
E. Once an applicant is prequalified, the company is placed in the on-line directory (www.das.state.ct.us) and substantiates company eligibility to participate on bids that required prequalification.

SECTION II. PREQUALIFICATION PROCESS (continued)

X. APPEAL PROCEDURES

A. Any applicant aggrieved by the DAS preliminary determination may request copies of the information upon which the DAS relied in making the preliminary determination.
   1. This request must be made not later than ten (10) days after the date the notice was mailed or sent by electronic mail.

B. The applicant may submit additional information to the DAS with a request for reconsideration.
   1. This additional information submittal cannot be later than twenty (20) days after the date the notice was mailed or sent by electronic mail.

C. The DAS shall issue a final determination regarding the application.
   1. Not later than ninety (90) days after the date the DAS mailed or set by electronic mail the notice of preliminary determination.

D. The DAS may extend the ninety (90) day period by an additional period not to exceed ninety (90) days if:
   1. The DAS gives written notice to the applicant that the DAS requires additional time
   2. Such notice is mailed during the initial ninety (90) day period.

E. Any applicant aggrieved by the Commissioner's final determination concerning a preliminary determination, a denial of certification, a reduction in prequalification classification or aggregate work capacity rating or a revocation or non-renewal of certification may appeal to the Superior Court in accordance with C.G.S. Section 4-183.

XI. Update Statements

P.A. 03-215 requires contractors to submit an Update Statement under certain situations:

A. Additional Prequalification Classification(s) for an existing certification.
   1. Utilize an Update Statement to request additional Prequalification Classification(s).
   2. There will be no change in the expiration date of the original certificate.
   3. Fee is six hundred ($600) regardless of the number of additional Prequalification Classification(s) requested.

B. Additional Aggregate Work Capacity (AWC) Ratings and/or Single Limit (SL) for an existing certification.
   1. Utilize an Update Statement to request additional Work Capacity Ratings.
   2. Submit the appropriate Aggregate Work Capacity Rating letter from the bonding company.
   3. A new certificate representing the additional AWC will be issued.
   4. The expiration date of the certification will change to one year from the newest certification date.
   5. Fee: The fee corresponding to the requested AWC.

C. Renewal of Prequalification Certification:
   1. A Prequalification Certificate may be renewed upon receipt of a completed Update Statement and a nonrefundable fee in an amount equal to one-half of the application fee for the applicable Aggregate Work Capacity Rating, except that in no event shall such fee be less that six hundred ($600).
   2. Requests for Renewals should be sent in at least sixty (60) days prior to expiration
   3. All areas of the Renewal Application Update Statement must be completed

D. Submitting a Bid Response:
   1. P.A. 03-215 requires that on and after October 1, 2004, each bid response submitted for a contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state or municipality, which is estimated to cost more than five hundred thousand ($500,000) and is paid for, in whole or in part, with state funds shall include a copy of a Prequalification Certification showing that bidder has the prequalification classification(s) and aggregate work capacity ratings required under such contract.
   2. Each bid response shall be accompanied by an Update Statement that shall include the following information:
      a. All projects completed by the bidder since the date the bidder's prequalification certificate was issued or renewed.
      b. All projects the bidder currently has under contract, including the percentage of work on such projects not completed.
      c. The names and qualifications of the personnel who will have supervisory responsibility for the performance of the contract.
      d. Any significant changes in the bidder's financial position or business organization since the date the certificate was issued or renewed.
   3. Any bid submitted without a copy of the prequalification certificate and an update statement shall be invalid.

SECTION II. PREQUALIFICATION PROCESS (continued)

XII. RENEWAL

The renewal of Contractor Prequalification Certificates will be based on the following:
At least sixty (60) days prior to the expiration date on the current contractor prequalification certificate.

1. If the contractor submits its renewal application sixty (60) days **prior** to its certification expiration date, the current certificate **remains in effect** until the Contractor Prequalification Unit takes an action.
    a. The fee = one-half (½) of the requested AWC or six hundred ($600.00) whichever is greater.
    b. The renewal date remains the same – with an additional year.
2. If the contractor submits its renewal application **within** the sixty (60) day period of its certificate expiration, the current certificate **may expire** and will not be in effect until the Contractor Prequalification Unit takes an action.
    a. The fee = one-half (½) of the requested AWC or six hundred ($600) whichever is greater.
    b. The renewal date changes to the date that the Contractor Prequalification Team took the action.
3. No contractor will be permitted to submit a renewal application **after** the current certification certificate has expired.
    a. Contractor must complete a new application.
    b. The fee = Full fee for the requested AWC.
    c. The date changes to the date that the new Contractor Certification is issued.

XIII. Safety

The Contractor Prequalification Unit will evaluate the safety history of applicant contractors. The following information will be reviewed and evaluated:

A. Experience Modification Rating (EMR)
    1. Experience Modification Rating (EMR) is a factor applied to an insurance policy, usually worker's compensation, that modifies the premium based on the policyholder's loss experience.
    2. Information will be required from your carrier that identifies the applicant's EMR.

B. Safety Manual / Meetings
    1. Applications will include information on the applicant's safety manual and the frequency and focus of safety meetings

XIV. Financials

The applicant shall include a statement of financial condition prepared by a certified public accountant which includes information concerning the applicant's assets and liabilities, plant and equipment, bank and credit references, bonding company and maximum bonding capacity, in order to effectively evaluate the applicant's financial capacity and responsibility.

XV. Terms & Definitions

1. ***Aggregate Work Capacity Rating*** means the aggregate work capacity rating established by the Commissioner of Administrative Services pursuant to Section 3 of P.A. 03-215.
2. ***Applicant*** means the company seeking prequalification.
3. ***Days*** means calendar days unless it falls on a weekend and/or State holiday, in which case, the next business day following the weekend and/or State holiday applies.
4. ***Prequalification*** means prequalification issued by the Commissioner of Administrative Services to bid on contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state or a municipality.
5. ***Prequalification Classification*** means the prequalification classifications established by the Commissioner of Administrative Services pursuant to Section 3 of P.A. 03-215
6. ***Subcontractor*** means any person who performs any of the four classes of work specified in C.G.S. Subsection (a) of Section 4b-93 with a value in excess of twenty-five thousand ($25,000) dollars
7. ***Principals and Key Personnel*** includes officers, directors, shareholders, members, partners and managerial employees.

SECTION III. APPLICANT INFORMATION

1. LEGAL BUSINESS NAME — 2. SSN OR FEIN NUMBER

3. D/B/A – DOING BUSINESS AS (IF APPLICABLE)

4. BUSINESS ADDRESS (PO BOX ONLY NOT ACCEPTED)
NUMBER/STREET — CITY — STATE — ZIP CODE

5. MAILING ADDRESS (IF DIFFERENT)
NUMBER/STREET — CITY — STATE — ZIP CODE

6. CONTACT NAME FOR PREQUALIFICATION TEAM (TYPED OR PRINTED)

7. TELEPHONE NUMBER (INCLUDE TOLL-FREE NUMBERS):

8. FAX NUMBER:

9. TYPE OR PRINT NAME OF AUTHORIZED PERSON — 10. TITLE OF AUTHORIZED PERSON

11. E-MAIL ADDRESS — 12. COMPANY WEB SITE

13. IS YOUR BUSINESS A:

☐ CORPORATION
DATE OF INCORPORATION ____/____/____
PLACE OF INCORPORATION _____

☐ GENERAL PARTNERSHIP
DATE OF PARTNERSHIP ____/____/____

☐ LIMITED LIABILITY COMPANY (LLC)
DATE OF LLC ____/____/____

☐ LIMITED LIABILITY PARTNERSHIP
DATE OF PARTNERSHIP ____/____/____

☐ SOLE PROPRIETORSHIP
DATE ESTABLISHED ____/____/____

☐ OTHER
DATE ESTABLISHED ____/____/____

14. INDICATE THE DATE THE BUSINESS WAS FIRST ESTABLISHED: ____/____/____

☐ BOUGHT EXISTING BUSINESS
☐ MERGER OR CONSOLIDATION
☐ SECURED FRANCHISE
☐ OTHER (PLEASE SPECIFY): _____

15. INDICATE THE STATE IN WHICH BUSINESS WAS ORGANIZED:

16. PROVIDE THE NUMBER OF YEARS UNDER CURRENT BUSINESS NAME:

17. PROVIDE THE NUMBER OF YEARS COMPANY HAS BEEN OWNED AND MANAGED BY PRESENT OWNER:

18. HAS THE BUSINESS EVER OPERATED UNDER ANOTHER NAME?
☐ YES (IF YES, ANSWER 19A & 19B) ☐ NO

19A. IDENTIFY THE PREVIOUS BUSINESS NAME:

19B. INDICATE THE DATE OF EXISTENCE: ____/____/____ TO ____/____/____

20. MONTH OF FISCAL YEAR END:

21. ARE YOU INTERESTED IN PARTICIPATING ON STATE OF CONNECTICUT – AGENCY ADMINISTERED PROJECTS UNDER $500,000.00?
☐ YES ☐ NO

22. Does the applicant company have ownership in any other business?
☐ YES ☐ NO
If Yes:
a) Provide the name of the business
b) The percentage of ownership in the business
c) The nature of the business
d) The dates of ownership

23. List all licenses, Permits, and/or PUC Leases held by the company.
For each License(s), Permit(s), PUC Lease(s) held, please provide:
a) Trade
b) License, Permit, and/or PUC Lease Identification Number
c) Date of License, Permit, PUC Lease
d) Expiration Date of License, Permit, PUC Lease

SECTION IV. PREQUALIFICATION CLASSIFICATIONS

1. Indicate classification(s) from the list below for which you wish to receive certification.
   EACH classification requested will require documentation to support experience and performance (See Section VII, "Capacity & Experience".)

1. To be considered for certification in any classification, contractors must perform work in those classifications using their own workforce.

2. Certification will not be granted in classifications where the work was subcontracted.

TOTAL AGGREGATE WORK CAPACITY REQUESTED: $ _____
TOTAL SINGLE LIMIT BONDING CAPACITY: $ _____

	Classification	Description	Licensure Requirement(s) (To view the licensure requirements and the Agency where licenses are obtained click on this website)
☐	ALARM SYSTEMS	Installation, renovation, repair and maintenance of low voltage fire protection, security and other types of alarm systems.	Not Applicable
☐	ASBESTOS REMOVAL	The removal and disposal of asbestos previously incorporated into a building, which may include encapsulation.	http://www.ct-clic.com/trantype.asp?code=739
☐	CONCRETE	Installation, renovation, repair and maintenance of poured in place concrete structures including foundations and structural concrete components including such incidental or related work as is customarily performed by those in the concrete trade.	Not Applicable
☐	CONCRETE: PRECAST STRUCTURAL & ARCHITECTURAL	Design, factory manufacture and field install precast concrete structural and architectural components for total precast concrete building systems. The types of structures would include parking garages, multi-unit housing, stadiums, office buildings, commercial buildings, schools, nursing homes and bridges.	Not Applicable
☐	DEMOLITION	Work customarily performed by a building wrecking contractor including the razing of buildings or parts of buildings major guttering of buildings or removal of structural elements of a building. The removal of partitions, flooring, windows, etc., incidental to a renovation or remodeling project is **NOT** within this category.	http://www.ct-clic.com/RsltKey.asp
☐	DOORS & WINDOWS	Work customarily performed by this industry, including installation of doors and windows made of wood, metal or other materials, both interior and exterior. This category does **NOT** include glass and glazing by itself.	Not Applicable
☐	DRYWALL & ACOUSTICAL	Installation, renovation, repair and maintenance of drywall and/or acoustical systems composed of metal or wood studs, drywall, taping including such incidental or related work as is customarily performed by those in the drywall/acoustical trade.	Not Applicable
☐	ELECTRICAL	Installation, renovation, repair and maintenance of electrical wiring, circuits, panel boards, fixtures and equipment, including, such incidental or related work as is customarily performed by those in the electrical trade.	http://www.ct-clic.com/trantype.asp?code=396

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SECTION IV. PREQUALIFICATION CLASSIFICATIONS (continued)

☐	ELEVATORS	The installation, renovation, repair and maintenance of power systems, process piping, instrumentation, controls, compressors, generators, turbines and other associated mechanical systems equipment. This category applies, in particular, to work on mechanical systems found in major buildings such as power plants, sewage and water treatment plants, pumping stations and similar buildings, which requires major mechanical contracting experience.	http://www.ct-clic.com/trantype.asp?code=397
☐	ENERGY MANAGEMENT SYSTEMS	The design and installation of systems or maintenance programs to conserve energy use within a building. This category includes shared savings programs.	Not Applicable
☐	FIRE PROTECTION SPRINKLER SYSTEMS	Installation, renovation, repairs and maintenance of fire protection sprinklers in buildings, including such incidental or related work as is customarily performed by those in the Fire Protection/Sprinkler System trades.	http://www.ct-clic.com/trantype.asp?code=399
☐	FLOOR COVERING	The installation of carpeting, resilient floor coverings, hardwood flooring and all types of tile installed as finished flooring.	Not Applicable
☐ ☐	**(GROUP A)** GENERAL BUILDING CONSTRUCTION CONSTRUCTION MANAGER AT RISK ***Note:*** ***If you are prequalified for General Building Construction, Construction Manager, and/or Construction Manager at Risk under Group B and/or Group C, you are automatically prequalified for Group A***	The undertaking of general contracts for the construction of buildings (i.e. new construction, renovation, rehabilitation, alteration, addition, etc.). The contract must include a variety of construction practices and supervision of a minimum of three sub-trades. Includes those designs that are repetitive, conventional in character, require minimum design based on pre-engineered systems, and that pose minimum effort by the design professional. Examples include repetitive designs, dormitories, warehouses, basic building structures without interior finishes, ceiling replacement, etc.	http://www.ct-clic.com/trantype.asp?code=419
☐ ☐	**(GROUP B)** GENERAL BUILDING CONSTRUCTION CONSTRUCTION MANAGER AT RISK ***Note:*** ***If you are prequalified for General Building Construction, Construction Manager, and/or Construction Manager at Risk under Group B, you are automatically prequalified for Group A.*** ***If you are prequalified for General Building Construction, Construction Manager and/or Construction Manager at Risk under Group C, you are automatically prequalified for Group A and Group B.***	The undertaking of general contracts for the construction of buildings (i.e. new construction, renovation, rehabilitation, alteration, addition, etc.). The contract must include a variety of construction practices and supervision of a minimum of three sub-trades. Includes most of the structures that normally house State functions. These all require normal mechanical/electrical systems for today's standards of operation for quality space, security and environmental comfort. Examples include office buildings, general classroom and administrative offices, college buildings, auditoriums, maintenance buildings and recreation facilities.	http://www.ct-clic.com/trantype.asp?code=419

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CONTRACTOR PREQUALIFICATION PROGRAM

SECTION IV. PREQUALIFICATION CLASSIFICATIONS (continued)

☐ ☐	**(GROUP C)** GENERAL BUILDING CONSTRUCTION CONSTRUCTION MANAGER AT RISK ***Note:*** ***If you are prequalified for General Building Construction, Construction Manager, and/or Construction Manager at Risk under Group C, you are automatically prequalified for Group A and Group B***	The undertaking of general contracts for the construction of buildings (i.e. new construction, renovation, rehabilitation, alteration, addition, etc.). The contract must include a variety of construction practices and supervision of a minimum of three sub-trades. Includes buildings that are truly custom, requiring extensive detailing, or that have large amounts of integrated scientific or complex mechanical/electrical equipment in order for them to function. Examples include hospitals, chemistry buildings, special collections buildings, historic preservation to a landmark structure, and/or any other structure that is truly one of a kind within the State's inventory.	http://www.ct-clic.com/trantype.asp?code=419
☐	GENERAL TRADES	The undertaking of general contracts for the construction and/or supervision of several sub-trades but not the construction of buildings as described in General Building Construction. The contract must include a variety of construction practices and supervision of a minimum of three sub-trades. The work of this category is intended for the interior finishes of a building.	Not Applicable
☐	HISTORICAL BUILDING RESTORATION • MASONRY • ROOFING	**Construction/renovation, masonry, and roofing work will require contractors with experience with the Secretary of the Interior's Standards for Rehabilitation issued by the U.S. Department of Interior, National Park Service, Washington, D.C. (Standards for Treatment of Historic Project.)**	Not Applicable – ***However depending on restoration, a specific license may be required.***
☐	HVAC	Installation, renovation, repair and maintenance of the systems and apparatus required, collectively or individually, to provide comfort heating, ventilation and/or cooling within or associated with a building, including such incidental or related work as is customarily performed by those in the HVAC trade. This category does not include sheet metal work by itself.	http://www.ct-clic.com/trantype.asp?code=424
☐	IRON: STRUCTURAL & MISCELLANEOUS	Fabrication and erection of structural steel and miscellaneous iron used in the repair, renovation and new construction of the structural and miscellaneous steel elements of a building.	Not Applicable
☐	LEAD ABATEMENT	The undertaking of lead abatement projects involving one or more of the following: scraping and/or chemical stripping of lead paint; encapsulation and covering of lead contaminated surfaces; or removal and replacement of windows, woodwork or other contaminated surfaces.	http://www.ct-clic.com/trantype.asp?code=801
☐	LOCKERS	Work customarily performed by this industry, including the furnishing and installation of lockers, toilet partitions and toilet accessories.	Not Applicable
☐	MASONRY	Installation, renovation, repair and maintenance of masonry units composed of concrete, stone, brick and the like, including such incidental or related work as is customarily performed by those in the masonry trade.	Not Applicable
☐	METAL SIDING	Work customarily performed by this industry including the supply and installation of metal siding where used as external components of custom designed buildings. This does not apply to pre-engineered buildings where the metal siding is a building component.	Not Applicable

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CONTRACTOR PREQUALIFICATION PROGRAM

SECTION IV. PREQUALIFICATION CLASSIFICATIONS (continued)

☐	PAINTING	Application of paint to interior and exterior surfaces of buildings and preparation of such surfaces for the purpose of receiving a finish coat of paint, including such incidental or related work as is customarily performed by those in the painting trades.	Not Applicable
☐	PLUMBING	Installation, repair and maintenance of pipes, fixtures and other apparatus in buildings for bringing in and distributing the water supply and removing liquid and water-borne waste, including such incidentals or related work as is customarily performed by those in the plumbing trade.	http://www.ct-clic.com/trantype.asp?code=442
☐	ROOFING	The installation of various types of roofing materials including shingles, slate, rubber, PVC and related flashing and drainage systems.	Not Applicable
☐	SEWAGE & WATER TREATMENT PLANTS	The undertaking of building construction projects for the purification, reduction and disposal of sewage and/or the purification and distribution of water supplies.	Not Applicable
☐	SITEWORK	Work customarily performed by this industry, including earthmoving activities, installation of drainage systems, utility systems and paving work.	Not Applicable
☐	TELECOMMUNICATIONS SYSTEMS	Installation, repair and maintenance of telephone, intercom, television, computer network or related equipment for a major communication system within a building.	Not Applicable
☐	TOILET PARTITIONS, TOILET ACCESSORIES	Work customarily performed by this industry, including the furnishing and installation of lockers, toilet partitions and toilet accessories.	Not Applicable
☐	WATERPROOFING	Installation, renovation, repair and maintenance of materials required to make foundations, walls and other surfaces of a building dam proof or impervious to water, including such incidental or related work as is customarily performed by those in the waterproofing and dam proofing trades. This category does not include roofing by itself.	Not Applicable

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CONTRACTOR PREQUALIFICATION PROGRAM

SECTION V. INTEGRITY

		YES	NO
1	Has the applicant ever been disqualified from bidding on state construction projects for violating any of the general bid form requirements set forth in C.G.S. § 4b-95? If Yes, please state: a. The date(s) the disqualification(s) occurred b. Which State agency(s) imposed the disqualification(s) c. The facts that gave rise to this disqualification(s) d. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the disqualification(s)	☐	☐
2	Has DAS ever revoked the applicant's prequalification certificate under (P.A. 03-215), Section 3 after a finding that the applicant has included a materially false statement in its prequalification application or update statement? If yes, please state: a. The date(s) the revocation(s) occurred b. The facts that gave rise to the revocation(s) c. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the revocation(s)	☐	☐
3	Has DAS ever revoked the applicant's prequalification certificate under (P.A. 03-215, Section 3) after a finding that the applicant has been convicted of a crime related to the procurement or performance of any public or private construction contract, or has otherwise engaged in fraud in obtaining or maintaining prequalification? If yes, please state: a. The date(s) the revocation(s) occurred b. The facts that gave rise to the revocation(s) c. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the disqualification(s)	☐	☐
4	Has the applicant ever been disqualified by the Department of Public Works from bidding on, applying for, or participating as a subcontractor under, contracts with the state under (C.G.S. §31-57c)? If yes, please disclose: a. The date(s) the disqualification(s) occurred b. The facts that gave rise to the disqualification(s) c. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the disqualification(s)	☐	☐
5	Has the applicant ever been disqualified by the Department of Transportation from bidding on, applying for, or participating as a subcontractor under, contracts with the state under (C.G.S. §31-57d)? If yes, please disclose: a. The date(s) the disqualification(s) occurred b. The facts that gave rise to the disqualification(s) c. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the disqualification(s)	☐	☐
6	Has the applicant ever appeared on the Department of Labor list of contractors in violation of labor laws under (C.G.S. § 31-57a)? If yes, please state: a. Date(s) during which applicant appeared on the list b. The facts that gave rise to the applicant's appearance(s) on the list c. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to its appearance(s) on the list	☐	☐

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CONTRACTOR PREQUALIFICATION PROGRAM

SECTION V. INTEGRITY (continued)

		YES	NO
7	Has the applicant, or any person or contractor that has an interest in the applicant, ever been cited pursuant to (C.G.S. Section 31-57b) for three or more willful or serious violations of any occupational safety and health act or of any standard, order or regulation promulgated pursuant to such act? If yes, please state: a. The date(s) of the citation(s) b. The facts that gave rise to the citation(s) c. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the citation(s)	☐	☐
8	Has the applicant or any person or contractor that has an interest in the applicant ever received one or more criminal convictions related to the injury or death of any employee? If yes, please state: a. The date(s) of the conviction(s) b. The facts that gave rise to the conviction(s) c. The efforts made by the applicant to eliminate or remedy the situation that gave rise to the conviction(s)	☐	☐
9	Has the applicant ever been disqualified from being awarded contracts by any other state? If yes, please disclose: a. The date(s) of disqualification(s) b. Which state(s) disqualified the applicant c. The facts that gave rise to this disqualification(s) d. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the disqualification(s)	☐	☐
10	Has the applicant ever been disqualified from being awarded government contracts by any federal agency or pursuant to federal law? If yes, please disclose: a. The date(s) of disqualification(s) b. Which federal agency(s) disqualified the applicant c. The facts that gave rise to the disqualification(s) d. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the disqualification(s)	☐	☐
11	Has the applicant's registration to perform work ever been suspended or revoked by the Department of Consumer Protection pursuant to (C.G.S. § 20-341gg)? If yes, please disclose: a. The date(s) of the suspension(s) or revocation(s) b. The facts that gave rise to this suspension(s) or revocation(s) c. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the suspension(s) or revocation(s)	☐	☐
12	Has the applicant ever been disqualified from being awarded contracts by any municipality? If yes, please disclose: a. Date(s) of the disqualification(s) or prohibition(s) b. The municipality(s) involved in the disqualification(s) or prohibition(s) c. The facts that gave rise to this disqualification(s) or prohibition(s) d. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the disqualification(s) or prohibition(s)	☐	☐

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CONTRACTOR PREQUALIFICATION PROGRAM

SECTION V. INTEGRITY (continued)

		YES	NO
13	Has the Connecticut State Ethics Commission ever issued the applicant a fine for, or ruled that the applicant has given a gift pursuant to (CGS 1-84(m)? If yes, please disclose: a. The date(s) of the fine(s) or ruling(s) b. The nature of the fine(s) or ruling(s) c. The name(s) and title(s) of the party(s) involved d. The facts that gave rise to the fine(s) or ruling(s) e. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the fine(s) or ruling(s)	☐	☐
14	Has the Connecticut State Ethics Commission ever issued the applicant a fine for, or ruled that the applicant has used its relationship with the State for the purpose of private gain pursuant to (CGS 1-86e)? If yes, please disclose: a. The date(s) of the fine(s) or ruling(s) b. The nature of the fine(s) or ruling(s) c. The name(s) and title(s) of the party(s) involved d. The facts that gave rise to the fine(s) or ruling(s) e. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the fine(s) or ruling(s)	☐	☐
15	In the past two years, has the applicant ever knowingly given, directly or indirectly, a gift as defined by (CGS 1-79e) in violation of (C.G.S. 1-84)? If yes, please disclose: a. The date(s) the gift(s) was given b. The gift(s) given c. The name(s) and title(s) of the party(s) involved d. The facts that gave rise to prompt the gift(s) e. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the gift(s)	☐	☐
16	Does the applicant presently owe any **overdue** money to any Connecticut State Agency? If yes, please disclose: a. The date(s) the debt(s) was imposed b. The State Agency(s) owed the debt(s) c. The nature of the debt(s) owed d. The facts that gave rise to the debt(s) owed e. The efforts made by the applicant to eliminate and/or remedy the situation(s) that gave rise to debt(s) owed	☐	☐
17	Have any of the applicant's contracts ever been taken over by the surety company (called in)? If yes, please disclose: a. The date(s) the contract(s) was taken over (called in) by the surety company b. A description of the contract(s) taken over (called in) by the surety company c. The name of the Surety Company(s) d. The facts that gave rise to the Surety Company(s) taking over (calling in) the contract(s) e. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the taking over (calling in) of the contract(s) by the Surety Company(s)	☐	☐
18	Are there any investigations, legal or administrative proceedings pending against the applicant that relate to the procurement or performance of any public or private construction contract? If yes, please disclose: a. The date(s) of the investigations, legal or administrative proceedings pending b. The name(s) and title(s) of the party(s) involved in the investigations, legal or administrative proceedings c. The facts that gave rise to the investigations, legal or administrative proceedings d. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the investigations, legal or administrative proceedings	☐	☐

Department of Administrative Services

CONTRACTOR PREQUALIFICATION PROGRAM

SECTION V. INTEGRITY (continued)

		YES	NO
19	Has the applicant ever knowingly used any subcontractor(s) that have, in the past (2) years: a) Been on any disqualification lists identified above or b) been in violation of one of the other integrity questions listed in this section? If yes, please disclose: a. The date(s) the subcontractor(s) was used b. The name of the subcontractor(s) used c. The project(s) the subcontractor(s) was used for d. The disqualification list(s) or the violation(s) of integrity that the subcontractor used was subject to e. The efforts made by the applicant to eliminate or remedy the use of the subcontractor(s)	☐	☐
20	Are there any legal or administrative proceedings concluded adversely against the applicant that relate to the procurement of performance of any public or private construction contract? If yes, please disclose: a. The date(s) of the legal or administrative proceedings concluded adversely b. The name(s) and title(s) of the party(s) involved in the legal or administrative proceedings concluded adversely c. The facts that gave rise to the legal or administrative proceedings concluded adversely d. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the adverse conclusion(s)	☐	☐
21	Has the applicant ever performed work with or for a public official that resulted in the public official or anyone in his/her family obtaining personal, financial or material gain? If yes, please disclose: a. The date(s) the work was performed b. The nature of work performed with or for the public official c. The name(s) of the public official or anyone in his/her family that the work was performed for or with d. The facts that gave rise to performing the work with or for a public official or anyone in his/her family e. The efforts made by the applicant to eliminate or remedy the situation(s) that gave rise to the performance of work for or with the public official or anyone in his/her family	☐	☐

Department of Administrative Services

CONTRACTOR PREQUALIFICATION PROGRAM

SECTION VI. PERSONNEL INFORMATION

1	Total Number of Employees
	FOR ALL OWNERS, PRINCIPALS, AND/OR KEY PERSONNEL ***"Principals and key personnel" includes officers, directors, shareholders, members, partners, and managerial employees.*** ***For each employee listed below, please answer the following questions:***
2	Name
3	Title
4	List all Licenses, Permits, and/or PUC Leases held by the employee. For each License(s), Permit(s), PUC Lease(s) held, please provide: a. Trade b. License, Permit, and/or PUC Lease Identification Number c. Date of License, Permit, PUC Lease d. Expiration Date of License, Permit, PUC Lease
5	Have any of the company's principals and/or key personnel served as principals and/or key personnel in another company whose bond has been called in (while they were serving as principals and/or key personnel)? ☐ YES ☐ NO If yes: a. The name of the company b. The position(s) held while at the company (principal and/or key personnel) c. Date(s) of employment at the company d. Date(s) the bond was called in e. The facts that gave rise to having the bond called in
6	Have any of the applicant's principals and/or key personnel been convicted of, entered a plea of guilty or nolo contendere for, or admitted to commission of a criminal offense as an incident to obtain or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract pursuant to CGS 31-57c and d? ☐ YES ☐ NO If yes: a. The offense(s) committed b. Date(s) of the offense(s) c. The facts that gave rise to conviction, plea of guilty or nolo contendere for, or admission Of commission
7	Have any of the applicant's principals and/or key personnel been convicted of, entered a plea of guilty or nolo contendere for, or admitted to commission of, any State or Federal law for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty pursuant to CGS 31-57c and d? ☐ YES ☐ NO If yes, please disclose for each: a. The offense(s) committed b. Date(s) of the offense(s) c. The facts that gave rise to conviction, plea of guilty or nolo contendere for, or admission of commission

Department of Administrative Services

CONTRACTOR PREQUALIFICATION PROGRAM

SECTION VI. PERSONNEL (continued)

8	Have any of the applicant's principals and/or key personnel ever been convicted of, entered a plea of guilty or nolo contendere for, or admitted to commission of any state or federal antitrust, collusion or conspiracy law arising out of the submission of bids or proposals on a public or private contract or subcontract pursuant to CGS 31-57c and d? ☐ YES ☐ NO If yes, please disclose for each: a. The offense(s) committed b. Date(s) of the offense(s) c. The facts that gave rise to conviction, plea of guilty or nolo contendere for, or admission of commission
9	Are there any investigations, legal or administrative proceedings pending against any of the applicant's principals and/or key personnel that relate to the procurement or performance of any public or private construction contract? ☐ YES ☐ NO If yes, please disclose: a. Date(s) of the proceeding(s) and the status (pending or concluded), b. The facts that gave rise to the proceeding(s) c. The name(s) and title(s) of the party(s) involved in the proceeding(s) d. The efforts made by the applicant to eliminate or remedy the situation that gave rise to the proceedings.
10	Are there any legal or administrative proceedings concluded adversely against any of the applicant's principals and/or key personnel that relate to the procurement or performance of any public or private construction contract? ☐ YES ☐ NO If yes, please disclose: a. Date(s) of the proceeding(s) and the status (pending or concluded), b. The facts that gave rise to the proceeding(s) c. The name(s) and title(s) of the party(s) involved in the proceeding(s) d. The efforts made by the applicant to eliminate or remedy the situation that gave rise to the proceedings.
11	Has/Does the owner, principal or key personnel have ownership in any other construction business? ☐ YES ☐ NO If Yes: a. Provide the name(s) of the affiliate company(s) b. The percentage of ownership in each company(s) c. The nature of the business d. The dates of ownership e. The FEIN number for each company(s) f. A description of any and all involvement

Department of Administrative Services

CONTRACTOR PREQUALIFICATION PROGRAM

SECTION VI. PERSONNEL (continued)

12	Does the employee have supervisory responsibility? ☐ YES ☐ NO If Yes: a. The number of employees being supervised
13	What is the number of years with the company?
14	Describe the employee's construction experience: a. Name(s) of Company(s) b. Length of Time c. Title
15	What is the employee's educational background: a. School: Technical School ☐ YES ☐ NO DATES ATTENDED: College or University ☐ YES ☐ NO DATES ATTENDED: Other ☐ YES ☐ NO DATES ATTENDED: B. DEGREE RECEIVED:

Department of Administrative Services

CONTRACTOR PREQUALIFICATION PROGRAM

SECTION VII. CAPACITY & EXPERIENCE

- For **each** Prequalification Classification requested, indicate the applicant's experience on public and private constructions over the past five (5) years **OR** the applicant's ten (10) most recently-completed projects
- If your contract includes several different categories of work for which your company seeks certification, please provide dollar breakdown attributable to each category of work separately.

Prequalification Classification: _____

	Project Title	Location	Start Date	End Date	% Complete	Contract Value	Total Available AWC	Project Owner (Name/Phone)	Project References (Name/Phone)	Supervisory Personnel (Name/Title)	Subcontractors Used
1											
2											
3											
4											
5											
6											
7											
8											
9											
10											
11	TOTALS					0	0				

Department of Administrative Services

CONTRACTOR PREQUALIFICATION PROGRAM

SECTION VIII: FINANCIALS

P. A. 03-215 requires that the applicant submit a statement of financial condition ***prepared by a certified public accountant*** and shall pertain to the applicant's most recently completed fiscal year. This financial statement must be **reviewed or audited** by a certified Public Accountant who conforms with generally-accepted principles, and shall include all supporting schedules, all contracts in progress, all contracts completed and all footnotes. In addition, it must indicate your company's current assets, current liability, total assets, total liability, and net worth.

I. FINANCIAL INFORMATION

Please provide the following information as it pertains to your statement of financial condition:

A. Current Assets $ _____
Defined as: Cash or other assets that are expected within a year or less, through the normal operations of a business.

B. Current Liabilities $ _____
Defined as: Liabilities that will be due within a short time (usually on year or less) and that are to be paid out of current assets.

C. Total Assets $ _____
Defined as: All items that have tangible value and can be sold or exchanged for something else that possesses value.

D. Total Liabilities $ _____
Defined as: Any debt or obligation a company, person, or business may have. Opposite of an asset. Something that takes away value.

E. Net Worth $ _____
Defined as: Total assets minus total liabilities.

II. BONDING INFORMATION

A letter from the bonding company must be submitted with your statement of financial condition indicating an annual Aggregate Work Capacity Rating and a Single Limit Work Capacity.

The bonding company must have at least an "A-" (A minus) rating by the A.M. Best Company and be authorized to transact business of the relevant type(s) of insurance in Connecticut.

Please provide the following information as it pertains to your bonding company

A. Bonding Company Name

B. A.M. Best Rating

C. Aggregate Work Capacity Rating (AWC)

D. Single Limit Bonding Capacity

Department of Administrative Services

CONTRACTOR PREQUALIFICATION PROGRAM

SECTION IX: SAFETY

I. Workers' Compensation Insurance:

Experience Modification Rating (EMR) is a factor applied to an insurance policy, usually workers compensation, that modifies the premium based on the policyholder's loss experience.

A. Please obtain from your insurance agent (or state fund, if applicable) your interstate EMR for the last three (3) ratings periods and complete the information in section C below.

B. If you do not have an interstate rating, obtain your intrastate EMR rating and complete the information in section C below.

C. Provide the following EMR information:

	Effective Dates	Modification Rates
Current policy year:		
1 year previously:		
2 years previously:		

D. If your EMR is exactly 1.0 for any policy year, is it because your firm is (or was) too new or too small to have an EMR calculated?

Yes ____ No ____ (if no, please explain)

II. Safety Practices

A. Do you hold safety meeting(s) for:

	Yes	No	Frequency	Title of Person Conducting Meeting
Field Supervisors				
Employees				
New Hires				
Subcontractors				

B. Do you conduct job safety inspections (both written/non-written)?

Yes ___ Frequency _____ No ___ (if no, please explain)

C. Do you have a formal written safety program?

Yes ___ If yes, please provide a copy of the Table of Contents from your program.

No ___ (if no, please explain)

SECTION X: FEES

I. NEW APPLICATIONS

A. One-Year Certification

All fees are NON-REFUNDABLE and are based upon the Total Aggregate Work Capacity Rating requested.

The following fees represent Prequalification Certification for an initial one (1) year period. In no event shall such fee be less than six hundred ($600).

Aggregate Work Capacity Rating	Fee
$ 5,000,000.00 - or less	$ 600.00
$ 5,000,000.01 - $ 8,000,000.00	$ 750.00
$ 8,000,000.01 - $ 10,000,000.00	$ 850.00
$ 10,000,000.01 - $ 15,000,000.00	$ 1,000.00
$ 15,000,000.01 - $ 20,000,000.00	$ 1,500.00
$ 20,000,000.01 - $ 40,000,000.00	$ 2,000.00
$ 40,000,000.01 - or more	$ 2,500.00

B. Prequalification Program Initial Start Up - Staggering of Expiration Dates Beyond One-Year

For the initial start-up of the Contractor Prequalification Program, it is the intention of DAS to implement a "staggering" process for the expiration of certifications. "Staggering" will allow Prequalification Certifications to extend past the one-year period in monthly intervals. This will allow for a more efficient and manageable workflow for DAS to process renewals after the first initial year of the Program. Fees for the extended one-year period have been pro-rated and take into consideration the reduced renewal fee as part of our calculation. The formula to determine a new application with an initial certification beyond a one (1) year period is:

Y + [(½ * Y/12) multiplied by N] = Staggered Fee

Y = Annual AWC Fee
N = Number of months greater than 12

Note: (½ multiplied by Y/12) – this can't be less than six hundred ($600).

SECTION X: FEES (continued)

II. CHANGES TO CERTIFICATION DURING CERTIFICATION PERIOD

A. To Add Or Change A Prequalification Classification (PQC) **during certification period**:

1. Utilize an update statement
2. No change of the expiration date for original certificate
3. Fee: six hundred ($600) regardless of the number of PQC requested

B. To Change Aggregate Work Capacity Rating **during certification period**:

1. Utilize an Update Statement
2. Expiration date change to one year from the newest certification
3. Fee: Fee corresponding to the requested AWC.

III. RENEWAL CERTIFICATION

Renewals should be submitted **sixty (60) days prior** to the expiration date on the current contractor prequalification certificate by utilizing an ***Update Statement***.

A. If the contractor submits its renewal application **sixty (60) days prior** to its certification expiration date, the current certificate **remains in effect** until the Contractor Prequalification Unit takes an action.
   1. The fee = one-half (½) of the requested AWC or six hundred ($600) whichever is greater.
   2. The renewal date remains the same – with an additional year.

B. If the contractor submits its renewal application **within the sixty-day period** of its certificate expiration, the current certificate may expire and will not be in effect until the Contractor Prequalification Unit takes an action.
   1. The fee = one-half (½) of the requested AWC or six hundred ($600) whichever is greater.
   2. The renewal date changes to the date that the Contractor Prequalification Team took the action.

C. If the contractor submits its renewal application **after the current certification date has expired**, the renewal will be rejected.
   1. Contractor must complete a new application.
   2. The fee = Full fee for the requested AWC.
   3. The date changes to the date that the new Contractor Certification is issued

Department of Administrative Services

CONTRACTOR PREQUALIFICATION PROGRAM

SECTION XI: SIGNATURE SHEET

I certify, under penalty of law, that all the information in this application and all the attached and required documents are true and accurate to the best of my knowledge as of this date.

_____ _____
(Print Name) (Title)

_____ _____
(Signature) (Date)

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Department of Finance & Administration

Office of Contracts Review

The Department of Finance & Administration's Office of Contracts Review (OCR) administers the state's Rules for Personal Service, Professional Service, and Consultant Service Contracts. This duty and F&A's statutory, service procurement responsibilities have established OCR as Tennessee's central oversight agency for the state's decentralized, service procurement and contracting processes. In this role, OCR offers both direction and support as well as approval reviews.

BUSINESS SUPPORT FUNCTIONS

OCR administers ongoing efforts, information systems, and consultation with staff of all state agencies to ensure that service contracts financially and legally safeguard the interests of taxpayers.

Review & Oversight. OCR reviews and approves both service procurement processes and contracts on behalf of the F&A Commissioner. These statutorily required approval reviews aim to ensure compliance with state law's and regulations, good business practice, fair competition, sound financial management, proper accounting and financial reporting, and conformity with state budgetary priorities.

Consulting. OCR assists all state agencies through direct consultation toward achieving goals related to buying the best service at that best price by ongoing consultations with all state staff. OCR consults with state agencies to properly select contractors and write

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contracts that achieve state goals and protect taxpayer's interests. OCR provides guidance, models, advice, and practical help to state agency staff with service procurement responsibilities.

In addition to consulting with other state agencies, OCR assists the F&A Commissioner with responsibilities related to state procurement as well as any procurement-related task forces or study groups of the executive and legislative branches of the state.

Contracting Instruction Manual. OCR maintains an Internet-based, compilation of resources and information to guide and direct all state agencies in buying professional services and drafting professional service contracts.

Management Information. OCR maintains its own Contract Data System to compile state service contracting data and management information that is not comprehensively available elsewhere in state government and to tract contracting documents through approval processing. Through this resource, OCR is able to provide analysis, information, and support for the state's procurement processes and service contracting as well as related information related to contracting such as federal Title VI and Title XI statistics.

Service Provider Registry. OCR administers the Internet-based registry designed to support competition and provide disadvantaged, minority, and small business entrepreneurs and non-profit organizations with increased opportunity to compete for business with the state.

Finance & Administration
Office of Contracts Review
12th Floor, TN Tower
Nashville, TN 37243

Service Contract

Manual

The staff of the executive branch of state government must use applicable statutes, rules, policy, and model language to successfully meet service contracting goals. Together, these resources and other related information comprise this Office of Contracts Review (OCR) Internet-based, service contract instruction manual.

This Internet-based, manual supercedes all previous policy regarding state professional service procurements pursuant to *Tennessee Code Annotated*, § 12-4-109 and will provide a dynamic, continuously improving resource to best assist state agency staff.

M. D. Goetz, Jr.
Commissioner
Finance & Administration

Manual Contents

each topic is a "link" to the page

Service Contracting Overview

Law

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TN Service Procurement

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Policy

Models & Formats

Glossary of Terms

Related Information ~

Related Rule: F&A Rule 0620-3-2

Related Rule: F&A Rule 0620-3-7

Related Rule: F&A Rule 0620-3-8

Related Policy: F&A Accounting Policy

F&A Title VI and Title IX Plan

OCR Communications Archive

Training Materials ~

Executive RFP Overview (slide show)

- Procurement Methods
- Rules
- Policy
- RFP Model

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Service Contract Authority Documents:

Signature Certifications & Contract Management Plans

Signature Certification and Authorization

F&A Rule 0620-3-3-.07(20) provides: "Each state agency shall file, with and in a form acceptable to the Department of Finance and Administration Office of Contracts Review, documentation detailing the actual signature of the head of the agency and the agency head's signature as written by any other persons authorized to sign service contracting documents on behalf of the agency head. " Related OCR Policy .07 i details that, "Each state agency head must submit a completed Signature Certification and Authorization for each calendar year for which the authorization shall be applicable. An authorization filed with OCR will be effective immediately and supersede previous authorizations. As any changes occur in personnel authorized to sign contracting documents, the subject agency must provide new documentation to OCR."

Contract Management Plan

Tennessee state government service contracting is decentralized to the various state agencies. *Tennessee Code Annotated*, §12-4-109(d), and F&A Rules, Chapter 0620-3-8, require that each state agency shall establish an Annual Contract Management Plan addressing the general management of service contracts for which it is responsible. The requirement for a current annual plan prior to any service contracting began January 1, 2003.

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Click Here **for a listing of 2004 Signature Certification & Authorizations** (by agency allotment code)

Click Here **for a listing of 2004 Contract Management Plans** (by agency allotment code)

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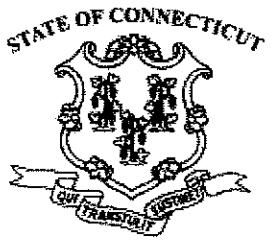


Substitute House Bill No. 6417

Public Act No. 03-215

AN ACT CONCERNING STATE CONSTRUCTION CONTRACTS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 4b-91 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) Every contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state, which is estimated to cost more than five hundred thousand dollars, except (1) a contract awarded by the Commissioner of Public Works for (A) a community court project, as defined in subsection (j) of section 4b-55, (B) the Connecticut Juvenile Training School project, as defined in subsection (k) of section 4b-55, (C) the downtown Hartford higher education center project, as defined in subsection (l) of section 4b-55, (D) The University of Connecticut library project, as defined in subsection (d) of section 4b-55, (E) a correctional facility project, as defined in subsection (m) of section 4b-55, (F) a juvenile detention center project, as defined in subsection (n) of section 4b-55, or (G) a student residential facility for the Connecticut State University system that is a priority higher education facility project, as defined in subsection (f) of section 4b-55, or (2) a project, as defined in subdivision (16) of section 10a-109c, undertaken and controlled by The University of Connecticut in accordance with section 10a-109n, shall be awarded to the lowest responsible and qualified general bidder <u>who is prequalified pursuant to section 3 of this act</u> on the basis of competitive bids in accordance with the procedures set forth in this chapter <u>and section 9 of this act</u>, after the Commissioner of Public Works or, in the case of a contract for the construction of or work on a building under the supervision and control of the Joint Committee on Legislative Management of the General Assembly, the joint committee or, in the case of a contract for the construction of or work on a building under the supervision and control of one of the constituent units of the state system of higher education, the constituent unit, has invited such bids by advertisements inserted at least once in one or more newspapers having a circulation in each county in the state. <u>The Commissioner of Public Works, the joint committee or the constituent unit, as the case may be, shall indicate the prequalification classification and aggregate work capacity rating required for the contract in such advertisement. As used in this section, "prequalification classification" means the prequalification classifications established by the Commissioner of Administrative Services pursuant to section 3 of this act and "aggregate work capacity rating" means the aggregate work capacity ratings established by the Commissioner of Administrative Services pursuant to section 3 of this act.</u>

<u>(b)</u> The Commissioner of Public Works, the joint committee or the constituent unit, as the case may be, shall determine the manner of submission and the conditions and requirements of such bids, and

the time within which the bids shall be submitted, consistent with the provisions of sections 4b-91 to 4b-96, inclusive. Such award shall be made within sixty days after the opening of such bids. If the general bidder selected as the general contractor fails to perform the general contractor's agreement to execute a contract in accordance with the terms of the general contractor's general bid and furnish a performance bond and also a labor and materials or payment bond to the amount specified in the general bid form, an award shall be made to the next lowest responsible and qualified general bidder. [If] No employee of the Department of Public Works, the joint committee or a constituent unit with decision-making authority concerning the award of a contract may communicate with any bidder prior to the award of the contract if the communication results in the bidder receiving information about the contract that is not available to other bidders, except that if the lowest responsible and qualified bidder's price submitted is in excess of funds available to make an award, the Commissioner of Public Works, the Joint Committee on Legislative Management or the constituent unit, as the case may be, [is empowered to] may negotiate with such bidder and award the contract on the basis of the funds available, without change in the contract specifications, plans and other requirements. If the award of a contract on said basis is refused by such bidder, the Commissioner of Public Works, the Joint Committee on Legislative Management or the constituent unit, as the case may be, may negotiate with other contractors who submitted bids in ascending order of bid prices without change in the contract, specifications, plans and other requirements. In the event of negotiation with general bidders as provided [herein] in this section, the general bidder involved may negotiate with subcontractors on the same basis, provided such general bidder shall negotiate only with subcontractors named on such general bidder's general bid form.

(c) On and after October 1, 2004, no person may bid on a contract, except for a project described in subdivision (2) of subsection (a) of this section, for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state or a municipality, which is estimated to cost more than five hundred thousand dollars and is paid for, in whole or in part, with state funds, unless the person is prequalified in accordance with section 3 of this act.

(d) On and after October 1, 2004, each bid submitted for a contract described in subsection (c) of this section shall include a copy of a prequalification statement issued by the Commissioner of Administrative Services showing that the bidder has the prequalification classification and aggregate work capacity ratings required under such contract. The bid shall also be accompanied by an update statement in such form as the Commissioner of Administrative Services prescribes. The form for such update statement shall provide space for information regarding all projects completed by the bidder since the date the bidder's prequalification certificate was issued or renewed, all projects the bidder currently has under contract, including the percentage of work on such projects not completed, the names and qualifications of the personnel who will have supervisory responsibility for the performance of the contract, any significant changes in the bidder's financial position or business organization since the date the certificate was issued or renewed, and such other relevant information as the Commissioner of Administrative Services prescribes. Any bid submitted without a copy of the prequalification certificate and an update statement shall be invalid.

(e) Any person who bids on a contract described in subsection (c) of this section shall certify under penalty of false statement at the conclusion of the bidding process that the information in the bid is true, that there has been no substantial change in the bidder's financial position or corporate structure since the bidder's most recent prequalification certificate was issued or renewed, other than those changes noted in the update statement, and that the bid was made without fraud or collusion with any person.

(f) Any person who receives information from a public official that is not available to the general

public concerning any construction, reconstruction, alteration, remodeling, repair or demolition project on a public building prior to the date that an advertisement for bids on the project is published shall be disqualified from bidding on the project.

[(b)] (g) Notwithstanding the provisions of this chapter regarding competitive bidding procedures, the commissioner may select and interview at least three responsible and qualified general contractors [, and] who are prequalified pursuant to section 3 of this act and selected by the award panel established in section 9 of this act. The commissioner may negotiate with any one of such contractors a contract which is both fair and reasonable to the state for a community court project, as defined in subsection (j) of section 4b-55, the downtown Hartford higher education center project, as defined in subsection (l) of section 4b-55, The University of Connecticut library project, as defined in subsection (d) of section 4b-55, the Connecticut Juvenile Training School project, as defined in subsection (k) of section 4b-55, a correctional facility project, as defined in subsection (m) of section 4b-55, a juvenile detention center project, as defined in subsection (n) of section 4b-55, or a student residential facility for the Connecticut State University system that is a priority higher education facility project, as defined in subsection (f) of section 4b-55. Any general contractor awarded a contract pursuant to this subsection shall be subject to the same requirements concerning the furnishing of bonds as a contractor awarded a contract pursuant to subsection [(a)] (b) of this section. On and after October 1, 2004, any agency that seeks to have a project awarded without being subject to competitive bidding procedures shall certify to the joint committee of the General Assembly having cognizance of matters relating to legislative management that the project is of such an emergency nature that an exception to competitive bidding procedures is required. Such certification shall include input from all affected agencies, detail the need for the exception and include any relevant documentation.

Sec. 2. Section 4b-92 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

As used in this chapter and except as otherwise provided, the words "lowest responsible and qualified bidder" shall mean the bidder who is prequalified pursuant to section 3 of this act, and whose bid is the lowest of those bidders possessing the skill, ability and integrity necessary to faithful performance of the work based on objective criteria considering past performance and [financial responsibility] information contained in the update statement submitted pursuant to section 4b-91, as amended by this act. Essential information in regard to such qualifications shall be submitted with the bid in such form as the awarding authority may require by specification in the bid documents and on the bid form. Every general bid shall be accompanied by a bid bond or a certified check in an amount which shall be ten per cent of the bid, provided no such bid bond or certified check shall be required in relation to any general bid in which the total estimated cost of labor and materials under the contract with respect to which such general bid is submitted is less than fifty thousand dollars. Failure to execute a contract awarded as specified and bid shall result in the forfeiture of such bid bond or certified check. In considering past performance the awarding authority shall evaluate the skill, ability and integrity of bidders in terms of the bidders' fulfillment of contract obligations and of the bidders' experience or lack of experience with projects of the [size] nature and scope of the project for which the bids are submitted.

Sec. 3. (NEW) (*Effective July 1, 2004*) (a) As used in this section: (1) "Prequalification" means prequalification issued by the Commissioner of Administrative Services to bid on a contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state or a municipality; (2) "subcontractor" means any person who performs any of the four classes of work specified in subsection (a) of section 4b-93 of the general statutes with a value in excess of twenty-five thousand dollars; and (3) "principals and key personnel" includes officers, directors, shareholders, members, partners and managerial employees.

(b) (1) Any person may apply for prequalification to the Department of Administrative Services. Such application shall be made on such form as the Commissioner of Administrative Services prescribes and shall be accompanied by a nonrefundable application fee as set forth in subdivision (2) of this subsection. The application shall be signed under penalty of false statement.

(2) The application fee shall be as follows:

Aggregate Work Capacity Rating	Fee
$ 5,000,000. 00 or less	$ 600. 00
$ 5,000,000. 01 - $ 8,000,000. 00	$ 750. 00
$ 8,000,000. 01 - $ 10,000,000. 00	$ 850. 00
$ 10,000,000. 01 - $ 15,000,000. 00	$ 1,000. 00
$ 15,000,000. 01 - $ 20,000,000. 00	$ 1,500. 00
$ 20,000,000. 01 - $ 40,000,000. 00	$ 2,000. 00
$ 40,000,000. 01 or more	$ 2,500. 00

(c) The application form shall, at a minimum, require the applicant to supply information concerning:

(1) The applicant's form of organization;

(2) The applicant's principals and key personnel and any names under which the applicant, principals or key personnel conducted business during the past five years;

(3) The applicant's experience on public and private construction projects over the past five years, or on the applicant's ten most recently-completed projects and the names of any subcontractors used on the projects;

(4) Any legal or administrative proceedings pending or concluded adversely against the applicant or any of the applicant's principals or key personnel within the past five years which relate to the procurement or performance of any public or private construction contract and whether the applicant is aware of any investigation pending against the applicant or any principal or key personnel;

(5) The nature of any financial, personal or familial relationship between the applicant and any public or private construction project owner listed on the application as constituting construction experience;

(6) A statement of whether (A) the applicant has been disqualified pursuant to section 4b-95 of the

general statutes, this section or section 31-57c or 31-57d of the general statutes, (B) the applicant is on the list distributed by the Labor Commissioner pursuant to section 31-57a of the general statutes, (C) the applicant is disqualified or prohibited from being awarded a contract pursuant to section 31-57b of the general statutes, (D) the applicant has been disqualified by another state, (E) the applicant has been disqualified by a federal agency or pursuant to federal law, (F) the applicant's registration has been suspended or revoked by the Department of Consumer Protection pursuant to section 20-341gg of the general statutes, as amended by this act, (G) the applicant has been disqualified by a municipality, and (H) the matters that gave rise to any such disqualification, suspension or revocation have been eliminated or remedied; and

(7) Other information as the commissioner deems relevant to the determination of the applicant's qualifications and responsibilities.

(d) The applicant shall include a statement of financial condition prepared by a certified public accountant which includes information concerning the applicant's assets and liabilities, plant and equipment, bank and credit references, bonding company and maximum bonding capacity, and other information as the commissioner deems relevant to an evaluation of the applicant's financial capacity and responsibility.

(e) Information contained in the application shall be current as of the time of filing except that the statement of financial condition shall pertain to the applicant's most recently-completed fiscal year.

(f) The commissioner shall determine whether to prequalify an applicant on the basis of the application and on relevant past performance according to procedures and criteria set forth in regulations which the commissioner shall adopt, in accordance with chapter 54 of the general statutes. Such criteria shall include, at a minimum, the record of the applicant's performance, including, but not limited to, written evaluations of the applicant's performance on public or private projects within the past five years, the applicant's past experience on projects of various size and type, the skill, ability and integrity of the applicant and any subcontractors used by the applicant, the experience and qualifications of supervisory personnel employed by the applicant, the maximum amount of work the applicant is capable of undertaking as demonstrated by the applicant's financial condition, bonding capacity, size of past projects and present and anticipated work commitments, and any other relevant criteria that the commissioner prescribes. Such regulations shall also (1) provide that the criteria considered shall be assigned separate designated numerical values and weights and that the applicant shall be assigned an overall numerical rating on the basis of all criteria, and (2) establish prequalification classifications and aggregate work capacity ratings. Such prequalification classifications shall be used to establish the types of work a contractor is qualified to perform and the aggregate work capacity ratings shall be used to establish the maximum amount of work a contractor is capable of undertaking.

(g) (1) The applicant shall indicate the prequalification classifications and aggregate work capacity rating that are sought. The commissioner may issue a certificate of prequalification to any applicant who meets the requirements of this section. Such certificate shall be effective for one year from the date issued and shall indicate the contractor's prequalification classifications and aggregate work capacity ratings.

(2) A prequalified contractor may apply at any time for additional prequalification classifications or aggregate work capacity ratings by submitting the applicable increase in fee, a completed update statement, and other information the commissioner requires.

(3) The commissioner may renew a prequalification certificate upon receipt of a completed update

statement, any other material the commissioner requires and a nonrefundable fee in an amount equal to one-half of the application fee for the applicable aggregate work capacity rating as set forth in subsection (b) of this section, except that in no event shall such fee be less than six hundred dollars.

(h) Not later than sixty days after receiving a completed application, the commissioner shall mail a notice to the applicant concerning the commissioner's preliminary determination regarding the conditions of the prequalification certification, a denial of certification, a reduction in the level of certification sought or nonrenewal of certification. Any applicant aggrieved by the commissioner's preliminary determination may request copies of the information upon which the commissioner relied in making the preliminary determination, provided such request is made not later than ten days after the date the notice was mailed as indicated by the postmark on the envelope. Not later than twenty days after said postmark date the applicant may submit additional information to the commissioner with a request for reconsideration. The commissioner shall issue a final determination regarding the application not later than ninety days after the date the commissioner mailed the notice of the preliminary determination, which ninety-day period may be extended for an additional period not to exceed ninety days if (1) the commissioner gives written notice to the applicant that the commissioner requires additional time, and (2) such notice is mailed during the initial ninety-day period.

(i) The commissioner may not issue a prequalification certificate to any contractor (1) who is disqualified pursuant to section 31-57c or 31-57d of the general statutes, or (2) who has a principal or key personnel who, within the past five years, has a conviction or has entered a plea of guilty or nolo contendere for or has admitted to commission of an act or omission that reasonably could have resulted in disqualification pursuant to any provision of subdivisions (1) to (3), inclusive, of subsection (d) of section 31-57c of the general statutes or subdivisions (1) to (3), inclusive, of subsection (d) of section 31-57d of the general statutes, as determined by the commissioner.

(j) The commissioner may revoke a contractor's prequalification or reduce the contractor's prequalification classification or aggregate work capacity ratings, after an opportunity for a hearing, if the commissioner receives additional information that supports such revocation or reduction.

(k) (1) Any materially false statement in the application or any update statement may, in the discretion of the awarding authority, result in termination of any contract awarded the applicant by the awarding authority. The awarding authority shall provide written notice to the commissioner of such false statement not later than thirty days after discovering such false statement. The commissioner shall provide written notice of such false statement to the Commissioner of Public Works and the Commissioner of Consumer Protection not later than thirty days after discovering such false statement or receiving such notice.

(2) The commissioner shall revoke the prequalification of any person, after an opportunity for hearing, if the commissioner finds that the person has included any materially false statement in such application or update statement, has been convicted of a crime related to the procurement or performance of any public or private construction contract or within the past five years or has otherwise engaged in fraud in obtaining or maintaining prequalification. Any person whose prequalification has been revoked pursuant to this subsection shall be disqualified for a period of two years after which the person may reapply for prequalification, except that a person whose prequalification has been revoked on the basis of conviction of a crime or engaging in fraud shall be disqualified for a period of five years after which the person may reapply for prequalification. The commissioner shall not prequalify a person whose prequalification has been revoked pursuant to this subdivision until the expiration of said two or five-year disqualification period and the commissioner is satisfied that the matters that gave rise to the revocation have been eliminated or remedied.

(l) The commissioner shall provide written notice of any revocation, disqualification, reduction in classification or capacity rating or reinstated prequalification to the Commissioner of Public Works and the Commissioner of Consumer Protection not later than thirty days after any final determination.

(m) The provisions of this section and section 4 of this act shall not apply to subcontractors.

(n) The commissioner shall establish an update statement for use by bidders for purposes of renewing or upgrading a prequalification certificate and for purposes of submitting a bid pursuant to section 4b-91 of the general statutes, as amended by this act.

(o) Any applicant aggrieved by the commissioner's final determination concerning a preliminary determination, a denial of certification, a reduction in prequalification classification or aggregate work capacity rating or a revocation or nonrenewal of certification may appeal to the Superior Court in accordance with section 4-183 of the general statutes.

Sec. 4. (NEW) (*Effective October 1, 2004*) (a) The Commissioner of Administrative Services shall adopt regulations, in accordance with chapter 54 of the general statutes, to establish a standard contractor evaluation form. Such form shall include, at a minimum, the following evaluation criteria: (1) Timeliness of performance; (2) quality of performance; (3) cost containment, including, but not limited to, the contractor's ability to work within the contract's allotted cost, the accuracy of the contractor's billing, and the number and cause of change orders and the manner in which the contractor determined the price on the change orders; (4) safety; (5) the quality of the contractor's working relationship with the agency and the quality of the contractor's supervision of the work area; (6) communication with the agency; (7) the quality of the contractor's required documentation; (8) the performance of the contractor's subcontractors, to the extent known by the official who completes the evaluation; and (9) the contractor's and any subcontractor's compliance with part III of chapter 557 of the general statutes, or chapter 558 of the general statutes, or the provisions of the federal Davis-Bacon Act, 40 USC, Sections 276a to 276a-5, inclusive, as from time to time amended, to the extent known by the official who completes the evaluation.

(b) Each public agency shall complete and submit the evaluation form to the commissioner after completion of a building project under the agency's control if the building project is funded, in whole or in part, by state funds. The commissioner shall include the evaluation in the contractor's prequalification file. The official shall mail a copy of the completed evaluation form to the contractor. Any contractor who wishes to contest any information contained in the evaluation form may submit a written response to the commissioner not later than thirty days after the date the form was mailed as indicated by the postmark on the envelope. Such response shall set forth any additional information concerning the building project or the oversight of the contract by the public agency that may be relevant in the evaluation of the contractor's performance on the project. The commissioner shall include any such response in the contractor's prequalification file.

(c) As used in this section, "public agency" means a public agency, as defined in section 1-200 of the general statutes, but does not include The University of Connecticut with respect to any project, as defined in subdivision (16) of section 10a-109c of the general statutes, that is undertaken and controlled by the university, and "subcontractor" means any person who performs any of the four classes of work specified in subsection (a) of section 4b-93 of the general statutes with a value in excess of twenty-five thousand dollars.

(d) Upon fifty per cent completion of any building project under a public agency's control, the agency shall advise the contractor in writing of the agency's preliminary evaluation of the contractor's performance on the project.

Sec. 5. Subsection (m) of section 1-84 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(m) No public official or state employee shall knowingly accept, directly or indirectly, any gift, as defined in subsection (e) of section 1-79, from any person the official or employee knows or has reason to know: (1) Is doing business with or seeking to do business with the department or agency in which the official or employee is employed; [or] (2) is engaged in activities which are directly regulated by such department or agency; or (3) is prequalified under section 3 of this act. No person shall knowingly give, directly or indirectly, any gift or gifts in violation of this provision.

Sec. 6. (NEW) (*Effective January 1, 2004*) (a) Not later than January 1, 2004, and annually thereafter, each awarding authority shall prepare a report on the status of (1) any ongoing project for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building which is estimated to cost more than five hundred thousand dollars and is paid for, in whole or in part, with state funds, or (2) any property management contract awarded by the Department of Public Works which has an annual value of one hundred thousand dollars or more. The awarding authority shall submit the report to the Governor and the joint standing committees of the General Assembly having cognizance of matters relating to government administration and finance, revenue and bonding. The report shall be submitted in accordance with section 11-4a of the general statutes. The first report submitted after a contract is awarded shall indicate: (A) When, where and how the request for bids was advertised; (B) who bid on the projects; (C) the provisions of law that governed the award of the contract and if there were any deviations from standard procedure in awarding the contract; (D) the names of the individuals who had decision-making authority in awarding the contract, including, but not limited to, the individuals who served on any award panel; (E) if an award panel was used, whether the recommendation of the panel was followed and, if applicable, the reason why such recommendation was not followed; (F) whether the awarding authority has any other contracts with the contractor who was awarded the contract, and if so, the nature and value of the contract; and (G) any provisions of law that authorized or funded the project.

(b) The University of Connecticut shall not be required to submit a report pursuant to this section for any project, as defined in subdivision (16) of section 10a-109c of the general statutes, that is undertaken and controlled by the university.

Sec. 7. Section 4b-100 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) The Commissioner of Public Works shall adopt regulations, in accordance with chapter 54, to implement the provisions of sections 4b-91 to 4b-100, inclusive, as amended by this act. Such regulations shall include (1) objective criteria for evaluating the qualifications of bidders, and (2) the procedures for evaluating bids after the prequalification status of the bidder has been verified.

(b) The Commissioner of Public Works shall adopt regulations, in accordance with the provisions of chapter 54, establishing a procedure for promptly hearing and ruling on claims alleging a violation or violations of sections 4b-91 to 4b-100, inclusive, as amended by this act. Such claims may be initiated by the Department of Public Works or any party whose financial interests may be affected by the decision on such a claim.

Sec. 8. (NEW) (*Effective October 1, 2004*) (a) The Department of Public Works shall establish Construction Services Award Panels which shall each consist of six members: Three of whom shall be appointed by the Commissioner of Public Works and shall be current employees of the Department of Public Works; two of whom shall be appointed by the department head of the user agency; and one of

whom who shall be a neutral party appointed by the commissioner. The members of each award panel appointed by the Commissioner of Public Works shall serve for terms of one year from July first. If any vacancy occurs on the panel, the Commissioner of Public Works or the head or acting head of the user agency, as appropriate, shall appoint a person for the unexpired term in accordance with the provisions of this subsection.

(b) A panel established pursuant to this section shall not be deemed to be a board or commission within the meaning of section 4-9a of the general statutes. Such panels shall be the award panels for any contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for the state pursuant to sections 4b-91 to 4b-100, inclusive, of the general statutes, as amended by this act, and section 4b-24 of the general statutes, as amended by this act.

(c) For each applicable contract, the commissioner shall designate one panel to screen all submitted proposals and establish a list of bidders to be interviewed and shall designate a separate panel consisting of different members to interview bidders on the list and submit a list of recommended contractors to the commissioner.

(d) The commissioner shall designate one voting member on each panel to serve as chairperson. The chairperson shall moderate the committee, collect votes and compile the results.

(e) Each award panel shall prepare a memorandum on the selection process indicating how the evaluation criteria were applied to determine the most qualified firms, which shall be available to the public after execution of the contract with the selected contractor. The commissioner shall select a contractor from among the list of firms submitted by the award panel that interviewed the contractors. After the commissioner has made a selection, the names of the contractor firms submitted to the commissioner shall be available to the public upon request. The commissioner shall also prepare a memorandum on the final phase of the selection process, indicating how the commissioner applied the evaluation criteria to determine the most qualified firm. Such memorandum shall be available to the public after execution of the contract with the selected contractor.

(f) The commissioner shall adopt regulations, in accordance with chapter 54 of the general statutes, to implement the provisions of this section.

Sec. 9. Subdivision (4) of section 4b-24 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(4) The commissioner may designate projects to be accomplished on a total cost basis for (A) new facilities to provide for the substantial space needs of a requesting agency, (B) the installation of mechanical or electrical equipment systems in existing state facilities, or (C) the demolition of any state facility that the commissioner is authorized to demolish under the general statutes. If the commissioner designates a project as a designated total cost basis project, the commissioner may enter into a single contract with a private developer which may include such project elements as site acquisition, architectural design and construction. The commissioner shall select a private developer from among the developers who are selected and recommended by the award panels established in section 9 of this act. All contracts for such designated projects shall be based on competitive proposals received by the commissioner, who shall give notice of such project, and specifications for the project, by advertising, at least once, in a newspaper having a substantial circulation in the area in which such project is to be located. No contract which includes the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state for which the total cost is estimated to be more than five hundred thousand dollars may be awarded to a person who is not prequalified for the work in accordance with section 3 of this act. The commissioner shall determine

all other requirements and conditions for such proposals and awards and shall have sole responsibility for all other aspects of such contracts. Such contracts shall state clearly the responsibilities of the developer to deliver a completed and acceptable product on a date certain, the maximum cost of the project and, as a separate item, the cost of site acquisition, if applicable. No such contract may be entered into by the commissioner without the prior approval of the State Properties Review Board and unless funding has been authorized pursuant to the general statutes or a public or special act.

Sec. 10. Subsection (c) of section 4b-52 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2004*):

(c) Whenever the Commissioner of Public Works declares that an emergency condition exists at any state facility, other than a building under the supervision and control of the Joint Committee on Legislative Management, and that the condition would adversely affect public safety or the proper conduct of essential state government operations, or said joint committee declares that such an emergency exists at a building under its supervision and control, the commissioner or the joint committee may employ such assistance as may be required to restore facilities under their control and management, or the commissioner may so act upon the request of a state agency, to restore facilities under the control and management of such agency, without inviting bids as required in subsection (b) of this section. The commissioner shall take no action requiring the expenditure of more than five hundred thousand dollars to restore any facility under this subsection (1) without the written consent of the Governor, and (2) until the commissioner has certified to the joint committee of the General Assembly having cognizance of matters relating to legislative management that the project is of such an emergency nature that an exception to subsection (b) of this section is required. Such certification shall include input from all affected agencies, detail the need for the exception and include any relevant documentation. The provisions of this subsection shall not apply if any person is obligated under the terms of an existing contract with the state to render such assistance. The annual report of the commissioner shall include a detailed statement of all expenditures made under this subsection.

Sec. 11. Subsections (b) to (e), inclusive, of section 4b-55 of the general statutes are repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(b) "Consultant" means (1) any architect, professional engineer, landscape architect, land surveyor, accountant, interior designer, environmental professional or construction administrator, who is registered or licensed to practice such person's profession in accordance with the applicable provisions of the general statutes, or (2) any planner [, construction manager] or financial specialist;

(c) "Consultant services" shall include those professional services rendered by architects, professional engineers, landscape architects, land surveyors, accountants, interior designers, environmental professionals, construction administrators, planners [, construction managers] or financial specialists, as well as incidental services that members of these professions and those in their employ are authorized to perform;

(d) "University of Connecticut library project" means a project to renovate and improve the Homer Babbidge Library at The University of Connecticut;

(e) "Firm" means any individual, partnership, corporation, joint venture, association or other legal entity (1) authorized by law to practice the profession of architecture, landscape architecture, engineering, land surveying, accounting, interior design, environmental or construction administration, or (2) practicing the profession of planning [, construction management] or financial specialization.

Sec. 12. (NEW) (*Effective October 1, 2004*) With respect to any contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building under the supervision and control of the Commissioner of Transportation which contract is estimated to cost more than five hundred thousand dollars and is not subject to section 4b-51 of the general statutes, the Commissioner of Transportation shall award the contract to the lowest responsible and qualified bidder, as defined in section 4b-92 of the general statutes, as amended by this act, in accordance with regulations which the commissioner shall adopt, in accordance with chapter 54 of the general statutes. Such regulations shall establish, at a minimum: (1) Standards for the advertisement of opportunities to bid, (2) objective criteria for evaluating the qualifications of bidders, (3) the procedures for evaluating bids after the prequalification status of a bidder has been verified, and (4) award panels for the purpose of screening submitted proposals, interviewing bidders and making recommendations to the commissioner. Any contract that is subject to section 4b-51 of the general statutes shall be awarded by the Commissioner of Public Works in accordance with chapter 60 of the general statutes.

Sec. 13. Subdivision (12) of section 13b-4 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(12) To provide for the planning and construction of any capital improvements and the remodeling, alteration, repair or enlargement of any real asset that may be required for the development and operation of a safe, efficient system of highway, mass transit, marine and aviation transportation, provided (A) the acquisition, other than by condemnation, or the sale or lease, of any property that is used for such purposes shall be subject to the review and approval of the State Properties Review Board in accordance with the provisions of subsection (f) of section 4b-3, and (B) any contract for the planning, construction, remodeling, alteration, repair or enlargement of any public building which is estimated to cost more than five hundred thousand dollars shall be advertised and awarded in accordance with section 12 of this act.

Sec. 14. Section 13b-42 of the general statutes is amended by adding subsection (h) as follows (*Effective October 1, 2004*):

(NEW) (h) Any lease which involves the construction, reconstruction, alteration, remodeling, repair or demolition of any public building which is estimated to cost more than five hundred thousand dollars shall be advertised and awarded in accordance with section 12 of this act.

Sec. 15. Section 20-341gg of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) As used in this section, "major contractor" means (1) any person engaged in the business of construction, structural repair, structural alteration, dismantling or demolition of a structure or addition that exceeds the threshold limits provided in section 29-276b, or (2) any person who, under the direction of a general contractor, performs or offers to perform any work that impacts upon the structural integrity of a structure or addition, including repair, alteration, dismantling or demolition of a structure or addition that exceeds the threshold limits provided in section 29-276b. Such work includes, but is not limited to, roofing, masonry and structural frame work.

(b) No person shall engage in or offer to perform the work of any major contractor in this state on any proposed structure or existing structure or addition that exceeds the threshold limits contained in section 29-276b unless such person has first obtained a license or certificate of registration as required under the provisions of chapter 539 or a registration from the Department of Consumer Protection in accordance with the provisions of this section. Individuals licensed under chapter 393 shall be exempt from the provisions of this chapter while engaging in work that they are licensed to perform. The

department shall issue a certificate of registration to any person who is prequalified pursuant to section 3 of this act who applies for registration in accordance with this section. Such prequalified person shall not be required to pay a fee for such registration at any time that the person maintains valid prequalification. If the individual or the firm, company, partnership or corporation employing such individual is engaged in work on a structure or addition that exceeds the threshold limits contained in section 29-276b and requires licensure under chapter 393, the firm, company, partnership or corporation shall be exempt from the provisions of this chapter concerning registration of major contractors, if the firm, company, partnership or corporation employs an individual who is licensed as a contractor under chapter 393 to perform such work. The department shall furnish to each qualified applicant a registration certifying that the holder of such registration is entitled to engage in the work for which the person has been issued a registration under this subsection, and the holder of such registration shall carry it on his person while engaging in such work. Such registration shall be shown to any properly interested person upon request. No such registration shall be transferred to or used by any person other than the person to whom the registration was issued. The department shall maintain rosters of registrants and shall update such rosters annually. The department may provide copies of rosters to the public for an appropriate fee. The department may suspend or revoke any registration issued by the department if the holder of such registration is convicted of a felony, is grossly incompetent, is disqualified, pursuant to section 3 of this act or whose prequalification certificate has been revoked pursuant to section 3 of this act, engages in malpractice or unethical conduct or knowingly makes false, misleading or deceptive representations regarding his work or violates any regulation adopted under subsection (c) of this section. Before any registration is suspended or revoked, such holder shall be given notice and an opportunity for hearing as provided in regulations adopted under subsection (c) of this section. The Commissioner of Consumer Protection shall provide written notice of any suspension or revocation of a registration to the Commissioner of Administrative Services not later than ten days after such suspension or revocation.

(c) The Commissioner of Consumer Protection shall adopt regulations, in accordance with chapter 54, to implement the provisions of this section. Such regulations shall (1) establish the registration requirements for major contractors, (2) specify application and registration fees, and (3) establish occupational standards for the preservation of the public safety.

Approved July 9, 2003

OLR Bill Analysis

sHB 6417 (File 513, as amended by House "A" and "B")*

AN ACT CONCERNING STATE CONSTRUCTION CONTRACTS

SUMMARY:

This bill:

1. requires contractors to prequalify to bid on public building construction contracts estimated to cost more than $ 500,000;

2. except as otherwise provided in law, redefines "lowest responsible qualified bidder" to include a prequalified contractor;

3. requires advertisements for bids on these contracts to include the financial capacity, prior experience, and workforce required to do the job;

4. requires the Department of Public Works (DPW) commissioner to disqualify contractors who receive advance information about a project;

5. expands the process for starting emergency restoration on state facilities under the DPW commissioner's control;

6. establishes Construction Services Award Panels within DPW;

7. requires state agencies to evaluate contractors after construction is completed and requires the Department of Administrative Services (DAS) commissioner to place the evaluation in the contractor's prequalification file;

8. requires agencies that award building construction contracts to make annual status reports to the governor and the legislature;

9. requires the DPW commissioner to adopt regulations to implement bidding and contracting procedures for building construction, including the (a) procedures for evaluating bids after a contractor's prequalification status has been verified and (b) objective criteria for evaluating bidder's qualifications;

10. prohibits state officials and employees from accepting gifts from prequalified building contractors;

11. prohibits employees with decision-making authority from communicating with bidders on building construction contracts under certain circumstances;

12. requires the Department of Transportation (DOT) commissioner to award large building construction contracts to the lowest responsible qualified bidder who is prequalified by DAS;

13. requires the Department of Consumer Protection (DCP) to issue any prequalified contractor who applies a certificate of registration as a major contractor and prohibits the department from collecting a registration fee during any period the contractor's prequalification is valid; and

14. changes the requirement for employing construction managers.

*House Amendment "A" eliminates the DPW commissioner's authority under the original bill to disqualify contractors who lie on their prequalification applications; prohibits all state officials and employees, rather than just those with decision-making authority as provided under the original bill, from accepting gifts from prequalified building contractors; establishes multiple Construction Services Award Panels within DPW instead of just one as required under the original bill; requires agencies that award building construction contracts to make annual, rather than semi-annual, status reports as required under the original bill; and adds the provisions on emergency restoration, DOT contracts, DCP registration certificates; and construction managers.

*House Amendment "B" limits the contractors who cannot receive a prequalification certificate because of a principal or key employee's criminal history.

EFFECTIVE DATE: October 1, 2004, except for the provisions permitting contractors to prequalify with DAS and emergency construction, which are effective July 1, 2004, and the provision on status reports, which is effective January 1, 2004.

CONSTRUCTION CONTRACTS OVER $ 500,000

Bidders and Awards

Beginning October 1, 2004, the bill, with one exception, requires contractors to prequalify before they can bid on a contract funded in whole or part by the state for the construction, reconstruction, alteration, remodeling, repair, or demolition ("building construction") of any state or municipal building estimated to cost more than $ 500,000. The requirement does not apply to UCONN 2000.

The authorities authorized by law to award these contracts are the DPW commissioner, the Joint Committee on Legislative Management for work or construction on buildings under its supervision, and public colleges and universities for work or construction on buildings under their supervision or control.

The bill requires the affected awarding authorities to award the contract on the basis of competitive bidding to the lowest responsible qualified bidder who is prequalified. By law, the lowest responsible qualified bidder on the basis of competitive bidding is the person possessing the skill, ability, and integrity necessary for the faithful performance of the work as determined by his past performance, including his experience with projects of the size of the one advertised, and financial ability.

The bill eliminates the requirement for the awarding authority to consider the bidder's financial ability and instead requires the authority to consider information contained in the bidder's update statement (see below). It requires awarding authorities to look at a bidder's past experience with projects of the nature and scope, rather than the size, of the one advertised.

Advertisement

The bill requires advertisements for bids on these contracts that awarding authorities are required by law to place in newspapers that circulate in the state to indicate the prequalification classification and aggregate work ratings required of successful bidders (i. e. , the types of work the contractor must be able to perform and the maximum amount of work he must be capable of undertaking).

Bids

Beginning October 1, 2004, the bill requires each bid on the affected large contracts to include a copy of a prequalification statement from the DAS commissioner showing that the bidder has the prequalification classification and aggregate work capacity ratings required under the contract. The bid must also have an update statement in the form the commissioner prescribes. Any bid submitted without these documents is invalid.

At the end of the bidding process, the bill requires the bidder to certify under penalty of false statement that (1) the bid information is true; (2) there were no substantial changes in his financial position or corporate structure since his most recent prequalification certificate was issued or renewed, other than those noted in the update statement; and (3) he made the bid without fraud or collusion with anyone.

CONTRACTOR PREQUALIFICATION

Prequalification Application

Contractors, but not subcontractors, can seek prequalification to work on any state or municipal construction project by submitting an application to DAS on a form prescribed by the DAS commissioner together with a nonrefundable fee.

The applicant must include information current at the time of filing, except that the statement of financial condition described below must reflect the most recently completed fiscal year. The applicant must sign the application under penalty of false statement.

The application must, at a minimum, require the applicant to disclose:

1. how he is organized;

2. his principals and key personnel and any business names he or his principals or key personnel used during the past five years;

3. his construction experience over the past five years or on the 10 most recently completed projects and the names of any subcontractors used on the projects;

4. any legal or administrative proceedings pending against or concluded adversely to him, or his principals or key personnel in the past five years concerning the procurement or performance of a construction contract;

5. his knowledge of any investigation pending against him or his principals or key personnel;

6. his relationship, whether financial, personal, or familial, with the owner of any construction project he listed as construction experience;

7. whether (a) he has been disqualified from bidding on federal, state, or municipal construction contracts, including those in other states, (b) the Department of Consumer Protection has revoked or suspended his registration, and (c) the matters that gave rise to the disqualification, revocation, or suspension have been remedied or eliminated; and

8. any other information the commissioner deems relevant to determining the applicant's qualifications and responsibility.

The applicant must include in the application a statement of financial condition prepared by an

accountant that shows the applicant's assets and liabilities, plant and equipment, bank and credit references, bonding company and maximum bonding capacity, and any other information the commissioner deems relevant to the determination of the applicant's financial capacity and responsibility.

Application Fee

The amount of the fee depends on the applicant's aggregate work capacity rating. It is a graduated fee starting at $ 600 and capped at $ 2,500.

Aggregate Work Capacity Rating	*Fee*
$ 5,000,000. 00 or less	$ 600
$ 5,000,000. 01 to $ 8,000,000. 00	$ 750
$ 8,000,000. 01 to $ 10,000,000. 00	$ 850
$ 10,000,000. 01 to $ 15,000,000. 00	$ 1,000
$ 15,000,000. 01 to $ 20,000,000. 00	$ 1,500
$ 20,000,000. 01 to 40,000,000. 00	$ 2,000
$ 40,000,000. 01 or more	$ 2,500

Prequalification Classification and Aggregate Work Capacity Rating

Applicants must indicate the prequalification classifications and aggregate work capacity rating they are seeking. Once prequalified, a contractor can apply at any time for additional prequalification classifications or aggregate work capacity ratings by submitting the applicable fee, a complete update statement, and other information the commissioner requires.

The DAS commissioner may issue to any applicant that meets the requirements a certificate of prequalification that includes his classifications and aggregate work capacity ratings (e. g. , the types of work the contractor can perform and the maximum amount of work he is capable of undertaking).

The certificate is effective for one year from the date issued and may be renewed upon receipt of a nonrefundable fee of $ 600 or one-half of the application fee for the applicable aggregate work capacity rating, whichever is greater; a completed update statement; and any other material the commissioner requires. Awarding authorities must use the classifications to determine the types of

work a contractor is qualified to perform and the aggregate work capacity ratings to establish the maximum amount of work he is capable of undertaking.

The commissioner must determine whether to prequalify an applicant based on the application and on relevant past performance in accordance with procedures and criteria that she must adopt in regulations. At a minimum, the criteria must include (1) the applicant's past performance record, including written evaluations on his performance on public or private projects in the past five years; (2) his prior experience on projects of various sizes and types; (3) his supervisory personnel's experience and qualifications; (4) his maximum work capacity as demonstrated by his financial condition, bonding capacity, size, or past projects, and present and anticipated work commitments; (5) the skill, ability, and integrity, of the applicant and any subcontractors he has used; and (6) any other relevant information the commissioner prescribes.

The regulations must also (1) provide that the criteria be assigned different numerical values and weights and that each applicant be assigned an overall numerical rating based on all criteria and (2) establish prequalification classifications and aggregate work capacity ratings.

False Applications

The contract awarding authority may terminate a contract with or disqualify any applicant for making a materially false statement on an application or statement update (see below). The awarding authority must give the DAS commissioner written notice of the false statement within 30 days after discovering it. And the DAS commissioner must, in turn, give the DPW and the consumer protection commissioners written notice of it within 30 days after discovery or after receiving notice from the awarding authority.

Decision on Applications and Review Process

Within 60 days after receiving a complete application, the DAS commissioner must notify applicants by mail of her (1) preliminary determination of the prequalification certification conditions or (2) decision to deny certification, reduce the certification level, or refuse to renew certification.

Any applicant aggrieved by a preliminary determination may, within 10 days after the notice of determination was mailed as indicated by the postmark on the envelope, ask for copies of the information the commissioner relied on to make it. Not later than 20 days after the post-marked date, the applicant can give the commissioner additional information and ask her to reconsider the application.

The commissioner must make a final determination on the application within 90 business days after the date the commissioner mailed her preliminary determination. The initial 90 days may be extended for up to an additional 90 days if the commissioner notifies the applicant, during the initial period, that she needs more time. Any applicant aggrieved by the final determination may appeal to the Superior Court.

Prequalification Revocation

The bill requires the commissioner the revoke a contractor's prequalification, after a hearing, if she finds that he (1) included materially false statements in his application or update statement, (2) has been convicted of a crime related to the procurement or performance of any public or private construction contract, or (3) has otherwise engaged in fraud in obtaining or maintaining prequalification within the past five years. The revocation is effective for two years, unless the

contractor has been convicted of fraud, in which case it is effective for five years. After this time, the commissioner cannot prequalify the contractor until she is satisfied that the revocation has been eliminated or remedied. She must give the DPW and consumer protection commissioners written notice of the revocation or reinstatement within 30 days after the final decision.

The bill permits her to revoke a contractor's prequalification or reduce his classification or aggregate work capacity ratings, after a hearing, if she receives additional information that supports the revocation or reduction.

UPDATE STATEMENTS

The commissioner must establish an update statement for certificate renewals and upgrades and for use by contractors who bid on building construction contracts with an estimated value of over $ 500,000. The statement must provide space for information on (1) all of the projects the bidder has completed since his prequalification certificate was issued or renewed; (2) all projects the bidder has under contract at that time, including the percentage incomplete; (3) the names and qualifications of personnel who will supervise the contract; (4) any significant change in the bidder's financial position or corporate structure since the certificate was issued or renewed; and (5) any other relevant information the commissioner prescribes.

DISQUALIFICATION

The bill prohibits the DAS commissioner from prequalifying any contractor (1) disqualified for labor law violations or (2) who has a principal or key person who within the past five years has been convicted or has entered a plea of guilty or *nolo contendere* for any act or omission that could result in disqualification as determined by the commissioner.

The bill requires the DPW commissioner, presumably, to disqualify from bidding on a public building construction project anyone who receives information that is not available to the general public from a public official about the project before an advertisement for bids is published.

EMERGENCY AND NON-BID PROJECTS

By law, the DPW commissioner can select and interview at least three responsible and qualified general contractors and negotiate with any one of them to complete any of eight special building projects: a community court, Connecticut Juvenile Training School, downtown Hartford higher education center, University of Connecticut library, a correctional facility, a juvenile detention center, and a student residential facility for the Connecticut State University system.

He can also declare an emergency condition at most state facilities and restore them at a cost under of $ 500,000 or less without inviting bids. If restoration costs would exceed $ 500,000, the law requires him to get the governor's written consent before going forward.

In addition to being responsible and qualified, the bill requires non-bid contractors to be prequalified and selected by a construction service award panel (see below). Beginning October 1, 2004, the bill requires any agency seeking to have a project awarded without competitive bidding to certify to the Legislative Management Committee the emergency nature of the project and the need for an exception to competitive bidding. The certification must include input from all affected agencies, detail the need for the exception, and include any relevant documentation.

The bill requires the commissioner to follow the above-described certification process before starting work on emergency projects that currently require the governor's written consent.

CONSTRUCTION SERVICES AWARD PANEL

The bill establishes six-member Construction Services Award Panels within DPW. The commissioner must appoint one neutral member and three other members from among current DPW employees. The agency requesting the construction must appoint the remaining two members. The commissioner's appointees serve for one year, beginning on July 1. The DPW commissioner or head of the requesting agency, as appropriate, must appoint people to fill vacancies for an unexpired term. The commissioner must designate one voting member on each panel to serve as chairperson. The chairperson serves as committee moderator, collects votes, and compiles results. The bill specifies that the panels are not boards or commissions for the purpose of appointments.

The panels must award state construction contracts, including contracts awarded on a total cost basis and contracts for the eight special building projects authorized by law.

Process

For each applicable contract, the commissioner must designate one panel to screen all proposals and establish a list of bidders to be interviewed and a separate panel to interview them and submit a list of recommended contractors to the commissioner. The commissioner must select a contractor from the list of recommended contractors to complete construction projects, including projects where he enters an agreement with a single developer to complete all phases of the contract (total cost basis). After the commissioner makes the selection, the names of the contractors submitted to him must be available to the public upon request.

Each panel and the commissioner must prepare a memorandum on the selection process and the final phase of the selection process, respectively, indicating how the evaluation criteria were used to determine the most qualified firms. The memoranda must be made publicly available after a contract has been entered with the selected contractor.

The bill requires the commissioner to adopt implementing regulations.

CONTRACTOR EVALUATIONS

The DAS commissioner must adopt regulations to establish a standard contractor evaluation form. At a minimum, the form must include the following evaluation criteria:

1. timeliness and quality of performance;

2. cost containment;

3. safety;

4. quality of the contractor's (a) working relationship with the agency, (b) supervision of the work area, and (c) required documentation;

5. communication with the agency;

6. performance of the contractor's subcontractors to the extent known; and

7. the contractor's and any subcontractor's compliance with state preference, prevailing wage, minimum wage, and other related laws or the federal prevailing wage law (Davis-Bacon Act), as from time to time amended to the extent known.

Each public agency, other than UCONN, must complete and submit an evaluation form on each contractor, but not subcontractor, at the conclusion of state-funded work funded on a building under the agency's control. The commissioner must include the evaluation in the contractor's prequalification file. The person certifying the evaluation must mail it to the contractor.

When 50% of the work on the construction project is completed, the agency must give the contractor a written copy of the preliminary evaluation.

A contractor may contest any information in the evaluation by submitting a written response to the DAS commissioner no later than 30 days after the date the evaluation was postmarked. The response must indicate anything that may be relevant to the contractor's performance on the contract. The commissioner must include the response in the contractor's prequalification file.

STATUS REPORTS

By January 1, 2004, and annually thereafter, the bill requires each awarding authority, other than UCONN with respect to projects under its control, to prepare a report on the status of any (1) ongoing building construction contracts estimated to cost more than $ 500,000 that will be paid, in whole or in part, with state funds or (2) DPW-awarded property management contract with an annual value of $ 100,000 or more. They must submit the reports to the governor and the Government Administration and Elections and Finance, Revenue and Bonding committees.

The bill requires the first report submitted after a contract is awarded to indicate:

1. when, where, and how bids were advertised;

2. the bidders;

3. the law governing the contract award and if there was any deviation from standard contract awarding procedures;

4. the people responsible for awarding the contract, including the names of people on any awarding panel;

5. whether an awarding panel was used and its recommendation followed;

6. why any panel recommendations were not followed;

7. the existence and nature of any other contract the authority has with the contractor that is the subject of the report; and

8. the text of any laws authorizing or funding the project.

ETHICS

Gifts to Decision-Makers on Contract Awards

The bill prohibits public officials and state employees from knowingly accepting, either directly or indirectly, a gift from any person they know or have reason to know is a prequalified contractor. It also prohibits these contractors from giving them gifts. Public officials and state employees are already prohibited from accepting gifts from people doing business with or seeking to do business with their agencies. The people seeking to do business with the state are also prohibited from giving

public officials and state employees gifts. The State Ethics Commission can fine violators up to $ 2,000 per violation or issue a cease and desist order.

Prohibited Communications

The bill prohibits certain employees of the awarding authorities from communicating with a bidder on a building contract prior to the contract award, if the communication results in the bidder receiving information about the contract that is not available to other bidders. The prohibition applies to employees with decision-making authority concerning the contract. The prohibition does not apply to negotiations with the lowest responsible qualified bidder when his price exceeds the amount of funds allocated for construction.

DOT CONTRACTS

The bill requires the DOT commissioner to advertise and award building construction contracts under his supervision and control and valued at over $ 500,000 to the lowest responsible and qualified bidder who has been prequalified by the DAS commissioner. The same requirements apply to construction associated with leases at airports under the commissioner's jurisdiction. The commissioner must adopt regulations that, at a minimum, establish:

1. bid advertisement standards;

2. objective criteria for evaluating bidders' qualifications;

3. evaluation procedures after bidders' qualifications are verified; and

4. panels to screen, interview, and make recommendations on bidders.

REGISTRATION AS MAJOR CONTRACTORS

The bill requires DCP to issue any prequalified contractor who applies a certificate of registration as a major contractor and prohibits the department from collecting a registration fee during any period the contractor's prequalification is valid. The bill authorizes the department to revoke the registration of any contractor (1) who cannot receive a prequalification certificate because of disqualification or (2) whose prequalification certificate is revoked.

The commissioner must give the DAS commissioner written notice within 10 days after any registration suspension or revocation.

CONSTRUCTION MANAGERS

The bill eliminates a requirement for (1) agencies to issue request for proposals through newspaper advertisements for construction managers and (2) the construction services selection panel to recommend to the awarding authority the respondent most qualified to do the job. It is unclear, under the bill, whether an agency seeking to hire a construction manager would have to enter a personal service agreement or follow the process the bill establishes for hiring a construction contractor.

BACKGROUND

Bid Disqualifications Under Current Law

A contractor can be disqualified from bidding on, applying for, or participating as a subcontractor

under state contracts for certain specific causes. These include:

1. conviction of, entry of a guilty or nolo contender plea, or admission to a criminal offense incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of one;

2. conviction of, entry of a guilty or nolo contender plea, or admission to a violation of any state or federal law for (a) embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or honesty that affects responsibility as a state contractor or (b) antitrust, collusion, or conspiracy offenses arising from submission of bids or proposals for any public or private contract or subcontract;

3. willful failure to perform according to terms, a history of performance failure, or unsatisfactory performance; or

4. willful violation of statutory or regulatory requirements applicable to a public contract, agreement, or transaction.

The existence of a cause for disqualification cannot be the only factor the commissioners consider. They must also consider the seriousness of the contractor's acts or omission and any mitigating factors when deciding whether to disqualify him.

Legislative History

On May 6, 14, 19, and 21, the House referred the bill (File 513) to the Judiciary, Finance, Revenue and Bonding, Appropriations, and Labor and Public Employees committees, respectively. They reported the bill unchanged on May 13, 15, 20, and 22, respectively.

COMMITTEE ACTION

Government Administration and Elections Committee

Joint Favorable Substitute

Yea 19 Nay 0

Judiciary Committee

Joint Favorable Report

Yea 24 Nay 10

Finance, Revenue and Bonding Committee

Joint Favorable Report

Yea 31 Nay 9

Appropriations Committee

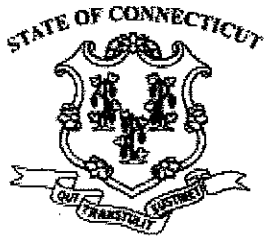
Joint Favorable Report

Yea 46 Nay 0

Labor and Public Employee Committee

Joint Favorable Report

Yea 11 Nay 1



Substitute House Bill No. 5433

Public Act No. 04-141

AN ACT REVISING PREQUALIFICATION REQUIREMENTS FOR STATE CONSTRUCTION CONTRACTS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 4b-91 of the general statutes, as amended by section 1 of public act 03-215, is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) Every contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state, which is estimated to cost more than five hundred thousand dollars, except (1) a contract awarded by the Commissioner of Public Works for (A) a community court project, as defined in subsection (j) of section 4b-55, (B) the Connecticut Juvenile Training School project, as defined in subsection (k) of section 4b-55, (C) the downtown Hartford higher education center project, as defined in subsection (l) of section 4b-55, (D) The University of Connecticut library project, as defined in subsection (d) of section 4b-55, (E) a correctional facility project, as defined in subsection (m) of section 4b-55, (F) a juvenile detention center project, as defined in subsection (n) of section 4b-55, or (G) a student residential facility for the Connecticut State University system that is a priority higher education facility project, as defined in subsection (f) of section 4b-55, or (2) a project, as defined in subdivision (16) of section 10a-109c, undertaken and controlled by The University of Connecticut in accordance with section 10a-109n, shall be awarded to the lowest responsible and qualified general bidder who is prequalified pursuant to section 3 of [this act] public act 03-215, as amended by this act, on the basis of competitive bids in accordance with the procedures set forth in this chapter, [and section 8 of this act,] after the Commissioner of Public Works or, in the case of a contract for the construction of or work on a building under the supervision and control of the Joint Committee on Legislative Management of the General Assembly, the joint committee or, in the case of a contract for the construction of or work on a building under the supervision and control of one of the constituent units of the state system of higher education, the constituent unit, has invited such bids by advertisements inserted at least once in one or more newspapers having a circulation in each county in the state. The Commissioner of Public Works, the joint committee or the constituent unit, as the case may be, shall indicate the prequalification classification [and aggregate work capacity rating] required for the contract in such advertisement. As used in this section, "prequalification classification" means the prequalification classifications established by the Commissioner of Administrative Services pursuant to section 3 of [this act] public act 03-215, as amended by this act. [and "aggregate work capacity rating" means the aggregate work capacity ratings established by the Commissioner of Administrative Services pursuant to section 3 of this act.]

(b) The Commissioner of Public Works, the joint committee or the constituent unit, as the case may be, shall determine the manner of submission and the conditions and requirements of such bids, and the time within which the bids shall be submitted, consistent with the provisions of sections 4b-91 to 4b-96, inclusive, as amended. Such award shall be made within sixty days after the opening of such bids. If the general bidder selected as the general contractor fails to perform the general contractor's agreement to execute a contract in accordance with the terms of the general contractor's general bid and furnish a performance bond and also a labor and materials or payment bond to the amount specified in the general bid form, an award shall be made to the next lowest responsible and qualified general bidder. No employee of the Department of Public Works, the joint committee or a constituent unit with decision-making authority concerning the award of a contract and no public official, as defined in section 1-79, may communicate with any bidder prior to the award of the contract if the communication results in the bidder receiving information about the contract that is not available to other bidders, except that if the lowest responsible and qualified bidder's price submitted is in excess of funds available to make an award, the Commissioner of Public Works, the Joint Committee on Legislative Management or the constituent unit, as the case may be, may negotiate with such bidder and award the contract on the basis of the funds available, without change in the contract specifications, plans and other requirements. If the award of a contract on said basis is refused by such bidder, the Commissioner of Public Works, the Joint Committee on Legislative Management or the constituent unit, as the case may be, may negotiate with other contractors who submitted bids in ascending order of bid prices without change in the contract, specifications, plans and other requirements. In the event of negotiation with general bidders as provided in this section, the general bidder involved may negotiate with subcontractors on the same basis, provided such general bidder shall negotiate only with subcontractors named on such general bidder's general bid form.

(c) On and after October 1, 2004, no person may bid on a contract, except for a project described in subdivision (2) of subsection (a) of this section, for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state or a municipality, which is estimated to cost more than five hundred thousand dollars and is paid for, in whole or in part, with state funds, unless the person is prequalified in accordance with section 3 of [this act] public act 03-215, as amended by this act.

(d) On and after October 1, 2004, each bid submitted for a contract described in subsection (c) of this section shall include a copy of a prequalification [statement] certificate issued by the Commissioner of Administrative Services. [showing that the bidder has the prequalification classification and aggregate work capacity ratings required under such contract.] The bid shall also be accompanied by an update statement in such form as the Commissioner of Administrative Services prescribes. The form for such update statement shall provide space for information regarding all projects completed by the bidder since the date the bidder's prequalification certificate was issued or renewed, all projects the bidder currently has under contract, including the percentage of work on such projects not completed, the names and qualifications of the personnel who will have supervisory responsibility for the performance of the contract, any significant changes in the bidder's financial position or [business organization] corporate structure since the date the certificate was issued or renewed, any change in the contractor's qualification status as determined by the provisions of subdivision (6) of subsection (c) of section 3 of public act 03-215, as amended by this act, and such other relevant information as the Commissioner of Administrative Services prescribes. Any bid submitted without a copy of the prequalification certificate and an update statement shall be invalid.

(e) Any person who bids on a contract described in subsection (c) of this section shall certify under penalty of false statement at the conclusion of the bidding process that the information in the bid is true, that there has been no substantial change in the bidder's financial position or corporate structure

since the bidder's most recent prequalification certificate was issued or renewed, other than those changes noted in the update statement, and that the bid was made without fraud or collusion with any person.

(f) Any person who receives information from a state employee or public official that is not available to the general public concerning any construction, reconstruction, alteration, remodeling, repair or demolition project on a public building prior to the date that an advertisement for bids on the project is published shall be disqualified from bidding on the project.

(g) Notwithstanding the provisions of this chapter regarding competitive bidding procedures, the commissioner may select and interview at least three responsible and qualified general contractors who are prequalified pursuant to section 3 of [this act] public act 03-215, as amended by this act, and [selected by the award panel established in subdivision (4) of section 4b-24] submit the three selected contractors to the construction services award panels process described in section 8 of public act 03-215, as amended by this act and any regulation adopted by the commissioner. The commissioner may negotiate with [any one of such contractors] the successful bidder a contract which is both fair and reasonable to the state for a community court project, as defined in subsection (j) of section 4b-55, the downtown Hartford higher education center project, as defined in subsection (l) of section 4b-55, The University of Connecticut library project, as defined in subsection (d) of section 4b-55, the Connecticut Juvenile Training School project, as defined in subsection (k) of section 4b-55, a correctional facility project, as defined in subsection (m) of section 4b-55, a juvenile detention center project, as defined in subsection (n) of section 4b-55, or a student residential facility for the Connecticut State University system that is a priority higher education facility project, as defined in subsection (f) of section 4b-55. The Commissioner of Public Works, prior to entering any such contract or performing any work on such project, shall submit such contract to the State Properties Review Board for review and approval or disapproval by the board, pursuant to subsection (i) of this section. Any general contractor awarded a contract pursuant to this subsection shall be subject to the same requirements concerning the furnishing of bonds as a contractor awarded a contract pursuant to subsection (b) of this section.

(h) On and after October 1, 2004, any agency that seeks to have a project awarded without being subject to competitive bidding procedures shall certify to the joint committee of the General Assembly having cognizance of matters relating to [legislative management] government administration and elections that the project is of such an emergency nature that an exception to the competitive bidding procedures of this section is required. Such certification shall include input from all affected agencies, detail the need for the exception and include any relevant documentation.

(i) In the event that the General Assembly approves legislation authorizing an exception to the competitive bidding process for a project, the State Properties Review Board shall complete a review of the contract for such project and approve or disapprove such contract no later than thirty days after the Commissioner of Public Works submits such contract to the board. Such review shall be conducted in accordance with the provisions of section 4b-3, as amended by this act. In the event that such review does not occur within the thirty-day period prescribed by this subsection, such contract shall be deemed to be approved.

Sec. 2. Section 3 of public act 03-215 is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) As used in this section: (1) "Prequalification" means prequalification issued by the Commissioner of Administrative Services to bid on a contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state or a municipality; (2)

"subcontractor" means a person who performs work with a value in excess of twenty-five thousand dollars for a contractor pursuant to a contract for work for the state or a municipality which is estimated to cost more than five hundred thousand dollars; [and] (3) "principals and key personnel" includes officers, directors, shareholders, members, partners and managerial employees; (4) "aggregate work capacity rating" means the maximum amount of work an applicant is capable of undertaking for any and all projects; and (5) "single project limit" means the highest estimated cost of a single project that an applicant is capable of undertaking.

(b) (1) Any person may apply for prequalification to the Department of Administrative Services. Such application shall be made on such form as the Commissioner of Administrative Services prescribes and shall be accompanied by a nonrefundable application fee as set forth in subdivision (2) of this subsection. The application shall be signed under penalty of false statement.

(2) The application fee shall be as follows:

Aggregate Work Capacity Rating	Fee
$ 5,000,000. 00 or less	$ 600. 00
$ 5,000,000. 01 - $ 8,000,000. 00	$ 750. 00
$ 8,000,000. 01 - $ 10,000,000. 00	$ 850. 00
$ 10,000,000. 01 - $ 15,000,000. 00	$ 1,000. 00
$ 15,000,000. 01 - $ 20,000,000. 00	$ 1,500. 00
$ 20,000,000. 01 - $ 40,000,000. 00	$ 2,000. 00
$ 40,000,000. 01 or more	$ 2,500. 00

(c) The application form shall, at a minimum, require the applicant to supply information concerning:

(1) The applicant's form of organization;

(2) The applicant's principals and key personnel and any names under which the applicant, principals or key personnel conducted business during the past five years;

(3) The applicant's experience on public and private construction projects over the past five years, or on the applicant's ten most recently-completed projects and the names of any subcontractors used on the projects;

(4) Any legal or administrative proceedings pending or concluded adversely against the applicant or any of the applicant's principals or key personnel within the past five years which relate to the procurement or performance of any public or private construction contract and whether the applicant is aware of any investigation pending against the applicant or any principal or key personnel;

(5) The nature of any financial, personal or familial relationship between the applicant and any public or private construction project owner listed on the application as constituting construction experience;

(6) A statement of whether (A) the applicant has been disqualified pursuant to section 4b-95, this section or section 31-57c or 31-57d, (B) the applicant is on the list distributed by the Labor Commissioner pursuant to section 31-57a, (C) the applicant is disqualified or prohibited from being awarded a contract pursuant to section 31-57b, (D) the applicant has been disqualified by another state, (E) the applicant has been disqualified by a federal agency or pursuant to federal law, (F) the applicant's registration has been suspended or revoked by the Department of Agriculture and Consumer Protection pursuant to section 20-341gg, as amended, (G) the applicant has been disqualified by a municipality, and (H) the matters that gave rise to any such disqualification, suspension or revocation have been eliminated or remedied; and

(7) Other information as the commissioner deems relevant to the determination of the applicant's qualifications and responsibilities.

(d) The applicant shall include a statement of financial condition prepared by a certified public accountant which includes information concerning the applicant's assets and liabilities, plant and equipment, bank and credit references, bonding company and maximum bonding capacity, and other information as the commissioner deems relevant to an evaluation of the applicant's financial capacity and responsibility.

(e) Information contained in the application shall be current as of the time of filing except that the statement of financial condition shall pertain to the applicant's most recently-completed fiscal year.

(f) The commissioner shall determine whether to prequalify an applicant on the basis of the application and on relevant past performance according to procedures and criteria set forth in regulations which the commissioner shall adopt on or before October 1, 2005, in accordance with chapter 54. Such criteria shall include, at a minimum, the record of the applicant's performance, including, but not limited to, written evaluations of the applicant's performance on public or private projects within the past five years, the applicant's past experience on projects of various size and type, the skill, ability and integrity of the applicant and any subcontractors used by the applicant, the experience and qualifications of supervisory personnel employed by the applicant, the maximum amount of work the applicant is capable of undertaking as demonstrated by the applicant's financial condition, bonding capacity, size of past projects and present and anticipated work commitments, and any other relevant criteria that the commissioner prescribes. Such regulations shall also (1) provide that the criteria considered shall be assigned separate designated numerical values and weights and that the applicant shall be assigned an overall numerical rating on the basis of all criteria, and (2) establish prequalification classifications, [and] aggregate work capacity ratings and single project limits. Such prequalification classifications shall be used to establish the types of work a contractor is qualified to perform and the aggregate work capacity ratings shall be used to establish the maximum amount of work a contractor is capable of undertaking.

(g) (1) The applicant shall indicate the prequalification classifications, [and] aggregate work capacity [rating] ratings and single project limits that are sought. The commissioner may issue a certificate of prequalification to any applicant who meets the requirements of this section. Such certificate shall be

effective for one year from the date issued and shall indicate the contractor's prequalification classifications, [and] aggregate work capacity ratings and single project limits. The commissioner may cause the initial certificate of prequalification to be effective for a period not to exceed two years and may require the applicant to remit payment of the application fee, as set forth in subsection (b) of this section, for the first twelve months of certification as well as a prorated application fee, as described in subdivision (3) of this subsection, for any additional period of certification beyond the first twelve months.

(2) A prequalified contractor may apply at any time for additional prequalification classifications, [or] aggregate work capacity ratings or single project limits by submitting the applicable increase in fee, a completed update statement, and other information the commissioner requires.

(3) The commissioner may renew a prequalification certificate upon receipt of a completed update statement, any other material the commissioner requires and a nonrefundable fee in an amount equal to one-half of the application fee for the applicable aggregate work capacity rating as set forth in subsection (b) of this section, except that in no event shall such fee be less than six hundred dollars.

(h) Not later than sixty days after receiving a completed application, the commissioner shall mail or send by electronic mail a notice to the applicant concerning the commissioner's preliminary determination regarding the conditions of the prequalification certification, a denial of certification, a reduction in the level of certification sought or nonrenewal of certification. Any applicant aggrieved by the commissioner's preliminary determination may request copies of the information upon which the commissioner relied in making the preliminary determination, provided such request is made not later than ten days after the date the notice was mailed [as indicated by the postmark on the envelope] or sent by electronic mail to the applicant. Not later than twenty days after [said postmark date] the date the notice was mailed or sent by electronic mail, the applicant may submit additional information to the commissioner with a request for reconsideration. The commissioner shall issue a final determination regarding the application not later than ninety days after the date the commissioner mailed or sent by electronic mail the notice of the preliminary determination, which ninety-day period may be extended for an additional period not to exceed ninety days if (1) the commissioner gives written notice to the applicant that the commissioner requires additional time, and (2) such notice is mailed or sent by electronic mail during the initial ninety-day period.

(i) The commissioner may not issue a prequalification certificate to any contractor (1) who is disqualified pursuant to section 31-57c or 31-57d, [or] (2) who has a principal or key personnel who, within the past five years, has a conviction or has entered a plea of guilty or nolo contendere for or has admitted to commission of an act or omission that reasonably could have resulted in disqualification pursuant to any provision of subdivisions (1) to (3), inclusive, of subsection (d) of section 31-57c or subdivisions (1) to (3), inclusive, of subsection (d) of section 31-57d, as determined by the commissioner.

(j) The commissioner may revoke a contractor's prequalification or reduce the contractor's prequalification classification or aggregate work capacity ratings, after an opportunity for a hearing, if the commissioner receives additional information that supports such revocation or reduction.

(k) (1) Any materially false statement in the application or any update statement may, in the discretion of the awarding authority, result in termination of any contract awarded the applicant by the awarding authority. The awarding authority shall provide written notice to the commissioner of such false statement not later than thirty days after discovering such false statement. The commissioner shall provide written notice of such false statement to the Commissioner of Public Works and the Commissioner of Agriculture and Consumer Protection not later than thirty days after discovering

such false statement or receiving such notice.

(2) The commissioner shall revoke the prequalification of any person, after an opportunity for hearing, if the commissioner finds that the person has included any materially false statement in such application or update statement, has been convicted of a crime related to the procurement or performance of any public or private construction contract or, within the past five years or has otherwise engaged in fraud in obtaining or maintaining prequalification. Any person whose prequalification has been revoked pursuant to this subsection shall be disqualified for a period of two years after which the person may reapply for prequalification, except that a person whose prequalification has been revoked on the basis of conviction of a crime or engaging in fraud shall be disqualified for a period of five years after which the person may reapply for prequalification. The commissioner shall not prequalify a person whose prequalification has been revoked pursuant to this subdivision until the expiration of said two or five-year disqualification period and the commissioner is satisfied that the matters that gave rise to the revocation have been eliminated or remedied.

(l) The commissioner shall provide written notice of any revocation, disqualification, reduction in classification or capacity rating or reinstated prequalification to the Commissioner of Public Works and the Commissioner of Agriculture and Consumer Protection not later than thirty days after any final determination.

(m) The provisions of this section and section 4 of [this act] public act 03-215, as amended by this act, shall not apply to subcontractors.

(n) The commissioner shall establish an update statement for use by bidders for purposes of renewing or upgrading a prequalification certificate and for purposes of submitting a bid pursuant to section 4b-91, as amended by this act.

(o) Any applicant aggrieved by the commissioner's final determination concerning a preliminary determination, a denial of certification, a reduction in prequalification classification or aggregate work capacity rating or a revocation or nonrenewal of certification may appeal to the Superior Court in accordance with section 4-183.

Sec. 3. Section 4 of public act 03-215 is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) [The] On or before October 1, 2005, the Commissioner of Administrative Services shall adopt regulations, in accordance with chapter 54, to establish a standard contractor evaluation form. Such form shall include, at a minimum, the following evaluation criteria: (1) Timeliness of performance; (2) quality of performance; (3) cost containment, including, but not limited to, the contractor's ability to work within the contract's allotted cost, the accuracy of the contractor's billing, and the number and cause of change orders and the manner in which the contractor determined the price on the change orders; (4) safety; (5) the quality of the contractor's working relationship with the agency and the quality of the contractor's supervision of the work area; (6) communication with the agency; (7) the quality of the contractor's required documentation; (8) the performance of the contractor's subcontractors, to the extent known by the official who completes the evaluation; and (9) the contractor's and any subcontractor's compliance with part III of chapter 557, or chapter 558, or the provisions of the federal Davis-Bacon Act, 40 USC, Sections 276a to 276a-5, inclusive, as from time to time amended, to the extent known by the official who completes the evaluation.

(b) Each public agency shall compile evaluation information during the performance of the contract and complete and submit the evaluation form to the commissioner after completion of a building

project under the agency's control if the building project is funded, in whole or in part, by state funds. Such evaluation information shall be available to any public agency for purposes of assessing the responsibility of the contractor during a bid selection and evaluation process. The designated official from such agency shall certify that the information contained in the evaluation form represents, to the best of the certifying official's knowledge, a true and accurate analysis of the contractor's performance record on the contract. The commissioner shall include the evaluation in the contractor's prequalification file. The official shall mail a copy of the completed evaluation form to the contractor. Any contractor who wishes to contest any information contained in the evaluation form may submit a written response to the commissioner not later than thirty days after the date the form was mailed as indicated by the postmark on the envelope. Such response shall set forth any additional information concerning the building project or the oversight of the contract by the public agency that may be relevant in the evaluation of the contractor's performance on the project. The commissioner shall include any such response in the contractor's prequalification file.

(c) As used in this section, "public agency" means a public agency, as defined in section 1-200, but does not include The University of Connecticut with respect to any project, as defined in subdivision (16) of section 10a-109c, that is undertaken and controlled by the university, and "subcontractor" means a person who performs work with a value in excess of twenty-five thousand dollars for a contractor pursuant to a contract for work for the state or a municipality which is estimated to cost more than five hundred thousand dollars.

(d) Upon fifty per cent completion of any building project under a public agency's control, the agency shall advise the contractor in writing of the agency's preliminary evaluation of the contractor's performance on the project.

(e) No public agency, employee of a public agency or certifying official of a public agency shall be held liable to any contractor for any loss or injury sustained by such contractor as the result of the completion of an evaluation form, as required by this section, unless such agency, employee or official is found by a court of competent jurisdiction to have acted in a wilful, wanton or reckless manner.

(f) Any public agency that fails to submit a completed evaluation form, as required by this section, not later than seventy days after the completion of a project, shall be ineligible for the receipt of any public funds disbursed by the state for the purposes of the construction, reconstruction, alteration, remodeling, repair or demolition of any public building or any public works project until such completed evaluation form is submitted.

Sec. 4. Section 6 of public act 03-215 is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) Not later than January 1, [2004] 2006, and annually thereafter, each awarding authority, other than a municipality, shall prepare a report on the status of (1) any ongoing project for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building which is estimated to cost more than five hundred thousand dollars and is paid for, in whole or in part, with state funds, or (2) any property management contract awarded by the Department of Public Works which has an annual value of one hundred thousand dollars or more. [The] Except for a school construction project, the awarding authority shall submit the report to the Governor and the joint standing committees of the General Assembly having cognizance of matters relating to government administration and finance, revenue and bonding. The report shall be submitted in accordance with section 11-4a. The first report submitted after a contract is awarded shall indicate: (A) When, where and how the request for bids was advertised; (B) who bid on the projects; (C) the provisions of law that governed the award of the contract and if there were any deviations from standard procedure in awarding the

contract; (D) the names of the individuals who had decision-making authority in awarding the contract, including, but not limited to, the individuals who served on any award panel; (E) if an award panel was used, whether the recommendation of the panel was followed and, if applicable, the reason why such recommendation was not followed; (F) whether the awarding authority has any other contracts with the contractor who was awarded the contract, and if so, the nature and value of the contract; and (G) any provisions of law that authorized or funded the project.

(b) The University of Connecticut shall not be required to submit a report pursuant to this section for any project, as defined in subdivision (16) of section 10a-109c, that is undertaken and controlled by the university.

Sec. 5. Section 4b-100 of the general statutes, as amended by section 7 of public act 03-215, is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) The Commissioner of Public Works shall adopt regulations, in accordance with chapter 54, to implement the provisions of sections 4b-91 to 4b-100, inclusive, as amended. Such regulations shall include (1) objective criteria for evaluating the qualifications of bidders, [and] (2) objective criteria for evaluating proposals, and (3) the procedures for evaluating bids after the prequalification status of the bidder has been verified.

(b) The Commissioner of Public Works shall adopt regulations, in accordance with the provisions of chapter 54, establishing a procedure for promptly hearing and ruling on claims alleging a violation or violations of sections 4b-91 to 4b-100, inclusive, as amended. Such claims may be initiated by the Department of Public Works or any party whose financial interests may be affected by the decision on such a claim.

Sec. 6. Section 8 of public act 03-215 is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) The Department of Public Works shall establish construction services award panels which shall each consist of six members: Three of whom shall be appointed by the Commissioner of Public Works and shall be current employees of the Department of Public Works; two of whom shall be appointed by the department head of the user agency; and one of whom who shall be a neutral party appointed by the commissioner. The members of each award panel appointed by the Commissioner of Public Works shall serve for terms of one year from July first. If any vacancy occurs on the panel, the Commissioner of Public Works or the head or acting head of the user agency, as appropriate, shall appoint a person for the unexpired term in accordance with the provisions of this subsection.

(b) A panel established pursuant to this section shall not be deemed to be a board or commission within the meaning of section 4-9a, as amended. Such panels shall be the award panels for any contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for the state pursuant to sections 4b-91 to 4b-100, inclusive, as amended, and section 4b-24, as amended.

(c) For each applicable contract, the commissioner shall designate one panel to screen all submitted proposals and establish a list of bidders to be interviewed and shall designate a separate panel consisting of different members to interview bidders on the list and submit a list of recommended contractors to the commissioner ranked in order of preference with the most qualified bidder listed first.

(d) The commissioner shall designate one voting member on each panel to serve as chairperson. The

chairperson shall moderate the committee, collect votes and compile the results.

(e) Each award panel shall prepare a memorandum on the selection process indicating (1) how the evaluation criteria were applied by each panel member to determine the most qualified firms, (2) the ranking of each bidder by each panel member which shall be available to the public after execution of the contract with the selected contractor, and (3) a certification by each panel member that the selection of the most qualified firm was not the result of collusion, the giving of a gift or the promise of a gift, compensation, fraud or inappropriate influence from any person.

(f) The commissioner shall select a contractor from among the list of firms submitted by the award panel that interviewed the contractors. After the commissioner has made a selection, the names of the contractor firms submitted to the commissioner shall be available to the public upon request. In the event the commissioner does not select the most qualified bidder listed by the awards panel, the commissioner shall prepare a written explanation of the commissioner's decision. The commissioner shall also prepare a memorandum on the final phase of the selection process, indicating how the commissioner applied the evaluation criteria to determine the [most qualified firm] successful bidder. Such memorandum shall include a certification by the commissioner that the commissioner's selection of the successful bidder was not the result of collusion, the giving of a gift or the promise of a gift, compensation, fraud or undue pressure from any person and shall be available to the public after execution of the contract with the selected contractor.

[(f)] (g) The commissioner shall adopt regulations, in accordance with chapter 54, to implement the provisions of this section.

Sec. 7. Section 4b-1 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) The Commissioner of Public Works shall (1) be responsible for the administrative functions of construction and planning of all capital improvements undertaken by the state, except (A) highway and bridge construction, the construction and planning of capital improvements related to mass transit, marine and aviation transportation, (B) the Connecticut Marketing Authority, (C) planning and construction of capital improvements to the State Capitol building or the Legislative Office Building and related facilities by the Joint Committee on Legislative Management, (D) any project as defined in subdivision (16) of section 10a-109c, undertaken by The University of Connecticut, and (E) construction and planning of capital improvements related to the Judicial Department if such construction and planning do not constitute a project within the meaning of subsection (g) of section 4b-55, as amended, including the preparation of preliminary plans, estimates of cost, development of designs, working plans and specifications, award of contracts and supervision and inspection. For the purposes of this subparagraph (E), the term "Judicial Department" does not include the courts of probate, the Division of Criminal Justice and the Public Defender Services Commission, except where such agencies share facilities in state-maintained courts; (2) select consultant firms in accordance with the provisions of sections 4b-56 to 4b-59, inclusive, to assist in the development of plans and specifications when in the commissioner's judgment such assistance is desirable; (3) render technical advice and service to all state agencies in the preparation and correlation of plans for necessary improvement of their physical plants; (4) cooperate with those charged with fiscal programming and budget formulation in the development of a capital program and a capital budget for the state; (5) be responsible for the purchase, sale, lease, sublease and acquisition of property and space to house state agencies and, subject to the provisions of section 4b-21, the sale or exchange of any land or interest in land belonging to the state; (6) maintain a complete and current inventory of all state-owned or leased property and premises, including space-utilization data; (7) supervise the care and control of buildings and grounds owned or leased by the state in Hartford, except the building and grounds of the State

Capitol and the Legislative Office Building and parking garage and related structures and facilities and grounds, as provided in section 2-71h, and the Connecticut Marketing Authority and property under the supervision of the Office of the Chief Court Administrator under the terms of section 4b-11; and (8) be responsible for the administrative functions of establishing and maintaining security standards for all facilities housing the offices and equipment of the state except (A) Department of Transportation mass transit, marine and aviation facilities, (B) the State Capitol and the Legislative Office Building and related facilities, (C) facilities under the care and control of The University of Connecticut or other constituent units of the state system of higher education, (D) Judicial Department facilities, (E) Department of Public Safety facilities, (F) Military Department facilities, (G) Department of Correction facilities, (H) Department of Children and Families client-occupied facilities, (I) facilities occupied by the Governor, Lieutenant Governor, Attorney General, Comptroller, Secretary of the State and Treasurer, and (J) facilities occupied by the Board of Parole. As used in this subdivision, "security" has the meaning assigned to it in section 4b-130. Subject to the provisions of chapter 67, said commissioner may appoint such employees as are necessary for carrying out the duties prescribed to said commissioner by the general statutes.

(b) Notwithstanding any other provision of the general statutes, [to the contrary,] except for the property of The University of Connecticut, the commissioner may supervise the care and control of (1) any state-owned or leased office building, and related buildings and grounds, outside the city of Hartford, used as district offices, except any state-owned or leased office building, and related buildings and grounds, used by the Judicial Department, and (2) any other state-owned or leased property, on a temporary or permanent basis, if the commissioner, the Secretary of the Office of Policy and Management and the executive head of the department or agency supervising the care and control of such property agree, in writing, to such supervision.

Sec. 8. Section 4b-3 of the general statutes, as amended by section 146 of public act 03-6 of the June 30 special session, is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*):

(a) There is established a State Properties Review Board which shall consist of six members appointed as follows: The speaker of the House and president pro tempore of the Senate shall jointly appoint three members, one of whom shall be experienced in matters relating to architecture, one experienced in building construction matters and one in matters relating to engineering; and the minority leader of the House and the minority leader of the Senate shall jointly appoint three members, one of whom shall be experienced in matters relating to the purchase, sale and lease of real estate and buildings, one experienced in business matters generally and one experienced in the management and operation of state institutions. No more than three of said six members shall be of the same political party. One of the members first appointed by the speaker and the president pro tempore shall serve a two-year term, one shall serve a three-year term and one shall serve a four-year term. One of the members first appointed by the minority leaders of the House and Senate shall serve a two-year term, one shall serve a three-year term and one shall serve a four-year term. All appointments of members to replace those whose terms expire shall be for a term of four years and until their successors have been appointed and qualified. If any vacancy occurs on the board, the appointing authorities having the power to make the initial appointment under the provisions of this section shall appoint a person for the unexpired term in accordance with the provisions hereof.

(b) The chairman of the board shall be compensated two hundred dollars per diem up to a maximum of thirty thousand dollars annually. Other members of the board shall be compensated two hundred dollars per diem up to a maximum of twenty-five thousand dollars annually. The members of the board shall choose their own chairman. No person shall serve on this board who holds another state or municipal governmental position and no person on the board shall be directly involved in any

enterprise which does business with the state or directly or indirectly involved in any enterprise concerned with real estate acquisition or development.

(c) The board may adopt such rules as it deems necessary for the conduct of its internal affairs, in accordance with section 4-167, and may employ a secretary, a clerk, and within its budget, such employees as it shall deem necessary.

(d) Notwithstanding any other statute or special act to the contrary, the Commissioner of Public Works shall be the sole person authorized to represent the state in its dealings with third parties for the acquisition, construction, development or leasing of real estate for housing the offices or equipment of all agencies of the state or for the state-owned public buildings or realty hereinafter provided for in section 2-90, as amended, sections 4b-1 to 4b-5, inclusive, 4b-21, 4b-23, 4b-24, as amended, 4b-26, 4b-27, 4b-30 and 4b-32, subsection (c) of section 4b-66, sections 4b-67 to 4b-69, inclusive, 4b-71, 4b-72, 10-95, 10a-72, 10a-89, 10a-90, 10a-114, 10a-130, 10a-144, 17b-655, 22-64, 22a-324, 26-3, as amended, 27-45, 32-1c, 32-39, 48-9, 51-27d and 51-27f, except that the Joint Committee on Legislative Management may represent the state in the planning and construction of the Legislative Office Building and related facilities, in Hartford; the board of trustees of a constituent unit of the state system of higher education may represent the state in the leasing of real estate for housing the offices or equipment of such constituent unit provided no lease payments for such realty are made with funds generated from the general revenues of the state; the Labor Commissioner may represent the state in the leasing of premises required for employment security operations as provided in subsection (c) of section 31-250; the Commissioner of Mental Retardation may represent the state in the leasing of residential property as part of the program developed pursuant to subsection (b) of section 17a-218, provided such residential property does not exceed two thousand five hundred square feet, for the community placement of persons eligible to receive residential services from the department and the Connecticut Marketing Authority may represent the state in the leasing of land or markets under the control of the authority, and, except for the housing of offices or equipment in connection with the initial acquisition of an existing state mass transit system or the leasing of land by said Marketing Authority for a term of one year or more in which cases the actions of the Department of Transportation and the Marketing Authority shall be subject to the review and approval of the State Properties Review Board. Said commissioner shall have the power to establish and implement any procedures necessary for him to assume his responsibilities as said sole bargaining agent for state realty acquisitions and shall perform the duties necessary to carry out such procedures. He may appoint, within his budget and subject to the provisions of chapter 67, such personnel deemed necessary by him to carry out the provisions hereof, including experts in real estate, construction operations, financing, banking, contracting, architecture and engineering. The Attorney General's office, at the request of the commissioner, shall assist the commissioner in contract negotiations regarding the purchase, lease or construction of real estate.

(e) The State Properties Review Board shall be an independent body within the Executive Department.

(f) The State Properties Review Board shall review real estate acquisitions, sales, leases and subleases proposed by the Commissioner of Public Works, [and] the acquisition, other than by condemnation, or the sale or lease of any property by the Commissioner of Transportation under subdivision (12) of section 13b-4, as amended, subject to section 4b-23 and subsection (h) of section 13a-73 and review, for approval or disapproval, any contract for a project described in subsection (h) of section 4b-91, as amended by this act. Such review shall consider all aspects of the proposed actions, including feasibility and method of acquisition and the prudence of the business method proposed. The board shall also cooperate with and advise and assist the Commissioner of Public Works and the Commissioner of Transportation in carrying out their duties. The board shall have access to all

information, files and records, including financial records, of the Commissioner of Public Works and the Commissioner of Transportation, and shall, when necessary, be entitled to the use of personnel employed by said commissioners. The board shall approve or disapprove any acquisition of development rights of agricultural land by the Commissioner of Agriculture and Consumer Protection under section 22-26cc, as amended.

Approved May 21, 2004

OLR Bill Analysis

sHB 5433 (File 674, as amended by House "A" and Senate "A")*

AN ACT REVISING PREQUALIFICATION REQUIREMENTS FOR STATE CONSTRUCTION CONTRACTS

SUMMARY:

This bill makes several changes to the laws governing public construction, including who may work on public construction projects, the requirements for obtaining this work, and reports and evaluations on the quality of the work. Most of these changes are to PA 03-215, which established new procedures for bidding on and awarding public construction contracts most of which become effective on October 1, 2004. That act's prequalification provisions become effective on July 1, 2004 and its status report requirements were effective on January 1, 2004.

Specifically, the bill:

1. expands the Department of Public Works (DPW) commissioner's and State Property Review Board's (SPRB) responsibilities regarding state agencies' office space needs;

2. makes changes to contractor prequalification laws, including requiring new information on prequalification applications, and adding new grounds for disqualification;

3. changes the process for awarding emergency, no-bid contracts beginning October 1, 2004;

4. increases the information that the DPW commissioner and each member of the construction awards panel must prepare on the selection process;

5. makes the contractor evaluations that each state agency must prepare after a construction project is completed available to all agencies for their use in assessing the contractor's fitness for future projects;

6. absolves from liability agencies and their employees who complete the evaluations;

7. delays for two years, from January 1, 2004 to January 1, 2006, awarding authorities' duty to complete status reports on construction projects;

8. eliminates a requirement for municipalities to complete the reports; and

9. requires DPW regulations to include objective criteria for evaluating contract proposals.

*House Amendment "A" eliminates provisions in the original bill that (1) established a contractor's code of ethics, (2) established penalties for failing to complete construction status reports, (3) added additional grounds for rejecting bidders as not responsible, (4) required agencies to adopt policies for disclosing information to bidders, and (5) required agencies to adopt objective criteria for awarding large construction and procurement contracts.

*Senate Amendment "A" (1) specifies that the DPW commissioner must submit the names of contractors to the construction panel before entering or beginning work on an emergency no-bid

contract, (2) requires the SPRB to approve or disapprove these contracts, and (3) removes a requirement for the SPRB to review bids on property selected for demolition.

EFFECTIVE DATE: October 1, 2004

STATE AGENCY SPACE NEEDS

The bill makes the DPW commissioner responsible for the sale or sublease of state agencies' office space. He is already responsible for purchasing, leasing, or acquiring state agencies' property and space. It requires the SPRB to review the commissioner's proposal to sell, lease, or sublease state property in the same way that it currently reviews real estate acquisitions.

PREQUALIFICATION

Applications

The law requires contractors, but not subcontractors, to prequalify before bidding on any state or municipal construction contract valued at $ 500,000 or more. To prequalify, they must submit an application, along with a nonrefundable fee, to the Department of Administrative Services (DAS) commissioner. The law requires the commissioner to adopt prequalification procedures and criteria in regulations.

The bill sets October 1, 2005 as the deadline for the commissioner to adopt regulations on prequalification procedures and criteria. It requires the regulations to include "single-project limits," which are the highest estimated cost of a single project that an applicant is capable of undertaking.

It requires applicants for prequalification, in addition to their aggregate work capacity rating, to include the single-project limits that they are seeking. As they can with aggregate work capacity rating, the bill allows a qualified contractor to apply for additional single project limits at any time. "Aggregate work capacity rating" is the maximum amount of work a contractor is capable of undertaking for any and all projects

Prequalification Certificates

By law, the DAS commissioner can give an applicant that meets the requirement a one-year certificate of prequalification that includes the types of work he can perform and the maximum amount of work he is capable of undertaking. The bill allows the commissioner to make the initial certificate effective for up to two years. It requires the contractor receiving this extended certificate to pay the fee for a one-year certificate plus a prorated fee for the period over one year.

It allows the commissioner to send preliminary determinations on prequalification certificates by e-mail, instead of just by regular mail.

Disqualification

The bill generally prohibits public officials from talking to bidders about a contract before it is awarded if the communication would result in the bidder receiving contract information that is not available to other bidders. Employees of construction contract awarding authorities are already prohibited from having these conversations.

The bill disqualifies bidders who receive non-public information about a contract from state employees prior to the date it is advertised from bidding on the contract. These bidders are already

disqualified if they receive this confidential information from public officials.

CONSTRUCTION ADVERTISING AND BID REQUIREMENTS

By law, authorities responsible for awarding most state contracts must do so on the basis of competitive bidding. Once the bids are in, the authority must award the contract to the lowest responsible qualified bidder who is prequalified by the DAS commissioner.

The bill eliminates a requirement for agencies that award construction contracts to include in their ads for bids the aggregate work capacity rating required to do the job. The law still requires bidders to submit their prequalification certificate, which shows their aggregate work capacity rating, with each bid. The bill requires the DAS commissioner to also include on the certificate the contractor's single-project limit.

The bill expands the information that bidders must report in the update statement they are required to submit with each bid to include changes in their qualification status.

EMERGENCY NO-BID CONTRACTS

By law, the DPW commissioner can select and interview at least three responsible and qualified general contractors and negotiate with any one of them to complete any of seven special building projects: a community court, the Connecticut Juvenile Training School, a downtown Hartford higher education center, the University of Connecticut library, a correctional facility, a juvenile detention center, and a student residential facility for the Connecticut State University system.

The bill requires the commissioner to submit the names of three contractors to the construction services awards panel before entering a contract with any one of them or beginning work on the project. The panels select the contractors who can negotiate with the DPW commissioner to build, alter, or repair state buildings. The panel must select one contractor with whom the commissioner must negotiate the contract. It requires the commissioner to submit the contract to the SPRB for approval or disapproval. If the board does not make a determination within 30 days after the submittal, the contract is deemed approved.

Beginning October 1, 2004, the bill requires agencies seeking to award a contract without competitive bidding to certify to the Government Administration and Elections Committee, rather than the Legislative Management Committee, that an emergency exists that justifies an exception to the competitive bidding process. If the legislature approves the contract, the bill requires the SPRB to review and approve or disapprove within 30 days after the commissioner submits it. If the board does not make a determination within this time period, the contract is deemed approved.

CONTRACT SELECTION PROCESS

The bill requires construction services award panels to rank, by qualification, the list of contractors it submits to the DPW commissioner for possible negotiations. The bill increases the information that each panel must prepare on the selection process. In addition to how the evaluation criteria were used to determine the most qualified firms, it must indicate how each panel member ranked each bidder. The ranking is available for public disclosure after the contract is executed.

The bill requires each panel to prepare a memorandum on the selection process that includes each member's certification that his selection of the most qualified firm was free from collusion, gift giving, compensation, fraud, or other inappropriate influences. It requires the commissioner to include in his memorandum on the process an explanation of his reasoning if he does not award a contract to

the lowest responsible qualified contractor selected by the panel. The bill requires him to make the same certification as panel members.

CONTRACTOR EVALUATIONS

By law, each public agency, other than UConn, must complete and submit to DAS an evaluation on each contractor at the conclusion of his state-funded work on a building under the agency's control. The bill, instead, requires the agencies to complete the evaluation while the work is being done and submit it to DAS once the work is completed.

It makes the evaluation information available to public agencies for assessing a contractor's "responsibility" during the bid selection and evaluation process. A designated agency official must certify that the evaluation information is, to the best of his knowledge, a true and accurate analysis of the contractor's performance on the contract.

The bill protects public agencies and their employees or certifying officials who complete the evaluation from any loss or injury it causes the contractor. The protection does not cover agencies, employees, or certifying officials who complete the evaluation in a willful, wanton, or reckless manner.

The bill makes public agencies that fail to complete the evaluation within 70 days after the job is done ineligible for any state funds to build, remodel, repair, or demolish any public building or public works project until the evaluation is completed.

The law requires the DAS commissioner to adopt regulations establishing a standard contractor evaluation form. The bill sets October 1, 2005 as the deadline for her to adopt these regulations.

STATUS REPORTS

By law, all awarding authorities, other than UConn, must report on any (1) ongoing building construction contract estimated to cost more than $ 500,000 that will be paid, in whole or in part, with state funds or (2) DPW-awarded property management contract with an annual value of $ 100,000 or more. The bill delays for two years, until January 1, 2006, the duty of most awarding authorities to prepare and submit these annual status reports. It also eliminates a requirement for municipalities to complete the report.

BACKGROUND

Legislative History

On April 6 and 15, respectively, the House referred the bill (File 408) to the Judiciary and Legislative Management committees. Both committees reported it favorably without change.

COMMITTEE ACTION

Government Administration and Elections Committee

Joint Favorable Substitute

Yea 17 Nay 0

Judiciary Committee

Joint Favorable Report

Yea 35 Nay 1

Legislative Management Committee

Joint Favorable Report

Yea 21 Nay 0

LEXSEE 189 CONN 539

Spiniello Construction Company v. Town of Manchester et al.

No. 10439

Supreme Court of Connecticut

189 Conn. 539; 456 A.2d 1199; 1983 Conn. LEXIS 468

November 10, 1982, Argued
March 22, 1983, Decided

PRIOR HISTORY: [*1]**
Action for an injunction restraining the defendants from entering into certain public works contracts awarded by the named defendant to the defendant Raymond International Builders, Inc., brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the court, *Bernstein, J.;* judgment granting injunctive relief, from which the defendant Raymond International Builders, Inc., appealed to this court.

DISPOSITION:

No error.

LexisNexis(R) Headnotes

COUNSEL:

Aaron Slitt, with whom were *Susan Kloct,* and, on the brief, *William Gerace,* for the appellant (defendant Raymond International Builders, Inc.).

William J. Shea, for the appellee (named defendant).

Emanuel N. Psarakis, with whom, on the brief, was *Charles B. Spadoni,* for the appellee (plaintiff).

JUDGES:

Healey, Parskey, Shea, Grillo and Sponzo, Js.

OPINIONBY:

SPONZO

OPINION:

[*540] [1200]** The plaintiff obtained a permanent injunction restraining the defendants, the town of Manchester (hereinafter Manchester) and Raymond International Builders, Inc. (hereinafter Raymond), from entering into or performing certain public works contracts. Raymond alone has appealed although Manchester **[***2]** has raised the issue of mootness.

Manchester was engaged in an extensive program of cleaning and lining water pipes to improve its water system. This program was divided into approximately twenty components. The town charter, § 5-22, n1 mandated competitive bidding for construction **[*541]** contracts costing in excess of $ 2500. In May, 1980, Manchester publicly invited two separate bids on contracts known as #2 and #3. In its "Instructions to Bidders," Manchester reserved to itself the right to reject any or all bids. In addition, the instructions set forth certain requirements and guidelines such as (a) the prohibition of oral addenda to or interpretations of any bidding documents, n2 (b) the necessity that all requests for such interpretations be in writing with the resultant interpretations issued as written addenda and mailed to prospective bidders, n3 and (c) the prohibition of conditional bids. n4

n1 Section 5-22 of the Manchester Code is set forth fully below: "Before any department, commission, officer or employee of the Town or the Board of Education shall make any purchase of or contract for any construction, supplies, materials, equipment or service, except personal services, provided by Town employees and officers and professional services, involving an expenditure of more than twenty-five hundred dollars, opportunity shall be given for competitive bidding in writing by at least three bona fide bidders under such rules and regulations as the Board of Directors or the Board of Education, as

the case may be, may establish. Before any department, commission, board, officer or employee of the Town shall sell any real or personal property of the Town, opportunity shall be given for competitive bidding in writing by at least three bona fide bidders under such rules and regulations as the Board of Directors or the Board of Education, as the case may be, may establish; and all moneys received from such sales shall be paid to the Collector of Revenue. Either of said Boards may waive the requirement for competitive bidding when the circumstances of a particular case do not permit a sufficient amount of time to fulfill the rules and regulations of that Board concerning competitive bids; or when a competitive bid is inappropriate; or when a competitive bid is impractical in that the Boards are unable to obtain competitive bids within the rules and regulations adopted by said Boards, which may provide for a limitation on the number of waivers in favor of any one firm, person or corporation. Any such waiver shall be in writing, certified by the appropriate Board, and shall set forth a specific substantial reason for such waiver and shall be filed in the Town Clerk's office as a public record." **[***3]**

n2 Section 7 of the instructions addresses oral addenda to pre-bid documents as follows: "No interpretation of the meaning of the plans, specifications or other pre-bid documents will be made to any bidder orally. All information given to bidders other than by means of the plans, specifications, or by addenda, as described below [in footnote 3 infra], is given informally and shall not be used as the basis of a claim against the Owner or the Engineer."

n3 The requirement of written requests and written interpretations is also set forth in section 7 of the instructions and reads: "Every request for such interpretation should be in writing addressed to Weston & Sampson Engineers, Inc., 10 High Street Boston, Massachusetts and to be given consideration must be received at least five days prior to the date fixed for the opening of bids. Any and all such interpretations and any supplemental instructions will be in the form of written addenda to the specifications which, if issued, will be mailed by certified mail with return receipt requested to all prospective bidders (at the respective address furnished for such purposes), not later than three days prior to the date fixed for the opening of bids. Failure of any bidder to receive any such addendum or interpretation shall not relieve such bidder from any obligation under his bid as submitted. All addenda so issued shall become part of the Contract Documents." **[***4]**

n4 Section 4 of the instructions prohibits conditional bids as set forth below: "The Owner may make such investigations as he deems necesary to determine the ability of the bidder to perform the work, and the bidder shall furnish to the Owner all such information and data for this purpose as the Owner may request. The Owner reserves the right to reject any bid if the evidence submitted by, or investigation of, such bidder fails to satisfy the Owner that such bidder is properly qualified to carry out the obligations of the Contract and to complete the work contemplated therein. Conditional bids will not be accepted."

[*542] **[**1201]** Three construction firms, including the plaintiff and Raymond, submitted separate bids on July 14, 1980. On contract #3 the plaintiff's bid ($ 268,450) was the lowest and Raymond's bid ($ 272,200) was next lowest. On contract #2 Raymond submitted the lowest bid ($ 397,860) and the plaintiff's bid ($ 399,160) was the next lowest. Unknown to the other bidders, a representative of Raymond contacted officials of Manchester on July 11, 1980, and inquired **[***5]** whether, in addition to the separate bids, it could file a reduced combined bid conditioned on both contracts being awarded to Raymond. The Manchester officials advised Raymond that it could submit such a proposal in addition to the separate bids. Despite the bid instructions which required written notice to all prospective bidders of interpretations of the bidding documents, no such notice was mailed to the plaintiff or to others.

On July 14, 1980, when the bids were opened publicly and in the presence of the plaintiff, the Raymond bid contained an additional provision that it would deduct the sum of $ 35,000 if both contracts **[*543]** were awarded to it. Since the plaintiff was not aware of this change in the bidding process, it had not submitted a discount proposal conditioned on the award of both contracts. The plaintiff filed a written protest which was denied. Also, the plaintiff requested permission to file a combined bid but this request was denied by Manchester on the ground that the bids had already been opened. On August 1, 1980, the plaintiff was notified that both contracts were awarded to Raymond.

The trial court found that the officials of Manchester

acted **[***6]** out of the highest motives to do what was best for Manchester, namely, to save approximately $ 31,000 by awarding both contracts to the same bidder. The court also found that there was no corruption involved in the bidding process. The court did find, however, that the Raymond bid was conditional and prohibited by the bidding instructions and, under all the circumstances, the process amounted to favoritism toward Raymond. Finally, the court found that the plaintiff, a New Jersey corporation, was not a taxpayer in the defendant town.

In its appeal Raymond has raised the following two main issues: (1) the plaintiff, as an unsuccessful bidder and a nontaxpayer, has no standing to bring this action in the absence of fraud or corruption, and (2) if the plaintiff did have standing, the court erred in finding that the bidding was invalid.

It is a well established principle that "[m]unicipal competitive bidding laws are enacted to guard against such evils as favoritism, fraud or corruption in the award of contracts, to secure the best product at the lowest price, and to benefit the taxpayers, not the bidders; they should be construed **[*544]** to accomplish these purposes fairly and **[***7]** reasonably with sole reference to the public interest." *John J. Brennan Construction Corporation, Inc. v. Shelton, 187 Conn. 695, 702, 448 A.2d 180 (1982); Austin v. Housing Authority, 143 Conn. 338, 345, 122 A.2d 399 (1956);* 10 McQuillin, Municipal Corporations (3d Ed. Rev.) § 29.29. Where the municipality "reserves the right to reject any and all bids, no bidder can claim any contractual rights until he has been awarded the contract." 10 McQuillin, supra, § 29.77. An honest exercise of discretion by a municipality which has reserved such a right will not be disturbed by the courts so long as its officials observe good faith and accord all bidders just consideration in accordance with the purpose of competitive bidding. Courts will intervene to prevent the exercise of that discretion to deny a bid, therefore, only where fraud, corruption or favoritism has influenced the conduct of the bidding officials or when the very object and integrity of the competitive bidding process is defeated by the conduct of municipal officials. *John J. Brennan Construction Corporation, Inc. v. Shelton, supra, 703; Joseph Rugo, Inc. v. Henson, 148 Conn. 430, 434,* **[***8]** *171 A.2d 409 (1961);* 10 McQuillin, supra.

[1202]** Although Manchester reserved the right to reject any or all bids, it violated its bidding instructions by accepting a conditional combined discount bid based on an oral addendum known only to Manchester and Raymond. No written notice of the interpretation of a bidding instruction was mailed to prospective bidders, including the plaintiff. By permitting Raymond to submit a conditional bid when other bidders were not afforded the same opportunity, Manchester precluded the other bidders from competing on equal terms. It defeated **[*545]** the object and integrity of the competitive bidding by unintentionally exhibiting favoritism to Raymond. While Manchester's actions were taken in good faith in an effort to obtain the best contract for its residents, judicial relief is warranted where municipal action amounts to an erosion on the integrity of the bidding statute. 10 McQuillin, supra, § 29.83. It is entirely possible that Manchester would have benefited financially if the other bidders had the same opportunity to submit a conditional or combined bid. Under the circumstances of this case the plaintiff had standing and there **[***9]** was ample support for the court's conclusion that the initial bidding was invalid. There is a growing trend for courts to permit one who has been aggrieved by a refusal to award a public contract pursuant to lowest responsible bidder provisions to also vindicate the public interest by challenging such arbitrary or capricious action by governmental officials. *Merriam v. Kunzig, 476 F.2d 1233* (3d Cir.), cert. denied, *414 U.S. 911, 94 S. Ct. 233, 38 L. Ed. 2d 149 (1973); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970);* see *Data Processing Service v. Camp, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970); Barlow v. Collins, 397 U.S. 159, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970).*

There is no merit to another claim of error by Raymond to the effect that the trial court erred in finding that the discount amount of $ 35,000 was discussed by Raymond and Manchester officials prior to the submission of the bid. Although the record does not indicate a discussion of that sum prior to submission, Raymond has failed to demonstrate how that finding would affect the final result. It was, therefore, harmless error. *Jones Destruction,* **[***10]** *Inc. v. Upjohn, 161 Conn. 191, 286 A.2d 308 (1971).*

[*546] Finally, Raymond claims that there was a variance between the plaintiff's allegations in its complaint and the proof, sufficient to defeat the cause of action. Although the plaintiff did allege collusion, conspiracy, fraud and corruption, it also alleged favoritism to such an extent as to defeat the competitive bidding process. n5 This allegation was adequate to permit the introduction of evidence in support of the trial court's conclusions.

n5 Paragraph 20 of the complaint reads as follows: "In awarding said contracts to Raymond and rejecting plaintiff's bids under the foregoing circumstances, the Town failed to observe good faith or to accord plaintiff just consideration and engaged in a fraudulent and corrupt course of conduct in favor of Raymond and against plaintiff in violation of defendant's charter, and bid documents so as to defeat the competitive bidding

process."

In oral argument before this court, counsel for Manchester contended **[***11]** that this appeal is moot because Manchester readvertised for bids on several contracts, including contracts #2 and #3. These contracts were awarded to a third party who completed the work allegedly making ineffective any contractual rights which Raymond might assert against Manchester. Raymond countered with the argument that the plaintiff had posted a bond in the injunctive proceedings as ordered by the trial court. In effect, Raymond claims that its potential right upon the bond is a sufficient interest in the outcome of the appeal to require this court to accept jurisdiction.

Spiniello filed a bond in the amount of $ 25,000 as a prerequisite to the granting of its application for a temporary injunction and a permanent injunction. The purpose of the bond is to indemnify the defendants from any damages which they might sustain if the plaintiff failed to prosecute the **[**1203]** action to effect. *General Statutes § 52-472.* "Where **[*547]** a . . . court has granted a permanent injunction, the parties will already have had their trial on the merits, and, even if the case would otherwise be moot, a determination can be had on appeal of the correctness of the trial court's **[***12]** decision on the merits, since the case has been saved from mootness by injunction bond." *Accurate Forging Corporation v. UAW Local No. 1017, 189 Conn. 24, 27-28 n.5, 453 A.2d 769 (1983),* quoting *University of Texas v. Camenisch, 451 U.S. 390, 396, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981).* Accordingly, Manchester's mootness claim is without merit.

There is no error.

In this opinion the other judges concurred.

LEXSEE 191 CONN 497

Ardmare Construction Company, Inc. v. Elisha C. Freedman, Commissioner of Administrative Services, et al.

No. 12124

Supreme Court of Connecticut

191 Conn. 497; 467 A.2d 674; 1983 Conn. LEXIS 613

October 4, 1983, Argued
November 15, 1983, Decided

PRIOR HISTORY: [*1]**
Action for mandamus to require the named defendant to award the plaintiff a contract for labor and materials on a certain state project, and for other relief, brought to the Superior Court in the judicial district of Fairfield at Bridgeport and tried to the court, *Ryan, J.;* judgment for the plaintiff, from which the defendants appealed to this court.

DISPOSITION:

Error; judgment directed.

LexisNexis(R) Headnotes

COUNSEL:

John Yacavone, assistant attorney general, with whom were *Thomas Yasensky,* assistant attorney general, *Steven G. Berg,* and, on the brief, *Joseph I. Lieberman,* attorney general, for the appellants (defendants).

Thomas W. Bucci, for the appellee (plaintiff).

JUDGES:

Speziale, C. J., Peters, Healey, Parskey and Shea, Js.

OPINIONBY:

SHEA

OPINION:

[*497] **[**674]** In a judgment rendered from the bench, n1 the trial judge granted the plaintiff's request for mandamus, and ordered **[**675]** the commissioner of administrative services to award a contract for the repair of walls and walks at the community correctional center in Bridgeport **[*498]** to the plaintiff. The defendants n2 have appealed maintaining that an order of mandamus was improper because (1) the **[***2]** commissioner performs a discretionary duty when awarding a public work contract; (2) the plaintiff had an adequate remedy at law; and (3) the plaintiff's bid was incomplete, requiring the commissioner to reject the bid pursuant to *General Statutes § 4-137e (c).* n3 We do not reach any of these issues but conclude that the plaintiff lacked standing to bring this action. n4

n1 A memorandum of decision was filed on May 13, 1983.

n2 The A. Petrucci Construction Company is a codefendant and has joined the commissioner in this appeal.

n3 *General Statutes § 4-137e (c)* provides in part: "General bids shall be for the complete work as specified and shall include the names of any subcontractors to be used by the general bidder and the dollar amounts of their subcontracts, and the general contractor shall be selected on the basis of such general bids. Every general bid which is on a form not completely filled in, or which is incomplete, conditional or obscure, or which contains any addition not called for, shall be invalid; and the awarding authority shall reject every such general bid. No such general bid shall be rejected because of the failure to submit prices for, or information relating to, any item or items for which no specific space is provided in the general bid form furnished by the awarding authority, but this sentence shall not be applicable to any failure to furnish prices or information

required by this section to be furnished in the above . . . ." **[***3]**

n4 Although neither party expressly raised this issue, the cases cited in the defendants' brief did bring the issue to our attention and it was discussed during oral argument. Generally, this court considers issues not raised or briefed as abandoned. See *Sachem's Head Assn. v. Lufkin, 168 Conn. 365, 366, 362 A.2d 519 (1975).* When the issue involves either the trial court's or this court's jurisdiction, however, we have no alternative but to address the issue. *Willard v. West Hartford, 135 Conn. 303, 306, 63 A.2d 847 (1949); Foss v. Foss, 105 Conn. 502, 512, 136 A. 98 (1927);* cf. *State v. Curcio, 191 Conn. 27, 30, 463 A.2d 566 (1983).*

The facts are not disputed. The commissioner solicited bids for the project pursuant to *General Statutes § 4-137a.* n5 The plaintiff and fourteen other construction **[*499]** companies submitted bids on forms supplied by the department of administrative services. n6 On January 12, 1983, a public bid opening was held where it was announced that the plaintiff had submitted the lowest bid.

n5 "[*General Statutes] Sec. 4-137a.* BIDDING FOR PUBLIC BUILDING CONTRACTS. Every contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building for work by the state, which is estimated to cost more than two hundred fifty thousand dollars shall be awarded to the lowest responsible and qualified general bidder on the basis of competitive bids in accordance with the procedures set forth in this chapter, after the commissioner of administrative services or, in the case of a contract for work on the state capitol building, the joint committee on legislative management of the general assembly, has invited such bids by advertisements inserted at least once in one or more newspapers having a circulation in each county in the state. Such award shall be made within sixty days after the opening of such bids. If the general bidder selected as the general contractor fails to perform his agreement to execute a contract in accordance with the terms of his general bid and furnish a performance bond and also a labor and materials or payment bond to the amount specified in Item 1 of the form for general bid, an award shall be made to the next lowest responsible and qualified general bidder. If the lowest responsible and qualified bidder's price submitted is in excess of funds available to make an award, the commissioner of administrative services or the joint committee on legislative management, as the case may be, is empowered to negotiate with such bidder and award the contract on the basis of the funds available, without change in the contract specifications, plans and other requirements. If the award of a contract on said basis is refused by such bidder, the commissioner of administrative services or the joint committee on legislative management, as the case may be, may, if he or it deems it advisable, negotiate with other contractors who submitted bids in ascending order of bid prices without change in the contract, specifications, plans and other requirements. In the event of negotiation with general bidders as provided herein, the general bidder involved may negotiate with subcontractors on the same basis, provided such general bidder shall negotiate only with subcontractors named on his general bid form." **[***4]**

n6 *General Statutes § 4-137e* requires the awarding authority to supply forms for the bids.

[676]** On January 17, 1983, the department of administrative services rejected the plaintiff's bid because the signature of the president, who purported to act as the agent for the company, had been impressed on the bidding form with a rubber stamp. The administrative services department had in the past maintained the practice of rejecting all bids that did not have an **[*500]** original handwritten signature. n7 According to the chief bidding officer, the department interpreted *General Statutes § 4-137e (b)* E n8 to require handwritten signatures. He conceded, however, that the department had not promulgated any regulation concerning its interpretation of the statute, and that no bidders had been notified of the requirement that bids be signed by hand.

n7 At trial, the commissioner's witness testified that only a handwritten signature would be an acceptable signature. The defendant now adopts the position that either an original handwritten signature or an authorized facsimile signature are permissible methods of signing the bidding form. **[***5]**

n8 *General Statutes § 4-137e (b)* E is set out

as follows:

"E. The undersigned agrees that, if he is selected as general contractor, he will, within five days, Saturdays, Sundays and legal holidays excluded, after presentation thereof by the awarding authority, execute a contract in accordance with the terms of this general bid.

Date ...

... (Name of General Bidder)
By ... (Title) ...
... (Business Address).
... (City and State)."

The commissioner eventually awarded the contract to the defendant A. Petrucci Construction Company, the next lowest bidder. The plaintiff sought a temporary restraining order against the construction company as well as the commissioner, which was granted on March 11, 1983. There has been no work performed on the project since that order was issued.

I

In *Perkins v. Lukens Steel Co., 310 U.S. 113, 125-30, 60 S. Ct. 869, 84 L. Ed. 1108 (1940),* it was held that prospective bidders had no standing to challenge an administrative interpretation of a public contract law because the competitive bidding statutes were enacted solely **[***6]** for the protection of the public and conferred no enforceable rights upon those seeking to do business with the government. "Courts should not, where Congress has not done so, subject purchasing agencies of **[*501]** Government to the delays necessarily incident to judicial scrutiny at the instance of potential sellers, which would be contrary to traditional governmental practice and would create a new concept of judicial controversies." *Id., 130.* Although the delay occasioned by this litigation has been greatly curtailed by our granting a motion for an expedited appeal, a period of more than six months has elapsed since this action was brought during which needed repair work upon a state facility has been stalled and may now have to be performed under conditions different from those contemplated when bids were submitted. This court has consistently followed the view that an unsuccessful bidder has no standing to challenge the award of a public contract. *Joseph Rugo, Inc. v. Henson, 148 Conn. 430, 171 A.2d 409 (1961); Austin v. Housing Authority, 143 Conn. 338, 122 A.2d 399 (1956);* 10 McQuillin, Municipal Corporations (3d Ed. Rev.) § 29.77. Recently, in **[***7]** *Spiniello Construction Co. v. Manchester, 189 Conn. 539, 456 A.2d 1199 (1983),* we held that only "where fraud, corruption or favoritism has influenced the conduct of the bidding officials or when the very object and integrity of the competitive bidding process is defeated by the conduct of municipal officials," does an unsuccessful bidder have standing to challenge the award. *Id., 544.*

A

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or **[**677]** interest in the subject matter of the controversy." *Hiland v. Ives, 28 Conn. Sup. 243, 245, 257 A.2d 822 (1966).*

This court has declared that "[a] bid, even the lowest responsible one, submitted in response to an invitation **[*502]** for bids is only an offer which, until accepted by the municipality, does not give rise to a contract between the parties." *John J. Brennan Construction Corporation, Inc. v. Shelton, 187 Conn. 695, 702, 448 A.2d 180 (1982),* citing *Joseph Rugo, Inc.* **[***8]** *v. Henson, 190 F. Sup. 281 (D. Conn. 1960);* see also *Spiniello Construction Co. v. Manchester, supra; Joseph Rugo, Inc. v. Henson, 148 Conn. 430, 171 A.2d 409 (1961); Austin v. Housing Authority, supra;* 10 McQuillin, Municipal Corporations (3d Ed. Rev.) § 29.80. An unsuccessful bidder, therefore, has no legal or equitable right in the contract. Not unlike any other person whose offer has been rejected, the disappointed bidder has no right to judicial intervention. n9 See *Perkins v. Lukens Steel Co., supra, 129; Austin v. Housing Authority, supra, 349.*

n9 The announcement that the plaintiff had submitted the lowest bid did not amount to acceptance. Acceptance occurs only after it is determined that the bid conforms to the statutory requirements, and the bidder is "competent to perform the work." See *General Statutes § 4-137 (a)* et seq.

Absent any impairment of a private right, judicial review may be obtained only when authorized by statute. In the federal **[***9]** arena, a disappointed bidder has

standing under the Administrative Procedures Act, *5 U.S.C. § 702,* which provides, "[a] person suffering legal wrong because of agency action, *or adversely affected or aggrieved by agency action* within the meaning of a relevant statute, is entitled to judicial review thereof." (Emphasis added.) See *B. K. Instrument, Inc. v. United States, 715 F.2d 713 (2d Cir. 1983); Airco, Inc. v. Energy Research & Development Administration, 528 F.2d 1294 (7th Cir. 1975)* (per curiam); *Armstrong & Armstrong, Inc. v. United States, 514 F.2d 402 (9th Cir. 1975)* (per curiam); *Hayes International Corporation v. McLucas, 509 F.2d 247* (5th Cir.), cert. denied, *423 U.S. 864, 96 S. Ct. 123, 46 L. Ed. 2d 92 (1975); William F. Wilke, Inc. v. Department of the Army, 485 F.2d 180* **[*503]** *(4th Cir. 1973); Merriam v. Kunzig, 476 F.2d 1233* (3d Cir.), cert. denied, *414 U.S. 911, 94 S. Ct. 233, 38 L. Ed. 2d 149 (1973); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).* n10 The Connecticut counterpart to § 702, however, is much more limited in scope. It provides that "[a] person who has **[***10]** exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review by way of appeal . . . ." *General Statutes § 4-183 (a).* A party seeking review of a state agency's action, therefore, must establish more than aggrievement (injury in fact); he must establish that the injury resulted from a final decision in a contested case. n11 See, e.g., *Rybinski v. State Employees' Retirement Commission, 173 Conn. 462, 469-72, 378 A.2d 547 (1977)* (commission meeting not a hearing within purview of *General Statutes § 4-166* [2]; therefore not a contested case); *Old Rock Road Corporation v. Commission on Special Revenue, 173 Conn. 384, 387-88, 377 A.2d 1119 (1977)* (provisional grant of racing license not a final decision). An **[**678]** agency decision to reject a bid or to award a contract has none of the attributes of a formal hearing, nor is a formal hearing required by law. For this reason, the agency's decision does not involve a contested case, and **[*504]** the disappointed bidder cannot assert standing under § 4-183 of the Administrative Procedure Act. See *Rybinski* **[***11]** *v. State Employees' Retirement Commission, supra.*

n10 The *Scanwell* decision and its progeny have removed all obstacles to judicial review of a federal agency's decision to award a public contract. One commentator has pointed out that the effect of that decision is to impose extraordinary delay in the performance and completion of the contract. See Pierson, "Standing to Seek Judicial Review of Government Contract Awards: Its Origins, Rationale and Effect on the Procurement Process," *12 B.C. Ind. & Com. L. Rev. 1, 24-31 (1970).*

n11 *General Statutes § 4-166 (2)* defines a contested case as "a proceeding, including but not restricted to rate-making, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by statute to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held, but does not include hearings referred to in section 4-168." See *Rybinski v. State Employees' Retirement Commission, 173 Conn. 462, 469-72, 378 A.2d 547 (1977).*

[*12]**

Nor does the competitive bidding statute provide the disappointed bidder with standing. This court has frequently declared "[m]unicipal competitive bidding laws are enacted to guard against such evils as favoritism, fraud or corruption in the award of contracts, to secure the best product at the lowest price, and to benefit the taxpayers, not the bidders." *John J. Brennan Construction Corporation, Inc. v. Shelton, 187 Conn. 695, 702, 448 A.2d 180 (1982);* see also *Joseph Rugo, Inc. v. Henson, 148 Conn. 430, 435, 171 A.2d 409 (1961); Austin v. Housing Authority, supra, 349.*

B

In *Spiniello Construction Co. v. Manchester, 189 Conn. 539, 456 A.2d 1199 (1983),* we recognized that our prior decisions had the effect of preventing judicial review of potentially meritorious claims concerning the implementation and execution of competitive bidding statutes. We also acknowledged the fact that the group most benefited by the statute -- the public -- had no effective means of protecting their interests. We substantially adopted the position in *Scanwell* that "[t]he public interest in preventing the granting of contracts through arbitrary or capricious **[***13]** action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a 'private attorney general.'" *Scanwell Laboratories, Inc. v. Shaffer, supra, 864;* see generally Davis, Administrative Law Treatise (2d Ed.) § § 24:2, 24:3. Thus, we held that where fraud, corruption or acts undermining the objective and integrity of the bidding **[*505]** process existed, an unsuccessful bidder did have standing under the public bidding statute. n12 We limited the scope of our holding in order to strike the proper balance between fulfilling the purposes of the competitive bidding statutes and preventing frequent litigation that might result in extensive delay in the commencement and completion of government projects to the detriment of the public.

n12 There is no uniformity of decisions

among the states. One state court has held that an unsuccessful bidder has absolute standing under the competitive bidding statute. See *Quincy Ornamental Iron Works, Inc. v. Findlen, 353 Mass. 85, 228 N.E.2d 453 (1967).* Other state courts have found limited standing pursuant to a mandamus statute; see, e.g., *Phoenix v. Wittman Contracting Co., 20 Ariz. App. 1, 509 P.2d 1038 (1973);* or a state land act. See *Alyeska Ski Corporation v. Holdsworth, 426 P.2d 1006 (Alaska 1967).* Still another state court has found standing only if the disappointed bidder was a taxpayer. See *Parks v. Larson, 499 Pa. 615, 454 A.2d 928 (1982);* accord *Austin v. Housing Authority, 143 Conn. 338, 122 A.2d 399 (1956).*

[*14]**

C

We are unable to agree with the trial court that the commissioner's actions so undermined the competitive bidding process as to fall within the exception recognized in *Spiniello*. There was no allegation of fraud or favoritism, nor was either proven. n13 The plaintiff attempted to establish only that the practice was so arbitrary as to undermine the bidding statute. This case, however, involves none of the factors we considered significant in *Spiniello*. There, the municipality had imparted information to one bidder that it had not provided other bidders. See *Spiniello Construction Co. v. Manchester, supra, 542.* Thus, parity of information no longer existed among the bidders as envisioned by the statute. In this case, **[**679]** however, the commissioner had not informed any bidder of its requirement. The **[*506]** construction company which received the contract award was not given any special advantage over the plaintiff in submitting its bid, nor was it privy to any secret information.

n13 In fact, testimony revealed that the department of administrative services had consistently rejected bids that were signed with a facsimile signature.

[*15]**

Noticeably absent in this case are elements traditionally thought to undermine the competitive bidding process. The commissioner did not apply its requirement inconsistently or in a discriminatory fashion. Nor was there any proof that the commissioner was acting in bad faith. In short, the commissioner made a good faith interpretation of the competitive bidding statute requirements, and applied it in a consistent fashion. The plaintiff was therefore without standing to challenge the award of the contract.

There is error, the judgment is set aside and the case is remanded with direction to dismiss the complaint.

In this opinion the other judges concurred.

LEXSEE 220 CONN 689

Unisys Corporation v. Department of Labor et al.

No. 14330

SUPREME COURT OF CONNECTICUT

220 Conn. 689; 600 A.2d 1019; 1991 Conn. LEXIS 517

October 2, 1991, Argued
December 31, 1991, Decided

PRIOR HISTORY: [*1]**
Action to enjoin the defendants from entering into a contract for the purchase and sale of certain computer equipment and support services, and for other relief, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford, where the court, Maloney, J., issued an ex parte temporary injunction against the defendants; thereafter, the court, O'Neill, J., granted the defendants' motion to dismiss and rendered judgment thereon dismissing the action and dissolving the temporary injunction, from which the plaintiff appealed.

DISPOSITION:

Reversed; further proceedings.

LexisNexis(R) Headnotes

COUNSEL:

William J. Egan, with whom, on the brief, was Thomas R. Legenhausen, for the appellant (plaintiff).

Richard Blumenthal, attorney general, and Thomas Yasensky, assistant attorney general, with whom, on the brief, was Susan I. Hellerman, assistant attorney general, for the appellees (named defendant et al.)

J. Charles Mokriski, with whom was Antonio B. Braz, for the appellee (defendant International Business Machines Corporation).

JUDGES:

Peters, C. J., Callahan, Glass, Borden and Berdon, Js.

OPINIONBY:

BERDON

OPINION:

[*690] [1020]** The principal issue in this case is whether the plaintiff, **[***2]** Unisys Corporation, is entitled to an evidentiary hearing to determine whether it has standing to enjoin the state from awarding a purchase contract. The plaintiff appeals from the trial court's decision granting the defendants' motion to dismiss. We reverse and remand for further proceedings.

The relevant facts are as follows. The defendant department of administrative services, on behalf of the named defendant, the department of labor (collectively hereinafter referred to as the state), issued two requests for proposals (RFPs) for the purchase of computer equipment, software and services. n1 The plaintiff **[*691]** alleges in **[**1021]** its complaint that the RFPs were not based upon competitive bidding as required by *General Statutes § 4a-57* n2 and that it was prevented from submitting a bid because the RFPs requested "single source" specifications -- that is, the RFPs' specifications were limited to the make, model number and particular equipment and software available only from International Business Machines Corporation (IBM), which was also made a party defendant in this action. The plaintiff further alleges in its complaint that it manufactures and supplies computer **[***3]** equipment and software equivalent to that of IBM, that it currently supplies the state with computer equipment and software, that the RFPs do "not permit proposals based upon equivalent computer equipment or software made by other manufacturers" and, therefore, that it did not submit a bid. The plaintiff also alleges that the state engaged in acts of favoritism to IBM that undermined the object and integrity of the competitive bidding process. Specifically, the plaintiff alleges that the state drafted the

RFPs in reliance on information it received from IBM so that it would favor IBM over other vendors. Further, the plaintiff alleges that the state provided information to IBM that was relevant to the RFPs, but that information was not provided to other vendors who received the RFPs.

n1 The plaintiff alleges in its complaint that the two RFPs issued specified the following: RFP 105 sought bids for "the purchase of certain computer equipment, software, system support services and other services described as: 'the purchase of an IBM 9121-320, related peripherals and software; system support to convert/modify/install GUIDE (Public Domain Software) using DB/2 as the data base platform; system support within the implementation of FARS; system support to convert UNISYS application onto the IBM platform; and other related services.'" RFP 110 sought "proposals for some of the services included in RFP 105 in connection with the purchase on installation of IBM equipment and software pursuant to RFP 105." **[***4]**

n2 *General Statutes § 4a-57 (a)* provides in pertinent part: "All purchases of, and contracts for, supplies, materials, equipment and contractual services, except gas, water and electric light and power services, and purchases and contracts made pursuant to the provisions of subsection (c) of this section shall be based, when possible, on competitive bids."

On the basis of these allegations, the plaintiff sought injunctive relief to prevent the state from either opening and examining proposals submitted in response to the RFPs or entering into a contract based on the RFPs. The plaintiff also requested "further relief as is just and proper."

[*692] The trial court, *O'Neill, J.*, granted the defendants' motion to dismiss the complaint n3 on the grounds that the plaintiff was not aggrieved in a contested case and had "never [been] in a contested case," and that the plaintiff had not exhausted its administrative remedies under the Uniform Administrative Procedure Act, *General Statutes § 4-166* et seq. In essence, the trial court found that the plaintiff lacked standing because it had **[***5]** not submitted a bid pursuant to the RFPs. The trial court also found that there were no facts to support "favoritism" as alleged in the second count of the complaint. The trial court did not address the taxpayer's standing issue raised by the plaintiff, or the state's claim of sovereign immunity. The plaintiff appealed to the Appellate Court, and we transferred the appeal to this court in accordance with Practice Book § 4023. We conclude that the plaintiff should have been given an evidentiary hearing to afford it the opportunity to prove that it does have standing. Accordingly, we reverse the **[**1022]** judgment of dismissal and remand the case for further proceedings.

n3 In conjunction with this action, on November 29, 1990, the plaintiff obtained an ex parte temporary order from the court, *Maloney, J.*, restraining the state from entering into a contract or purchase based upon the RFPs. The court issued an order directing the defendants to appear on December 10, 1990, to show cause why a temporary injunction should not issue. On December 7, 1990, the state filed both an objection to the temporary injunction and the motion to dismiss, claiming the plaintiff lacked standing to bring the action. IBM orally joined in this motion. The state also argued that the plaintiff's suit was barred by the doctrine of sovereign immunity. The court, *O'Neill, J.*, continued the hearing on the temporary injunction to December 18, 1990; it also ordered that the temporary restraining order be continued until that date and stated that it would consider the motion to dismiss during the interim. On December 18, 1990, the trial court granted the motion to dismiss on the ground that the plaintiff lacked standing, and denied the plaintiff's request for an evidentiary hearing to prove its allegations of standing. Accordingly, the plaintiff, for the purposes of this appeal, relies on the allegations of its complaint and the affidavit of Joseph M. Robens, its branch manager, which was submitted in support of its request for injunctive relief and in opposition to the motion to dismiss.

[*6]**

[*693] It is a basic principle of law that a plaintiff must have standing for the court to have jurisdiction. "'Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy.'" *Ardmare Construction Co. v. Freedman, 191 Conn. 497, 501, 467 A.2d 674 (1983)*, quoting *Hiland v. Ives, 28 Conn. Sup. 243, 245, 257 A.2d 822 (1966)*. "Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed

by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual **[***7]** or representative capacity. Such a 'personal stake in the outcome of the controversy'; *Shaskan v. Waltham Industries Corporation, 168 Conn. 43, 49, 357 A.2d 472 (1975)* . . . provides the requisite assurance of 'concrete adverseness' and diligent advocacy." (Citations omitted in part.) *Maloney v. Pac, 183 Conn. 313, 320-21, 439 A.2d 349 (1981).*

The plaintiff maintains that, in this case, it has sufficiently alleged standing in its pleadings on one of two grounds, either as a potential competitor aggrieved by irregularities in the bidding process, or as a taxpayer. It seeks the opportunity to establish such standing at an evidentiary hearing. We agree that such a hearing should be held.

The plaintiff's standing as a competitor injured by the bidding process flows from our holding in *Ardmare* **[*694]** *Construction Co. v. Freedman, supra, 503,* where we held that the decision to reject a bid or to award a contract is not a contested case under the Uniform Administrative Procedure Act and, therefore, does not permit a challenge to the state's decision by way of an administrative appeal. Nevertheless, we went on to reaffirm our holding in *Spiniello Construction* **[***8]** *Co. v. Manchester, 189 Conn. 539, 544, 456 A.2d 1199 (1983),* that the "[c]ourts will intervene . . . where fraud, corruption or favoritism has influenced the conduct of the bidding officials or when the very object and integrity of the competitive bidding process is defeated by the conduct of [the] . . . officials." *Ardmare Construction Co. v. Freedman, supra, 504-505.*

Although in *Spiniello Construction Co.* the plaintiff who sought the injunction was a bidder, in *Ardmare Construction Co.* we did not tailor the remedy solely to that class of persons. Indeed, we quoted with approval from *Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 864 (D.C. Cir. 1970),* the following: "'[T]he public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit *brought by one who suffers injury* as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a "private attorney general."'" (Emphasis added.) *Ardmare Construction Co. v. Freedman, supra, 504.* In *Ardmare Construction Co.*, we pointed out that the scope of **[***9]** our holding in *Spiniello Construction Co.* was "to strike the proper balance between fulfilling the purposes of the competitive bidding statutes and preventing frequent litigation that might result in extensive delay in the commencement and completion of government projects to the detriment of the public." *Ardmare Construction Co. v. Freedman, supra, 505.* In the present case, if the plaintiff establishes that it would have submitted a bid if not **[*695]** for the single source specifications, its status would, for purposes of standing, be the equivalent of **[**1023]** one who had submitted a bid. n4 See *Gerzof v. Sweeney, 16 N.Y.2d 206, 211 N.E.2d 826, 264 N.Y.S.2d 376 (1965);* 10 E. McQuillin, Municipal Corporations (3d Ed. Rev. 1990) § 29.49.

n4 Robens' affidavit stated in part that the plaintiff "would submit a proposal in response to RFP 105 and RFP 110 but for the fact that RFP 105 specifies IBM equipment only, by make and model number, and does not permit functionally equivalent products, or even specify what functions are required."

[*10]**

The plaintiff also claims it has standing because it is a taxpayer. See *Ardmare Construction Co. v. Freedman, supra, 505 n.12; Austin v. Housing Authority, 143 Conn. 338, 122 A.2d 399 (1956).* The plaintiff, however, merely alleges in its complaint and in the affidavit of Robens that it is a federal and state taxpayer, but fails to allege in what manner it is harmed as a taxpayer. "A taxpayer is not entitled to an injunction restraining such illegal conduct as the plaintiff claims unless he has suffered a pecuniary or other direct loss in that capacity." *Cassidy v. Waterbury, 130 Conn. 237, 245, 33 A.2d 142 (1943).* Therefore, we do not reach this issue of whether it could have standing as a federal or state taxpayer.

Accordingly, we conclude that the plaintiff in this case would have standing if it is able to prove that it would have submitted a bid on the RFPs but for the single source specifications, that its equipment and software is equivalent to that specified in the RFPs and that the restrictions of the single source specifications undermined the object and integrity of the competitive bidding process, or that there was proof of favoritism.

With **[***11]** respect to this issue of standing -- that is bidder injury -- questions of fact were raised and the trial court should have allowed an evidentiary hearing. "When issues of fact are necessary to the determination of a court's jurisdiction, due process requires that **[*696]** a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses. The trial court erred in not holding such a hearing." *Standard Tallow Corporation v. Jowdy, 190 Conn. 48, 56, 459 A.2d 503 (1983).*

We further note that although the governing statute in this state does not specifically permit single source specifications, it does provide that contracts for purchase

"be based, when possible, on competitive bids." *General Statutes § 4a-57.* n5 Under § 4a-57, RFPs are not necessarily illegal merely because the specifications of the RFPs can be met by only one vendor. As the New York Court of Appeals pointed out in *Gerzof*, "[m]ore must appear in order to render the specifications and the contract based thereon illegal . . . since a particular product, that is, one marketed by only one manufacturer, may be required in the public interest. **[***12]** However, an objectionable and invalidating element is introduced when specifications are drawn to the advantage of one manufacturer not for any reason in the public interest but, rather, to insure the award of the contract to that particular manufacturer." (Citations omitted.) *Gerzof v. Sweeney, supra, 211.* In this case, the plaintiff alleges that it manufactures and supplies computer equipment and software equivalent to those specified in the RFPs and that the RFPs were written in a manner to favor IBM over other vendors.

n5 See footnote 2, supra.

The defendants raise two additional claims pertaining to the jurisdiction of the court. First, the state claims that this court lacks jurisdiction because the appeal is now moot. It argues that "[t]here has been agreement [between the state and IBM] as to all contracts under which work has been commenced and over one-half of the $ 5,000,000.00 plus program involving RFP's . . . has been expended already." The state **[*697]** further argues that because **[***13]** the work has commenced, the injunctive relief that the plaintiff seeks cannot be granted. It relies, for this mootness claim, upon *Mills v. Green, 159 U.S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293 (1895).* We have quoted *Mills* with approval as follows: "'The duty of this court, as of every other judicial tribunal, is to decide actual controversies **[**1024]** by a judgment which can be carried into effect . . . . It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court . . . to grant [the plaintiff] any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.'" *Hartford Principals' & Supervisors' Assn. v. Shedd, 202 Conn. 492, 497-98, 522 A.2d 264 (1987).*

The state's argument, however, ignores *General Statutes § 4a-65*, which provides in pertinent part: "When any state agency purchases or contracts for any supplies, materials, equipment or contractual services contrary to the provisions of this chapter or the regulations promulgated in pursuance thereof, such order or contract shall **[***14]** be void and of no effect." If the plaintiff's claims in this action are sustained, any contract or other agreement with IBM will be null and void. The plaintiff's claims are not moot. n6

n6 Although the prayer for relief seeks to enjoin the state from opening and examining bids and entering into a contract pursuant to the RFPs, it also seeks "such other and further relief as is just and proper . . ." under which appropriate relief can be given.

Second, the defendants raise the shield of sovereign immunity. This claim has no merit. Although suits against an officer or a department of the state, as in the present case, are in effect against the state; *Sentner v. Board of Trustees, 184 Conn. 339, 342, 439 A.2d 1033 (1981);* sovereign immunity does not bar suits against officials of the state who act in excess of their **[*698]** statutory authority, as the plaintiff alleges herein. *Savage v. Aronson, 214 Conn. 256, 264, 571 A.2d 696 (1990).*

The judgment is reversed and the case is remanded **[***15]** for an evidentiary hearing on the defendants' motion to dismiss.

In this opinion the other justices concurred.

Laws: Cases and Codes : U.S. Code : Title 31 : Section 3729

Search Title 31

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U.S. Code as of: 01/02/01

Section 3729. False claims

Related Res

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(a) Liability for Certain Acts. - Any person who -

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that -

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United

States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and Knowingly Defined. - For purposes of this section, the terms ''knowing'' and ''knowingly'' mean that a person, with respect to information -

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim Defined. - For purposes of this section, ''claim'' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption From Disclosure. - Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. - This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

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Laws: Cases and Codes : U.S. Code : Title 31 : Section 3730

Search Title 31

- United States Code
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U.S. Code as of: 01/02/01

Section 3730. Civil actions for false claims

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(a) Responsibilities of the Attorney General. - The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by Private Persons. - (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall -

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the Parties to Qui Tam Actions. - (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the

court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant - notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as -

(i) limiting the number of witnesses the person may call;
(ii) limiting the length of the testimony of such witnesses;
(iii) limiting the person's cross-examination of witnesses; or
(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam Plaintiff. - (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information

(other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government (FOOTNOTE 1) Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(FOOTNOTE 1) So in original. Probably should be ''General''.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain Actions Barred. - (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, ''senior executive branch official'' means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government (FOOTNOTE 2) Accounting Office report, hearing, audit, or investigation, or from

the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(FOOTNOTE 2) So in original. Probably should be ''General''.

(B) For purposes of this paragraph, ''original source'' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government Not Liable for Certain Expenses. - The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and Expenses to Prevailing Defendant. - In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

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U.S. Code as of: 01/02/01

Section 3731. False claims procedure

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(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought -

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

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      - CHAPTER 37 - CLAIMS
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U.S. Code as of: 01/02/01

Section 3732. False claims jurisdiction

(a) Actions Under Section 3730. - Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims Under State Law. - The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

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Section 3733. Civil Demand

(a) In General. -

(1) Issuance and service. - Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person -

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines. -

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall -

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall -

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall -

(i) prescribe a date, time, and place at which oral

testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) Protected Material or Information. -

(1) In general. - A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under -

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws. - Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) Service; Jurisdiction. -

(1) By whom served. - Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries. - Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court

of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) Service Upon Legal Entities and Natural Persons. -

(1) Legal entities. - Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by -

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons. - Service of any such demand or petition may be made upon any natural person by -

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) Proof of Service. - A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary Material. -

(1) Sworn certificates. - The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by -

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials. - Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false

claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories. - Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by -

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) Oral Examinations. -

(1) Procedures. - The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present. - The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken. - The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony. - When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of

the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian. - The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness. - Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony. - (A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances. - Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) Custodians of Documents, Answers, and Transcripts. -

(1) Designation. - The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure. - (A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe -

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings. - Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material. - If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and -

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians. - In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced

pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly -

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) Judicial Proceedings. -

(1) Petition for enforcement. - Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand. - (A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed -

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery. - (A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed -

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date

specified in the demand, whichever date is earlier, or
(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.
(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.
(4) Petition to require performance by custodian of duties. - At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.
(5) Jurisdiction. - Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.
(6) Applicability of federal rules of civil procedure. - The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.
(k) Disclosure Exemption. - Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.
(l) Definitions. - For purposes of this section -
(1) the term ''false claims law'' means -
(A) this section and sections 3729 through 3732; and
(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;
(2) the term ''false claims law investigation'' means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;
(3) the term ''false claims law investigator'' means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;
(4) the term ''person'' means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;
(5) the term ''documentary material'' includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other

information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;.

(6) the term ''custodian'' means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term ''product of discovery'' includes -

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

Laws: Cases and Codes : U.S. Code : Title 18 : Section 287

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      - CHAPTER 15 - CLAIMS AND SERVICES IN MATTERS AFFECTING GOVERNMENT

U.S. Code as of: 01/22/02

Section 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

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921 False Claims

Title 18, United States Code, section 287--the false claims statute--provides in part:

> Whoever makes or presents to any person or officer in the civil, military or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years . . . .

See Project, *Tenth Annual Survey of White Collar Crime*, 32 Am. Crim. L. Rev. 137, 309-32 (1995)(discussing § 287). There is also a companion conspiracy statute, 18 U.S.C. § 286.

In 1863 Congress enacted a false claims and statements statute "in the wake of a spate of frauds upon the government." *United States v. Bramblett*, 348 U.S. 503, 504 (1955). As originally enacted the statute penalized presentment "for payment or approval" of false claims upon or against the Government. . ." (*Bramblett*, 348 U.S. at 504) as well as false statements made "for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim." On June 25, 1948, the statute was divided into 18 U.S.C. § 287 and 18 U.S.C. § 1001, respectively. 62 Stat. 749.

The Section 287 statute is designed to "protect the government against those who would cheat or mislead it in the administration of its programs" (*United States v. White*, 27 F.3d 1531, 1535 (11th Cir. 1994)), and it has been employed to combat fraudulent claims filed under numerous Federal programs, including Medicare and Medicaid. *White* (Medicare claims by a chiropractor); *United States v. Hooshmand*, 931 F.2d 725, 733 (11th Cir. 1991)(Medicare claims for tests); *see also United States v. Abud-Sanchez*, 973 F.2d 835, 836 (10th Cir. 1992)(Medicare and Medicaid claims); *United States v. Siddiqi*, 959 F.2d 1167, 1171-72 (2d Cir. 1992)(physician submitted Medicare claims for a period when he was out of the country); *United States v. Nazon*, 940 F.2d 255, 258, 261 (7th Cir. 1991)(Medicaid claims for lab work not done); *United States v. Beasley*, 550 F.2d 261, 263-64 (5th Cir.), *cert. denied*, 434 U.S. 863 (1977)(claims for costs of clinics never built).

Obstruction of Federal Audit	Criminal Resource Manual at 929
Major Fraud Against the United States	Criminal Resource Manual at 930
Department of Defense Voluntary Disclosure Program	Criminal Resource Manual at 931
Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act	Criminal Resource Manual at 932
Medicare-Medicaid Frauds	Criminal Resource Manual at 933
Policy Statement of the Department of Justice on its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States	Criminal Resource Manual at 934
Implementation of the Policy Statement	Criminal Resource Manual at 935
Social Security Violations	Criminal Resource Manual at 936
Department of Agriculture-Food Stamp Violations	Criminal Resource Manual at 937
Department of Defense Memorandum of Understanding	Criminal Resource Manual at 938

9-42.010 Coordination of Criminal and Civil Fraud Against the Government Cases

A. The United States has both statutory (e.g., the False Claims Act, 31 U.S.C. §§ 3729-3733) and common law rights of action arising from fraud against the government and from the corruption of its officials. Every report of fraud or official corruption should be analyzed for its civil potential before the file is closed. In the first instance, this review should be conducted by an Assistant United States Attorney or Departmental Trial Attorney assigned to the initial referral. Claims of fraud against the government involving more than $1,000,000 in single damages plus civil penalties also should be referred to the Civil Division's Commercial Litigation Branch.

B. The Federal Bureau of Investigation has been directed to furnish both the Fraud Section of the Criminal Division and the Commercial Litigation Branch of the Civil Division with copies of all reports in all matters involving fraud against the government, or bribery or conflict of interest involving a public employee. Other federal investigative agencies are required to forward similar reports of investigation to the Branch Director or appropriate United States Attorney.

C. Cases pursued criminally must also be analyzed for civil potential. This analysis should be conducted at the earliest possible stage. Criminal dispositions by plea bargain should not waive or release the government's civil interests, except in return for adequate consideration, as measured by the Department's standards for civil settlements generally. Proposed civil dispositions involving over $1,000,000 in single damages plus civil penalties must be referred to the Commercial Litigation Branch for approval. *See* 28 C.F.R. § 0.160, § 0.164, and Civil Division Directive No. 14-95, 60 Fed. Reg. 17457 (April 6, 1995), *reprinted in* 28 C.F.R. Pt. 0, Subpart Y,

Appendix.

D. As to cases referred to it, the Commercial Litigation Branch notifies the appropriate United States Attorney and other interested offices within the Department of Justice of potential civil actions that come to the Branch's attention. The Branch coordinates its cases with the appropriate United States Attorney to ensure the pursuit of both civil and criminal redress. Cases are similarly coordinated within the United States Attorneys' offices. This coordination may include the simultaneous initiation of civil and criminal proceedings in cases in which the monetary recovery to the government and the deterrent effect will be enhanced, giving due consideration to the risks to the criminal case and the availability of protective orders and stays.

E. The attorney from the Commercial Litigation Branch or Assistant United States Attorney assigned to the matter follows the investigation as it develops and, where necessary, requests, in coordination with other interested offices of the Department of Justice, that an investigation be conducted relating to areas such as damages, which are particularly pertinent to civil actions. It is the policy of the Department to coordinate jointly the investigation of criminal and civil actions. Pursuant to this policy, an Attorney General memorandum to the United States Attorneys dated July 16, 1986 states that "where possible, documents should be obtained by methods other than grand jury subpoenas." This Attorney General memorandum encourages the use of Inspector General subpoenas as an alternative to grand jury subpoenas in those cases where an Inspector General has determined that such usage is appropriate.

F. The Branch attorney or AUSA assigned to the matter, should give consideration at the earliest possible date to the initiation of civil action and advise other interested offices in the Department or United States Attorneys' offices of any contemplated civil action. Absent a specific, detailed statement that there is a strong likelihood that institution of a civil action would materially prejudice contemplated criminal prosecution of specific subjects, the decision to institute civil action is governed solely by the standards specified in 38 Op. Att'y Gen. 98 (1934). That is, the suit is instituted unless there is

1. doubt as to collectibility

   or

2. doubt as to the facts or law.

G. Provisional relief may be sought in cases in which the investigation warrants the conclusion that dissipation of any substantial amounts of assets is likely, notwithstanding the degree to which the criminal aspects of the matter have been concluded. The Commercial Litigation Branch and/or assigned Assistant United States Attorney should advise other interested offices of the Department or United States Attorneys' offices of any provisional action. Such provisional relief is sought unless there is a clear likelihood that efforts to prevent dissipation of assets would materially prejudice criminal prosecution of specific subjects. Where there is a possible criminal component to the case, the criterion for determining "substantial assets" is set at $50,000, which is the minimum debt that must exist for the United States to obtain discovery in connection with a request for provisional relief under the Federal Debt Collection Procedures Act, 28 U.S.C. § 3015(b). In cases in which assets of $50,000 or more may be dissipated, efforts at provisional relief to secure recovery on behalf of a client agency should, if a conflict exists, be resolved within the Department at the appropriate level.

H. The Commercial Litigation Branch and the United States Attorneys offices are accorded significant latitude in urging client agencies to withhold payment of claims presented by any subject known to have engaged in fraudulent conduct. The Branch will advise the appropriate United States Attorney's Office and other interested offices of the Department when taking such actions. Absent a specific, detailed statement that withholding action would materially prejudice contemplated criminal prosecution of specific subjects, the decision to withhold is governed by the usual Department standards. The government's common law right to withhold payment by setoff has been upheld by the United States Supreme Court. *United States v. Munsey Trust Co.*,

332 U.S. 234 (1947). Withholding is an important tool for effecting civil redress, and in recent years the government has successfully defended a number of cases in which client agencies have employed this self-help remedy. *See, e.g., Peterson v. Weinberger*, 508 F.2d 45 (5th Cir. 1975); *Brown v. United States*, 524 F.2d 693 (Cl. Ct. 1975), *as amended*, (1976); *Continental Management, Inc. v. United States*, 527 F.2d 613 (Cl. Ct. 1975). The negotiation of favorable settlements in unliquidated matters also may be enhanced by the bargaining leverage which withholding affords. Client agencies also should be urged to withhold pay and retirement benefits to Federal employees separated because of evidence of wrongdoing. The current regulations regarding the withholding or setoff of backpay are found at 4 C.F.R. § 102.3, 5 C.F.R. §§ 550.805(e)(2), 845.206(b). The current regulations regarding the withholding or setoff of retirement benefits are found at 4 C.F.R. § 102.4 and 5 C.F.R. §§ 179.213(a)(4), 831.1306, 831.1801, 845.206(a).

I. The existing delegations of authority to file suit, settle or close civil fraud claims are set forth in 28 C.F.R. § 0.160, § 0.164, and Civil Division Directive No. 14-95, 60 Fed. Reg. 17457 (April 6, 1995), *reprinted in* 28 C.F.R. Pt. 0, Subpart Y, Appendix. They provide for redelegation of the authority of the Civil Division's Assistant Attorney General over fraud claims (set out in 28 C.F.R. § 0.45(d)) to the Division's Branch Directors and United States Attorneys in certain circumstances. Under Directive 14-95, the United States Attorneys are authorized to file suit, close a case, or "take any other action necessary to protect the interests of the United States," wherever "the gross amount of the original claim does not exceed" $1,000,000. Directive No. 14-95, § 1(c). Agencies are also authorized to refer matters directly to United States Attorneys involving "[m]oney claims by the United States, except claims involving penalties and forfeitures, where the gross amount of the original claim does not exceed $1,000,000." *Id.* § 4(a)(1).

In the following instances, cases within the monetary range normally within the authority of the United States Attorneys shall not be delegated and shall be submitted to the Assistant Attorney General:

1. where a proposed action "will control or adversely influence the disposition of other claims totaling more than" the amount within the United States Attorney's authority, *id.* § 1(e)(1);
2. where "a novel question of law or a question of policy is presented," *id.* § 1(e)(2);
3. where the "agencies involved are opposed to the proposed action," *id.* § 1(e)(3); and
4. where, "for any other reason, the proposed action should * * * receive the personal attention of the Assistant Attorney General, Civil Division," *id.* § 1(e)(2).

The Directive also provides that "[a]ny case involving bribery, conflict of interest, breach of fiduciary duty, breach of employment contract, or exploitation of public office" will "normally" not be delegated to United States Attorneys for handling. *Id.* § 4(c)(4).

Similarly, "[a]ny fraud or False Claims Act case where the amount of single damages, plus civil penalties, if any, exceeds $1,000,000" will "normally" not be delegated to United States Attorneys. *Id.* § 4(c)(5). Nevertheless, upon the recommendation of the Director, Commercial Litigation Branch, "the Assistant Attorney General, Civil Division may delegate to United States Attorneys suit authority involving any claims or suits where the gross amount of the original claim does not exceed $5,000,000 where the circumstances warrant such delegations." *Id.* § 4(b). Any authority exercised by the United States Attorneys under Directive No. 14-95 may be redelegated to Assistant United States Attorneys who supervise other Assistant United States Attorneys handling civil litigation. *Id.* § 1(d).

Where the matter was originally within their authority, United States Attorneys may accept any offer in compromise where either the gross amount of the original claim or the principal amount of the proposed settlement does not exceed $1,000,000, *id.* §§ 1(b)(2)(a) & (b). In cases where the gross amount of the original claim is more than $1 million but less than $5 million, the United States Attorney may accept any settlement in which "the difference between the gross amount of the original claim and the proposed settlement does not exceed $1,000,000." *Id.* § 1(b)(2)(a)(ii).

Inquiries should be directed to: Director, Commercial Litigation Branch, Civil Division, and Chief, Fraud Section, Criminal Division.

J. Each United States Attorney's Office has an Affirmative Civil Enforcement (ACE) coordinator, who should be consulted on issues arising from parallel criminal and civil cases.

9-42.160 False Statements to a Federal Criminal Investigator

It is the Department's policy not to charge a Section 1001 violation in situations in which a suspect, during an investigation, merely denies guilt in response to questioning by the government. This policy is to be narrowly construed, however; affirmative, discursive and voluntary statements to Federal criminal investigators would not fall within the policy. Further, certain false responses to questions propounded for administrative purposes (e.g., statements to border or United States Immigration and Naturalization Service agents during routine inquiries) are also prosecutable, as are untruthful "no's" when the defendant initiated contact with the government in order to obtain a benefit. See the Criminal Resource Manual at 916 for a brief discussion of the case law.

Prior consultation with the Criminal Division is not required before initiating prosecutions for false statements to Federal investigators; however, the Fraud Section is available for consultation on cases involving these principles.

9-42.191 Application of Appropriate Statute

It is the policy of the Department that in those instances in which the United States Attorney (USA) has a choice of statutes, charges normally should be brought pursuant to the more specific statute. In those cases in which special aggravating circumstances exist, the USA retains the discretion to charge a violation of the more serious general statute. *See also* the Criminal Resource Manual at 920 (General versus Specific Statutes).

9-42.420 Federal Procurement Fraud Unit

In August 1982, the Attorney General and the Secretary of Defense established the Defense Procurement Fraud Unit in the Criminal Division's Fraud Section to help concentrate and coordinate the law enforcement resources of the Department in prosecuting significant procurement fraud cases involving the Department of Defense's ("DOD") multi-billion dollar procurement of equipment and services. That unit is now called the Federal Procurement Fraud Unit (Unit), and handles a variety of fraud cases affecting both civilian and defense agency procurements, including product substitution, false testing, cost mischarging, defective pricing, and kickback cases. In addition to conducting major procurement investigations, the Unit provides expertise and guidance on procurement fraud issues to investigative agencies and United States Attorneys' Offices that request their assistance.

9-42.430 Department of Defense Voluntary Disclosure Program

In July 1986, the Department of Defense initiated its Voluntary Disclosure Program which is designed to encourage self-policing and voluntary disclosure by Defense contractors of procurement-related problems. The Fraud Section's Federal Procurement Fraud Unit (Unit) is the contact point in the Department of Justice to oversee voluntary disclosure matters. See the Criminal Resource Manual at 931 for a listing of the Unit's responsibilities and procedures.

9-42.440 Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act

In 1986, Congress amended the False Claims Act, 31 U.S.C. § 3729 *et seq.*, *see generally* False Claims Act Amendments of 1986, Pub.L. 99-562, 100 Stat. 3153 (October 27, 1986), *reprinted in*, 10A USCCAN (December 1986). One of the Congress's objectives in modifying the Act was to encourage the use of qui tam actions in which citizens are authorized to bring, as "private Attorneys General," lawsuits on behalf of the United States alleging frauds upon the government.

When United States Attorneys receive information about a qui tam action, they should promptly

forward a copy of the complaint and statement of evidence to the Commercial Litigation Branch of the Civil Division, particularly because relators frequently fail to serve the Attorney General or delay in doing so. The Commercial Litigation Branch will contact the agency involved, the Criminal Division, and, frequently, the Inspector General of the agency, to determine if the allegations are known to them and to obtain an assessment of the material evidence furnished by the relator. The Criminal Division will, in turn, check with appropriate United States Attorneys' offices USAOs and investigative agencies to determine if the allegations relate to a pending criminal investigation. Because of the 60-day deadline, it must be emphasized that a prompt response is required to these inquiries.

See the Criminal Resource Manual at 932 for an additional discussion of this issue.

9-42.451 Plea Bargaining in Medicare-Medicaid Frauds

A potential problem area has been identified regarding the practice of plea bargaining as it relates to administrative sanctions available to the Health Care Financing Administration, United States Department of Health and Human Services (HHS), in Medicare-Medicaid fraud cases.

Specifically, provision 229 of Pub.L. No. 92-603, enacted on October 30, 1972, amended Sections 1862 and 1866(b) of the Social Security Act to enable the Secretary of HHS to deny payment under Title XVIII of the act upon determining that a provider or person has committed fraud or abuse against the Medicare program. Subsequent to such determinations, Section 1903(i)(2) of the act also prohibits Federal financial participation (FFP) for payments to these providers or persons in the Medicaid program. In addition, the legislation (Pub.L. No. 95-142, Medicare-Medicaid Anti-Fraud and Abuse Amendments) enacted on October 25, 1977, contains a provision (Section 7) that requires the Secretary of HHS to suspend program participation for a physician or individual practitioner convicted of a criminal offense involving the Medicare or Medicaid programs. Suspension from program participation is immediate and applicable to both programs. The Section 7 provision is incorporated in the Code of Federal Regulations at 42 C.F.R. § 405.315-2 for Title XVIII and at 42 C.F.R. § 450.85 for Title XIX.

Since the administrative sanction would generally be effectuated after any criminal proceedings, plea bargains that include commitments to forego or restrict administrative remedies, which the HHS may elect to pursue under the aforementioned provisions, should be rare and made only after obtaining prior explicit approval from the Criminal Division.

See USAM 9-16.000 et seq. and 9-27.000 et seq. for additional guidance regarding plea agreements.

See the Criminal Resource Manual at 933 for further discussion of the Medicaid/Medicare Programs and statutes that can be used to prosecute fraud against these programs. *See also* USAM 9-44.000 *et seq.* (Health Care Fraud).

9-42.500 Referral Procedures -- Relationship and Coordination With the Statutory Inspectors General

A. **Policy Statement of the Department of Justice on its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States:** The investigation and prosecution of fraud and corruption in federal programs is a major priority of the Department of Justice. On June 3, 1981, the Deputy Attorney General issued a "Policy Statement of the Department of Justice on its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States." This statement is summarized in the Criminal Resource Manual at 934. The statement was first announced at a meeting of the President's Council on Integrity and Efficiency (Inspectors General group) and was the result of a combined effort of the Criminal Division, the Federal Bureau of Investigation (FBI) and the Executive Office for United States Attorneys.

The policy statement has two principal purposes: an early alert system for prosecutors relative to ongoing investigations and increased emphasis on coordination and cooperation between the FBI and the Inspectors General. Several particular provisions deserve special

emphasis. Consistent with an Inspector General's obligation to "report to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of law," the Inspector General is to report to "the United States Attorney in the District where the crime occurred." Simultaneously, the Inspector General is expected to notify the appropriate FBI field office. The FBI is committed to investigating every criminal violation which the prosecutor determines will be prosecuted, if proved.

The timing of the report to the prosecutor is discussed in the policy statement. In an ordinary investigation involving completed events, the policy statement simply tracks the Inspector General legislation and requires a report whenever there are reasonable grounds, i.e., some evidence to believe that a Federal crime has occurred. Immediate reporting is required for crimes of an ongoing nature and organized crime allegations. Such urgent and sensitive matters often require use of sophisticated investigative techniques, and the Inspector General is to make an immediate report upon receipt of the information. The policy statement requires the FBI to advise the appropriate Inspector General when it initiates an investigation and to keep the Inspector General regularly informed of its progress.

B. **Implementation of the Policy Statement:** Since the Department of Justice issued the June 3, 1981 policy statement, there have been discussions over its meaning, with requests from various Inspectors General and the FBI for further clarification of their respective investigative responsibilities.

The Department is concerned about the allocation of limited investigative resources and the possibility of competitive and, at times, redundant and unproductive relationships among law enforcement agencies. The policy statement addresses these issues and establishes a structure for early reporting of instances of criminality to the prosecutor. As a further refinement, to set out more clearly the Department's expectations regarding the use of the limited investigative resources in both the FBI and the Offices of individual Inspectors General, the policy statement has been supplemented by a February 19, 1982 statement on the implementation of the policy statement (see the Criminal Resource Manual at 935), which allocates investigative responsibility between the Inspectors General and the FBI with respect to four types of crime in which both have an investigative interest:

1. bribery
2. significant allegations of fraud involving federal employees
3. organized crime matters and
4. fraud against the government.

Implementation of the policy statement requires the cooperation and support of the USAs, the FBI, and the Inspectors General. The Fraud Section of the Criminal Division is charged with overseeing the operations of the policy and resolving any uncertainties or differing interpretations which arise in its implementation. Any questions or information should be directed to the Fraud Section.

9-42.510 Social Security Fraud

Pursuant to an agreement reached between the Department of Justice and the Social Security Administration (SSA) in April 1977, the SSA will not refer matters in which one or more of the factors below is present unless additional aggravating circumstances are present:

A. The suspect is 75 or more years old;

B. The suspected violation did not result in improper payment. This exception does not apply in criminal misuse cases such as conversion by a representative payee, SSN misuse or improper disclosure;

C. There is evidence that the suspect has an illness expected to result in his/her death in the near future; or

D. The suspected violation is solely a failure to disclose an increase in a pension amount.

The SSA has discontinued its procedure of summarizing each case involving one or more of the aforementioned factors and recommending against further action. The SSA will, however, continue to take administrative action directed toward recovering any overpayments in those cases not warranting criminal prosecution. Matters in which the factors cited above are either not present or not compelling will be referred with an appropriate recommendation.

Each referral with a recommendation for prosecution contains the name and telephone number of the SSA Regional Integrity Specialist familiar with the facts of the case. You are invited to contact that individual for discussion or additional investigation.

For additional discussion of Social Security Numbers and criminal violations involving misuse of Social Security Numbers, see the Criminal Resource Manual at 936.

9-42.530 Department of Defense Memorandum of Understanding

In August 1984, the United States Attorney General and the Secretary of Defense signed a Memorandum of Understanding ("MOU") between the Departments of Justice and Defense relating to the investigation and prosecution of certain crimes. Special attention is directed to the treatment of investigative jurisdiction of corruption, fraud and theft cases. The prosecutor has the responsibility to

1. concur before Department of Defense can initiate any corruption investigation;
2. confer to determine investigative jurisdiction in all fraud and theft matters; and
3. concur before the Department of Defense initiates any administrative investigation or actions during the pendency of any criminal investigation.

The MOU was developed with the expectation that the more complex cases require the joint efforts of the Departments of Defense and Justice. In this regard a repeated theme of the MOU is the prosecutor's responsibility for coordinating and effectuating the various interests of the United States. The Federal Procurement Fraud Unit, Fraud Section, Criminal Division, of the Department of Justice has developed substantial expertise in these investigations and can assist in structuring and conducting the investigations requiring expertise from the FBI and Department of Defense. Questions concerning the MOU should be directed to the Justice Department's Fraud Section, Criminal Division.

See the Criminal Resource Manual at 938 for the text of the MOU.

1-12.000
Coordination of Parallel Criminal, Civil, and Administrative Proceedings

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The Attorney General issued a Memorandum on July 28, 1997, requiring a system for coordinating the criminal, civil and administrative aspects of all white-collar crime matters within every United States Attorney's office and each Department Litigating Division. The system should contain management procedures to address issues of parallel proceedings including:

- timely assessment of the civil and administrative potential in all criminal case referrals, indictments, and declinations;
- timely assessment of the criminal potential in all civil case referrals and complaints;
- effective and timely communication with cognizant agency officials, including suspension and debarment authorities, to enable agencies to pursue available remedies;
- early and regular communication between civil and criminal attorneys regarding *qui tam* and other civil referrals, especially when the civil case is developing ahead of the criminal prosecution; and
- coordination, when appropriate, with state and local authorities.

The Attorney General has further directed that appropriate staff in each office receive comprehensive training regarding parallel proceedings utilizing a course of instruction and training materials to be developed by the Council on White-Collar Crime and the Office of Legal Education.

The full text of this Memorandum is in the DOJ Organization and Functions Manual at 27.

June 1998 **USAM Chapter 1-12**

TAXPAYERS AGAINST FRAUD EDUCATION FUND
1220 19th Street, NW
Suite 501
Washington, DC 20036
phone: 202-296-4926
tollfree: 1-800-USFALSE
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The California False Claims Act,

Cal. Gov't Code §§ 12650-12655 (1992)

Article 9

FALSE CLAIMS ACTIONS

Section

- 12650 Definitions.
- 12651 Acts subjecting person to treble damages, costs and civil penalties; exceptions.
- 12652 Attorney general investigations and prosecutions; powers of prosecuting authority; civil actions by individuals as qui tam plaintiff; jurisdiction of courts.
- 12653 Employer interference with employee disclosures, etc.; liability of employer; remedies of employee.
- 12654 Limitation of actions; activities antedating this article; burden of proof.
- 12655 Remedies under other laws; severability of provisions; liberality of article construction.

§ 12650 Definitions

For purposes of this article:

(a) "Claim" includes any request or demand for money, property, or services made to any employee, officer, or agent of the state or of any political subdivision, or to any contractor, grantee, or other recipient, whether under contract or not, if any portion of the money, property, or services requested or demanded issued from, or was provided by, the state (hereinafter "state funds") or by any political subdivision thereof (hereinafter "political subdivision funds").

(b) "Knowing" and "knowingly" mean that a person, with respect to information, does any of the following:

(1) Has actual knowledge of the information.

(2) Acts in deliberate ignorance of the truth or falsity of the information.

(3) Acts in reckless disregard of the truth or falsity of the information.

Proof of specific intent to defraud is not required.

(c) "Political subdivision" includes any city, city and county, county, tax or assessment district, or other legally authorized local governmental entity with jurisdictional boundaries.

(d) "Prosecuting authority" refers to the county counsel, city attorney, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, a particular political subdivision.

(e) "Person" includes any natural person, corporation, firm, association, organization, partnership, business, or trust.

§ 12651 Acts subjecting person to treble damages, costs and civil penalties; exceptions

(a) Any person who commits any of the following acts shall be liable to the state or to the political subdivision for three times the amount of damages which the state or the political subdivision sustains because of the act of that person. A person who commits any of the following acts shall also be liable to the state or to the political subdivision for the costs of a civil action brought to recover any of those penalties or damages, and may be liable to the state or political subdivision for a civil penalty of up to ten thousand dollars ($10,000) for each false claim:

(1) Knowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim for payment or approval.

(2) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision.

(3) Conspires to defraud the state or any political subdivision by getting a false claim allowed or paid by the state or by any political subdivision.

(4) Has possession, custody, or control of public property or money used or to be used by the state or by any political subdivision and knowingly delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt.

(5) Is authorized to make or deliver a document certifying receipt of property used or to be used by the state or by any political subdivision and knowingly makes or delivers a receipt that falsely represents the property used or to be used.

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property.

(7) Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state or to any political subdivision.

(8) Is a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim.

(b) Notwithstanding subdivision (a), the court may assess not less than two times and not more than three times the amount of damages which the state or the political subdivision sustains because of the act of the person described in that subdivision, and no civil penalty, if the court finds all of the following:

(1) The person committing the violation furnished officials of the state or of the political subdivision responsible for investigating false claims violations with all information known to that person about the violation within 30 days after the date on which the person first obtained the information.

(2) The person fully cooperated with any investigation by the state or a political subdivision of the violation.

(3) At the time the person furnished the state or the political subdivision with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

(c) Liability under this section shall be joint and several for any act committed by two or more persons.

(d) This section does not apply to any controversy involving an amount of less than five hundred dollars ($500) in value. For purposes of this subdivision, "controversy" means any one or more false claims submitted by the same person in violation of this article.

(e) This section does not apply to claims, records, or statements made pursuant to Division 3.6 (commencing with Section 810) of Title I or to workers' compensation claims filed pursuant to Division 4 (commencing with Section 3200) of the Labor Code.

(f) This section does not apply to claims, records, or statements made under the Revenue and Taxation Code.

§ 12652 Attorney general investigations and prosecutions; powers of prosecuting authority; civil actions by individuals as qui tam plaintiff; jurisdiction of courts

(a)(1) The Attorney General shall diligently investigate violations under Section 12651 involving state funds. If the Attorney General finds that a person has violated or is violating Section 12651, the Attorney General may bring a civil action under this section against that person.

(2) If the Attorney General brings a civil action under this subdivision on a claim involving political subdivision funds as well as state funds, the Attorney General shall, on the same date that the

complaint is filed in this action, serve by mail with "return receipt request[ed]" a copy of the complaint on the appropriate prosecuting authority.

(3) The prosecuting authority shall have the right to intervene in an action brought by the Attorney General under this subdivision within 60 days after receipt of the complaint pursuant to paragraph (2). The court may permit intervention thereafter upon a showing that all of the requirements of Section 387 of the Code of Civil Procedure have been met.

(b)(1) The prosecuting authority of a political subdivision shall diligently investigate violations under Section 12651 involving political subdivision funds. If the prosecuting authority finds that a person has violated or is violating Section 12651, the prosecuting authority may bring a civil action under this section against that person.

(2) If the prosecuting authority brings a civil action under this section on a claim involving state funds as well as political subdivision funds, the prosecuting authority shall, on the same date that the complaint is filed in this action, serve a copy of the complaint on the Attorney General.

(3) Within 60 days after receiving the complaint pursuant to paragraph (2), the Attorney General shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the Attorney General shall assume primary responsibility for conducting the action and the prosecuting authority shall have the right to continue as a party.

(B) Notify the court that it declines to take over the action, in which case the prosecuting authority shall have the right to conduct the action.

(C)(1) A person may bring a civil action for a violation of this article for the person and either for the State of California in the name of the state, if any state funds are involved, or for a political subdivision in the name of the political subdivision, if political subdivision funds are exclusively involved. The person bringing the action shall be referred to as the qui tam plaintiff. Once filed, the action may be dismissed only with the written consent of the court, taking into account the best interest of the parties involved and the public purposes behind this act.

(2) A complaint filed by a private person under this subdivision shall be filed in superior court in camera and may remain under seal for up to 60 days. No service shall be made on the defendant until after the complaint is unsealed.

(3) On the same day as the complaint is filed pursuant to paragraph (2), the qui tam plaintiff shall serve by mail with "return receipt requested" the Attorney General with a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses.

(4) Within 60 days after receiving a complaint alleging violations which involve state funds but not political subdivision funds. the Attorney General shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the seal shall be lifted.

(B) Notify the court that it declines to take over the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(5)(A) Within 15 days after receiving a complaint alleging violations which exclusively involve political subdivision funds, the Attorney General shall forward the complaint and written disclosure to the appropriate prosecuting authority for disposition and shall notify the qui tam plaintiff of the transfer.

(B) Within 45 days after the Attorney General forwards the complaint and written disclosure pursuant to subparagraph (A), the prosecuting authority shall do either of the following:

(i) Notify the court that it intends to proceed with the action, in which case the seal shall be lifted.

(ii) Notify the court that it declines to take over the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(6)(A) Within 15 days after receiving a complaint alleging violations which involve both state and political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure to the appropriate prosecuting authority, and shall coordinate its review and investigation with those of the prosecuting authority.

(B) Within 60 days after receiving a complaint alleging violations which involve both state and political subdivision funds, the Attorney General shall do either of the following:

(i) Notify the court that it intends to proceed with the action, in which case the seal shall be lifted.

(ii) Notify the court that it declines to take over the action but that the prosecuting authority of the political subdivision involved intends to proceed with the action, in which case the seal shall be lifted and the action shall be conducted by the prosecuting authority.

(iii) Notify the court that both it and the prosecuting authority decline to take over the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(C) If the Attorney General proceeds with the action pursuant to clause (i) of subparagraph (B), the political subdivision shall be permitted to intervene in the action within 60 days after the Attorney General notifies the court of its intentions. The court may authorize intervention thereafter upon a showing that all the

requirements of Section 387 of the Code of Civil Procedure have been met.

(7) Upon a showing of good cause and reasonable diligence in its investigation, the Attorney General or the prosecuting authority of a political subdivision may move the court for extensions of the time during which the complaint remains under seal, but in no event may the complaint remain under seal for longer than 90 days.

(8) When a person brings an action under this subdivision, no other person may bring a related action based on the facts underlying the pending action.

(d)(1) No court shall have jurisdiction over an action brought under subdivision (c) against a member of the State Senate or Assembly, a member of the state judiciary, an elected official in the executive branch of the state, or a member of the governing body of any political subdivision if the action is based on evidence or information known to the state or political subdivision when the action was brought.

(2) In no event may a person bring an action under subdivision (c) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the state or political subdivision is already a party.

(3)(A) No court shall have jurisdiction over an action under this article based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing, or audit conducted by or at the request of the Senate, Assembly, auditor, or governing body of a political subdivision, or from the news media, unless the action is brought by the Attorney General or the prosecuting authority of a political subdivision, or the person bringing the action is an original source of the information.

(B) For purposes of subparagraph (A), "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based, who voluntarily provided the information to the state or political subdivision before filing an action based on that information, and whose information provided the basis or catalyst for the investigation, hearing, audit, or report which led to the public disclosure as described in subparagraph (A).

(4) No court shall have jurisdiction over an action brought under subsection (c) based upon information discovered by a present or former employee of the state or a political subdivision during the course of his or her employment, unless that employee first in good faith exhausted existing internal procedures for reporting and seeking recovery of such falsely claimed sums through official channels and unless the state or political subdivision failed to act on the information provided within a reasonable period of time.

(e)(1) If the state or political subdivision proceeds with the action, it shall have the primary responsibility for prosecuting the action. The

qui tam plaintiff shall have the right to continue as a full party to the action.

(2)(A) The state or political subdivision may seek to dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified by the state or political subdivision of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity to oppose the motion and present evidence at a hearing.

(B) The state or political subdivision may settle the action with the defendant notwithstanding the objections of the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances.

(f)(1) If the state or political subdivision elects not to proceed, the qui tam plaintiff shall have the same right to conduct the action as the Attorney General or prosecuting authority would have had if it had chosen to proceed under subdivision (c). If the state or political subdivision so requests, and at its expense, the state or political subdivision shall be served with copies of all pleadings filed in the action and supplied with copies of all deposition transcripts.

(2)(A) Upon timely application, the court shall permit the state or political subdivision to intervene in an action with which it had initially declined to proceed if the interest of the state or political subdivision in recovery of the property or funds involved is not being adequately represented by the qui tam plaintiff.

(B) If the state or political subdivision is allowed to intervene under paragraph(A), the qui tam plaintiff shall retain principal responsibility for the action and the recovery of the parties shall be determined as if the state or political subdivision had elected not to proceed.

(g)(1)(A) If the Attorney General initiates an action pursuant to subdivision (a) or assumes control of an action initiated by a prosecuting authority pursuant to subparagraph (A) of paragraph (3) of subdivision (b), the office of the Attorney General shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which funds shall be used to support its ongoing investigation and prosecution of false claims.

(B) If a prosecuting authority initiates and conducts an action pursuant to subdivision (b), the office of the prosecuting authority shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which funds shall be used to support its ongoing investigation and prosecution of false claims.

(C) If a prosecuting authority intervenes in an action initiated by the Attorney General pursuant to paragraph (3) of subdivision (a) or remains a party to an action assumed by the Attorney General pursuant to subparagraph (A) of paragraph (3) of subdivision (b), the court may award the office of the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery under subparagraph (A), taking into account the prosecuting

authority's role in investigating and conducting the action.

(2) If the state or political subdivision proceeds with an action brought by a qui tam plaintiff under subdivision (c), the qui tam plaintiff shall, subject to paragraphs (4)and (5), receive at least 15 percent but not more than 33 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the qui tam plaintiff substantially contributed to the prosecution of the action. When it conducts the action, the Attorney General's office or the office of the prosecuting authority of the political subdivision shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which funds shall be used to support its ongoing investigation and prosecution of false claims made against the state or political subdivision. When both the Attorney General and a prosecuting authority are involved in a qui tam action pursuant to subparagraph (C) of paragraph (6) of subdivision (c), the court at its discretion may award the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery, taking into account the prosecuting authority's contribution to investigating and conducting the action.

(3) If the state or political subdivision does not proceed with an action under subdivision (c), the qui tam plaintiff shall, subject to paragraphs (4) and (5), receive an amount which the court decides is reasonable for collecting the civil penalty and damages on behalf of the Government. The amount shall be not less than 25 percent and not more than 50 percent of the proceeds of the action or settlement and shall be paid out of such proceeds.

(4) Where the action is one provided for under paragraph (4) of subdivision (d), the present or former employee of the state or political subdivision shall not be entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff those sums from the proceeds as it considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision goes forth with the action or 50 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, and the scope of, and response to, the employee's attempts to report and gain recovery of such falsely claimed funds through official channels.

(5) Where the action is one which the court finds to be based primarily on information from a present or former employee who actively participated in the fraudulent activity, the employee shall not be entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff such sums from the proceeds as it considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision goes forth with the action or 50 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, the scope of the present or past employee's involvement in the fraudulent activity, said employee's attempts to avoid or resist such activity, and all other circumstances surrounding the activity.

(6) The portion of the recovery not distributed pursuant to paragraphs (1) to (5), inclusive, shall revert to the state if the underlying false claims involved state funds exclusively and to the political subdivision if the underlying false claims involved political subdivision funds exclusively. If the violation involved both state and political subdivision funds, the court shall make an apportionment between the state and political subdivision based on their relative share of the funds falsely claimed.

(7) For purposes of this section, "proceeds" include civil penalties as well as double or treble damages as provided in Section 12651.

(8) If the state, political subdivision, or the qui tam plaintiff prevails in or settles any action under subdivision (c), the qui tam plaintiff shall receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable costs and attorneys' fees. All expenses, costs, and fees shall be awarded against the defendant and under no circumstances shall they be the responsibility of the state or political subdivision.

(9) If the state or political subdivision does not proceed with the action and the qui tam plaintiff conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the qui tam plaintiff was clearly frivolous, clearly vexatious, or brought solely for purposes of harassment.

(h) The court may stay an act of discovery of the person initiating the action for a period of not more than 60 days if the Attorney General or local prosecuting authority show that the act of discovery would interfere with an investigation or a prosecution of a criminal or civil matter arising out of the same facts, regardless of whether the Attorney General or local prosecuting authority proceeds with the action. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Attorney General or local prosecuting authority has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(i) Upon a showing by the Attorney General or local prosecuting authority that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Attorney General's or local prosecuting's authority prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, including the following:

(1) Limiting the number of witnesses the person may call.

(2) Limiting the length of the testimony of such witnesses.

(3) Limiting the person's cross-examination of witnesses.

(4) Otherwise limiting the participation by the person in the litigation.

12653 Employer interference with employee disclosures, etc.; liability of employer, remedies of employee

(a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed under Section 12652.

(b) No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against, an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652.

(c) An employer who violates subdivision (b) shall be liable for all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, compensation for any special damage sustained as a result of the discrimination, and, where appropriate. punitive damages. In addition, the defendant shall be required to pay litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate superior court of the state for the relief provided in this subdivision.

(d) An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the state or a political subdivision shall be entitled to the remedies under subdivision (c) if, and only if, both of the following occur:

(1) The employee voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed.

(2) The employee had been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place.

§ 12654 Limitation of actions; activities antedating this article; burden of proof

(a) A civil action under Section 12652 may not be filed more than three years after the date of discovery by the official of the state or political subdivision charged with responsibility to act in the circumstances or, in any event, no more than 10 years after the date on which the violation of Section 12651 is committed.

(b) A civil action under Section 12652 may be brought for activity prior to the effective date of this article if the limitations period set in subdivision (a) has not lapsed.

(c) In any action brought under Section 12652, the state, the political subdivision, or the qui tam plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, a guilty verdict rendered in a criminal proceeding charging false statements or fraud, whether upon a verdict after trial or upon a plea of guilty or nolo contenders, except for a plea of nolo contenders made prior to January 1, 1988, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subdivision (a), (b), or (c) of Section 12652.

§ 12655 Remedies under other laws; severability of provisions; liberality of article construction

(a) The provisions of this article are not exclusive, and the remedies provided for in this article shall be in addition to any other remedies provided for in any other law or available under common law.

(b) If any provision of this article or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the article and the application of the provision to other persons or circumstances shall not be affected thereby.

(c) This article shall be liberally construed and applied to promote the public interest.

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State False Claims Acts

Nevada Submission of False Claims to State or Local Government

NRS 357.010 Definitions. As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 357.020 and 357.030 have the meanings ascribed to them in those sections.

(Added to NRS by 1999, 824)

NRS 357.020 "Claim" defined. "Claim" means a request or demand for money, property or services made to:

1. An officer, employee or agent of this state or of a political subdivision of this state; or

2. A contractor, grantee or other recipient of money from the state or a political subdivision of this state if any part of the money, property or services requested or demanded was provided by the state or political subdivision.

(Added to NRS by 1999, 824)

NRS 357.030 "Political subdivision" defined. "Political subdivision" means a county, city, assessment district or any other local government as defined in NRS 354.474.

(Added to NRS by 1999, 824)

LIABILITY

NRS 357.040 Liability for damages and civil penalty for certain acts.

1. Except as otherwise provided in NRS 357.050, a person who, with or without specific intent to defraud, does any of the following listed acts is liable to the state or a political subdivision, whichever is affected, for three times the amount of damages sustained by the state or political subdivision because of the act of that person, for the costs of a civil action brought to recover those damages and for a civil penalty of not less than $2,000 or more than $10,000 for each act:

(a) Knowingly presents or causes to be presented a false claim for payment or approval.

(b) Knowingly makes or uses, or causes to be made or used, a false

record or statement to obtain payment or approval of a false claim.

(c) Conspires to defraud by obtaining allowance or payment of a false claim.

(d) Has possession, custody or control of public property or money and knowingly delivers or causes to be delivered to the state or a political subdivision less money or property than the amount for which he receives a receipt.

(e) Is authorized to prepare or deliver a receipt for money or property to be used by the state or a political subdivision and knowingly prepares or delivers a receipt that falsely represents the money or property.

(f) Knowingly buys, or receives as security for an obligation, public property from a person who is not authorized to sell or pledge the property.

(g) Knowingly makes or uses, or causes to be made or used, a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the state or a political subdivision.

(h) Is a beneficiary of an inadvertent submission of a false claim and, after discovering the falsity of the claim, fails to disclose the falsity to the state or political subdivision within a reasonable time.

2. As used in this section, a person acts knowingly with respect to information if he:

(a) Has knowledge of the information;

(b) Acts in deliberate ignorance of whether the information is true or false; or

(c) Acts in reckless disregard of the truth or falsity of the information.

(Added to NRS by 1999, 824)

NRS 357.050 Limitation of damages and waiver of penalty for cooperation

of defendant.

In a civil action pursuant to this chapter, the court may give judgment for not less than twice or more than three times the amount of damages sustained, and no civil penalty, if it finds that:

1. The person against whom the judgment is entered:

(a) Furnished all information known to him concerning the act, within 30 days after becoming aware of the information, to the attorney general; and

(b) Fully cooperated with any investigation of the act by the state or

political subdivision; and

2. At the time the information was furnished, no criminal prosecution or civil or administrative proceeding had commenced with respect to the act and the person had no knowledge of the existence of any investigation with respect to the act.

(Added to NRS by 1999, 825)

NRS 357.060 Joint and several liability.

Liability pursuant to this chapter is joint and several for an act done by two or more persons.

(Added to NRS by 1999, 825)

CIVIL ACTIONS

NRS 357.070 Investigation and action by attorney general.

The attorney general may investigate any alleged liability pursuant to this chapter and may bring a civil action pursuant to this chapter against the person liable.

(Added to NRS by 1999, 825)

NRS 357.080 Maintenance of action by private plaintiff; limitations; complaint under seal; copy of complaint and written disclosure of evidence to be sent to attorney general.

1. Except as otherwise provided in this section and NRS 357.090 and 357.100, a private plaintiff may maintain an action pursuant to this chapter on his own account and that of the state if money, property or services provided by the state are involved, or on his own account and that of a political subdivision if money, property or services provided by the political subdivision are involved, or on his own account and that of both the state and a political subdivision if both are involved. After such an action is commenced, it may be dismissed only with leave of the court, taking into account the public purposes of this chapter and the best interests of the parties.

2. If a private plaintiff brings an action pursuant to this chapter, no other person may bring another action pursuant to this chapter based on the same facts.

3. An action may not be maintained by a private plaintiff pursuant to this chapter:

(a) Against a member of the legislature or the judiciary, an elected officer of the executive department of the state government, or a member of the governing body of a political subdivision, if the action is based upon evidence or information known to the state or political subdivision at the time the action was brought.

(b) If the action is based upon allegations or transactions that are the subject of a civil action or an administrative proceeding for a monetary penalty to which the state or political subdivision is

already a party.

4. A complaint filed pursuant to this section must be placed under seal and so remain until the attorney general has elected whether to intervene. No service may be made upon the defendant until the complaint is unsealed.

5. On the date the private plaintiff files his complaint, he shall send a copy of the complaint to the attorney general by mail with return receipt requested. He shall send with each copy of the complaint a written disclosure of substantially all material evidence and information he possesses.

(Added to NRS by 1999, 825)

NRS 357.090 Action based on information public employee discovered during public employment prohibited in certain circumstances.

No action may be maintained pursuant to NRS 357.080 that is based upon information discovered by a present or former employee of the state or a political subdivision during his employment, unless he first in good faith exhausted internal procedures for reporting and seeking recovery of the proceeds of the fraudulent activity through official channels and the state or political subdivision failed to act on the information provided for at least 6 months.

(Added to NRS by 1999, 828)

NRS 357.100 Action based upon certain public disclosures may only be brought by attorney general or original source of information.

1. No action may be maintained pursuant to this chapter that is based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in an investigation, report, hearing or audit conducted by or at the request of a house of the legislature, an auditor or the governing body of a political subdivision, or from the news media, unless the action is brought by the attorney general or an original source of the information.

2. As used in this section, ôoriginal sourceö means a person:

(a) Who has direct and independent knowledge of the information on which the allegations were based;

(b) Who voluntarily provided the information to the state or political subdivision before bringing an action based on the information; and

(c) Whose information provided the basis or caused the making of the investigation, hearing, audit or report that led to the public disclosure.

(Added to NRS by 1999, 828)

NRS 357.110 Attorney general may elect to intervene in action by private plaintiff; motion to extend time for election;

unsealing of complaint.

1. Within 120 days after receiving a complaint and disclosure, the attorney general may intervene and proceed with the action or he may, for good cause shown, move the court to extend the time for his election whether to proceed. The motion may be supported by affidavits or other submissions in chambers.

2. If the attorney general elects to intervene, the complaint must be unsealed. If the attorney general elects not to intervene, the private plaintiff may proceed and the complaint must be unsealed.

(Added to NRS by 1999, 826)

NRS 357.120 Effect of intervention of attorney general in action by private plaintiff; motion to dismiss; settlement.

1. If the attorney general intervenes, the private plaintiff remains a party to an action pursuant to NRS 357.080.

2. The attorney general may move to dismiss the action for good cause. The private plaintiff must be notified of the filing of the motion and is entitled to oppose it and present evidence at the hearing.

3. Except as otherwise provided in this subsection, the attorney general may settle the action. If the attorney general intends to settle the action, he shall notify the private plaintiff of that fact. Upon the request of the private plaintiff, the court shall determine whether settlement of the action is consistent with the public purposes of this chapter and shall not approve the settlement of the action unless it determines that such settlement is consistent with the public purposes of this chapter.

(Added to NRS by 1999, 826)

NRS 357.130 Effect of declination of attorney general to intervene in action by private plaintiff; authority for and effect of election by attorney general to intervene subsequently in such action.

1. If the attorney general elects not to intervene in an action pursuant to NRS 357.080, the private plaintiff has the same rights in conducting the action as the attorney general would have had. A copy of each pleading or other paper filed in the action, and a copy of the transcript of each deposition taken, must be mailed to the attorney general if the attorney general so requests and pays the cost thereof.

2. Upon timely application, the attorney general may intervene in an action in which he has previously declined to intervene, if the interest of the state or a political subdivision in recovery of the money or property involved is not being adequately represented by the private plaintiff.

3. If the attorney general so intervenes, the private plaintiff retains primary responsibility for conducting the action and any recovery

must be apportioned as if the attorney general had not intervened.

(Added to NRS by 1999, 826)

NRS 357.140 Response by defendant.

The defendant is entitled to 30 days in which to respond after a complaint filed pursuant to NRS 357.080 is unsealed and served upon him.

(Added to NRS by 1999, 826)

NRS 357.150 Stay of discovery by private plaintiff; extension.

1. The court may stay discovery by a private plaintiff for not more than 60 days if the attorney general shows that the proposed discovery would interfere with the investigation or prosecution of a civil or criminal matter arising out of the same facts, whether or not the attorney general participates in the action.

2. The court may extend the stay upon a further showing that the attorney general has pursued the civil or criminal investigation or proceeding with reasonable diligence and the proposed discovery would interfere with its continuation. Discovery may not be stayed for a total of more than 6 months over the objection of the private plaintiff, except for good cause shown by the attorney general.

3. A showing made pursuant to this section must be made in chambers.

(Added to NRS by 1999, 828)

NRS 357.160 Court-imposed limitation upon participation of private plaintiff in action.

Upon a showing by the attorney general that unrestricted participation by a private plaintiff would interfere with or unduly delay the conduct of an action, or would be repetitious, irrelevant or solely for harassment, the court may limit his participation by, among other measures, limiting:

1. The number of witnesses he may call;

2. The length of the testimony of the witnesses; or

3. His cross-examination of witnesses.

(Added to NRS by 1999, 828)

NRS 357.170 Limitation of actions; standard of proof; effect of certain findings of guilt in criminal proceeding on action.

1. An action pursuant to this chapter may not be commenced more than 3 years after the date of discovery of the fraudulent activity by the attorney general or more than 5 years after the fraudulent activity occurred, whichever is earlier. Within those limits, an action may be based upon fraudulent activity that occurred before October

1, 1999.

2. In an action pursuant to this chapter, the standard of proof is a preponderance of the evidence. A finding of guilt in a criminal proceeding charging false statement or fraud, whether upon a verdict of guilty or a plea of guilty or nolo contendere, estops the person found guilty from denying an essential element of that offense in an action pursuant to this chapter based upon the same transaction as the criminal proceeding.

(Added to NRS by 1999, 829)

NRS 357.180 Award of expenses and attorney's fees.

1. If the attorney general or a private plaintiff prevails in or settles an action pursuant to NRS 357.080, the private plaintiff is entitled to a reasonable amount for expenses that the court finds were necessarily incurred, including reasonable costs, attorney's fees and the fees of expert consultants and expert witnesses. Those expenses must be awarded against the defendant, and may not be allowed against the state or a political subdivision.

2. If the defendant prevails in the action, the court may award him reasonable expenses and attorney's fees against the party or parties who participated in the action if it finds that the action was clearly frivolous or vexatious or brought solely for harassment.

(Added to NRS by 1999, 828)

DISTRIBUTION OF RECOVERY

NRS 357.190 "Recovery" defined.

As used in NRS 357.190 to 357.230, inclusive, "recovery" includes civil penalties and does not include any allowance of expenses or attorney's fees.

(Added to NRS by 1999, 827)

NRS 357.200 Distribution to special account in state general fund if attorney general initiated action.

If the attorney general initiates an action pursuant to this chapter, 33 percent of any recovery must be paid into the state general fund to the credit of a special account, for use by the attorney general as appropriated or authorized by the legislature in the investigation and prosecution of false claims.

(Added to NRS by 1999, 827)

NRS 357.210 Distribution to private plaintiff in certain actions.

1. If the attorney general intervenes at the outset in an action pursuant to NRS 357.080, the private plaintiff is entitled, except as otherwise provided in NRS 357.220, to receive not less than 15 percent or more than 33 percent of any recovery, according to the

extent of his contribution to the conduct of the action.

2. If the attorney general does not intervene in the action at the outset, the private plaintiff is entitled, except as otherwise provided in NRS 357.220, to receive not less than 25 percent or more than 50 percent of any recovery, as the court determines to be reasonable.

(Added to NRS by 1999, 827)

NRS 357.220 Distribution to private plaintiff in action based upon information obtained by public employee during public employment.

1. If the action is one described in NRS 357.090, the present or former employee of the state or political subdivision is not entitled to any minimum percentage of any recovery, but the court may award him no more than 33 percent of the recovery if the attorney general intervenes in the action at the outset, or no more than 50 percent if the attorney general does not intervene, according to the significance of his information, the extent of his contribution to the conduct of the action and the response to his efforts to report the false claim and gain recovery through other official channels.

2. If the private plaintiff is a present or former employee of the state or a political subdivision and benefited financially from the fraudulent activity, he is not entitled to any minimum percentage of any recovery, but the court may award him no more than 33 percent of the recovery if the attorney general intervenes in the action at the outset, or no more than 50 percent if the attorney general does not intervene, according to the significance of his information, the extent of his contribution to the conduct of the action, the extent of his involvement in the fraudulent activity, his attempts to avoid or resist the activity and the other circumstances of the activity.

(Added to NRS by 1999, 827)

NRS 357.230 Distribution of unapportioned portion to general fund of state or political subdivision, or both.

The portion of any recovery not apportioned pursuant to NRS 357.200, 357.210 and 357.220 must be paid into the state general fund if the money, property or services were provided only by the state, or into the general fund of the political subdivision if they were provided only by a political subdivision. If the action involved both the state and a political subdivision, the court shall apportion the remaining portion of any recovery between them according to the respective values of the money, property or services provided by each.

(Added to NRS by 1999, 827)

MISCELLANEOUS PROVISIONS

NRS 357.240 Employer prohibited from forbidding employee from making certain disclosures or acting in furtherance of

action relating to false claim and from taking any retaliatory action against employee for such disclosures or actions.

1. An employer shall not adopt or enforce any rule or policy forbidding an employee to disclose information to the state, a political subdivision or a law enforcement agency or to act in furtherance of an action pursuant to this chapter, including investigation for, bringing or testifying in such an action.2. An employer shall not discharge, demote, suspend, threaten, harass, deny promotion to or otherwise discriminate against an employee in the terms or conditions of his employment because of lawful acts done by him on his own behalf or on behalf of others in disclosing information to the state, a political subdivision or a law enforcement agency in furtherance of an action pursuant to this chapter, including investigation for, bringing or testifying in such an action.

(Added to NRS by 1999, 829)

NRS 357.250 Liability of employer for violations of NRS 357.240; entitlement of employee to remedies.

1. An employer who violates subsection 2 of NRS 357.240 is liable to the affected employee in a civil action for all relief necessary to make him whole, including, without limitation, reinstatement with the same seniority as if the discrimination had not occurred or damages in lieu of reinstatement if appropriate, twice the amount of lost compensation, interest on the lost compensation, any special damage sustained as a result of the discrimination and punitive damages if appropriate. The employer is also liable for expenses recoverable pursuant to NRS 357.180, costs and attorney's fees.

2. An employee is entitled to the remedies provided in subsection 1 only if:

(a) He voluntarily disclosed information to the state or a political subdivision or voluntarily acted in furtherance of an action pursuant to this chapter; and

(b) He was harassed, threatened with termination or demotion, or otherwise coerced by his employer into any participation in fraudulent activity.

(Added to NRS by 1999, 829)

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State False Claims Acts

Illinois Whistleblower Reward and Protection Act

Section

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175/1 Short title

§ 1. This Act may be cited as the Whistleblower Reward and Protection Act.

175/2 Definitions

§ 2. Definitions. As used in this Act:

(a) "State" means the State of Illinois.

(b) "Guard" means the Illinois National Guard.

(c) "Investigation" means any inquiry conducted by any investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of this Act.

(d) "Investigator" means a person who is charged by the Department of State Police with the duty of conducting any investigation under this Act, or any officer or employee of the State acting under the direction and supervision of the Department of State Police, through the Division of Criminal Investigation or the Division of Internal Investigation, with an investigation.

(e) "Documentary material" includes the original or any copy of any

book, record, report, memorandum, paper, communication, tabulation. chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery.

(f) "Custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1) of Section 6.

(g) "Product of discovery" includes:

(1) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property. examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(2) any digest, analysis, selection, compilation, or derivation of any item listed in paragraph (1); and

(3) any index or other manner of access to any item listed in paragraph (I)

1.75/3 False claims

§ 3. False claims.

(a) Liability for certain acts. Any person who:

(1) knowingly presents, or causes to be presented, to an officer or employee of the State or a member of the Guard a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the State:

(3) conspires to defraud the State by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the State and, intending to defraud the State or willfully to conceal the property. delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the State and, intending to defraud the State, makes or delivers the receipt without completely knowing that the information on the ,receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the State, or a

member of the Guard, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the State, is liable to the State for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the State sustains because of the act of that person. A person violating this subsection (a) shall also be liable to the State for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. As used in this Section, the terms "knowing" and "knowingly" mean that a person, with respect to information:

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information: or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. As used in this Section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the State provides any portion of the money or property which is requested or demanded, or if the State will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exclusion. This Section does not apply to claims, records, or statements made under the Illinois Income Tax Act.'

Civil actions for false claims

§ 4. Civil actions for false claims.

(a) Responsibilities of the Attorney General and the Department of State Police. The Department of State Police shall diligently investigate a civil violation under Section 3. If the Department of State Police finds that a person has violated or is violating Section 3, the Attorney General may bring a civil action under this Section against the person.

(b) Actions by private persons. (1) A person may bring a civil action for a violation of Section 3 for the person and for the State. The action shall be brought in the name of the State. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the State. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The State may elect to

intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The State may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this Section until 20 days after the complaint is unsealed and served upon the defendant.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the State shall:

(A) proceed with the action, in which case the action shall be conducted by the State, or

(B) notify the court that if declines to take over the action, in which case the person bringing the action shall have the fight to conduct the action.

(5) When a person brings an action under this subsection (b), no person other than the State may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to Qui Tam actions. (1) If the State proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the fight to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The State may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the State of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The State may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the State that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the State's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as

(i) limiting the number of witnesses the person may call,

(ii) limiting the length of the testimony of such witnesses

(iii) limiting the person's cross-examination of witnesses: or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the State elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the State so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the State's expense). When a person proceeds with the action, the court. without limiting the status and rights of the person initiating the action, may nevertheless permit the State to intervene at a later date upon a showing of good cause.

(4) Whether or not the State proceeds with the action, upon a showing by the State that certain actions of discovery by the person initiating the action would interfere with the State's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the State has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the State may elect to pursue its claim through any alternate remedy available to the State, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this Section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this Section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam plaintiff. (1) If the State proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15% but not more than 25% of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a legislative, administrative, or Auditor General's report, hearing,

audit, or investigation, or from the news media. the court may award such sums as it considers appropriate, but in no case more than 10% of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph (I) shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. The State shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred by the Attorney General, including reasonable attorneys' fees and costs, and the amount received shall be deposited in the Whistleblower Reward and protection Fund created under this Act. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the State does not proceed with an action under this Section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25% and not more than 30% of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the State proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of Section 3 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection (d), taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of Section 3, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the State to continue the action.

(4) If the State does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred. (1) No court shall have jurisdiction over an action brought by a former or present member of the Guard under subsection (b) of this Section against a member of the Guard arising out of such person's service in the Guard.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a member of the General Assembly, a member of the judiciary, or an exempt official if the action is based

on evidence or information known to the State when the action was brought.

(B) For purposes of this paragraph (2), "exempt official" means any of the following officials in State service: directors of departments established under the Civil Administrative Code of Illinois, the Adjutant General, the Assistant Adjutant General, the Director of the State Emergency Services and Disaster Agency, members of the boards and commissions, and all other positions appointed by the Governor by and with the consent of the Senate.

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the State is already a party.

(4)(A) No court shall have jurisdiction over an action under this Section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a legislative, administrative, or Auditor General's report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph (4), "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the State before filing an action under this Section which is based on the information.

(f) State not liable for certain expenses. The State is not liable for expenses which a person incurs in bringing an action under this Section.

(g) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this Section. including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this Section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate circuit court for the relief provided in this subsection (g).

False claims procedure

§ 5. False claims procedure.

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under Section 4 of this Act may be served at any place in the State.

(b) A civil action under Section 4 may not be brought:

(1) more than 6 years after the date on which the violation of Section 3 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the State charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed.

whichever occurs last.

(c) In any action brought under Section 4, the State shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, a final judgment rendered in favor of the State in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of Section 4.

175/6 Civil investigative demands

§ 6. Civil investigative demands.

(a) In general. (1) 4ssuance and service. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to an investigation, the Attorney General may, before commencing a civil proceeding under this Act, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person:

(A) to produce such documentary material for inspection and copying,

(B) to answer, in writing, written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General shall delegate the authority to issue civil investigative demands under this subsection (a) to the Department of State Police. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, an Assistant Attorney General or the delegate of the Department of State Police shall cause to be served, in any manner authorized by this Section, a copy of such demand upon the person from whom

the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines. (A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting an alleged violation which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall:

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall:

(i) set forth with specificity the written interrogatories to be answered:

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall:

(i) prescribe a date, time, and place at which oral testimony shall be commenced

(ii) identify an investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the fight to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this Section which is

an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this Section shall be a date which is not less than 7 days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General or the delegate of the Department of State Police determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General or the delegate of the Department of State Police shall not authorize the issuance under this Section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General or the delegate of the Department of State Police, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General shall authorize the performance by the delegate of the Department of State Police by any function vested in the Attorney General under this subparagraph (G).

(b) Protected material or information. (1) In general. A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers. or testimony would be protected from disclosure under:

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of this State to aid in a grand jury investigations or

(B) the standards applicable to discovery requests under the Code of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this Section.

(2) Effect on other orders, rules, and laws. Any such demand which is an express demand for any product of discovery supersedes any inconsistent order. rule, or provision of law (other than this Section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person make such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) Service; jurisdiction. (1) By whom served. Any civil investigative demand issued under subsection (a) may be served by an investigator, or by any person authorized to serve process on individuals within Illinois.

(2) Service in foreign countries. Any such demand or any petition filed under subsection (j) may be served upon any person who is

not found within Illinois in such manner as the Code of Civil Procedure prescribes for service of process outside Illinois. To the extent that the courts of this State can assert jurisdiction over any such person consistent with due process, the courts of this State shall have the same jurisdiction to take any action respecting compliance with this Section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) Service upon legal entities and natural persons. (1) Legal entities. Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by:

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, general agent, or registered agent of the partnership, corporation, association or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity as its principal office or place of business.

(2) Natural person. Service of any such demand or petition may be made upon any natural person by:

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) Proof service. A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary material. (1) Sworn certificates. The production of documentary material in response to a civil investigative demand served under this Section shall be made under a sworn certificate, in such form as the demand designates, by:

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such

production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the investigator identified in the demand.

(2) Production of materials. Any person upon whom any civil investigative demand for the production of documentary material has been served under this Section shall make such material available for inspection and copying to the investigator identified in such demand at the principal place of business of such person, or at such other place as the investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the investigator may prescribe in writing. Such person may, upon written agreement between the person and the investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories. Each interrogatory in a civil investigative demand served under this Section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates by:

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) Oral examinations. (1) Procedures. The examination of any person pursuant to a civil investigative demand for oral testimony served under this Section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the State or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Code of Civil Procedure.

(2) Persons present. The investigator conducting the examination

shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the State, any person who may be agreed upon by the attorney for the State and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken. The oral testimony of any person taken pursuant to a civil investigative demand served under this Section shall be taken in the county within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the investigator conducting the examination and such person.

(4) Transcript of testimony. When the testimony is fully transcribed, the investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the investigator, **with** a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness. unless the witness in writing waives the signaling, is ill. cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or investigator shall sign it and state on the record the fact of the waiver, illness. absence of the witness, or the refusal to sign, together with the reasons. if any, given therefor.

(5) Certification and delivery to custodian. The officer before whom the testimony is taken shall certify on the transcript that the witness was swom by the officer and that the transcript is a true record of the testimony given by the witness. and the officer or investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness. Upon payment of reasonable charges therefor, the investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, an Assistant Attorney General or employee of the Department of State Police may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

Conduct of oral testimony. (A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person. in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question. in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against

self-incrimination. If such person refuses to answer any question, a petition may be filed in circuit court under subsection (j)(I) for an order compelling such person to answer such question.

(B) If such person refuses any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with Article 106 of the Code of Criminal Procedure of 1963.

(8) Witness fees and allowances. Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the circuit court.

(i) Custodians of documents, answers, and transcripts.

(1) Designation. The Attorney General shall designate the Department of State Police to serve as custodian of documentary material, answers to interrogatories. and transcripts of oral testimony received under this Section, and shall designate additional employees of the Department of State Police as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure. (A) An investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this Section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any investigator, or other officer or employee of the Attorney General or employee of the Department of State Police who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized investigator or other officer or employee in connection with the taking of oral testimony under this Section.

(C) Except as otherwise provided in this subsection (i), no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than an investigator or other officer or employee of the Attorney General or employee of the Department of State Police authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the General Assembly, including any committee or subcommittee of the General Assembly, or to any other State agency for use by such

Limitation on disclosure

agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a circuit court. showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe:

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative for that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings. Whenever any attorney of the office of the Attorney General, or State's Attorney upon a referral has been designated to appear before any court, grand jury, or State agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this Section may deliver to such attorney such material. answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material. If any documentary material has been produced by any person in the course of any investigation pursuant to a civil investigative demand under this Section and:

(A) any case or proceeding before the **court** or grand jury arising out of such investigation, or any proceeding before any State agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the investigator under subsection (f)(2) or made for the Attorney General or employee of the Department of State Police under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians. In the event of the death,

disability, or separation from service in the Department of State Police of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this Section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly:

(A) designate another employee of the Department of State Police to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph (5) shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this Section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) Judicial proceedings. (1) Petition for enforcement. Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the circuit court of any county in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand. (A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the circuit court of any county within which such person resides, is found, or transacts business, and serve upon the investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the circuit court of the county in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph (A) must be filed:

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this Section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed

for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portion of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery. (A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the circuit court of the county in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph (A) must be filed:

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief upon subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this Section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed from compliance with the demand.

(4) Petition to require performance by custodian of duties. At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the circuit court of the county within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this Section.

(5) Jurisdiction. Whenever any petition is filed in any circuit court under this subsection (j), such court shall have jurisdiction to hear and determine the matter so presented, and to enter such orders as may be required to carry out the provisions of this Section. Any final order so entered shall be subject to appeal in the same manner as appeals of other final orders in civil matters. Any disobedience of any final order entered under this Section by any court shall be punished as a contempt of the court.

(k) Disclosure exemption. Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under the Illinois Administrative Procedure Act.

175/7 Procedure

§ 7. Procedure. The Code of Civil Procedure shall apply to all proceedings under this Act, except when that Code is inconsistent with this Act.

175/8 Funds-Grants

§ 8. Funds; Grants.

(a) There is hereby created the Whistleblower Reward and Protection Fund as a special fund in the State Treasury. All proceeds of an action or settlement of a claim brought under this Act shall be deposited in the Fund.

(b) Monies in the Fund shall be allocated, subject to appropriation, as follows: One-sixth of the monies shall be paid to the Attorney General and one-sixth of the monies shall be paid to the Department of State Police for State law enforcement purposes. The remaining two-thirds of the monies in the Fund shall be used for payment of awards to Qui Tam plaintiffs, for attorneys' fees and expenses, and as otherwise specified in this Act. The Attorney General shall direct the State Treasurer to make disbursement of funds as provided in court orders setting those awards, fees, and expenses. The State Treasurer shall transfer any fund balances in excess of those required for these purposes to the General Revenue Fund.

TAXPAYERS AGAINST FRAUD EDUCATION FUND
1220 19th Street, NW
Suite 501
Washington, DC 20036
phone: 202-296-4826
toll-free: 1-800-16FALSE
fax: 202-296-4838

Massachusetts False Claims Act

General Court, 2000 Second Annual Session

CHAPTER 159

H.B. No. 5300

APPROPRIATIONS--FISCAL YEAR 2001

Ch. 159, s 18

SECTION 18. Chapter 12 of the General Laws is hereby amended by inserting after section 5 the following 15 sections:--

Section 5A. (a) For the purposes of this section, the following words shall, unless the context clearly requires otherwise, have the following meaning:--

"Claim", any request or demand, whether pursuant to a contract or otherwise, for money or property which is made to an officer, employee, agent or other representative of the commonwealth, political subdivision thereof or to a contractor, subcontractor, grantee, or other person if the commonwealth or any political subdivision thereof provides any portion of the money or property which is requested or demanded, or if the commonwealth or any political subdivision thereof will reimburse directly or indirectly such contractor, subcontractor, grantee, or other person for any portion of the money or property which is requested or demanded.

"False claims law", pursuant to sections 5B to 5O, inclusive.

"False claims action", an action filed by the office of the attorney general or a relator pursuant to this section.

"Knowing and knowingly", possessing actual knowledge of relevant information, acting with deliberate ignorance of the truth or falsity of the information or acting in reckless disregard of the truth or falsity of the information and no proof of specific intent to defraud is required.

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"Original source", an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the attorney general, without public disclosure, before filing an action under this section which is based on such information.

"Person", any natural person, corporation, partnership, association,

trust or other business or legal entity.

includes false claims against cities, towns et

"Political subdivision", any city, town, county or other governmental entity authorized or created by state law, including public corporations and authorities.

"Relator", an individual who brings an action under paragraph (2) of section 5C.

Section 5B. Any person who:

Prohibited Conduct

(1) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to obtain payment or approval of a claim by the commonwealth or any political subdivision thereof;

(3) conspires to defraud the commonwealth or any political subdivision thereof through the allowance or payment of a fraudulent claim;

(4) has possession, custody, or control of property or money used, or to be used, by the commonwealth or any political subdivision thereof and knowingly delivers, or causes to be delivered to the commonwealth, less property than the amount for which the person receives a certificate or receipt with the intent to willfully conceal the property;

(5) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the commonwealth or any political subdivision thereof and with the intent of defrauding the commonwealth or any political subdivision thereof, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the commonwealth or any political subdivision thereof, knowing that said officer or employee may not lawfully sell or pledge the property;

(7) enters into an agreement, contract or understanding with one or more officials of the commonwealth or any political subdivision thereof knowing the information contained therein is false;

(8) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or to transmit money or property to the commonwealth or political subdivision thereof; or

false stmt to avoid paying $ due to gov

(9) is a beneficiary of an inadvertent submission of a false claim to the commonwealth or political subdivision thereof, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the commonwealth or political subdivision within a reasonable time after discovery of the false claim shall be liable to the commonwealth or political subdivision for a

civil penalty of not less than $5,000 and not more than $10,000 per violation, plus three times the amount of damages, including consequential damages, that the commonwealth or political subdivision sustains because of the act of that person. A person violating sections 5B to 5O, inclusive, shall also be liable to the commonwealth or any political subdivision for the expenses of the civil action brought to recover any such penalty or damages, including without limitation reasonable attorney's fees, reasonable expert's fees and the costs of investigation, as set forth below. Costs recoverable under said sections 5B to 5O, inclusive, shall also include the costs of any review or investigation undertaken by the attorney general, or by the state auditor or the inspector general in cooperation with the attorney general.

(10) Notwithstanding the provisions of paragraphs (1) to (9), inclusive, if the court finds that:

(i) the person committing the violation of said paragraphs (1) to (9) furnished an official of the office of the attorney general responsible for investigating false claims law violations with all the information known to such person about the violation within 30 days after the date on which the person first obtained the information;

(ii) such person fully cooperated with any commonwealth investigation of such violation; and

(iii) at the time such person furnished the commonwealth with the information about the violation, no civil action or administrative action had commenced under sections 5B to 5O, inclusive, or no criminal prosecution had commenced with respect to such violation, and such person did not have actual knowledge of the existence of an investigation into such violation, the court may reduce the assessment of damages to the amount of damages, including consequential damages, that the commonwealth or any political subdivision thereof sustains because of the act of a person.

(11) A corporation, partnership or other person is liable to the commonwealth under sections 5B to 5O, inclusive, for the acts of its agent where the agent acted with apparent authority, regardless of whether the agent acted, in whole or in part, to benefit the principal and regardless of whether the principal adopted or ratified the agent's claims, representation, statement or other action or conduct.

(12) Sections 5B to 5O, inclusive shall not apply to claims, records or statements made or presented to establish, limit, reduce, or evade liability for the payment of tax to the commonwealth, or any other governmental authority.

(13) A person who has engaged in conduct described in paragraphs (1) to (9), inclusive, prior to payment shall only be entitled to payment from the commonwealth of the actual amount due less the excess amount falsely or fraudulently claimed.

Section 5C. (1) The attorney general shall investigate violations under sections 5B to 5O, inclusive, involving state funds or funds from any political subdivision. If the attorney general finds that a person has violated or is violating said sections 5B to 5O, inclusive, the

attorney general may bring a civil action in superior court against the person.

(2) An individual, hereafter referred to as relator, may bring a civil action in superior court for a violation of said sections 5B to 5O, inclusive, on behalf of the relator and the commonwealth or any political subdivision thereof. The action shall be brought in the name of the commonwealth or the political subdivision thereof. The action may be dismissed only if the attorney general gives written reasons for consenting to the dismissal and the court approves the dismissal. Notwithstanding any general or special law to the contrary, it shall not be a cause for dismissal or a basis for a defense that the relator could have brought another action based on the same or similar facts under any other law or administrative proceeding.

(3) When a relator brings an action pursuant to said sections 5B to 5O, inclusive, a copy of the complaint and written disclosure of substantially all material evidence and information the relator possesses shall be served on the attorney general pursuant to Rule 4(d)(3) of the Massachusetts Rules of Civil Procedure. The complaint shall be filed under seal and shall remain so for 120

days. Notwithstanding any other general or special law or procedural rule to the contrary, service on the defendant shall not be required until the period provided in paragraph (5). The attorney general may, for good cause shown, ask the court for extensions of no more than 90 days during which the complaint shall remain under seal. Any such motions may be supported by affidavits or other submissions under seal. The court shall not grant more than two requests for extensions unless the attorney general can demonstrate extraordinary circumstances requiring a further extension. The attorney general may elect to intervene and proceed with the action on behalf of the commonwealth or political subdivision within the 120 day period or during any extension, after he receives both the complaint and the material evidence and information. Any information or documents furnished by the relator to the attorney general in connection with an action or investigation under said sections 5B to 5O, inclusive, shall be exempt from disclosure under section 10 of chapter 66.

(4) Before the expiration of the initial 120 day period or any 90 day extensions obtained under paragraph (3), the attorney general shall; (i) assume control of the action, in which case the action shall be conducted by the attorney general; or (ii) notify the court that he declines to take over the action, in which case the relator shall have the right to conduct the action.

(5) If the attorney general decides to proceed with the action, the complaint shall be unsealed and served promptly thereafter. The defendant shall not be required to respond to any complaint filed under said sections 5B to 5O, inclusive, until 20 days after the complaint is unsealed and served upon the defendant pursuant to rule 4 of the Massachusetts rules of civil procedure.

(6) When a relator brings an action pursuant to this section, no person other than the attorney general may intervene or bring a related action based on the facts underlying the pending action.

Section 5D. (1) If the attorney general proceeds with the action, he shall have primary responsibility for prosecuting the action, and shall not be bound by any act of the relator. The relator shall have the right to continue as a party to the action, subject to the limitations in sections 5B to 5O, inclusive.

(2) The attorney general may dismiss the action notwithstanding the objections of the relator if the relator has been notified by the attorney general of the filing of the motion and the court has provided the relator with an opportunity for a hearing on the motion. Upon a showing of good cause, such hearing may be held in camera.

(3) The attorney general may settle the action with the defendant notwithstanding the objections of the relator if the court determines, after a hearing, that the proposed settlement is fair, adequate and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(4) Upon a showing by the attorney general that unrestricted participation during the course of the litigation by the relator initiating the action would interfere with or unduly delay the attorney general's prosecution of the case, or would be repetitious, irrelevant or for purposes of harassment, the court may, in its discretion, impose limitations on the relator's participation, including but not limited to: (i) limiting the number of witnesses the relator may call; (ii) limiting the length of the testimony of such witnesses; (iii) limiting the relator's cross examination of witnesses; or (iv) otherwise limiting the participation by the relator in the litigation.

(5) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the relator would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the relator in the litigation.

(6) If the attorney general elects not to proceed with the action, the relator who initiated the action shall have the right to conduct the action. If the attorney general so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts at the attorney general's expense. When a relator proceeds with the action, the court, without limiting the status and rights of the relator initiating the action, may nevertheless permit the attorney general to intervene at a later date upon a showing of good cause.

(7) Whether or not the attorney general proceeds with the action, upon a showing by the attorney general that certain acts of discovery by the relator initiating the action would interfere with the attorney general's investigation or prosecution of a criminal or civil matter arising out of the same or similar facts, the court may stay such discovery for a period of not more than 60 days. Such showing by the attorney general shall be conducted in camera. The court may extend the 60 day period upon a further showing in camera that the attorney general has pursued the criminal or civil investigation or proceedings with reasonable diligence and may stay any proposed discovery in the civil action that will interfere with the ongoing criminal or civil investigations or proceedings.

Section 5E. Notwithstanding the provisions of section 5C, the attorney general may elect to pursue its claim through any alternate remedy available to the attorney general, including any administrative proceeding, to determine a civil penalty. If any such alternate remedy is pursued in another proceeding, a relator shall have the same rights in such proceeding as said relator would have had if the action had continued under said section 5C. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under sections 5B to 5O, inclusive. For purposes of this section, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the commonwealth, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

Section 5F. (1) If the attorney general proceeds with an action brought by a relator pursuant to section 5C, the relator shall receive at least 15 per cent but not more than 25 per cent of the proceeds recovered and collected in the action or in settlement of the claim depending upon the extent to which the relator substantially contributed to the prosecution of the action.

(2) Where the action is one which the court finds to be based primarily on disclosures of specific information, other than information provided by the relator, relating to allegations or transactions in a criminal, civil, or administrative hearing; in a legislative, administrative, auditor or inspector general hearing, audit, or investigation; or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 per cent of the proceeds, taking into account the significance of the information and the role of the relator bringing the action in advancing the case to litigation.

(3) Any payment to a relator pursuant to this section shall be made only from the proceeds recovered and collected in the action or in settlement of the claim. Any such relator shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, including reasonable attorney's fees and costs. All such expenses, shall be awarded against the defendant.

(4) If the attorney general does not proceed with an action pursuant to section 5C, the relator bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages on behalf of the commonwealth or any political subdivision thereof. The amount shall be not less than 25 per cent nor more than 30 per cent of the proceeds recovered and collected in the action or settlement of the claim, and shall be paid out of such proceeds. The relator shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, including reasonable attorney's fees and costs. All such expenses shall be awarded against the defendant.

(5) Whether or not the attorney general proceeds with the action, if the court finds that the action was brought by a relator who planned, initiated or knowingly participated in the violation of sections 5B to 5O, inclusive, then the court may, to the extent the court considers appropriate, reduce or eliminate the share of the proceeds of the

action which the relator would otherwise receive pursuant to paragraphs (1) to (4), inclusive, taking into account the role of the relator in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the relator bringing the action is convicted of criminal conduct arising from his role in the violation of this section, the relator shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the attorney general to continue the action.

Section 5G. (1) No court shall have jurisdiction over an action brought pursuant to section 5C against the governor, lieutenant governor, the attorney general, the treasurer, secretary of state, the auditor, a member of the general court, the inspector general or a member of the judiciary, if the action is based on evidence or information known to the commonwealth when the action was brought.

(2) An individual may not bring an action pursuant to paragraph (2) of said section 5C that is based upon allegations or transactions which are the subject of a civil suit or an administrative proceeding in which the commonwealth or any political subdivision thereof is already a party.

(3) No court shall have jurisdiction over an action pursuant to sections 5B to 5O, inclusive, based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing; in a legislative, administrative, auditor's or inspector general's report, hearing, audit or investigation; or from the news media, unless the action is brought by the attorney general, or the relator is an original source of the information. No court shall have jurisdiction over an action pursuant to said sections 5B to 5O, inclusive, brought by a person who knew or had reason to know that the attorney general, the state auditor or the inspector general already had knowledge of the situation.

(4) An individual who is or was employed by the commonwealth or any political subdivision thereof as an auditor, investigator, attorney, financial officer, or contracting officer who otherwise performed such functions for the commonwealth or who discovered or learned of the allegations or the underlying facts from such persons, may not bring an action pursuant paragraph (2) of section 5C that is based upon allegations or transactions that the relator discovered or learned of in such capacity. For the purposes of this paragraph, the term "in such capacity" shall refer to any matter within the scope of such person's duties or job description.

Section 5H. (1) All money recovered by the commonwealth, as a result of actions brought by the attorney general or a person pursuant to sections 5B to 5O, inclusive, other than costs and attorney's fees awarded pursuant to paragraph (2), shall be credited by the state treasurer to the False Claims Prosecution Fund, established by section 2YY of chapter 29.

(2) Costs and attorney's fees awarded to a relator by final judicial order in an action under this section shall be paid directly by the defendant to the relator.

Section 5I. (1) If the attorney general initiates an action or assumes control of an action brought by a person pursuant to sections 5B to 5O, inclusive, the attorney general shall be awarded his reasonable attorney's fees and expenses incurred in the litigation, including costs, if he prevails in the action. Any such award shall be deposited in the False Claims Prosecution Fund established by said section 2YY of said chapter 29.

(2) If the attorney general does not proceed with an action pursuant to sections 5B to 5O, inclusive, and the defendant is the prevailing party, the court may award the defendant reasonable attorneys' fees and costs against the relator upon a written finding that such action was pursued in bad faith or was wholly insubstantial, frivolous, and advanced for the purpose of causing the defendant undue burden, unnecessary expense or harassment.

(3) No liability shall be incurred by the commonwealth, the affected agency or the attorney general for any expenses, attorney's fees or other costs incurred by any person in bringing or defending an action under said sections 5B to 5O, inclusive.

Section 5J. (1) No employer shall make, adopt or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting to further a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed pursuant to said sections 5B to 5O, inclusive. No employer shall require as a condition of employment, during the term of employment, or at the termination of employment, that any employee agree to, accept or sign any agreement that limits or denies the employee's rights to bring an action or provide information to a government or law enforcement agency pursuant to said sections 5B to 5O, inclusive. Any such agreement shall be void.

(2) No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against an employee in the terms or conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed pursuant to sections 5B to 5O, inclusive.

(3) Notwithstanding any general or special law to the contrary, an employer who violates paragraph (2) shall be liable for such damages or equitable relief as a court shall deem appropriate, including: reinstatement with the same seniority status such employee would have had but for the employer's violation of sections 5B to 5O, inclusive, two times the amount of back pay, interest on the back pay, and compensation for any special damage sustained as a result of the employer's violation of said sections 5B to 5O, inclusive. In addition, the defendant shall be required to pay litigation costs and reasonable attorney's fees. An employee may bring an action in the appropriate superior court or the superior court of the county of Suffolk for the relief provided in this section.

(4) An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the commonwealth or a political subdivision thereof shall be entitled to the remedies pursuant to paragraph (3) only if both of the following occurred:

(i) the employee has been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place; and

(ii) the employee voluntarily disclosed information prior to being dismissed to a government or law enforcement agency or acts in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed.

Section 5K. (1) A civil action pursuant to sections 5B to 5O, inclusive, for a violation of section 5B may not be brought (i) more than six years after the date on which the violation occurred; or (ii) more than three years after the date when facts material to the right of action are known or reasonably should have been known by the official within the office of the attorney general charged with responsibility to act in the circumstances, but in no event more than ten years after the date on which the violation is committed, whichever occurs last. A civil action pursuant to sections 5B to 5O, inclusive, may be brought for acts or omissions that occurred prior to the effective date of this section, subject to the limitations period set forth in this section.

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(2) Notwithstanding any other law or rule of procedure or evidence, a final judgment rendered in favor of the commonwealth in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same act, transaction or occurrence as in the criminal proceedings and which is brought under section 5B.

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Section 5L. In any action brought pursuant to sections 5B to 5O, inclusive, the party bringing the action shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

Section 5M. The attorney general may promulgate any rules, regulations or guidelines that, in the attorney general's judgment, are necessary and appropriate to the effective administration of this chapter.

Section 5N. (1) Notwithstanding any general or special law, procedural rule or regulation to the contrary, the attorney general, whenever he has reason to believe that any person may be in possession, custody or control of any documentary material or information relevant to a false claims law investigation, may, before commencing a civil proceeding under sections 5B to 5O, inclusive, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person (i) to produce such documentary material for inspection and copying; (ii) to answer

Civil Invest Subpoena

written interrogatories, in writing and under oath; (iii) to give oral testimony under oath; or (iv) to furnish any combination of such material, answers or testimony.

(2) Service of any such demand may be made by (i) delivering a copy thereof to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of such person; (ii) delivering a copy thereof to the principal place of business in the commonwealth of the person to be served; or (iii) mailing by registered or certified mail a copy thereof addressed to the person to be served at the principal place of business in the commonwealth or, if said person has no place of business in the commonwealth, to his principal office or place of business.

(3) Each such demand requesting documentary material or oral testimony shall (i) state the time and place of the taking of testimony or the examination and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs; (ii) state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated; (iii) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified; (iv) prescribe a return date within which the documentary material is to be produced; (v) identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying; and (vi) if such demand is for the giving of oral testimony, notify the person receiving the demand of the right to be accompanied by an attorney and any other representative, prescribe a date, time and place at which oral testimony shall be commenced, identify the assistant attorney general who shall conduct the examination and to whom the transcript of such examination shall be submitted, specify that such attendance and testimony are necessary to the conduct of the investigation, and describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand. Notice of the time and place of taking oral testimony shall be given by the attorney general at least ten days prior to the date of such taking of testimony or examination, unless the attorney general or an assistant attorney general designated by the attorney general determines that exceptional circumstances are present which warrant such taking of testimony within a lesser period of time.

(4) The oral examination of all persons pursuant to sections 5B to 5O, inclusive, shall be conducted before a person duly authorized to administer oaths by the law of the commonwealth. Rule 30(e) of the Massachusetts Rules of Civil Procedure shall be applicable to oral examinations conducted pursuant to said sections 5B to 5O, inclusive.

(5) Any person compelled to appear for oral testimony under a civil investigative demand issued under said sections 5B to 5O may be accompanied, represented and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record

the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a motion may be filed for an order compelling such person to answer such question.

(6) The production of documentary material in response to a civil investigative demand served under sections 5B to 5O, inclusive, shall be made under a sworn certificate, in such form as the demand designates, by (i) in the case of a natural person, the person to whom the demand is directed, or (ii) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person. The certificate shall state that all of the documentary material required by the demand and in the possession, custody or control of the person to whom the demand is directed has been produced and made available to the members of the attorney general's staff identified in the demand.

(7) Each written interrogatory served under sections 5B to 5O, inclusive, shall be answered separately and fully in writing under the penalties of perjury. The person upon whom the interrogatories have been served shall serve the answers and objections, if any, upon the attorney general within 14 days after service of the interrogatories.

(8) Any documentary material or other information produced by any person pursuant to sections 5B to 5O, inclusive, shall not, unless otherwise ordered by a justice of the superior court for good cause shown, be disclosed to any person other than the authorized agent or representative of the attorney general and any officer or employee of the commonwealth who is working under their direct supervision with respect to the false claims law investigation, unless with the consent of the person producing the same. Such documentary material or information may be disclosed by the attorney general in court proceedings or in papers filed in court. Nothing in this section shall preclude the attorney general from disclosing information and evidence secured pursuant to sections 5B to 5O, inclusive, to officials of the United States, the commonwealth or any political subdivision thereof charged with responsibility for enforcement of federal, state or local laws respecting fraud or false claims upon federal, state or local governments. Prior to any such disclosure the attorney general shall obtain a written agreement from such officials to abide by the restrictions of this section.

(9) At any time prior to the date specified in the civil investigative demand, or within 21 days after the demand has been served, whichever period is shorter, the court may, upon motion for good cause shown, extend such reporting date or modify or set aside such demand or grant a protective order in accordance with the standards set forth in Rule 26(c) of the Massachusetts Rules of Civil Procedure. The motion may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county.

(10) Whenever any person fails to comply with any civil investigative demand issued under sections 5B to 5O, inclusive, the attorney general may file, in the superior court of the county in which such person resides, is found, or transacts business, a motion for the enforcement of the civil investigative demand. The Massachusetts Rules of Civil Procedure shall apply to any such motion. Any final order entered pursuant to such petition may also include the assessment of a civil penalty of not more than $5,000 for each act or instance of noncompliance.

(11) All such information and documentary materials as are obtained by the attorney general pursuant to sections 5B to 5O, inclusive, shall not be public records and are exempt from disclosure under section 10 of chapter 66 or any other law.

(12) For purposes of sections 5B to 5O, inclusive, "documentary material" shall include the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart or other document or graphic representation, or data stored in or accessible through a computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data.

(13) Nothing in sections 5B to 5O, inclusive, shall be construed to authorize the attorney general to compel the production of information or documents from the state auditor or from the inspector general, unless otherwise authorized by law. Nothing in this chapter shall bar the attorney general from referring matters or disclosing information or documents to the state auditor or to the inspector general for purposes or any review or investigation they may deem appropriate.

Section 5O. Nothing in sections 5B to 5M, inclusive, shall be construed to relieve an agency of its reporting requirements regarding matters within that agency under chapter 647 of the acts of 1989.

TAXPAYERS AGAINST FRAUD EDUCATION FUND
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Virginia Fraud Against Taxpayers Act

CHAPTER 842

An Act to amend the Code of Virginia by adding in Chapter 3 of Title 8.01 an article numbered 19.1, consisting of sections numbered 8.01-216.1 through 8.01-216.19, relating to the Virginia Fraud Against Taxpayers Act.
[S 445]

Approved April 17, 2002

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 3 of Title 8.01 an article numbered 19.1, consisting of sections numbered 8.01-216.1 through 8.01-216.19, as follows:

Article 19.1.
Virginia Fraud Against Taxpayers Act.

§ 8.01-216.1. Citation.

This article may be cited as the Virginia Fraud Against Taxpayers Act.

§ 8.01-216.2. Definitions.

As used in this article, unless the context requires otherwise:

"Attorney General" means the Attorney General of Virginia, the Chief Deputy, other deputies, counsels or assistant attorneys general employed by the Office of the Attorney General and designated by the Attorney General to act pursuant to this article.

"Claim" means any request or demand, whether under a contract or otherwise, for money or property that is made to a contractor, grantee, or other recipient if the Commonwealth provides any portion of the money or property that is requested or demanded, or if the Commonwealth will reimburse such contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded.

"Commonwealth" means the Commonwealth of Virginia, any agency of state government, and any political subdivision of the Commonwealth.

"Documentary material" means the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery.

"Investigation" means any inquiry conducted by an investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of this article.

"Person" includes any natural person, corporation, firm, association, organization, partnership, limited liability company, business or trust.

"Product of discovery" means (i) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature; (ii) any digest, analysis, selection, compilation, or derivation of any item listed in clause (i); and (iii) any index or other manner of access to any item listed in clause (i).

§ 8.01-216.3. False claims; civil penalty.

A. Any person who:

1. Knowingly presents, or causes to be presented, to an officer or employee of the Commonwealth a false or fraudulent claim for payment or approval;

2. Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Commonwealth;

3. Conspires to defraud the Commonwealth by getting a false or fraudulent claim allowed or paid;

4. Has possession, custody, or control of property or money used, or to be used, by the Commonwealth and, intending to defraud the Commonwealth or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

5. Authorizes to make or deliver a document certifying receipt of property used, or to be used, by the Commonwealth and, intending to defraud the Commonwealth, makes or delivers the receipt without completely knowing that the information on the receipt is true;

6. Knowingly buys or receives as a pledge of an obligation or debt, public property from an officer or employee of the Commonwealth who lawfully may not sell or pledge the property; or

7. Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Commonwealth;

shall be liable to the Commonwealth for a civil penalty of not less than $5,000 and not more than $10,000, plus three times the amount of damages sustained by the Commonwealth.

B. If the court finds that (i) the person committing the violation of this section furnished officials of the Commonwealth responsible for investigating false claims violations with all information known to the person about the violation within thirty days after the date on which the defendant first obtained the information; (ii) such person fully cooperated with any Commonwealth investigation of such violation; (iii) at the time such person furnished the Commonwealth with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to such violation, and (iv) the person did not have actual knowledge of the existence of an investigation into such violation, the court may assess not less than two times the amount of damages that the Commonwealth sustains because of the act of the person. A person violating this section shall also be liable to the Commonwealth for the costs of a civil action brought to recover any such penalty or damages.

C. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

D. This section shall not apply to claims, records or statements relating to income taxation as set forth in Title 58.1.

§ 8.01-216.4. Attorney General; investigation, civil action.

The Attorney General shall investigate any violation of § 8.01-216.3. If the Attorney General finds that a person has violated or is violating § 8.01-216.3, the Attorney General may bring a civil action under this section.

§ 8.01-216.5. Civil actions filed by private persons; Commonwealth may intervene.

A. A person may bring a civil action for a violation of § 8.01-216.3 for the person and for the Commonwealth. The action shall be brought in the name of the Commonwealth. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

B. A copy of the motion for judgment and written disclosure of substantially all material evidence and information the person possesses shall be served on the Commonwealth. The motion for judgment shall be filed in camera, shall remain under seal for at

least 120 days, and shall not be served on the defendant until the court so orders. The Commonwealth may elect to intervene and proceed with the action within 120 days after it receives both the motion for judgment and the material evidence and information.

C. The Commonwealth may, for good cause shown, move the court for extensions of the time during which the motion for judgment remains under seal. Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any motion for judgment filed under this section until twenty-one days after the motion for judgment is unsealed and served upon the defendant.

D. Before the expiration of the 120-day period or any extensions obtained under subsection C, the Commonwealth shall proceed with the action, in which case the action shall be conducted by the Commonwealth, or notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to prosecute the action.

E. When a person brings an action under this section, no person other than the Commonwealth may intervene or bring a related action based on the facts underlying the pending action.

§ 8.01-216.6. Rights of private plaintiff and Commonwealth.

A. If the Commonwealth proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations of this section.

B. The Commonwealth may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Commonwealth of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

C. The Commonwealth may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera. The Commonwealth may, for good cause shown, move the court for a partial lifting of the seal to facilitate the investigative process or settlement.

D. Upon a showing by the Commonwealth that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Commonwealth's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as (i)limiting the number of witnesses the person may call; (ii) limiting the length of the testimony of such witnesses; (iii) limiting the person's cross-examination of witnesses; and (iv) otherwise limiting

the participation by the person in the litigation.

E. Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

F. If the Commonwealth elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Commonwealth so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts at the Commonwealth's expense. When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Commonwealth to intervene at a later date upon a showing of good cause.

G. Whether or not the Commonwealth proceeds with the action, upon a showing by the Commonwealth that certain actions of discovery by the person initiating the action would interfere with the Commonwealth's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than sixty days. Such a showing shall be conducted in camera. The court may extend the sixty-day period upon a further showing in camera that the Commonwealth has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

H. Notwithstanding the provisions of subsection B of § 8.01-216.5, the Commonwealth may elect to pursue its claim through any alternate remedy available to the Commonwealth, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this article. For purposes of this subsection, a finding or conclusion is final if it has been finally determined on appeal to a court of competent jurisdiction of the Commonwealth, if the time for filing an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

§ 8.01-216.7. Award to private plaintiff.

A. Except as hereinafter provided, if the Commonwealth proceeds with an action brought by a person under § 8.01-216.5, such person shall receive at least fifteen percent but not more than twenty-five percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one that the court finds to be based primarily on disclosures of specific

information, other than information provided by the person bringing the action, relating to allegations or transactions in a criminal, civil, or administrative hearing, in a legislative, administrative, or Auditor of Public Accounts' report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than ten percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under this section shall be made from the proceeds of the award. Any such person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

B. If the Commonwealth does not proceed with an action, the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than twenty-five percent and not more than thirty percent of the proceeds of the award or settlement and shall be paid out of the proceeds. Such person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

C. Whether or not the Commonwealth proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of § 8.01-216.3 upon which the action was brought, or if the person bringing the action is convicted of criminal conduct arising from his role in the violation of § 8.01-216.3, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the Commonwealth to continue the action.

D. If the Commonwealth does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

§ 8.01-216.8. Certain actions barred.

No court shall have jurisdiction over an action brought under § 8.01-216.5 based on information discovered by a present or former employee of the Commonwealth during the course of his employment unless that employee first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and unless the Commonwealth failed to act on the information provided within a reasonable period of time.

No court shall have jurisdiction over any action brought under this

article by an inmate incarcerated within a state or local correctional facility as defined in § 53.1-1.

No court shall have jurisdiction over an action brought under this article against any department, authority, board, bureau, commission, or agency of the Commonwealth, any political subdivision of the Commonwealth, a member of the General Assembly, a member of the judiciary, or an exempt official if the action is based on evidence or information known to the Commonwealth when the action was brought. For purposes of this section, "exempt official" means the Governor, Lieutenant Governor, Attorney General and the directors or members of any department, authority, board, bureau, commission or agency of the Commonwealth or any political subdivision of the Commonwealth.

In no event may a person bring an action under this article that is based upon allegations or transactions that are the subject of a civil suit or an administrative proceeding in which the Commonwealth is already a party.

No court shall have jurisdiction over an action under this article based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a legislative, administrative, or Auditor of Public Accounts' report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. For purposes of this section, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Commonwealth before filing an action under this article that is based on the information.

The Commonwealth shall not be liable for expenses a person incurs in bringing an action under this article.

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his employer because he has opposed any practice referenced in § 8.01-216.3 or because he has initiated, testified, assisted, or participated in any manner in any investigation, action or hearing under this article, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in a court of competent jurisdiction for the relief provided in this section.

§ 8.01-216.9. Procedure; statute of limitations.

A subpoena requiring the attendance of a witness at a trial or hearing conducted under this article may be served at any place in the Commonwealth.

A civil action under § 8.01-216.5 may not be brought (i) more than six years after the date on which the violation is committed or (ii) more than three years after the date when facts material to the right of action are known or reasonably should have been known by the official of the Commonwealth charged with responsibility to act in the circumstances, but in that event no more than ten years after the date on which the violation is committed, whichever occurs last.

In any action brought under § 8.01-216.5, the Commonwealth shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

Notwithstanding any other provision of law, a final judgment rendered in favor of the Commonwealth in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action that involves the same transaction as in the criminal proceeding and which is brought under § 8.01-216.5.

§ 8.01-216.10. Civil investigative demands; issuance.

A. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under this article, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person (i) to produce such documentary material for inspection and copying, (ii) to answer in writing written interrogatories with respect to such documentary material or information, (iii) to give oral testimony concerning such documentary material or information, or (iv) to furnish any combination of such material, answers, or testimony.

B. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General shall cause to be served, in any manner authorized by this article, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

§ 8.01-216.11. Civil investigative demand; contents and deadlines.

Each civil investigative demand issued under this article shall state the nature of the conduct constituting the alleged violation of a false claims law that is under investigation, and the applicable provision of law alleged to be violated.

If such demand is for the production of documentary material, the demand shall (i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified; (ii) prescribe a return date for each

such class that will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and (iii) identify the false claims law investigator to whom such material shall be made available.

If such demand is for answers to written interrogatories, the demand shall (i) set forth with specificity the written interrogatories to be answered; (ii) prescribe dates at which time answers to written interrogatories shall be submitted; and (iii) identify the false claims law investigator to whom such answers shall be submitted.

If such demand is for the giving of oral testimony, the demand shall (i) prescribe a date, time, and place at which oral testimony shall be commenced; (ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted; (iii) specify that such attendance and testimony are necessary to the conduct of the investigation; (iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and (v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry that will be taken pursuant to the demand.

Any civil investigative demand that is an express demand for any product of discovery shall not be returned or returnable until twenty-one days after a copy of such demand has been served upon the person from whom the discovery was obtained.

The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this article shall be a date that is not less than seven days after the date on which the demand is received, unless the Attorney General determines that exceptional circumstances are present that warrant the commencement of such testimony within a lesser period of time.

The Attorney General shall not authorize the issuance of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

§ 8.01-216.12. Civil investigative demands; protected material or information.

A civil investigative demand issued under this article shall not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under (i) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of this Commonwealth to aid in a grand jury investigation or (ii) the standards applicable to discovery requests under the Rules of the Supreme Court of Virginia, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this article.

Any such demand that is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law, other than this section, preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege that the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

§ 8.01-216.13. Civil investigative demands; service and jurisdiction.

Any civil investigative demand issued under this article may be served by an investigator, or by any person authorized to serve process on individuals in the Commonwealth.

Any such demand or any petition filed under this article may be served upon any person who is not found within Virginia in such manner as the Rules of the Supreme Court of Virginia or the Code of Virginia prescribe for service of process outside Virginia. To the extent that the courts of this Commonwealth can assert jurisdiction over any such person consistent with due process, the courts of this Commonwealth shall have the same jurisdiction to take any action respecting compliance with the provisions of this article by any such person that the court would have if such person were personally within the jurisdiction of the court.

Service of any civil investigative demand issued under this article or of any petition filed under this article may be made upon a partnership, corporation, association, or other legal entity by (i) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity; (ii) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or (iii) depositing an executed copy of such demand or petition in the United States mail by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

Service of any such demand or petition may be made upon any natural person by (i) delivering an executed copy of such demand or petition to the person, or (ii) depositing an executed copy of such demand or petition in the United States mail by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

A verified return by the individual serving any civil investigative demand issued under this article or any petition filed under this article setting forth the manner of such service shall be proof of service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of

delivery of such demand.

§ 8.01-216.14. Civil investigative demands; documentary material.

The production of documentary material in response to a civil investigative demand served under this article shall be made under a sworn certificate, in such form as the demand designates, by (i) in the case of a natural person, the person to whom the demand is directed, or (ii) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person. The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the investigator identified in the demand.

Any person upon whom any civil investigative demand for the production of documentary material has been served shall make such material available for inspection and copying to the investigator identified in such demand at the principal place of business of such person, or at such other place as the investigator and the person thereafter may agree and prescribe in writing, or as the court may direct. Such material shall be made available on the return date specified in such demand, or on such later date as the investigator may prescribe in writing. Such person may, upon written agreement between the person and the investigator, substitute copies for originals of all or any part of such material.

§ 8.01-216.15. Civil investigative demands; interrogatories.

Each inquiry in a civil investigative demand served under this article shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by (i) in the case of a natural person, the person to whom the demand is directed, or (ii) in the case of a person other than a natural person, the person or persons responsible for answering each inquiry. If any inquiry is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

§ 8.01-216.16. Civil investigative demands; oral examinations.

A. The examination of any person pursuant to a civil investigative demand for oral testimony served under this article shall be taken before an officer authorized to administer oaths under the laws of this Commonwealth or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the

witness on oath and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the Attorney General. This section shall not preclude the taking of testimony by any means authorized by and in a manner consistent with the Rules of the Supreme Court of Virginia.

B. The investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Commonwealth, any person who may be agreed upon by the attorney for the Commonwealth and the person giving the testimony, the officer before whom the testimony is to be taken, and any court reporter taking such testimony.

C. The oral testimony of any person taken pursuant to a civil investigative demand served under this article shall be taken in the county or city within which such person resides, is found, or transacts business or in such other place as may be agreed upon by the investigator conducting the examination and such person.

D. When the testimony is fully transcribed, the investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance that the witness desires to make shall be entered and identified upon the transcript by the officer or the investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within thirty days after being afforded a reasonable opportunity to examine it, the officer or the investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

E. The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the Attorney General.

F. Upon payment of reasonable charges therefor, the investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

G. Any person compelled to appear for oral testimony under a civil investigative demand may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or

counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the circuit court for an order compelling such person to answer such question. If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with applicable law.

H. Any person appearing for oral testimony under a civil investigative demand issued under this article shall be entitled to the same fees and allowances paid to witnesses in the circuit court.

§ 8.01-216.17. Civil investigative demands; custodian of documents; answers.

A. The Attorney General shall serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this article.

B. An investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the Attorney General. The Attorney General shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material.

C. The Attorney General may cause the preparation of such copies of documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any investigator, or other officer or employee of the Attorney General or employee of the Department of State Police, who is authorized for such use by the Attorney General. Such material, answers, and transcripts may be used by any authorized investigator or other officer or employee in connection with the taking of oral testimony under this article.

D. Except as otherwise provided in this section, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the Attorney General, shall be available for examination by any individual other than an investigator or other officer or employee of the Attorney General or employee of the Department of State Police authorized by the Attorney General. The prohibition on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subsection is intended to prevent disclosure to the General Assembly, including any committee or subcommittee of the General Assembly, or to any

other state agency for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a circuit court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

E. While in the possession of the Attorney General and under such reasonable terms and conditions as the Attorney General shall prescribe, (i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers, and (ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony or by a representative of that person authorized by that person to examine such transcripts.

F. Any attorney employed by the Office of the Attorney General designated to appear before any court, grand jury, or state agency in any case or proceeding may use any documentary material, answers to interrogatories, or transcripts of oral testimony in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered that have not passed into the control of the court, grand jury, or agency through introduction into the record of such case or proceeding.

G. If any documentary material has been produced by any person in the course of any investigation pursuant to a civil investigative demand under this article, and (i) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any state agency involving such material, has been completed, or (ii) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation, the Attorney General shall, upon written request of the person who produced such material, return to such person any material, other than copies furnished to the investigator, or made for the Attorney General that has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

§ 8.01-216.18. Civil investigative demands; judicial proceedings for noncompliance.

A. Whenever any person fails to comply with any civil investigative demand issued under this article, or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender the material, the Attorney General may file in the appropriate circuit court for the county or city in which such person resides, is found, or transacts business, and serve upon such person a petition for a court order for the enforcement of the civil investigative demand.

B. Any person who has received a civil investigative demand issued under this article may file, in the circuit court of any county or city within which such person resides, is found, or transacts business, and serve upon the investigator identified in such demand a petition for an order of the court to modify or set aside the demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the circuit court of the county or city in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this section shall be filed (i) within twenty-one days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or (ii) within such longer period as may be prescribed in writing by any investigator identified in the demand.

C. The petition shall specify each ground upon which the petitioner relies in seeking relief, and may be based upon any failure of the demand to comply with the provisions of this article or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

D. In the case of any civil investigative demand issued under this article that is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the circuit court of the county or city in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any investigator identified in the demand and upon the recipient of the demand a petition for a court order to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subsection shall be filed (i) within twenty-one days after the date of service of the civil investigative demand or at any time before the return date specified in the demand, whichever date is earlier, or (ii) within such longer period as may be prescribed in writing by any investigator identified in the demand.

E. The petition shall specify each ground upon which the petitioner relies in seeking relief and may be based upon any failure of the demand from which relief is sought to comply with the provisions of this article, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

F. At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given by any person in compliance with any civil investigative demand issued under this article, such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may

file, in the circuit court of the county or city within which the office of such custodian is situated, and serve upon such custodian a petition for a court order to require the performance by the custodian of any duty imposed upon the custodian by this section. Whenever any petition is filed in any circuit court under this section, the court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal in the same manner as appeals of other final orders in civil matters. Any disobedience of any final order entered under this section by any court shall be punished as contempt of the court.

G. Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under this article shall be exempt from disclosure under the Virginia Administrative Process Act (§ 2.2-4000 et seq.).

§ 8.01-216.19. Application of the Rules of the Supreme Court.

The Rules of the Supreme Court of Virginia shall apply to all proceedings under this article, except when those Rules are inconsistent with this article.

2. That the provisions of this act shall become effective January 1, 2003.

TAXPAYERS AGAINST FRAUD EDUCATION FUND
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State False Claims Acts

Hawaii False Claims Act

FALSE CLAIMS TO THE STATE (661-21 et seq)
AND
FALSE CLAIMS TO THE COUNTIES (46-171 et seq.)

Chapter 661, Hawaii Revised Statutes

PART II. QUI TAM ACTIONS OR RECOVERY OF FALSE CLAIMS TO THE STATE

§661-21 Actions for false claims to the State; qui tam actions.

(a) Notwithstanding section 661-7 to the contrary, any person who:
(1) Knowingly presents, or causes to be presented, to an officer or employee of the State a false or fraudulent claim for payment or approval;
(2) Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the State;
(3) Conspires to defraud the State by getting a false or fraudulent claim allowed or paid;
(4) Has possession, custody, or control of property or money used, or to be used, by the State and, intending to defraud the State or wilfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
(5) Is authorized to make or deliver a document certifying receipt of property used, or to be used by the State and, intending to defraud the State, makes or delivers the receipt without completely knowing that the information on the receipt is true;
(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any officer or employee of the State who may not lawfully sell or pledge the property;
(7) Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the State; or
(8) Is a beneficiary of an inadvertant submission of a false claim to the State, who subsequently discovers the falsity of the claim, and fails to disclose the false claim to the State within a reasonable time after discovery of the false claim;
shall be liable to the State for a civil penalty of not less than $5,000 and not more than $10,000, plus three times the amount of damages that the State sustains due to the act of that person.

(b) If the court finds that a person who has violated subsection (a):

(1) Furnished officials of the State responsible for investigating false claims violations with all information known to the person about the violation within thirty days after the date on which the defendant first obtained the information;
(2) Fully cooperated with any State investigation of such violation; and
(3) At the time the person furnished the State with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation; the court may assess not less than two times the amount of damages that the State sustains because of the act of the person. A person violating subsection (a), shall also be liable to the State for the costs and attorneys' fees of a civil action brought to recover the penalty or damages.

(c) Liability under this section shall be joint and several for any act committed by two or more persons.

(d) This section shall not apply to any controversy involving an amount of less than $500 in value. For purposes of this subsection, "controversy" means the aggregate of any one or more false claims submitted by the same person in violation of this chapter. Proof of specific intent to defraud is not required.

(e) For purposes of this section:
"Claim" includes any request or demand, whether under a contract or otherwise, for money or property that is made to a contractor, grantee, or other recipient if the State provides any portion of the money or property that is requested or demanded, or if the government will reimburse the contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded.

"Knowing" and "knowingly" means that a person, with respect to information:
(1) Has actual knowledge of the information;
(2) Acts in deliberate ignorance of the truth or falsity of the information; or
(3) Acts in reckless disregard of the truth or falsity of the information;
and no proof of specific intent to defraud is required.

(f) This section shall not apply to claims, records, or statements for which procedures and remedies are otherwise specifically provided for under chapter 231.

§661-22 Civil actions for false claims.

The attorney general shall investigate any violation under section 661-21.
If the attorney general finds that a person has violated or is violating section 661-21, the attorney general may bring a civil action under this section.

§661-23 Evidentiary determination; burden of proof.

A determination that a person has violated the provisions of this chapter shall be based on a preponderance of the evidence.

§661-24 Statute of limitations.

An action for false claims to the State pursuant to this chapter shall be brought within six years after the false claim is discovered or by exercise of reasonable diligence should have been discovered and, in any event, no more than ten years after the date on which the violation of section 661-21 is committed.

§661-25 Action by private persons.

(a) A person may bring a civil action for a violation of section 661-21 for the person and for the State. The action shall be brought in the name of the State. The action may be dismissed only with the written consent of the court, taking into account the best interests of the parties involved and the public purposes behind this chapter.

(b) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the State in accordance with the Hawaii Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least sixty days, and shall not be served on the defendant until the court so orders. The State may elect to intervene and proceed with the action within sixty days after it receives both the complaint and the material evidence and information.

(c) The State may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under subsection (b). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until twenty days after the complaint is unsealed and served upon the defendant in accordance with the Hawaii Rules of Civil Procedure.

(d) Before the expiration of the sixty-day period or any extension obtained, the State shall:
(1) Proceed with the action, in which case the action shall be conducted by the State and the seal shall be lifted;
or
(2) Notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action and the seal shall be lifted.

(e) When a person brings an action under this section, no person other than the State may intervene or bring a related action based on the facts underlying the pending action.

§661-26 Rights of parties to qui tam actions.

(a) If the State proceeds with an action under section 661- , the State shall have the primary responsibility for prosecuting the action and shall not be bound by an act of the person bringing the action. The person shall have the right to continue as a party to the action,

subject to the following limitations:

(1) The State may dismiss the action notwithstanding the objections of the person initiating the action if the court determines, after a hearing on the motion, that dismissal should be allowed;
(2) The State may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing,
that the proposed settlement is fair, adequate, and reasonable. Upon a showing of good cause, the hearing may be held in camera;
(3) The court, upon a showing by the State that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the State's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, may, in its discretion impose limitations on the person's participation by:
(A) Limiting the number of witnesses the person may call;
(B) Limiting the length of the testimony of the witnesses;
(C) Limiting the person's cross-examination of witnesses; or
(D) Otherwise limiting the participation by the person in the litigation.

(b) The defendant, by motion upon the court, may show that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense. At the court's discretion, the court may limit the participation by the person in the litigation.

(c) If the State elects not to proceed with the action, the person who initiated that action shall have the right to conduct the action. If the State so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied

with copies of all deposition transcripts at the State's expense. When a person proceeds with the action, the court without limiting the status and rights of the person initiating the action, may nevertheless permit the State to intervene at a later date upon showing of good cause.

(d) Whether or not the State proceeds with the action, upon motion and a showing by the State that certain actions of discovery by the person initiating the action would interfere with the State's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay the discovery for a period of not more than sixty days. The court may extend the sixty day period upon a motion and showing by the State that the State has pursued the investigation or prosecution of the criminal or civil matter with reasonable diligence and the proposed discovery would interfere with the ongoing investigation or prosecution of the criminal or civil matter.

(e) Notwithstanding section 661-25, the State may elect to pursue its claim through any alternate remedy available to the State, including any administrative proceedings to determine civil monetary penalties. If any alternate remedy is pursued in another proceeding, the person initiating the action shall have the same

rights in the proceedings as the person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in the other proceeding that becomes final shall be conclusive on all parties to an action under this section.

(f) Whether or not the State elects to proceed with the action, the parties to the action shall receive court approval of any settlements reached.

§661-27 Awards to qui tam plaintiffs.

(a) If the State proceeds with an action brought by a person under section 661-25, the person shall receive at least fifteen per cent but not more than twenty-five per cent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one that the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the action, relating to allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award sums as it considers appropriate, but in no case more than ten per cent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under this subsection shall be made from the proceeds. Any person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred,plus reasonable attorneys' fees and costs. All expenses, fees, and costs shall be awarded against the defendant.

(b) If the State does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than twenty-five per cent and not more than thirty per cent of the proceeds of the action or settlement and shall be paid out of the proceeds. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All expenses, fees, and costs shall be awarded against the defendant.

(c) Whether or not the State proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 661-21 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action that the person would otherwise receive under subsection (a), taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from the person's role in the violation of section 661-21 , that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. The dismissal shall not prejudice the right of the State to continue the action.

(d) If the State does not proceed with the action and the person

bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was frivolous, vexatious, or brought primarily for purposes of harassment.

(e) In no event may a person bring an action under section 661-25 :
(1) Against a member of the state senate or state house of representatives, a member of the judiciary, or an elected official in the executive branch of the State, if the action is based on evidence or information known to the State. For purposes of this section, evidence or information known only to the person or persons against whom an action is brought shall not be considered to be known to the state;
(2) When the person is a present or former employee of the State and the action is based upon information discovered by the employee during the course of the employee's employment, unless the employee first, in good faith, exhausted any existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and the State failed to act on the information provided within a reasonable period of time; or
(3) That is based upon allegations or transactions that are the subject of a civil or criminal investigation by the State, civil suit, or an administrative civil money penalty proceeding in which the State is already a party.

§661-28 Jurisdiction.

No court shall have jurisdiction over an action under this part based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media,
unless the action is brought by the attorney general or the person bringing the action is an original source of the information. For purposes of this section:
"Original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the State before filing an action under this part that is based on the information, and whose information provided the basis or catalyst for the investigation, hearing, audit, or report that led to the public disclosure.

§661-29 Fees and costs of litigation.

The State shall not be liable for expenses or fees, including attorney fees, that a person incurs in bringing an action under this part and shall not elect to pay those expenses or fees.

SECTION 2. The provisions of this Act are not exclusive and are in addition to any other applicable law or remedy. This Act shall be liberally construed and applied to promote the public interest.

SECTION 3. This Act shall take effect upon its approval.

Added by Act 126, 5/26/00.

Chapter 46, Hawaii Revised Statutes

PART X. QUI TAM ACTIONS OR RECOVERY OF FALSE CLAIMS TO THE COUNTIES

§46-171 Actions for false claims to the counties; qui tam actions.

(a) Any person who:

1. Knowingly presents, or causes to be presented, to an officer or employee of a county a false or fraudulent claim for payment or approval;

2. Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by a county;

3. Conspires to defraud a county by getting a false or fraudulent claim allowed or paid;

4. Has possession, custody, or control of property or money used, or to be used, by a county and, intending to defraud a county or wilfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

5. Is authorized to make or deliver a document certifying receipt of property used, or to be used by a county and, intending to defraud a county, makes or delivers the receipt without completely knowing that the information on the receipt is true;

6. Buys, or receives as a pledge of an obligation or debt, public property from any officer or employee of a county that the person knows may not lawfully sell or pledge the property;

7. Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to a county; or

8. Is a beneficiary of an inadvertent submission of a false claim to a county, who subsequently discovers the falsity of the claim, and fails to disclose the false claim to the county within a reasonable time after discovery of the false claim;

shall be liable to the county for a civil penalty of not less than $ 5,000 and not more than $ 10,000, plus three times the amount of damages that the county sustains due to the act of that person.

(b) If the court finds that a person who has violated subsection (a):

1. Furnished officials of the county responsible for investigating false claims violations with all information known to the person about the violation within thirty days after the date on which the defendant first obtained the information;

2. Fully cooperated with any county investigation of the violation; and

3. At the time the person furnished the county with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation;

the court may assess not less than two times the amount of damages that the county sustains because of the act of the person. A person violating subsection (a), shall also be liable to the county for the costs and attorneys' fees of a civil action brought to recover the penalty or damages.

(c) Liability under this section shall be joint and several for any act committed by two or more persons.

(d) This section shall not apply to any controversy involving an amount of less than $ 500 in value. For purposes of this subsection, "controversy" means the aggregate of any one or more false claims submitted by the same person in violation of this part. Proof of specific intent to defraud is not required.

(e) For purposes of this section:

"Claim" includes any request or demand, whether under a contract or otherwise, for money or property that is made to a contractor, grantee, or other recipient if the county provides any portion of the money or property that is requested or demanded, or if the government will reimburse the contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded.

"Knowing" and "knowingly" means that a person, with respect to information:

1. Has actual knowledge of the information;

2. Acts in deliberate ignorance of the truth or falsity of the information; or

3. Acts in reckless disregard of the truth or falsity of the information;

and no proof of specific intent to defraud is required.

§46-172 Civil actions for false claims.

The county corporation counsel or county attorney shall investigate any violation under §46-171.

If the corporation counsel or county attorney finds that a person has violated or is violating §46-171, the corporation counsel or county attorney may bring a civil action under this section.

§46-173 Evidentiary determination; burden of proof.

A determination that a person has violated this part shall be based on a preponderance of the evidence.

§46-174 Statute of limitations.

An action for false claims to a county pursuant to this part shall be brought within six years after the false claim is discovered or by exercise of reasonable diligence should have been discovered and, in any event, no more than ten years after the date on which the violation of §46-171 is committed.

§46-175 Action by private persons.

(a) A person may bring a civil action for a violation of §46-171 for the person and for a county.

The action shall be brought in the name of the county.
The action may be dismissed only with the written consent of the court, taking into account the best interests of the parties involved and the public purposes behind this part.

(b) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the county in accordance with the Hawaii rules of civil procedure. The complaint:

(1) Shall be filed in camera;

(2) Shall remain under seal for at least sixty days; and

(3) Shall not be served on the defendant until the court so orders.

The county may elect to intervene and proceed with the action within sixty days after it receives both the complaint and the material evidence and information.

(c) The county, for good cause shown, may move the court for extensions of the time during which the complaint remains under seal under subsection (b). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until twenty days after the complaint is unsealed and served upon the defendant in accordance with the Hawaii rules of civil procedure.

(d) Before the expiration of the sixty-day period or any extension obtained, the county shall:

1. Proceed with the action, in which case the action shall be conducted by the county and the seal shall be lifted; or

2. Notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action and the seal shall be lifted.

(e) When a person brings an action under this section, no person

other than the county may intervene or bring a related action based on the facts underlying the pending action.

§46-176 Rights of parties to qui tam actions.

(a) If a county proceeds with an action under §46-175, the county shall have the primary responsibility for prosecuting the action and shall not be bound by an act of the person bringing the action. The person shall have the right to continue as a party to the action, subject to the following limitations:

1. The county may dismiss the action notwithstanding the objections of the person initiating the action if the court determines, after a hearing on the motion, that dismissal should be allowed;

2. The county may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable. Upon a showing of good cause, the hearing may be held in camera;

3. The court, upon a showing by the county that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the county's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, may, in its discretion, impose limitations on the person's participation by:

A. Limiting the number of witnesses the person may call; Limiting the length of the testimony of the witnesses;

B. Limiting the person's cross-examination of witnesses; or

C. Otherwise limiting the participation by the person in the litigation.

(b) The defendant, by motion upon the court, may show that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense. At the court's discretion, the court may limit the participation by the person in the litigation.

(c) If the county elects not to proceed with the action, the person who initiated that action shall have the right to conduct the action. If the county so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts at the county's expense. When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the county to intervene at a later date upon showing of good cause.

(d) Regardless of whether the county proceeds with the action, upon motion and a showing by the county that certain actions of discovery by the person initiating the action would interfere with the county's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay the discovery for a

period of not more than sixty days. The court may extend the sixty-day period upon a motion and showing by the county that the county has pursued the investigation or prosecution of the criminal or civil matter with reasonable diligence and the proposed discovery would interfere with the ongoing investigation or prosecution of the criminal or civil matter.

(e) Notwithstanding §46-175, the county may elect to pursue its claim through any alternate remedy available to the county, including any administrative proceedings to determine civil monetary penalties. If any alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in the proceedings as the person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in the other proceeding that becomes final shall be conclusive on all parties to an action under this section.

(f) Regardless of whether the county elects to proceed with the action, the parties to the action shall receive court approval of any settlements reached.

§46-177 Awards to qui tam plaintiffs.

(a) If a county proceeds with an action brought by a person under §46-175, the person shall receive at least fifteen per cent but not more than twenty-five per cent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one that the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the action, relating to allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award sums as it considers appropriate, but in no case more than ten per cent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under this subsection shall be made from the proceeds. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All expenses, fees, and costs shall be awarded against the defendant.

(b) If the county does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than twenty-five per cent and not more than thirty per cent of the proceeds of the action or settlement and shall be paid out of the proceeds. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All expenses, fees, and costs shall be awarded against the defendant.

(c) Regardless of whether the county proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of §46-171 upon which the action was

brought, then the court, to the extent the court considers appropriate, may reduce the share of the proceeds of the action that the person would otherwise receive under subsection (a), taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from the person's role in the violation of §46-171, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. The dismissal shall not prejudice the right of the county to continue the action.

(d) If the county does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was frivolous, vexatious, or brought primarily for purposes of harassment.

(e) In no event may a person bring an action under §46-175:

(1) Against any elected official of the county, if the action is based on evidence or information known to the county. For purposes of this section, evidence or information known only to the person or persons against whom an action is brought shall not be considered to be known to the county;

(2) When the person is a present or former employee of the county and the action is based upon information discovered by the employee during the course of the employee's employment, unless the employee first, in good faith, exhausted any existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and the county failed to act on the information provided within a reasonable period of time; or

(3) That is based upon allegations or transactions that are the subject of a civil or criminal investigation by the county, civil suit, or an administrative civil money penalty proceeding in which the county is already a party.

§46-178 Jurisdiction.

(a) No court shall have jurisdiction over an action under this part based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media,
unless the action is brought by a county corporation counsel or county attorney or the person bringing the action is an original source of the information.

(b) For purposes of this section:

"Original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the county before filing an action under this part that is based on the information, and whose information provided the basis or catalyst

for the investigation, hearing, audit, or report that led to the public disclosure.

§46-179 Fees and costs of litigation.

A county shall not be liable for expenses or fees, including attorney fees, that a person incurs in bringing an action under this part and shall not elect to pay those expenses or fees."

SECTION 2. The provisions of this Act are not exclusive and are in addition to any other applicable law or remedy. This Act shall be liberally construed and applied to promote the public interest.

SECTION 3. In codifying the new sections added by section 1 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 4. This Act shall take effect upon its approval.

HISTORY:
Approved by the Governor June 13, 2001.

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State False Claims Acts

Delaware False Claims and Reporting Act

§ 1201. Liability for certain acts.

(a) Any person who:

(1) Knowingly presents, or causes to be presented, directly or indirectly, to an officer or employee of the Government a false or fraudulent claim for payment or approval;

(2) Knowingly makes, uses or causes to be made or used, directly or indirectly, a false record or statement to get a false or fraudulent claim paid or approved;

(3) Conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) Has possession, custody or control of property or money used or to be used by the Government and, intending to defraud the Government or willfully to conceal the property, delivers or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) Is authorized to make or deliver a document certifying receipt of property used or to be used by the Goverment and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government who the person knows may not lawfully sell or pledge the property; or

(7) Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, increase or decrease an obligation to pay or transmit money or property to or from the Government

shall be liable to the Goverment for a civil penalty of not less than $5,500 and not more than $11,000 for each act constituting a violation of this section, plus 3 times the amount of actual damages which the Government sustains because of the act of that person.

(b) Notwithstanding the foregoing, the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person, if:

(1) The person committing the violation of this subsection furnished

officials of the Government responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(2) Such person fully cooperated with any government investigation of such violations; and

(3) At the time such person furnished the Government with the information about the violation, no criminal prosecution, civil action, investigation or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violations.

A person violating this subsection shall also be liable for the costs of a civil action brought to recover any such penalty or damages, including payment of reasonable attorneys fees and costs.

(c) The Superior Court shall have jurisdiction of all offenses under this chapter. (72 Del. Laws, c. 370, § 1.)

§ 1202. Definitions.

As used in this chapter:

(1) "Knowing" and "knowingly" mean that a person, with respect to information:

a. Has actual knowledge of the information;

b. Acts in deliberate ignorance of the truth or falsity of the information; or

c. Acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(2) "Claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee or other recipient where the Government provides, directly or indirectly, any portion of the money or property which is requested or demanded, or where the Government will, directly or indirectly, reimburse such contractor, grantee or other recipient for any portion of the money or property which is requested or demanded.

(3) "Government" includes all departments, boards or commissions of the executive branch of the State, all political subdivisions of the State, the Delaware Department of Transportation and all state and municipal authorities, all organizations created by or pursuant to a statute which declares in substance that such organization performs or has for its purpose the performance of an essential governmental function, and all organizations, entities or persons receiving funds of the State where the act complained of pursuant to this act relates to the use of such funds of the State.

(4) "Affected person, entity or organization" includes an employee

or former employee of a person who is liable under § 1201 of this title, or a "labor organization" as defined by § 1107A(d) of Title 19. (72 Del. Laws, c. 370, § 1.)

§ 1203. Civil actions for false claims.

(a) Responsibilities of the Attorney General. -- The Attorney General shall diligently investigate suspected violations under this chapter. If the Attorney.General finds that a person has violated or is violating the provisions of this chapter, the Attorney General may bring a civil action under this section against the person.

(b) Private actions. --

(1) A private civil action may be brought by any affected person, entity or organization (hereinafter "private party" or "party") for a violation of this chapter on behalf of the party bringing suit and for the Government. The action shall be brought in the name of the Government. Unless dismissed pursuant to paragraph (2) of this subsection, the action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the private party possesses shall be served on the Attorney General pursuant to Rules 4 and 5 of the Superior Court Civil Rules. The complaint shall be filed in camera and shall remain under seal for at least 60 days. The complaint shall not be served on the defendant until the expiration of 60 days or any extension approved under paragraph (3) of this subsection. Within 60 days after receiving a copy of the complaint, the Attorney General shall conduct an investigation of the factual allegations and legal contentions made in the complaint, shall make a written determination of whether there is substantial evidence that a violation of this chapter has occurred, and shall provide the affected person, entity or organization, and the Government, with a copy of the determination. The Government may elect to intervene and proceed with the action within 60 days after it receives the complaint, the material evidence and information, and the written determination of the Attorney General. If the Attorney General determines that there is not substantial evidence that a violation of this chapter occurred, then the complaint shall be dismissed.

(3) The Government or the Attorney General may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2) of this subsection. Any such motion may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Superior Court Civil Rules. The complaint shall be deemed unsealed at the expiration of the 60-day period in the absence of a court approved extension of the time frame.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3) of this subsection, the Govermnent shall:

a. Proceed with the action, in which case the action shall be conducted by the Government; or

b. Notify the court that it declines to take over the action, in which case the private party bringing the action shall have the right to conduct the action if, pursuant to paragraph (2) of this subsection, the Attorney General determined that there is substantial evidence that a violation of this chapter has occurred.

(5) When a party brings an action under this subsection, no party other than the Government may intervene or bring a related action based on the facts underlying the pending action. (72 Del. Laws, c. 370, § 1.)

§ 1204. Rights of the parties to qui tam actions.

(a) If the Government proceeds with the action, it shall have the exclusive responsibility for prosecuting the action, and shall not be bound by an act of the party bringing the action. Such party shall have the right to continue as a nominal party to the action, but, except as provided in subsections (b) and (c) of this section, such party shall not have the right to participate in the litigation except as a witness.

(b) The Government may dismiss the action notwithstanding the objections of the party initiating the action if the party has been notified by the Government of the filing of the motion and the court has provided the party with an opportunity for a hearing on the motion.

(c) The Government may settle the action with the defendant notwithstanding the objections of the party initiating the action if the court determines after a hearing that the proposed settlement is fair, adequate and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(d) If the Government elects not to proceed with the action, the party who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of the pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a party proceeds with the action, the court, without limiting the status and rights of the party initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(e) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the party initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing

criminal or civil investigation or proceedings. (72 Del. Laws, c. 370, § 1.)

§ 1205. Award to qui tam plaintiff.

(a) If the Government proceeds with an action brought by a party under § 1203(b) of this title, such party shall, subject to the 2nd sentence of this subsection, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the party substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the party bringing the action) relating to allegations or transactions in a criminal, civil or administrative hearing, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the party bringing the action in advancing the case to litigation. Any payment to a party under the 1st or 2nd sentence of this paragraph shall be made from the proceeds. Any such party shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. In determining the amount of reasonable attorneys' fees and costs, the court shall consider, without limitation, whether such fees and costs were necessary to the prosecution of the action, were incurred for activities which were duplicative of the activities of the Government in prosecuting the case, or were repetitious, irrelevant or for purposes of harassment, or caused the defendant undue burden or unnecessary expense. All such expenses, fees and costs shall be awarded against the defendant.

(b) If the Government does not proceed with an action under this chapter, the party bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such party shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. In determining the amount of reasonable attorneys' fees and costs, the court shall consider, without limitation, whether such fees and costs were necessary to the prosecution of the action, were incurred for activities which were repetitious, irrelevant or for purposes of harassment, or caused the defendant undue burden or unnecessary expense. All such expenses, fees, and costs shall be awarded against the defendant.

(c) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a party who planned and initiated the violation upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the party would otherwise receive under subsection (a) or (b) of this section, taking into account the role of that party in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the party bringing the action is convicted of criminal conduct arising from his

or her or its role in the violation of this chapter, that party shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the State to continue the action, represented by the Attorney General's Office.

(d) If the Government does not proceed with the action and the party bringing the action conducts the action, the court may award to the defendant its reasonable attorneys fees and expenses if the defendant prevails in the action and the court finds that the claim of the party bringing the action was:

(1) Filed for any improper purpose, such as to harass or to vex;

(2) Not warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law; or

(3) Based on allegations or factual contentions not supported by the evidence of record. (72 Del. Laws, c. 370, § 1.)

§ 1206. Certain actions barred.

(a) No court shall have jurisdiction of an action brought pursuant to this chapter against a State Government official if the action is substantially based on evidence or information known to the Government when the action was brought.

(b) In no event may a party bring an action under this chapter which is substantially based upon allegations or transactions which are the subject of a civil suit or an administrative proceeding in which the Government is already a party.

(c) No court shall have jurisdiction over an action under this chapter substantially based upon the public disclosure of allegations or actions in a criminal civil or administrative hearing, or from the news media, unless the action is brought by the Attorney General or the party bringing the action is an original source of this information.

For purposes of this subsection, "original source" means the party bringing suit who has independent knowledge, including knowledge based on its own investigation of the defendant's conduct, of the information on which the allegations are based and has voluntarily provided or verified the information on which the allegations are based or has voluntarily provided the information to the Government before filing an action under this section which is based on the information. (72 Del. Laws, c. 370, § 1.)

§ 1207. Government not liable for certain expenses.

No Government shall be liable for expenses which a party incurs in bringing an action under this chapter. (72 Del. Laws, c. 370, § 1.)

§ 1208. Employee protection.

Any employee who is discharged, demoted, suspended, threatened,

harassed or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this chapter, including investigation for, initiation of, testimony for or assistance in an action filed or to be filed under this chapter, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys" fees. An employee may bring an action in the appropriate court of the State for the relief provided in this subsection. (72 Del. Laws, c. 370, § 1.)

§ 1209. False claims and reporting procedure.

(a) A civil action under this act may not be brought:

(1) More than 6 years after the date on which the violation is committed; or

(2) More than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the Government charged with responsibility to act in the circumstances,

but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(b) In any action brought under this chapter, the Government or the private party shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(c) Notwithstanding any other provision of law, the Delaware Rules of Criminal Procedure, or the Delaware Rules of Civil Procedure, a final judgment rendered in favor of the Government in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under this chapter. (72 Del. Laws, c. 370, § 1.)

THE FALSE CLAIMS ACT RESOURCE CENTER

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Description of False Claims Act

The False Claims Act imposes civil liability on any person or entity who submits a false or fraudulent claim for payment to the United States government. The False Claims Act also prohibits:

- making a false record or statement to get a false or fraudulent claim paid by the government;
- conspiring to have a false or fraudulent claim paid by the government;
- withholding property of the government with the intent to defraud the government or to willfully conceal it from the government;
- Making or delivering a receipt for the government's property which is false or fraudulent;
- buying property belonging to the government from someone who is not authorized to sell the property; or,
- making a false statement to avoid or deceive an obligation to pay money or property to the government.

Causing the Submission of a False Claim

It is also improper to cause someone else to submit a false claim. For example, if a subcontractor provides false information to a contractor, who in turn bills the government based on that false information, the subcontractor is liable for causing the submission of a false claim.

Damages Under the False Claims Act

Damages under the False Claims Act are severe. A person who violates the act must repay three times the amount of damages suffered by the government plus a mandatory civil penalty of at least $5,500 and no more than $11,000 per claim, for all claims made after September 29, 1999.

This means that, for example, a person who submits fifty false claims for fifty dollars each is liable for between $282,500 [($2,500 x 3) + (50 x $5,500)] and $557,500 [($2,500 x 3) + (50 x $11,000)] in damages under the False Claims Act.

The stiff penalties have made the False Claims Act one of the government's favorite tools to combat fraud and abuse in government-funded programs.

Qui Tam Provisions of the False Claims Act

The False Claims Act allows an individual, often referred to as a whistleblower,

who knows about a person or entity who is submitting false claims to bring a suit, on behalf of the government, and to share in the damages recovered as a result of the suit. The whistleblower who brings the case is called a qui tam relator. In the past thirteen years, hundreds of qui tam suits have been filed. These suits have resulted in almost four billion dollars in recoveries for the United States Treasury. The whistleblowers who filed these suits have received more than one hundred million dollars for their efforts.

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Brief History of Qui Tam Provisions

POINTS OF INTEREST:

- History of Qui Tam Provisions
- English Common Law
- Early Days of the U.S.A.
- Adoption of the False Claims Act
- 1943 Restrictions of the False Claims Act
- 1986 Congressional Amendments
- Effect of the Amendments

Qui tam is a shorthand version of the Latin phrase:

> ***"Qui tam pro domino rege quam pro se ipso,"***

which means:

> "Who sues on behalf of the King, as well as for Himself"

Black's Law Dictionary 1251 (6th ed. 1990).

These provisions allow citizens to act as "private attorneys general" and to bring actions against those who violate the law. A brief history of qui tam provisions and the False Claims Act follows.

English Common Law

Qui Tam provisions -- giving private citizens the ability to bring actions on behalf of the government -- have existed for centuries. During the Middle Ages, England did not have an organized police force to enforce laws. English common law, by adopting various qui tam provisions, attempted to provide for the enforcement of the law by those who were injured by violations of the law. Qui tam provisions allowed private parties to act like a policeman. The private party was paid a bounty to make the effort worthwhile and to give incentives to other individuals to bring similar suits.

Early Days of the United States of America

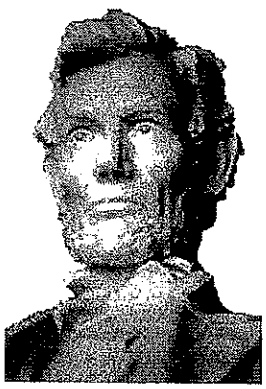
"There is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government."

-- Ben Franklin

The founders of the United States followed their English predecessors and engrafted qui tam provisions onto many statutes. Ten of the twelve penal statutes enacted by American's first ruling body, the Continental Congress, contained qui tam provisions.

Adoption of the False Claims Act

President Abraham Lincoln urged Congress to pass the False Claims Act in 1863. President Lincoln needed to protect the Union Army from the numerous fraudulent suppliers who sold it faulty war supplies during the Civil War. These faulty supplies included broken rifles, rancid food, useless ammunition and lame horses and mules.



"Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortunes of the nation while patriotic blood is crimsoning the plains of the south and their countrymen are moldering in the dust."

--Abraham Lincoln.

The 1863 False Claims Act provided both criminal and civil penalties, contained a qui tam provision, and permitted a whistleblower to collect 50% of the damages.

The 1943 Restriction Amendments to the False Claims Act

In 1943, reacting to what it considered to be "parasitic" qui tam relators, Congress severely restricted the relator's role under the False Claims Act. As a result of Congress' 1943 Amendments to the False Claims Act:

- whistleblowers could not bring claims that were based on evidence or information that was known to the government at the time the action was brought, regardless whether the government had any intention of bringing a claim and even if the whistleblower was the original source of the evidence or information.

- the whistleblower's share in the proceeds of a successful action was reduced from 50% to a maximum of 25% if the government did not help with the litigation and 10% if the government helped with the litigation.

The 1943 Amendments resulted in an increasingly narrow application of the qui tam provisions and, as a result, very few cases were brought or could ever by successfully maintained by whistleblowers. In the ensuing years, both the False Claims Act, and the qui tam provisions withered from disuse.

1986 Congressional Amendments: Breathing Life into the False Claims Act

In 1986 Congress, like Abraham Lincoln over one hundred years earlier, turned to the Civil False Claims Act to combat rampant fraud against the government. With bipartisan support and President Reagan's blessing, Congress significantly amended the Civil False Claims Act to increase its reach and to reestablish the qui tam relator as a potent anti-fraud force.

The most important changes brought by the 1986 Amendments include:

- Statutorily defining the level of mens rea (or intent) needed to be liable for submitting a false claim to include submitting claims with deliberate ignorance or reckless disregard as to the truth of the information contained on the claim;

- Requiring the government or qui tam relator to adduce proof of the submission of a false claim by a preponderance of evidence instead of higher standards that had been imposed by courts;

- Enlarging the time within which a false claims act case may be bought;

- Providing for treble damages;

- Enhancing the qui tam relator's role in the litigation and enlarging his or her share to between 15-25% where the government participates in the litigation or 25-30% where the government declines to participate in the litigation;

- Mandating that the defendant pay a successful qui tam relator's attorney's fees; and

- Protecting relators from retaliation by their employers.

Effect of the 1986 Amendments (as reported by the Department of Justice in October 1997)

Since the 1986 Amendments, qui tam suits have proved successful beyond even

Congress' expectations.

As awareness of the qui tam provisions spreads, more and more whistleblowers are coming forward:

Year	Number of Suits
1987	33
1988	60
1989	95
1990	82
1991	90
1992	119
1993	131
1994	221
1995	279
1996	363
1997	530
1998	417
1999	483
2000	21 (to date)

	2924

Recoveries for the United States Treasury have skyrocketed as a result of qui tam relators.

Year	Recoveries from Qui Tam Suits
1987	200,000
1988	355,000
1989	15,000,000
1990	40,000,000
1991	72,000,000
1992	134,000,000
1993	173,000,000
1994	379,000,000
1995	244,000,000
1996	127,000,000
1997	625,000,000
1998	331,000,000
1999	$458,000,000

	$2,598,555,000

By 2000, fourteen years after the 1986 Amendments, the False Claims Act, and especially its qui tam provisions, has become the single most successful tool in the government's fight against fraud and abuse.

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Why the False Claims Act?

What is the False Claims Act & Why is it Important?

The False Claims Act is the single most important tool U.S. taxpayers have to recover the billions of dollars stolen through fraud by U.S. government contractors every year.

Under the False Claims Act, 31 U.S.C. §§ 3729-3733, those who knowingly submit, or cause another person or entity to submit, false claims for payment of government funds are liable for three times the government's damages plus civil penalties of $5,500 to $11,000 per false claim.

The False Claims Act explicitly excludes tax fraud. Section 3729(e) states that the Act "does not apply to claims, records, or statements made under the Internal Revenue Code." If you wish to report tax fraud, please call the IRS Fraud Hotline at 800-829-0433.

Qui Tam Whistleblower Provisions

The False Claims Act contains *qui tam*, or whistleblower, provisions. *Qui tam* is a unique mechanism in the law that allows citizens with evidence of fraud against government contracts and programs to sue, on behalf of the government, in order to recover the stolen funds. In compensation for the risk and effort of filing a *qui tam* case, the citizen whistleblower or "relator" may be awarded a portion of the funds recovered, typically between 15 and 25 percent. A *qui tam* suit initially remains under seal for at least 60 days during which the Department of Justice can investigate and decide whether to join the action

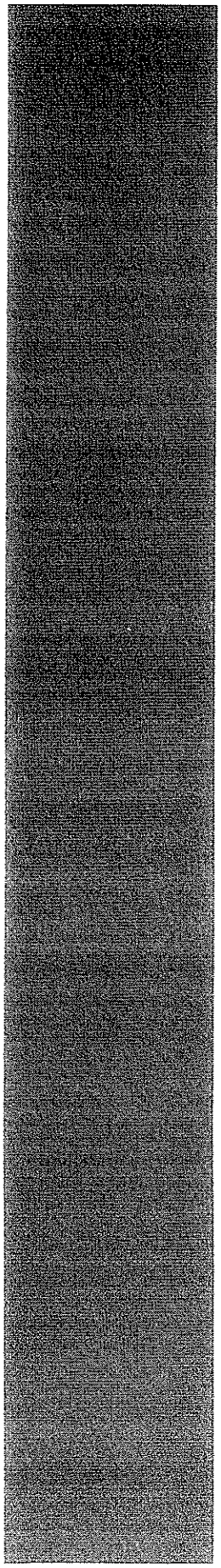
A Public-Private Partnership

Congress recognized that the Government alone, with its limited resources, was overmatched in the fight against rampant fraud. In response to widespread reports that the U.S. Treasury was being repeatedly bilked, in 1986 Congress rejuvenated a Civil War-era law—the False Claims Act. The 1986 amendments strengthened the False Claims Act's qui tam provisions, creating incentives for private citizens with evidence of fraud to commit their time and resources to supplement the Government's efforts. By doing so, Congress put into play a powerful public-private partnership for uncovering fraud against the federal fisc and obtaining the maximum recovery for American taxpayers.

Changing the Culture of Fraud

The False Claims Act is about more than money. It is also about discouraging fraud and changing the culture of corporate America. As Sen. Charles Grassley (R-IA) and Rep. Howard Berman (D-CA) have noted:

"Studies estimate the fraud deterred thus far by the qui tam *provisions runs into the hundreds of billions of dollars. Instead of encouraging or rewarding a culture of deceit, corporations now spend substantial sums on sophisticated and meaningful compliance programs. That change in the corporate culture -- and in the values-based*



decisions that ordinary Americans make daily in the workplace -- may be the law's most durable legacy."

Who the Law Applies To

In general, the False Claims Act covers fraud involving any federally funded contract or program, with the exception of tax fraud.

While many *qui tam* actions in the late 1980s and early 1990s involved Department of Defense contracts, in recent years most *qui tam* actions have been used to fight Medicare fraud and fraud against other federally funded health care programs. A broad array of scenarios can constitute FCA violations. Some examples include the following:

- A contractor falsifies test results or other information regarding the quality or cost of products it sells to the Government;
- A health care provider bills Medicare for services that were not performed or were unnecessary, or;
- A grant recipient charges the Government for costs not related to the grant.

Types of Fraud Prosecuted Under the FCA

It is impossible to list all of the frauds that have been prosecuted under the False Claims Act, but the following list gives some idea of the scope of the false claims on the Government that have been uncovered to date:

- Billing for goods and services that were never delivered or rendered.
- Billing for marketing, lobbying or other non-contract related corporate activities.

- Submitting false service records or samples in order to show better-than-actual performance.
- Presenting broken or untested equipment as operational and tested.
- Performing inappropriate or unnecessary medical procedures in order to increase Medicare reimbursement.
- Billing for work or tests not performed.
- Billing for premium equipment but actually providing inferior equipment.
- Automatically running a lab test whenever the results of some other test fall within a certain range, even though the second test was not specifically requested.
- Defective testing - Certifying that something has passed a test, when in fact it has not.
- "Lick and stick" prescription rebate fraud and "marketing the spread" prescription fraud, both of which involve lying to the government about the true wholesale price of prescription drugs.
- Unbundling - Using multiple billing codes instead of one billing code for a drug panel test in order to increase remuneration.
- Bundling -- Billing more for a panel of tests when a single test was asked for.
- Double billing - Charging more than once for the same goods or service.
- Upcoding - Inflating bills by using diagnosis billing codes that suggest a more expensive illness or treatment.
- Billing for brand -- Billing for brand-named drugs when generic drugs are actually provided.
- Phantom employees and doctored time slips: Charging for employees that were not actually on the job, or billing for made-up hours in order to maximize reimbursements.
- Upcoding employee work: Billing at doctor rates for work that was actually conducted by a nurse or resident intern.
- Yield burning -- skimming off the profits from the sale of municipal bonds.
- Falsifying natural resource production records -- Pumping, mining or harvesting more natural resources from public lands that is actually reported to the government.
- Being over-paid by the government for sale of a good or service, and then not reporting that overpayment.
- Misrepresenting the value of imported goods or their country of origin for tariff purposes.
- False certification that a contract falls within certain guidelines (i.e. the contractor is a minority or veteran).
- Billing in order to increase revenue instead of billing to reflect actual work performed.
- Failing to report known product defects in order to be able to continue to sell or bill the government for the product.
- Billing for research that was never conducted; falsifying research data that was paid for by the U.S. government.
- Winning a contract through kickbacks or bribes.
- Prescribing a medicine or recommending a type of treatment or

diagnosis regimen in order to win kickbacks from hospitals, labs or pharmaceutical companies.

- Billing for unlicensed or unapproved drugs.
- Forging physician signatures when such signatures are required for reimbursement from Medicare or Medicaid.

Limits on the False Claims Act

Though the False Claims Act is a powerful tool to combat fraud, it is a tool that is sharply constrained by both the law and economics of litigation.

- Tax issues are not covered by the False Claims Act.
- For a civil case to be filed, the fraud has to reach a certain size, otherwise it is generally not worth it for the relator to risk his or her career to file suit, nor is it worth it for a law firm to take on the case and risk the loss of the enormous time and expense that a False Claims Act represents.
- A defendant in a False Claims Act has to have relatively deep pockets. Many of the smaller companies that may be defrauding the government are liable to declare bankruptcy if faced with the triple damages that can be levied under the False Claims Act.
- A law firm that take on a False Claims Act case must believe it has a very strong case in order to proceed. Not only can a firm be out time and money, but if the government does not take the case and the whistleblower proceeds, he or she can be forced to pay the defendants attorney's fees if the court finds that the claim was frivolous or brought primarily for purposes of harassment.

State False Claims Acts

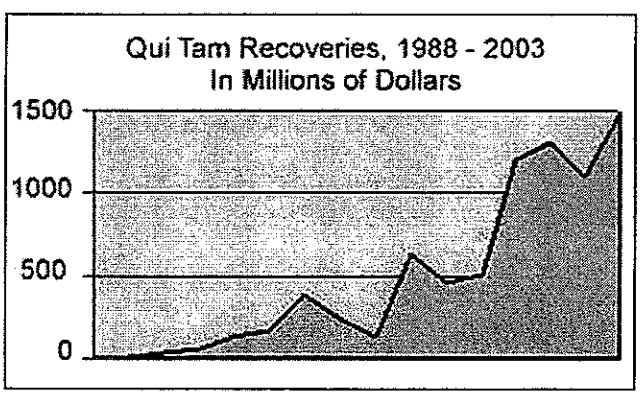
In addition to the Federal False Claims Act, a number of states also have False Claims Acts that work to discourage frauds perpetrated against state governments. States with False Claims Acts include: Arkansas, California, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Louisiana, Massachusetts, Nevada, Tennessee, Texas, Utah, and Virginia.

TAXPAYERS AGAINST FRAUD EDUCATION FUND
1220 19th Street, NW
Suite 501
Washington, DC 20036
phone: 202-296-4826
tollfree: 1-800-USFALSE
fax: 202-296-4838

Statistics

Qui Tam Statistics
(as reported by DOJ: FY ending September 30, 2003)

- **Total amount recovered in Fiscal Year 2003 under the False Claims Act:** $2,100,000,000 -- a 75% increase over FY 2002.
- **Relator's share of the rewards in FY 2003:** $319,000,000.
- **Total amount recovered under the False Claims Act since 1986:** over $12,000,000,000.
- **Relator's share of the rewards since 1986:** Over $1,000,000,000.
- **Total FCA amount recovered where there is an associated *qui tam* case, to date:** $7,870,000,000.
- **Total FCA amount recovered by DOJ in cases that DOJ entered or otherwise pursued:** $7,510,000,000.
- **Total FCA amount recovered by relators in cases declined by DOJ, to date:** $362,000,000.
- **Total number of *qui tam* cases files to date:** 4,281



***Qui tam* cases filed (by fiscal year):**

1987	33

1988	60
1989	95
1990	82
1991	90
1992	119
1993	132
1994	222
1995	277
1996	363
1997	533
1998	470
1999	482
2000	367
2001	310
2002	320
2003	326

Recoveries in *qui tam* cases pursued by DOJ (by fiscal year):

1988	$355,000
1989	$15 million
1990	$40 million
1991	$70 million
1992	$134 million
1993	$171 million
1994	$380 million
1995	$245 million
1996	$125 million
1997	$623 million
1998	$433 million
1999	$454 million
2000	$1.2 billion
2001	$1.2 billion
2002	$1.04 billion
2003	$1.48 billion

Recoveries in *qui tam* cases declined by DOJ (by fiscal year):

1988	$35,431
1989	$0

1990	$75,000
1991	$69,500
1992	$994,456
1993	$5.9 million
1994	$1.8 million
1995	$1.8 million
1996	$14 million
1997	$7 million
1998	$29.2 million
1999	$62.5 million
2000	$1.8 million
2001	$125.7 million
2002	$26.1 million
2003	$85.04 million

DOJ's decision on *qui tam* cases (numbers are not necessarily current and depend on reporting from the U.S. Attorneys' offices):

Intervened or otherwise pursued	**750**
Active	79
Settled or Judgment	639
Dismissed, no recovery	27
Inactive	3
Unclear	2
Declined	**2,653**
Active	153
Settled or Judgment	139
Dismissed, no recovery	2,184
Inactive	10
Unclear	38
Under investigation	**891**

Percentage of qui tam cases involving HHS as the client agency (by fiscal year):

1987	12 percent
1988-1992	15 percent each year
1993	30 percent
1994	36 percent
1995	34 percent
1996	56 percent
1997	54 percent
1998	61 percent
2003	52 percent

Total amounts paid or to be paid to relators as their statutory share, to date: **$987.8 million**

Total recoveries for *qui tam* by agency
DOD: $1.59 billion ($291.03 million to relators)
HHS: $5.178 billion ($851.6 million to relators)

Cases filed by agency
DOD: 1,277
HHS: 2,200

Relator award when DOJ intervened in or otherwise pursued the case: **$1.395 billion** (average 15% of FCA recovery)

Relator award when government declined to intervene: **$85.04 million** (average 25% of FCA recovery)

>> View Department of Justice press release describing record 2003 recoveries

§ 8:67 —FCA liability in contract formation process

Where fraud infects the formation of the contract, such as in a bid-rigging situation, then nearly every submission by the government contractor in connection with the work may be considered a false claim. In *United States ex rel. Alexander v. Dyncorp., Inc.*,[1] a disappointed bidder brought a qui tam action alleging, among other things, that the successful bidder submitted false statements in its bid proposal in order to acquire the contract. In rejecting the defendants' contention that this allegation failed to meet the statutory definition of "claim," the court noted:

> Count 1 alleges that defendants fraudulently obtained the 1993 Contract by submitting false statements in its bid proposal upon which the DoJ relied in awarding the 1993 Contract, regarding its record of business effects and the availability of "key personnel" to complete the contract at the stated price. If Dyncorp. obtained the 1993 Contract fraudulently, then all claims submitted under the Contract are fraudulent.[2]

§ 8:68 —FCA liability on federally funded state and local projects

FCA jurisdiction is not limited to federal projects. State and local projects utilizing federal funds can implicate the Act. For example, in *United States ex rel. Barth v. Ridgedale Elec., Inc.*,[1] an electrical contractor performing work on the Braemar Golf Course in Edina, Minnesota found itself a defendant in a qui tam

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668, 25 Cont. Cas. Fed. (CCH) ¶ 82700, 49 A.L.R. Fed. 836 (9th Cir. 1978)); U. S. ex rel. Marcus v. Hess, 317 U.S. 537, 63, 63 S. Ct. 379, 87 L. Ed. 443 (1943).

[Section 8:67]

[1]U.S. ex rel. Alexander v. Dyncorp, Inc., 924 F. Supp. 292 (D.D.C. 1996).

[2]U.S. ex rel. Alexander v. Dyncorp, Inc., 924 F. Supp. 292, 298 (D.D.C. 1996). The Supreme Court of the United States employed similar reasoning in connection with a bid-rigging scheme. In U. S. ex rel. Marcus v. Hess, 317 U.S. 537, 63 S. Ct. 379, 87 L. Ed. 443 (1943), an electrical contractor who obtained a federally subsidized public works contract through collusive bidding violated the FCA, although the contractor's later claims for payment were submitted to the government through an intermediary. The Supreme Court reasoned:

> The government's money would never have been [paid] . . . to respondents had its agents known the bids were collusive. . . . This fraud did not spend itself with the execution of the contract. The initial fraudulent action and every step thereafter taken pressed to the ultimate goal—payment of government money to person who had caused it to be defrauded.

U. S. ex rel. Marcus v. Hess, 317 U.S. 537, 543-544, 63 S. Ct. 379, 384, 87 L. Ed. 443 (1943).

[Section 8:68]

[1]U.S. ex rel. Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 40 Cont. Cas. Fed. (CCH) ¶ 76737, 129 Lab. Cas. (CCH) ¶ 33191 (8th Cir. 1995).

FCA action.[2] The project was partially funded through a federal Community Development Block Grant administered through the department of Housing and Urban Development (HUD), and thus was subject to the federal prevailing wage requirements of the Davis-Bacon Act. Eldon Barth, the qui tam relator was the defendant's project superintendent. In reality, however, he performed the work of a journeyman electrician. The defendant's president and sole shareholder requested Barth to prepare two sets of false timecards for the project which would indicate that he had been supervisor on the project.

While the project was in progress, representatives of the International Brotherhood of Electrical Workers contacted a number of the defendant's employees and obtained copies of payroll reports which led union representatives to suspect that the defendant had falsely characterized its employees on the payroll reports. While HUD and the local county attorney's office investigated the situation, nothing became of the matter until almost six years after the project's completion when Barth and the Union commenced its qui tam action, alleging that the defendant falsely certified compliance with the David-Bacon Act's requirements on its periodic payment applications and that the defendant misclassified its employees on the weekly payroll reports to avoid paying prevailing wages. The defendant electrical contractor avoided liability only because the court determined that neither relator was an "original source" as required under the qui tam provisions of the Act.[3]

§ 8:69 —Element of materiality under FCA

The element of falsity often gives rise to a question of materiality. Can any "false claim" satisfy the statute or do only "materially" false claims pass muster? Neither the civil False

[2]Braemar is a municipal-owned golf course just down the road from where O'Connor lives and where he has shot a mediocre round or two.

[3]U.S.C.A. § 3730(e)(4)(A) and (B). Federal money finds its way into numerous state and local projects. As a result, the net cast by the FCA can be quite broad. See U.S. ex rel. Plumbers and Steamfitters Local Union No. 38 v. C.W. Roen Const. Co., 183 F.3d 1088, 5 Wage & Hour Cas. 2d (BNA) 808, 138 Lab. Cas. (CCH) ¶ 33916 (9th Cir. 1999), cert. denied, 530 U.S. 1203, 120 S. Ct. 2195, 147 L. Ed. 2d 232, 6 Wage & Hour Cas. 2d (BNA) 160 (2000) (city of Santa Rosa project involving improvements to the Laguna wastewater treatment plant subject to FCA as the plant was a federally funded project); U.S. ex rel Mistick PBT v. Housing Authority of City of Pittsburgh, 186 F.3d 376 (3d Cir. 1999), cert. denied, 529 U.S. 1018, 120 S. Ct. 1418, 146 L. Ed. 2d 310 (2000) (city project to undertake lead-based paint abatement work on HUD-associated housing fell within scope of the FCA); Hagood v. Sonoma County Water Agency, 81 F.3d 1465 (9th Cir. 1996) (dam project under Water Supply Act subject to the FCA).

Claims Act nor its criminal version expressly states that materiality is an element.[1] Most of the circuit courts that have addressed the issue have concluded that materiality is an element of both the civil and criminal false claims statute. For example, the Fourth Circuit in *United States ex rel. Berge v. Trustees of University of Alabama*[2] stated, "if previously unclear, we now make explicit that the current civil False Claims Act imposes a materiality requirement."[3] The materiality requirement, at least so far as the Fourth Circuit was concerned, raised the inquiry as to whether the false statement "has natural tendency to influence, [is] capable of influencing, the decision of the decision-making body to which it was addressed."[4] To the extent that materiality is an element of a FCA violation, then a defendant is entitled to have a jury make the materiality determination.[5]

A United States Supreme Court decision in a case involving a statute making it a criminal violation to submit a false statement to FDIC-insured entities casts doubt on the prevailing view that materiality is an element of an FCA violation. In *United States v. Wells*,[6] the Supreme Court interpreted the express language of 18 U.S.C.A. § 1014, which covered "any false statement" to FDIC-insured entities as not requiring the statement to be material.[7] Nevertheless, while not an element of the offense, the concept of materiality lurks nearby in the form of the intent requirement:

> It will be relatively rare that the Government will be able to prove that a false statement was made with the subjective intent of influencing a decision unless it could first prove that the statement has the natural tendency to influence the decision. Hence, the lit-

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[Section 8:69]

[1]The criminal False Claims Act is codified at 18 U.S.C.A. § 287. By contrast, another civil war era statute, the False Statements Act, 18 U.S.C.A. § 1001, was amended in 1996 to expressly state that materiality is an element of the statutory violation. Pub. L. No. 104-292, 110 Stat. 3459; H.R. 680, 104th Cong., 2d Sess. (1996), reprinted in 1996 U.S.C.C.A.M. 3935.

[2]U.S. ex rel. Berge v. Board of Trustees of the University of Alabama, 104 F.3d 1453, 115 Ed. Law Rep. 344, 41 U.S.P.Q.2d (BNA) 1481 (4th Cir. 1997).

[3]U.S. ex rel. Berge v. Board of Trustees of the University of Alabama, 104 F.3d 1453, 1459, 115 Ed. Law Rep. 344, 41 U.S.P.Q.2d (BNA) 1481 (4th Cir. 1997).

[4]U.S. ex rel. Berge v. Board of Trustees of the University of Alabama, 104 F.3d 1453, 1460, 115 Ed. Law Rep. 344, 41 U.S.P.Q.2d (BNA) 1481 (4th Cir. 1997) (citing Kungys v. U.S., 485 U.S. 759, 770, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988)). See also U.S. v. Hausmann, 711 F.2d 615, 617, 13 Fed. R. Evid. Serv. 1552 (5th Cir. 1983).

[5]U.S. v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).

[6]U.S. v. Wells, 519 U.S. 482, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997).

[7]U.S. v. Wells, 519 U.S. 482, 117 S. Ct. 921, 927, 137 L. Ed. 2d 107 (1997).

> eral reading of the statute will not normally take the scope of section 1014 beyond the limit that a materiality requirement would impose.[8]

Ironically, this reasoning provides some measure of protection to civil FCA defendants but is less helpful to those charged under the criminal False Claims Act.[9]

The United States Supreme Court's blending of materiality with intent is a common approach taken by courts interpreting civil FCA suits in cases where it is alleged that the government knew about the false claims:

> Wang alleged, among other FCA claims related to a weapons project, that the defendant's engineering work was poor and its design was faulty. The court affirmed a summary judgment dismissing the claim, holding that because the defendant had shared with the Army all of the mistakes and limitations that later became the subject of Wang's FCA allegations, Wang had not produced the required evidence of intent. . . . [Similarly, in this case], if the district court correctly found that the only reasonable conclusion a jury could draw from the evidence was that MDHC and the Army had so completely cooperated and shared all information during the testing that MDHC did not "knowingly" submit false claims, then we must affirm the directed verdict. We examine the individual statements below, to determine whether, if they are arguably false, the government's knowledge of their deficiencies negates MDHC's intent.[10]

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[8]U.S. v. Wells, 519 U.S. 482, 117 S. Ct. 921, 931, 137 L. Ed. 2d 107 (1997) (citation omitted).

[9]See Anderson, The False Claims Act: Is Materiality Required?, 33 The Procurement Lawyer 6, 7 & 27 (Fall 1997) ("Like 18 U.S.C. § 1014, notions and materiality are probably inherent in the civil False Claims Act requirement that the false statement be made or used for the purpose of getting a false or fraudulent claim paid or approved. That is, one would need proof that the false statement was made for the purpose of getting paid and would, by its very nature, require that the statement have a 'natural tendency to influence,' i.e., be material. The same prediction cannot be made for the criminal False Claims Act, however, because the language of 18 U.S.C. § 287 does not describe the purpose for which the false claim need be presented, nor does the case law provide substantial insight.").

[10]U.S. ex rel. Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 327, 40 Cont. Cas. Fed. (CCH) ¶ 76857 (9th Cir. 1995) (citing Wang v. FMC Corp., 975 F.2d 1412, 1421, 7 I.E.R. Cas. (BNA) 1256, 38 Cont. Cas. Fed. (CCH) ¶ 76413 (9th Cir. 1992)). See also U.S. ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421, 37 Cont. Cas. Fed. (CCH) ¶ 76068 (9th Cir. 1991); U.S. ex rel. Durcholz v. FKW Inc., 189 F.3d 542, 545 (7th Cir. 1999) ("If the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim. In such a case, the government's knowledge effectively negates the fraud or falsity required by the FCA."); U.S. ex rel. Lamers v. City

§ 8:70 —FCA liability in claims certification process

The fine line between legitimate contract disputes and violations of the FCA requires that the government carefully exercise its discretion in invoking the False Claims Act in response to a contractor's claim certification. A government contractor's certification of a request for an equitable adjustment can expose it to FCA liability. In *United States ex rel. Wilkins v. North American Const. Corp.*,[1] the Army Corp of Engineers awarded a fixed-price contract to defendant for the construction of a ground water treatment facility at an Air Force base located in Oklahoma. The government changed the design after contract award and requested a change order proposal from the defendant. The defendant, in turn, looked to its drilling subcontractor, CH&A Corp., for a price quotation. CH&A, in turn, sought a price from Evi Cherrington Environmental (ECE). CH&A submitted ECE with test boring logs it had prepared but failed to supply it with the Corps' boring logs. ECE submitted a price quotation with which the defendant negotiated a contract change with the government.

ECE encountered soil conditions that differed materially from that represented in CH&A's boring logs. In submitting a draft request for equitable adjustment to defendant, ECE noted CH&A's failure to provide it with the Corps' boring logs. The defendant informed ECE that if it blamed another contractor for the problem, the government was unlikely to approve the change request. ECE accordingly revised its request to state that it had relied on the government's boring logs in preparing its price quotations. Both defendant and CH&A certified a $3.9 million request for equitable adjustment. The government denied the request and commenced a FCA action against the defendant and

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of Green Bay, 168 F.3d 1013, 1018, 132 Ed. Law Rep. 727 (7th Cir. 1999) ("It is impossible to meaningfully discuss falsity without implicating the knowledge requirement"); U.S. ex rel. Windsor v. DynCorp, Inc., 895 F. Supp. 844, 854, 2 Wage & Hour Cas. 2d (BNA) 1519, 131 Lab. Cas. (CCH) ¶ 33304 (E.D. Va. 1995) ("Thus, this case presents the somewhat unusual circumstance where a contractor's submission of an invoice covering work not actually performed does not constitute a false claim. The Army was fully cognizant of the billing situation, and Dyncorp and the Army were entitled to develop practical measures to respond to the usual and unanticipated contract administration problems that arose as a result of changed circumstances."). But see U.S. v. Incorporated Village of Island Park, 888 F. Supp. 419, 442 (E.D.N.Y. 1995) (government's knowledge not a bar to a FCA claim if the knowledge is incomplete or acquired too late in the process).

[Section 8:70]

[1]U.S. ex rel. Wilkins v. North American Const. Corp., 101 F. Supp. 2d 500 (S.D. Tex. 2000).

CH&A. In refusing to dismiss the government's complaint, the district court explained that:

> To state a claim based on false certification of the REA [request for an equitable adjustment], the government must allege facts that, if proven, would show that: (1) the defendants falsely certified that they submitted the REA in good faith; (2) with the requisite scienter; (3) the false certification was material; and (4) the REA involved a claim.[2]

In this case, while the genesis of the dispute may have been grounded in contract, the contractor's actions of certifying a request for an equitable adjustment that intentionally misrepresented material facts with respect to the government's culpability for the differing site condition met the elements of a FCA offense.[3]

§ 8:71 —Fraud liability under Contract Disputes Act

In addition to the False Claims Act (FCA), the government also has available to it a remedial statute with which to deal with fraudulent claims by government contractors under the Contract Disputes Act (CDA).[1] The CDA's fraudulent claim provision holds a contractor liable when it is "unable to support any part of [its] claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor . . ."[2] The CDA defines misrepresentation of fact as "a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter at hand, made with intent to deceive or mislead."[3] Contractors who assert a fraudulent claim are "liable to the government

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[2]U.S. ex rel. Wilkins v. North American Const. Corp., 101 F. Supp. 2d 500, 524 (S.D. Tex. 2000).

[3]See also Al Munford, Inc. v. U.S., 34 Fed. Cl. 62, 65, 40 Cont. Cas. Fed. (CCH) ¶ 76830 (1995), order vacated on other grounds, 86 F.3d 1178, 40 Cont. Cas. Fed. (CCH) ¶ 76932 (Fed. Cir. 1996) ("plaintiff's submission of a claim for an amount already paid by the government, at the very least, constitutes recklessness with regard to the validity of the claim. Every party filing an action in this court has a duty to examine its records to determine what amounts the government already has paid. A failure to make this type of minimal examination is nothing more than deliberate ignorance. A party that is deliberately ignorant of a false claim is liable under the FCA. Plaintiff's error was not merely an innocent mistake. To find otherwise would allow any party filing an action in this court to 'double-bill' the government and then cloak itself in a shield of feigned ignorance.").

[Section 8:71]

[1]41 U.S.C.A. § 604.

[2]41 U.S.C.A. § 604.

[3]41 U.S.C.A. § 601(7).

for an amount equal to such unsupported part of the claim in addition to all costs to the government attributable to the cost of reviewing said part of [their] claim."[4] Because the CDA's fraudulent claim provision requires the government to establish that the contractor intended to deceive it when submitting its claim, this vehicle is used less often than the FCA.[5]

§ 8:72 —Constitutional concerns over FCA penalties

The penalties and damages that may be awarded against a defendant under the FCA have raised a number of concerns. In some cases the FCA penalties can substantially outweigh the harm to the government. This raises constitutional implications. The United States Supreme Court in *United States v. Bajakajian*[1] determined that disproportionate civil penalties are unconstitutional. In a 5-4 decision, the majority set forth a test for determining when a punitive forfeiture is unconstitutionally excessive. The new test focuses on whether there is a "gross disproportionality" between the civil penalty and the criminal offense committed. With respect to the recovery of damages, the Court of Federal Claims in *Commercial Contractors, Inc. v. United States*[2] held that to recover damages in addition to civil penalties, the government must establish actual loss resulting from the false claim. The reasonable costs of correcting the contractor's performance may be recovered if they are not "clearly

[4]41 U.S.C.A. § 604.

[5]See Al Munford, Inc. v. U.S., 34 Fed. Cl. 62, 67-68, 40 Cont. Cas. Fed. (CCH) ¶ 76830 (1995), order vacated on other grounds, 86 F.3d 1178, 40 Cont. Cas. Fed. (CCH) ¶ 76932 (Fed. Cir. 1996) ("To prove a violation of the CDA, the government must show by a preponderance of the evidence that the contractor's misrepresentation was made with the intent to deceive or mislead the government. Defendant [government] provided no direct evidence that plaintiff had such intent. In fact, plaintiff's subsequent admissions that it made a mistake and that the amounts contained in its claim were no longer valid provided some minimal evidence during the course of the litigation that plaintiff did not actually intend to deceive the government." Therefore, the government was not entitled to summary judgment under the CDA but the government did receive summary judgment on its counterclaims brought under the FCA.). See also Sterling Millwrights, Inc. v. U.S., 26 Cl. Ct. 49, 111, 1992 WL 88368 (1992).

[Section 8:72]

[1]U.S. v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998).

[2]Commercial Contractors, Inc. v. U.S., 154 F.3d 1357, 42 Cont. Cas. Fed. (CCH) ¶ 77374 (Fed. Cir. 1998), reh'g denied, (Nov. 5, 1998).

disproportionate" to the probable loss in value resulting from the deficient performance.[3]

§ 8:73 —Private suits under False Claims Act: Qui tam actions

Without a doubt, one of the most controversial features of the civil False Claims Act is the language permitting private citizens to sue, on behalf of the government, to recover federal funds obtained through fraudulent means. These suits are known as "qui tam" actions.[1] Pursuant to § 3730(b) of the Act:

A person may bring a civil action for a violation of section 3729 for

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[3]See also U.S. ex rel. Aakhus v. Dyncorp, Inc., 136 F.3d 676, 42 Cont. Cas. Fed. (CCH) ¶ 77253 (10th Cir. 1998). FCA case law has developed a number of measurement theories for determining the government's damages. Not all of these measures are consistent with one another. One test followed in a number of cases is known as the "actual loss" test. Under this rule the government is entitled to recover, as single damages, the amount of money it actually paid by reason of the false statements minus the amount it would have paid had the claim been truthful. See U.S. v. Ekelman & Associates, Inc., 532 F.2d 545, 35 A.L.R. Fed. 794 (6th Cir. 1976); U. S. v. Hibbs, 568 F.2d 347 (3d Cir. 1977); U. S. v. Miller, 645 F.2d 473 (5th Cir. 1981). A broader measure of damages is known as the "but for" test. It tends to be used in misrepresentation cases where the government guarantees a loan or enters into a contract where the immediate cause of the government's loss is unrelated to this initial fraudulent representation. See U.S. v. First National Bank of Cicero, 957 F.2d 1362 (7th Cir. 1992); Toepleman v. U.S., 263 F.2d 697 (4th Cir. 1959). See also Boese, Civil False Claims and Qui Tam Actions 3-18 (1993)(reporting that the Fourth, Sixth and Seventh Circuits have applied the "but for" test, while the Third, Fifth and Eighth Circuits have rejected it). Another measure of damage is best described as the "benefit of the bargain" rule. Under this rule the government's damages from false claims are measured by the difference between the market value of the product received by the government and the market value of the product that the government contracted for. See U. S. v. Bornstein, 423 U.S. 303, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976); U. S. v. Ben Grunstein & Sons Co., 137 F. Supp. 197 (D.N.J. 1955). Another damage issue that arises frequently involves the handling of damage set-offs. Because the government is entitled to a trebling of its actual damages, there is often a debate as to when the multiplication takes place. If a defendant has cost the government $1 million in damages but the government still owes the defendant $500,000, does the trebling occur before the $500,000 is off-set against the loss (for a net damage of $2.5 million) or does the set-off occur first and then the trebling applied (for a net damage of $1.5 million)? The courts have developed a rule that favors the government and holds that the defendant's set-offs are taken after and not before the trebling of damages. See U. S. v. Bornstein, 423 U.S. 303, 316-17, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976); U.S. v. Ekelman & Associates, Inc., 532 F.2d 545, 35 A.L.R. Fed. 794 (6th Cir. 1976).

[Section 8:73]

[1]"Qui tam" is an abbreviated latin phrase. The full latin phrase is: "Qui tam pro domino rege quam pro se ipso in hac parte sequitur," which means "Who as

the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.[2]

The Act provides substantial inducements to private citizens to commence qui tam actions. They may receive between 15 and 25% of the government's recovery and attorney's fees.[3]

The FCA, including its qui tam provisions, has its roots in the rampant fraud and profiteering practiced by union army suppliers during the Civil War.[4] The original Act, however, created its own profiteering as "parasitic" civil suits proliferated in the 1930s and 1940s. Frequently, private citizens merely took the allegations and information discovered by the government in the course of its criminal prosecutions and brought derivative qui tam actions.[5] In response to these "parasitic" suits, Congress in 1943 amended the Act to prohibit qui tam suits based upon informa-

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well for the King as for himself sues in this matter." Black's Law Dictionary (7th ed.).

[2]31 U.S.C.A. § 3730(b). Private FCA actions may be dismissed with the Attorney General's consent. The Act gives the government the express authority to dismiss actions notwithstanding the objections of the FCA plaintiff, known as a "relator." 31 U.S.C.A. § 3730(c)(2)(A). The government rarely uses its dismissal powers. See Zimmerman, The Sequoia Significance: The Role of the Civil False Claim Act's Dismissal Provision in Procurement Reform, 29 Pub. Cont. L. J. 329 (Winter 2000). The government may also settle a private qui tam action over the relator's objections upon a hearing establishing that the proposed settlement is fair, adequate and reasonable under all circumstances. 31 U.S.C.A. § 3730(c)(2)(B). The relator's participation in the qui tam action may be restricted by the court in order to avoid interference with the government's prosecution of the matter or to avoid harassment of the defendant. 31 U.S.C.A. § 3730(c)(2)(C).

[3]31 U.S.C.A. § 3730(d). See also Callahan & Dworkin, Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act, 37 Vill. L. Rev. 273 (1992); Cheh, Constitutional Limitations on Using Civil Remedies to Achieve Criminal Objectives: Understanding and Transcending the Criminal/Civil Law Distinction, 42 Hastings L. J. 1325 (1991); Rudstein, Civil Penalties and Multiple Punishment Under the Double Jeopardy Clause: Some Unanswered Questions, 46 Okla. L. Rev. 587 (1993); Dees & Bouquet, Beyond "Diminished Value": New Challenges in the Law of Civil False Claims Act Damages, 25 Pub. Cont. L. J. 597 (1996).

[4]See Erickson ex rel. U.S. v. American Institute of Biological Sciences, 716 F. Supp. 908, 915 (E.D. Va. 1989) (citing Act of March 2, 1863, ch 67, 12 Stat. 696). See also Theis, Government Employees as Qui Tam Plaintiffs: Subverting the Purposes of the False Claims Act, 28 Pub. Cont. L. J. 225 (Winter 1999) (author provides a well reasoned and concise history in evolution of the Act).

[5]See U. S. ex rel. Marcus v. Hess, 317 U.S. 537, 63, 63 S. Ct. 379, 87 L. Ed. 443 (1943), reh'g denied, 318 U.S. 799, 63 S. Ct. 756, 87 L. Ed. 1163 (1943) (realtor entitled to maintain qui tam action over government's objections that he

tion in the government's possession. This proved to be a significant restriction and qui tam actions declined dramatically from the mid-1940s to 1986. In 1986, Congress once again revisited the FCA and invigorated the Act's qui tam provisions. Among other things, Congress replaced the "government knowledge" jurisdictional bar with a more relaxed "public disclosure" requirement and reduced the statute's scienter requirement.[6] In addition to lowering the bar, Congress also increased the bounty available to qui tam plaintiffs.[7] The 1986 amendments had their intended affect as qui tam actions skyrocketed after 1986.[8]

The "archetypal" qui tam action "is filed by an insider at a private company who discovers his employer has overcharged under a government contract."[9] While this may be true, qui tam actions have by no means been restricted to such classic whistleblower situations. There is a fair amount of controversy over whether government employees may be relators.[10] Inspector general employees have been held not to be per se barred from

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not be allowed to proceed as he received his information not from his own investigation but from a previous criminal indictment).

[6]31 U.S.C.A. § 3730(e)(4)(A) and (B). The court has jurisdiction over qui tam actions based upon allegations that have been publicly disclosed only where the person bringing the action is an original source of the information. The Act was also amended to make it clear that one could prove a violation without establishing that the defendant intended to deceive the government. Less stringent "mental states" such as "deliberate ignorance" or "reckless disregard" were sufficient. 31 U.S.C.A. § 3729(b). The 1986 amendments also extended the statute of limitations and lowered the burden of proof. 31 U.S.C.A. § 3731(b) and (c).

[7]31 U.S.C.A. § 3730(d)(1) and (2). The statutory penalties that could be assessed against FCA defendants were also increased. 31 U.S.C.A. § 3729(a) (civil penalties range from not less than $5,000 and not more than $10,000, plus three times the amount of damages which the Government sustains because of the defendant's actions, subject to reduction in the event the court finds the defendant cooperated with the Government in its investigation of FCA violations).

[8]See Fed. Cont. Rep. (BNA) No. 225, at A-28 (Nov. 23, 1999) (relators have filed nearly 3,000 qui tam actions after Congress amended the Act in 1986). See also Grimaldi & Manos, Pretrial Motions Under the False Claims Act, 29 Pub. Cont. L. J. 693 (Summer 2000) (authors note that the government declines to intervene in about 75% of the cases filed); Gerson, Issues & Developments in Qui Tam Suits, In Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy (1996).

[9]U.S. ex rel. Hopper v. Anton, 91 F.3d 1261, 1266, 111 Ed. Law Rep. 676 (9th Cir. 1996).

[10]See U.S. ex rel. LeBlanc v. Raytheon Co., Inc., 913 F.2d 17, 36 Cont. Cas. Fed. (CCH) ¶ 75936 (1st Cir. 1990), reh'g denied, (Oct. 16, 1990) (while there is no automatic bar to permitting current or former government employees from prosecuting qui tam actions, a former employee could not pursue such a suit based on information learned in the course of his government service); U.S. ex

bringing qui tam actions based upon information obtained during the course of their employment.[11] Moreover, a former state Attorney General was determined to have standing to bring a qui tam action against a contractor on a federally funded highway construction project as the state had conducted an extensive investigation of the contractor's alleged fraudulent practices and had a direct relationship, or interest in, the claims.[12]

In addition to the classic employee relator, two classes of qui tam plaintiffs merit discussion. Labor unions and disappointed bidders have proven to be energetic FCA plaintiffs. Labor unions use the Act to police compliance with Davis-Bacon Act wage requirements.[13] Disappointed bidders have utilized the Act to further their challenges to the award of government contracts to competitors.[14] There are no express prohibitions against unions and bidders from maintaining qui tam actions. Whether these

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rel. Williams v. NEC Corp., 931 F.2d 1493, 37 Cont. Cas. Fed. (CCH) ¶ 76114 (11th Cir. 1991) (government employee entitled to file qui tam action based on information acquired during the course of his employment). See also Theis, Government Employees as Qui Tam Plaintiffs: Subverting the Purposes of the False Claims Act, 28 Pub. Cont. L. J. 225 (Winter 1999). The issue of who is the proper qui tam plaintiff is different from who is entitled to relief under the "whistleblower" provision of the FCA. The whistleblower provision prohibits employers from discriminating against employees who provide information with regard to fraud or corruption to the government. See Neal v. Honeywell, Inc., 826 F. Supp. 266, 39 Cont. Cas. Fed. (CCH) ¶ 76552 (N.D. Ill. 1993), aff'd, 33 F.3d 860, 9 I.E.R. Cas. (BNA) 1500, 129 Lab. Cas. (CCH) ¶ 11219 (7th Cir. 1994). Whistleblower protection is not, however, available to independent contractors. See Hardin v. DuPont Scandinavia (ARA-JET), 731 F. Supp. 1202, 90-2 U.S. Tax Cas. (CCH) ¶ 50499, 66 A.F.T.R.2d 90-5122 (S.D.N.Y. 1990); Vessell v. DPS Associates of Charleston, Inc., 148 F.3d 407, 14 I.E.R. Cas. (BNA) 316, 135 Lab. Cas. (CCH) ¶ 10191 (4th Cir. 1998).

[11]U.S. ex rel. Fine v. MK-Ferguson Co., 861 F. Supp. 1544, 41 Cont. Cas. Fed. (CCH) ¶ 77023 (D.N.M. 1994), aff'd, 99 F.3d 1538, 41 Cont. Cas. Fed. (CCH) ¶ 77024 (10th Cir. 1996).

[12]U.S. ex rel. Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624 (N.D. Ill. 1992).

[13]See U.S. ex rel. Windsor v. DynCorp, Inc., 895 F. Supp. 844, 2 Wage & Hour Cas. 2d (BNA) 1519, 131 Lab. Cas. (CCH) ¶ 33304 (E.D. Va. 1995); U.S. ex rel. Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 40 Cont. Cas. Fed. (CCH) ¶ 76737, 129 Lab. Cas. (CCH) ¶ 33191 (8th Cir. 1995); U.S. ex rel. Plumbers and Steamfitters Local Union No. 38 v. C.W. Roen Const. Co., 183 F.3d 1088, 5 Wage & Hour Cas. 2d (BNA) 808, 138 Lab. Cas. (CCH) ¶ 33916 (9th Cir. 1999), cert. denied, 530 U.S. 1203, 120 S. Ct. 2195, 147 L. Ed. 2d 232, 6 Wage & Hour Cas. 2d (BNA) 160 (2000).

[14]See U.S. ex rel. Alexander v. Dyncorp, Inc., 924 F. Supp. 292 (D.D.C. 1996); U.S. ex rel. Durcholz v. FKW Inc., 997 F. Supp. 1159, 42 Cont. Cas. Fed. (CCH) ¶ 77345 (S.D. Ind. 1998), aff'd, 189 F.3d 542 (7th Cir. 1999); U.S. v. Bald Eagle Realty, 1 F. Supp. 2d 1311 (D. Utah 1998).

plaintiffs are successful depends, in large measure, upon not only the actual support for their allegations, but whether they are deemed to be "original sources" for purposes of the FCA.[15]

§ 8:74 —Criminalizing the payment process: Criminal False Claims Act

The criminal False Claims Act reads as follows:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than

[15]See U.S. ex rel. Alexander v. Dyncorp, Inc., 924 F. Supp. 292 (D.D.C. 1996) (unsuccessful bidder relator alleging that defendant fraudulently failed to disclose that it had been convicted of bid rigging was not an original source because, "[i]n order to confirm that Dyncorp was convicted of bid rigging, [that] Dyncorp was found to have filed false claims by the Army, or that Dyncorp was unable to complete the 1993 contract at the bid price, plaintiff would necessarily have checked court records, Army hearing records, and DOJ records."); U.S. ex rel. Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 703-04, 40 Cont. Cas. Fed. (CCH) ¶ 76737, 129 Lab. Cas. (CCH) ¶ 33191 (8th Cir. 1995) ("[A] qui tam relator must have both independent and direct knowledge of the alleged fraudulent activity in order to satisfy the subject matter jurisdictional requirement . . . [both union and former employee had knowledge 'independent' of public disclosures and therefore inquiry was whether the knowledge was direct] . . . Here, the district court correctly concluded that the Union did not have original source standing because [union representative] did not have direct knowledge of Ridgedale's alleged fraud against the government. . . . [union representative] 'was, in effect, simply gathering information on behalf of the Union . . . [and] [a]s such, he was a recipient of information and not a direct source.'" Moreover, the former employee was not deemed an original source because he did not "voluntarily provide" the information regarding his employer's alleged fraud to the government prior to filing suit as required by the Act.). For a helpful article on the "public disclosure" and "original source" requirements of the FCA, see Grimaldi and Manos, Pretrial Motions Under the False Claims Act, 29 Pub. Cont. L. J. 693 (Summer 2000). There are also a number of articles discussing a number of constitutional issues raised by the qui tam provisions of the FCA. See memorandum from Barr, Assistant Attorney General, Office of Legal Counsel to Dick Thornburgh, Attorney General, Constitutionality of the Qui Tam Provisions of the False Claims Act, reprinted in Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy App. 188-95 (National Legal Center for Public Interest, 1996); Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 Hastings L. J. 1325 (1991); Adlestein, Corporation's Right to a Jury Trial Under the Sixth Amendment, 27 U.C. Davis L. Rev. 375 (1994); Peloso & Sarnoff, Double Jeopardy and SEC Proceedings, 212 N.Y.L.J. 3 (1994); Arkin, Double Jeopardy and Sentences for Acquitted Conduct, 210 N.Y.L.J. 3 (1993); Rudstein, Civil Penalties and Multiple Punishment Under the Double Jeopardy Clause: Some Unanswered Questions, 46 Okla. L. Rev. 587 (1993).

five years and shall be subject to a fine in the amount provided in this title.[1]

Section 286 of the Act makes it a crime to enter into any agreement, combination, or conspiracy to defraud the United States by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim.[2] It is not uncommon for the conspiracy statute to be employed in connection with a false claims prosecution where more than one defendant is involved.[3]

[Section 8:74]

[1]18 U.S.C.A. § 287. The maximum criminal penalty for making or presenting any claim upon or against the United States relating to a contract with the Department of Defense, knowing such claim to be false, fictitious, or fraudulent, is $1,000,000. Pub. L. 99-145, Title IX, § 931, Nov. 8, 1985, 99 Stat. 699. Another criminal statute that is often invoked in connection with a False Claims Act violation is the mail fraud statute, 18 U.S.C.A. § 1341. See U. S. v. Blecker, 657 F.2d 629, 29 Cont. Cas. Fed. (CCH) ¶ 81838 (4th Cir. 1981) (government contractor and its president convicted on six counts of presenting false claims [invoices] in violation of 18 U.S.C.A. § 287 and corporate defendant convicted on two counts of mail fraud in violation of 18 U.S.C.A. § 1341). Another criminal statute that can come into play in these situations is the criminal False Statements Act, 18 U.S.C.A. § 1001. This Act makes it a crime to knowingly and willfully: (1) falsify, conceal or cover up material facts; (2) make a false, fictitious or fraudulent statement or representation; or (3) use a false writing or document, knowing the same to be false, fictitious or fraudulent, to influence government action. See U.S. v. Parsons, 967 F.2d 452, 92-2 U.S. Tax Cas. (CCH) ¶ 50442, 70 A.F.T.R.2d 92-5123 (10th Cir. 1992); U.S. v. Norris, 749 F.2d 1116 (4th Cir. 1984) (abrogation on other grounds recognized by, U.S. ex rel. Berge v. Board of Trustees of the University of Alabama, 104 F.3d 1453, 115 Ed. Law Rep. 344, 41 U.S.P.Q.2d (BNA) 1481 (4th Cir. 1997)); U.S. v. Langer, 962 F.2d 592, 38 Cont. Cas. Fed. (CCH) ¶ 76318 (7th Cir. 1992) (false statement in first article test report); U.S. v. Anderson, 879 F.2d 369, 28 Fed. R. Evid. Serv. 578 (8th Cir. 1989), reh'g denied, (Aug. 10, 1989) and reh'g denied, (Aug. 11, 1989) and reh'g denied, (Aug. 14, 1989) and reh'g denied, (Aug. 24, 1989) and reh'g denied, (Aug. 30, 1989) and reh'g denied, (Oct. 12, 1989) (false statement regarding participation in § 8(a) program). A scienter requirement of the False Statements Act has been deemed to be satisfied upon a reckless indifference standard. See U. S. v. Dothard, 666 F.2d 498, 9 Fed. R. Evid. Serv. 1159 (11th Cir. 1982); U.S. v. Tamargo, 637 F.2d 346 (5th Cir. 1981); U.S. v. Puente, 982 F.2d 156, 38 Cont. Cas. Fed. (CCH) ¶ 76533 (5th Cir. 1993) (defendant deliberately failed to read certification form he signed). This Act has been employed to criminally prosecute government contractors for submitting false invoices. See U.S. v. Gibson, 881 F.2d 318 (6th Cir. 1989); U.S. v. White, 765 F.2d 1469, 33 Cont. Cas. Fed. (CCH) ¶ 73741 (11th Cir. 1985); U.S. v. Brack, 747 F.2d 1142 (7th Cir. 1984).

[2]18 U.S.C.A. § 286.

[3]See U.S. v. Upton, 91 F.3d 677, 41 Cont. Cas. Fed. (CCH) ¶ 76965 (5th Cir. 1996) (defendants convicted of conspiring to defraud the government, in violation of 18 U.S.C.A. § 286, submitting false claims in violation of 18 U.S.C.A. §

For purposes of calculating what is an actionable "claim" under the Act, it has been held that each progress estimate was a separate claim for statute of limitations purposes.[4] To justify a conviction under the criminal False Claims Act, the government must establish that the defendant knew the claims were false at the time they were made.[5] It is not necessary, however, for the government to establish an intent to defraud or deceive.[6] There is a fine line between knowing that a claim is false and intending to deceive or defraud the government. Moreover, it has been held that a claim or statement may be false even though it contains no untrue information or entries if, within the totality of the circumstances, the demand is not valid.[7]

§ 8:75 ——Is materiality an element of criminal FCA?

One of the more controversial issues regarding the criminal False Claims Act is whether materiality is an element of the crime. Unlike the False Statements Act, which expressly makes materiality an element of the offense, § 287 is silent on this point. This has led some courts to conclude that materiality is

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287 and making false statements in violation of 18 U.S.C.A. §§ 1001 and 1002, in connection with a fraudulent, private surety scheme).

[4]U.S. v. Benjamin, 995 F.2d 19 (3d Cir. 1993) (second pay estimate, which contained essentially the same information as the first pay estimate, was nevertheless considered a second claim for purposes of the Act). See also U.S. v. J.R. Watkins Co., 16 F.R.D. 229 (D. Minn. 1954) (corporation and its president were charged under 18 U.S.C.A. § 1001 for filing an amended report in which they knowingly misrepresented that certain alcohol was being used in the manufacture of liniment for external uses only. In fact, the defendants had knowledge that some of the alcohol would be used in the manufacture of linament for internal use. Although the amended report provided no more information in regard to the use of the liniment than did the original report (prosecution for which the statute of limitations had run), the court held that the amended report, nevertheless, constituted a false claim within the meaning of the relevant statute.).

[5]See U.S. v. Barker, 967 F.2d 1275 (9th Cir. 1991) (defendant, a civil engineer with the Bechtel Corporation working on the Alaska pipeline, was improperly convicted of False Claims Act violations as the evidence failed to establish the defendant's state of mind and the documentary evidence was inconclusive at best); Morissette v. U.S., 342 U.S. 246, 270-71, 72 S. Ct. 240, 253-54, 96 L. Ed. 288 (1952).

[6]See U. S. v. Milton, 602 F.2d 231 (9th Cir. 1979). But see U. S. v. Miller, 545 F.2d 1204, 76-2 U.S. Tax Cas. (CCH) ¶ 9809, 39 A.F.T.R.2d 77-364 (9th Cir. 1976) (the offenses of tax evasion, mail fraud, involving false tax returns, and filing false claims against the United States require an intent to evade taxes or an otherwise legal obligation, which is the equivalent of an intent to defraud the government).

[7]See Dimmick v. U.S., 116 F. 825 (C.C.A. 9th Cir. 1902). See also U.S. v. Downey, 257 F. 366 (D.R.I. 1919).

not an element of a criminal false claims violation.[1] The courts that find that materiality is not an element of a § 287 offense generally look to the plain language of the statute:

> In making our determination of whether materiality is an element of § 287, we look to the plain language of the statute. . . . The plain language of this provision in no way suggests that materiality is an element of the offense. "When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." The plain language of a statute must be followed unless the language is "so bizarre that Congress could not have intended it." We therefore agree with our sister circuits' . . . and hold that materiality is not an element of 18 U.S.C. § 287.[2]

The pendulum with regard to the materiality issue has probably swung in favor of finding that no such element exists to establish a criminal false claims violation. The United States Supreme Court in *United States v. Wells*[3] held that materiality was not an element of 18 U.S.C.A. § 1014, making it a crime to submit false statements for the purpose of influencing a federally insured banking institution. Courts considering whether materiality is an element of § 287 have noted the relevance of *Wells*.[4] The United States Court of Appeals for the Sixth Circuit's analysis is typical:

> Whether materiality is an element of 18 U.S.C. § 287 is an issue of

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[Section 8:75]

[1]See U.S. v. Taylor, 66 F.3d 254 (9th Cir. 1995) (holding that while 18 U.S.C.A. § 1001 [False Statements Act] expressly makes materiality an element of the offense, 18 U.S.C.A. § 287 [False Claims Act] does not and *Gaudin* [Supreme Court case requiring the issue of materiality under § 1001 to be submitted to the jury] does not apply to a § 287 conviction).

[2]U.S. v. Upton, 91 F.3d 677, 685, 41 Cont. Cas. Fed. (CCH) ¶ 76965 (5th Cir. 1996) (quoting Demarest v. Manspeaker, 498 U.S. 184, 190, 111 S. Ct. 599, 604, 112 L. Ed. 2d 608 (1991)) (citations omitted). See also U.S. v. Parsons, 967 F.2d 452, 92-2 U.S. Tax Cas. (CCH) ¶ 50442, 70 A.F.T.R.2d 92-5123 (10th Cir. 1992) (holding that materiality is not an element required by § 287); U.S. v. Elkin, 731 F.2d 1005 (2d Cir. 1984) (abrogation on other grounds recognized by, U.S. v. Ali, 68 F.3d 1468 (2d Cir. 1995)) (same; abrogation was with respect to court's view that materiality not an element of § 1001); and U.S. v. Fordham, 225 F.3d 647, 2000 WL 1160489 (2d Cir. 2000) (unreported; citing *Elkin*: "We note that it is doubtful that materiality is even an element of § 287."). But see U. S. v. Snider, 502 F.2d 645, 74-2 U.S. Tax Cas. (CCH) ¶ 9548, 74-2 U.S. Tax Cas. (CCH) ¶ 9620, 34 A.F.T.R.2d 74-5388, 34 A.F.T.R.2d 74-5601, 27 A.L.R. Fed. 885 (4th Cir. 1974) (materiality is an essential element of a § 287 charge); U.S. v. Pruitt, 702 F.2d 152, 12 Fed. R. Evid. Serv. 1249 (8th Cir. 1983) (question of materiality an essential element of § 287).

[3]U.S. v. Wells, 519 U.S. 482, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997).

[4]See U.S. v. Upton, 91 F.3d 677, 685, 41 Cont. Cas. Fed. (CCH) ¶ 76965 (5th Cir. 1996).

first impression in this circuit. Four other circuits have held that materiality is not an element of § 287. On the other hand, two circuits have held that it is. First, in determining whether materiality is an element of § 287, we look to the plain language of the statute. . . . As can be seen, the plain language of the statute neither mentions "materiality" nor in any way implies that the claim must be material. . . . The Supreme Court has recently held [*Wells* decision] that materiality is not an element of another statute criminalizing false statements, 18 U.S.C. § 1014, based upon the statute's omission of the term "material."

Second, Congress expressly included "materiality" as a requirement in many of the statutes criminalizing false statements. The Supreme Court has said that we are to assume that Congress intended each of its terms to have meaning and should hesitate to treat statutory terms as surplusage. Reading materiality into a statute such as § 287 where the term does not exist would therefore make surplusage of Congress's use of the term in other statutes, such at § 1001.

Third, the legislative history of § 287 does not indicate that Congress intended to make materiality a necessary element of the statute. Finally, a requirement of materiality would set up an incongruous "heads I win, tails you lose" dichotomy. Nash [defendant] is in effect arguing that his inartful attempt to defraud the government would not have fooled the IRS, thus making his false claims "immaterial." To permit such a defense would reward the taxpayer with an ill-gotten refund if his scheme worked, yet allow him to claim immateriality if he got caught. The taxpayer cannot have it both ways, and there is no justification in allowing him to do so. For all of the above reasons, we join the second, fifth, ninth, and tenth circuits in holding that materiality is not an element of 18 U.S.C.A. § 287.[5]

Without materiality as an element, is it possible for the government to impose criminal penalties for relatively trivial conduct? Say, for example, that I submit a form to a federally insured institution and purposefully put in a birthdate that makes me 10 years younger than my actual age. Does my vanity subject me to five years imprisonment? The Supreme Court dismissed this concern in connection with 18 U.S.C.A. § 1014 on the grounds that it would be "relatively rare that the Government will be able to prove that a false statement was made with the subjective intent of influencing a decision unless it could first prove that the

[5]U.S. v. Nash, 175 F.3d 429, 433-34, 83 A.F.T.R.2d 99-2129, 1999 FED App. 157P (6th Cir. 1999), cert. denied, 528 U.S. 888, 120 S. Ct. 210, 145 L. Ed. 2d 176 (1999).

statement has a natural tendency to influence the decision."[6] The criminal False Claims Act, however, contains no language with regard to the purpose or intent behind the making of the false claim. The only requirement expressly stated is that the claim be false and that the defendant know it to be so.[7] This leads to the incongruous situation where a violation of the criminal False Claims Act is easier to establish (at least with respect to materiality) than a violation of the civil False Claims Act. The civil False Claims Act expressly states that liability attaches for a person who knowingly presents or causes to be presented a false claim with purpose of getting it paid.[8]

§ 8:76 ——State false claims statutes

A number of states and the District of Columbia have determined that fraud, waste and abuse in their contracting processes was of sufficient concern to warrant enacting false claims legislation.[1] California was the first state to enact a False Claims Act.[2] It did so in 1987.[3] The California statute, like all of the state FCA acts, is closely modeled on the federal statute.[4] There are some differences, however, between the federal and California acts. There is no minimum penalty set forth in the California

[6]U.S. v. Wells, 519 U.S. 482, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997). As a consequence, the Supreme Court noted that "the literal reading of the statute will not normally take the scope of section 1014 beyond the limit that a materiality requirement would impose." U.S. v. Wells, 519 U.S. 482, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997). If unbeknownst to me, younger borrowers are more highly favored by the federal lending institution, does lying about my age have a natural tendency to influence the government's decision? Does my incarceration hinge upon lending criteria of which I know nothing?

[7]18 U.S.C.A. § 287.

[8]31 U.S.C.A. § 3729(a)(1). See also Anderson, The False Claims Act: Is Materiality Required?, 33 The Procurement Lawyer 6, 7 & 26 (Fall 1997).

[Section 8:76]

[1]See Shirk, District of Columbia False Claims Act—A Comparison to the Federal Statute, 32 The Procurement Lawyer 1 (Spring 1997) (author discusses the reasons behind the District of Columbia's enactment of a False Claims Act and compares it to the federal statute).

[2]Cal. Gov. Code §§ 12650-12655.

[3]1987 Cal. Stat. 1420.

[4]See Taylor & Taugher, The California False Claims Act, 25 Pub. Cont. L. J. 315, 317 (Winter 1996) ("The state act hardly operates in a vacuum, however. Closely modeled on the federal act, state litigators have looked to federal case law for guidance when language or provisions are similar. That to date this approach has been accepted by trial courts should not be a surprise because California courts often rely on federal court decisions in interpreting parallel legislative acts.").

Act. Instead, the statutory penalty under the state act for each false claim violation is "up to $10,000."[5] The federal act, by contrast, contains a minimum penalty of $5,000.[6] The California Act's qui tam recovery provisions are potentially more lucrative for a qui tam plaintiff. It is possible for a qui tam plaintiff to receive up to 50% of any recovery, in addition to costs and fees.[7] Under the federal Act a qui tam plaintiff may not receive more than 30% of the proceeds of the action or settlement.[8] The California Act is also quite generous with regard to a qui tam plaintiff's entitlement to costs. Under the Act, a qui tam plaintiff shall receive "an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable costs and attorneys' fees."[9] This language permits private citizens to be paid for their investigation costs in addition to litigation expense.

The District of Columbia's Act closely parallels the federal statute. But like the California Act there are subtle but potentially significant differences. Many of the differences are in the form of express clarifications of issues that have caused a fair amount of dispute under the federal act. For example, the District's law clearly spells out when District employees may bring qui tam actions.[10] The Act also clearly states that it is prospective in application.[11]

Because state false claim acts have been in existence for only a relatively short time, very little case law has developed in connection with them. In all likelihood, given that they are closely patterned on the federal act, federal case law will be influential in how these acts are interpreted and employed to police public procurement. It is only a matter of time before public procurement in such jurisdictions as Illinois, California, Hawaii, and the District of Columbia, as well as other jurisdictions enacting false claim statutes, will become as risky for contractors who are not

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[5]Cal. Gov. Code § 12651(a)(1).

[6]31 U.S.C.A. § 3729(a).

[7]Cal. Gov. Code § 12652(g)(3).

[8]31 U.S.C.A. § 3730(d).

[9]Cal. Gov. Code § 12652(g)(8).

[10]D.C. Code Ann. § 1-1188.9(c)(5).

[11]See Shirk, District of Columbia False Claims Act—A Comparison to the Federal Statute, 32 The Procurement Lawyer 1, 34-36 (Spring 1997) (author discusses the District's retroactivity provision in the context of the uncertainty surrounding the issue under the federal act).

careful about how they transact business with public entities, as has been the situation for some time in the federal arena.[12]

§ 8:77 Federal sovereign immunity: Tucker Act and Contract Disputes Act

The doctrine of sovereign immunity developed from the ancient maxim *rex non potest peccar*—"the King can do no wrong."[1] The doctrine's classic expression in American law was offered by Justice Oliver Wendell Holmes, Jr. in *Kawananakoa v. Polyblank*,[2] "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[3]

If the sovereign was to be sued, one had to obtain its permission. Permission first came with respect to contract claims. In 1855, Congress established the former U.S. Court of Claims. This court had jurisdiction over contract claims against the United States based upon the Constitution and federal statutes and regulations.[4] In 1887, the Tucker Act gave the U.S. district courts authorization to receive certain contractual claims against the United

[12]Illinois' False Claims Act is codified at 740 Ill. Comp. Stat. Ann. 175/3. It is closely modeled on the federal act. Hawaii's False Claim Act is codified at Haw. Rev. Stat. § 61-21. It too is closely modeled on the federal act.

[Section 8:77]

[1]See 1 William Blackstone, Commentaries 246 ("The king, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing.").

[2]Kawananakoa v. Polyblank, 205 U.S. 349, 353, 27 S. Ct. 526, 527, 51 L. Ed. 834 (1907).

[3]Kawananakoa v. Polyblank, 205 U.S. 349, 353, 27 S. Ct. 526, 527, 51 L. Ed. 834 (1907).

[4]See Lavenue, Survey of Government Contract Cases in the United States Court of Appeals for the Federal Circuit: 1997 in Review, 47 Am. U. L. Rev. 1393, 1498 (1998). This court has evolved over the years and its current manifestation, the U.S. Court of Federal Claims, has been subject to criticism over gaps in jurisdiction. See also Bruggink, A Modest Proposal, 28 Pub. Cont. L. J. 529, 533-35 (1999). (The "court of last resort for virtually all matters involving government contracts" is the U.S. Court of Appeals for the Federal Circuit. This court shapes much of the law with respect to rights and responsibilities of contractors doing business with the federal government.) See also Plager, The United States Courts of Appeals, The Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model, 39 Am. U. L. Rev. 853 (1990) (interesting commentary on the U.S. Court of Appeals for the Federal Circuit's role in the federal court system).

Whistle Blower Matters:

Under the provisions of Section 4-61dd of the General Statutes, known as the Whistle Blower Act, we receive complaints from any person having knowledge of any matter involving corruption, unethical practices, violations of State laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any State department or agency or quasi public agency. Section 4-61dd also applies to large State contracts. We investigate such matters and report our findings and recommendations to the Attorney General. At the request of the Attorney General or on our own initiative, we assist in any continuing investigation. During the fiscal year ended June 30, 2003, we received 99 complaints covering such matters as misuse of grant money, harassment, conflicts of interest and various fee collection problems.

As required by the aforementioned Section 4-61dd, an annual report on such matters was prepared as of August 29, 2003, and filed with the clerks of the House and Senate. By law, the identity of the complainant cannot be disclosed, but the general nature of each complaint is available in our Office.

In addition to the confidentiality of the complainant, the records of any investigation of whistle blower matters are considered exempt records and do not require disclosure under the Freedom of Information statutes. This exemption aids our investigation of complaints and permits the extension of anonymity to others providing information on the matter.

The following is a summary of those complaints received during the 2002-2003 fiscal year and the action taken thereon, updated to December 31, 2003.

Whistle Blower Matters Received Agency/Subject	Date	Date Reported To Attorney General
Administrative Services:		
Alleged Bidding and Contract Irregularities	09/11/02	12/18/02
Auditors of Public Accounts:		
Exam Results	07/17/02	07/29/02
Board of Education and Services for the Blind:		
Retaliation of Employees	01/07/03	05/05/03
Misuse of Funds	03/27/03	04/25/03
Coca Cola Contract	04/08/03	04/22/03
Industries Equipment	04/03/03	05/14/03
Capital Community College:		
Payroll Distribution	11/21/02	02/24/03

Whistle Blower Matters Received Agency/Subject	Date	Date Reported To Attorney General
Children and Families:		
Connecticut Juvenile Training School	07/17/02	07/29/02
Long Lane School	07/17/02	07/29/02
Riverview Hospital	08/01/02	08/05/02
Complaints Against Supervisor	09/19/02	04/22/03
Complaint about Non-Profit	10/25/02	*
Alleged Misuse of State Equipment for Political Purposes	11/01/02	11/12/02
Connecticut Children's Place	11/06/02	12/04/02
Alleged Failure to Protect a Parent's Children	12/18/02	02/11/03
Bidding Irregularities	01/10/03	02/06/03
Misuse of State Computer	01/27/03	04/04/03
Child Custody	01/30/03	03/05/03
Commission on Human Rights and Opportunities:		
Inadequate Investigation	02/13/03	03/05/03
Connecticut State University:		
Time and Attendance	02/06/03	03/17/03
Corrections:		
Release of Confidential Information	07/05/02	08/30/02
Altered Reports	07/01/02	08/05/02
Industries Program	04/30/03	*
Misuse of Time and Services MacDougall Industries	06/01/03	*
Consumer Protection:		
Reckless Driving With a State Vehicle	07/15/02	10/11/02
Consumer Complaint	08/26/02	11/21/02
Economic and Community Development:		
Alleged Ineffective Monitoring of Grants Funds ***	06/23/03	12/31/03
Education Department:		
Attendance Matters	02/26/03	04/30/03
Cooperative Education Service	01/30/03	03/10/03
Unaccounted Monies from Candy Sales	06/05/03	08/01/03

Whistle Blower Matters Received Agency/Subject	Date	Date Reported To Attorney General
Environmental Protection:		
False Report	08/05/02	10/02/02
Retaliation	09/27/02	11/12/02
Alleged Misuse of State Funds	03/27/03	05/09/03
Favoring One Contractor	05/08/03	06/20/03
Grants Funds Used by the Town of West Haven**	05/27/03	07/11/03
Alleged Ineffective Monitoring of Grants Funds ***	06/23/03	12/31/03
Judicial Department:		
State Marshals Payroll	12/12/02	02/24/03
Alleged Mishandling of a Client's Account	05/07/03	06/30/03
Hidden Assets	05/12/03	*
Computer Access	06/12/03	07/02/03
Labor:		
Alleged Inappropriate Use of Funds	08/07/02	08/26/02
Alleged Mishandling of a Client's Account	03/10/03	03/19/03
Work Hours	04/24/03	06/11/03
Questionable Use of State Vehicles	05/08/03	10/22/03
Legislative Management:		
Alleged Bid Irregularities	08/27/02	10/16/02
Rehiring Practices	01/07/03	03/05/03
Improper Hiring	04/03/03	05/05/03
Computer Use	04/21/03	08/11/03
Mental Health and Addiction Services:		
Alleged Retaliation Against a DMHAS Employee	07/09/02	07/17/02
Comp Time Fraud	08/06/02	12/27/02
Patient Mistreatment	08/13/02	12/18/02
Inadequate Investigation of a Complaint	09/20/02	12/27/02
Possible Retaliation	08/30/02	09/11/02
Grant Reporting by a Non-Profit	02/14/03	06/20/03
Treatment and Billing Issues Involving a Non-Profit	06/18/03	*
Connecticut Woman's Consortium of New Haven	06/24/03	10/30/03
Large State Contract	06/30/03	07/07/03

Whistle Blower Matters Received Agency/Subject	Date	Date Reported To Attorney General
Mental Retardation:		
Camp Harkness	09/06/02	06/18/03
Miscellaneous Complaint	08/06/02	05/05/03
Military Department:		
Personnel Issues	11/07/02	02/11/03
Personnel Issues	02/19/03	05/07/03
Personnel Issues	04/14/03	11/26/03
Personnel Issues	06/23/03	11/14/03
Office of Policy and Management:		
Grants Funds Used by the Town of West Haven**	05/27/03	07/11/03
Public Health:		
Inadequate Investigation of a Complaint	04/02/03	04/25/03
Public Works:		
Building Conditions	08/08/02	09/25/02
Security Guards on the Norwich Hospital Grounds	01/09/03	04/10/03
Public Safety:		
Misuse of Funds	03/26/03	04/21/03
Revenue Services:		
Alleged Acceptance of Gifts by an Employee	03/07/03	04/25/03
Improper Collection of Sales Tax	03/12/03	06/11/03
Secretary of the State:		
Alleged Non-State Business Conducted in the Workplace	06/20/03	12/19/03
State Marshal Commission:		
Failure to Act on a Complaint	07/29/02	12/04/02
Social Services:		
Alleged Attendance Fraud	07/30/02	08/30/02
Yale New Haven Hospital	02/24/03	03/19/03
Contractor ECHN	05/06/03	07/02/03
Unfair Audit Practices	05/27/03	09/24/03

Whistle Blower Matters Received Agency/Subject	Date	Date Reported To Attorney General
Southern Connecticut State University:		
Delay in Refunding Tuition Overpayment	10/03/02	11/13/02
Special Revenue:		
Release of Confidential Information	09/11/02	09/19/02
Attendance Matters	12/19/02	03/05/03
Transportation:		
Alleged Theft by DOT Employee	07/15/02	10/11/02
I-95 Service Facility, No Water	07/30/02	09/04/02
Perjury	01/29/03	03/05/03
Construction Project Route 4 Cornwall	06/18/03	06/20/03
Treasurer's Office:		
Alleged Failure to Act on a Violence in the Workplace Complaint	07/02/02	07/22/02
Tunxis Community College:		
Alleged Bid Irregularities	08/19/02	02/24/03
University of Connecticut:		
Misconduct and Financial Allegations	10/04/02	*
Volume of Overnight and Priority Mailings	02/14/03	04/11/03
Owner Controlled Insurance Program	04/28/03	12/12/03
University of Connecticut Health Center:		
Questionable Hiring	11/12/02	03/26/03
Director of the Cancer Center	11/13/02	03/05/03
Leave Accruals and Payroll Issues	12/13/02	02/06/03
Mandated Reporting	01/27/03	03/05/03
Alleged Waste of Funds	03/12/03	*
Grant Billings	06/05/03	*
Various State Agencies:		
DAYTOP Treatment Facility	10/08/02	03/12/03
Prescription Drug Pricing, Benefit Manager, Group Purchases Organizations	10/28/02	11/22/02

Veterans Affairs:		
Client's Estate	09/23/02	12/27/02
Alleged Misuse of a State Computer and a Cell Phone	11/08/02	01/06/03
Alleged Misuse of a State Computer	05/16/03	11/24/03
Western Connecticut State University:		
Student Financial Aid	11/05/02	04/21/03
Assistance to Students	03/14/03	07/16/03

* Matters currently under review
** 03-88 Whistle Blower against two agencies DEP & OPM
*** 03-95 Whistle Blower against two agencies DEP & DECD

Generally Accepted Government Auditing Standards (GAGAS):

An audit consists of a review and examination of records, documents and financial statements and the collection of information needed to certify to the fairness of presentations in financial reports and compliance with statutory requirements and regulations and to evaluate management's efficiency and effectiveness in carrying out responsibilities. Standards have been set by national organizations for the conduct of audits and for the preparation and issuance of audit reports. Generally Accepted Government Auditing Standards (GAGAS) are auditing standards established by the United States General Accounting Office (GAO) that are codified into a publication entitled "Government Auditing Standards," which is more commonly referred to as "the Yellow Book."

Although the standards prepared by GAO are only required in connection with entities supported by or receiving Federal assistance, they are so comprehensive that their application to all governmental audits is generally encouraged. Because the Auditors of Public Accounts in the State of Connecticut function in many respects as the GAO in the Federal Government, we have chosen to accept and follow "Government Auditing Standards" in the performance of virtually all of our audit work.

Following GAGAS has had a significant impact on our operations. Continuing education for our professional staff, periodic external quality control review assessments (peer reviews) and compliance with recent Statements on Auditing Standards (SAS) issued by the American Institute of Certified Public Accountants (AICPA) require constant attention, updating of policies and procedures, and monitoring.

Continuing Education:

With respect to continuing education, auditors responsible for planning, directing, conducting, or reporting on government audits must complete, every two years, at least 80 hours of appropriate continuing education and training, with at least 24 of the 80 hours in subjects directly related to the government environment and government auditing. Accordingly, we have

of human rights and opportunities commission rather than with affirmative action "guidelines" of administrative department; P.A. 88-116 deleted obsolete reference to Sec. 4-61v; P.A. 96-168 changed reference to "upward" to "career mobility", effective July 1, 1996.

Secs. 4-61x to 4-61z. Reserved for future use.

Sec. 4-61aa. Committee to encourage employment by state of persons with disabilities. (a) There is established a committee to encourage the employment by the state of persons with disabilities. The Commissioner of Administrative Services shall appoint the members of the committee, which shall be chaired by such commissioner or his designee, and include one representative of each of the following:

(1) The Board of Education and Services to the Blind;

(2) The Commission on the Deaf and Hearing Impaired;

(3) The Bureau of Rehabilitative Services;

(4) The Office of Protection and Advocacy for Persons with Disabilities;

(5) The Department of Mental Health and Addiction Services;

(6) The Department of Mental Retardation; and

(7) The Labor Department.

(b) The committee shall:

(1) Advise, and develop written guidelines for, the Commissioner of Administrative Services and the executive heads of other state agencies regarding the adaptation of employment examinations and alternative hiring processes for, and the reasonable accommodation of, persons with disabilities; and

(2) Review the program established under subsection (b) of section 4-61u and compliance with the provisions of section 46a-70 concerning persons with physical disabilities.

(P.A. 98-205, S. 4.)

Secs. 4-61bb and 4-61cc. Reserved for future use.

Sec. 4-61dd. Whistleblowing. Disclosure of information to Auditors of Public Accounts. Investigation by Attorney General. Proceedings re alleged retaliatory personnel actions. Report to General Assembly. Large state contractors. (a) Any person having knowledge of any matter involving corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department or agency or any quasi-public agency, as defined in section 1-120, or any person having knowledge of any matter involving corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in any large state contract, may transmit all facts and information in his possession concerning such matter to the Auditors of Public Accounts. The Auditors of Public Accounts shall review such matter and report their findings and any recommendations to the Attorney General. Upon receiving such a report, the Attorney General shall make such investigation as he deems proper. At the request of the Attorney General or on their own initiative, the auditors shall assist in the investigation. The Attorney General shall have power to

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report his findings to the Governor, or in matters involving criminal activity, to
chief State's Attorney. The Auditors of Public Accounts and the Attorney General
not, after receipt of any information from a person under the provisions of this
disclose the identity of such person without his consent unless the Auditors of
Accounts or the Attorney General determine that such disclosure is unavoidable
the course of the investigation.

(1) No state officer or employee, as defined in section 4-141, no quasi-public
y officer or employee, no officer or employee of a large state contractor and no
nting authority shall take or threaten to take any personnel action against any state
asi-public agency employee or any employee of a large state contractor in retaliation
such employee's disclosure of information to the Auditors of Public Accounts or
ttorney General under the provisions of subsection (a) of this section.

If a state or quasi-public agency employee or an employee of a large state con-
or alleges that a personnel action has been threatened or taken in retaliation for such
oyee's disclosure of information to the Auditors of Public Accounts or the Attorney
ral under the provisions of subsection (a) of this section, the employee may notify
Attorney General, who shall investigate pursuant to subsection (a) of this section.
the conclusion of such investigation, the Attorney General, the employee or the
oyee's attorney may file a complaint concerning such personnel action with the
f Human Rights Referee designated under section 46a-57. The Chief Human Rights
ee shall assign the complaint to a human rights referee appointed under said section
57, who shall conduct a hearing and issue a decision concerning whether the officer
ployee taking or threatening to take the personnel action violated any provision
is section. If the human rights referee finds such a violation, the referee may award
aggrieved employee reinstatement to the employee's former position, back pay and
establishment of any employee benefits to which the employee would otherwise have
eligible if such violation had not occurred, reasonable attorneys' fees, and any
damages. For the purposes of this subsection, such human rights referee shall act
independent hearing officer. The decision of a human rights referee under this
section may be appealed by any person who was a party at such hearing, in accordance
the provisions of section 4-183.

The Chief Human Rights Referee shall adopt regulations, in accordance with
provisions of chapter 54, establishing the procedure for filing complaints and notic-
and conducting hearings under subdivision (2) of this subsection.

As an alternative to the provisions of subdivisions (2) and (3) of this subsection
a state or quasi-public agency employee who alleges that a personnel action has
threatened or taken may file an appeal within thirty days of knowledge of the
ecific incident giving rise to such claim with the Employees' Review Board under
ion 5-202, or, in the case of a state or quasi-public agency employee covered by a
ective bargaining contract, in accordance with the procedure provided by such con-
t, or (B) an employee of a large state contractor alleging that such action has been
atened or taken may, after exhausting all available administrative remedies, bring
il action in accordance with the provisions of subsection (c) of section 31-51m.

In any proceeding under subdivision (2), (3) or (4) of this subsection concerning
sonnel action taken or threatened against any state or quasi-public agency employee

or any employee of a large state contractor, which personnel action occurs within year after the employee first transmits facts and information concerning a matter subsection (a) of this section to the Auditors of Public Accounts or the Attorney Gen there shall be a rebuttable presumption that the personnel action is in retaliation for action taken by the employee under subsection (a) of this section.

(c) Any employee of a state or quasi-public agency or large state contractor is found to have knowingly and maliciously made false charges under subsection this section shall be subject to disciplinary action by his appointing authority up including dismissal. In the case of a state or quasi-public agency employee, such shall be subject to appeal to the Employees' Review Board in accordance with 5-202, or in the case of state or quasi-public agency employees included in coll bargaining contracts, the procedure provided by such contracts.

(d) On or before September first, annually, the Auditors of Public Accounts submit to the clerk of each house of the General Assembly a report indicating the num of matters for which facts and information were transmitted to the auditors pursu this section during the preceding state fiscal year and the disposition of each such ma

(e) Each contract between a state or quasi-public agency and a large state cont shall provide that, if an officer, employee or appointing authority of a large state cont tor takes or threatens to take any personnel action against any employee of the contra in retaliation for such employee's disclosure of information to the Auditors of Pu Accounts or the Attorney General under the provisions of subsection (a) of this sect the contractor shall be liable for a civil penalty of not more than five thousand dol for each offense, up to a maximum of twenty per cent of the value of the contract. Eac violation shall be a separate and distinct offense and in the case of a continuing violat each calendar day's continuance of the violation shall be deemed to be a separate distinct offense. The executive head of the state or quasi-public agency may request Attorney General to bring a civil action in the superior court for the judicial distric Hartford to seek imposition and recovery of such civil penalty.

(f) Each large state contractor shall post a notice of the provisions of this sect relating to large state contractors in a conspicuous place which is readily available viewing by the employees of the contractor.

(g) As used in this section:

(1) "Large state contract" means a contract between an entity and a state or quas public agency, having a value of five million dollars or more, except for a contract the construction, alteration or repair of any public building or public work; and

(2) "Large state contractor" means an entity that has entered into a large state co tract with a state or quasi-public agency.

(P.A. 79-599, S. 1, 2; P.A. 83-232; P.A. 85-559, S. 5; P.A. 87-442, S. 1, 8; P.A. 89-81, S. 3; P.A. 97-55; P.A. 98-1 S. 1, 2; P.A. 02-91, S. 1.)

History: P.A. 83-232 amended Subsec. (a) to authorize a former state employee or state employee bargaining repres tive to disclose information and to require the attorney general to report to the complainant his findings and any ac taken, amended Subsec. (b) to prohibit retaliatory action by "any state officer or employee" and to provide that an empl may file an appeal if retaliatory action is threatened or taken, and added Subsec. (c) re sanctions for an employee makes false charges; P.A. 85-559 required that state employees report to inspector general rather than to attorney gen and that findings be reported in accordance with Sec. 2-104(b) rather than to governor or chief state's attorney as previously the case; P.A. 87-442, in Subsec. (a), substituted "person" for "state employee, former state employee or st employee bargaining representative acting on behalf of any state employee or former state employee or on his own beha authorized any such person to transmit facts and information to auditors of public accounts, instead of to inspector gene required auditors to review matter and report to attorney general, required attorney general to make investigation

Excerpt From Attorney General's Recommendations

- The provisions of Conn. Gen. Stat. §1-84(c) currently prohibit public officials from disclosing for financial gain confidential information acquired in the course of their official duties. A similar prohibition for former public officials is contained in Conn. Gen. Stat. §1-84a. These provisions should be clarified to make clear that they prohibit any official involved or previously involved in the process of awarding state business from disclosing confidential information if the communication is likely to result in the recipient being advantaged in a competitive bidding process over other competitors. This prohibition should not be dependent on receiving financial gain for such disclosures.

4. **The Whistleblower Statute Should Be Strengthened and Whistleblowers Should be Given Additional Protection.**

The whistleblower statute should be strengthened to provide a greater ability to ferret out corruption and mismanagement, to permit legal action to be initiated, as well as providing greater protection for whistleblowers. This is described in part V of this report below.

5. **Require stricter standards and scrutiny of contracts to privatize significant functions performed by state employees.**

Contracting abuses exposed to date stem substantially from large profits made on state contracts. Career state employees do not have a comparable personal financial stake in projects they supervise or operate, greatly reducing the likelihood of problematic contract practices. State employees have high level skills which the state should utilize. Close, critical scrutiny is necessary to prevent abuse or waste, especially when privatization will prove less cost effective and less efficient. Accordingly, legislation should require that all privatization contracts be reviewed by the independent contract review body recommended here. The legislature should establish standards for approving such contracts to ensure they achieve actual fiscal savings while maintaining the quality of services and protecting public healthy and safety.

B. RECOMMENDATIONS FOR IMPROVING INTERNAL AGENCY OVERSIGHT OF CONTRACTING

The following proposals are designed to create effective internal structures and mechanisms under which state agencies can monitor and control their contracting practices.

1. **Certain agencies should designate a single high level official responsible for ethics oversight and training.**

Most state agencies do not have a single designated official responsible for ethics oversight. Agencies that routinely engage in construction contracting and large scale commodities or equipment procurement, particularly the DPW, DOT, DAS, and DOIT, should create an Ethics Compliance Officer position, whose mission is the development of ethics policies, ethics training programs and materials, reporting and monitoring of

2. Change orders that significantly increase the costs of projects must be closely monitored and avoided whenever possible.

After the awarding of a construction contract, unforeseen circumstances often arise that increase the overall costs of construction. These occurrences typically result in the proposal of a contract revision, or "change order," that increases the project's total construction costs. When change orders occur, the cost of the project can significantly exceed the cost stated in the contractor's bid or proposal. Certainly, change orders are often necessary and proper. Troubling questions arise, however, when significant change orders are proposed immediately or shortly after awarding of a contract and before substantial work is performed or when change orders constitute a substantial percentage of the total project cost. For example, if a change order is proposed by a contractor soon after its bid, was the bid artificially low? Consequently, procedures are necessary to encourage good faith bidding and limit change order abuse.

Contracts should be drafted such that any substantial change order proposed before significant work has commenced should void the contract and the project should be amended and rebid after payment to the original contractor of its legitimate costs. Substantial change orders should be defined as those equaling or exceeding a certain amount of the total contract price. Whatever newly discovered circumstances required the change order should be incorporated into the revised project advertisement. Of course, agencies should retain discretion to continue with a project without rebidding if time pressures so require. In this instance, agencies should document why rebidding is inappropriate.

Additional procedures are required to monitor change orders that arise after the commencement of work on a project, i.e., where it would be impracticable to rebid the project given the amount of work already performed. Agencies should develop mechanisms for review of substantial change orders and should have the discretion to cancel and rebid contracts when it appears that a contractor is proposing excessive or unjustified change orders.

V. THE EXISTING WHISTLEBLOWER STATUTE SHOULD BE SIGNIFICANTLY STRENGTHENED.

Substantive reforms designed to minimize corruption in public contracting, such as the recommendations in this report, should also be accompanied by expanded tools for identifying wrongdoing and mismanagement, as well as better protecting whistleblowers. Important enhancements to the existing whistleblower statute are summarized below.

(A) THE WHISTLEBLOWER STATUTE SHOULD BE AMENDED TO PROVIDE GENERAL AUTHORITY TO INVESTIGATE WRONGDOING AND MISMANAGEMENT IN STATE GOVERNMENT.

Connecticut law concerning investigations with respect to fraud and mismanagement in state government is too narrow. This needs to change. There should

always be a state official who is fully empowered to investigate fraud and mismanagement.

The provisions of Conn. Gen. Stat. §4-61dd, commonly known as the "Whistleblower Statute," split limited investigative responsibilities between the Auditors of Public Accounts and the Attorney General. These provisions are not broad enough to fully protect the public interest.

The beginning point of an investigation under Conn. Gen. Stat. §4-61dd(a) is someone having knowledge of "any matter involving corruption, unethical practices, violations of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety ..." actually reporting such information. While there have been numerous whistleblower complaints that have led us to investigate aspects of the current public contracting scandal,[8] there is no certainty that future wrongdoing in state government that needs to be exposed and corrected will be accompanied by a whistleblower actually providing information. It has been argued that in the absence of an individual providing such information, the current whistleblower statute may not provide clear authority for exposing the wrongdoing. Section 61-dd, therefore, should be clarified to implicitly allow investigations to proceed without a specific complaining "Whistleblower."

There is also a major gap in the scope of Conn. Gen. Stat. §4-61dd. When this statute was expanded in 1998 to cover "large state contracts" the legislation incorporated a significant loophole. The definition of "large state contract" in Conn. Gen. Stat. §4-61dd(g)(1) specifically exempts "a contract for the construction, alteration or repair of any public building or public work..." While this provision does not in any way limit the authority to procure information material to an investigation of misconduct by state officials, it could well limit investigations that arise solely as a result of complaints about state contractors for construction contracts.[9]

There is presently a public concern that contractors were able to inappropriately manipulate the State of Connecticut's selection process for very large public works projects. This possibility is surely more than ample justification to eliminate the construction contract loophole for large state contracts under the whistleblower statute.

Finally, the current whistleblower statute is an "investigate and report" statute. Under Conn. Gen. Stat. §4-61dd the Attorney General is empowered to "make such investigation as he deems proper" following receipt of a report from the Auditors of Public Accounts. "Upon the conclusion of his investigation, the Attorney General shall where necessary, report his findings to the Governor, or in matters involving criminal

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[8] Under Conn. Gen. Stat. §4-61dd we are required to keep the identities of such whistleblowers confidential.

[9] It can also cause substantial delay in investigations. Several Tomasso Group companies have filed motions to quash subpoenas issued to them by the Attorney General. Among other things they argue that the construction contract exception to the definition of large state contracts eliminates them from the reach of subpoenas under Conn. Gen. Stat. §4-61dd. While we are confident that the Superior Court will see through this obvious delaying tactic, that does not cure the delay. Under the strengthened whistleblower statute suggested here, it would have been much more difficult for the Tomasso Group companies to delay our investigation.

activity, to the Chief State's Attorney." Conn. Gen. Stat. §4-61dd(a). The whistleblower statute does not itself contain any civil or administrative remedies.[10]

A report to the Governor[11] about wrongdoing can be very hollow if that report is not explicitly backed by the authority to initiate appropriate legal action arising from the wrongdoing that is reported on. For example, if a whistleblower investigation reveals that the State of Connecticut was defrauded, then the report should be followed by a civil action against the wrongdoer. An important step in this direction would be accomplished by enacting a False Claims Act, as recommended below.

(B) THE WHISTLEBLOWER STATUTE SHOULD PROVIDE INCREASED PROTECTION TO WHISTLEBLOWERS.

The General Assembly has recently been moving in a positive direction by increasing protections for whistleblowers. Some additional steps would be very beneficial.

The provisions of Conn. Gen. Stat. §4-61dd were modified by Public Act 02-91 to permit whistleblowers who felt they were retaliated against to notify the Attorney General and, following the conclusion of the Attorney General's investigation, to file retaliation complaints with Human Rights Referees at the Commission on Human Rights and Opportunities ("CHRO"). This statute could be improved in two important respects. First, this protection against retaliation should be expanded to cover retaliation for providing information to the employing agency or anywhere else, rather than limited to retaliation for providing information to the Auditors of Public Accounts or Attorney General. In addition, a person who is the victim of retaliation for blowing the whistle should not have to await the conclusion of the Attorney General's investigation before being able to invoke the remedial mechanism of Conn. Gen. Stat. §4-61dd. Such a person should be able to seek relief immediately.

Also, no state employee, employee of a private contractor or other citizen should hesitate to report unethical or illegal conduct relating to state contracting out of a fear of being sued. Nor should corrupt officials or contractors be permitted to use lawsuits or the threat of lawsuits to squelch reporting or criticism of their misconduct. There should be a broad statutory immunity that protects any person from civil liability for commenting on, reporting, evaluating or otherwise making any statement about the conduct of any private or public individual or entity relating to state contracting. The immunity should apply in all instances except where the statement at issue was false and made with malicious intent and actual knowledge of falsity. This immunity should not be in lieu of any common law immunity or witness immunity providing greater protection.

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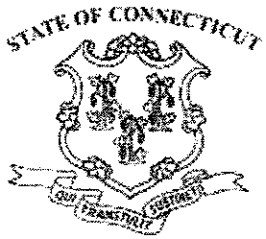
[10] Under current Connecticut law the Chief State's Attorney has sufficient authority to commence a criminal prosecution if the evidence rises to the level of establishing criminal liability. The Chief State's Attorney has wisely formed a Public Integrity Bureau to deal with such issues. However, not all misconduct rises to the level of being criminal wrongdoing. Other remedies should be available in such circumstances.

[11] In addition, the whistleblower statute does not make any provision for reporting to someone other than the Governor in the event that the report addresses issues that may involve the Governor.



General Assembly

File No. 354

February Session, 2004

Substitute Senate Bill No. 386

Senate, March 31, 2004

The Committee on Government Administration and Elections reported through SEN. DEFRONZO of the 6th Dist., Chairperson of the Committee on the part of the Senate, that the substitute bill ought to pass.

AN ACT CONCERNING WHISTLEBLOWER COMPLAINTS AND CIVIL RECOVERY OF MISAPPROPRIATED FUNDS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 4-61dd of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2004*) :

(a) Any person having knowledge of any matter involving corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department or agency or any quasi-public agency, as defined in section 1-120, or any person having knowledge of any matter involving corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in any large state contract, may transmit all facts and information in **[his]** such person's possession concerning such matter to the Auditors of Public Accounts. The Auditors of Public Accounts shall review such matter and report their findings and any recommendations to the Attorney General. Upon receiving such a report, the Attorney General shall make such investigation as **[he]** the Attorney General deems proper. Nothing in this section shall be construed to limit such investigation to the allegations or information transmitted pursuant to this section. At the request of the Attorney General or on their own initiative, the auditors shall assist in the investigation. The Attorney General shall have power to summon witnesses, require the production of any necessary books, papers or other documents and administer oaths to witnesses, where necessary,

for the purpose of an investigation pursuant to this section or sections 2 to 5, inclusive, of this act. Upon the conclusion of [his] the investigation, the Attorney General shall where necessary, report [his] any findings to the Governor, or in matters involving criminal activity, to the Chief State's Attorney. [The] In addition to the exempt records provision of section 1-210, as amended, the Auditors of Public Accounts and the Attorney General shall not, after receipt of any information from a person under the provisions of this section or sections 2 to 5, inclusive of this act, disclose the identity of such person without [his] such person's consent unless the Auditors of Public Accounts or the Attorney General determine that such disclosure is unavoidable, and may withhold records of such investigation, during the [course] pendency of the investigation.

FOI & disclosure exemption

(b) (1) No state officer or employee, as defined in section 4-141, no quasi-public agency officer or employee, no officer or employee of a large state contractor and no appointing authority shall take or threaten to take: (A) [any] Any personnel action against any state or quasi-public agency employee or any employee of a large state contractor, or (B) any action to impede or terminate a contract between a state agency and a large state contractor in retaliation for such employee's or contractor's disclosure of information to an employee of (i) the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section or sections or sections 2 to 5, inclusive, of this act; (ii) the state agency or quasi-public agency where such state officer or employee is employed; (iii) a state agency pursuant to a mandated reporter statutes; or (iv) in the case of a large state contractor, to an employee of the contracting state agency concerning information involving the large state contract.

Retaliation

(2) If a state or quasi-public agency employee or an employee of a large state contractor alleges that a personnel action has been threatened or taken in [retaliation for such employee's disclosure of information to the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section,] violation of subdivision (1) of this subsection the employee may notify the Attorney General, who shall investigate pursuant to subsection (a) of this section. [After the conclusion of such investigation, the Attorney General, the employee or]

(3) (A) Not later than thirty days after learning of the specific incident giving rise to a claim that a personnel action has been threatened or has occurred in violation of subdivision (1) of this subsection, a state or quasi-public agency employee, an employee of a large state contractor or the employee's attorney may file a complaint concerning such personnel action with the Chief Human Rights Referee designated under section 46a-57. The Chief Human Rights Referee shall assign the complaint to a human rights referee appointed under said section 46a-57, who shall conduct a hearing and issue a decision concerning whether the officer or employee taking or threatening to take the personnel action violated any provision of this section. If the human rights referee finds such a violation, the referee may award the aggrieved employee reinstatement to the employee's former position, back pay and reestablishment of any employee benefits to which the employee would otherwise have been eligible if such violation had not occurred, reasonable attorneys' fees, and any other damages. For the purposes of this subsection, such human rights referee shall act as an independent hearing officer. The decision of a human rights referee under this subsection may be appealed by any person

who was a party at such hearing, in accordance with the provisions of section 4-183.

[(3)] (B) The Chief Human Rights Referee shall adopt regulations, in accordance with the provisions of chapter 54, establishing the procedure for filing complaints and noticing and conducting hearings under [subdivision (2) of this subsection] subparagraph (A) of this subdivision.

(4) As an alternative to the provisions of subdivisions (2) and (3) of this subsection (A) a state or quasi-public agency employee who alleges that a personnel action has been threatened or taken may file an appeal within thirty days of knowledge of the specific incident giving rise to such claim with the Employees' Review Board under section 5-202, or, in the case of a state or quasi-public agency employee covered by a collective bargaining contract, in accordance with the procedure provided by such contract, or (B) an employee of a large state contractor alleging that such action has been threatened or taken may, after exhausting all available administrative remedies, bring a civil action in accordance with the provisions of subsection (c) of section 31-51m.

criminal provision

(5) In any proceeding under subdivision (2) , (3) or (4) of this subsection concerning a personnel action taken or threatened against any state or quasi-public agency employee or any employee of a large state contractor, which personnel action occurs within one year after the employee first transmits facts and information concerning a matter under subsection (a) of this section or sections 2 to 5, inclusive, of this act to the Auditors of Public Accounts or the Attorney General, there shall be a rebuttable presumption that the personnel action is in retaliation for the action taken by the employee under subsection (a) of this section.

(6) If a state officer or employee, as defined in section 4-141, a quasi-public agency officer or employee, an officer or employee of a large state contractor or an appointing authority takes or threatens to take any action to impede or cancel a contract between a state agency and a large state contractor, in violation of subdivision (1) of this subsection, such person may, not later than ninety days from the date of such violation, bring a civil action in the superior court for the judicial district of Hartford to recover damages, attorney's fees and costs.

(c) Any employee of a state or quasi-public agency or large state contractor, who is found to have knowingly and maliciously made false charges under subsection (a) of this section shall be subject to disciplinary action by [his] such employee's appointing authority up to and including dismissal. In the case of a state or quasi-public agency employee, such action shall be subject to appeal to the Employees' Review Board in accordance with section 5-202, or in the case of state or quasi-public agency employees included in collective bargaining contracts, the procedure provided by such contracts.

(d) On or before September first, annually, the Auditors of Public Accounts shall submit to the clerk of each house of the General Assembly a report indicating the number of matters for which facts and information were transmitted to the auditors pursuant to this section during the preceding state fiscal year and the disposition of each such matter.

(e) Each contract between a state or quasi-public agency and a large state contractor shall

provide that, if an officer, employee or appointing authority of a large state contractor takes or threatens to take any personnel action against any employee of the contractor in retaliation for such employee's disclosure of information to any employee of the contracting state or quasi-public agency or the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section, the contractor shall be liable for a civil penalty of not more than five thousand dollars for each offense, up to a maximum of twenty per cent of the value of the contract. Each violation shall be a separate and distinct offense and in the case of a continuing violation each calendar day's continuance of the violation shall be deemed to be a separate and distinct offense. The executive head of the state or quasi-public agency may request the Attorney General to bring a civil action in the superior court for the judicial district of Hartford to seek imposition and recovery of such civil penalty.

(f) Each large state contractor shall post a notice of the provisions of this section relating to large state contractors in a conspicuous place which is readily available for viewing by the employees of the contractor.

(g) No person who, in good faith discloses information to the Auditors of Public Accounts or the Attorney General in accordance with this section shall be liable for any civil damages resulting from such good faith disclosure.

(h) As used in this section:

(1) "Large state contract" means a contract between an entity and a state or quasi-public agency, having a value of five million dollars or more; [, except for a contract for the construction, alteration or repair of any public building or public work;] and

(2) "Large state contractor" means an entity that has entered into a large state contract with a state or quasi-public agency.

Sec. 2. (NEW) (*Effective October 1, 2004*) For purposes of sections 2 to 5, inclusive, of this act:

(1) "Claim" means any request or demand for money or property made (A) to a state officer, state employee, state agent or any other representative of the state, or (B) to a contractor, subcontractor, grantee or other person if the state provides any portion of the money or property requested or demanded, or if the state will reimburse directly or indirectly such contractor, subcontractor, grantee or other person for any portion of the money or property requested or demanded;

(2) "Knowing" and "knowingly" means a person, with respect to information, does any of the following: (A) Has actual knowledge of the information, (B) acts in deliberate ignorance of the truth or falsity of the information, or (C) acts in reckless disregard of the truth or falsity of the information;

(3) "Original source" means an individual who has direct and independent knowledge of information that the individual voluntarily provided to the Attorney General or the Auditors of Public Accounts, without public disclosure, and on which the Attorney

General has based an action brought pursuant to section 4 of this act;

(4) "Person" means any natural person, corporation, partnership, association, trust or other business or legal entity; and

(5) "State" means any state agency in the executive, legislative and judicial branch, including any quasi-public authority as defined in section 1-120 of the general statutes.

Sec. 3. (NEW) (*Effective October 1, 2004*) (a) A person defrauds the state when such person:

(1) Knowingly presents, or causes to be presented, to any state official or employee a false or fraudulent claim;

(2) Knowingly makes, uses or causes to be made or used, a false record or statement to obtain payment or approval of a claim by the state;

(3) Conspires to defraud the state through the allowance or payment of a false or fraudulent claim;

(4) Pursuant to a certificate or receipt, has possession, custody or control of property or money used, or to be used, by the state and knowingly delivers, or causes to be delivered, to the state less property than the amount indicated on such certificate or receipt with the intent to knowingly conceal the property;

(5) Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the state and with the intent to deceive the state, knowingly makes or delivers the receipt without verifying that the information on the receipt is true;

(6) Buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the state knowing that such officer or employee may not lawfully sell or pledge the property;

(7) Enters into an agreement, contract or understanding with an official or employee of the state knowing the information contained therein is false;

(8) Knowingly makes, uses or causes to be made or used a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the state; or

(9) Is a beneficiary of an inadvertent submission of a false claim to the state and subsequently discovers the falsity of the claim but knowingly fails to disclose the false claim to the state within a reasonable time after discovery of the falsity of the claim.

(b) This section shall not be construed to apply to an act that would constitute workers' compensation fraud pursuant to section 31-290c of the general statutes, an act that violates any provision of title 12 of the general statutes or an act where the alleged loss to the state is less than twenty-five thousand dollars.

Sec. 4. (NEW) (*Effective October 1, 2004*) (a) Whenever the Attorney General has reason to believe that a person may have defrauded the state, in violation of section 3 of this act, the Attorney General may investigate such act and bring a civil action in the superior court against such person to recover civil penalties and damages as provided in this section and to obtain such equitable relief as the court deems appropriate.

(b) Proof that a person acted with the specific intent to defraud the state shall not be required for a finding that such person has defrauded the state pursuant to section 3 of this act. Innocent mistake shall be an affirmative defense to any action brought pursuant to this section. The state shall prove all essential elements of such cause of action, including damages, by a preponderance of the evidence. A corporation, limited liability corporation, partnership or other person shall be liable to the state for the acts of its agent where the agent acted with apparent authority to defraud the state in violation of section 3 of this act.

(c) Any person who is found by a court of competent jurisdiction to have defrauded the state shall be liable to the state for (1) three times the amount of damages that the state sustained due to the fraudulent act, (2) a civil penalty of not less than five thousand dollars and not more than ten thousand dollars for each act that constitutes a violation of section 3 of this act, and (3) reasonable attorney's fees and costs.

(d) Notwithstanding the provisions of subsection (c) of this section, a court may, within its discretion, reduce an award of damages to the state upon finding any violation of section 3 of this act, provided such award includes an award for the consequential damages the state sustained as a result of the person's violation. The court may, within its discretion, decide not to impose a civil penalty against such person provided the court finds all of the following:

(1) The person committing the violation provided the Attorney General with all the information known to such person about the violation not later than thirty days after the date on which the person first obtained the information;

(2) The person fully cooperated with any state investigation of such violation; and

(3) At the time such person provided the Attorney General with such information, no criminal prosecution, civil action or administrative action had commenced with respect to the defrauding of the state, and the person did not have actual knowledge of the existence of an investigation into the defrauding of the state.

Sec. 5. (NEW) (*Effective October 1, 2004*) (a) The superior court shall approve any settlement of an action brought under section 4 of this act. In approving a settlement of, or rendering a judgment in, an action brought under section 4 of this act, the court, upon application by the Attorney General, may award to an original source not more than five per cent of the award of actual damages paid to the state, taking into consideration the significance of the information provided by the original source to the court's finding of a violation of section 3 of this act or the settlement of the action.

(b) Notwithstanding the provisions of subsection (a) of this section, an original source is

not entitled to receive a portion of any court judgment or settlement if: (1) The action brought pursuant to section 4 of this act is based on allegations or transactions that are the subject of another criminal, civil, administrative or legislative proceeding; (2) the information provided by the original source is based on the public disclosure of allegations or transactions in a criminal, civil, administrative or legislative proceeding or hearing or from the news media; (3) the original source is an individual who is or was employed by the state whose scope of employment includes investigating or prosecuting fraud against the state and the information was gathered in the course of such employment; or (4) the original source planned, initiated or knowingly participated in the defrauding of the state.

This act shall take effect as follows:	
Section 1	*October 1, 2004*
Sec. 2	*October 1, 2004*
Sec. 3	*October 1, 2004*
Sec. 4	*October 1, 2004*
Sec. 5	*October 1, 2004*

GAE *Joint Favorable Subst.*

The following fiscal impact statement and bill analysis are prepared for the benefit of members of the General Assembly, solely for the purpose of information, summarization, and explanation, and do not represent the intent of the General Assembly or either House thereof for any purpose:

OFA Fiscal Note

State Impact:

Agency Affected	Fund-Effect	FY 05 $	FY 06 $
Attorney General; Auditors	GF - None	None	None

Resources of the General Fund	GF - Revenue Gain	Potential Significant	Potential Significant
Human Rights & Opportunities, Com.	GF - Potential Cost	Minimal	Minimal

Note: GF=General Fund

Municipal Impact: None

Explanation

The bill permits the Office of the Attorney General (OAG) to expand the scope of its investigations into large public works contracts beyond any specific allegations or information transmitted by a whistleblower. The OAG could accommodate the bill's increased investigatory powers without requiring additional appropriations. The bill establishes civil penalties for defrauding the state which include treble damages, attorney's fees and costs. The likelihood and regularity of future recoveries is uncertain, but could be significant (i.e., greater than $100, 000) in any given year.

The bill authorizes the court to give a portion of actual damages awarded to the person who volunteered information. The number of additional whistleblower matters filed with the state as a result of the bill's provision of an award is unknown, but not expected to be substantial. The Auditors of Public Accounts have received an average of 88 such matters annually over the last four fiscal years. For illustrative purposes, a ten per cent increase would yield eight to nine additional cases.

The bill revises the procedure by which a whistleblower complaint is brought to the Commission on Human Rights and Opportunities' (CHRO) Chief Human Rights Referee. Currently, the Office of the Attorney General may refer complaints to the Chief Human Rights Referee. Under the bill, a state or quasi-public agency employee, an employee of a large state contractor or the employee's attorney may file directly with the Chief Human Rights Referee. Although it is certain that the bill would result in increased workload, to what extent is unknown. Since the enactment of Public Act 02-91, "An Act Concerning State Employee and Contractor Whistleblowing Complaints, " seven complaints have been referred to the Chief Human Rights Referee, two of which have been dismissed. Should the number of complaints rise because of directly filing with the Chief Human Rights Referee, there would be a minimal cost.

OLR Bill Analysis

sSB 386

AN ACT CONCERNING WHISTLEBLOWER COMPLAINTS AND CIVIL RECOVERY

OF MISAPPROPRIATED FUNDS

SUMMARY:

This bill gives the attorney general unlimited scope in his investigation of state agency whistleblower complaints. It expands the whistleblower statutes' applicability to include retaliation for certain disclosures to state employees. It also subjects large state contracts for public buildings or public works to the whistleblower provisions. The bill extends contract provisions addressing the contractor's civil liability to retaliations for disclosure to the contracting agency's employees. It bars civil liability for good faith disclosure of information to the attorney general or auditors of public accounts.

The bill establishes civil penalties for defrauding the state, such as presenting false claims for payment or receiving property from state officials and employees knowing the official or employee lacks the authority to sell or pledge the property. It allows the attorney general to investigate the defrauding of the state and bring civil actions against alleged violators. It makes anyone who defrauded the state liable for treble damages, civil penalties, attorney's fees, and costs. The bill also gives the court discretion not to impose penalties for voluntary cooperation with the investigation.

The bill allows the court to give a portion of the actual damages award to someone who volunteered information to the attorney general, enabling him to bring the action. But it prohibits this person from receiving any money if (1) the action is based on allegations or transactions that are the subject of another proceeding, (2) the information he provided is based on public disclosure of those allegations or transactions, (3) the source gained the information in his role as a state employee, or (4) the source knowingly participated in the defrauding of the state.

EFFECTIVE DATE: October 1, 2004

WHISTLEBLOWERS

Attorney General's Authority

The bill gives the attorney general unlimited authority to investigate state agency whistleblower allegations or information he receives from the auditors of public accounts. It allows the auditors or attorney general, in addition to the exempt records provision of the Freedom of Information Act, to withhold the investigation records while the investigation is pending.

Whistleblower Protections

The law prohibits appointing authorities and officers and employees of the state, quasi-public agencies, or large state contractors from taking or threatening to take personnel action against an employee in retaliation for his disclosure of information to the auditors of public accounts or the attorney general. The bill also bars them from taking or threatening to take action to impede or terminate a contract between a state agency and large state contractor in retaliation for the employee's or contractor's disclosure to an employee of (1) the auditors or the attorney general, (2) the agency

where the state officer or employee works, (3) a state agency pursuant to a mandated reporter statute; or (4) in the case of a large state contractor, an employee of the contracting state agency concerning information about the large state contract.

Current law defines a large state contract as a contract for at least $5 million with a state or quasi-public agency, other than a contract to construct, alter, or repair a public building or public work, and a large state contractor as an entity that enters into such a contract. The bill eliminates the public building or public work exception.

Complaints

Current law allows the attorney general, the employee, or the employee's attorney to file a complaint about the personnel action with the chief human rights referee after the investigation concludes. The bill eliminates the attorney general's ability to file a complaint. It requires the employee or his attorney to file the complaint with the referee within 30 days after learning of the specific incident giving rise to a claim that a personnel action has occurred or been threatened.

Civil Actions and Damages

If a state or quasi-public agency officer or employee, a large state contractor officer or employee, or an appointing authority takes or threatens to take action impeding or canceling a contract between a state agency and a large state contractor in violation of the whistleblower statutes, the bill allows the person to bring a civil action in Hartford Superior Court within 90 days of the violation to recover damages, attorney's fees, and costs (see COMMENT) .

The law requires contracts between a state or quasi-public agency and a large state contractor to provide for the contractor's civil liability for up to $5, 000 per offense, up to 20% of the contract value, for personnel actions the contractor's officer, employee, or appointing authority takes or threatens to take against its employees in retaliation for the employee's disclosure of information to the auditors of public accounts or the attorney general. The bill extends this monetary penalty to retaliations against the contractor's employees for disclosing information to the contracting state or quasi-public agency's employees.

The bill prohibits anyone from being held liable for civil damages as a result of his good faith disclosure of information to the auditors or the attorney general.

DEFRAUDING THE STATE

Defrauding the State Defined

The bill describes actions in which a person may engage which qualify as defrauding the state, such as knowingly presenting or paying a false claim or knowingly delivering to the state less property than is owed. It defines "knowing" and "knowingly" to mean a person, with respect to information, (1) has actual knowledge of the information, (2) acts in deliberate ignorance of the information's truth or falsity, or (3) acts in reckless disregard of the information's truth of falsity. It defines a "claim" as any request or

demand for money or property made to (1) a state officer, state employee, state agent, or other state representative or (2) to a contractor, subcontractor, grantee, or other person if the state provides any part of the money or property requested or demanded, or if the state will reimburse the person directly or indirectly for any part of the money or property requested or demanded.

The bill specifies that a person defrauds the state when he:

1. knowingly presents, or causes to be presented, a false or fraudulent claim to any state official or employee;

2. knowingly makes, uses, or causes to be made or used, a false record or statement to obtain the state's payment or approval of a claim;

3. conspires to defraud the state through the allowance or payment of a false or fraudulent claim;

4. pursuant to a certificate or receipt, has possession, custody, or control of property or money the state used or will use, and knowingly delivers or causes to be delivered to the state less property than the amount the certificate or receipt indicates with the intent to knowingly conceal the property;

5. is authorized to make or deliver a document certifying receipt of property the state used or will use, and with intent to deceive the state, knowingly makes or delivers the receipt without verifying that the information on it is true;

6. buys, or receives as a pledge of an obligation or debt, public property from a state officer or employee knowing that the officer or employee may not lawfully sell or pledge the property;

7. enters into an agreement, contract, or understanding with a state official or employee knowing the information contained in it is false;

8. knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state; or

9. is a beneficiary of an inadvertent submission to the state of a false claim and later discovers the claim's falsity but knowingly fails to disclose the false claim to the state within a reasonable time after discovering the falsity.

The bill specifies that these provisions do not apply to acts constituting workers compensation fraud, violating Connecticut tax laws, or where the alleged loss to the state is less than $25, 000.

Civil Actions for Defrauding the State

Whenever the attorney general believes that a person may have defrauded the state, the bill allows him to investigate the act and bring an action against the person in Superior

Court to recover civil penalties and damages and obtain any equitable relief the court deems appropriate. The bill does not require proof that a person acted with the specific intent to defraud the state in order to find that he defrauded the state. But it does allow "innocent mistake" as an affirmative defense to such a charge. It requires the state to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence. It makes a corporation, limited liability corporation, partnership, or other person liable to the state for its agent's acts where the agent acted with apparent authority to defraud the state.

Judgments and Settlements

If the court finds that anyone defrauded the state, the bill makes that person liable to the state for (1) three times the amount of damages that state sustained due to his fraudulent act, (2) a $5, 000 to $10, 000 civil penalty for each violation, and (3) reasonable attorney's fees and costs.

The bill allows the court to use its discretion to reduce a damage award as long as the judgment includes an award for consequential damages the state sustained from the person's violation. It also allows the court to use its discretion not to impose a civil penalty against the person if the court finds all of the following:

1. the person committing the violation provided the attorney general with all the information he knew about the violation within 30 days after the person obtained the information;

2. the person fully cooperated with any state investigation of the violation; and

3. at the time the person provided the attorney general with the information, no criminal prosecution, civil action, or administrative action about the defrauding of the state had commenced, and the person did not have actual knowledge that an investigation into the defrauding existed.

The bill requires the Superior Court to approve any settlement of an action for defrauding the state. In approving a settlement or rendering a judgment for defrauding the state, the bill allows the court, on the attorney general's application, to give up to 5% of the actual damages awarded to an original source, taking into consideration the significance of the information the original source provided to the court's finding of a violation or the settlement. It defines an "original source" as an individual with direct and independent knowledge of information that he voluntarily provided to the attorney general or auditors of public accounts, without public disclosure, and on which the attorney general based a civil action for defrauding the state.

The bill prohibits an original source from receiving any of the court judgment or settlement if (1) the civil action is based on allegations or transactions that are the subject of another criminal, civil, administrative, or legislative proceeding; (2) the information the original source provided is based on public disclosure of allegations or transactions in a criminal, civil, administrative, or legislative proceeding or hearing or from the news media; (3) the original source is or was a state employee whose job includes investigating

or prosecuting fraud against the state and he gathered the information in the course of his employment; or (4) the original source planned, initiated, or knowingly participated in the defrauding of the state.

COMMENT

Civil Action for Contract Impediment or Cancellation

The bill inadvertently fails to identify the party entitled to bring a civil action when someone takes or threatens to take action to impede or cancel a state contract.

COMMITTEE ACTION

Government Administration and Elections Committee

Joint Favorable Substitute

Yea 11 Nay 6

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