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Testimony of Attorney Steven B. Kaplan
Legal Counsel to the Connecticut Subcontractors Association
Re: Senate Bill 850--
An Act Concerning Department of Administrative Services & DOT Prequalification and Evaluation of Contractors
Committee on Labor & Public Employees
February 10, 2011

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

The Connecticut Subcontractors Association strongly **opposes** Senate Bill 850, An Act Concerning Department of Administrative Services & DOT Prequalification and Evaluation of Contractors. Specifically objectionable are the following two sections of the bill:

> Section 1: This section would amend Conn. Gen. Stat. §4a-100 and require the DAS Commissioner to deny prequalification for contractor and substantial subcontractors who had received "three or more unsatisfactory written evaluations" within the past five years.
>
> Section 4: This section would amend Conn. Gen. Stat. §13b-20(n) and require CDOT to deny prequalification to any bidder who has "received three or more unsatisfactory written evaluations of the bidder's performance on public or private jobs" in the prior seven years.

Although well-intentioned, the effect of these amendments would be to impose unfair and draconian punishment on many responsible and qualified contractors or substantial subcontractors (hereinafter referred to as "contractors"). The specific problems here are: (a) the mandatory nature of these provisions, which eliminate all agency discretion in reviewing a contractor's qualifications on a case-by-case basis; (b) the lengthy timeframes for penalizing contractors regarding previous jobs; and (c) the lack of any meaningful criteria for imposing these absolute requirements.

CSA, along with other industry groups, was instrumental in establishing the contractor prequalification program that is now being administered by DAS. The CSA continues to work closely with DAS officials to ensure that the program runs smoothly and efficiently, and above all fairly. DAS, and its administrative personnel, deserve special praise for their great success in implementing

this very successful program. We know from discussions with other trade groups and government agencies in the Northeast that the Connecticut Contractor Prequalification Program is widely respected and emulated.

If a contractor's prequalification status is revoked or rejected, it imposes a death sentence on that contractor. Not only does this bar the contractor from performing public construction for at least one year, but it also stamps an indelible, highly prejudicial mark on the contractor's resume that will have an extremely deleterious effect on its ability to procure private work as well.

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

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

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

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

Thanks to the Chair and all members of Committee on Labor & Public Employees for considering the CSA's comments on this important legislation.