

**Department of Administrative Services (DAS)**

Special Act 14-18

**Construction Contracting and  
Bidding Transparency  
Working Group**

**DRAFT Final Report**

**12/11/14**

**Donald J. DeFronzo**  
Commissioner  
Department of Administrative Services

January 1, 2015



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## I. Commissioner's Letter

January 1, 2015

Governor Dannel P. Malloy  
State of Connecticut  
210 Capitol Avenue  
Hartford, CT 06106

Government Administration & Elections Committee  
Legislative Office Building Room 2200  
300 Capitol Avenue  
Hartford, CT 06106

Honorable Dannel P. Malloy and distinguished Chairs of the Government Administration & Elections Committee.

Special Act 14-18 established a Working Group entitled the "Construction Contracting and Bidding Transparency Working Group," (hereinafter the "CCBT" or "Working Group"), to be chaired by the Commissioner of the Department of Administrative Services ("DAS"). The Special Act charged the Working Group, which includes several state agency members as well as appointed construction industry representatives, with studying state construction contracting and subcontracting processes. The Act specifically stated that "as part of such study, the working group shall solicit testimony and recommendations from the public, trade associations and the general contractor and subcontractor community." The Act required the CCBT to issue a report containing the Working Group's findings and recommendations.

In order to ensure conduct a comprehensive study, the Working Group requested testimony and recommendations from the public, trade associations not represented on the Working Group, state agencies with contracting authority, and officials from the Massachusetts Division of Capital Asset Management & Maintenance ("DCAMM"). DAS also sought informal input from the Department of Consumer Protection. The testimony and information requested by the Working Group was in addition to the insights and wealth of construction expertise provided by members of the Working Group. This submission constitutes the final report of the Working Group. It embodies a series of legislative and administrative recommendations.

This report includes:

- 2014 legislative background of Senate Bill 454, "An Act Increasing the Transparency of General Bids for State Contracts;"
- Connecticut legislative history and background on policies regarding subcontractor bidding procedures and processes;
- A summary of other states' and the federal government's policies regarding sub-bid filing and sub-bid listing;
- An analysis and description of the term and practice known in the industry as "bid shopping;"
- Analysis of state agencies' existing processes and laws regarding construction delivery methods, and the enforcement and compliance requirements applicable to contractors and subcontractors;
- Report findings; and
- Legislative and administrative recommendations intended to improve lower tier subcontracting transparency, integrity and reporting.

The Working Group implemented a very aggressive meeting schedule to fulfill the January 1, 2015 reporting requirement, which included four public input sessions and three working sessions from June through December.

I would like to personally thank the Working Group members, whose names are listed separately, for their participation. The variety of industry and agency perspectives within the group provided invaluable contributions that have allowed the Working Group to submit a substantive report. I hope that in the months ahead the content of this document will be useful to policymakers and vested stakeholders as they consider changes in the area of construction contracting.

Sincerely,

Donald J. DeFronzo  
Commissioner

## II. Membership

The Construction Contracting & Bidding Transparency Working Group consisted of the following members, appointed in accordance with the criteria outlined in the Special Act:

Appointing Authority	Appointed Member	Appointment Criteria
Governor	Lynn Kleeberg	Women-owned firm familiar with state construction processes
Governor	Dave Roche *Cindy Dubuque	A representative of the Connecticut State Building Trades
Governor	John Butts	A representative from an organization representing general contractors
Governor	Pat Delany	A representative who is a Construction Manager-at-Risk (CMR)
Governor	Dwight Bolton	A minority-owned firm familiar with state construction processes
DAS Commissioner	Donald DeFronzo *Kevin Kopetz	Appointed Chairman
DAS	Peter Babey	A non-managerial employee of the Department of Administrative Services familiar with state construction processes
OPM Secretary	Patrick O'Brien	Executive Branch agency
UConn President	Matthew Larson *Berri Gerjuoy	Executive Branch agency
Department of Labor (DOL) Commissioner	Gary Pechie *Sandra Barrachina	Executive Branch agency
Commission on Human Rights & Opportunities (CHRO) Executive Director	Alix Simonetti *Jim O'Neill	Executive Branch agency
Senate President Pro Tempore	Robert Berkmoes	A member from an organization representing subcontractors
Senate Majority Leader	Gregory Oneglia	A representative who is a general contractor
Senate Minority Leader	Philip Cerrone	An association representing design

		professionals
Speaker of the House	Donald Shubert	An organization familiar with state construction processes
House Majority Leader	Ed Reilly	A representative from a trades organization
House Minority Leader	John Mastriano	A representative who is small contractor with fewer than thirty employees

\* Non-voting members who participated in CCBT activities.

### III. 2014 Legislative Background

Senate Bill 454, “An Act Increasing the Transparency of General Bids for State Contracts,” proposed several changes concerning the awarding of subcontracts for public works projects subject to the state's competitive bidding laws. Senate Bill 454 proposed that general bidders separately list subcontractor names and prices for any class of work estimated to cost more than twenty-five thousand dollars and for which the Department of Administrative Services (“DAS”) has a prequalification classification. The bill proposed to apply these requirements to DAS construction projects that use the Construction Manager-at-Risk (“CMR”) delivery method as well as design-bid-build projects. Senate Bill 454 also proposed that (1) CMRs, within five days of being awarded a contract, present a subcontract to each subcontractor listed and (2) the subcontractors execute an agreement within five business days.

The Government Administration & Elections (“GAE”) Committee held a public hearing on Senate Bill 454 on March 17, 2014. The bill was approved by the GAE Committee and referred by the Senate to the Appropriations Committee, where no further action was taken. The Department of Administrative Services and the Legislature agreed that due to the scope of the changes being proposed, a study and report on the issues raised in Senate Bill 454 was the practical next step.

### IV. Creation of the CCBT Working Group

Special Act 14-18 established a working group entitled the “Construction Contracting and Bidding Transparency Working Group” (hereinafter the “CCBT” or the “Working Group”), to be chaired by the Commissioner of Administrative Services. The Working Group is comprised of broadly inclusive construction industry representatives appointed by the Governor and Legislative leaders, as well as several state agency members. The Special Act charges the Working Group with studying state construction contracting and subcontracting processes. The Act specifically states that, as part of such study, the Working Group shall solicit testimony and recommendations from the public, trade associations and the general contractor and subcontractor community.

The Act also charged the Working Group with submitting a report on its findings and recommendations to the Governor and the GAE Committee no later than January 1, 2015. Pursuant to the Special Act, the report must include a review and analysis of the current general contractor and construction manager at risk practices for receiving subcontractor and lower tier subcontractor bid submissions on capital projects, a review of existing laws governing construction and contractors, a review of subcontractor

and lower tier subcontractor bidding practices used by other states, and recommendations for administrative and legislative changes. The Chairman established an aggressive meeting schedule throughout the summer and fall of 2014. Four informational meetings were conducted from June to September, followed by a series of working sessions, culminating with the final meeting in December when the Working Group voted to approve this Report.

The entire compilation of Working Group documentation – which includes meeting agendas, meeting minutes and presentations – can be found on the DAS website at <http://das.ct.gov/fp1.aspx?page=452>.

## **V. Connecticut’s Legislative History of Subcontractor Bidding Practices**

### **A. Working Definitions of Key Terms**

As background for this legislative history, the following definitions are useful in understanding the distinctive practices that the State has adopted and utilized in the past and currently. In addition, there is a **Glossary of Terms** at the end of this Report, which provides additional definitions that may be helpful.

#### **1. Bid Listing**

A construction contracting bidding method, “**bid-listing**” is a practice used by an awarding authority that requires general contractors at the time of bid submission to list subcontractors and their bid prices for specific classes of work, typically specialty trade work essential to complete the project. States that utilize this contracting method, including Connecticut, have statutes that define the classes of work required to be listed at the time of bid. In addition, most states maintain the discretion to require additional subcontractor listing of other classes of work if desired by the awarding authority. States require the listed subcontractors at the time of bid. Upon notification by the awarding authority of general contract award, the prime contractor, within a defined number of days, must provide the awarding agency with signed subcontractor agreements for the listed subcontractors and the subcontracts must be for the amount listed in the bid form.

In Connecticut, C.G.S. §4b-93 requires that bidders on State design-bid-build projects must include plans and specifications detailing all labor and materials to be furnished on the job. The statute requires that such specifications include a separate section for each of the following categories of work, if in the estimate of the awarding authority, the category of work will exceed twenty-five thousand dollars: (1) masonry work; (2) electrical work; (3) mechanical other than heating, ventilating and air conditioning (“HVAC”); and (4) HVAC work. C.G.S. §4b-93 also provides that the awarding authority may require that specifications also include a separate section for other categories of work when the awarding authority deems it necessary or convenient.

#### **2. Pre-Filed Sub Bid**

The construction contracting bidding method known as “**pre-filed subcontractor bidding**” is used when the public awarding authority accepts bids directly from subcontractors on a series of sub-bid classifications. Filed sub-bids are first reviewed and considered by the awarding authority. Filed sub-bidders can restrict their bids to certain general contractors. Responsible

and eligible filed sub-bidders are placed on a tabulation sheet managed by the awarding authority, which is shared with the general contractors. General contractors must choose from the tabulation sheet but are not required to use the lowest filed sub-bidder in their bid submissions. Massachusetts appears to be the only state in the nation that uses this contracting methodology extensively. In Massachusetts, sub-bids must be opened four and a half days before the opening of general bids. The awarding authority has two days to reject bids. Tabulation sheets are sent to all bidders two days before the opening of general bids.

## **B. Specific Legislation**

The following is a list of major Connecticut legislation relating to public works construction contracts and subcontractor bidding practices.

- **Public Act 82-447 - An Act Concerning Bids for State Public Works Contracts**

Prior to 1982, Connecticut used pre-filed sub bids. As described above, subcontractors submitted bids directly to the State. This procedure required significant agency involvement in the bidding process and evaluation of the contractors and subcontractors. Public Act 82-447 eliminated this method of procuring subcontractors and replaced it with a "bid listing" of subcontractors as described in the definitions above. P.A. 82-447 eliminated most of the agency's role in subcontractor procurement that was required by the pre-filed sub bids.

- **Public Act 89-367 - An Act Concerning Bidding for Public Works Contracts and Requirements for Award Of Public Contracts**

As mentioned above, Connecticut became a bid listing state in 1982. The bid listing requirements were extensive, and mandated the issuance of separate specifications for any class of work or sub trade that was deemed necessary for a project. Public Act 89-367 modified the language established in P.A. 82-447 so that the State would be required to issue separate job specifications for only four classes of work if the work is estimated to exceed \$25,000. The State, in its discretion, could list other classes of work depending on the needs of a specific project.

Price protection for subcontractors results from the requirement that general contractors, through "bid listing," list the names and bid prices of subcontractors they intend to use when their bids are submitted to the State for the four listed major classes of work outlined in C.G.S. §4b-93: (1) masonry, (2) electrical, (3) mechanical work other than heating, ventilation, air conditioning, and (4) heating, ventilation and cooling.

Failure of the general contractor to list the subcontractor's bid price is cause for rejection of its bid. Substitutions are allowed but require a showing of good cause, as well as the contractor to provide to the State documented proof that the contractor offered the contract to the listed subcontractor (including providing copies of the related correspondence). P.A. 89-367 instituted time limits on the contract offers to subcontractors and the execution of the subcontracts. This provision, however, does not extend to second and third tier subcontractors.

- **Public Act 96-235 - An Act Concerning the Supervision and Maintenance of Certain Real Property and Concerning the Department of Public Works Construction Projections**

Prior to 1996, Connecticut had Construction Manager Advisor (“CMA”) statutes. Effective June 6, 1996, Section 18 of Public Act 96-235 repealed C.G.S. §4b-98, §4b-98a and §4b-99 relating to CMAs. Under this Act, a CMA held a contract with the State and allowed prime contractors in each trade to bid for work with the State and be supervised by the CMA as the State’s agent. The State held all the contracts and was required to manage this process including selection and oversight of the CMA, as well as certifying payrolls, day to day management, and reporting. The administrative burden of this Act and the CMA process led to the sunset of these statutory directives.

## **VI. State Government Practices Concerning Subcontractor Bidding**

### **A. In General**

To put this topic in context, the following definitions of “bid shopping” and “bid chiseling” drawn from Bruner & O’Connor on Construction Law are the definitions accepted by the Working Group. This resource reads:

Two construction industry practices universally deplored, but not infrequently utilized by successful bidders after award to improve contract profitability are “*bid shopping*” (the post-bid auctioning of subcontract work) and “*bid chiseling*” (the post-bid negotiation to reduce an already low sub-bid price without reduction in scope of work).<sup>1</sup>

In the 1980s, states attempted to address “bid shopping” by implementing policy changes in line with the contractual guide of the Federal Government utilized in the General Services Administration’s (“GSA”) subcontracting bidding form and process. While virtually all stakeholders appear to acknowledge that bid shopping does exist, there is little agreement on the extent to which it is used. Some believe it is more common in the private sector. While contract trade associations roundly deplore the practice, policymakers nationwide, for the most part, have opined that bid shopping, while unethical and potentially unhealthy for subcontractors and the industry, is not illegal and the matter is further complicated by trying to differentiate “bid shopping” from acceptable negotiations that take place over the scope and cost of a proposal. The Federal Government has not attempted to strengthen its bid requirements on GSA contracts in over thirty years and based on that approach, most states appear to have followed suit.<sup>2</sup>

States that have attempted to tackle this issue all appear to incorporate one of the following measures as an attempt at limiting bid shopping: (1) **bid listing** (such as Connecticut’s current §4b-93 requirement relating to the four major classifications), (2) **sub-bid filing** (e.g. Massachusetts), (3) separate **mandated contract requirements** for additional listed classifications, and (4) separate classification **optional contracts**, which roll in additional enforcement and monetary penalties in an effort to curb the bid shopping practice. Based on a government affairs bulletin prepared by the National Electrician Contractor Association (“NECA”) in 2014<sup>3</sup>, eight states including Connecticut were cited as having current anti bid-shopping legislation in place. **Table 1** identifies these states:

**Table 1**

<b>State</b>	<b>Bidding Method</b>
Arkansas	Bid Listing
California	Bid Listing
Connecticut	Bid Listing
Delaware	Bid Listing
Florida	Separate Contracts *Optional
Massachusetts	Bid Filing
New York	Separate Contracts *Required
New Jersey	Separate Contracts *Optional

**B. Specific State Practices**

• **Massachusetts**

Massachusetts law requires filed sub-bids by specific trades that are submitted to the Division of Capital Asset Management & Maintenance ("DCAMM") independently of the general contractor bid. Filed sub-bidders must be DCAMM certified if the project is in excess of one hundred thousand dollars (\$100,000) and if estimated costs for filed sub-bids are more than twenty thousand dollars (\$20,000). Under Massachusetts law, sub-bids fall into the following classifications: (a) roofing and flashing; (b) metal windows; (c) waterproofing, damp-proofing and caulking; (d) miscellaneous and ornamental iron; (e) lathing and plastering; (f) acoustical tile; (g) marble; (h) tile; (i) terrazzo; (j) resilient floors; (k) glass and glazing; (l) painting; (m) plumbing; (n) heating, ventilating and air-conditioning; (o) electrical work, including direct electrical radiation for heating; (p) elevators; (q) masonry work; and (r) fire protection sprinkler system. The awarding authority may add classes of work to this list on a project-by-project basis.

Filed sub-bids are reviewed and considered by the awarding authority. Filed sub-bidders can restrict their bids to certain general contractors. Responsible and eligible filed sub-bidders are placed on a tabulation sheet managed by DCAMM, which is shared with the general contractors. General contractors must choose from that sheet but are not required to list the lowest filed sub-bidder in their bid submissions. Sub-bids must be opened four and a half days before the opening of general bids. The awarding authority has two days to reject bids. Tabulation sheets are sent to all bidders two days before the opening of general bids.

• **Minnesota**

Using what is popularly today called "partnering techniques," the Minnesota contracting agencies got together with the Minnesota Associated General Contractors and several specialty contractors including the Minnesota Mechanical Contractors Association and the Minnesota Electrical Association to develop a new plan for bidding and contracting on state projects. After nearly one year of discussions and negotiations, the parties reached agreement on a new bidding and contract plan.

The bidding portion of the plan includes the following seven elements: (1) the state will use only single prime contracts for public construction; (2) mechanical and electrical contracts are bid separately to the agency two days prior to the prime bid opening date and the subcontractor can state the names of general contractors for which it will not work; (3) general contractors desiring to submit a bid then have two days to review the scope of work with those subcontractors submitting bids, and then choose which subcontractors they intend to use; (4) the bid amount as originally submitted by the subcontractor cannot be changed by either the prime or the subcontractor; (5) the subcontractor must submit a joint bid bond to both the state and the prime contractor (along with the bid bond the contractor can also state which general contractors he will not work for); (6) the state agency will award the contract to the prime with the lowest responsive bid; and (7) this bidding law applies to all contracts with an estimated value exceeding one hundred thousand dollars (\$100,000). In terms of sub-bid law, the Minnesota provisions are viewed as the most comprehensive of states other than Massachusetts.

- **Delaware**

Delaware law requires that subcontractors must be listed on all public works contracts (except projects involving roads, streets or highways) that are in excess of ten thousand dollars (\$10,000). Prime contractors listing themselves as subcontractors must be appropriately licensed by the state to perform the required type of work and must normally engage in that type of work. The agency administering the contract has the final say in allowing the prime to perform specialty work.

Substitution of any subcontractor after the prime has been awarded the contract will only be allowed if the subcontractor is proven to be incapable of performing the work, fails to execute a contract with the prime, has defaulted on the project, or is no longer in business. Approval is subject to agency review. The law also gives the awarding agency the power to assign penalties against the prime contractor if it does not use all of the subcontractors listed. The amount of the fine is up to agency discretion. The Delaware state government states that the primary purpose of the bid listing law is to protect the public from the wasting of money. A secondary intent of the law is to avoid bid shopping.

For any subcontractor contract in excess of ten thousand dollars (\$10,000), the agency develops plans and specifications. The awarding agency coordinates a meeting of all prospective bidders at least fifteen days before the date of the submission of bids. At that meeting all participants, including the agency, attempt to agree upon the listing of all subcontractor categories to be included in the bids. If they cannot agree, the awarding agency must determine the subcontractor categories to be listed ten days prior to the submission due date.

- **California**

The State of California's Subletting and Subcontracting Fair Practices Act requires subcontractors to be listed on all state and local contracts and allows substitution of the listed sub under limited circumstances. The law requires that either the specifications or general conditions provide that the general contractor set forth in its bid the names and locations of subcontractors who will perform work in excess of one half of one percent of the total bid, or ten thousand dollars, whichever is greater, as well as the portion of work to be performed by each such subcontractor.

- **Mississippi**

In Mississippi, every invitation to bid on a contract for the construction, alteration or repair of any public building or public work of the state or any political subdivision thereof, which is expected to cost in excess of one hundred thousand dollars (\$100,000.00), shall require each bidder to submit as part of its bid the names of the subcontractors for the categories of work for which subcontractors are required to be listed pursuant to statute. Each bidder agrees, if awarded the contract, not to have any of the designated categories of work performed by an individual or firm other than those named in the bid.

The contracting agency for each project determines the categories of work for which subcontractors are to be included and is required to include all categories of work expected to cost more than fifty thousand dollars (\$50,000.00). Other categories may be included on the list when, in the judgment of the contracting agency, the inclusion is necessary.

- **Arkansas**

Arkansas law requires that all contractors submitting bids on public construction contracts with an estimated value of twenty thousand dollars (\$20,000) or more must list their subcontractors. Subcontractors to be listed must be licensed and qualified as either mechanical, electrical, roofing, and/or sheet metal contractors. The prime contractor must submit the subcontractors' names and quotes in both its bid and in a separate sealed envelope.

In the event that a listed subcontractor refuses to enter into a contract, the prime contractor is allowed to substitute with another subcontractor provided that the replacement subcontractor is approved by the architect, owner, and the State Building Services. The replacement subcontractor cannot cost more than the original quote. If the replacement subcontractor's bid is less than the original bid the difference must be refunded to the state.

- **Maine**

Maine has a non-statutory filed sub-bid system called the Maine Construction Bid Depository ("MCBD"). It is administered by the Associated General Contractors (AGC) of Maine. In short, a "bid-depository" is a receiving box or location where all bid documents must be lodged by a specific date in order to be eligible for award consideration. The MCBD website provides a more complete description of this bid process:

<http://agcmaine.org/wp-content/uploads/2009/08/MAINE-CONSTRUCTION-BID-DEPOSITORY.pdf>

## **VII. Connecticut Bid Listing Process**

### **A. Bid Listing in Design-Bid-Build Projects**

Pursuant to C.G.S. §4b-91, every Design-Bid-Build ("D-B-B") project delivery contract that exceeds five hundred thousand dollars (\$500,000) shall be awarded to the lowest responsible and qualified general bidder who is "prequalified" by DAS (C.G.S §4a-100) on the basis of competitive bids.

Additionally, per C.G.S. §4b-93, the D-B-B bidding documents “must include plans and specifications detailing all labor and materials to be furnished thereunder, [and] [s]such specifications shall have a separate section for each of the following classes of work, if in the estimate of the awarding authority, the class of work will exceed twenty-five thousand dollars: (1) Masonry work; (2) electrical work; (3) mechanical work other than heating, ventilating and air conditioning work; and (4) heating, ventilating and air conditioning work.” The statute also provides that “Such specifications shall also have a separate section for each other class of work for which the awarding authority deems it necessary or convenient.”

Therefore, each the following “classes of subcontractor work” are required to be listed on the D-B-B Bid Proposal Form:

1. Masonry;
2. Electrical Work;
3. Mechanical Work (other than heating, ventilating and air conditioning work); and
4. HVAC (heating, ventilating and air conditioning work).

A general contractor awarded a D-B-B contract must execute a “Subcontractor Agreement” (per C.G.S §4b-96) with each listed subcontractor for the amount shown on the Bid Proposal Form. The general contractor may substitute another subcontractor for a listed subcontractor, but only for “good cause,” and the substitute subcontractor must be acceptable to the State and not change the original amount shown on the Bid Proposal Form.

The general contractor, prior to contract award, is required to demonstrate how it will meet the statutory small business enterprise and minority business enterprise (“SBE/MBE”) set-aside requirements, required pursuant to C.G.S. §4a-60g, which may be accomplished through the listed and non-listed subcontractors.

### **B. Bid Listing in Construction Manager-at-Risk Projects**

Every Construction Manager-at-Risk (“CMR”) project delivery contract (governed by C.G.S §4b-103) must provide for a Guaranteed Maximum Price (“GMP”) for the cost of construction on the basis of multiple Subcontractor Invitations to Bid that are advertised and publically opened. The CMR bidding documents contain separate sections for the plans and specifications that detail each type of labor and materials needed on the project (“bid packages”), to be bid on by the trade contractors (subcontractors) that bid to the CMR.

A subcontractor intending to bid on a bid package that is estimated to equal or exceed five hundred thousand dollars (\$500,000) by law must be prequalified by DAS (according to C.G.S §4a-100). The CMR may advertise any number of bid packages and the subcontractor bid proposal forms are publically opened.

The CMR is required to meet the SBE and MBE set aside requirements established by statute. This is accomplished by assigning set aside requirements for each bid package and having certain bid packages restricted to firms that are certified small (SBE) and minority business (MBE) enterprises.

## **VIII. Bid Shopping and Subcontractor Transparency in Connecticut**

### **A. Bid Shopping**

The impetus for Senate Bill 454 and Special Act 14-18 were the issues of the bid shopping of subcontractor bids by general contractors or prime subcontractors on CMR projects, as well as the lack of verifiable information as to the entities performing work on State projects beyond the first tier subcontractors. The questions and concerns over these issues led to the creation of CCBT Working Group, which was charged with analyzing the issues, determining the extent and impact of the identified practices and developing recommendations that address the issues appropriately.

While virtually all actors in the construction industry – the subcontractors, the awarding authority agencies, and the general contractors – deride the practice of “bid shopping,” not all agree as to the extent it occurs in Connecticut or as to the various possible economic impacts that such practice is having on State capital projects. Furthermore, many caution that is imperative to distinguish “bid shopping” from the legitimate negotiations that take place in the course of the bidding and contract award processes. For that reason, some industry representatives have expressed reluctance to make major changes in state contracting protocols and in law that may result in negative or unintended consequences in what is already a complex and burdensome process.

To approach this issue, Special Act 14-18 required a balanced Working Group comprised of State agency representatives, general contractors, WBEs and MBEs, CMRs, subcontractors, design professionals, trade organizations and small contractors. The seventeen-member Working Group is charged with completing a report by January 1, 2015 which the Act specifically stated shall include:

- (1) A review and analysis of the current general contractor and construction manager at risk practices for receiving subcontractor and lower tier subcontractor bid submissions on capital projects;
- (2) A review of existing laws regarding state enforcement, compliance, and licensing authorities that govern general contractors, construction managers at risk and subcontractors;
- (3) A review of existing construction contracting methods;
- (4) Best practices for subcontractor and lower tier subcontractor bid submissions on capital projects used by other states and government jurisdictions; and
- (5) Recommendations for administrative and legislative changes.

Members of the Working Group agreed on a working definition of “bid shopping” to mean the practice of a general contractor or first tier subcontractor using the lowest bid received and relied upon in the general and first tier bid to pressure the sub-bidder to submit an even lower bid price or risk losing the work to another subcontractor. “Bid chiseling” is a similar practice that is described as the “post bid negotiation to reduce an already low sub bid price without a reduction in scope of work.” The purpose of these practices can be to improve the profit margin of the general contractor or prime subcontractor by reducing the subcontractor’s or lower tier subcontractor’s offered price. According to Donald Gregory and Eric Travers in the Construction Lawyer article “*Ethical Challenges of Bid Shopping*,” the following are outlined as potential negative impacts of bid shopping:

- Undermining the competitive bid process;
- Promoting lower-quality work;
- Incentivizing corner cutting;
- Increasing claims and change orders;
- Delaying project completion; and
- Generally worsening the business climate<sup>4</sup>

While no CCBT member denies the existence of bid shopping, no data was provided that quantified the extent of the practice on State capital projects or the other negative impacts identified above.

### **B. Subcontractor Transparency**

The concern expressed under the rubric of subcontractor transparency is that often work is being performed through lower tier subcontractors that have a history of problems related to inaccurate payrolls, failure to provide workers' compensation insurance, non-payment of fringe benefits, and the misclassification of workers. Some subcontractors could also have a history of safety violations and a record of poor work performance. In all these cases, it is difficult to enforce legal requirements absent the knowledge of the actual subcontractors performing work on the site. The level of project reporting on this subject can vary, but the need for more information is consistent.

## **IX. Presentations to the CCBT Working Group**

### **A. Foundation for Fair Contracting in Connecticut (FFCCT)**

The testimony presented to the Working Group in the summer of 2014 indicates that while some level of bid shopping may exist, no specific documentation pertaining to the prevalence or frequency of bid shopping in Connecticut was submitted. The Foundation for Fair Contracting in Connecticut ("FFCCT") maintains, however, that the limited number of named subcontractors required in the Design-Bid-Build ("D-B-B") framework and the lack of transparency in the lower tier contracting levels of the Construction Manager-at-Risk ("CMR") approach "ripens the opportunity for contractors to contact several subcontractors in the same discipline in an effort to reduce the previously quoted prices." FFCCT, one of the leading proponents of expanded bid listing, proposed mandating nineteen specific listed project elements applicable to both D-B-B and CMR projects. The essential argument is that once bids are submitted on the project elements they are not subject to modification or substitution, and the opportunity for bid shopping and related abuses would be significantly reduced.

In addition, FFCCT argues that the lack of information concerning lower tier subs provides the opportunity for unscrupulous contractors to avoid payroll obligations and misclassify and underpay workers. To combat these problems, FFCCT proposes designating a "Clerk of the Works" for each project whose duties shall include monitoring of work sites for the type of abuses typically identified and investigated by the Department of Labor ("DOL"). FFCCT and the sheet metal trades believe that any increased costs to agencies and contractors in conforming their processes are far outweighed by the benefits to the subcontractors. They also represent that significant savings will be achieved by making these changes, but no savings were quantified to the Working Group.

### **B. DAS Division of Construction Services**

Representatives of the Division of Construction Services ("DCS") within DAS testified that once named subs submit their bids for D-B-B projects, and subcontracts are selected in the CMR process, the opportunity for bid shopping ceases at that level and the State has knowledge of these subcontractors who will be performing work on a project. The same is true, generally, for the set-aside subcontractors. While there are requirements for identifying other subcontractors and knowing who is working on site, the compliance is not consistent. Second, third and lower tier contracts are not subjected, consequently, to the same level of scrutiny, and the reporting at the lower levels is far less

transparent. It was also noted that DCS has observed a need to vastly improve its database concerning lower tier subcontractors. This is needed to both improve performance related information, add accountability in State contracting and to improve the availability of information needed to verify and support supplier diversity policies and practices.

### **C. Department of Labor**

The Department of Labor (“DOL”) staff testified that virtually every construction project it monitors presents some type of abuse at the subcontractor level. Typical violations include:

- Falsified payrolls;
- Non-payment of fringe benefits;
- Prevailing Wage violations;
- Misclassification of workers;
- Non-payment of pensions;
- Under-reporting of hours;
- Using unlicensed workers; and
- Bad payroll checks.

DOL reported that since 1993, its staff has investigated over four thousand contractors for not paying prevailing wage, debarred fifty contractors and sixty-three individuals, secured back pay for over twenty-eight thousand workers and prosecuted fifteen individuals for criminal violations. DOL also reported that since it does not hold all the contracts, it has become aware that GCs and CMRs do not always know who is working on the site and it has even seen cases where no written contract is in place. Related to this observation, DOL indicated support for a more active monitoring presence on construction projects, along the lines of the program employed in Massachusetts.

Staff also indicated that there is little observed linkage between DOL, the agency maintaining contractor compliance information, and contracting agencies that select and hire GCs and their subs. As a result, it is possible for a subcontractor under review by DOL for contractor violations to be selected by a contracting agency for additional work, or by a named sub on a DCS project for work at a lower tier level.

### **D. Commission on Human Rights and Opportunities**

As a member of the Working Group, the Commission on Human Rights and Opportunities (“CHRO”) expressed an interest in ensuring that companies hired as State contractors include an adequate and representative number of MBEs. Staff testified that the added number of work classifications in the CMR construction option has significantly improved achievement in goal attainment as added bid packages lead to more subcontracts, usually in smaller dollar amounts, and improved opportunities for MBEs. This observation was confirmed by DCS staff.

While CHRO did not directly comment on the bid shopping issue, staff did express an interest in learning if added work classifications and greater disclosure and scrutiny of second and third tier subcontractors could improve compliance with MBE goals as new standards of accountability at that level would assist in their compliance efforts.

Subsequently, FFCCT has argued that more named subcontractors would also result in smaller bid packages and a greater likelihood that MBEs and smaller SBE firms could compete more effectively for that work.

### **E. Industry Comments**

The Connecticut Construction Industry Association (“CCIA”) presented its position on bid shopping and proposed changes to the construction selection and contracting system as part of the Working Groups deliberations. Throughout the process CCIA has condemned the practice of bid shopping, but questioned the extent to which it is used in Connecticut and reminded the Working Group that there is an acceptable level of give and take in discussions over cost and scope of work that should not be confused with “bid shopping.”

CCIA is comprised of general contractors, construction managers, subcontractors, material producers, equipment dealers, suppliers and affiliated professional firms. Representatives argued that existing State agency staff resources are strained under the burden of existing requirements and that the addition of new work classifications, as proposed by FFCCT, would lead to process delays or the need for additional contracting agency staffing. CCIA also contends that new work classifications will add administrative costs to general contractors and construction managers, further burdening an already taxed industry.

Important to CCIA is its contention that the current Design-Bid-Build and Construction Manager-at-Risk processes provide for needed flexibility in the management and coordination of work elements in complex construction projects. With nineteen mandated work classifications for each and every project, as proposed by FFCCT, the current level of flexibility enjoyed by general contractors would be lessened resulting in additional costs, workplace disputes, and increased claim activity. In addition, CCIA argues that the economics of the proposed new requirements do not add up for Connecticut contractors. More requirements, adding still more administrative cost burdens, will act as a disincentive to the participation of contractors in State bidding. CCIA cites the “Compliance Mode” of state government for its cumbersome rules and regulations, extraordinary overhead costs and increased liability.

CCIA recommended that any changes to the process should be practical, realistic, free of administrative burdens, encourage competition, preserve current project management advantages, make economic sense and consider unintended consequences.

The Associated Builders and Contractors (“ABC”) of Connecticut are comprised of two hundred general contractors, construction managers, subcontractors and material suppliers as well as professional associate members. While ABC had no independent information concerning the extent of bid shopping, the organization cautioned against any significant change in process that could add new burdens to general contractors and construction managers.

ABC believes that all contracts should be awarded to the lowest, qualified and responsible bidder regardless of their union affiliation. The organization favors the elimination of burdensome regulations that may discourage qualified contractors from bidding on State work and have unintended consequences that hurt the industry. ABC maintains that many State contractors are being deterred from State work because of the many layers of laws and regulations currently in place. They contend that “if this trend continues” the State “may not get the most qualified contractors to provide the best product for the end user.” ABC’s concerns include:

- Increased cost of compliance;
- Burdensome regulations;
- No statute of limitations on claims brought by the State;
- Fear of rules constantly changing; and
- Laws being created to fix problems that do not exist.

ABC concludes that any recommendation adopted by the Working Group should “avoid unintentional consequences that have negative impact on the industry as a whole, and the State’s ability to deliver the highest quality construction projects to Connecticut residents.” These may include new requirements that can actually increase costs to the State and contractors while delaying project completion.

**F. Massachusetts Division of Capital Asset Management and Maintenance**

Representatives of the Massachusetts Division of Capital Asset Management and Maintenance (“DCAMM”) made a presentation to the Working Group on its filed subcontractor bid program. For executive branch agencies, the judiciary and higher education, as well as other state client agencies, DCAMM is responsible for the planning, design, construction, repair and improvements of facilities, facility management and maintenance, contractor certification, leasing, asset management and acquisition and disposition of property.

DCAMM employs four hundred employees, one hundred of which are in the Office of Planning, Design and Construction (“OPDC”). OPDC works with DCAMM’s Offices of Finance, Legal and Bids to select, award and contract with contractors who perform work with designers selected through the Design Selection Board.

For the D-B-B program, the filed-sub bid law applies to construction with an estimated cost of one hundred thousand dollars (\$100,000) or more. This provides for competitive bidding on the eighteen trades directly to the awarding authority instead of the General Contractor.

Subcontractor bids are opened publicly by the awarding authority at least four days prior to opening of the general bids and the subcontractor bids are secured and not subject to change unless approved by the awarding authority. Certain trade classifications are required to include in their bids the sub-subcontractors names and prices. The general contractor assembles its bid from among the filed bids together with trades that are not required by state law to be filed with the awarding authority. The award of the contract to the general contractor is based upon the determination of the lowest eligible and responsible bidder. Non-filed bids can be modified through a negotiation process in which DCAMM staff is involved.

DCAMM certifies contractors annually and prequalifies them on a project-by-project basis. Subcontractors may not be substituted unless the Awarding Authority agrees to do so. The DCAMM presentation listed the pros and cons of this system.

Pros:

- Greater access to work for competent subs;
- Generates a useful pool of data regarding costs and project components;
- Selection and pricing all done in the public view;
- Transparency of sub bids available to all general bidders;
- Prevents bid shopping after general bids are submitted;

- More complete design and cost estimates are prepared prior to bid;
- More control by owner;
- Increases competition – thereby benefiting the public;
- Increases number of qualified sub bidders; and
- Provides protection to subs with a statutory contract form.

Cons:

- Restricts GCs from assembling their own team (flexibility);
- Perception that subs are not accountable to GCs;
- Discourages certain GCs and subs from bidding;
- Does not foster harmony on the site;
- Detailed design at bid phase hurts GCs ability to consolidate and coordinate work (flexibility);
- Imposes administrative burden on owner with multiple selections, increased opportunity for protests, adds cost and delays process; and
- Creates access problems for MBE/WBE firms.

DCAMM also administers a Construction Manager-at-Risk (“CMR”) program. With this project delivery method a construction management firm provides a range of pre-construction services including: cost estimation, design, scheduling, preparation and coordination of bid packages, value engineering, assistance in evaluating trade contractors and other subs. The CMR will also provide the management of the construction phase of the project. When approximately 20% of construction is completed, a Guaranteed Maximum Price (“GMP”) is agreed to and trade contracts are publically bid and the lowest prequalified trade contractors are selected. These subs contractors cannot be substituted and prices cannot be modified without permission of the owner.

The Massachusetts Filed Sub Bid Process is a comprehensive institutionalized system designed to protect subcontractors performing certain classes of work from bid shopping and similar practices while improving the pool of qualified subcontractors.

DCAMM representatives also described their Resident Engineer program which is similar to the “Clerk of the Works” proposal offered by FFCCT and is structured to monitor subcontractors, daily worker logs, payroll records, wage and hour requirements and compliance with other state laws and regulations.

A detailed and comprehensive comparison of DAS and DCAMM Processes for Design-Bid-Build and Subcontractor Requirements is reflected in **Appendix A**.

## **X. FFCCT Proposal & Analysis**

During the course of the Working Group’s regular meetings, FFCCT and the Connecticut Building Trades, the leading proponents of change in the State’s subcontracting system, offered a set of four proposals. The proposals served as a basis for organizing material received from the presentations, and providing the framework for discussion of the issues that led to the creation of the Working Group. Consequently, the proposals will serve as the format for the analysis and subsequent recommendations and findings. The proposals are as follows:

- Amend C.G.S. §4b-95(b)(1) and §4b-103 to require names of sub-subcontracts with contracts in excess of \$25,000;
- Amend C.G.S. §4b-95 and §4b-103 to increase or add the listed classifications to nineteen categories;
- Amend C.G.S. §4b-93 and §4b-103 to require the general contractor or construction manager at risk to designate a clerk of the works; and,
- Amend C.G.S. §4b-95 to expand the definition of awarding authority for purposes of the Freedom of Information Act.

#### **A. Transparency**

In view of the testimony submitted to the Working Group the need for improved transparency in terms of knowing who is performing work on State capital projects is clear. While named subcontractors in the Design-Bid-Build project delivery method, and prime subcontractors for the various bid packages in the CMR process, are identified and their bids are secured once submitted, there is often not enough information concerning lower tier subcontractors to ensure compliance with the various legal requirements for performance of work on State capital projects.

To be sure, there are numerous existing requirements already in place that pertain to obtaining information regarding the contractors and workers on a State capital project. The applications for payment are to include a list of all subcontractors and suppliers names (Section 01 29 76 Progress Payment Procedures for Design-Bid-Build). The construction administrator is charged with recording the names and addresses of the general contractor, subcontractors and major suppliers.

A Construction Administrator's duties also include keeping a daily log book of the general contractor's and subcontractors' staff on the job site, obtaining weekly certified payrolls and periodically monitoring the weekly certified payrolls as they apply to the prevailing wage laws and the accuracy of the workers on site, in order to confirm compliance with the laws, and that their payments are correct (Contract for Construction Administration, Form 214). Additionally, on CMR projects, the new CMR contract includes a provision requiring the CMR to provide information on each subcontract and second tier subcontract. Despite these requirements, compliance has been uneven and insufficient and the need for greater transparency is clear.

Several reasons support the importance of addressing these deficiencies:

- Public policy demands greater accountability in the use of public funds;
- Better subcontractor information will assist in efforts to ensure the use of responsible and qualified companies;
- Such information is needed, and will become increasingly needed, to document and justify state policy related to supplier diversity and SBE and MBE set aside programs; and
- Subcontractor information may help generate a useful source of data concerning project costs and components.

State contracting agencies must acquire more detailed information on lower tier contractors. This can be achieved in the short run by the introduction of administrative reporting requirements as discussed below; and, longer term, by the acquisition and deployment of an improved data management reporting system.

## **B. Bid Shopping**

With respect to the concern about bid shopping, little hard evidence was presented to document its widespread use in Connecticut or to quantify its negative impact on State capital projects. Anecdotal information does suggest it may occur in certain circumstances, and it is reasonable to conclude that, if it does occur in the State contracting process, it likely happens at the lower tier subcontractor level where the selection process is less transparent, timing requirements are less rigid and pricing may be more sensitive to market pressures, competition, and price variations. Where it is reasonable and practical to limit the potential for bid shopping, changes in the contracting system should promote practices which serve to minimize such abuse.

FFCCT and the Building Trades have proposed amending C.G.S. §4b-93 and §4b-103 to increase the number of, or add the requirement for, the listing of 19 categories of trade work. The mandated categories of work would include: (1) Site work; (2) Demolition; (3) Masonry; (4) Electrical; (5) HVAC – Units and Piping; (6) Sheet Metal Ductwork and All Related Components; (7) Roofing, Waterproofing, Flashing, and Metal Siding; (8) Doors and Windows; (9) Miscellaneous Metals; (10) Flooring; (11) Painting; (12) Plumbing; (13) Fire Protection Sprinklers; (14) Mechanical Insulation; (15) Elevators; (16) Concrete; (17) Structural Steel Fabrication; (18) Structural Steel Installation; and, (19) General Trades. The proponents recommend also adding a category for “any other as needed or desired project element.”

The proposal to mandate 19 specific listed project elements applicable to both D-B-B and CMR projects is based on the argument that if more project elements are specified, they would not be subject to modification or substitution once submitted to the CMR or included in the bid by the general contractor, and therefore, the opportunity for bid shopping would be significantly reduced. While this may be true, the implementation of such a proposal appears to create substantial challenges including increased professional design fees; the need for additional State staffing for quality assurance, document preparation, and scope review; increased costs related to bid challenges and change orders; project delays especially in the bidding and contract award process; diminished project management flexibility; potential jurisdictional conflicts; and the imposition of additional administrative overhead costs on GCs and CMRs. Finally, there is some question as to whether the particular classifications would be the most appropriate for bid listing.

While these factors weigh against acceptance of the FFCCT plan, alternative actions can achieve many of the same objectives as those intended in the 19 category plan, without creating nearly so many negative fiscal and administrative impacts. To put this discussion in context the following excerpts from impact statements from a variety of sources has been assembled. (The full impact statements are attached in the Appendices.)

## 1. DAS Process Impact Analysis

Below is a summary of agency impacts for the C.G.S. §4b-93 (D-B-B) portion of the FFCCT proposal. These comments have been modified from comments provided by DAS on Raised Bill 454 during the 2014 legislative session:

The proposal dramatically increases the complexity of the both design & bidding processes for design professionals, contractors, and DAS/DCS. This complexity will also dramatically increase the time needed to bid a project, the time for contractors to respond to the bid, and the time DAS/DCS will need to devote to the review of bids and execute contracts.

The proposal increases the number of the current 4 classes of work to 19 classes of work for which the design professionals would need to provide separate plans and specifications; increases the number of “classes of work” for which the general contractor must solicit subcontractor bids; and increases time it shall take DAS to analyze all of the bids and additional subcontractor bidding documents, and increase the number of Subcontractor Agreements that the general contractor must execute.

For example, currently *Subsection 7.5 of our Bid Proposal Form* requires the general contractor to submit a host of information on its 4 named subcontractors. If this subsection required this information for 19 classes of work (instead of 4) a general contractor work load would be greatly increased as they would be required to submit the following information for the increased classes of work.

First, DAS's Bid Proposal Form requires each general contractor to list its subcontractors and their prices for all trades identified in Schedule 7.5.1.

**FAILURE TO PROPERLY COMPLETE THIS SECTION ACCORDING TO THE BELOW INSTRUCTIONS SHALL RESULT IN REJECTION OF THE BID.** The GC shall indicate the subcontractor name and contract value for the largest single subcontractor in each named sub trade.

SCHEDULE 7.5.1 – NAMED SUBCONTRACTORS				
Description	Name of Subcontractor	Amount Dollars	Labor & Material Payment Bond	Performance Bond
1. Masonry	_____	\$ _____	_____ %	_____ %
2. Electrical	_____	\$ _____	_____ %	_____ %
3. HVAC	_____	\$ _____	_____ %	_____ %
4. Mechanical*	_____	\$ _____	_____ %	_____ %
* (except HVAC)				

Additionally, the Bid Proposal Form requires the general contractors to include the following information on the named subcontractors:

- 7.5.2 List the name and price of each Named Subcontractor that will perform the work of the trades listed in Schedule 7.5.1.
- 7.5.3 The General Contractor may list itself together with its price (failure to provide both will be cause for rejection), if it customarily performs any of the trades specified. If the General Contractor leaves the spaces for a specific "Trade Description" completely blank, it will be assumed that the General Contractor will perform all the work for that trade.
- 7.5.4 If the General Contractor requires a Performance and/or Labor and Material Payment Bond, then the General Contractor must indicate in Schedule 7.5.1 which of the Named Subcontractors are subject to this requirement. The amount (%) shall not exceed the Named Subcontractor's price listed in Schedule 7.5.1.

- 7.5.5 The undersigned agrees that each of the Named Subcontractors listed in Schedule 7.5.1 of the Bid Proposal Form will be used for the Work indicated at the amount stated, unless a substitution is permitted by the awarding authority as provided for in section 00 21 19 Notice to Bidders.

If the FFCCT's proposed changes went into effect, within ten calendar days after the bid opening, the three apparent low bidders need to get potentially 19 named subcontractors to complete and submit the "Named Subcontractor Bidder Qualification Statement" and then have the Project Manager and DAS Procurement review all of these Bidder Qualification Statements. Thereafter, DAS Procurement will need to get the general contractor to get potentially 19 named subcontractors to execute a Subcontractor Agreement as required by C.G.S. §4b-96.

DAS believes that FFCCT's proposed changes will have profound consequences to its ability to bid projects in a timely manner and for general contractors to respond to our Invitations to Bid in a timely manner. Additionally, requiring the 19 categories to be bid as separate packages may result in larger bid packages that require the subcontractor to be prequalified, which would impact the ability of smaller and minority firms, including set aside subcontractors, to bid on the work.

See Appendix B for a complete summary of agency impacts of the modified proposal.

## **2. DAS Fiscal Impact Statement on Raised Bill 454**

The following agency impact statements were submitted during the 2014 legislative session in response to Senate Bill 454, which proposed to remove the four listed major classification components outlined in C.G.S. §4b-93 (masonry, electrical, mechanical, and HVAC) and substitute the over thirty plus DAS Contractor Classifications in their place. Since the legislative session, the proponents have modified their proposal to include 19 classes of work (instead of 30+). DAS acknowledges that the fiscal impacts expressed in regards to SB 454 would be lessened as a result of this change; however the information below outlines areas where fiscal impacts will remain for DAS even with the modified proposal.

The areas of fiscal impacts are:

- Systemic revision of bid forms, guidance documents, and realignment of prequalification classifications;
- Necessary IT improvements;
- Current and pipeline capital project delays; and
- Division of Construction Services and Process management staffing needs.

DAS submitted the following fiscal impacts:

- Department of Administrative Services Direct Costs  
\$200,000 System Modifications and Consulting Services  
\$650,000 IT improvements  
\$807,590 Staffing needs

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- \$1,657,590 Total in direct costs
- Department of Administrative Services Indirect Costs

There is the potential for a 2-5% increase in GC and CMR future bids, as contractors are going to build the costs for complying with these new requirements into their bid submissions. With more than \$200,000,000 a year in State construction, the increased indirect costs to the State can be estimated in the \$4-\$10 million range.

See Appendix B for a complete summary of agency administrative and fiscal impacts of the modified proposal.

### 3. Office of Fiscal Analysis Fiscal Impact Statement

The Office of Fiscal Analysis reported the following agency impacts of Senate Bill 454:

- State Impact:

Agency Affected	Fund-Effect	FY 15 \$	FY 16 \$
Dept. of Administrative Services	GF - Cost	575,000	300,000
State Comptroller - Fringe Benefits <sup>1</sup>	GF - Cost	82,485	109,980

- Municipal Impact: None

- Explanation

The bill makes several changes concerning the awarding of subcontracts for public works projects that are subject to the state's competitive bidding laws. The Department of Administrative Services (DAS) would need to hire a consultant at up to \$100,000 in FY 15 to re-design bidding systems, revise templates, bid forms, manuals, and reporting systems.

To implement the revised bid award requirements, DAS would need to make improvements to their IT systems that track subcontractors and second tier contracting data as their current IT system is not capable of tracking this data. It is anticipated that improvements to this system would cost \$250,000 in FY 15.

In addition, it is estimated that DAS would require four positions at a cost of \$307,485 (\$225,000 in salary and \$82,485 in fringe benefits) in FY 15 to operate with the expanded requirements. The new positions would collect and review listed subcontracts and lower tier subcontracts, handle increased bid protests, scope reviews of bid packages, and manage requests from contractors or subcontractors for substitutions of subcontractor or lower tier subcontractors who are unable to perform their duties.

- UCONN Supplement

In addition to the cost to the Department of Administrative Services, it is estimated that the University of Connecticut would require two positions at a cost of \$191,324 (\$140,000 in salary and \$51,324 in fringe benefits) in FY 15 to operate with the expanded requirements. The new positions would collect and review listed subcontracts and lower tier subcontracts, handle increased bid protests, scope reviews of bid packages, and manage requests from contractors or

subcontractors for substitutions of subcontractor or lower tier subcontractors who are unable to perform their duties.

Since the end of the 2014 legislative session, UConn has reviewed its staffing needs and determined that it would need three positions to fulfill these new responsibilities.

#### **4. Department of Consumer Protection Comments**

The Department of Consumer Protection (“DCP”), the agency responsible for licensing and registration of specific construction trades, provided the Department of Administrative Services with information in response to the Connecticut Building Trades & Foundation For Fair Contracting in Connecticut’s proposal to expand the number of listed subcontractors to include other trades. DCP highlighted an issue using sheet metal work as an example.

“Sheet metal work” is defined in C.G.S. §20-330(13) to mean the installation, erection, replacement, repair or alteration of duct work systems, both ferrous and nonferrous. This definition is consistent with the DAS Prequalification Contractor Classification description of the work. This description also notes that to prequalify for sheet metal work, the contractor must have a Sheet Metal Work Contractor License through the State of Connecticut Department of Consumer Protection.

DCP further informed DAS that jurisdictional disputes among trades is not uncommon in the installation of HVAC systems due to the fact that the definition of the work of a specific trade may be more expansive in its collective bargaining agreement than the definition and description found in state statutes and regulations. DAS offered from its experience that the elements of work that are part of an HVAC system are coordinated through the HVAC contractor, and separating out sheet metal or the other various components of the system as separate bid packages could lead to trade disputes and coordination issues. The present statutory scheme under C.G.S. §4b-93, the approach taken by CMRs on DAS projects, and the Massachusetts statutory scheme do not have a separate bid package for the components of a HVAC system; rather, the components are sub-subcontractors to the prime HVAC subcontract.

#### **5. Alternative to FFCCT’s Proposal**

If the 19 work element plan is not a cost effective option, what other steps can be taken to achieve its intended purpose?

In both the D-B-B and CMR approaches, first tier subcontractors are identified, bids are submitted and secured and substitution can only be made with the approval of DCS. Second and lower tier subs are not required to be submitted to DCS, potentially leading to many of the problems identified as concerns by FFCCT, DOL and CHRO.

Rather than expanding the number of named subs in the D-B-B process and mandating a predetermined number of work elements in the CMR process, alternative modifications to the existing system can be considered. Specifically, improving the transparency and bid listing requirements at the sub-subcontractor level would move the State in the right direction. For example, State awarding authorities can require the following of general contractor for non-named subcontractors, named subcontractors on the Design-Bid-Build projects, and all first tier subcontractors on the CMR projects:

- A general contractor and a CMR shall provide to the awarding authority, within twenty-one days of the execution and approval of its contract in the case of a general contractor, and within twenty-one days of the execution and approval of its GMP amendment in the case of a CMR, a copy of each first tier subcontract for work to be performed on the project. Any change in pricing after that date, or any substitution of a first tier subcontractor, will require the approval of the awarding authority. Also within the twenty-one day period following contract or GMP amendment execution and approval, each first tier subcontractor shall file with the GC or CMR, as applicable, and the awarding authority, the names, bid prices and contracts of all its second tier subcontractors that will be performing work with an estimated value of fifty thousand dollars (\$50,000) or more. Any proposed change in pricing after that date, or any proposed substitution of a second tier subcontractor, will require the approval of the GC or CMR and the awarding authority. All other subcontractor names, bid prices and subcontracts, regardless of tier, shall be filed with the GC or CMR and the awarding authority prior to mobilization of the subcontractor at the project site. In the event that bid or contract documents require earlier submission of subcontracts, the time period specified in those documents shall take precedence.

This solution effectively limits any potential bid shopping activity to the period of subcontractor selection and execution of the subcontractor contract or sub-subcontractor contract, as the case may be, which would now have to be completed and documented within twenty-one days. In addition, awarding agencies would require that the prime general contractor provide names and prices for all other subcontracts in advance of their mobilization to the construction site.

This provision would also improve the ability of CHRO to work with significant subcontractors in identifying opportunities for greater inclusion of MBE companies in the State construction program.

### **C. Clerk of the Works**

The third element of the FFCCT proposal calls for amending C.G.S. §4b-93 and §4b-103 to include the following:

“Upon receiving a contract from the Awarding Authority, the General Contractor or Construction Manager shall designate an individual to act as a Clerk of the Works whose duties shall include but not be limited to: maintaining and reviewing daily sign in logs of any mechanic, laborer, or workman to ensure an accurate head count; reviewing certified payroll records for accuracy and compliance with all state laws and regulations (with specific adherence to wage/hour/benefits regulations and worker classification); and reviewing workers’ compensation insurance to be sure that all workers are properly covered for the classification of work they are performing. The proposal further suggests that the general contractor or CMR be held liable for any blatant misrepresentations or discrepancies that may arise from the failure of the Clerk of the Works.”

As indicated earlier in this report, DOL staff testified that virtually every construction project it monitors presents some type of abuse at the subcontractor level. Typical violations include falsified payrolls, non-payment of fringe benefits, Prevailing Wage violations, misclassification of workers, non-payment of pensions, under-reporting of hours, utilizing unlicensed workers, and bad payroll checks.

In support of its testimony, DOL reported that since 1993 its staff has investigated over four thousand contractors for not paying prevailing wage, debarred fifty contractors and sixty-three individuals, secured back pay for over twenty-eight thousand workers and prosecuted fifteen individuals for criminal violations. DOL also reported that since it does not hold all the contracts, GCs and CMRs do not always know who is working on the site and DOL has even seen cases where no written contract is in place. Related to this observation, DOL indicated support for a more active monitoring presence on construction projects, along the lines of the program employed in Massachusetts.

The DOL position is consistent with the FFCCT “Clerk of the Works” proposal. However, moving to a system-wide Clerk of the Works or Integrity Officer type of monitoring program may require some additional research on its cost and impact on Connecticut construction projects. Toward that end, authorizing legislation to permit a pilot program in this area, involving relevant state agencies, GCs, CMRs, trade unions and subcontractors, would be an appropriate step. In Fiscal Year 2016, between three and five D-B-B and CMR projects could be targeted for inclusion in a pilot program with the information generated providing policy makers with the data needed to assess the cost of the program and its effectiveness in reducing or preventing contractor abuse. Several state agencies, including DOL, DAS, UCONN and CHRO could benefit from the information produced through this project.

#### **D. Changes to the FOI Law**

Finally, FFCCT proposes amending C.G.S. §4b-95 to define “awarding authority” to include anyone acting on behalf of or as an agent of the State agency awarding the contract. This would, according to FFCCT, increase transparency under the Freedom of Information Act (“FOIA”), since the GC or CMR would be recognized as an entity representing the State. Without passing judgment on the merit of the argument being made, this proposal seems beyond the charge and scope of the current CCBT Working Group and may more appropriately be the subject of further study along with several other items identified in this report. There are serious legal concerns in expanding the definition of an “awarding authority” to include a private entity, and making such entity an agent of the State. However, it should be noted, that if the subcontractor disclosure requirements recommended above are implemented, this change would make these contracts subject to FOIA law and requirements.

### **XI. CCBT Findings**

#### **A. Bid Shopping – Increasing Listed Subcontractor Classifications**

1. In 1982, the State of Connecticut repealed its “pre-filed bidding” law and in 1989 required the use of four specific work classifications if the estimated cost of the work of a classification exceeds twenty five thousand dollars (\$25,000).
2. Testimony suggests that, under current bidding processes, bid shopping or related types of activities do occur in Connecticut, but the extent and frequency of the practice on State of Connecticut projects has not been documented and quantified.
3. An increase of bid listed subcontractors, as proposed by FFCCT – from four to nineteen – on Design-Bid-Build projects and CMR projects under C.G.S. §4b-91 *et seq.* and §4b-103 would present substantial challenges for the design professional, general contractor or CMR.

4. The Office of Fiscal Analysis report and the DAS documentation demonstrate that there is a significant cost related to the addition and implementation of additional work classification as proposed by FFCCT.
5. A DAS/DCS staff analysis prepared in the Spring of 2014, and again in October 2014 for the Working Group, estimates that the changes embodied in the FFCCT proposal pertaining to the classifications will add substantial processing time to the design, procurement and contracting phases of the Design-Bid-Build and CMR processes.
6. Industry association testimony identifies present State contracting requirements as burdensome and resulting in additional project overhead costs for contractors, both of which operate as impediments to bidding on State capital projects, particularly by smaller contractors lacking the administrative staff to comply with such requirements.
7. The CMR project delivery method presently involves a bidding process that includes more than nineteen bid packages, a number of which are committed to achieving and/or exceeding set-aside goals as well as increasing the opportunities for S/MBE firms to participate significantly on State projects.
8. The current CMR bidding of trade packages has significantly improved set-aside goal attainment, particularly goals related to S/MBE firms through subcontractor set-aside requirements within larger bid packages and by smaller trade packages restricted to set-aside bidders only.
9. General Contractors and CMRs value the inherent flexibility of the existing bidding processes as they allow them to better coordinate work on complex construction projects as well as to meet or exceed set-aside goals.
10. Bid shopping and related types of activities can be restricted by the imposition of bid deadlines, public disclosure of bids, prohibitions on the modification of bids after submission and limitations on subcontractor substitution.

**B. Subcontractor Transparency**

1. State contracting agencies do not consistently compile adequate information on all tiers of subcontractors performing work on State capital projects; particularly on the second and lower tiers of subcontractors.
2. The subcontractor information is necessary for greater accountability in the use of public funds; to assist the State in the efforts of using only responsible and qualified companies; to document and enforce State policy related to supplier diversity; to generate additional data concerning project costs; and to ensure compliance with state labor requirements. Such information will also be critically important in helping to guide policymakers and stakeholders on future supplier diversity policies including, potentially, a disparity study.

In order to develop accurate and comprehensive utilization data from contracting agencies to support future policy discussions related to MBE and supplier diversity related policies, a comprehensive disparity study would need to be performed. It is estimated that such a study would cost approximately two million dollars.

3. The provision of subcontractor information to State agencies will enhance public access to the information.

### **C. Clerk of the Works / Integrity Monitoring**

1. Systems utilized by project owners, including the State of Connecticut, for monitoring contractor compliance with labor law requirements are limited or inconsistent in their application or implementation, and not linked as fully as possible so that information is widely available for use in the selection and award of contracts.
2. Due to deficiencies in monitoring systems, construction projects, both private and public, are subject to similar abuses pertaining to falsified payrolls, non-payment of fringe benefits or prevailing wages, misclassification of workers, under reporting of hours, use of substitute and potentially inferior materials, and the use of unlicensed workers.
3. Programs utilized in other states employing a "Clerk of the Works" or an "Integrity Monitor" serve to reduce contractor abuses, strengthen compliance efforts and assist in improving subcontractor transparency efforts.

## **XII. CCBT Recommendations**

### **A. Bid Shopping**

1. State contracting agencies will contractually strengthen the subcontractor reporting requirements at the second tier level and in doing so provide greater protection against bid shopping. An example of what the reporting requirement would entail is as follows:

"A general contractor or a CMR shall provide to the awarding authority, within twenty-one days of the execution and approval of its contract in the case of a general contractor, and within twenty-one days of the execution and approval of its GMP amendment in the case of a CMR, names, bid prices, and subcontracts for each first tier subcontractor performing work on the project. Any change in pricing after that date, or any substitution of a first tier subcontractor, will require the approval of the awarding authority. Also within the twenty-one day period following contract or GMP amendment execution and approval, each first tier subcontractor shall file with the GC or CMR, as applicable, and the awarding authority, the names, bid prices and contracts of all second tier subcontractors that will be performing work with an estimated value of \$50,000 or more. Any proposed change in pricing after that date, or any proposed substitution of a second tier subcontractor, will require the approval of the GC or CMR and the awarding authority. In the event that bid or contract documents require earlier submission of subcontracts, the time period specified in those documents shall take precedence. The Commissioner may, for good cause shown, extend the time for the filing of the names, prices, and subcontracts for a first or second tier subcontractor."

2. All other subcontractor names, bid prices and subcontracts, regardless of tier, shall be filed with the GC or CMR and the awarding authority prior to mobilization of the subcontractor at the project site.

The basic definition of mobilization is the activation of a contractor's physical and manpower resources for transfer to the construction site until the completion of the contract. Mobilization consists of preparatory work and operations necessary for the movement of personnel, equipment, supplies, and incidentals to the project site; for the establishment of offices, buildings, and other facilities necessary for the work; for premiums on bond and insurance for the work; and for other operations performed or costs incurred before the beginning of work.

#### **B. Subcontractor Transparency**

1. State contracting agencies must acquire more detailed information on all tiers of subcontractors performing work on State projects. This will be achieved in the short term through the introduction of administrative reporting requirements and, longer term, by the acquisition and development of an improved data management reporting system. By requiring the submission of all lower tier subcontractor information to appropriate State agencies, transparency and accountability in the system will be improved.
2. The Department of Labor and State contracting agencies will form an interagency working group to improve linkages among agencies to better share and utilize information pertaining to contractor abuses of wage, benefit, insurance and safety laws.
3. State contracting agencies shall review forms used in their Bid Proposal review process, including Objective Criteria, to ensure that more information concerning contractor compliance with wage and hour, classification, safety, previous MBE utilization and insurance laws and regulations is collected and used in the evaluation of prospective contractors.
4. The Department of Administrative Services Procurement staff has participated in preliminary discussions on data management systems, as a result of the on-going disparity study discussions and the State's need to improve its data collection on goods and services contracts, and on construction contracts for improved contractor and subcontractor data. Estimated implementation cost for the system is four hundred thousand dollars (\$400,000), with annual recurring maintenance costs of two hundred and fifty thousand dollars (\$250,000). DAS and industry representatives believe that regardless of those on-going discussions, an upgrade or improvement of the State's data management and collection systems should occur.

DAS would represent only one of the various agency users of this data management system when/if purchased. Proper implementation of such a system would require a centralized, statewide effort to identify and coordinate the required technical staff from each affected agency to collaborate on the issues of system integration and inter-agency transition and utilization.

#### **C. Clerk of the Works, Integrity Monitoring**

DAS/DCS, in consultation with DOL, CHRO, UCONN and industry representatives, will implement a pilot program designed to improve compliance with statutory and regulatory laws.

This working group, to be designated by the Commissioner of DAS, will specify the scope of work, functions and tasks envisioned for this pilot program, provide DAS with suggestions for qualifications and certification requirements that would be necessary for a position or entity to provide “Clerk of the Works” or Integrity Monitoring tasks, and identify a selected number of State construction projects beginning in 2015 to which the pilot program could be applied. In developing its recommendations the working group may evaluate the functions of the traditional “Clerk of the Works” and the “Integrity Monitoring” models for inclusion into a Connecticut specific program.

It is further recommended that once the scope of work, functions and tasks of the pilot program is determined, individuals and/or companies seeking to provide services for the program shall be qualified by DAS, be included in a pre-selected pool of qualified vendors, and assigned to projects as needed, being responsible to the project owner (State agency).

Information from this pilot will be used to determine its effectiveness and future need.

#### **D. Freedom of Information Act**

If the recommendations outlined in the subcontractor transparency section of this Report are implemented, all subcontracts provided to the awarding authority would be subject to FOIA laws.

#### **E. DAS Existing Statutory Authority- Expanding Opportunities For Small and Minority Business Enterprises(S/MBEs)—New Pilot Program**

C.G.S. §4b-93 already provides DAS with the ability on Design-Bid-Build projects to require additional plans and specifications for classifications of work beyond the outlined four listed classifications. The statute states:

(a) Every contract subject to this chapter shall include plans and specifications detailing all labor and materials to be furnished thereunder. Such specifications shall have a separate section for each of the following classes of work if, in the estimate of the awarding authority, the class of work will exceed twenty-five thousand dollars: (1) Masonry work; (2) electrical work; (3) mechanical work other than heating, ventilating and air conditioning work; and (4) heating, ventilating and air conditioning work. Such specifications shall also have a separate section for each other class of work for which the awarding authority deems it necessary or convenient.

When other CCBT industry working group recommendations and findings are complete, DAS and UCONN, in consultation with industry representatives, will develop and implement a pilot program where awarding agencies utilize their discretion to develop separate specifications for other classes of work, as permitted in §4b-93(a). CHRO and other state agencies will be invited to those discussions.

### **XIII. Areas for Further Study**

#### **A. Additional FOIA Changes**

As indicated in the recommendations and report, DAS is prepared to require additional subcontractor information from general contractors on both Design-Bid-Build and CMR project delivery methods. DAS believes these administrative changes address the desired changes relating to disclosure of subcontractors and increased transparency, and does not believe that a legislative change to C.G.S. §4b-95 is necessary. In the event that the administrative actions prove insufficient, further study of additional options may be necessary.

**B. Reassess Number of Required Work Classifications for DAS Prequalification**

A result of the discussions that this Working Group has had regarding the listing of additional classes of work has been to identify that the DAS Prequalification classifications, as well the specific classes of work designated in C.G.S. §4b-93, require updating and modification to conform more accurately to the CSI Masterformat. Industry representatives have asked for this review for several years and DAS is willing to convene a group of industry and contracting agency representatives to discuss needed updates and modifications to the DAS Prequalification Program classifications. CHRO and other state agencies will be invited to those discussions.

**C. Additional Steps to Lessen GC/CMR and Subcontractor Administrative Burdens**

DAS, UConn, and other contracting agencies should work with industry representatives to identify areas of our respective processes that could be more “business friendly” and less burdensome to the construction community. CHRO and other state agencies will be invited to those discussions.

**D. S/MBE Bonding Requirements**

While bonding was not a required study area for the CCBT Working Group, questions did arise in regards to the impact of the proponent’s proposal on smaller and minority firms’ ability to participate in State construction contracting opportunities. It remains undetermined what the application of the proposed nineteen classes of work would mean to those firms’ ability to bid directly to the prime general contractor, but the issue of bonding remains. DAS continues to hear that the lack of access to bonding remains a significant obstacle for many small and minority-owned businesses that want to do work for the State. To bid and work on State construction projects, companies generally are required to provide the State with a bid bond, a performance bond, and a payment bond. There are numerous State agencies involved in the continued discussion of the bond surety program currently administered by the Department of Economic and Community Development. The existing program should be examined to ensure that it is effectively providing SBEs and MBEs with access to the necessary bonding required to work on State projects



To compare the current processes on design-bid-build as it pertains to bid procedures, the following chart is provided. It illustrates that DAS has a three-step bidding procedure while DCAMM's procedures are based on seven steps.

Step	DA S- Three (3) Step Bid Procedure
1	<p><b>Pre-Bid "Contractor Prequalification Program":</b>            DAS Contractor Prequalification Program requires <u>forty-four (44) Contractor Classifications</u> to prequalify before they can bid on a DAS contract or perform work pursuant to a contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building or any other public work by the state or a municipality, estimated to cost more than \$500,000 and which is funded in whole or in part with state funds.</p>
2	<p><b>Invitation to Bid to Prequalified General Contractors and Subcontractors:</b>            Any Prequalified Subcontractor may submit their bids directly to a Prequalified General Contractor (<u>not DAS</u>) for a specific project in response to a publically posted Invitation to Bid. General Contractors submit their Bids (<u>includes 4 Named Subcontractor Bids</u>) directly to DAS. DAS requires a the General Contractor to submit a <b>Bidder's Qualification Statement</b> with their Bid and all <b>Named Subcontractors</b> of the apparent lowest qualified bidder to submit a <b>Bidder's Qualification Statement</b> after the Bid Due Date. A <b>Bidder's Qualification Statement</b> contains Project Specific information that must be submitted to DAS to determine if the Contractor and Named Subcontractors are qualified to perform the work of the Specific Project.</p>
3.	<p><b>Bid Analysis:</b>            DAS reviews the General Contractor Bids (<u>includes 4 Named Subcontractor Bids</u>) to determine the "lowest responsible and qualified General Contractor bidder".</p>

Step	DCAMM - Seven (7) Step Bid Procedure
1	<p><b>Pre-Bid "Certification of Eligibility":</b>            DCAMM Certification is required for <u>thirty-four (34) Contractors and/or Subcontractors Categories</u> to become eligible to perform public construction work for projects estimated to cost over \$100,000 in the Commonwealth prior to Bidding.</p>
2	<p><b>Pre-Bid "Prequalification RFQ":</b>            Prior to Bidding DCAMM issues a <b>Prequalification RFQ</b> for <u>only "Certified"</u> General Contractors and Subcontractors interested to become prequalified to bid on a specific project. <b>The Prequalification RFQ may be for any of the following:</b></p> <ul style="list-style-type: none"> <li>• both general contractors and subcontractors;</li> <li>• only general contractors;</li> <li>• only subcontractors;</li> <li>• certain subcontractors; or</li> <li>• any combination thereof.</li> </ul>
3	<p><b>Invitation to Bid to Prequalified General Contractors and Subcontractors:</b>            DCAMM sends an Invitation to Bid to Prequalified General Contractors and Prequalified Subcontractors to submit Bids <u>directly</u> to DCAMM. Prequalified Subcontractors <u>do not</u> submit bids to General Contractors).</p>
4	<p><b>Public Bid Opening of Subcontractors (Filed Sub-bids):</b>            DCAMM conducts a public Bid Opening of Prequalified Subcontractors (Filed Sub-bids) Bids for the <u>eighteen (18) Subcontractor Categories</u> four (4) day prior to the General Contractor's Bid Due Date.</p>
5	<p><b>Filed Sub-Trade Bid Sent to Prequalified General Contractors:</b>            DCAMM mails a Filed Sub-Bid Tabulation Sheet of Subcontractor Bids that contains the <u>eighteen (18) Subcontractor Categories</u> to every Prequalified General Contractor who purchased plans &amp; specifications from DCAM. General Contractors must choose any Filed Sub-bids for the <u>eighteen (18) Subcontractor Categories</u> from the Filed Sub-Bid Tabulation Sheet.</p>
6	<p><b>Public Bid Opening of General Contractor Bids:</b>            DCAMM conducts a public Bid Opening of General Contractors Bids (<u>includes the 18 Filed Sub-bids that they chose from the Filed Sub-Bid Tabulation Sheet</u>).</p>
7	<p><b>Bid Analysis:</b>            DCAMM reviews the General Contractor Bids (<u>includes the 18 Filed Sub-bids</u>) to determine the "lowest responsible and qualified General Contractor Bidder".</p>

## Appendix B

### **DAS Fiscal Impacts**

The following agency impact statements were submitted during the 2014 legislative session in response to Senate Bill 454, which proposed to remove the four listed major classification components outlined in C.G.S. §4b-93 (masonry, electrical, mechanical, and HVAC) and substitute the over 30+ DAS Contractor Classifications in their place. The proponents have modified their proposal to include nineteen (19) classes of work. DAS acknowledges that the fiscal impacts expressed in regards to SB 454 would be lessened as a result of this change; however the information below outlines four areas of the agency where fiscal impacts will remain, even with the modified proposal.

The areas of fiscal impacts are:

- Systemic revision of bid forms, guidance documents, and realignment of prequalification classifications;
- IT improvements;
- Current and pipeline capital project delays; and
- Division of Construction Services and Process Management Unit staffing needs.

#### **DAS Fiscal Impact Statement Submissions on Raised Bill 454**

This bill, which seeks a systemic change to the present construction contracting processes, would be very costly for DAS to implement; specifically, DAS would need a number of new staff, implementation of IT improvements, and can anticipate significant delays in projects, adding to capital costs.

To date, DAS has not been provided by the proponents with quantifiable data or analysis regarding the **cost benefits** or **improved efficiencies** in this dramatic change to the State's administering and processing of capital projects. It would be unwise to proceed with a systemic change of this magnitude without verifiable cost benefits. DAS would reasonably expect to incur additional costs on its bonded capital projects as a result of the provisions of the bill. This "sub bid" methodology is to be applied to our **design-bid-build**, and **Construction manager at risk project** delivery methods.

We have outlined areas of fiscal impacts:

- Systemic *revision of bid forms*, guidance *documents*, and *realignment of prequalification classifications*
- *IT improvements*
- *Current and pipeline capital project delays*
- Division of Construction Services and Process Management Unit *staffing needs*

#### **Documentation Changes**

Section 2 of the bill proposes to remove the four listed major classification components outlined in C.G.S. §4b-93 (masonry, electrical, mechanical, and HVAC) and substitute the nineteen categories of work in their place. In addition, section 2 requires the contractor to obtain from the subcontractors—any lower tier subcontractor who will perform work for each subcontractor, and list those companies on the bid form as well. As stated above, this dramatically changes the way DAS administers projects on behalf of the State.

All DAS contract documents **design bid build, on-call, CMR** would need to be reviewed, revised and updated. Our prequalification classifications and applications would need to be reviewed and revised. DAS would need to determine whether the current Prequalification Contractor Classifications are sufficient and accurately reflect the industry standard specifications --**Construction Specifications Institute Masterformat**. Certain contractor classifications may not conform to these specifications, which are the basis for preparing bid packages on DAS projects. Changes would need to be made to the Prequalification Classifications. Subsequently, DAS would need to revise a significant number of its templates, including but not limited to, the bid forms, Consultant Manual, Agency Administered Project Manual, Construction Manager at Risk RFQ/RFP and contract, and the General Conditions. These revisions **could not be done with the current staffing levels** in process management. Reporting processes would also need to be revised. In order to maintain current work flow, we would **need to hire outside consultants** to re-design system, forms and reporting systems **at an estimated cost of \$100,000 to \$200,000 (Management analyst services at \$80 to \$100 per hour over one year = \$160,000 to \$208,000).**

Historically on contracts that require “a fee from the vendor,” or create major administrative burdens to comply with—there is the potential **for a 2-5% increase in GC and CM future bids** as contractors are going to build the costs for complying with this into their bid submissions. With more than \$200,000,000 a year in construction the increased indirect costs to the state can be estimated in the **\$4-\$10 million range.**

### IT Improvements

We have explained to the proponents that a lot of the subcontractor and second tier contracting data should be available in the future as there are on-going discussions regarding the State’s need to improve their data management and collection processes around construction contracting. However, those discussions will not yield any immediate IT improvements to DCS and this bill is effective this Fall. DAS would need to evaluate the needed improvements to our existing PM WEB in expeditious fashion—which would require some **consultant costs** to have the company analyze the needed upgrades for reporting and **training** process management staff. \*This would literally only be a band-aid approach since PM WEB is outdated and likely going to be dramatically improved when the State does purchase a data management system but again Fall effective date would require it now. The capital costs for the BG2Now data collection system which would be needed to manage the lower tier subcontracting data **is \$400,000 with \$250,000 annually to maintain the system.**

Department of Administrative Services Procurement Staff have performed preliminary research on data management systems as a result of the on-going Disparity Study discussions regarding the State’s need to improve data on goods and service contracts, as well as on construction contracts re: contractor and subcontractor data collection. DAS has no authority to purchase this system and only represents one of the various agency users of this data management system when/if purchased. Statewide leadership would be needed to identify and coordinate the required technical staff from each affected using area to work with team on interface needs (i.e., Core-CT staff, Judicial Department financial system staff, University financial system staff, etc).

The Legislature remains unclear on the status and assignment of the Disparity Study. DAS believes that regardless of those discussions, an upgrading/improvement of our data management/collection systems should occur

### Project Delays

DAS cannot implement the changes of SB 454, without stopping work on the substantial number of projects in the queue waiting for selection of consultants and construction managers. Delays to getting projects

designed and bid will result in cost escalation to the projects as labor and material prices increase over time. Delays often times exacerbate the existing conditions that would make repairs and renovations more costly. In addition to the delays as result of implementation, the bill will require from GC, CM and Design Professionals that they all would now need to provide separate plans and specifications. This increases the number of "classes of work" for which the general contractor must solicit subcontractor bids; which in turn increases the time it will take DAS to analyze all of the Bids and additional subcontractor bidding documents, and increases the number Subcontractor Agreement that the general contractor must execute with potentially nineteen subcontractors. The expansion of classifications bid will increase the number of contracts DAS staff would need to review and monitor. We expect that bid disputes will certainly increase dramatically causing further delays and additional work for our Legal Unit.

Lastly, DAS Procurement will need to get the general contractor to get potentially **nineteen (19) classes of work** (instead of 4) named subcontractors to execute a Subcontractor Agreement as required by statute. (See DAS Process Impact Analysis for more detail.)

### **Staffing Needs**

These documentation revisions **could not be done with the current staffing levels** in process management and Legal. In addition, after bids are received, it is thought that there will be increased responsibilities for collecting and reviewing listed subcontracts and lower tier subcontracts for compliance with the bid, as well as an increase in the number and the need for more in depth scope reviews of bid packages to make certain that all items in the plans and specifications are included in the bid in order to avoid change orders in the future for missed scope. We anticipate, further, an increase in the number of bid protests based on incorrect listing of subcontractors and lower tier subcontractors, particularly given the timing for the receipt of bids. Errors in listing subcontractors has been an issue raised on past bid protests. Lastly, there could be more situations where a contractor or subcontractor has to request substitution of subcontractor or lower tier subcontractor, who is unable or unwilling to perform in accordance with the bid. Bid protests and substitution requests suspend the contract award process until the issues are resolved. All of these items will generate the need for more staff.

DCS would need at least four **project managers \$94,564.00 starting salary**, not including benefits, and **one associate project managers at a starting salary of \$76,897.00** not including benefits. In addition, **DCS Legal** is understaffed with one lead attorney managing all construction contract reviews, protests, change orders and coordination with the projects management team of documentation needs with large CM firms and subcontractors, as well professional service contracts. The anticipated increased administrative duties of SB 454 will require the addition of at least **two Staff Attorney 1 positions (total starting salaries \$128,582.00)**, **one Paralegal Specialist 1 \$55,273-\$70,024**, and **one Administrative Assistant \$40,000 starting salary** -- all positions not including benefits dedicated solely to construction matters.

## Appendix C

### Individual Task Force Members' Requested Submissions

- **CT State Building Trades**



#### Executive Board

Kevin Cwikla  
Heat & Frost Insulators #33

Dominick Cleri  
I.U.P.A.T. District Council 11

John Tarr  
Sheet Metal Workers' #38

John Sweeney  
Operative Plasterers/  
Cement Masons #262

Mike Hassett  
Roofers #9

Steven A. Bruno  
Elevator Constructors #91

#### Executive Council

President, New Haven  
Building Trades  
Andy Esposito

President, Hartford / New Britain  
Building Trades  
Peter "Ed" Reilly

President, Norwich / New London  
Building Trades  
Keith Brothers

President, Waterbury  
Building Trades  
Jeff Merrow

President, Fairfield County  
Building Trades  
Peter Carroll



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President  
David A. Roche

Executive Vice-President  
Pete Carroll

Executive Secretary Treasurer  
John P. Livingstone



Honorable Dannel Malloy  
Governor of Connecticut  
210 Capitol Avenue  
Hartford, CT 06106

December 8, 2014

**Re: Construction Contracting and Bidding Transparency Working Group**

Governor Malloy:

Thank you for appointing me as one of your designees to the *Construction Contracting and Bidding Transparency Working Group*, which was designed to examine construction contracting and subcontracting processes. As a member of this group, I am encouraged by the progress that has been made, which is outlined in the following report.

There are promising outcomes in this report, including the development of a pilot program to create a "Clerk of the Works" or "Integrity Monitor" position, which will provide on-site monitoring of projects and reduce opportunities for deviant business practices that harm workers, contractors and tax payers. However, many of the proposed outcomes, which Building Trades will support, fall short of achieving our objectives of increasing transparency and decreasing bid shopping.

The CT Building Trades believes that, while reporting secondary and tertiary tier subcontractors is a considerable step towards increasing transparency, the twenty-one (21) day reporting window simply shortens the time for bid shopping but does not prevent the practice, which all parties agree is harmful and should be eliminated. We maintain that General Contractors ("GC") and Construction Managers at Risk should be required to name all their subcontractors at the time of bid.

In addition to the afore mentioned, we maintain that the number of listed project elements in Conn. Gen. Stat. §4b-93 should be expanded from four to 19 categories, or some variation thereof. It is our belief that increasing the number of direct bid project elements will allow for stronger competition among contractors of similar scopes of work. In addition, the ability to bid directly to a



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CONNECTICUT  
TAXPAYERS

GC will significantly reduce bid shopping at the current second and third tier subcontracting levels. Furthermore, the CHRO noted that the ability to create direct bid packages within the CMR process has significantly increased their ability to meet MBE goals. Creating a pilot program where awarding authorities utilize their discretion to develop separate specifications for other classes of work is a good first step, but this ability to deem additional classifications necessary or convenient has been available to awarding authorities under 4b-93 since the most recent change to statute in 1989. Unfortunately, this offers little solace to those contractors who are consistently being bid shopped. Nonetheless, we look forward to seeing what comes about from this pilot initiative.

This Working Group has provided our industry an opportunity to examine some difficult truths and the outcomes of these discussions are good first steps; but we believe that these are simply first steps and by no means final conclusions. Bid shopping, while difficult to quantify, is a persistent and pervasive issue that continues to harm workers, contractors and tax payers. It is so persistent that dozens of scholars have studied and written about the practice, and courts in CT, OH, CA and KY have heard cases and ruled on the matter as well. Much like any underground deviant practice hidden in the shadows, it is difficult to cast a light and reveal the true scope of the matter. Therefore, much more work needs to be done and we look forward to continuing these conversations with you and the legislature.

Regards,

**David A. Roche**  
President, CT State Building Trades

# CONNECTICUT CONSTRUCTION INDUSTRIES ASSOCIATION, INC.



December 10, 2014

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Honorable Dannel P. Malloy  
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210 Capitol Avenue  
Hartford, Connecticut 06106

Government Administration & Elections Committee  
Legislative Office Building, Room 2200  
300 Capitol Avenue  
Hartford, Connecticut 06106

Tel: 860.529.6855  
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Re: Construction Contracting & Bidding Transparency Working Group Report

Honorable Dannel P. Malloy and distinguished Chairs of the Government Administration & Elections Committee:

The members of the Connecticut Construction Industries Association that were appointed to the above-captioned workgroup fully endorse this report. The report is the result of a comprehensive study of the contracting process which considered a wide variety of options and outcomes. The report offers appropriately tempered recommendations that will benefit the state and every participant in the contracting process for years to come.

The report:

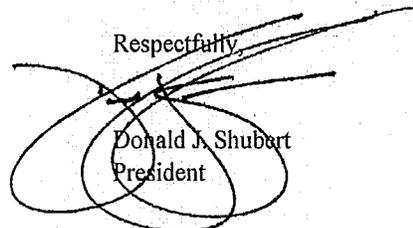
- Implements a reasoned approach to improving public-sector contracting in Connecticut;
- Maximizes the state's ability to administer and deliver much needed projects;
- Provides the flexibility to address the unique aspects of many different types of projects; and,
- Balances and aligns the economics of state contracting with those of the construction marketplace.

We would like to recognize the leadership of Commissioner DeFronzo in preparing this report. His many years of experience with contracting reform in Connecticut guided this broad-based workgroup to consensus on very important issues. Throughout the process, the industry was concerned that special interests, which are not party to the contracting process, were using this report as a tool to advance their specific agenda. Commissioner DeFronzo carefully addressed those concerns by reaching out and listening to all special interests inside and outside of the contracting process, while carefully considering proposals that may have been intended to unbalance the system for the benefit of third-party organizations and agendas.

The construction industry holds this report in high regard. It is the work of a well-rounded group of public officials and construction-related parties. Its recommendations were vetted by construction experts who routinely engage in the contracting process in the public and private sectors. The construction industry strongly urges the Administration and General Assembly to follow the recommendations in this report and cautions not to be influenced by specific interests, who are not participants in the contracting process, and who may attempt to upset Connecticut's public contracting system for their own agendas.

It was an absolute pleasure to participate in this process. Please do not hesitate to call upon us if we can be of further help.

Respectfully,



Donald J. Shubert  
President

*Shaping the future of the construction industry*





## Glossary of Terms

The following words and terms are referenced throughout the Report. Below are general definitions and supplemental information to guide and assist the reader through many of these construction industry-specific words, terms and concepts.

- **Bid-listing**

As outlined in the Report, **bid listing** is a practice used by an awarding authority that requires general contractors at the time of bid submission to list subcontractors and their bid prices for specific classes of work, typically specialty trade work essential to complete the project. States that utilize this contracting method, including Connecticut, have statutes that define the classes of work required to be listed at the time of bid. In addition, most states maintain the discretion to require additional subcontractor listing of other classes of work if desired by the awarding authority. States require the listed subcontractors at the time of bid and upon notification by the awarding authority of general contract award, the general contractor, within a defined amount of days, must provide the awarding agency with signed subcontractor agreements for the listed subcontractors and the subcontracts must be for the amount listed in the bid form.

- **Pre-filed sub bid**

As outlined in the Report, **pre-filed subcontractor bidding** is when the public awarding authority accepts bids directly from subcontractors on a series of sub-bid classifications. Filed sub-bids are first reviewed and considered by the awarding authority. Filed sub-bidders can restrict their bids to certain general contractors. Responsible and eligible filed sub-bidders are placed on a tabulation sheet managed by the awarding authority which is shared with the general contractors. General contractors must choose from that sheet but are not required to list the lowest filed sub-bidder in their bid submissions.

- **Bid-shopping**

**Bid shopping** occurs when a general contractor obtains prices from trade contractors that the general contractor uses in preparing its general bid and then, after being awarded the contract, the general contractor solicits estimates again from the trade contractors in order to obtain prices lower than those provided initially. Throughout their discussions, presentations and meetings, the Working Group agreed on the definition of “**bid shopping**” to be the post-bid auctioning of subcontract work. While the degree and impacts of bid shopping are undetermined, the Working Group’s recommendations are intended to mitigate this activity.

- **Bid-chiseling**

The Working Group agreed that **bid chiseling** is the post-bid negotiation with an individual subcontractor where the general contractor seeks to reduce an already low price without a reduction in the scope of work. Different than bid shopping, bid chiseling

appears to be where subcontractors actively participate – willingly or unwillingly – in the activity, which could create inaccurate pricing as a result of the competing lower bids for the same amount of work.

- **Clerk of the Works**

In general, a **Clerk of the Works** is employed by an architect or a client on a construction site. The role is primarily to represent the interests of the client to ensure that the quality of both materials and workmanship are in accordance with the design information such as the specifications and engineering drawings, in addition to recognized quality standards.

A Clerk of the Works can also be employed by the client (state body, local authority, private client) to monitor design-build projects where the traditional role of the architect is within the design-build project team. The role, to this day, is based on the impartiality of the Clerk of the Works in ensuring that value for the client - rather than the contractor - is achieved through rigorous and detailed inspection of materials and workmanship throughout the building process. In many cases, the traditional title has been discarded to comply with modern trends, such as site inspector, architectural inspector and quality inspector, but the requirement for the role remains unchanged since the origin of the title. The duties and responsibilities of a typical Clerk of the Works include:

- making sure that work is carried out to the client's standards, specifications, material requirements, workmanship, and schedule;
- becoming familiar with all the relevant drawings and written instructions, checking them, and using them as a reference when inspecting work;
- making visual inspections;
- taking measurements and samples on site to make sure that the work and the materials meet the specifications and quality standards;
- being familiar with legal requirements and checking that the work complies with them;
- having a working knowledge of health and safety legislation and bringing any shortfalls observed to the attention of the architect or owner; and
- advising the contractor about certain aspects of the work, particularly when something has gone wrong, but this advice should not be interpreted as an instruction.

- **Integrity Monitoring**

Due to the potential for fraudulent and criminal behavior in large construction projects involving dozens of contractors and the costs of such activities, construction owners are creating fiscal and **Integrity Monitoring** programs to reduce or eliminate their exposure to these risks.

Firms are retained to provide independent construction monitoring and forensic accounting services to establish protocols and identify weaknesses in internal and project

controls. These controls can prevent or identify fraudulent, improper and criminal behaviors during the design, pre-qualification and contract award, project execution, and operations and maintenance phases of the construction project. Firms involved in this specialty construction service create a process to help owners mitigate their construction fraud risks as follows:

- ***Construction Risk Assessment*** which includes analyzing the construction portfolio, project specifications and contracts to determine the areas of highest risk.
- ***Establish Effective Control Environment*** to implement control activities and appropriate policies and procedures designed to identify fraudulent behavior in these risk areas. Their specialists will integrate new control activities into existing risk management and construction/facilities functions.
- ***Institute Fiscal and Integrity Monitoring.*** A team of construction accounting and monitoring specialists that provide independent monitoring of construction activities.

The exact nature of the monitoring activities performed varies from project to project based on the risks and controls established. The following are some examples of the types fiscal and integrity monitoring services provided:

- Conduct bid pricing evaluations
- Provides an independent assessment of the financial strength of bidders
- Evaluates the contractor's price schedule and subcontractor and supplier relationships
- Calculates overhead absorption rates
- Examines records and monitors job site for such issues as improper payroll, materials and equipment billing; improper project management and safety and environment problems

- **Mobilization**

The basic definition of **mobilization** is the activation of a contractor's physical and manpower resources for transfer to a construction site until the completion of the contract. Mobilization consists of preparatory work and operations necessary for the movement of personnel, equipment, supplies, and incidentals to the project site; for the establishment of offices, buildings, and other facilities necessary for the work; for premiums on bond and insurance for the work; and for other operations performed or costs incurred before the beginning of work.

- **Awarding Authority**

For purposes of the Working Group, the term **Awarding Authorities** refers to the two executive branch agencies/entities participating in the Working Group that have the

statutory authority to enter into contracts for state construction and public works projects – DAS and UConn. There are other awarding authorities in the State of Connecticut that have complete or limited independent construction contracting authority, including the Office of Legislative Management, the Department of Transportation, the Board of Regents (up to two million dollars), and the Judicial Department (up to one million and two hundred fifty thousand dollars).

- **Construction Administrator**

For purposes of the Working Group, a **Construction Administrator** is one of the professional services contracts administered and utilized by DAS on behalf of client agencies. Specifically, the Construction Administrator Consultant provides extensive oversight on behalf of DCS, including compliance with contract documents and schedule. The Consultant’s primary business is construction administration—not design or construction related work—and the role brings experience with the institutional knowledge of building projects.

- **Minority Business Enterprise**

By statute (C.G.S. §4a-60g), a **Minority Business Enterprise**, or MBE, is a small contractor with at least 51% ownership by one or more persons who: (1) exercises operational authority over daily affairs of the business; (2) has the power to direct the management and policies and receive the beneficial interests of the business; (3) possesses managerial and technical competence and experience directly related to the principal business activities of the enterprise; and (4) is a member of a “minority,” as that term is defined in C.G.S. 32-9n(a), or who is an individual with a disability.

- **Small Business Enterprise**

By statute (C.G.S. §4a-60g), a **Small Business Enterprise**, or SBE, is a small contractor or supplier of materials whose principal place of business is in Connecticut, has gross revenues that do not exceed \$15,000,000 during its most recently completed fiscal year; and is “independent.” To be “independent,” the viability of the SBE must not depend upon another person, as determined by an analysis of the small contractor’s relationship with any other person in regards to the provision of personnel, facilities, equipment, other resources and financial support, including bonding.

- **Set-aside**

**Set-aside** is a program established in Connecticut statute (C.G.S. §4a-60g), whereby state agencies are required to make good faith efforts to transact at least 25% of their business with SBEs, 25% of which (totaling 6.25% overall) should be transacted with MBEs. DAS’s Supplier Diversity Office is the certification body for companies that wish to seek certification as SBEs and/or MBEs within the State of Connecticut.

- **DAS Prequalification Classifications**

For purposes of the Working Group, the proposed changes would have applied the bid listing of classes of work to the entire DAS Construction Contractor Prequal Classifications, which includes over forty classes of work. Each state develops a classification list of the construction related categories it deems necessary to fulfill all of its construction contracting delivery needs. Most states utilize the Construction Specifications Institute (CSI) Masterformat materials (national construction plans and specification manual) as a guide in conforming their state classifications as closely as possible to those CSI Masterformat specifications, the industry standard/model.

- **CSI Masterformat**

The **Construction Specification Institute (CSI) Masterformat**, as indicated above, is the model that most states use to establish their construction work classifications. See **CSI Divisions**. The CSI Masterformat is critical in the State's constructing of bid packages and DAS attempts to ensure that the DAS classifications meet the CSI qualification/standards in terms of materials used, plans and specifications.

- **First Tier Subcontractor**

DAS and UConn view the **first tier subcontractor** as all those subcontractors in direct contract with a general contractor of CMR.

## Footnotes

<sup>1</sup>Current Practices Used to Reduce Bid Shopping

<sup>2</sup><http://www.keglerbrown.com/content/uploads/2013/08/TheConstructionLawyer-Summer2010.pdf>

<sup>3</sup>National Electricians 2014 Bid Shopping Brief

<sup>4</sup><http://www.keglerbrown.com/content/uploads/2013/08/TheConstructionLawyer-Summer2010.pdf>