REPORT OF THE

TASK FORCE TO STUDY DEBARMENT AND LIMITATIONS ON THE AWARDING OF STATE CONTRACTS

JANUARY 31, 2020

Special Act 19-11, signed by Governor Ned Lamont on June 18, 2019, established a ***Task Force to Study Debarment and Limitations on the Awarding of State Contracts***. The task force was formed in order to "study Connecticut's debarment procedures, particularly as they relate to debarment procedures of other states and Title 31 of the general statutes." Further, Special Act 19-11 directs that, "not later than February 1, 2020, the task force shall submit a report on its findings and recommendations, in accordance with the provisions of section 11-4a of the general statutes, to the joint standing committee of the General Assembly having cognizance of matters relating to labor."

The members of the task force are:

Thomas Wydra, Co-Chair, Department of Labor

Kimberly Glassman, Co-Chair, Foundation for Fair Contracting of Connecticut

Keith Brothers, Connecticut State Building Trades Council

Travis Woodward, Connecticut State Employees Association

Nadine Nevins, Connecticut Legal Services

Brian Kronenberger, Kronenberger & Sons Restoration

Frank Ferrucci, Mechanical Contractors Association of Connecticut

Noel Petra, Department of Administrative Services

Don Ward, Department of Transportation

Alan Calandro, University of Connecticut

Nicole Lake, Office of the Attorney General

The task force met on November 8, 2019, November 22, 2019, December 20, 2019, December 27, 2019, January 10, 2020, and January 24, 2020. The task force requested the following reports from the Office of Legislative Research (OLR): "Prevailing Wage Debarment Laws in Connecticut and Other States," published on December 6, 2019; and "Prevailing Wage Debarment Procedures in Massachusetts, New York, and Ohio," published on December 19, 2019. These OLR reports are included as Appendix A and Appendix B of this report.

The task force invited both Heidi Lane and Steve Lattanzio, counsel to the Department of Labor (DOL), to address the task force at their meetings on November 8, 2019, November 22, 2019 and December 20, 2019.

Based upon the OLR reports enclosed and discussions with the DOL's counsel, the task force has identified the following issues:

Debarment:

C.G.S. Sec. 31-53a authorizes the Labor Commissioner to debar a contractor for up to 3 years for wage violations pursuant to C.G.S. Sec. 31-53 and Sec. 31-76c, which is specific to overtime. It also directs the Labor Commissioner to distribute the list of debarred contractors to all state agencies and political subdivisions.

On December 6, 2019, the OLR published a report entitled, "Prevailing Wage Debarment Laws in Connecticut and Other States." That report studied the debarment statutes of Connecticut, California, Illinois, Massachusetts, New Jersey, New York, Ohio, Pennsylvania and Rhode Island.

Table 2: Other Debarment Variables of the report lists the debarment duration of the indicated states. While Connecticut debars contractors for up to three years, other states have longer durations depending on the violation. For example, Massachusetts, New York and Rhode Island have debarment durations up to five years. Additionally, some states include thresholds for debarment. For example, in Massachusetts, violators will be debarred for five years if their violations are deemed "willful," however other violations will include a debarment period of six months. And if they receive "three citations with a finding of intent within a three year period," they will be debarred for two years. Likewise, in Ohio, violators will be debarred for "three years for subsequent intentional violations committed within five years of a previous debarment." And in Rhode Island, violators will be debarred for five years if "a violation is within 18 months of a previous violation".

The task force notes that debarring a contractor from performing work on state or municipal contracts is a serious consequence and should be utilized only when a company has egregious or repeated wage violations. Debarment should not be instituted for minor offenses, such as reporting errors on certified payroll records. Debarment should only be considered for serious, willful violations or repeat offenses (e.g. misclassification, kickbacks, wherein an employee is forced to pay back their employer a portion of their paycheck, non-payments into a 401k or other retirement plan, etc.).

Currently, the DOL uses voluntary debarment as a tool to recover lost wages for a worker. This means that a contractor who is in violation of C.G.S. Sec. 31-53 can voluntarily debar themselves until all back wages are paid in full, or in some cases, for an extended period of time to avoid any further penalties. The list of debarred contractors is posted on the DOL's website at https://www.ctdol.state.ct.us/wgwkstnd/wgdisbar.htm. The DOL has not debarred a contractor in over 2 years.

Based upon information received from the DOL, it is our understanding that, when there is evidence of a violation of C.G.S. Sec. 31-53, or related statutes, the agency's main objective is to ensure that any aggrieved workers receive full restitution or back pay. Most often, violations

investigated by the DOL are due to the non-payment or under-payment of wages and benefits, or due to misclassification – either by misclassifying employees as independent contractors or misclassifying them by trade. The agency will use the ability to reach settlements with the contractor(s) in question as a tool for fulfilling their main objective. The terms of these settlements will include any negotiated back wages and fines or penalties. It is not the agency's practice to refer these matters to the State's Attorney, nor is it the agency's practice to seek to debar the contractors who are in violation. In fact, it has been 20 years since the agency has sought a court ruling on debarring a contractor.

The DOL's position is that their ability to settle is a valuable tool, but that it also presents challenges and obstacles with regard to curbing future violations. There are certain companies that the DOL has investigated numerous times for the same or similar violations of C.G.S. Sec 31-53. The DOL recognizes that they need to maintain the ability to settle with contractors who have violated the law, but also recognize that they need to retain latitude in determining whether a settlement or more formal administrative proceedings, including debarment, is appropriate. Settlements are not adjudicated judgments, and therefore, are not used as the causation for debarment proceedings. And absent being debarred, bad players can continue to bid and be awarded public contracts.

Awarding of State Contracts:

C.G.S. Sec. 4a-100 establishes a process for the Department of Administrative Services (DAS) to prequalify contractors and substantial contractors who are seeking to bid and perform work on public contracts. Prequalification is required on contracts valued at $500,000 or more of state monies. When then-chair of the General Administration & Elections Committee, Rep. Jim O'Rourke, brought out on the House floor in May of 2003 HB 6417, which created DAS' prequalification process, he said this:

> "Our duty to the taxpayers, Madam Speaker, to use their tax dollars wisely, to get the most value that we possibly can out of every tax dollar is clear, Madam Speaker, and at this time, a fiscal crisis in our State and in our communities, I don't have to remind anyone in this Chamber how important it is that our duty to protect the taxpayers of our State. People also have a real expectation of honesty and integrity in their government, Madam Speaker, and that is why it is so important, the bill that is before us, to pass today, Madam Speaker because we're going to take a step now to tighten up our system whereby large state contracts are awarded, Madam Speaker, and try to prevent the kind of abuse that we think has gone on here."

Rep. Livvy Floren added, "I realize that we cannot legislate morality. What we're trying to do is to build a transparent arena to surround a level playing field."

The bill creating DAS' prequalification process passed the House 143-2 and passed the Senate on consent. Public Act 03-215 was signed by Governor Rowland on July 9, 2003.

The prequalification application requests information including, but not limited to, financial statements, a letter from their bonding company, licenses and certifications, and performance evaluations.

Public Act 19-126, signed by Governor Ned Lamont on July 9, 2019, amends the prequalification application to include the disclosure of "any legal or administrative proceedings concluded adversely against the applicant or any of the applicant's principals or key personnel within the past five years which relate to the nonpayment or underpayment of wages or benefits to the applicant's, principal's or key personnel's employees during the performance of any public or private construction contract."

The Department of Administrative Services (DAS), which manages the state's Prequalification Program, does not have the statutory authority to require settlements to be included in their Prequalification review process. Further, DAS believes that a denial of prequalification to a contractor, based upon a history of settlements, could be challenged in the courts. Therefore, DAS suggests that the DOL reject settling in some cases, and instead seek adjudicated judgments or debarments.

However, DOL's suggestion is that, if DAS would consider the number of settlements with a particular contractor in determining whether or not to approve prequalification, that could help to deter contractors from violating the prevailing wage statutes.

Recommendations:

Representatives and staff members of the DOL, DAS, DOT, UCONN and Office of Policy and Management (OPM) met on Thursday, January 16, 2020 to discuss recommendations that the agencies and administration believe would be the most effective deterrents to wage violators while allowing DOL the ability to recover wages. Based upon the proposals reached by the agencies in their January 16, 2020 meeting, and based upon the full task force meetings, we are proposing the following recommendations:

(1) Proposed legislation be drafted to modify the current debarment provisions provided in Conn. Gen. Stat. § 31-53 et seq. and the prequalification provisions stated in Conn. Gen. Stat. § 4a-100 et seq.

(2) DOL should utilize specific criteria to limit the consideration of settlements. The criteria should include settlement thresholds, i.e., overall dollar amounts, maximum number of settlements by the same contractor, and the duration of time during which a specified number of settlements occur.

(3) DOL should consider settlements into their debarment procedures. DAS, DOT and UCONN should consider settlements in their prequalification procedures.

(4) DOL, DAS, DOT and UCONN should report and share information, including settlements, regarding debarment and prequalification.

(5) DOL should review debarment procedures as they apply to any persons or firms which are related to or succeed the entity against whom enforcement has been taken. DAS, DOT and UCONN should review their prequalification enforcement measures as they apply to any persons or firms which are related to or succeed the entity against whom enforcement has been taken.

(6) The charge of the Task Force be extended beyond the stated February 1, 2020 termination date until the date on which proposed legislative recommendations are formally submitted by the Task Force, or the beginning date of the 2021 General Assembly session, which is January 6, 2021.

(7) OPM should be added as a Task Force member

The task force supports the DOL's use of settlements. They are a valuable tool to ensure that workers recover their lost wages in a timely manner. We also recognize that settlements may prevent both the DOL and our contracting agencies from deterring irresponsible and unscrupulous contractors from violating or circumventing the law.

The task force recognizes how important it is for DAS to be able to carry out its procurement responsibilities. When contracts for construction are erroneously delayed, costs can balloon. Therefore, the task force is not recommending any proposal that would limit DAS' authority to approve or deny applications for prequalification. The task force finds, however, that disclosure of settlements would be beneficial to DAS when reviewing applications.

Further, we believe that both the legislatively appointed members of the task force and the agency representatives have a clear understanding and appreciation of both the obstacles to debarment and the awarding of state contracts, as well as to possible solutions. We recognize that some of the solutions may require more analyses and interagency cooperation. It is for this reason that we are recommending that the task force's charge be extended to January of 2021, and why we also recommend that OPM be included on the task force.

However, should the legislature decide not to extend the responsibility of the task force, we wanted to list items 1-5 as recommendations that we encourage the DOL and contracting agencies to continue working toward for the 2021 legislative session.