



June 17, 2009

The Honorable Brian Joyce, Senate Chairman  
The Honorable Steven Walsh, House Chairman  
Joint Committee on State Administration & Regulatory Oversight  
State House, Room 22  
Boston, MA 02133

Dear Chairmen and Members of the Committee:

On behalf of Associated Builders and Contractors' Massachusetts Chapter, I thank you for allowing me the opportunity to submit testimony on a number of bills before the committee today. ABC's Massachusetts Chapter represents 475 contractors and construction related companies throughout Massachusetts who believe in the merit shop philosophy. ABC's member firms are primarily open shop or non-union, and their employees are from the 80 percent of the Massachusetts construction workforce that is not unionized. ABC's member contractors are active in the Massachusetts public construction market and support laws, rules and regulations that set high standards yet are fair and equitable to contractors and workers, union and open shop.

**S1444:** *AN ACT AUTHORIZING A GOVERNMENTAL BODY TO ENTER INTO CONTRACTS FOR THE OPERATION, MAINTENANCE, OPERATION AND MAINTENANCE, LEASE OR SALE AND MODIFICATION OF WATER STORAGE FACILITIES, WATER TREATMENT FACILITIES AND WASTEWATER TREATMENT FACILITIES, COLLECTION AND DISTRIBUTION SYSTEMS, SEWERS AND PUMP STATIONS.*

**S1446:** *AN ACT AUTHORIZING A GOVERNMENTAL BODY TO ENTER INTO CONTRACTS FOR THE INSPECTION, MAINTENANCE, REPAIR OR MODIFICATION OF WATER STORAGE FACILITIES.*

Both these pieces of legislation seek bid law exemptions to pursue alternative procurements for water and sewage treatment plants outside the spirit and intent of the construction reform law.

S 1444 contains language relating to collective bargaining provisions that is vague and unclear. ABC is concerned that this language could exclude eligible and responsible open shop contractors that are not signatory to collective bargaining agreements.

Additionally, S1444 contains restrictive apprentice languages that we believe inhibits the ability of small contractors to participate in the bidding process. For these reasons, ABC opposes these bills.

**H2971: AN ACT MAKING TECHNICAL CORRECTIONS TO THE PUBLIC CONSTRUCTION REFORM LAW**

ABC is pleased to support this legislation. For your convenience, we have attached a corresponding position paper on this bill.

**H2979: AN ACT RELATIVE TO THE DETERMINATION OF THE LOWEST ELIGIBLE AND RESPONSIBLE BIDDER FOR CERTAIN PUBLIC CONSTRUCTION CONTRACTS**

This legislation would give an awarding authority the power to overrule a contractor eligibility decision of DCAM. In particular, the bill allows an awarding authority to reject a bidder with two unsatisfactory evaluations in five years. DCAM's policy allows no more than three unsatisfactory evaluations in five years. It is important to note that any score of less than 80 constitute an unsatisfactory evaluation.

We believe the Construction Reform Law and corresponding policy changes at DCAM provide a high bar for contractors performing public construction in Massachusetts. These proposed changes supplant DCAM authority and its well-reasoned policies, and are both onerous and unnecessary. ABC therefore opposes this bill.

**H3052: AN ACT RELATIVE TO BIDDING ON STATE FUNDED CONSTRUCTION PROJECTS.**

This piece of legislation would allow pending legal proceedings to render a contractor ineligible from bidding on public works projects. If passed, this bill will prevent companies not found guilty by a court of any wrongdoing from doing business and prevent their employees from earning. Our system of justice operates under a presumption of innocence and due process. This legislation flies in the face of these important and necessary cornerstones of our society. It is certainly possible that legal proceedings could conclude with the contractor being found not guilty. Under this bill, that contractor would have lost the ability to bid on public projects for no valid reason. Beyond being unfair, this prospect raises legal issues regarding unfair restraint of trade. Current law holds contractors accountable, including subjecting them to debarment, in the event of an adverse legal decision. We believe that all employers, like all citizens, deserve an opportunity for a fair hearing before the proper judicial authorities before they are denied the opportunity to earn a living. As such, ABC opposes this bill.

**H3053: AN ACT TO PROMOTE FAIR CONTRACT PROVISIONS**

This bill represents a consensus approach among the entire construction industry and sends a clear message that among all levels of the industry there is support for fair and ethical practices. After being passed by the Legislature in 2004, the bill was vetoed by Gov. Romney on the last day of that session. It is our hope that the legislature will maintain its support for the provisions of this bill.

In an industry known for its very real financial risks, contractors have to be accustomed to dealing with a greater than normal level of uncertainty regarding payments for work performed. On top of this, "pay if paid" clauses that are frequently used in construction contracts compound the risks – and potential problems – by putting payments such as those from a general contractor to a subcontractor in jeopardy if the project's owner defaults.

The proposed legislation also provides fairness by banning pay-if-paid clauses except in limited and appropriate circumstances. In conclusion, we are happy to join with our colleagues in the construction industry to support this legislation.

**H 3759: AN ACT RELATIVE TO BIDDING FOR PUBLIC CONSTRUCTION CONTRACTS.**

This bill would unnecessarily impair the privacy and due process of Massachusetts contractors by allowing the public and, more specifically, industry competitors access to Division of Capital Asset Management (DCAM) certificate of eligibility applications for public construction work. The application process should be allowed to be completed before information is released that could be taken out of context or used to gain a competitive advantage. There is no legitimate reason for information being considered by DCAM as part of a deliberative process to be made public before the process is completed. This will create the potential for competitors to handicap one another and provide a disincentive for companies to seek DCAM certification.

This legislation also mandates the termination of a contract for “materially false statements.” Under current law, this is a debarable offense, but the awarding authority has the discretion as to whether to terminate a contract. We support the current law that allows this discretion. Mandatory termination could have severe negative consequences for a community. For example, if a school is near completion for a September opening and the municipality is forced to terminate the contract with the contractor, the school will not be ready for the students. For these reason, ABC opposes this bill.

Please do not hesitate to contact me at any time to discuss our positions on the legislation heard today or any bills that may come before your committee in the future. I thank you for the opportunity to address your committee.

Sincerely,

Gregory F. Beeman  
President and CEO