

Testimony of Constantine G. Antipas, P.E., Legislative Liaison,
CBA Construction Law Section
House Bill 5205, An Act Concerning Recovery of Misappropriated State Funds
Government Administration and Elections Committee
March 8, 2006

Senator DeFronzo, Representative Caruso and members of the Government Administration and Elections Committee, thank you for the opportunity to comment on House Bill 5205, An Act Concerning Recovery of Misappropriated State Funds.

My name is Constantine G. Antipas. I am the principal of the Antipas Law Firm in Mystic where my practice focuses on construction and commercial law and litigation. In addition to being admitted to the bar in several states, I am a registered New York professional engineer. I have also worked in private practice as project engineer and manager on numerous highway, railroad, bridge and site design projects. I am the legislative liaison of the CBA Construction Law Section and a member of its executive committee.

The CBA Construction Law Section **opposes** legislation that would establish a false claims act in the state because of its potential for misuse, it imposes significant penalties and burdens, it is an incorrect remedy, and it would reduce business with the state and revenue. House Bill 5205, if enacted, carries with it significant potential for misuse. On behalf of the CBA Construction Law Section, I respectfully request that the committee **not act** on House Bill 5205.

The CBA Construction Law Section consists of several hundred members who practice in the area of construction law. Many of our members are in private practice, some of whom represent the state on a contract basis; some serve as assistant attorneys general who represent various state agencies in contracting matters. Our members also represent contractors, architects, sureties and owners. They have a great deal of experience in construction law and we all have a great interest in legislation regulating construction procedures, investigation, enforcement and compliance and ethics. We serve our clients and the public at large by ensuring that all participants in public construction in the state understand the laws and what is needed in order to fully comply with applicable laws. Our members in private practice represent contractor-clients having a long and respected track record in doing business with the state.

House Bill 5205 authorizes the Attorney General, whenever he has reason to believe that a person may have defrauded the state, to investigate and sue in superior court. The bill sets forth several instances in which a person is liable for defrauding the state, including knowingly present[ing] a false or fraudulent claim. A person found to have defrauded the state is liable for three times the amount of damages the state sustained due to the fraudulent act, a \$5,000 to \$10,000 civil penalty for each act, and attorney's fees and costs.

The level of knowledge needed to trigger liability under the provisions of House Bill 5205 means it could be used in several scenarios other than those involving actual fraud, as understood at law. They include very real situations that are not always clear-cut

where contracting clients, otherwise engaged in legitimate business and acting in good faith, could be subject to liability under the bill:

- **A contractor maintains unconventional pay practices.** A contractor, for instance, retains the services of several subcontractors for a state project. Each time the contractor submits an application for payment to the state, it includes documentation from its subcontractors. The contractor keeps general daily reports but relies on each subcontractor to keep track of its own employees. It turns out that one of the subcontractors has been reimbursing its key employees for "expenses" in lieu of overtime payments in accordance with a long-standing agreement. At some point, a disgruntled ex-employee of the subcontractor becomes an "original source" and informs the state of the subcontractor's pay practices. The state, which happens to be facing a series of proposed change orders from the contractor, claims the contractor has been submitting "false" information in its payment requests and is liable for damages and penalties. The contractor, not at all confident of its ignorance of the subcontractor's practices will be seen as an "innocent mistake" strikes an unfavorable bargain with the state in exchange for a withdrawal of the "false claim" action.
- **Legitimate claims against the state.** A small contractor budgets 15,000 man hours for a particular project, and 35 years of experience has proven his budgets correct to within $\pm 5\%$. The contractor experiences unusual losses of productivity on the project that he attributes to the construction manager's failure to properly administer the overall project. The contractor finds that he has expended 10,000 man hours over his original budget. Negotiations with the state break down, and the contractor has no choice but to make a formal claim against the state for the significant additional cost. The contractor feels he is right and that in the claim process he will discover all the information he needs to bear him out. In the meantime, the state claims the contractor has submitted a "false claim". The contractor has learned that his type of claim is typically hard to prove, so the odds are against him; but if he loses, he's also made the state's case that his claim was "false". Not only is he not compensated for the additional 10,000 man hours, he may also owe the state an enormous sum. As a result, the contractor withdraws his claim in exchange for a promise from the Attorney General that he will not be prosecuted for making "false claims" against the state.
- **Significant penalties for each "fraudulent" act.** A contractor on a federally-funded state project, following a prevailing wage schedule, classifies its employees using the "tools of the trade" analysis approved in other jurisdictions by the U.S. Department of Labor. The contractor later learns that the same agency claims a different classification should have been used based on its updated but unpublished interpretation of the law. Not only is the contractor faced with an unexpected claim for "back pay", its claim for payment to the state, based on certified payrolls, exposes it to staggering penalties for "false claims" \$5,000 to \$10,000 for each

“fraudulent” act. The state could conceivably count as an act each entry for an employee for each week of payroll.

- **Challenging project management situations.** A contractor keeps a mediocre project manager on its payroll because it knows it’s hard to find qualified employees. If the contractor makes its expectations known to the project manager loud and clear, maybe he will “shape up”. On the other hand, the project manager could take umbrage at the increased pressure, quit to work elsewhere, and become a confidential “original source” of information for the Attorney General to launch an investigation of the contractor. The contractor knows the investigation will turn up nothing, but it will suffer great inconvenience, cost, and bad publicity in the meantime. As a result, the contractor keeps the project manager and hopes he will leave on his own one day.

The section commends the committee and the legislature for their sincere attempt to address the contracting challenges confronting the state. The CBA Construction Law Section supports these efforts. Members believe, however, that a false claims act would not solve these problems and would instead unfairly place a significant burden on legitimate contractors.

On behalf of the CBA Construction Law Section, thank you again for the opportunity to comment on the bill before the committee.