



# LEGAL CORNER

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## Connecticut Legislature Tinkers With State Contracting Laws To Boost Connecticut Construction Industry

Editor's Note: I would like to acknowledge the assistance of my partner, Jared Cohane, who prepared this month's article. Jared is a Partner in Hinckley, Allen & Snyder's Construction and Public Contracts Group in Hartford, CT.

*The Connecticut legislature has recently passed a new statute, Public Act 11-229, effective October 1, 2011, which makes significant changes to the state's public contracting laws in an effort to provide a boost to the stagnated Connecticut construction industry. The new law could be a double-edged sword, opening up possible opportunities for smaller New England-based utility contractors looking to break into the Connecticut market, while potentially limiting opportunities for non-Connecticut contractors who regularly perform utility work for the State of Connecticut. The new law, among other things, revamps the state statute concerning gift affidavits, relaxes the criteria for businesses to qualify as certified small business enterprises, and tasks the Department of Administrative Services with implementing a program to increase the number of public contracts awarded to Connecticut firms.*



### Ethics Compliance

**T**he Connecticut Legislature continues to tinker with state contracting ethics requirements that were spawned in the past decade by the scandal involving then-Governor John Rowland. Under existing law, contractors bidding a public works project are required to affirm that they are in compliance with state ethics laws each time they enter into a state contract. This includes a certification by recipients of contracts estimated to be in excess of \$500,000 that no gifts were given to any public official or state employee substantially involved in the award (or any official or employee of any agency that supervises or makes appointments to

*continued on page 19*

the contracting agency) between the date the agency began planning the contract and the date it was executed. This certification covers gifts by the person or business submitting the bid, or any officer or managerial employee of the business or their agent who participated substantially in preparing the bid or contract proposal or negotiating the contract.

As of October 1, the scope of the gift ban in the certification has been expanded, requiring **all** personnel substantially involved in preparing bids or contract negotiations to certify that they have not given gifts, at **any** time, to state contracting personnel or their supervisors. Under the new act, any official of the construction firm authorized to sign state contracts can make the certification, rather than the signatory of the specific contract, as was previously required. Finally, the act also requires contractors to certify that all of their bids or proposals are without fraud or collusion, not just the present bid or proposal.

### **Expanding The Number Of Small Business Enterprises**

By law, Connecticut state agencies must set aside 25% of the total value of all contracts they let for construction, goods, and services each year for certified small business enterprises ("SBE"). Twenty-five percent of that set-aside value is exclusively bid by certified small minority-owned contractors. In an effort to expand opportunities for certified SBEs, the new act eliminates the requirement that a small utility contractor do business under the same ownership or management for a year before it is certified as an SBE. The act also eliminates the requirement that at least 51% of an SBE's ownership is held by someone with authority over daily operations, management, and policies and who receives beneficial interests.

These changes should allow more companies qualify as certified SBE's, expanding the pool of po-

tential bidders for the exclusive set-asides on large public projects. Small contractors will not, however, receive certification as an SBE if they are "affiliated" with another person and together their revenues exceed \$15 million. By law, "affiliated" means one person, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with another person. This caveat should close a potential loophole whereby a large contractor can gain a competitive advantage and the opportunity to bid on the exclusive SBE set-aside by affiliating with and controlling a small contractor.


### **Program To Promote Award To Connecticut Firms**

The new act requires the Department of Administrative Services ("DAS") to submit, no later than January 1, 2012, a report on in-state contracting. The report is to analyze any law or economic factor that results in a Connecticut resident bidder being at a disadvantage to a non-resident bidder in submitting the lowest responsible qualified bid, and to make recommendations to increase the number of state contracts awarded to Connecticut residents, through an in-state contract preference or otherwise.

No later than July 1, 2012, DAS must develop and implement a program to accomplish the goal of increasing the number of state contracts awarded to Connecticut firms. DAS must ensure that the program does not run afoul of the Commerce Clause of the United States Constitution, which will be a significant challenge. Massachusetts, Rhode Island, Maine, New Hampshire and New York based contractors who regularly bid Connecticut projects or are considering expanding operations into Connecticut should stay tuned to see whether the new program proves to be an impediment to obtaining work in Connecticut.

### **Conclusion**

*The changes to state contracting law implemented by Public Act No. 11-229 will require some firms to alter their operations. Bidding processes should be evaluated to ensure compliance with the ethics requirements. Similarly, smaller enterprises and fledgling firms should evaluate whether there is the potential to obtain SBE certification, opening up opportunities to bid for the exclusive SBE set-aside. Whether these changes will help jump start the Connecticut construction industry remains an open question. ■*

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