



**Building Your
Community's Future:
Best Practices for Local
Government Construction
Projects**

Governmental Webinar
Heyl, Royster, Voelker & Allen
March 28, 2013



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**Construction Projects:
How are you going to pay
for it?**

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Budget

“Show me the money”

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Need money now?
Loans versus Bonds

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Types of Bonds:

General Obligation
Revenue
Tax increment allocation Alternative
Limited
Industrial

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Be creative

Public-Private Partnerships (P3)
Collaborate and Cooperate

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The Construction Bid Process



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Overview of the Construction Contract Process

- Budget
- Selection of architect or engineer
- Design development
- Bid solicitation
- Bid selection
- Pre-construction administrative tasks
- Construction

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Selection of Architect or Engineer

- Architect or engineer must be licensed
- Professional Engineering Practice Act
 - 225 ILCS 325/41
 - “It is unlawful for the State or any of its political subdivisions, or any county, city or town to engage in the construction of any public work involving professional engineering, unless the engineering plan, specifications and estimates have been prepared by, and the construction is executed under the guidance of a professional engineer licensed under this Act.”

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Local Government Professional Services Selection Act

- 50 ILCS 510/
- Applies to any school district and any unit of local government of fewer than 3 million inhabitants, except home rule units.
- Governs use of architectural, engineering, and land surveying services (“AES”).

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Local Government Professional Services Selection Act (cont.)

- Section 4. Public notice.
- If utilizing AES, political subdivision must allow the professional firms to “annually file a statement of qualifications and performance data.”

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Local Government Professional Services Selection Act (cont.)

- Section 4 (cont.)
- When project requires AES, the political subdivision must:
 - Mail notice requesting statement of interest from firms with current info on file; or
 - Place advertisement in daily newspaper requesting statement of interest and statement of qualification and performance data from firms interested.

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Local Government Professional Services Selection Act (cont.)

- Section 5. Evaluation Procedure.
- During evaluation, must take into account “qualifications, ability of professional personnel, past record and experience, performance data on file, willingness to meet time requirements, location, workload of the firm, and such other qualifications-based factors as the political subdivision may determine in writing are applicable.”

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Local Government Professional Services Selection Act (cont.)

- Section 5 (cont.)
- May conduct discussions with, and require public presentations by, firms deemed to be the most qualified.
- Prior to selection, cannot seek verbal or written estimates of costs or proposals in terms of dollars, hours required, percentage of construction cost, or any other measure of compensation.

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Local Government Professional Services Selection Act (cont.)

- Section 6. Selection procedure.
 - Shall select at least 3 firms that are most qualified to provide services and rank them in order of qualifications.
 - Then must contact firm ranked most preferred and attempt to negotiate a contract at a fair and reasonable compensation.

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Local Government Professional Services Selection Act (cont.)

- Section 7. Contract negotiation.
 - Must prepare a written description of the scope of the proposed services to be used as a basis for negotiations and negotiate a contract with highest qualified firm.
 - If unable to negotiate satisfactory contract, terminate negotiations and move on to next ranked firm.

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Local Government Professional Services Selection Act (cont.)

- Exceptions to Sections, 4, 5, and 6 if political subdivision:
 - Already has satisfactory relationship with firm(s);
 - Determines by resolution that an emergency exists and expeditious selection needed; or
 - Determines by resolution that expected cost of the services will be less than \$25,000.

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Application of PSSA (non home rule units)

- Design/build contracts – likely unable to have single contract
- Construction manager – likely outside scope of PSSA
- Architectural competitions – likely able to have if rules consistent with PSSA
- Performance contracting – Local Government Energy Conservation Act

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Bidding – Governing Rules

- Counties – 55 ILCS 5/5-1022
- Villages and Cities – Illinois Municipal Code Sections 8-9-1, et. seq. and 9-2-100
- Townships – Illinois Township Code Sections 85-30 and 205-105
- Home rule units – own rules

**Always check your local ordinances to ensure compliance.

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Bidding – When Required

Political Subdivision	Threshold
• Counties < 2,000,000	\$30,000
• Cities and villages < 500,000	\$20,000
• Townships	\$20,000

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Bidding – Exceptions

- When bidding may not be required:
 - Counties:
 - Emergency situations authorized by Board
 - Contracts with the federal government
 - Purchases of used equipment
 - Purchases at auction
 - Transactions not suitable to competitive bidding
 - Certain contracts for data processing equipment

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Bidding – Exceptions

- When bidding may not be required:
 - Villages and cities:
 - Contracts approved by 2/3 of all aldermen or trustees
 - Contracts with federal government

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Bidding – Exceptions

- When bidding may not be required:
 - Townships:
 - Board resolution by ¾ vote that in best interests of township to forgo advertising for bids
 - In case of emergency authorized by Board

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Caution

- Cannot split a project into smaller projects to avoid bidding requirements.
- Class 4 felony:
 - Stringing;
 - Attempting to avoid or evade the duty to bid; or
 - Assisting another in doing so.

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Bid Advertisements

- Nature and character of work;
- Deadline for receipt of bids;
- When and where bids will be opened;
- How to obtain set of specifications;
- Bid deposits or bonds required; and
- Statement of right to reject all bids and waive any nonmaterial variances.

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Qualifications to Bid

- May require each potential bidder to submit written documentation addressing:
 - Financial ability to perform;
 - Ability to obtain necessary bonds and insurance;
 - Experience in building like projects with specific examples; and
 - List of references.

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Pre-bid Conference

- Meeting with political subdivision, architect or engineer, and interested bidders
- Not required but often held for larger or more complicated projects
- Held after bidding documents released but before due date
- Should make mandatory and create transcript or minutes of conference

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Methods of Submitting Bids

- Bidding instructions should require sealed bids.
 - Required by statute for park district and school district projects
- Bidding instructions should state bidding by phone, fax, or email is not acceptable.
- Include precise procedures for modifying or withdrawing any bids prior to opening.

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Opening the Bids

- Opened publicly and read aloud
- Does not need to occur at Board Meeting
- Summary of bids transmitted to all bidders by architect or engineer
- NOTE: If changing due date or date which bids are opened, send notice to all who requested bidding documents and publicly post notice.

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Bid Rejection

- Can reject all bids (be cautious of financial penalties though)
- Must reject any bid containing a “material variance” from requirements.

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Bid Rejection – Material Variance

- A variance is material if it gives a bidder a substantial advantage or benefit not enjoyed by other bidders.
 - Leo Michuda & Son Co. v. Metropolitan Sanitary District of Greater Chicago, 97 Ill.App.3d 340 (1st Dist. 1981).

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Bid Selection

- If awarded, must be awarded to lowest “responsible bidder.”
- List factors used in determining responsibility in bidding documents.
- If you are not going with the lowest bidder, carefully document basis for decision and if possible get opinion letters from architect and/or legal counsel supporting the decision.

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Bid Selection – Responsible Bidder

- Some factors related to responsibility:
 - credentials,
 - financial information,
 - bonding capacity and insurance protection,
 - qualifications and past experience,
 - ability to complete the contract, and
 - in some cases, social policy.

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Bid Selection – Formal Acceptance

- Should formally accept by ordinance or resolution.
- Written notice of acceptance should be served on the lowest responsible bidder.

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Post Bid Considerations

- Contract
- Public entity obligations
 - Access, insurance, avoid delay, make payments.
 - Local Government Prompt Payment Act
 - 50 ILCS 505/
- Work changes
 - Public Construction Contract Act
 - 30 ILCS 557/

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Bidders Beware!

- Prevailing Wage Act
- Substance Abuse Prevention on Public Works Project Act
- Employment of Illinois Workers on Public Works Act
- Bid-Rigging
- Conflicts of Interest

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Illinois Prevailing Wage Act

I. Introduction

- Illinois Prevailing Wage Act
- 820 ILCS 130/0.01 – 12

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II. Why Be Concerned?

A. Potential Liability for Government Official

- **Sec. 6.** “Any officer, agent or representative of any public body who willfully violates, or omits to comply with, any of the provisions of this Act...is guilty of a . . . misdemeanor.”

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B. Criminal Liability for The Contractor or Sub-Contractor

- **Sec. 6** “...any contractor or subcontractor, or agent or representative thereof, doing public work as aforesaid, who neglects to keep, or cause to be kept, an accurate record of the names, occupation and actual wages paid to each laborer, worker and mechanic employed by him, in connection with the public work or who refuses to allow access to same at any reasonable hour to any person authorized to inspect same under this Act...is guilty of a...misdemeanor.”

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C. Governmental Enforcement

- **Sec. 6.** “The Department of Labor shall inquire diligently as to any violation of this Act, shall institute actions for penalties herein prescribed, and shall enforce generally the provisions of this Act. The Attorney General shall prosecute such cases upon complaint by the Department or any interested person.”
- Emphasis on enforcement by the Illinois Attorney General's office
- Legislative interest

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III. Public Policy Served by the PWA

- It is the policy of the State of Illinois that a wage of no less than the general prevailing hourly rate as paid for work of a similar character in the locality in which the work is performed, shall be paid to all laborers, workers and mechanics employed by or on behalf of any and all public bodies engaged in public works.

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IV. What Is Covered by the PWA?

- “Public Works” or directly associated activity.
- “Construction” (includes demolition, maintenance & repair).
- Public Body or projects funded with public money.
- Payment of general prevailing rate of hourly wages to workers on site (and not mere deliverers).
- Prevailing wage includes wages & benefits.
- Only non-governmental employees (includes sub-contractors).
- No dollar minimum.

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V. Obligations of the Public Body

- Yearly – Sections 4, 7, 8, 9
- Each Job – Sections 4, 5

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A. Yearly Obligations Overview

- Ascertain prevailing wage for various jobs
- Pass Ordinance in June
- Publish notice of passage (can do jointly)
- Post ordinance or keep for inspection
- File certified copy by July 15th with Illinois Secretary of State and Illinois Department of Labor
- Mail to Requesting Parties

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B. Overview of Obligations for Each Job

- Notice of Prevailing Wage Act in bid and contract or on purchase order or separate document
- Provision in contractor's bond
- Contractor is to include notice in subcontracts; ditto for subs to sub-sub.
- Notice by public body of wage revisions (but see PA 97-0694)
- Posting by contractor
- Contractor to submit certified monthly payroll
- Retention requirements for public body
- FOIA requirements for public body
- Retention requirements for contractor
- Potential liability to public body
 - Notice
 - Payroll certification
 - Retention/FOIA

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VI. Liabilities & Penalties

A. Criminal Liabilities Under Section 6

- Any officer, agent or representative of any public body who willfully violates, or willfully fails to comply with, any of the provisions of this Act, and any contractor or subcontractor, and any officer, employee, or agent thereof, who as such officer, employee, or agent, has a duty to create, keep, maintain, or produce any record or document required by this Act to be created, kept, maintained, or produced who willfully fails to create, keep, maintain, or produce such record or document as or when required by this Act, is guilty of a misdemeanor.

The Department of Labor shall inquire diligently as to any violation of this Act, shall institute actions for penalties herein prescribed, and shall enforce generally the provisions of this Act. The Attorney General shall prosecute such cases upon complaint by the Department or any interested person.

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B. Remedies & Penalties Under Sec. 11

- Any contract not meeting requirements is void
- Contractor cannot recover damages – recovery limited to cost of materials and labor supplied
- Applies to sub-contractors, too
- Worker has claim for shortage in wages
- Also can recover costs and attorney fees
- Penalty paid to IDOL – 20-50%
- Punitive damages to worker of 2% - 5% monthly

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C. Contract Bar

- Violations can lead to a bar from receiving public contracts

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Contact the Illinois Department of Labor on the Web



<http://www.state.il.us/agency/idol/>

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Substance Abuse Prevention on Public Works Project Act

- 802 ILCS 265/1 et seq.
- Applies wherever Prevailing Wage Act applies
 - Public works or publicly funded works
 - Contractor or subcontractors

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Substance Abuse Prohibited

- No employee on the job may use, possess, distribute, deliver or be under influence
- Alcohol threshold is .02%

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Substance Abuse Prevention Program Required

- Sec. 15 requires that an employer before beginning work have in place such a program
- Must be filed with public body
(Note to subcontractors . . .)
- Program shall include a requirement that employees on project submit to pre-hire, random, reasonable suspicion, and post-accident drug and alcohol testing

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Reasonable Suspicion Testing

- A belief, “based on behavioral observations or other evidence, sufficient to lead a prudent or reasonable person to suspect an employee is under the influence and exhibits slurred speech, erratic behavior, decreased motor skills, or other such traits”
- Multiple people observing such behavior
- Procedure for testing

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Employee Removal from Project

- Fails test
- Refuses test
- Officer or employee of contracting agency so requests
- Return of employee

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Collective Bargaining Exception

- Where the collective bargaining agreement addresses this subject matter

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Employment of Illinois Workers on Public Works Act (30 ILCS 570/1, et seq.)

- “A period of excessive unemployment” - any month immediately following two consecutive calendar months during which state unemployment exceeded 5%
- “Public works” – Any fixed work construction or improvement for the State of Illinois or any political subdivision of the State if that fixed work construction or improvement is funded or financed in whole or in part with State funds or funds administered by the State of Illinois.

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What Is Required?

Sec. 3. Employment of Illinois laborers. Whenever there is a period of excessive unemployment in Illinois, if a person or entity is charged with the duty, either by law or contract, of (1) constructing or building any public works, as defined in this Act, or (2) the clean-up and on-site disposal of hazardous waste for the State of Illinois or any political subdivision of the State, and that clean-up or on-site disposal is funded or financed in whole or in part with State funds or funds administered by the State of Illinois, then that person or entity shall employ at least 90% Illinois laborers on such project. Any public works project financed in whole or in part by federal funds administered by the State of Illinois is covered under the provisions of this Act, to the extent permitted by any applicable federal law or regulation. Every public works contract let by any such person shall contain a provision requiring that such labor be used: Provided, that other laborers may be used when Illinois laborers as defined in this Act are not available, or are incapable of performing the particular type of work involved, if so certified by the contractor and approved by the contracting officer.

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Important Aspects of Statute

- Certain exceptions apply for experts
- Federally funded project exception
- Monetary penalties (each worker/each day)
- IDOL enforcement
- Private right of action

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Bid-Rigging (720 ILCS 5/33E-3)

- A person commits the offense of bid-rigging when he knowingly agrees with any person who is, or but for such agreement would be, a competitor of such person concerning any bid submitted or not submitted by such person or another to a unit of State or local government when with the intent that the bid submitted or not submitted will result in the award of a contract to such person or another and he either (1) provides such person or receives from another information concerning the price or other material term or terms of the bid which would otherwise not be disclosed to a competitor in an independent noncollusive submission of bids or (2) submits a bid that is of such a price or other material term or terms that he does not intend the bid to be accepted.

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Penalties

- Class 3 felony
- 5 year contract bar
 - Possible exception where entity can demonstrate innocence and good faith (and wrongdoer is terminated)

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Conflicts of Interest

- Found in a variety of locations in the Illinois Statutes
- For each unit of government, an examination should be made of that public body's unique law

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Conflict Statutes of Broad Application

- Prohibited interest in contracts (50 ILCS 105/3)
- Disclosure of identity in real estate contracts (50 ILCS 105/3.1)
- Pecuniary interest allowed in deposit and financial services contracts (50 ILCS105/3.2)

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Any Questions?

- Please feel free to email us:
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