

PUBLIC CONSTRUCTION PROJECT LIABILITY

Presented and Prepared by:

Maura Yusof

myusof@heyloyster.com

Chicago, Illinois • 312.853.8700

Heyl, Royster, Voelker & Allen, P.C.

PEORIA • CHAMPAIGN • CHICAGO • EDWARDSVILLE • ROCKFORD • SPRINGFIELD

PUBLIC CONSTRUCTION PROJECT LIABILITY

I.	INTRODUCTION.....	H-3
II.	BIDDING	H-3
III.	CONTRACT FORMATION, BONDS AND INSURANCE	H-6
IV.	THE PREVAILING WAGE ACT	H-7
A.	Key Provisions.....	H-8
B.	Wage Payment Requirements.....	H-9
C.	General Prevailing Rate of Hourly Wages.....	H-9
D.	What Workers are Covered?	H-9
E.	Criminal Liabilities	H-9
F.	Violations.....	H-10
G.	Prevailing Wage Act Requirements for Each Project.....	H-10
H.	Other Issues Raising Potential Liability to a Public Body	H-10

The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

PUBLIC CONSTRUCTION PROJECT LIABILITY

I. INTRODUCTION

There are special liability concerns when it comes to public construction projects. These materials provide an overview of the issues pertinent to government construction projects and potential liability. The primary discussion points relate to bidding, contract language, bonds and insurance, and the Illinois Prevailing Wage Act.

II. BIDDING

Pursuant to 60 ILCS 1/85-30, bidding is required for purchases greater than \$20,000.

Section 85-30 states:

Purchases; bids

Any purchase by a township for services, materials, equipment, or supplies in excess of \$20,000 (other than professional services) shall be contracted for in one of the following ways:

(1) By a contract let to the lowest responsible bidder after advertising for bids at least once

(i) in a newspaper published within the township, or

(ii) if no newspaper is published within the township, then in one published within the county, or

(iii) if no newspaper is published within the county, then in a newspaper having general circulation within the township.

(2) By a contract let without advertising for bids in the case of an emergency if authorized by the township board. This Section does not apply to contracts by a township with the federal government.

60 ILCS 1/85-30.

As for bid modifications, bidders can change or revoke their bids until the bidding is opened. However, after bids have been opened, a bid may not be materially changed or altered because that would be a showing of favoritism. *City of Chicago v. Mohr*, 216 Ill. 320, 328 (1905). Bidders may revoke their bid if they can establish clear and convincing evidence that the bid was based on an excusable error or omission. *Department of Public Works and Bldgs. v. South East Nat. Bank of Chicago*, 131 Ill. App. 2d 238 (1st Dist. 1971) (Engineer inadvertently misplaced decimal

point that resulted from last minute quotations from subcontractors and suppliers. Public Works Department was notified before bid was awarded).

Bids must conform to the advertised requirements of the invitation to bid. "A bid which contains a material variance is an unresponsive bid and may not be corrected after the bids have been opened in order to make it responsive. The test of whether a variance is material is whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders." *Leo Michuda & Son Co. v. Metropolitan Sanitary Dist. of Greater Chicago*, 97 Ill. App. 3d 340, 344 (1st Dist. 1981), See also *A & K Midwest Insulation, Inc. v. State of Illinois*, 35 Ill. Ct. Cl. 767 (1983); *Interstate Rock Products, Inc. v. U.S.*, 50 Fed. Cl. 349 (2001).

Section 85-30 requires that the contract be awarded to the "lowest responsible bidder," but that is not the same as the lowest bidder. There is no exact definition in the township code, unlike the State Procurement Code. Considerations that should be included are whether the low bidder is financially capable of performing the project, competent to perform the work, and whether there is an appearance of impropriety with the low bidder. *Joseph J. Henderson & Son, Inc. v. City of Crystal Lake*, 318 Ill. App. 3d 880, 885 (2d Dist. 2001), (the lowest bidder on a project to improve the city's waste water treatment plant was not the "lowest responsible bidder" because the lowest bidder had an ongoing business relationship with a company in which city's supervising engineer had a majority ownership; the company had derived all its profits in the most recent year from work done jointly with the lowest bidder. It was in the public interest for the city to avoid the appearance of impropriety. Awarding the contract to the other bidder was not based on favoritism, unfair dealing, fraud, or any other arbitrary conduct.

A township may adopt a "Responsible Bidder Ordinance" that specifies criteria that a contractor must meet in order to be a responsible bidder. Considerations may include proper business registrations; past compliance with environmental, labor and safety laws; relevant insurance coverage; prevailing wage compliance; and Bureau of Apprenticeship Training Programs.

Under 720 ILCS 5/33E-3, bid rigging is a class 3 felony and may result in being barred from public contracts for 5 years.

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.

720 ILCS 5/33E-3.

Under Section 33E-4, bid rotating is a class 2 felony and may result in being permanently barred from public contracts.

A person commits the offense of bid rotating when, pursuant to any collusive scheme or agreement with another, he engages in a pattern over time (... 3 contract bids within a period of 10 years ...) of submitting sealed bids ... with the intent that the award of such bids rotates, or is distributed among, persons or business entities which submit bids on a substantial number of the same contracts.

720 ILCS 5/33E-4.

Disclosure of bidding information by a public official is governed by Section 33E-5, which states:

(a) Any person who is an official of or employed by any unit of State or local government who knowingly opens a sealed bid at a time or place other than as specified in the invitation to bid or as otherwise designated by the State or unit of local government, or outside the presence of witnesses required by the applicable statute or ordinance, commits a Class 4 felony.

(b) Any person who is an official of or employed by any unit of State or local government who knowingly discloses to any interested person any information related to the terms of a sealed bid whether that information is acquired through a violation of subsection (a) or by any other means except as provided by law or necessary to the performance of such official's or employee's responsibilities relating to the bid, commits a Class 3 felony.

(c) It shall not constitute a violation of subsection (b) of this Section for any person who is an official of or employed by any unit of State or local government to make any disclosure to any interested person where such disclosure is also made generally available to the public.

(d) This Section only applies to contracts let by sealed bid.

720 ILCS 5/33E-5.

Interference with contract submission and award by a public official is governed by 720 ILCS 5/33E-6, which states:

(a) Any person who is an official of or employed by any unit of State or local government who knowingly conveys, either directly or indirectly, outside of the publicly available official invitation to bid, pre-bid conference, solicitation for contracts procedure or such procedure used in any sheltered market

procurement adopted pursuant to law or ordinance by that unit of government, to any person any information concerning the specifications for such contract or the identity of any particular potential subcontractors, when inclusion of such information concerning the specifications or contractors in the bid or offer would influence the likelihood of acceptance of such bid or offer.

720 ILCS 5/33E-5(a).

Kickbacks may be found to be a class 3 or class 4 felony and are governed by Section 33E-7, which states:

- (a) A person violates this Section when he knowingly either:
- (1) provides, attempts to provide or offers to provide any kickback;
 - (2) solicits, accepts or attempts to accept any kickback; or
 - (3) includes, directly or indirectly, the amount of any kickback ... in the contract price ...

720 ILCS 5/33E-7(a).

Unsuccessful bidders may file challenges to the bidding process based on purported violations of any of the above.

III. CONTRACT FORMATION, BONDS AND INSURANCE

When the project is bid, there is a written contract that includes standard AIA documents for construction. However, even when the project is not bid, a contract may be formed by a written contract; implied by the conduct of the parties; a contractor may submit an offer and later have access to the site; by word of mouth with an offer often accepted by telephone; or by exchange of letters as is common for small projects.

The Public Construction Bond Act states as follows:

Except as otherwise provided by this Act, all officials, boards, commissions, or agents of this State, or of any political subdivision thereof, in making contracts for public work of any kind costing over \$50,000 to be performed for the State, or of any political subdivision thereof, shall require every contractor for the work to furnish, supply and deliver a bond.... shall be conditioned for the completion of the contract, for the payment of material used in the work and for all labor performed in the work, whether by subcontractor or otherwise.

30 ILCS 550/1.

There are several types of bonds, including:

- Performance Bond: Guarantees the contractor (or a replacement) contractor will complete the project according to contract
- Payment Bond: Guarantees payment to suppliers and subcontractors
- Labor and Material Bonds

A public body can be held liable if it fails to secure the proper bonds. Time and notice requirements must be followed by a township with the surety – 15 day deadline. Similarly, time and notice requirements must be followed by the Sub-Contractors with the Township and surety – 180 days after last work or materials.

Standard construction contracts may require the contractor to provide proof of the following types of insurance coverage:

- Worker's Compensation
- Employer's Liability
- Comprehensive General Liability
- Completed Operations
- Automobile Liability
- Umbrella Liability Insurance
- Pollution Liability (*depending on project type)

It is a breach of contract if the contractor fails to purchase the required insurance. *Jokich v. Union Oil Company of California*, 214 Ill. App. 3d 906 (1st Dist. 1991).

IV. THE PREVAILING WAGE ACT

The Illinois Prevailing Wage Act, 820 ILCS 130/0.01 requires that for certain public works projects, prevailing wage be paid. "Public works" as defined in the Act includes:

all projects financed in whole or in part with bonds, grants, loans, or other funds made available by or through the State or any of its political subdivisions, including but not limited to: bonds issued under the Industrial Project Revenue Bond Act (Article 11, Division 74 of the Illinois Municipal Code), the Industrial Building Revenue Bond Act, the Illinois Finance Authority Act, the Illinois Sports Facilities Authority Act, or the Build Illinois Bond Act; loans or other funds made available pursuant to the Build Illinois Act ..." (citations omitted).

820 ILCS 130/2.

The Act requires contractors and subcontractors to pay laborers, workers and mechanics performing services on public works projects no less than the current "prevailing rate of wages" (hourly cash wages plus fringe benefits) in the county where the work is performed.

The Illinois Department of Labor (IDOL) publishes the prevailing wage rates on its website at <http://www.state.il.us/agency/idol/rates/rates.HTM>. The department revises the prevailing wage rates and the contractor/subcontractor has an obligation to check IDOL's web site for revisions to prevailing wage rates.

All contractors and subcontractors rendering services under this contract must comply with all requirements of the Act, including but not limited to, all wage requirements and notice and record keeping duties.

There is potential liability for government officials who violate the Prevailing Wage Act, which may be enforced by the Illinois Attorney General's office. Section 6 of the Act states:

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 ... is guilty of a Class A misdemeanor.

820 ILCS 130/6.

The contractor and sub-contractor also face potential liability for violations of the Prevailing Wage Act. Section 6 of the Act further states:

... any contractor or subcontractor, and any officer, employee, or agent thereof, ... 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 Class A misdemeanor.

820 ILCS 130/6.

A. Key Provisions

'Public body' means the State or any officer, board or commission of the State or any political subdivision or department thereof, or any institution supported in whole or in part by public funds, and includes every county, city, town, village, township, school district, irrigation, utility, reclamation improvement or other district and every other political subdivision, district or municipality of the state whether such political subdivision, municipality or district operates under a special charter or not.

820 ILCS 130/2.

B. Wage Payment Requirements

Not less than the general prevailing rate of hourly wages for work of a similar character on public works in the locality in which the work is performed, and not less than the general prevailing rate of hourly wages for legal holiday and overtime work, shall be paid to all laborers, workers and mechanics employed by or on behalf of any public body engaged in the construction or demolition of public works.

820 ILCS 130/3.

C. General Prevailing Rate of Hourly Wages

The terms "general prevailing rate of hourly wages", "general prevailing rate of wages" or "prevailing rate of wages" when used in this Act mean the hourly cash wages plus annualized fringe benefits for training and apprenticeship programs approved by the U.S. Department of Labor, Bureau of Apprenticeship and Training, health and welfare, insurance, vacations and pensions paid generally, in the locality in which the work is being performed, to employees engaged in work of a similar character on public works.

820 ILCS 130/2.

D. What Workers are Covered?

Only such laborers, workers and mechanics as are directly employed by contractors or subcontractors in actual construction work on the site of the building or construction job, and laborers, workers and mechanics engaged in the transportation of materials and equipment to or from the site, but not including the transportation by the sellers and suppliers or the manufacture or processing of materials or equipment.

820 ILCS 130/3.

E. Criminal Liabilities

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 Class 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.

820 ILCS 130/6.

F. Violations

- Any contract not meeting requirements is void
- Contractor cannot recover damages – recovery limited to cost of materials and labor supplied
- Applies to sub-contractors
- Worker has claim for shortage in wages (5 year statute of limitations)
- Also can recover costs and attorney fees
- Penalty paid to IDOL – 20-50%
- Punitive damages to worker of 2% - 5% monthly
- Violations may lead to a bar from receiving public contracts

G. Prevailing Wage Act Requirements for Each Project

- 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-subs.
- Notice by public body of wage revisions
- Posting by contractor
- Contractor to submit certified payroll
- Retention requirements for public body
- FOIA requirements for public body
- Retention requirements for contractor

H. Other Issues Raising Potential Liability to a Public Body

- Notice
- Payroll certification
- Retention/FOIA



Maura Yusof

- Of Counsel

Maura's practice spans a wide variety of litigation – from commercial disputes to medical malpractice, product liability claims to employment law. Her primary areas of practice include commercial litigation, product liability, construction and premises liability, healthcare, cannabis business & law, and medical malpractice defense. As a primary focus of her commercial practice, she has worked on several cases related to retail sales tax sourcing litigation. Her practice also encompasses large loss property subrogation matters pending throughout the United States and internationally. She has mediated and arbitrated numerous cases, including a three-week arbitration in Tokyo, Japan, that resulted in a multi-million dollar recovery for a construction defect matter, which arbitration award the Japanese courts affirmed on appeal. Her practice has involved various types of property damage claims, including construction defects, product defects, fires, explosions, and boiler and turbine failures. The nature of her practice has required regular analysis of contract documents, including whether exculpatory provisions and limitations of liability are enforceable based on the applicable state's law. In the subrogation area, her experience also includes obtaining recoveries arising out of workers' compensation claims.

Maura began her legal career with Heyl Royster in 2002, when she worked at the firm's Edwardsville office primarily representing corporate defendants in asbestos toxic tort litigation for serious injury cases pending in Madison County, Illinois, including product liability and premises liability claims. In 2004, Maura moved to Chicago and expanded her litigation practice to large loss property subrogation matters. In 2010, Maura returned to Heyl Royster to handle commercial litigation and other civil matters pending in Chicago as well as asbestos toxic tort claims.

Maura was born in Kabul, Afghanistan and speaks fluent Dari, a dialect of Persian.

Significant Cases

- *Hartney Fuel Oil Company v. Hamer*, 2013 IL 115130 - Suit was filed by a retail sales taxpayer against our client, The Regional

Transportation Authority (RTA), the Illinois Department of Revenue, and a Cook County municipality contending that the assessment of back sales taxes of \$20+ million was incorrect. Ultimately, the RTA's position was upheld in the Illinois Supreme Court. While the taxpayer was not required to pay back taxes pursuant to the Taxpayer Bill of Rights, the Illinois Supreme Court invalidated existing regulations in adopting a "multi-factor test" as argued for by the RTA, a decision which had statewide application to sales tax sourcing favoring governmental entities such as our client.

Publications

- Law Review: Articles and Notes Editor, Washington University Journal of Law and Policy

Public Speaking

- "Going to Pot? Anticipating and Preparing for Workplace Effects in the Wake of Illinois' Medical Marijuana Pilot Program" IDC's Employment Committee Seminar (2016)
- "Lakes and Other Bodies of Water In Parks: Special Liability Concerns" Heyl Royster's 31st Annual Claims Handling Seminar (2016)
- "Lakes and Other Bodies of Water in Parks: (Part 1) Special Liability Concerns; (Part 2) Risk Management and Insurance; and Parades and Festivals in Parks – Liability Issues and Recent Decisions" IAPD/IPRA "Soaring to New Heights" Conference (2016)
- "Parades and Festivals in Parks – Liability Issues and Recent Decisions" Illinois Association of Park Districts: Legal Symposium (2015)
- "Representing Medical Practices & Physicians: Medicare and Medicaid Liens" Illinois Institute for Continuing Legal Education, Chicago, Illinois – (April 29, 2015)
- "Concealed Carry in Illinois: Employer Rights and Responsibilities" Illinois Association of Defense Trial Counsel, Chicago, IL (2014)

- “Triggering the Policy”
DRI Insurance Coverage and Claims Institute,
Construction Defect Track (2012)
- “Settlement Pitfalls”
Heyl Royster’s 26th Annual Claims Handling
Seminar (2011)

Professional Recognition

- Martindale-Hubbell AV Preeminent
- Illinois Association of Defense Trial Counsel –
President’s Commendation for Leadership and
Service as part of the Cook County Cost &
Delay Task Force, 2013
- Named to Law Bulletin Publishing Company’s
2015 and 2016 list of Illinois *Emerging Lawyers*.
Only two percent of Illinois lawyers under the
age of 40 or who have been licensed to
practice for 10 years or less earn this
distinction.
- Named to the Illinois *Super Lawyers Rising Stars*
list (2012-2016). The *Super Lawyers Rising Stars*
selection process is based on peer recognition
and professional achievement. Only 2.5 percent
of Illinois lawyers under the age of 40 or who
have been practicing 10 years or less earn this
designation/

Professional Associations

- Claims and Litigation Management Alliance
(CLM)
- Illinois Women in Cannabis
- Chicago Bar Association
- American Bar Association
- National Association of Subrogation
Professionals
- International Centre for Dispute Resolution
Young & International Group
- Defense Research Institute
- Illinois Association of Defense Trial Counsel
- Risk and Insurance Management Society, Inc.
(RIMS)
- Illinois State Bar Association

Court Admissions

- State Courts of Illinois and Missouri
- United States District Courts, Northern District
of Illinois, Eastern Division (General and Trial
Bar), Eastern District of Wisconsin, Western
District of Wisconsin, and Eastern District of
Pennsylvania (MDL)
- *Pro hac vice* admittance in State Courts of
Indiana, New York, Oregon, Arizona, California,
Florida, Ohio, Massachusetts, Maryland, and
internationally in Japan and Taiwan

Education

- Juris Doctor, Washington University School of
Law, 2002
- Bachelor of Science in Language Arts-
Government (International Affairs) and Spanish,
Georgetown University, 1998