



SubStance



Jim Rohlfing,
IMSCA President

Greetings IMSCA Members

IMSCA has much to be optimistic about as it begins a new year. I have witnessed many successes over the twenty some years I've been a member, but last year was certainly one of the organizations most accomplished. The work that IMSCA did with its construction industry allies to protect

“The achievements of an organization are the result of the combined effort of each individual.”

-Vince Lombardi

its members from the Cypress Creek decision was of benefit to the entire construction industry in Illinois. As Louie has pointed out, having many different organizations work together on the same project was undoubtedly the reason for a success that many had told us was impossible when the struggle started two years before. In addition, 2013 saw a successful lobby day, fruitful PAC events, the defeat of adverse legislation, and valiant efforts to enact additional reforms of benefit to subcontractors and others. So, we should be grateful for a good year and enthusiastic about continuing on this positive wave.

We are now faced with fresh challenges and opportunities in a new legislative year. The State still has daunting financial burdens that will continue to

make payments on public projects slow or unpredictable. We will monitor the legislature's recent efforts to tame the debt monster and see how it holds up to inevitable judicial challenges. IMSCA will work to keep its members informed of how the Capitol Development Board and other public entities operate in this financially constrained environment. In addition, we know that industries and organizations with interests at odds with IMSCA's members will continue to assert their own agendas. We have seen that IMSCA is up to the challenge, and with active participation from all of its members, it will continue to fight for its members and its members' members.

For example, we recently discovered, the banks have not quietly accepted the amendment to the mechanics lien act that modified the Cypress Creek court decision. Instead, some subcontractors are now being required to subordinate their mechanics lien claims to lender's mortgages, thereby undercutting the rights won through the Cypress Creek legislation. Remedying this inequity will be a priority for IMSCA in the upcoming legislative session.

It is an honor to serve as your president. I look forward to a fun and prosperous year for our organization and a healthy one for all of my friends at IMSCA. I hope that you will all reward yourself by staying active in IMSCA.

*Legislative
Representation
for over 2,000
Construction
Employers*



Subordination of mechanics liens - Cypress Creek II

Jim Rohlfig, IMSCA President

page 4



New Year...New Laws!

Check out what's new in 2014

Jessica Newbold, Legislative Consultant

page 6



Under What...Will A Subcontractor Be Bound By Its Bid?

Kenneth A. Cripe & Edward B. Keidan

page 8



2014

Legislative Agenda

Louis Giordano, Executive Vice President

page 10



IMSCA
Illinois Mechanical & Specialty Contractors Association



Jim Rohlfing,
IMSCA President

Featured Story

Subordination of mechanics liens -

CYPRESS CREEK II

In Illinois, there has been a long-standing conflict between mechanics lien claimants and construction lenders over how to distribute limited proceeds from a construction project after an owner runs out of money, the property is sold and the proceeds from the sale are insufficient to fully pay the lender and the lien claimants. Historically, the law had been interpreted to give contractors priority over lenders for the value of the improvements made to property, while lenders had priority for the value of the property attributable to the land before the improvements were made. For a hundred fifty years, this resulted in an equitable sharing of the sale proceeds. This proceeds distribution method was changed by the Illinois Supreme Court on February 25, 2011, in the case known as LaSalle Bank v. Cypress Creek.

The Cypress Creek decision changed the distribution method so that when there are insufficient proceeds from a foreclosure sale to pay both lenders and mechanics lien claimants, lenders received the lion's share and mechanics lien claimants got much less than before. The Supreme Court's drastic change in the law forced those in the construction industry to turn to the Illinois legislature for help. In January 2013, the Illinois legislature responded to the cries of the construction industry, as voiced by IMSCA and others. Public Act 97-1165 reinstated the pre-Cypress Creek method of sharing the foreclosure sale proceeds.

Now, banks and contractors once again share equitably in the limited proceeds available on troubled projects.

That's the good news.

Unfortunately, the bad news is that construction lenders are attempting to circumvent and frustrate the legislative fix to the Cypress Creek decision.

Now, some lenders are demanding that real estate developers require contractors and subcontractors to subordinate their mechanics lien rights to the mortgage liens of their construction lenders when they sign general contracts and subcontracts. These subordination clauses can all but destroy the mechanics lien rights of general contractors and their subcontractors. An enforceable subordination clause gives a lender a priority claim to all proceeds generated by a foreclosure until its mortgage balance, accrued interest, attorneys' fees, and costs have been paid in full. Mechanics lien claimants would get nothing until after the lender has been paid in full. As a practical matter, these subordination clauses not only destroy the rights won through the Cypress Creek legislative battle, they leave mechanics lien claimants worse off than they were after the Supreme Court ruled in Cypress Creek!

The work of contractors and subcontractors and the improvements they make with their toil, materials and capital would be a gift to the lenders who get all of the benefits of construction without having to fully pay for them. And, it gets

worse. Pursuant to some of the subordination clauses currently used in Illinois, lenders would be able to make new loans after the date of the construction contract without the contractors' knowledge or consent. A lender's exploitation of such extensions could easily result in the loss of mechanics lien rights in their entirety.

One example of a subordination clause in use in Illinois is:

lien rights against those who would exploit their superior financial leverage to eliminate them. Though the Mechanics Lien Act prohibits waiving mechanics liens in construction contracts, it doesn't expressly forbid giving them up through subordination; but the result for contractors is the same when construction mortgages are unpaid. IMSCA hopes the legislature will be responsive to the needs of

assure that contractors, subcontractors, and suppliers are timely paid and that the construction loan remains in balance. Lenders even have the power to preserve their right to pay contractors, subcontractors, and suppliers directly when a borrower's performance under its loan proves to be unreliable. Lien claimants don't have that opportunity. Forcing mechanics lien claimants to subordinate their positions discourages careful lending practices at the beginning and throughout a construction project. Worse, the reliance upon subordination clauses creates a temptation for a lender that would benefit from a borrower not paying its contractor for property improvements, as the lender's collateral would be enhanced without an increase in the loan balance. Instead, the law should encourage diligent conduct by all parties in the process. The subordination clause undermines the lender's incentive to be cautious while diminishing the financial protection necessary for contractors and subcontractors.

Section 16 of the Mechanics Lien Act has worked for 150 years to protect all parties in the construction process. Contractors and subcontractors have traditionally been given a lien on the improvements to property to induce them to provide materials and labor on credit. Contractors and subcontractors faced with these subordination provisions should understand the dire risks they are taking. Banks have the ability to protect themselves prior to lending and during the course of the project, and contractors should as well. The construction industry should join together to ask the Illinois legislature to stop overreaching by lenders and to protect the mechanics lien rights of contractors and the men and women of Illinois who work for them.

Subordination clause found in one subcontract

Subcontractor acknowledges and agrees that the Work and all labor and materials herein contracted for are being provided solely for the development and improvement of the Project and that any claim of lien of Subcontractor or its subcontractors or suppliers with respect to labor or materials furnished for the improvement of the Project is, and shall be, subordinate and inferior to the lien and security title of any deed to secure debt and security agreement encumbering the Project and given to secure any indebtedness now or hereafter incurred by Owner, to provide financing for all or any portion of the Project. Such subordination is and shall be effective without the need for any further written agreement or instrument of Subcontractor, but Subcontractor nonetheless agrees promptly to execute and deliver, in recordable form, any such written lien subordination agreement or acknowledgment which Owner may from time to time request. Subcontractor agrees to require each Subcontractor, Sub-subcontractor and Supplier to assume toward Subcontractor, the subordination of lien rights set forth in this Paragraph.

This use of subordination clauses to eliminate mechanics lien rights is an injustice IMSCA will ask the legislature to address. IMSCA will seek to have a bill introduced in the legislature that would amend sections 1 and 21 of the Illinois Mechanics Lien Act to prevent the elimination of lien rights through the use of subordination clauses. In 1991, The legislature banned no-lien construction contracts because it recognized the importance of preserving mechanics

the construction industry and the importance of mechanics liens as it was when no-lien contracts were prohibited and when Cypress Creek was overturned.

Such proposed legislation would not unduly prejudice lenders. Bankers already have the ability to protect themselves from a failed project by requiring more equity, personal guarantees, collateral security and other protections from their borrowers. Bankers already have the ability to insist that their borrowers



Jessica Newbold,
Legislative Consultant,
IMSCA

New Year...New Laws!

Check out what's new in 2014

As of January 1, 2014 over 220 new laws became effective. This number is significantly higher than a year ago, when 150 laws went into effect. The increase in new legislation could be an indication lawmakers were looking ahead to the 2014 election year. These new laws cover everything from medical marijuana to underage tanning to driving faster on interstate highways. Below is a sampling of new laws that might be of interest to you and your family.

mean the program will be up and running anytime soon. There are many safeguards built into the law; including medical marijuana can only be grown by an approved cultivation center and distributed by a registered dispensary. Three state agencies are involved with getting the program underway – and each agency must draft rules for their part of the operation, and those rules must be reviewed before they are adopted.

[Medical Marijuana, Cell Phones, Speed Limits, & More]

HB 1-P.A. 98-0122:

Illinois became the 19th state in the nation to allow marijuana for medicinal use. The plan authorizes a pilot program for physicians to prescribe marijuana only to patients with whom they have an existing relationship and patients must have at least one of the more than three dozen terminal illnesses or other debilitating medical conditions specifically listed in the law. The law creates a framework for a four-year pilot program that includes requiring patients and caregivers to undergo background checks. After the four year pilot program ends, lawmakers will have the opportunity to determine if the program has been effective. Although the law became effective on January 1st, that doesn't

SB 2356-P.A. 98-0511:

Illinois joins 34 other states with interstate speed limits of 70 mph or higher. Illinois speed limit will increase from 65 mph to 70 mph. That includes all states surrounding Illinois, including Wisconsin which recently voted to increase its speed limit. The law allows heavily populated counties to opt out of the higher limits. That list includes Cook, DuPage, Lake, McHenry, Will, Madison and St. Clair counties. Drivers beware – this new law lowers the threshold where speeding becomes a misdemeanor instead of a petty offense. Currently, it's 31 mph over the limit; that will drop to 26 mph over the limit.

HB 1247-P.A. 98-0506:

Illinois makes the 10th state to impose a statewide ban on talking on cell phones while driving. Illinois drivers will have to get a hands-free device if they wish to continue talking while

driving. Beginning Jan. 1 – using a handheld device will get you a \$75 ticket for the first offense; and \$150 thereafter. Illinois already has a law banning texting while driving, and a ban on using cellphones in certain areas like school and construction zones. However, the new law says you can't use handheld devices behind the wheel at any time. Another new law allows felony charges to be filed against a driver distracted by a cellphone or other device that leads to an accident resulting in serious injuries or permanent disability.

HB 922-P.A. 0328 and HB 923-P.A.0105:

You may recall IMSCA reported on these two pieces of legislation during the spring 2013 session. IMSCA lobbyists originally had issues with both bills – but after working with the sponsors, we were able to remove our opposition. HB 922 requires any contractor or subcontractor who participates in public works projects to keep and maintain records of all laborers, mechanics, and other workers employed by them. This new law requires these records to be kept for 5 years, which is an increase from the previous 3 year requirement. IMSCA was also opposed to HB 923, but along with the support of other construction industry lobbying groups, the bill was amended. This law establishes new reporting requirements for construction

contractors that make payments to entities that are not classified as employees such as individuals, sole proprietors or partnerships who perform construction services for a contractor. However, these requirements do not apply to individuals or firms who meet the responsible bidder requirements.

Other new business related laws that may be of interest includes HB 1217-P.A.98-0140 which extends a portion of the Plumbing License Law and changes the number of licensed plumbers irrigation contractors have to employ to install a sprinkler system. HB 1338-P.A.98-0211 prohibits the Illinois Department of Financial and Professional Regulation (IDFPR) from printing the home addresses on licenses and certificates that business owners are required to display to their customers. Finally, SB 2255-P.A.98-0543 allows the Coal Mining Act to allow the Office of Mines and Minerals to administer a mine electrician certification program.

We hope you find this list of new laws useful as you begin the New Year. More information on these new Public Acts can be found on the Illinois General Assembly website www.ilga.gov.





Kenneth A. Cripe is a partner with Conway & Mrowiec, a construction law and litigation practice. Prior to joining Conway & Mrowiec, Ken was the president of CSM Mechanical, Inc. He may be reached at (312) 658-1100. For information, go to the firm's website at www.cmcontractors.com.

Under What Circumstances Will A Subcontractor Be Bound By Its Bid?

*By Edward B. Keidan and
Kenneth A. Cripe*

In order for a contract to exist, there must be an offer, and an acceptance of that offer. When a subcontractor submits a bid to a prime contractor, what is the offer, what is the acceptance, and when does the contract come into existence? And even if there is no contract, under what circumstances will a subcontractor be bound by that bid?

Typically, the subcontractor's bid is considered the offer. (A prime contractor's bid solicitation is an invitation to make an offer.) On its face, these offers (bids) often remain open for at least 30 days. Typically, once the prime contractor is awarded the contract by the owner, the prime contractor then accepts the offer, by sending a written subcontract (or at least preliminarily, a written letter of intent to award a subcontract, allowing the subcontractor to begin the work).

What happens when a subcontractor no longer wants to be bound by its bid?

In the leading case of *Pickus Construction And Equipment v. American Overhead Door*, 326 Ill. App. 3d (2d Dist. 2001), American Overhead Door submitted two bids prior to bid day. On bid day, the prime contractor was concerned that American Overhead's bid was too low. In a telephone call that day, American Overhead assured Pickus that the bid

was correct. In return, Pickus told American Overhead that it would use the bid, and if awarded the contract, it would use American Overhead.

Two months after bid day, a meeting was held to award the subcontract. American Overhead told Pickus at that meeting that it had not figured the specified manufacturer into its price, and said that American Overhead was no longer willing to enter into a subcontract based on its bid price.

American Overhead's revised price was higher than the next lowest bidder. Pickus then entered into a subcontract with the next low bidder, and sued American Overhead.

Because there was no subcontract, the lawsuit was not for breach of contract. Instead, the prime contractor sued for promissory estoppel. In order to succeed on a claim for promissory estoppel, a plaintiff must show (1) that the defendant made an unambiguous promise, (2) that the plaintiff relied on that promise, (3) that the reliance was expected and foreseeable, and (4) that the reliance was detrimental.

The Illinois Appellate Court concluded that promissory estoppel applies generally to hold a subcontractor to its bid to a prime contractor, providing that the conditions are met. But in this case, American Overhead argued first that its bid was ambiguous, and second that the prime contractor's reliance on its bid was not reasonable.

First, American Overhead argued that its bid was ambiguous because it did not specify the manufacturer of the doors it proposed to use. The court rejected this argument, and concluded that no ambiguity existed, because the bid was based on the plans and specifications for the project, which clearly set forth what constituted an acceptable door.

What happens when a subcontractor no longer wants to be bound by its bid?

Next, American Overhead argued that the prime contractor's reliance on its bid was not reasonable, because its bid was so much lower than the other bidders, and because the bid (on its face) only remained open for 30 days.

The Court agreed that a general contractor that receives a bid that is substantially lower than other bids is put on notice that the bid may be erroneous. However, in this case the prime contractor called the subcontractor, and received assurances that the bid was accurate. Under these circumstances, the Court refused to hold that the prime contractor's reliance was not reasonable.

However, with respect to the provision that the subcontractors bid remained open only for 30 days, the trial court held that this was not a "firm

rule" in the construction industry. The Appellate Court rejected this reasoning, stating that the prime contractor had failed to prove the existence of a trade practice on this issue. On this issue, the Appellate Court reversed the ruling in favor of the prime contractor. (It should be noted that the Appellate Court may have upheld the ruling in favor of the general contractor if the

general contractor had provided evidence of a trade practice that subcontract bid "30 day provisions" are routinely disregarded).

Although the Appellate Court did not rule in favor of the prime contractor in the Pickus case, the general application of that ruling is that the doctrine of promissory estoppel applies to subcontractor bids to prime contractors in the construction industry. A subcontractor who submits a bid to a prime contractor may be liable to the prime contractor if the subcontractor fails to perform the work at the agreed upon bid price, provided the prime contractor reasonably relied on that bid when the prime contractor submitted its bid to the owner.

This article is intended for general information only and should not be construed as legal advice or legal opinion on any specific facts or circumstances.



Edward B. Keidan is a partner with Conway & Mrowiec, a construction law and litigation practice. Ed represents contractors, design builders and trade contractors in payment disputes, delay damages claims, defective work claims and other disputes. He may be reached at (312) 658-1100. For information, go to the firm's website at www.cmcontractors.com.



Louis Giordano,
Executive Vice President,
IMSCA

2014 Legislative Agenda

The Spring 2014 legislative session begins on the heels of a fall veto session where very little was accomplished. Lawmakers were successful in passing two looming issues – approving same-sex marriages, and pension reform. The future of the pension bill remains to be seen as many state employee organizations are filing suit, contending the legislation is unconstitutional. Illinois' fiscal stability also remains unknown, because as written, Illinois will not see immediate financial savings. The pension legislation will have to be in

Show your support for the
Illinois construction industry –
be informed and involved.

place for thirty years before savings will be seen.

2014 is an election year and IMSCA members will have the opportunity to vote in the March Primary Election, and also in the November General Election. All seats in the Illinois House of Representatives are up for re-election, in addition to Illinois' Constitutional Officers. Due to the upcoming elections, it is unlikely that many high-profile issues will be addressed in the upcoming session.

Your IMSCA lobbying team plans to introduce legislation fighting subordination clauses and will seek amendment to the Public Construction

Bond Act. IMSCA recently learned the lending industry is responding to the 2013 Cypress Creek (HB 3636) legislation by including subordination clauses in contracts. These clauses require sub-contractors to stand behind the lender; which means the lender will be first in line for payment. Essentially, subordination clauses completely wipe out Section 16 of the Mechanic's Lien Act – which we fought so hard to protect. IMSCA will focus on addressing this issue legislatively before subordination clauses become common practice by the banking industry. IMSCA plans to re-energize the construction industry coalition who assisted IMSCA in successfully passing HB 3636. Once again – IMSCA will be on the opposite side of the bankers, and we will seek your help in educating lawmakers of problems these clauses will add to an already ailing construction industry.

We will also pursue a minor amendment to the Public Construction Bond Act. The amendment will require sureties to be insured. Under current law, this isn't required. This lack of insurance results in bonds being ineffective. These two initiatives are being drafted by the Legislative Reference Bureau. Once the legislation is introduced and receive bill numbers – we will let everyone know.

In addition to the bills IMSCA will introduce to the General Assembly – we will also continue to be on the lookout for issues that impact the Illinois

construction industry. Specifically, we have been made aware the Illinois State Bar Association (ISBA) will seek passage of their bonding over initiative. You may recall this legislation was introduced in 2013, and IMSCA was successful in opposing the bill by blocking its introduction in a committee hearing. This legislation would seriously weaken the mechanics lien rights of contractors, subcontractors, laborers and material suppliers by allowing bonds to stand in the place of mechanic's liens. Mechanic's liens are the only assurance a contractor has to ensure payment on work completed. Allowing bonds to stand in the place of mechanic's liens will remove the ability of contractors to receive full and timely payments. We are also concerned this practice will force contractors to incur exorbitant legal fees to ensure their deserved payment is received.

In addition, we will continue to keep track of any effort by the Capitol Development Board (CDB) to eliminate multiple prime bidding on Illinois construction projects. If the CDB moves forward with such legislation, your IMSCA lobbyists will be ready to oppose it.

Your lobbying team expects to be greeted with opposition on our legislative initiatives – and will fight a big fight against the supporters of bonding over. Please stay tuned for Calls to Action on these issues, and any others that might arise. It is helpful to our work at the Capitol when our

members place phone calls, send emails and write letters expressing support or opposition to legislation. Your support of IMSCA's legislative efforts is appreciated, and goes a long way in continuing IMSCA's successful legislative legacy at the statehouse.

I would also like to invite you to attend IMSCA's Lobby Day on Tuesday, February 18 in Springfield. Lobby Day activities will include a special presentation by Senate Republican Leader Christine Radogno. We will discuss the issues mentioned here, and many more. Lobby Day is a unique opportunity for you to lobby your legislators and make YOUR voice heard!

Finally, this is a reminder the Primary Election will be held on March 18, 2014. All seats in the Illinois House of Representatives are up for re-election, including constitutional officers. There are four Republican candidates running for Governor vying to take on Governor Pat Quinn in November. I encourage you to research these candidates, and place your vote in March for the candidate you believe will best address issues facing our state.

Please show your support for the Illinois construction industry – and be informed and involved in the issues that matter to you and your business. Your IMSCA lobbyists are looking forward to working with you on another successful legislative year for the Illinois construction industry.

Session

• **February 2014:**
4, 5, 6,
18, 19-Governor's Budget
Address, 20, 25, 26, 27

• **March 2014:**
4, 5, 6, 7,
19, 20, 21,
24, 25, 26, 27, 28

• **April 2014:**
1, 2, 3, 4,
7, 8, 9, 10, 11,
29, 30

• **May 2014:**
1,
6, 7, 8, 9,
12, 13, 14, 15, 16,
18, 19, 20, 21, 22, 23, 24,
25, 26, 27, 28, 29, 30, 31-
Adjournment

Register
TODAY!

IMSCA Lobby Day

Tuesday February 18, 2014

The Statehouse Inn
101 East Adams Street
Springfield, IL 62701

We will discuss issues important to the Illinois construction industry. Don't miss this unique opportunity to talk to YOUR legislators about YOUR business needs.

The joint reception will be
hosted by IMSCA, ICIC and WCOE
at the Sangamo Club,
227 E. Adams Street, Springfield, IL

please make your
voice heard and
attend this
important event.

Please fill out the below information and return to IMSCA by fax 217. 679.4657
or email JNEWBOLD@gcsconsult.com

Deadline to Register is FEBRUARY 11, 2014

Name: _____

Company: _____ Phone/Email: _____

Association: _____