



Substance

Illinois Mechanical & Specialty Contractors Association



WINTER 2015



Greetings IMSCA Members

Tom Morton,
IMSCA President

I have been in the union construction industry since 1973. When I first started my career in the trades it was and still is a great alternative for those who did not want to follow the college path. You earned while you learned and by the end of a four year apprenticeship you had a career. You did not accumulate any debt from your training, as most college students do. If you were a member of the IBEW as I was, you had the ability to travel wherever the work was in the country, if the work in your area was slow. In my opinion, it was a great deal then and still is today. The issue was that you usually had to know someone to get in to the mechanical trade unions. They were a pretty exclusive club. In my area at that time, we had control of over 80% of the construction market. A journeyman wireman was earning equal or better than a college graduate.

Unfortunately, I believe our partners have lost sight of what was going on in the industry. We were slow to build our workforce and did not keep up with demand. New methods of construction eliminated a great deal of the skill required to perform the more mundane tasks and others started being able to perform these tasks with less training. We were keeping up with the training of our workers in the new

methods, but we were not taking enough new members in.

We were paying the ones we had more each year, as they were being more productive and the market was bearing the additional cost. Unfortunately, the non-union, lesser trained workers were able to do most of the jobs in residential construction and were willing to do it for wages that reflected the skill required. We started to lose market share in the residential

market. We waited too long to address this shift and by the time we realized the wage structure and manpower needs had to be addressed, it was too late. Most of the residential work around the country was and is being done non-union.

We still perform around 60% of the market share in commercial and industrial construction in this area, but that is on the decline. We are the last major market in the country with that large of a market share. We must address this now with our union partners. We must come up with a plan to better serve our clients and prove to our customers that union construction is a better and more cost effective manner to do their project. If we do not do this we are doomed to follow the same path as the rest of the country and the residential work in our area.

My challenge to all of you for the New Year is to work together to negotiate better work rules and more competitive wages with our union partners. We need to do this to make us more competitive in the market. Let's not just go for higher wages because we can, or because someone else in the area has received them. Let's put our heads together and come up with a plan on what we need to change in our contracts with the unions because it is best for our area and the industry. Let's come up with reasons why our customers should use us and the value added services they get from using union contractors as opposed to the non-union. Let's educate them on how everything in construction is not quantifiable. There is great value of no injuries on their projects. Prove to them that our projects are done safely, within budget, on time, and what the value of that is to them. Explain to them the training we do is all privately funded and is the best training available. Explain to them we provide our employees with a good living, with health care and retirement plans that do not cost any of their tax dollars. Explain to them construction trade unions and public unions are two different entities and not the same. This is what IMSCA tries to explain to our legislators and why it is so important we continue to support them and be a part of the process.

I hope many of you meet my challenge in 2016 and I wish you all a happy and successful New Year.

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for over 2,000
Construction
Employers*



MSCA
Illinois Mechanical & Specialty Contractors Association



FEATURED STORY

What Are You Worth —

Margery Newman, Esq.

page 4



Bonding Over in Illinois —

Jim T. Rohlffing

page 6



**How to Choose Your
Business Entity**

Sarah Delano Pavlik

page 8



**Capital Development
Board Update**

Jodi Golden

page 10



**New Age
Authentication**

Morgan G. Churma

page 11



State Capitol Report

Louis Giordano, Executive Vice President

page 13

Featured Story



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What are You Worth — *The New U.S. DOT DBE Regulations*

The U.S. Department of Transportation (“DOT”) amended its Disadvantaged Business Enterprise (“DBE”) program regulations in November, 2014. The new rules do the following:

- Revise the uniform certification application reporting forms;
- Create a new uniform personal net worth form;
- Add new provisions authorizing summary suspensions under specified circumstances; and
- Modify several program provisions concerning subjects such as (1) overall goal setting, (2) good faith efforts, and (3) counting for trucking companies.

The DOT DBE program is designed to enable small businesses owned and controlled by socially and economically disadvantaged individuals to compete for federally-funded contracts let by State and local transportation agencies which receive funds from DOT. These State and local agencies are referred to as “recipients”. One of the most hotly contested revisions relates to the personal net worth (“PNW”) form and related requirements to qualify as a DBE.

A. PERSONAL NET WORTH

Based upon comments it received, the DOT created its own PNW form. This form allows recipients to request certain backup information for assets or liabilities noted on the PNW form on

a case-by-case basis. The DOT PNW form is a new form which must be used without modification by certifiers (recipients) and applicants whose economically disadvantaged status is relied upon for DBE certification. Sections 26.67(a)(2)(i) and (ii) of 49 CFR26 were amended to reflect this requirement. DOT specifically stated that with regard to personal net worth, DOT intended for all information collection requests to serve a useful purpose that addressed a specific question regarding a value stated in the form. It was not to operate as authority to collect all possible documentation for each listed asset or a general requirement that business owners obtain appraisals of all assets. See DOT final rule. As a result, recipients should not request PNW statements for owners that are not claiming social and economic disadvantage. Additionally, a recipient should not request a PNW statement from persons who are not listed as comprising 51% or more of the ownership percentage of the applicant firm.

The DOT PNW form is modeled closely on the Small Business Administration’s (“SBA”) form 413, but with differences tailored to DBE program-specific needs, e.g., not to include the 49 CFR §26.67(a)(2)(iii) exclusions for ownership interest in the firm and equity in the primary residence.

Like the SBA, the DOT is requiring each owner to list all assets, whether

solely or jointly held, and specify liabilities. The categories of assets and liabilities required by DOT mirror closely the SBA's categories, but there are some differences. The DOT PNW form omits "sources of income and contingent liabilities," which are contained on the SBA's form. On the DOT PNW form, owners must report any equity line of credit balances on real estate holdings, how the assets were acquired, and the source of market valuation. Owners must also detail the nature of the personal property or assets, such as automobiles and other vehicles, their household goods, and any accounts receivable, placing a value on such items. The DOT PNW form also added a section asking whether any of the assets were insured.

The DOT decided not to require submission of the PNW form by a spouse of the DBE who is not involved in the operation of the business. The DOT agreed that such a requirement is unduly burdensome for the applicant and the certifier (recipient), needlessly intrudes into the affairs of individuals who are not participants in the program, and is not necessary because certifiers (recipients) may request this information as needed on a case-by-case basis. In keeping with recent United States Supreme Court rulings, the DOT added a definition of spouse that includes same-sex or opposite-sex couples that are part of a domestic partnership or civil union recognized under State law.

B. \$1.32 MILLION DOLLAR CAP

The DOT also decided that recipients needed to consider two different indicia of whether a DBE is economically disadvantaged. First, if the PNW indicates that assets held by an applicant total \$1.32 million dollars or more, the DBE applicant is "presumed" to not be economically disadvantaged. The purpose and intent of the \$1.32 million dollar cap is to ensure that the DBE program reaches only those disadvantaged individuals adversely impacted by discrimination

and the effects of discrimination and to accomplish the goal of remedying the effects of discrimination. The presumption, however, that a person with personal net worth exceeding \$1.32 million dollars is a rebuttable presumption.

Second, if the PNW falls below the \$1.32 million dollar threshold, but there is evidence that indicates assets held by the applicant suggest that he or she is not economically disadvantaged, then the DBE applicant may also be "presumed" to not be economically disadvantaged. For example, a person with a very expensive house, a yacht, or extensive real and personal property holdings may be found not to be economically disadvantaged even though they have a PNW below the \$1.32 million dollar threshold.

According to the DOT, it wanted to provide recipients with a tool to exclude from the program someone who, in terms of overall assets, is what a reasonable person would consider to be a wealthy individual, even if that person had liabilities sufficient to bring his or her net worth under \$1.32 million dollars. The DOT strongly believed that recipients should be able to look beyond the individual's PNW bottom line and consider his or her overall economic situation in cases where the specific facts suggest the individual is obviously wealthy with resources indicating to a reasonable person that he or she is not economically disadvantaged.

C. ABILITY TO ACCUMULATE SUBSTANTIAL WEALTH

In order for recipients to look beyond an applicant's PNW, the DOT devised an "ability to accumulate substantial wealth" standard as evidenced by the individual's income, and the value of the various accumulated personal assets. Unfortunately, the "ability to accumulate substantial wealth" is a subjective standard which could lead to arbitrary decisions by recipients as to whether an applicant is actually economically disadvantaged.

As a result, the DOT included in its final rules specific factors that recipients may consider in evaluating the economic disadvantaged status of an applicant or owner. Those factors include:

- a. Whether the average adjusted gross income of the owner over the most recent three-year period exceeds \$350,000;
- b. Whether the income was unusual and not likely to occur in the future, (e.g., inheritance);
- c. Whether the earnings were offset by losses (e.g., losses from gambling);
- d. Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the business;
- e. Whether there exists other evidence that income is not indicative of lack of economic disadvantage; and,
- f. Whether the fair market value of all assets exceeds \$6,000,000.

The DOT stressed that requiring recipients to consider the above factors for every DBE applicant whose PNW falls below the \$1.32 million dollar regulatory cap is not a requirement. The purpose of the final rule, as articulated by DOT, is to provide recipients "who have a reasonable basis to believe that a particular owner should not be considered economically disadvantaged, despite their PNW" have the explicit authority to look at evidence beyond the PNW to determine whether that DBE is truly economically disadvantaged. The listed factors are intended to provide guidance to recipients and are not intended to be a checklist.

The new DBE rules cover more than an analysis of the DBE's PNW. There have been amendments to certification provisions (49 CFR §26.65), program objectives (49 CFR §26.1), good faith efforts to meet contract goals (49 CFR §26.53), trucking (49 CFR §26.55(d)), regular dealers versus brokers (49 CFR §26.55(e)), and how to address setting contract goals for design-build contracts (49 CFR §26.53(b)). This article covers just one aspect of the new DBE regulations. ■



James T. Rohlffing is an attorney representing the construction industry. Throughout his thirty years of practicing law on behalf of small businesses, many of his clients have been subcontractors and contractors. Jim was recently President of IMSCA, the largest organization of subcontractors in Illinois. He has drafted legislation on construction issues introduced in the Illinois legislature, testified before the legislature on behalf of the construction industry, and written numerous articles relating to construction law and litigation. He is the editor and a chapter author of the book *Illinois Construction Law Manual*. Contact Jim at jtr@rolaw.net

Bonding Over in Illinois *A Closer Look*

In the fall 2015 Issue of Substance, was an article about the new Bonding Over law that will be effective January 1, 2015. That article described generally how the new law provides a means for a party with an interest in property to post a surety bond (a “lien bond”) in exchange for a release of a mechanics lien claim. This article will pick up from that one and explain the effects of the new law and some strategies for dealing with the change.

Bonding Over, section 38.1 of the Illinois Mechanics Lien Act, 770 ILCS 60/38.1, was touted by its promoters as a way to simplify the enforcement of mechanics lien rights. The title companies argued that by taking the banks and title companies out of lien foreclosure cases, lien litigation would be simpler for all parties, including lien claimants. The argument was that the title companies would not have an interest in defending the title after a lien bond is posted and the lien is released, so the cases would be simpler. Further, they said that once a bond is posted in lieu of a lien, the issue of priority with a bank that holds a mortgage on the property would no longer be a concern. There would be no need for a lien claimant to demonstrate that the improvement to the property enhanced its value. Also, since the surety bond that takes the place of the lien claim is dedicated solely to pay one single lien

claim, the prolonged litigation battles that sometimes occur between lien claimants and banks when there is not enough equity to pay everyone would not occur. Therefore, once a bond is furnished on an “under water” project, a lien claimant need not be concerned about limited proceeds from a foreclosure sale to pay all of the lien claimants and lenders. In fact, the litigation process should be simpler, though that is only part of the story.

A separate bond must be provided for each lien claim to be removed, including duplicative liens of different tiers. For a larger project on which lien claims have been filed by multiple tiers of contractors and subcontractors, an owner might have to post bonds equal to 175% of double or more of the cost of the original contract. Moreover, the remaining lien claimants, for which a bond is not posted, would be in a better position as there would be fewer lien claims to share the same amount of proceeds if a sale became necessary. Of course, developers are less likely to furnish a surety bond on financially troubled projects because they would be reluctant to risk additional funds if they were considering walking away from the project. With these costs and risks in mind, an owner will be reluctant to furnish a lien bond unless there is a compelling need to rid the property of

liens and the cost of furnishing lien bonds for all liens and potential liens against a project is a worthwhile investment.

Anyone with “an interest in the property against which a lien claim ... is asserted...” may furnish a bond to replace a lien claim. This includes owners, other lien claimants, condominium associations, former owners, general contractors and others. This broad definition of eligible bond principals is useful for anyone who has a need to remove a lien against property. The expansive definition is troubling, however, to lien claimants whose liens against property are more leverage than a bond. The broad description of bond principals also should be disturbing to general contractors who will undoubtedly be obligated to obtain a surety bond to cause the removal of any liens filed by their subcontractors. Though similar provisions have been common in general contracts in the past, the ease and certainty of obtaining lien will certainly cause an increase in the number of general contractors who are required by contract to procure lien bonds to remove their subcontractors’ liens. As a practical matter, this law will enable owners to push down to general contractors, or higher tier subcontractors, the responsibility to remove liens, provide lien bonds and fight with lower tiers over payment for work done on their projects. General contractors should consider the cost of the surety bond and the expense of litigation with their own subcontractors before agreeing to a term in a general contract that holds them responsible for unpaid subcontractors and suppliers.

The method for obtaining a surety bond is simple. A petition based on a two page form is filed with the court attaching a copy of the bond. Most likely, the clerks of the various circuit courts will draft forms for petitions for bond, the surety bond itself, and an order from the court authorizing the bond and

removing the lien. Copies of those forms in draft are available by clicking on the blog tab at www.rolaw.net. As the clerks officially adopt forms, the blog will be updated to include them. If the petition attaching a bond equal to 175% of the lien amount is filed in proper form, with a surety having the required qualifications, the court will enter an order replacing the lien claim with the bond. There are virtually no defenses to a proper petition. Though the new law does not expressly so provide, for all practical purposes, once the order is entered and recorded with the recorder’s office, the lien is released from the property title. Thereafter, the lien claimant’s right to recover against the bond is substituted for the causes of action that could have been asserted under Sections 9, 27, or 28 of the Mechanics Lien Act.

An important part of the new law is the right to recover attorney’s fees. Instead of a provision that simply awards attorney’s fees to the prevailing party, as many laws and contracts provide, section 38.1 defines the term “prevailing party.” A lien claimant is a “prevailing party” if the lien claimant is awarded a judgment of at least 75% of his lien claim, and a bond principal awarded 25% or less of the lien claim amount is a prevailing party. There is no prevailing party for recoveries by either party in the middle 50%. It sounds simple, but it is not. Because the law does not assign discretion to the judge hearing the case, it relies upon a strict definition of prevailing party which is a fraction for which the denominator is the “lien claim” and the numerator is the amount of the judgment. There is some doubt about the effect on the definition of “prevailing party” when payments are made during the course of the litigation. The intent of the drafters was to decrease gamesmanship and increase pressure on both sides to resolve the case promptly before incurring substantial attorney’s fees for which they

would be liable. For example, if a bond principal knows a lien claim is valid but refuses to pay merely to exert economic pressure on a lien claimant desperate for payment, the threat of paying the attorney’s fees of the lien claimant as well as the attorney’s fees of the bond principal might encourage early payment. A lien claimant in that situation might be emboldened to insist on full payment if it believed that there was a surety that would eventually pay the claim, plus 10% interest and its own attorney’s fees. On the other side of the coin, the new law makes it risky for a lien claimant with a shaky claim to push it in prolonged litigation knowing that the gamble is greater if a loss requires the claimant to pay the bond principal’s attorney’s fees.

An owner intending to bond over a lien would be well served by paying that portion of a lien claim that is potentially due BEFORE obtaining a bond. This has the advantage of reducing the face amount and expense of the bond. The additional benefit to the owner of paying the valid portion of a questioned lien claim is that it decreases the likelihood the bond principal will be liable for the attorney’s fees of the lien claimant. For example, if a lien claimant recovers \$80,000 of a \$100,000 lien claim (80%), the bond principal will be liable for the claimant’s attorney’s fees. If the owner had paid \$40,000 and the lien claimant recovered only \$40,000 of a \$60,000 lien claim (66%), the owner would not be liable for fees. Similarly, a lien claimant has an incentive to reduce any questionable portion of its lien claim so it is more likely to recover more than 75% and therefore be entitled to payment of its attorney’s fees by the bond principal. Attorney’s fees to be paid by a bond principal are limited to the amount remaining on the bond after payment of the claim amount and interest. A lien claimant’s obligation for fees is capped at 50% of the amount of the lien claim. ■



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How To Choose Your Business Entity

If you own a business or are considering starting a business, one of the important decisions facing you will be the selection of a business entity. In Illinois, you can choose from the following: a sole proprietorship, a C corporation, an S corporation, a limited liability company, a series limited liability company, a general partnership, a limited partnership and a registered limited liability partnership. Each entity has specific advantages and disadvantages.

A sole proprietorship is not really a business entity. It is an individual operating a business. All income and expenses are reported on the owner's personal income tax return. The primary advantage of a sole proprietorship is simplicity. No organizational documents are required. The business does not have a separate income tax return, and there are no annual filings with the Secretary of State. The disadvantages of a sole proprietorship are unlimited liability of the owner for business liabilities and the limitation on ownership. A sole proprietorship, by definition, can have only one owner.

A "C" corporation is taxed under Chapter C of the Internal Revenue Code. It is a separate entity under state law and federal tax law. The primary advantage of a C corporation is limited liability for the business owners. If the business is sufficiently capitalized

and the owners observe the corporate formalities, business liabilities should not pass through to the stockholders. A corporation can have an unlimited number of owners and can have different classes of stock, for example, common and preferred stock. The shares of a corporation are also freely transferable, meaning that absent a shareholder agreement a shareholder can sell or give his shares to anyone he pleases and the new owner will receive all of the rights of the original shareholder.

The disadvantages of a "C" corporation are income taxation and paperwork and fees. Articles of incorporation must be filed with the Illinois Secretary of State. The filing fee is \$150. The corporation must also file an annual report with the Secretary of State (\$75 fee) and a franchise tax return (minimum franchise tax of \$25). The corporation must file a separate Illinois income tax return and pay tax on net income at 7.0% and replacement tax of 2.5%. The corporation must have bylaws and annual meetings of the board of directors and the stockholders. Stock certificates should be issued, and corporate resolutions are required for various actions such as opening a bank account.

A C corporation subjects the owners to two levels of taxation. The corporation must pay federal and state income taxes on its net income. If

the shareholders want to receive the net income, however, the corporation must declare and pay a dividend. The dividends will be taxable income to the shareholders, resulting in a double tax. It is this system of double taxation that makes it especially difficult to own real property (land and buildings) in a C corporation. Many small business owners view the land and the business as different businesses. Owners frequently want to sell their business but keep the land or vice versa. If a corporation sells its real property, the corporation realizes gain on the sale. The gain can be significant because of the depreciation of the improvements. Then, if the owner wishes to receive the proceeds of the sale, the income must be paid out as salary or dividends, both of which are taxable to the owner as taxable income. As a general rule, you should never own real property in a "C" corporation.

An "S" corporation is identical to a C corporation under state law, however, an S corporation is taxed very differently under Chapter S of the Internal Revenue Code. An S corporation must follow the corporate formalities described above, i.e., articles of organization, bylaws, annual meetings, annual report, etc. In addition, the corporation must file an S corporation election with the IRS. The S election allows the corporation to be taxed more like a partnership; income and deductions flow through to the shareholders. With any S corporation, the owners can take distributions from the corporation without recognizing additional income. In addition, many businesses operate at a loss in the early years. With an S corporation the losses flow out to the stockholders offsetting other income.

The disadvantages of an S corporation are the restrictions set forth in the tax code. An S corporation

cannot have more than 100 shareholders, only certain types of trusts can hold S corporation stock, and non-resident aliens cannot be shareholders. In addition, an S corporation can have only one class of stock.

Limited liability companies ("LLCs") were created in order to obtain the limited liability of a corporation and the pass through taxation of an S corporation without the tax code restrictions. Owners of an LLC are called members. An LLC is controlled by the members or by designated managers. Member interests can be transferred, but the LLC is not required to admit the transferee as a member, meaning that the transferee cannot vote on any matters. A limited liability company is a very flexible and useful business entity. The primary disadvantage of a limited liability company in Illinois is the fees. The filing fee for a limited liability company is \$500, and the annual renewal fee is \$250. A limited liability company can elect to be taxed as a corporation (including an S corporation) or as a partnership.

A series limited liability company is a relatively new type of entity that allows you to operate several businesses under one umbrella. For example, if you had several rental properties, you could create a difference LLC for each property, such as Rental LLC 1, Rental LLC 2, etc. An advantage to using a series LLC over separate non-series LLCs is that the filing fees are less expensive. The fee for filing Articles of Organization for a series is \$750 (as opposed to \$500 for each individual LLC), and the annual report fee is \$250 for the LLC and \$50 for each series (as opposed to \$250 for each individual LLC). In addition, it is easier to create a new series at any time in the future. Instead of filing new Articles

of Organization for \$500, you file a Certificate of Designation for \$50.

A general partnership is similar to a sole proprietorship except that there are at least two owners. State law does not require a general partnership to have a written agreement, however, it would be foolish not to have one. A general partnership must file documentation with the county recorder's office. The general partners are personally liable for all partnership debts. Income and losses pass through to the partners, and the partnership does not pay additional income tax. Partnership interests are not transferable, except as provided in the partnership agreement. If any partner withdraws from the partnership, the partnership is dissolved. The remaining partners may, however, establish a new partnership.

A limited partnership is composed of general partners and limited partners. General partners control the partnership and have unlimited personal liability. (A corporation can serve as the general partner, however, if liability is a concern.) Limited partners can only vote on very limited matters such as dissolution of the partnership. They are essentially silent partners and are not personally liable for partnership debts. Limited partnerships offer many of the benefits of LLCs without the higher filing fees.

A registered limited liability partnership is similar to a general partnership except that general partners can limit their liability. The filing fee for a registered limited liability partnership is \$100 per partner up to \$5,000.

The choice of business entity can have long lasting consequences for your business. Before choosing an entity, you should consult with your CPA and attorney to ensure that you obtain maximum legal and tax benefits. ■



Jodi Golden is the Executive Director at the Illinois Capital Development Board (CDB), which is the construction management agency for the State of Illinois. CDB oversees the construction of new state facilities as well as renovation projects at over 8,000 state-owned buildings.

Capital Development

Board Update

Since taking the position of Executive Director at the Illinois Capital Development Board (CDB), I have been busy working with agency staff, industry partners and user agencies to gather feedback on ways CDB can improve the project experience and streamline processes. I recognize the valuable partnerships the mechanical and specialty contractors provide CDB, and I look forward to continuing to meet and get to know IMSCA members. With over \$6 billion in deferred maintenance across our state facilities, there are many opportunities for us to work together in the future.

Upon taking this position I quickly learned how difficult it can be to do business with CDB. The requirements and processes that our industry partners are subject to in order to bid on CDB projects can be overly burdensome; the paperwork can be overwhelming and the procurement timeframe can be lengthy. This has to change. One of my first actions as Executive Director was to form a working group focused on the review and enhancement of CDB's construction project processes and procedures. Since its formation, this group has identified every step of a project, from initial funding to final closeout. We are currently reviewing each of those steps and identifying where efficiencies can be achieved, duplication can be eliminated and productivity improved.

Another endeavor I have championed is the development of a new sub-contractor/supplier/consultant registration database. CDB is in the process of building a searchable, web-based database that potential bidders can use when in search of partners and as a means to make companies more visible to other prime contractors. Many of you may have received communication from CDB with an updated registration form. The form asks firms to identify what services they

are able to perform, which in turn will be incorporated into the database. At a later date, the agency also plans to make available a database of CDB pre-qualified firms. My hope is that this proves to be a useful tool to enhance the construction industry's experience working with CDB.

If your firm is looking for a way to eliminate multiple paper-based forms for each bid or project, another tool that could be of use is the Illinois Procurement Gateway (IPG). The IPG allows prospective vendors to provide disclosures, certifications and other documentation needed to do business with CDB and other State agencies, in advance of any particular procurement. Registration cuts down the amount of paperwork you need to submit with bids in order to save time and energy. If you are not already registered, you can follow this link to get started: <https://ipg.vendorreg.com/FrontEnd/StartRegistry.asp?TN=ipg&XID=6783>

My objective as Executive Director is to help CDB become a more efficient agency, improve the project experience for all parties involved, save taxpayer dollars, increase the bidding and partnership pools, and ultimately building better quality projects in a timely and fiscally responsible manner. Undoubtedly, CDB is limited in some respects by statute and requirements placed upon the agency by the independent Chief Procurement Office, but where the agency can enhance our own internal processes, we will. I welcome any feedback that you may have in regards to previous experiences with CDB, and where you see a need for further review. Your patience and cooperation throughout the last few months is much appreciated and illustrates what valuable partnerships your membership provides. Thank you for your commitment to CDB, and I look forward to working together to build a successful capital program in Illinois.



Morgan Churma focuses his practice on resolving commercial and construction disputes ranging from mechanics liens to tortious interference. Morgan is licensed to practice law in Illinois and is currently an associate of the Chicago law firm of James T. Rohlifing & Associates, P.C

New Age Authentication: *The Legal Effect of Email Signature Blocks*

The ubiquitous use of email signature blocks has never been more pronounced. Those few automatically generated lines at the bottom of an email may be used to serve a variety of functions, but will a sender be legally bound by the contents of the email that utilizes an auto-filled signature? While mere nomenclature is often a poor tool for determining the legal consequences of a term or phrase, courts have held that email signature blocks can be legally binding signatures. This is particularly important to the construction industry because the mere inclusion of an automatically generated email signature block can form a contract or modify an existing one.

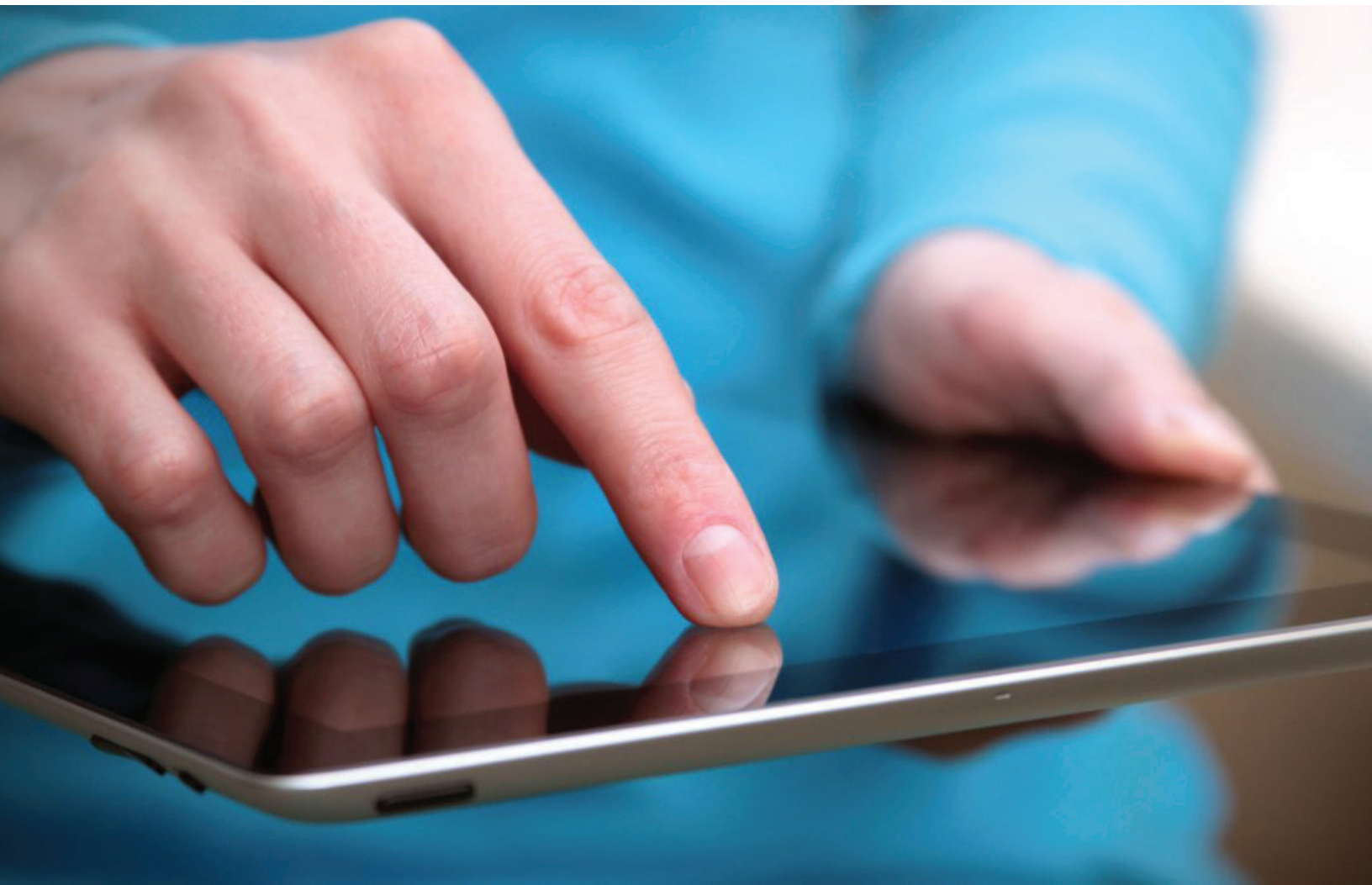
While contracts are often made by entirely oral communication, Illinois law provides a number of circumstances where a contract or modification must be in writing and signed. *See*

modification must be written and signed if the original contract was required to be in writing, the contract as modified would be required to be in writing, or the original contract requires all modifications to be in writing. Since the governing law varies depending on what the contract is for, the first inquiry is whether the contract is primarily for the sale of goods or for something else. If it is for the sale of goods then the Illinois Uniform Commercial Code (UCC) applies; for everything else, the Illinois Frauds Act applies. Once it is determined that a signature is required, a necessary inquiry is whether there is anything in the purported contract that could satisfy the requirement. While the issue of whether a signature block will constitute a signature for contracts other than contracts for the sale of goods remains open, a recent holding by the District Court for the Northern District of Illinois sheds light on the likely outcome. *See Princeton Industrial Products, Inc. v. Precision Metals Corp.*, No. 13 C 7160 (Aug. 17, 2015).

The Northern District held that an email signature block satisfies the UCC, but did not resolve the issue for contracts that are not for the sale of goods. In *Princeton Industrial*, the plaintiff was attempting to hold the defendant accountable for revised purchase orders based on a series of emails. At the bottom of defendant's emails pertaining to the revised purchase orders, a standard signature block naming an employee, her title, the

The IECSA provides that a signature can be "any symbol executed or adopted...using electronic means or otherwise...with the intent to authenticate a record."

740 ILCS 80/2; 810 ILCS 5/2-201. Most importantly for our discussion are the requirements that contracts for the sale of goods over \$500 and for services required by contract to extend beyond a year must have signed written documentation. Additionally, a



company, and its contact information was automatically generated. The meat of the defendant's argument is that the signature block does not satisfy Illinois signature requirements because there was no affirmative action by the employee in generating the signature block. The Illinois Electronic Commerce Security Act (IECSA) provides that a signature can be "any symbol executed or adopted...using electronic means or otherwise...with the intent to authenticate a record." 5 ILCS 175/5-105. It seemed clear to the court that having a signature block, automatically generated or not, served the purpose of authenticating an email. Furthermore, the intent to authenticate may be either actual or apparent. Restatement (Second) of Contracts § 134 (1981). This is the same issue regarding passive signatures that the

7th Circuit resolved in determining that company letterhead satisfied the signing requirement. See *Monetti, S.P.A. v. Anchor Hocking Corp.*, 931 F.2d 1178 (7th Cir. 1991).

While *Princeton Industrial*, certainly makes clear that a signature block satisfies signature requirements under the UCC for contracts for the sale of goods, it does not address other types of contracts. However, the analysis a court would use would likely be nearly identical. First, the IECSA is broadly applied and provides that "[w] here a rule of law requires a signature, or provides certain consequences if a document is not signed, an electronic signature satisfies that rule of law." 5 ILCS 175/5-120. Thus, a court's opinion would likely follow the same analysis as discussed above regarding whether or not the signature block was

intended to authenticate what was said in the email. To this end, it seems likely that signature blocks are going to satisfy a signature requirement in a written contract.

While there are numerous benefits to including a signature block in your company emails, it is important to understand the legal implications and ramifications that may accompany them. Where formerly we sat down and penned out our signature, acknowledging the significance of this overt act, business and legal sense now imposes obligations based the prior act of establishing an email signature block. Conducting business electronically is an invaluable tool, but this often means that emails and data transmitted over the internet may have repercussions far beyond the expectations inherent in merely clicking "Send." ■



Louis Giordano,
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State Capitol Report

Illinois is heading into its fifth month without a budget – and unfortunately, it doesn't seem likely a budget will be approved before 2016. The political climate in Springfield is the worst many insiders have seen. The general feeling is the relationship between political leaders is worse than it was during the Blagojevich days.

Governor Rauner has been very clear in stating his goals – an approved budget must include Prevailing Wage and Workers Compensation reform. On the other hand, the Democratic leaders have dug in their heels on these items just as deep as the Governor. Governor Rauner doesn't provide any degree of give and take and isn't willing to back off from meeting his goals of removing prevailing wage and reforming the workers compensation system in ways the Democrats will never agree to. There is a lot of fighting between the two sides – and the fighting doesn't seem to be getting us anywhere. In general, it seems Illinois citizens appreciate Governor Rauner taking a tough stand against Speaker Madigan – but this fight could last a long time. The state is currently spending at a rate that is nearly 40% higher than incoming revenues. This will only push our state further and further into debt.

In addition to the general disagreements between Democrats and Republicans, other issues are coming into play that impacts the hope of reaching a budget deal before 2016. A big motivator on the horizon is the March 15th primary and whether or not elected officials will face primary opposition. Politicians don't like to make tough decisions when they will soon face voters and ask for their re-election support. In order for the two sides to agree on a budget, tough decisions are exactly what needs to happen. These tough choices include a possible tax increase to close the revenue gap and pieces of Governor

Rauner's pro-business agenda.

In order to be placed on the ballot for the March 15 primary election, candidates must file nominating petitions with the Illinois State Board of Elections by November 30th. All seats in the Illinois House and about two-thirds of the Illinois Senate will be up for re-election. A factor increasing primary opponent fears is Governor Rauner's \$20 million dollar political war chest coupled with his new political action committee that has vowed to spend millions against Democrats re-election campaigns in the March primaries. The November 30th deadline is important because it will give legislators a sense as to whether or not they can or should take the risk of making a tough vote on a budget deal before the primary election.

Another issue impacting the timing of a budget resolution is January 1st, when only a simple majority is required to approve legislation. The Illinois constitution states that after May 31, any bill approved by the legislature requires a three-fifths majority vote in both chambers, which translates to 71 "yes" votes in the House and 36 in the Senate. However, if lawmakers wait until January to vote on a budget deal, only 60 "yes" votes will be needed in the House and only 30 in the Senate. This is a far easier threshold to reach.

It's possible that some lawmakers will prefer to wait until after the March 15 primary before voting for a budget package – and it's also possible that leaders are so far away from an agreement that we simply won't have a plan to be voted on by March. Either way, pressure will continue to mount on legislators to come to an agreement and get the job done. The longer the budget impasse continues the more all of us will be negatively impacted.

I sincerely hope for a holiday miracle and we see a budget agreement sooner rather than later. ■