



Substance

Illinois Mechanical & Specialty Contractors Association



FALL 2015



Tom Morton,
IMSCA President

Greetings IMSCA Members

As the summer season comes to a close, I find it is a time of reflection for me as it may be for many of you. I listen to so many of my friends and colleagues complain about the apparent dysfunction of our politicians on both the federal and state level. However, the majority of them only offer complaints with no solutions, as do many of our political leaders. Although I do not have the answers, I at least try to stay involved the best I can with the issues that may have negative consequences on our industry. Being a member of IMSCA and contributing to our IMSCA-PAC is the best way I have found to stay politically involved on a state level. It is the only avenue I have found that allows me the opportunity not just to be a complainer but also help cultivate solutions.

This year because of IMSCA, we were successful in finding middle ground on bills that would have negatively impacted our industry. Without the support of IMSCA members this would never have happened. There are a lot of changes newly elected Governor Rauner is trying to implement that we need to pay close attention to. Some of the Governor's agenda items may be positive for our state, but there are definitely some that could adversely affect the Illinois sub-contracting industry. Louie and Jessica keep a close watch on all that is happening with the support IMSCA members give them. If they send out an email asking for your assistance in contacting your state representative or senator, please take the time to do so with an email or phone call. It can make all the difference in maintaining IMSCA's success in protecting our industry.

Please think about supporting IMSCA-PAC with a donation this year - even without the incentive of a raffle or fundraiser. Even as little as \$40.00 can make a difference - if every member gave just \$40.00 we would raise over \$50,000.00 and have a stronger voice on issues that impact our businesses and livelihood. In my opinion, this is a pretty cost effective way to protect our industry.

As IMSCA's President, I hope this year we will all try harder to be part of resolving some of the issues faced by the Illinois construction industry and support our IMSCA lobbying team in their efforts. Please find this issue of SubStance enjoyable and informative and share it with your staff and colleagues. As we head into the fall season, I hope you enjoy the last waning days of summer.

*Legislative
Representation
for over 2,000
Construction
Employers*



IMSCA
Illinois Mechanical & Specialty Contractors Association



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Bonding Over in Illinois — *New law allows for lien release with Surety Bond*

James T. Rohlifing 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.

On July 29, 2015, Illinois Governor Bruce Rauner signed into law Public Act 99-0178, which adds section 38.1 to the Illinois Mechanics Lien Act (the “Act”). 770 ILCS 60/38.1. The new law, which takes effect on January 1, 2016, permits interested parties to furnish a surety bond in exchange for the release of a mechanics lien; it provides for “bonding over” a mechanics lien and it sets forth a means and procedures for litigating over the bond which replaces the rights of a claimant under the mechanics lien act. All or almost all other states already had some procedure in place to bond over liens. Previously, in Illinois, title companies would sometimes agree to insure over mechanics lien claims. Also, some trial courts in Illinois would infrequently allow bonding over even though there was no specific law authoring it.

A broad group of people are eligible to file a petition to substitute a bond for a lien under Section 38.1; including all persons who have an interest in the property and all persons who may be liable for payment of the lien claim. A party who is authorized to file a petition to substitute a bond for the lien claim may do so at any time after: i) service of a subcontractor’s 90-day notice

under Section 24; ii) recording of a lien claim; or iii) the filing of a suit to enforce a mechanics’ lien (but not more than five months after such a suit is filed).

The bond must meet certain requirements to be permitted to substitute for the lien claim. The surety must be licensed to issue surety bonds in Illinois and have a specified financial strength. The bond must be in an amount equal to 175% of the principal lien amount. The surety and principal on the bond must submit to the jurisdiction of the court and agree to pay a judgment if one is entered for the lien claimant.

Bonding over will be a useful tool to property owners and others faced with the need to clear a lien claim against property but who, for whatever reason, do not have the time, ability or desire to promptly resolve the underlying lien claim. There will be situations when it is the best available remedy. There will be many times, however, when bonding over is undesirable and litigation on the lien claim is preferable. For example, an owner might not want to pay the cost of the bond. Presumably, the surety company will require a payment or the posting of an asset equal to at least 175% of the lien amount, plus a premium for the bond to issue. Moreover,



a party considering a bond might not want to lose the leverage that comes in lien litigation when the owner asserts there is no equity in the property. In addition, if an owner is attempting to prolong the litigation, the downside is that attorney's fees must be paid to the prevailing party. A prevailing party is simply defined as either a lien claimant that recovers 75% or more of the lien claim or a bond principal, when the amount of the lien claim recovered is less than 25%. Previously, attorney's fees were only rarely awarded under Section 17 of the Act when the court found that the owner or lien claimant acted without just cause or right.

In addition, subsection (i)

provides that "the principal and surety ... shall be jointly and severally liable to the lien claimant for the amount that the lien claimant would have been entitled to recover under this Act if no surety bond had been furnished,

Bonding over will be a useful tool to property owners and others faced with the need to clear a lien claim against property....

subject to the limitation of liability of the surety to the face amount of the bond." Therefore, a party who becomes a bond principal may become personally liable when such liability would not have been imposed under the Act without a bond. Finally, an action on a bond

does not exclude other claims, such as breach of contract and quantum meruit.

Thus, the new law provides benefits to lien claimants and bond principals, but it also exacts a price against both. Many lien claimants would still rather have a lien claim, despite the additional cost to litigate and the additional avenue of recovery under a bond, simply because they believe there is more leverage in a lien - a cloud on title cannot easily be ignored. For an owner or other party who simply must remove a lien claim as a cloud against title, the new law is a benefit, but they must be wary of the additional costs and the potential for having additional liability, including attorney's fees. ■



Jessica Newbold,
Legislative Consultant,
IMSCA

~Thank You~

for supporting IMSCA-PAC!

I would like to offer a big THANK YOU to all IMSCA members who supported our recent IMSCA-PAC fundraiser – and for your assistance in marketing this event to your friends and colleagues. Our fundraiser sold 349 tickets and raised \$17,450.00! This is a significant increase from our 2014 fundraising year where we raised \$13,850.00. We are inching closer to meeting our goal of raising \$20,000 – and with your continued support I am confident we will meet that goal.

Your willingness and interest in making an investment in your legislative representation is appreciated. Your financial support provides your IMSCA lobbying team with the necessary tools to fight for legislation that is important to you as a contractor.

IMSCA's 2015 legislative accomplishments include:

- Negotiated detailed changes to bad legislation resulting in the protection of your mechanics lien rights in the event a bond is purchased to replace your lien (HB 2635).
- Successfully maintained multiple prime contracting in Illinois by stifling efforts seeking to completely eliminate multiple prime construction (HB 3497).
- Stopped legislation seeking to amend the Energy Efficient Building Act that would have added “green standards” to construction (HB 3541).
- Stopped legislation seeking to require a contractor to submit a separate, sworn statement of those furnishing labor, services, or other materials to a homeowner before any payments could be made to the contractor (HB 3380).
- Stopped legislation requiring a court order before any lien can be recorded on a foreclosed property in Cook County. IMSCA successfully exempted mechanics liens from this requirement (SB 1487).

This list of accomplishments was made possible with your support. IMSCA's lobbying team looks forward to continuing to provide you and your business legislative representation and will continue to fight for you on these issues and more.

Thank you again for your support of IMSCA-PAC!



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Avoiding the Courthouse

Owning or operating a business today involves much more than just selling a product or service and keeping customers happy. Management is spending increasing amounts of time complying with new governmental regulations. The last thing any business needs on top of the already burdensome requirements imposed by government fiat is to find itself a defendant in a lawsuit. Here are some tips for staying out of the courthouse so that you can concentrate on the business of growing your business.

- 1. Get it in Writing:** Litigation involving “he said, she said” allegations is difficult and expensive. Do yourself a favor - if it’s important, get it in writing. Often a simple email confirming an agreement can avoid litigation.
- 2. Shareholder Agreements:** Many businesses have investors or more than one owner. As we all learned on the playground during childhood, people don’t always get along. Minority shareholders may not like how the company is being run and might file suit to enforce their minority rights. An angry co-owner might sell his or her interest to your competitor or worst enemy. The best way to avoid these problems is with shareholder agreements or buy-sell agreements. These agreements can include rights of first refusal that allow you to keep out undesirable new investors or owners. They can also include pre-determined buy-out prices – either set by formula or through stipulated sums. The permutations and possibilities are almost endless. Take the time to address these issues now rather than leaving them for a judge or jury to decide.
- 3. Be Informed:** Business owners need to stay informed on the latest regulatory issues and changes in the law that effect their business. There are a multitude of webinars and internet resources out there for just about every industry. Remember, ignorance of the law is not a legitimate defense.

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Who is the “Contractor”

for determination of funds available to satisfy lien claims under Section 30 of the Illinois Mechanics Lien Act?

Section 30 of the Illinois Mechanics Lien Act provides, in part:

If there are several liens under Sections 21 and 22 of this Act [770 ILCS 60/21 and 770 ILCS 60/22] upon the same premises, and the owner or any person having such a lien shall fear that there is not a sufficient amount coming to the contractor to pay all such liens, the owner or any one or more persons having such lien may file his, her or their complaint in the circuit court of the proper county, stating such fact and such other facts as may be sufficient to a full understanding of the rights of the parties. The contractor and all persons having liens upon or who are interested in the premises,

the owner to the contractor, and the amount due to each of the persons having liens, and in case the amount found to be due to the contractor shall be insufficient to discharge all the liens in full, the amount so found in favor of the contractor shall be divided between the persons entitled to such liens pro rata . . .

If subcontractors contract directly with the general contractor, then most certainly the Section 30 “contractor” is the general contractor for determination of amounts available to be paid to the lien claimants. But who is the “contractor” if the mechanics lien claimant is a sub-subcontractor to the subcontractor? Is the “contractor,” for determining amounts due from the owner to the “contractor”, the subcontractor or general contractor?

In the recent case of *GX Chicago, LLC v Galaxy Environmental, Inc.*, 2015 IL App (1st) 133624, the Appellate Court issued a decision determining, among

Is the “contractor,” for determining amounts due from the owner to the “contractor”, the subcontractor or general contractor?

- so far as the same are known to or
- can be ascertained by the plaintiff,
- upon diligent inquiry shall be made
- parties. *Upon the hearing the court*
- *shall find the amount due from*

other things, that “the amount due from the owner to the contractor” under Section 30 of the Illinois Mechanics Lien Act refers to the amount owed to the claimant’s



immediate contractor, when the liens at issue are asserted by sub-subcontractors that lacked privity with either the owner or the owner's general contractor.

In GX Chicago, the Owner and General Contractor filed a complaint pursuant to Section 30 of the Mechanics Lien Act pleading that a Subcontractor's sub-subcontractors had claims totaling \$267,989 but that there remained only the sum to be paid to the Subcontractor under its contract with the General Contractor the sum of \$126,178. The Section 30 complaint sought an accounting to determine the amount due the Subcontractor under Subcontractor's subcontract with the General Contractor; the amounts due the Sub-subcontractors; and "the amount due from the [Owner] to [General Contractor] under their contract with respect to the amounts due and payable to [Subcontractor] and its sub-subcontractors.

The Sub-subcontractors filed a counterclaim against the

Owner, the General Contractor and Subcontractor including, among other claims, counterclaims to foreclose mechanics liens.

The Sub-subcontractors argued that under Section 30, the Sub-subcontractors were entitled to lien claims on the amount due to General Contractor from the Owner. Owner and the General Contractor argued that the Sub-subcontractors had no privity with the General Contractor and because Owner and the General Contractor had no knowledge that the Subcontractor had not paid the Sub-subcontractors until the Sub-subcontractors filed their mechanics lien notices, Sub-subcontractors mechanics lien claims were limited to the amounts the General Contractor owed to the Subcontractor.

The trial court agreed with the Owner and General Contractor. The Sub-subcontractors appealed.

The appellate court upheld the trial court ruling, stating: "... where an owner has acted in good

faith and in compliance with the [Illinois Mechanics Lien] act, the balance is struck in favor of the owner so as not to hold the owner liable for amounts beyond what was contractually owed to the lien holder's immediate contractor . . . we agree that section 30's phrase 'the amount due from the owner to the contractor' refers to the amount owed to the claimant's immediate contractor, when the liens at issue are asserted by sub-subcontractors that lacked privity with either the owner or the owner's general contractor."

Lesson learned: When acting as a sub-subcontractor (having no privity with either the owner or general contractor), a sub-subcontractor's mechanics lien claim amount will be limited by the amount due to the Subcontractor, and not the amount owed by the Owner to the General Contractor, provided the owner acted in good faith and in compliance with the Illinois Mechanics Lien Act. ■



James P. Garrison is the President and Founder of JCR Settlements. As a 22 year veteran of the structure settlement industry, he has had the opportunity to be involved in Federal and State cases throughout the United States. He is a long standing member of the National Structured Settlements Trade Association. Jim holds a Bachelor of Science Degree in Administration of Justice from Southern Illinois University, an Advanced Safety Certificate from the National Safety Council and an Associate in Risk Management from the Insurance Institute of America. Jim can be reached directly at (480) 478-0159 or jgarrison@jcrsettlements.com.

Structured Settlements

Reducing Settlement Costs While Meeting Needs

Contractors face numerous risks in their day to day operations. Even when you have used every resource available to avoid accidents, transfer risks and their associated liabilities, they may still return to you for resolution.

When faced with these risks a structured settlement annuity (“structure”) can assist your claims and litigation management team in resolving the legal issues against your company.

First developed in the 1970’s, a structure is an agreement between parties pursuant to existing Internal Revenue Regulations, which provides tax-free or tax-deferred payments over time to claimants. The defense purchases a structure for a one-time payment to a highly rated life company at a reduced present value cost. The structure is designed as part of the settlement process to meet specific future needs of the claimants.

Utilizing a structure allows your company to realize substantial cost savings by providing timely settlements, reducing legal and administrative fees, and avoiding trial. A full and final release is still



obtained at the conclusion of the settlement negotiations.

Under the Internal Revenue Code 104 (a), payments from personal physical injury settlements, workers’ compensation, Medicare Set-Asides or liability claims are considered tax-free. Payments from claims classified as non-physical injury, such as construction defect, employment disputes, wrongful termination, sexual harassment, discrimination, attorney fees, punitive damages, environmental claims, property damage and the like are tax-deferred as no physical injury exists to obtain

tax-free payment status.

Most structured settlements include cash for the claimant and to pay associated fees and costs as well as a sum to be utilized to purchase the structured settlement annuity. Structures can be employed in smaller cases where there are needs to be met over a period of time. You do not need a large claim to utilize this concept; claims as small as \$25,000 can be structured.

The guaranteed structure payments can be made for virtually any length of time, even for the recipient's lifetime. In the event of the individual's death, a guaranteed portion of the settlement may be made to the estate or a named beneficiary. The plan may even defer funds in cases involving minors or be designated to a beneficiary such as a scholarship fund or religious organization. Inflation can be countered by including periodic increases in the benefit amount or by providing lump sums at future dates. A structure may be designed to include an educational fund, retirement income, or even mortgage payments.

One of the most important benefits of structured settlement annuities is the financial security they offer. Regardless of what happens to the stock market, the economy, or interest rates, the benefits from a structure are guaranteed.

Settlement funds can disappear in a number of ways, including bad investments, loans to friends and relatives, and unwise or frivolous purchases. A structure is a guaranteed source of tax-free or tax-deferred income, and it is very difficult for even the sophisticated investor to match the guaranteed rate-of-return generated by a structure.

Utilizing structures will provide your team with a tool that is truly a win-win for all settling parties. ■

“Avoiding the Courthouse” continued

4. Early Action/Consult Counsel:

Most problems, if ignored, will not just go away. Rather they continue to fester and get worse. Don't let little problems become big, and expensive, problems. Be proactive and take action before things get out of control. Often, it's necessary to consult legal counsel. Consult your lawyer before it's too late. It's usually money well spent.

5. Trade Names: Just because you incorporate your business or file for an assumed name does not necessarily mean that you have the right to use that perfect name for your business. Indeed, just recently, a local restaurant was forced to change its name because another, out of state, restaurant operated under the same name and had the foresight to protect its name. Spend the time to make sure that your trade name is available or risk the chance that the time and effort spent in promoting that name will be wasted when you are successfully sued for infringement. The easiest way to do this is with a trademark search. Again, consult with a lawyer experienced in this area.

6. Unhappy Employees: The most likely lawsuit you will face will be from your own employees. Reduce the chances of these lawsuits by becoming familiar with basic human resource law. Obvious areas of concern include discrimination and sexual harassment. It should go without saying that these should be strictly avoided. However, for those who grew up in a different era, be warned that previously acceptable conduct is

now actionable. Spend a day and attend one of the many seminars that are periodically put on for business owners on this topic. Also, familiarize yourself with the growing number of state and federal statutes that govern the employment relationship. Finally, take the time and prepare an employee handbook that sets out all of the major employment issues. If you strictly comply with a well written handbook, you should gain the upper hand in any suit filed by an employee or former employee.

7. Don't Over-Promise: Keep in mind that overstating what you can provide or deliver will almost certainly result in litigation. Unfulfilled promises, especially when in writing, will come back to haunt you. .

8. Be Reasonable: Businesses exist to make money, not to litigate to “prove a point” or because of the “principle.” Of course there will be times when, if sued, a business must fully and completely defend itself. However, if a reasonable settlement can be reached, that is often the best solution. Settlement offers finality on terms acceptable to you, rather than as determined by a judge or jury. Don't eschew settlement simply to prove a point.

9. Emotions: Don't let emotion take over. Anger, fear, humiliation, etc should not dictate your reaction to legal problems. Step back and realize that whatever the issue, it is simply another business decision. Approach it rationally and calmly. Along these lines, avoid “email rage.” ■



Louis Giordano,
Executive Vice President,
IMSCA

State Capitol *Report*

As summer begins to head into fall – the contentiousness of the spring 2015 legislative session continues to live on. There doesn't seem to be an end in sight to the overtime session. Republicans and Democrats failed to agree on a budget and many reforms included in Governor Rauner's "Turnaround Agenda". The Democratic controlled House and Senate did pass budget bills – but Governor Rauner warned all along they didn't go far enough in addressing our state's budget woes. Governor Rauner ultimately vetoed all parts of the budget passed by the House and Senate, with the exception of the education portion. This move will allow Illinois schools to resume on time.

As a result, of the failure to agree on a budget, the House and Senate have returned to Springfield on an almost weekly basis since the May 31st adjournment deadline. These weekly session days, which typically last no longer than one day, have turned out to be minimal work days for legislators – and the longer they are called to return to Springfield, the fewer legislators actually show up for the overtime session dates. The state's fiscal year ended June 30th – and since then, payments to state employees and other state funded facilities and departments have barely been able to be met.

The budget impasse continues to not only negatively impact state

employees or state government supported departments and facilities – IMSCA's own contractor members are adversely affected. As previously reported, the Capital Development Board alerted all contractors currently under contract to "stop work" as of June 30th. The stop work order was a direct result of the absence of an agreed FY2016 budget. State funded construction work will not resume until a budget is agreed upon. It was recently estimated that the stop work order will cost the state an additional \$30-\$50 million dollars in lost revenue.

Another side effect of the continued dysfunction of our government is the expected high turnover rate of elected officials. So far, two senators have announced they aren't seeking re-election in 2016 – Senator John Sullivan and Senator Dave Luchtefeld. Also, three House Republicans have announced they too will not seek re-election – Representative Mike Tryon, Representative Adam Brown and Representative Ed Sullivan. I expect we will see even more of these announcements as the impasse continues.

Despite the challenging times faced by our state, IMSCA experienced a successful spring legislative session. We were able to come to agreements on many bills that were of interest to our members – and all of the bills we were directly involved with passed both chambers



and have been signed into law by Governor Rauner.

The following is a list of bills that was of interest to IMSCA during the spring legislative session:

HB 2635 (Sandack/Nekritz/Bennett):

This bill allows a bond to replace a mechanics lien filed by a contractor. We learned quickly that HB 2635 had strong legs and was very likely to move. After discussing this bill at the spring IMSCA board meeting – it was decided our best course of action would be to seek an amendment to the legislation in an attempt to make the bill as livable to the industry as possible. We approached the sponsors and the proponents of the bill – after a lot of hard work, an amendment was agreed upon by all parties. The amended version includes a bond amount of 175% of the lien and attorney's fees may be paid to the prevailing party. HB 2635 passed both chambers and was signed by Governor Rauner. The legislation goes in to effect January 1, 2016.

HB 3497 (Currie):

The Capital Development Board moved forward with legislation to increase the use of single prime contracts. The bill, HB 3497, received a lot of support in both chambers. We knew early on that despite our efforts to oppose this bill,

it was likely to pass. IMSCA reached out to the Associated Building Contractors and the Illinois Black Chamber to assist us in amending HB 3497. With their help, we were able to come to an agreement with the Capital Development Board and the Governor's office. The amended version includes: projects of \$5 million and under will be multi-prime with 50% of those projects potentially single-prime, the Procurement Policy Board has oversight and approval on 1 of 5 single prime projects up to \$10 million for two years, and the Capital Development Board must submit quarterly reports for four years on all single prime projects. HB 3497 as amended passed both chambers and was signed by Governor Rauner. The legislation had an immediate effective date, and became effective on August 4, 2015.

SB 1487 (Cunningham/Evans, Jr.):

SB 1487 would have caused much harm to the construction industry in the event of a property foreclosure is. This legislation creates a pilot program in Cook County and as originally written, would have a court order before any lien can be recorded once a foreclosure case begins. This would have included mechanics liens – which was our main concern. IMSCA opposed this measure and successfully worked with the bill's

proponents on an amendment. The amended version includes a complete exemption of mechanics liens. With this amendment, we were able to remove our objections. SB 1487 passed both chambers and was sent to Governor Rauner for approval. SB 1487 was signed by Governor Rauner. This legislation goes into effect January 1, 2016.

SB 1334 (Clayborne/Turner):

This is a higher education/ community college construction bill that popped up late in session and received a lot of support from both sides of the aisle. This bill increases the minority and female owned business goal in state construction projects from 10% to 20%. Members of our construction industry coalition understood this would be a difficult bill to oppose. The suggestion IMSCA made for an amendment to this bill was the inclusion of a cure period. We successfully argued that instead of bids being thrown out for missing paperwork, the state should allow a period of time for the bidder to complete bid document and produce anything that was missing. SB 1334 was amended and passed both chambers and has been signed by Governor Rauner. This legislation had an immediate effective date, and became effective August 25th.

As a reminder, the full text of these bills can be found by visiting www.ilga.gov.



IMSCAPAC provides your IMSCA lobbying team with the necessary tools to fight for legislation that is important to YOU as a subcontractor.

IMSCA's most recent legislative accomplishments include:

PASSED legislation preventing subordination of mechanic's liens. Subordination is now prohibited as a condition of a loan contract or subcontract. (SB 3023)

PASSED legislation amending the Public Construction Bond Act to require sureties to meet certain qualifications including: bonds **MUST** have a certificate of authority from the Department of Insurance, the company must have a financial rating of at least an A-. (HB 4769)

STOPPED legislation that would allow a bond to take the place of YOUR mechanics liens. (HB 4657)

STOPPED legislation that would have **REQUIRED** a written and executed contract in order for you to file a mechanics lien. (HB 5663)

STOPPED legislation that would have allowed out of state contractors to enter Illinois during a state of emergency to provide disaster relief services **WITHOUT** meeting licensing requirements, or register, file or remit state and local taxes on disaster related work. (HB 5595)

IMSCA is fighting for you and serving as the voice of the Illinois construction industry in Springfield. **IMSCAPAC** helps IMSCA continue its successful legislative legacy. Will you invest in the legacy and join the fight?

To learn more about how IMSCA-PAC is fighting for you, please visit www.imsca.org.

YES! I will join the fight!

Please accept my contribution of: \$50 ____ \$100 ____ \$150 ____ \$200 ____ Other ____

Under State Law, IMSCA-PAC can accept both corporate and personal checks. Your support is appreciated.

Name: _____

Address: _____

Company: _____

Phone: _____

Please return this form to: IMSCA, 519 South Grand Ave., Springfield, IL 62704

If you have additional questions regarding IMSCA-PAC, please contact Jessica Newbold at 217.523.4361 or JNewbold@gcsconsult.com.