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Substance

Illinois Mechanical & Specialty Contractors Association





Greetings IMSCA Members

Tom Morton,
IMSCA President

This is my last article as your IMSCA President. It has been a very interesting few years in Springfield during my term. We are now going in to the second year without a budget as of this writing. The outcome of the Federal and State elections has made it even clearer to me how important it is for us to stay involved in the political process. We must have a voice in what our elected officials are doing in both the State and Federal levels. It saddens me to see the apathy of our fellow citizens. Only 55% of the electorate chose to vote in this election. That means that less than 30% of the people of this country decided who should lead us. We don't have a clue what the majority of the people think or want in this nation and that is sad.

In order for IMSCA to represent us, we must stay involved and let them know our

issues. They do a great job at looking out for our interests, but if you have a particular problem with regulations or proposed legislation that you hear about, you must make sure that your IMSCA representatives know about them. They keep a watchful eye on all proposed legislation and look for our feedback when needed. When you see an email from IMSCA please read it, and if they are asking for action from you I cannot stress enough the importance of helping out. It only takes a few minutes of your time. Please continue to support IMSCA-PAC and stay involved in the political process. Good change can only occur if we have a voice, which IMSCA gives us. I want to thank all the board members and Louie and Jessica for all of their hard work and support during my term. It is your choice to stay involved I hope you all choose to do so.

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Representation
for over 2,000
Construction
Employers*



MSCA
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Meet CDB's new CPO

On February 1, 2016, **Margaret van Dijk** was appointed Chief Procurement Officer for the Capital Development Board. She has a Bachelor of Science degree in political science from the University of Oregon and a law degree from Washington University in St. Louis.

Margaret worked as a lawyer in private practice for 9 years in Missouri and Illinois. She has worked for the State of Illinois for over 18 years in a variety of legal and policy positions, and is well known as being a person who listens and is willing to work with people to solve problems.

Margaret is certified by the Universal Public Procurement Certification Council as a Certified Public Procurement Officer.

The Chief Procurement Office for the Capital Development Board (CPO-CDB) is responsible for overseeing all procurements for construction and construction-related services committed by law to the jurisdiction or responsibility of the Illinois Capital Development Board (CDB). Chief Procurement Officers are appointed by the Executive Ethics Commission and confirmed by the Senate to a five year term, are independent from the Governor's Office and agency directors, must show proficiency in procurement by being certified by the Universal Public Purchasing Certification Council, are prohibited from engaging in political activity, and owe a fiduciary duty to the State of Illinois.

The CPO-CDB's role is to ensure compliance with procurement laws and administrative rules. Here are some highlights of what the CPO-CDB has been working on:

- **Restarting construction projects.** CDB received appropriations to restart with some construction projects that were suspended on July 1, 2015 due to the budget impasse. The CPO-CDB is acting in concert with CDB to review and approve resumption of work as quickly as possible.
- **Finding efficiencies.** The CPO-CDB implemented guidance in response to a change in the law that removes persons or entities who provide incidental

goods or supplies from the subcontractor requirements of the Procurement Code. This should reduce the number of disclosures submitted from first and second tier suppliers by 30%.

The CPO-CDB and CDB have consolidated internal review steps to remove redundancies and eliminate as much "paper" as possible. New steps to transmit requests electronically should decrease the amount of time it takes to bid, issue contracts, and approve change orders.

- **Providing consistency in administrative rules for competitive bidding.** Previously, there were four different dollar thresholds for competitive bidding for construction, depending if you were a contractor who did business with CDB, the Illinois Department of Transportation, state universities, or other agencies that have construction projects. Now, regardless of whether you bid with CDB or any other state entity, a formal competitive process is required when a construction project is estimated to be \$100,000 or more.

During rule-making, the CPO-CDB worked with IMSCA and other industry groups to ensure fair processes are in place when awarding small construction projects through an informal Request for Quote procedure. The



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CPO-CDB requires CDB to consider small, diverse, and veteran-owned businesses, provide equal opportunity for businesses to compete by providing uniform descriptions of work and time-lines for response, avoid the repeated use of a contractor, and provide documentation of the selection process.

- **One Stop Help.** Pathway to Procurement is a website created by the Chief Procurement Officers that provides information on how to do business with the State of Illinois. It provides a “procurement roadmap” and is the quickest way to become familiar with the rules, requirements, programs and procurement bulletins across the State. The roadmap assists in directing you toward the resources needed to successfully begin the bidding process. It provides links to vendor training, the Illinois Procurement Gateway, helpdesks, and other resources. Pathway to Procurement can be accessed [here](#).

The Chief Procurement Officers also developed the Illinois Procurement Gateway (IPG), a web based system that serves as the primary location for entering, organizing, and reviewing vendor information. The IPG allows prospective vendors to provide their financial disclosures, registrations, and other documentation needed to do business with the State in advance of any particular

procurement. Upon approval, vendors receive a registration number that may be used in place of paper submission of required forms. IPG has been well received by the vendor community, and provides a searchable directory of registered vendors and eliminates the need to submit multiple paper-based forms. IPG can be accessed through the Pathway to Procurement website or [here](#).

The changes made to the Procurement Code establishing the independent Chief Procurement Office have provided much needed integrity and transparency, resulting in Illinois being ranked #1 for procurement integrity among the 50 states by the Center for Public Integrity ([2015 State Integrity Investigation](#)). In 2012 and 2014, the Chief Procurement Officers successfully sponsored legislation to ease some of the administrative burdens of the Procurement Code, and have proposed additional changes that eliminate barriers to vendor participation, provide for competition and cost savings, and deliver procurements to agencies and universities on time and on budget.

The CPO-CDB appreciates the excellent working relationship it has with IMSCA in helping to effectuate good procurement practices in the State and looks forward to our continued collaboration. If you have questions, the CPO-CDB can be reached at CDB.CPO@illinois.gov or 217-558-2156. 🌟



Dispelling the Myths of Lean Construction and IPD

Justin Weisberg is a partner in the Chicago office of global law firm K&L Gates. Mr. Weisberg focuses his practice on construction law and commercial litigation representing private, public, local and international clients in a variety of construction-related transactions and litigation matters. His transactional experience includes contract drafting and negotiation, contract document review and project counseling. His construction dispute resolution experience includes both bench and jury trials, appeals, arbitration and mediation. Mr. Weisberg is also a Professional Engineer and has been a former Chair of the EJCDC. He also serves as Counsel on the Construction Section of the ISBA and most recently in that capacity was involved with Co-Authoring the recently enacted Mechanics Lien Bond Bill, providing testimony and working with various committees in support of the bills passage. He can be reached with any questions at: justin.weisberg@klgates.com.

Over the last year we have witnessed a successful Congress in Chicago by the Lean Construction Institute, a growing number of projects adopting Lean Construction Processes (“LCP”), in Illinois, and the recognition of the completion of at least one significant project in Illinois, which utilized Integrated Project Delivery (“IPD”). Nevertheless, I have perceived that there is confusion in the industry relative to LCP and IPD based upon comments made at presentations given by practitioners in the construction industry, who have not been involved with, or studied Lean Construction. The following article provides a brief overview and a comparison of LCP and IPD to address the myths created by some of these comments.

The first and easiest myth to dispel is the myth that LCP and IPD are one and the same. LCP and IPD are clearly not the same. There are many more projects currently using LCP than projects utilizing IPD. Therefore, there is no question that a Lean Construction Project can exist even where the parties are working under a traditional construction contract.

Lean Construction is a process that aims to, for example, increase efficiency, improve quality control and align the expectations of the Owner with the vision of the Designer and the goals of the Builder. The development of Lean Construction has roots in manufacturing. Certain LCP concepts reflect methods derived from manufacturing processes such as those described in *Workplace Management*, Authored by Taiichi Ohno, Translated by Jon Miller, Gemba Press (2007). These processes focus on the elimination of

waste, improving workflow and continuous improvement. Considering concepts originally derived from the assembly line, probably the most demonstrable reflection of a process developed for Lean Construction is Pull Planning.

Looking from the outside in, Pull Planning illustrates a process where work is planned and scheduled from the bottom up rather than from the top down. The Pull Planning sessions involve participation of trade contractors, the general contractor and design professionals as well as, in many instances, the Owner. Project participants would plan a given project by activities which would be identified on sticky notes placed on a wall. More recently, technology has been developed to allow the sticky notes to be virtually placed on large computer screens. The schedules are updated at sessions that occur on a periodic basis and the parties work toward scheduling activities to begin only when needed, in order to insure a continuous work flow. For example, instead of storing materials for months on site, the parties strive to limit deliveries of materials to a few days at most before they are incorporated into the Project.

LCP allow for vertical integration of responsibility, involving for example, foreman of subcontractors in the planning and scheduling process, instead of requiring those individuals to comply with schedules that they had no input in creating. The collaboration and empowerment of project participants can also have an impact on the motivation of the individuals responsible for completing the work in field. The Pull Planning process also provides a platform for communication of the project

participants directly from the field to project managers, designers, and even representatives of the ownership team.

Unlike LCP, IPD is not a process, but a project delivery method with a basis in contract. One recognized IPD contract form is identified as, the ConsensusDocs 300, Standard Multi-Party Project Delivery (IPD) Agreement. It has been proven that IPD is not a necessary delivery system for LCP to be used, although the forms were developed at least in part to facilitate collaboration and support LCP, and both forms have provisions which assist in the implementation of LCP.

Given that Pull Planning is a significant element of an LCP project, the contract must provide for compensation of the contractor and key subcontractors beginning with the early design stage of the Project. Under the IPD forms, the Architect, Contractor and Owner are parties to the same agreement, facilitating the use of the Contractor's services from the early stages of design. However, the use of a more traditional Construction Manager at Risk ("CMAR") form of delivery would also provide contractor services during the design phase of the Project. Notably, a project utilizing LCP would require the Contractor to engage primary trade contractors during the design stage of the Project, although there is nothing that would limit the engagement of primary trade contractors in other construction forms including, Construction Manager Advisor ("CMA"), CMAR or a Design Build ("DB"). Moreover, a DB form of agreement is also an integrated agreement from the perspective that the design and construction is under one agreement with the Owner.

One factor identified by LCP practitioners supporting a preference for IPD as compared to traditional delivery has been the engagement of the Owner in the LCP. It is noted that IPD form agreements do incorporate certain LCP such as Pull Planning,

Collaboration and BIM. However, many terms targeted to involve the Owner in LCP can be easily inserted into traditional contracts. Therefore, the question presented is whether there is any provision unique to IPD that facilitates LCP. Form IPD agreements attempt to facilitate collaboration through the use of a management by committee model based upon a Core Group with a representative of the Owner, Contractor and Designer. Provisions including Target Value, Profit Pool and Incentive Compensation are IPD provisions that at least in theory, shift the position of the Owner into a closer alignment with the other Project participants relative to compensation, performance and risk.

Target Value Design is based upon a team approach in which the Owner, Designer, General Contractor and primary trade contractors work together during the design process to develop a Target Value. During the design, the Project members work together to establish a design that will have a cost does not exceed the Target Value which is continuously validated throughout the design process. When the design documents are sufficiently developed, the Core Group proposes a Target Value, or Expected Maximum Price (the "Target") to the Owner. Once accepted, the Designer, Contractor and primary trade contractors then work on cost basis placing some or all of profits at risk in a Risk Pool to defray costs that exceed the established Target. There is a contingency amount established for certain unknown costs such as escalation, but once the contingency is exhausted the profits of the Risk Pool members are applied to defray excesses above the Target. Once the Target is exhausted, the costs above the Target, contingency and Risk Pool are incurred by the Owner. Therefore, the myth that the risk of a cost overrun in an IPD project is assumed by the Owner alone is incorrect. As the IPD form of contract is relatively new, there might

be a potential underwriting challenge concerning the limits of a builders risk policy based upon a Target.

In addition to amounts in the Risk Pool related to the Target, there are also funds put at risk for Goal Achievement. These funds not conditioned upon delivering the Project within the Target, but instead related to reaching certain set goals such as attendance at meetings, milestones, obtaining certain sustainability ratings or for example a successful safety record.

The IPD parties waive liability between each other removing the concept of fault from errors or defective work. The IPD contracts do attempt to preserve rights between the parties to the extent of available insurance, although there might be potential challenges by insurers concerning the impact of such waivers on coverage.

The IPD method of continuing to validate cost through design is significantly different from the traditional method of the creation of construction level drawings and then having the cost determined by bid. A CMA or CMAR arrangement would allow for construction expertise prior to completion of design, although in contrast to an IPD approach, input of recommended design alternatives would not occur until the value engineering phase after the design is relatively complete. The traditional design build model does integrate design and construction, although the validation of cost and schedule occurs at one time in cases where a GMP is established, usually by amendment at some level in the design process. Once the GMP is set, although there may be some sharing of risk between the Design Builder and Owner relative to contingency account savings, the ultimate risk for completion and cost falls on the Design Builder. This is in contrast to the sharing of risk in IPD where the initial risk of cost and completion to the extent of the Risk

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Early Holiday Present for Employers – Overtime Regulations Stayed

Mr. Tremblay is a partner in the Arnstein & Lehr Chicago office. He is the chair of the Employment & Labor Practice Group, as well as a member of the firm's Litigation Group. Mr. Tremblay focuses his practice in employment and commercial litigation. In the commercial area, he represents parties in a broad range of complex business and tort litigation matters, including matters involving breach of contract, breach of fiduciary duty, fraud, interference with contract, shareholder disputes and insurance coverage.

In a last minute blow to the Obama Administration's labor and employment legacy, a federal district court in Texas granted an emergency motion for preliminary injunction yesterday barring the Department of Labor from enforcing its revised overtime rules, scheduled to take effect on December 1, 2016. See *State of Nevada, et al v. United States Department of Labor, et al.*, Case No. 4:16-CV-00731 (E.D. Tex. Nov. 22, 2016)(J. Mazzant).

The final regulations were poised to double the salary level for employees deemed to be exempt from overtime under the Fair Labor Standards Act pursuant to the Department of Labor's "white collar" exemptions. In entering the injunction, the court reasoned that, by raising the minimum salary level, the Department of Labor supplanted the duties portion of the "white collar" exemption test and exceeded its delegated authority.

This decision has created a real dilemma for employers, many of whom have spent months getting up-to-speed on understanding and implementing the changes required by the new regulations, as well as communicating them to their workforce. What employers should do next is the issue of the day for businesses around the country.

Below are some of the issues for employers to understand and consider.

First, this injunction is nationwide and therefore, as of the drafting of this article, applies to all employers throughout the country.

Second, it is uncertain how long this injunction will stay in place. It may become permanent, but the regulations are now only temporarily stayed meaning the regulations will not become effective, as originally scheduled, on December 1st. One caveat to this would be if the court's decision was appealed by the Department of Labor. In that circumstance, the DOL could request a stay of the injunction pending the appeal which would result in the regulations going into effect. This outcome does appear to us to be unlikely based on the rationale that the court communicated in entering the injunction.

Third, the court's decision has created quite a quandary for many employers throughout the country based on how far along they were in the implementation process, such as whether compensation plans have already modified or communicated to employees. For those employers who have already communicated salary and compensation changes in anticipation of the

updated regulations becoming effective on December 1st, they have the option of still going through with the salary and compensation changes despite the ruling or, alternatively, delay or cancel the anticipated changes. If an employer decides to delay or cancel the anticipated changes, it will need to communicate something in writing to the affected employees (and soon) explaining the sudden change. Any written announcement will depend upon where the employer is in the implementation process.

The situation is much more difficult for companies who, as of the date of the decision, had already changed compensation in anticipation of the updated regulations. It will be much more difficult (but not impossible) to roll back the salary and compensation changes without causing a mutiny in the workforce. In that case, a business decision will need to be made as to whether it is worth rolling back the changes after compensation plans have already been communicated, made and implemented.

Fourth, since there is still a chance the regulations may become effective in the future depending on the results of any appeals (and a remote chance that any subsequent dissolution or reversal of the injunction will be retroactive to December 1st), it is prudent for employers to continue (or begin) to track the time worked on those employees who were going to be reclassified, in case that data or records are needed later.

This decision, while welcome news for most employers, is complex and could change again in the near future. Employers should therefore discuss this fluid situation with their counsel and carefully consider the appropriate course of action.

Should you have any questions regarding the above, or should you need assistance complying with the law, please do not hesitate to contact E. Jason Tremblay at 312-876-6676. 🌟

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2017 Legislative Session Dates

IMSCA
Lobby Day
February 15th

The Spring 2017 legislation session will adjourn May 31st.





Jessica Newbold
IMSCA Legislative
Consultant

News from Under the Dome

Lucky for us, we just witnessed the most expensive General Election in Illinois history. Governor Bruce Rauner spent nearly \$30 million dollars supporting Republicans seeking election to the Illinois General Assembly. Governor Rauner's spending was nearly matched by the House and Senate Democrats making Illinoisans endure months of unprecedented amounts of television, media and direct mail buys. Governor Rauner and the Illinois GOP successfully chipped away at the state's Democratic stronghold that has stifled Governor Rauner's ability to pass his "Turnaround Agenda" – and making the rest of us suffer under ongoing budget-less conditions.

In the wake of the 2016 General Election, Senate President Cullerton was able to hold on to his veto proof supermajority; even though newly elected legislators will join the chamber. In 2017, we'll see the following changes in the Illinois Senate:

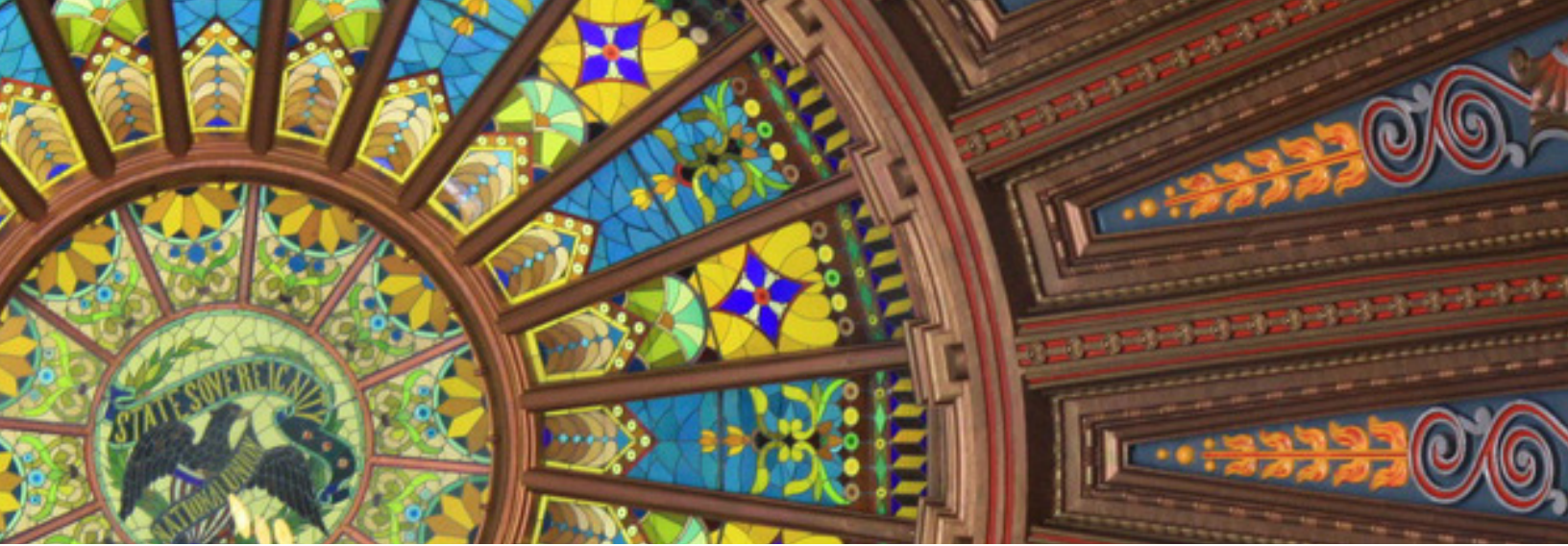
- **47th District:** Former GOP State Representative Jil Tracy will fill the vacated seat of Democrat John Sullivan.
- **58th District:** The seat vacated by Senator Dave Luechtefeld will be filled by Republican Paul Schimpf.
- **59th District:** Long-time Democratic Senator Gary Forby was ousted by Dale Fowler.

A slight power shift will be seen in the Illinois House where Speaker Madigan no longer holds his supermajority of 71

seats. The House Republicans gained four seats and lost one incumbent – Representative Dwight Kay who was beat by Katie Stuart in the 112th District. The Republicans held on to a top-tier race in the 20th District, Representative Michael McAuliffe and won five seats there were controlled by House Democrats. The seats picked up by House Republicans include:

- **63rd District:** Republican Steven Reick will fill the seat vacated by former Democratic State Representative Jack Franks.
- **71st District:** Republican Tony McCombie beat first-term Democratic State Representative Mike Smiddy.
- **79th District:** Democratic incumbent State Representative Kate Cloonen lost her seat to attorney Lindsay Parkhurst.
- **76th District:** Democratic State Representative Andy Skoog lost his seat to Jerry Long.
- **117th District:** This is probably the biggest loss to Speaker Madigan, one of his top lieutenants; State Representative John Bradley was defeated by Republican Dave Severin.

The Illinois GOP successfully crafted messaging that tied Democratic challengers to Speaker Madigan, who is the most unpopular elected official in Illinois. The GOP's messaging, coupled with Governor Rauner's bottomless pot of money contributed to the Republican Party's wins, and the ultimate losses of Illinois Democrats.



GOP party leaders viewed the election results as a true sign that Illinois voters want the Democrats to get on board with Governor Rauner's agenda to bring change and reform to our government. On the other hand, Illinois Democrats viewed their statewide wins that included Tammy Duckworth unseating Senator Mark Kirk and Chicago City Clerk Susana Mendoza's defeat of Comptroller Leslie Munger as signs Illinoisans want continued Democratic "checks and balances" of Governor Rauner's extreme agenda. In a post-election statement, Speaker Madigan blamed his losses on the popularity of President-Elect Trump in rural areas and Governor Rauner's unprecedented cash flow. At the end of the day, I believe the messaging of Rauner and Trump worked, and the Democratic messaging simply didn't resonate with the electorate.

Although the election will bring minor change to the Illinois General Assembly, political insiders are not encouraged that more cooperation between Governor Rauner, Speaker Madigan and Senate President Cullerton will happen in 2017. The previous working relationships between these men coupled with the lack of progress of recent leadership budget negotiation meetings indicate we're going to continue to be caught up in a stalemate created by the inability and possibly unwillingness

of Governor Rauner and Speaker Madigan to work together.

The four legislative leaders and the Governor started meeting during the fall veto session to discuss passage of the remaining FY 17 budget. Legislators approved a partial spending plan on June 30th that is set to expire December 31st. That stopgap spending plan provided a full year of funding for primary and secondary education and capital construction for IDOT and the Capital Development Board. At risk come December 31st is funding for higher education, human services and some government operations. At this point, the Democrats are offering to set up more budget "working groups" to discuss a series of non-budget issues, including education, pensions, workers' compensation, local government consolidation and the elimination of mandates on local governments – the Speaker also added AFSCME's contract negotiations to the list. The Republicans response to the Democrats offer is it's too little too late and they view the creation of more working groups as a stall tactic.

The crux of the disagreement over an approved budget remains the same – Governor Rauner wants parts of his agenda passed; including – pro-business legislation, freezing property taxes and term limits. The Democratic leaders still believe Rauner should drop his demands and focus only on a state budget without pre-conditions. In the

meantime, Illinois' deficit stands at \$10.4 billion and continues to grow. We often hear how the lack of a budget is negatively impacting schools, universities and social service providers – but it is negatively impacting all of us – including contractors. While the Capital Development Board did receive a full year of funding in the stopgap budget and have been able to re-start about 50 of their stalled construction projects, there are still nearly 60 that are waiting to be re-started. Each day these jobs are on the stop-work list is another day we add to the ever growing deficit. The deficit has clearly grown to the point that budget cuts alone won't solve the problem. The problem will need to be fixed with a combination of cuts and a tax increase – and the question remains, how much is that tax increase going to be?

The Illinois General Assembly will hold a two day lame duck session on January 9th and 10th. Members of the 100th General Assembly will be inaugurated January 11th. Your IMSCA staff looks forward to introducing IMSCA to the new faces of the General Assembly and continuing to represent our members on issues that may impact the Illinois sub-contracting industry. IMSCA staff also wants to thank our members for all of the hard work and support you have shown us throughout the year and we wish you all a very happy holiday season! ❁



Courts Put Teeth in Attorney Fee Section of Illinois Mechanics Lien Act

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Two recent Illinois cases have strengthened the section of the Illinois Mechanics Lien Act (the "Lien Act") which, in essence, provides that if a party in a mechanics lien case acts in bad faith, that party must pay the attorneys' fees of the winning party. In the recent case of *Roy Zenere Trucking & Excavating, Inc v. Build Tech, Inc.*, 2016 Ill. App (3d) 140946, August 2, 2016, the court decided to put teeth into section 17 of the Lien Act in holding that an owner who wrongfully withheld payment for work performed must pay the contractor's attorneys' fees. And, in *Father & Sons Home Improvement II, Inc. v. Stuart*, 2016 IL App (1st) 143666, the court ordered a contractor that had litigated a fraudulent lien claim to pay the attorneys' fees of the property owner. Although section 17 of the Lien Act has been law since 1995, few courts have been willing to enforce that section to discourage bad conduct on either side of lien litigation. These two cases are a positive development both for good faith lien claimants as well as property owners subjected to overreaching lien claims. The new law means property owners may pay a price for refusing to pay a contractor when there is no basis for withholding payment, and, in addition, wrongfully prosecuting or overstating a lien claim could be a risky proposition for contractors.

In the *Roy Zenere* case, the owner failed to pay amounts requested as change orders as well as a balance due under the base contract. The trial court found the property owner did not approve and, as a result, was not obligated to pay disputed change order

requests. Therefore, the lien claimants were not entitled to be paid the amounts requested as change orders. The trial court did, however, award the lien claimants the unpaid amount due under the original contracts. Thus, the lien claimants received some but not all of what they were asking for in the case. The trial court decided there was no justification for not paying the balance of the original contracts, but it still denied the lien claimants request for attorneys' fees.

The appellate court reversed the lower court's decision not to award attorneys' fees. The appellate court wrote that Section 17 of the Lien Act, specifically allows for attorneys' fees where the owner's failure to pay was "without just cause or right." The evidence did not show any justification for the owner's failure to pay the original contract amounts. The appellate court acknowledged that the owner may have had "just cause or right" not to pay the unapproved extras portion of the lien claim, but this did not preclude the claimants' right to receive attorney's fees for the owner's failure to pay the undisputed amount. Therefore, even though the owner was justified in not paying the extras, the owner was not entitled to withhold payment for the amounts that were essentially uncontested, and therefore, the owner was required to pay the lien claimant's attorneys' fees.

Unfortunately, it is all too common that an owner will withhold all payments due under a contract, even when everyone knows at least some amount is due. The owner's strategy, of course, is to use financial leverage to force a contractor to

capitulate by not paying anything unless the contractor agrees to accept a lesser amount. In light of the Roy Zenere case, an owner should think twice about withholding payments that it knows are due because it might end up paying a lien claimants' attorneys' fees if the failure to pay is without good reason.

Section 17 of the Lien Act works both ways – it also provides that a lien claimant who wrongfully asserts or unjustifiably overstates a claim risks having to pay the owner's attorneys' fees. In another recent case, the appellate court decided that property owners were entitled to recover their attorney fees for defending a mechanics lien claim that was brought without just cause or right. In *Father & Sons*

Home Improvement II, Inc. v. Stuart, 2016 IL App (1st) 143666, 52 N.E.3d 581, a contractor recorded a lien claim eight months before completing construction, which claimed that all of the work required by the contract was completed and that the claimant was owed \$46,200. Though it is permissible to file a lien claim before the work is complete, it is not permissible to assert that the work is complete when, in fact, it is not even close to complete. The court held that the claimant's misrepresentation was sufficient to prove constructive fraud. Thus, not only was the entire lien unenforceable, but the lien claimant was ordered to pay the attorneys' fees incurred by the owner who had to defend the fraudulent claim. The trial

court found several false statements were made by the lien claimant and the appellate court held that the trial court's imposition of attorneys' fees was justified.

These two cases demonstrate that under the right circumstances, a lien claimant or an owner may recover attorney fees in connection with a mechanics lien case if there is bad faith conduct involved. In light of these cases, owners would be well served to pay any undisputed amounts owed to lien claimants, even where there are separate amounts that are legitimately disputed. On the other hand, lien claimants must be careful to assert only those amounts in a lien claim that are supported by a good faith belief that they are entitled to payment. ❀

Dispelling the Myths *continued from page 5*

Pool is shouldered by the Contractor, the Designer and selected trade contractors, with the ultimate risk shouldered by the Owner once the Risk Pool is exhausted. Consequently, the motivation to reach completion of the Project within the Target is theoretically more aligned from the trade contractor level through Ownership with IPD, than other more traditional methods of Project delivery.

As with other forms of negotiated rather than hard bid contracts, IPD is based upon a cost plus open book compensation system. Unlike a system based upon a lump sum bid, an Owner managing a cost plus contract requires at least some sophistication in construction accounting in order to appropriately administrate the payment process. Given the selection of the construction team early in the design process, the competitive method of construction procurement which is available for traditional lump sum design build projects is simply not possible with IPD. This barrier to traditional competitive procurement

can present a challenge to public projects, although recent statutory changes which allow alternative delivery methods, allow for competitive procurement based upon value rather than cost. It is also noted that in many cases, public agencies are relatively more sophisticated than private entities in auditing and reviewing design and construction costs, and will be in the best position to take advantage of an open book project delivery system as new statutes and regulations increase the flexibility of public project procurement.

IPD benefits of continuous cost validation and close integration of all project participants throughout the design and construction process could realize significant advantages on a complex project. This is particularly true in projects with significant programming requirements where the needs of the Owner are complex and are not fully defined prior to the design process. However, the benefits of IPD may be less apparent for a cookie cutter type of improvement which has few

surprises and where relatively accurate estimation is possible based upon a schematic design. Given the cost of administrating an IPD project versus a traditional delivery method, the value of IPD might be questioned for cookie cutter projects that require little owner input. Consequently, the comparative popularity of IPD on complex healthcare facilities is not a surprise.

LCP is process oriented and can be successfully implemented to some extent regardless of the project delivery method involved. LCP can involve participants from the subcontractor's field personnel to project executives. In contrast to LCP, IPD is a project delivery method that when weighed against other project delivery methods can provide benefits, when implemented on certain types of projects such as complex or challenging projects, procured on a negotiated basis. IPD contract forms like other construction contracts are specific to risk, obligations and compensation rather than the processes used by individuals and teams during design and construction. ❀



Louis Giordano

Executive Vice President,
IMSCA

Governor Rauner vs. AFSCME Local 31

We have talked for nearly two years about the lack of an approved budget and the overall dysfunction that exists in the state of Illinois. Governor Rauner and the legislative leaders simply can't come to an agreement on ways to balance the state's budget for a myriad of reasons – but one of the major issues also playing a role in budget talks is the contract negotiations between Governor Rauner and the American Federation of State, County and Municipal Employees (AFSCME) Local 31. AFSCME is the largest and fastest growing public employee union in the nation – and Governor Rauner wants to rein them in.

The state has operated without an approved full year budget since Rauner was elected to office. Even in the absence of an approved budget, AFSCME successfully sought a court order requiring the state to continue paying state employee's salaries – which in no doubt created additional difficulty for the state in dealing with the state's ever growing backlog of unpaid bills.

Just last month, the Illinois Labor Relations Board (ILRB) issued an opinion that contract negotiations between the state and AFSCME were at an impasse. This ruling allowed the Rauner administration to impose its "best and final" contract terms to the union. Since the ruling, Governor Rauner imposed contract terms including the beginning of a merit raise system, and drug testing of employees suspected of working impaired. In response to the ILRB's opinion and Rauner's imposed contract terms – AFSCME went back to court filing a lawsuit against the Rauner administration contending

the contract terms could not be imposed until the ILRB ruling was submitted in writing. Again, AFSCME was successful in court and a temporary restraining order was issued blocking the Rauner administration from imposing contract terms on the union. The judge's opinion said these actions violated an agreement between the state and AFSCME have in place while a new contract is negotiated. AFSCME has filed a "petition for review" of the ILRB opinion with an appeals court based in Cook County. A date for a hearing on that case has not been set.

The lack of a contract between the state and AFSCME has a direct impact on budget negotiations between Governor Rauner and the legislative leaders. The leaders have been meeting on a regular basis to discuss the remaining FY 17 budget to no avail. Last week, Speaker Madigan stated he wants the group to discuss the AFSCME negotiations as part of their budget talks. Senate President Cullerton echoed those comments and urged Governor Rauner to come to an agreement with the union because once that issue is taken care of, it will make a pension reform agreement that much easier.

If the two sides aren't able to come to an agreement soon – it's possible the union will strike and we'll experience a government shutdown if employees choose to stay home. Governor Rauner contends his contract terms are common sense solutions that will help ease our budget deficit pain. AFSCME doesn't see it that way – but the unfortunate reality is their inability to negotiate a contract is adding another layer to the budget impasse that isn't beneficial to anyone. ❁