

June 2017



Substance

Illinois Mechanical & Specialty Contractors Association





Ya Wanna Make Somethin' Out Of It?

Dave Nelson,
IMSCA President

Perhaps you remember that phrase from the playground when you were in school. As we mature, or grow older, whichever you prefer, this means something entirely different.

For the most part, my answer is yes, and I'll bet yours is the same. Our families, our careers and our goals are always on our mind to make "somethin out of it". This is not something we can do on our own, it's a team project. We not only need assistance but input as well. This is the point of this short story, "Ya Wanna Make Somethin Out Of It", and I'm talking about IMSCA.

Let's first look at input. It would be a complete travesty if we didn't mention Louie Giordano on this list. We just celebrated his retirement after 30 years of input and assistance on behalf of IMSCA. His input and assistance with our goals have been one of our greatest assets. His willingness to stay on as consultant and aide to Jessica shows his dedication to our programs. We look forward to many accomplishments with Jessica in the future.

I know many of you just have a passing understanding of the function of IMSCA, but let me assure you that this is a group of people doing the best for you and your business. Your input to your needs is very important. When you express your ideas through your local association it ends up with the IMSCA board. I promise you

we will work on your behalf and get you answers to your questions.

Your individual input to your state legislator is important also. Get to know them, call them, stop in and introduce yourself. If they do something you approve of let them know. As strange as it may seem, a thank you note will go a long way. Positive input has a great impact.

Let's take a look at assistance as far as our common goals go. I know everyone does not want to serve on an IMSCA committee. It would be foolish to think so but those of us that do, want to assist you. Here are some things we want to offer.

We want positive legislation to enhance our business success possibilities. Items like Workers Compensation Reform, Reduce Retainage, Prompt Payment and Separate Prime Contracts are just a few. We may ask you from time to time to contact your legislator to support our position. Legislators do listen to your input.

If your association needs assistance in understanding our mission, let us know. We may be able to come to your meeting to let them know what we do and just where their dues contribution is going.

IMSCA really wants to "Make Somethin Out Of It". Your help with input, ideas, and assistance with our programs can and will make a difference. We hope to serve you and work together to improve the construction industry. ✨

contents



2 FEATURED STORY

The IL Prevailing Wage Controversy
- Josh Weger



4 MARGERY NEWMAN

False Claims and Whistleblowers



6 KEN CRIPE

"Pay-If-Paid" and "Pay-When-Paid"



10 JESSICA NEWBOLD

Spring 2017 Legislative Update



12 LOUIS GIORDANO

A Thank You from your Exec. VP

*Legislative
Representation
for over 2,000
Construction
Employers*



MSCA
Illinois Mechanical & Specialty Contractors Association



The Illinois Prevailing Wage Controversy

Josh Weger leads the Foundation's policy development, strategic planning, and research and analysis. Prior to joining the Foundation, he served as Deputy Director of the Illinois Capital Development Board. He has also held several positions with the Illinois Department of Commerce & Economic Opportunity, served with the Office of the Illinois Auditor General, and spent two years with the Illinois House of Representatives. He has a bachelor's in Economics and a master's in Political Science, both from the University of Illinois Springfield.

Prevailing wage laws, which establish minimum wages for construction work on public projects, are vitally important because they ensure workers are paid local market wage rates that help them reach a decent standard of living (especially veterans, who work in construction at higher rates than non-veterans). Prevailing wage laws also help contractors by making wage rates uniform, taking labor costs out of the equation as they formulate their bids. Taxpayers benefit from prevailing wage laws as well because they get the highest quality construction from responsible contractors and properly trained workers.

Throughout his term in office, Gov. Bruce Rauner has repeatedly conveyed his desire to erode the Illinois Prevailing Wage Act. The Rauner administration has made various political, legislative, and administrative attempts to undermine the law over the last two and a half years. Administratively, its main strategy has been the Illinois Department of Labor's efforts to shroud the law with obfuscation instead of enforcing it properly.

The Illinois Prevailing Wage Act re-

quires IDOL to "investigate and ascertain" prevailing wage rates for all construction crafts in each county in the state annually in June and publicly post the rates. For many years, IDOL has posted the rates on its website on a monthly basis, going above the minimum required by statute.

The process went smoothly the first year of the Rauner administration, with contractor and labor associations following the well-established practice of submitting data, documents and wage certifications to IDOL in June to evidence the wages they pay to different construction crafts. It is common knowledge that collectively bargained wage rates have long prevailed on public

"The sweeping changes IDOL made to the prevailing wage survey program created mass confusion and chaos throughout the industry."

construction throughout Illinois, and 2015 was no different. The rates certified by IDOL were overwhelmingly rates which had been collectively bargained in local markets.

In the months that followed, there were rumors that the new political appointees in charge at IDOL were plotting chang-



es to the Department's wage survey program with the goal of slashing the rates. My organization submitted several Freedom of Information Act requests to IDOL seeking information about the rumored changes, all of which were stonewalled by the Department. Then on June 1, 2016, IDOL shocked the construction industry by imposing sweeping changes to its survey program - with no prior notice, no input from stakeholders, no training, and no transparency. Some examples of the changes included:

- IDOL banned contractor associations from participating in the survey on behalf of their members, which was the practice for decades. IDOL declared that, from now on, only individual contractors and unions will be allowed to submit information. Given that the survey is conducted annually in June (during the fever pitch of construction season), this is a punitive and onerous burden on contractors, most of which are small businesses and have difficulty dealing with impractical bureaucratic demands. This crass move by IDOL also eliminated a key value-added service of construction industry associations.
- IDOL unilaterally abolished all lawfully established prevailing wage classifications and work de-

scriptions and replaced them with standard occupation classifications (SOCs) used by federal statistical agencies. SOCs are duplicative by design and do not reflect the Illinois construction industry. This change forced contractors and unions to prepare a comprehensive submission for every single unique wage rate they pay in every applicable county, then repeat the process for numerous overlapping SOCs. It can be best described as trying to fit hundreds of square pegs into round holes.

- IDOL initially gave participants only three weeks to complete their submissions. Then, when faced with an avalanche of valid complaints, they grudgingly extended the deadline to August 1st.

The sweeping changes IDOL made to the prevailing wage survey program created mass confusion and chaos throughout the industry. Participating in the program became far more difficult, redundant, confusing and time consuming. But despite these challenges, the Illinois construction industry tried to adapt and did its level best to participate in the new program. When IDOL made its radical changes to the program, officials repeatedly claimed that their only goal was to allow the Department to be more efficient and accurate in determining wage rates.

The Prevailing Wage Act provides a 30-day window for anyone affected by a prevailing wage schedule published on IDOL's web site to object to the rates (820 ILCS 130/9). So when IDOL initially posted "2015 prevailing wage rates are still in effect" on its website in July 2016, a number of unions filed requests for a hearing to challenge the posting under Section 9 of the Act. IDOL denied these requests, so the unions sought administrative review in Cook County circuit

court. The unions also asked the court to order IDOL to post 2016 rates.

At a hearing in May 2017, the court ordered IDOL to post 2016 prevailing wage rates by May 26, 2017. IDOL complied with this order by the deadline and posted "Rates effective June 5, 2017." The classifications listed with new rates appear to be consistent with the well-established classifications used by the Department for years, not the SOC codes imposed in the last-minute 2016 survey. In addition, it appears that the Department increased rates, at least to 2016 levels, based on data submitted by various trades in 2016.

On June 1, 2017, the Department emailed contractors and unions to notify them of the 2017 prevailing wage survey. The notification requests that data be submitted electronically by June 30, 2017. It appears that the Department abandoned use of the federal SOC codes in favor of the existing Illinois classifications. This return to Illinois classifications is a significant improvement over last year's process.

Finally, as of May 30, 2017, House Bill 3044 passed both chambers unanimously and will go to the governor to sign or veto. This bill requires the Department to post a prevailing wage schedule on its website no later than August 15 each year. This will prevent the Department from refusing to post rates as they did in 2016. At the time of publication, we do not know whether the governor will sign or veto this bipartisan legislation. ✨

About III-FFC: The Indiana-Illinois-Iowa Foundation for Fair Contracting is a 501c5 nonprofit construction industry organization guided by a board comprised of both labor and management trustees. The Foundation's mission is to increase market share for responsible contractors, work opportunities for skilled craftsmen, and value for taxpayers. The Foundation pursues its mission with a comprehensive program of procurement oversight, market share analysis, jobsite monitoring, legal/regulatory advocacy, and public policy education.



False Claims & Whistleblowers



Margery Newman concentrates her practice in construction law including complex construction litigation in both the private and public sectors, and related business litigation.

Margery's clients are primarily owners, general contractors, specialty trade contractors and disadvantaged business enterprises. She places particular emphasis in client counseling on the drafting and negotiation of construction contracts, mechanics' lien claims and foreclosure actions, construction defects and DBE certification and compliance. Margery is an attorney at Bryce, Downey & Lenkov LLC and can be reached at mnewman@bdlfirm.com or 312.327.0041.

Due to a historical unwillingness to utilize minority and female owned businesses in the construction industry, public bodies in Illinois have instituted diversity programs. These programs are designed to increase the number of minority and female owned businesses in the construction industry. For ease of reference both of these groups will be referred to as Disadvantaged Business Enterprises or DBEs.

In order for a DBE to become certified, it must meet certain requirements. Specifically, a DBE must own at least 51% of its company, manage the day-to-day operations of the company and control the business of the company. It is not, however, sufficient for a DBE to be merely certified in order to avoid certification problems. The certified company must also perform a commercially useful function. A commercially useful function occurs when a DBE is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing and supervising the work involved in its contract.

Recently, a cottage industry has arisen in the construction industry revolving around allegations that certain DBEs are fronts or are not performing commercially useful functions. Specifically, the False Claim Act (FCA) imposes liability on persons and companies who attempt to defraud the public agencies overseeing DBE programs. People who report such fraud may benefit financially. This cottage industry is made up

primarily of current or former disgruntled employees, competitors, or other people who believe they are in possession of information that the DBE is a front or a sham or not performing a commercially useful function.

These people, statutorily referred to as Relators, are commonly known as Whistleblowers.

On the Federal side, the FCA is the government's primary tool in combating fraud because the government is entitled to recover treble damages and civil penalties of not less than \$5,000.00 and not more than \$10,000.00. When individuals make FCA claims, this is called a qui tam action. As of 2012, over 70% of all FCA actions were initiated by Whistleblowers who stand to receive a percentage (up to 30%) of any damages recovered from the fraudulent DBE.

Illinois promotes Whistleblower actions by financially encouraging Whistleblowers. For example, the Relator/Whistleblower in the recent Perdel Construction case received \$2,000,000.00 as part of a \$14,000,000.00 settlement. Perdel Contracting Co. was a certified WBE that specialized in concrete and carpentry. In 2016, Perdel's owner was found guilty of allowing her company to be claimed as a subcontractor on two City of Chicago construction projects without actually performing any work. The owner's activities were uncovered following a 2008 Whistleblower lawsuit brought under the False Claims Act by a former Perdel project manager.

In 2014, Jesse Brunte, owner of Brunte



continued on page 9



“Pay-If-Paid” & “Pay-When-Paid” Subcontracts

Who Bears the Risk When the Owner Fails to Pay?

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

When a Project Owner goes insolvent prior to paying the General Contractor for completed work, is the General Contractor still legally obligated to pay its Subcontractor for work the General Contractor never received Owner payment for? Prudent contractors and subcontractors should analyze who bears the risk of Owner non-payment because the answer depends on whether the Subcontract is "Pay-if-Paid" or "Pay-When-Paid" and the determination of which type of Subcontract applies is not always easy.

"Pay-if-Paid" Subcontracts require Owner payment to the General Contractor as a condition precedent to the General Contractor's obligation to make payment to the Subcontractor. "Pay-When-Paid" Subcontracts address the timing of payment, but do not excuse the General Contractor from the obligation to pay the Subcontractor in the event that the Owner fails to pay the General Contractor.

Unfortunately, whether a Subcontract is "Pay-if-Paid" or "Pay-When-Paid" is not always clear, and often the subject of litigation. As stated by the appellate court in the recent case of *Beal Bank Nevada v. Northshore Center THC, LLC*, 2016 Ill. App. LEXIS 672 (1st Dist. 2016) when discussing whether contracts are "Pay-if-Paid" or "Pay-

When-Paid", "... there are no 'magic words,' and we consider the determination of the contracting parties' intent from the clear and ordinary language contained within the subcontract as requiring case-by-case analysis."

In the seminal case of *A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corp.*, 132 Ill. App. 3d 325 (1st Dist. 1985) the Court examined the following two Subcontract provisions:

"ARTICLE 5: Material invoices submitted before the 25th of the current month will be paid by the 28th of the following month, provided the material so delivered is acceptable, **and if payment for invoiced material has been received by [the Contractor] under its general contract.**"***

ARTICLE 18: * * * [I]f the work has been satisfactorily performed and invoice as rendered is approved **and if payment for such labor and material so invoiced has been received by Campbell-Lowrie-Lautermilch Corporation under its general contract, the subcontractor will be paid 85% of invoice as approved, less any payments previously made on account for previous periods.**" (Emphasis added.)

After review, the appellate court affirmed the trial court holding that the above quoted Subcontract paragraphs 15 and 18 were clear and unambiguous, requiring the Owner payment to the General Contractor as a condition precedent to the General Contractor payment obligation to the Subcontractor. In other words, the Subcontract was "Pay-if-Paid" (contingent upon the General Contractor receiving payment from the



Owner under the general contract).

Recently, the trial court in *Beal Bank Nevada v. Northshore Center* decided that a Subcontractor was not entitled to Subcontract payment from a General Contractor after the Owner failed to pay General Contractor because (the above discussed) Conte case "is controlling on the instant case," and the Conte payment terms were "nearly identical to the provision in the Subcontract at issue in the case at bar." The Subcontract provisions in the *Beal Bank Nevada* Subcontract included:

"[5.1] Provided Subcontractor's rate of progress and general performance are satisfactory to the Contractor, and provided that the Subcontractor is in full compliance with each and every provision of the Subcontract Documents, the Contractor will

make partial payments to the Subcontractor in an amount equal to 90 percent of the estimated value of work and materials incorporated in the construction and an amount equal to 90 percent of the materials delivered to and suitably and properly stored by the Subcontractor at the Project site, to the extent of Subcontractor's interest in the amounts allowed thereon and paid to Contractor by the Owner, less the aggregate of previous payments, within five (5) days of receipt thereof from the Owner.***

[5.2] Final payment will be made within thirty (30) days after the work called for hereunder has been completed by the Subcontractor to the satisfaction of the Owner and the Contractor and the Contractor has received from the

Owner written acceptance thereof together with payment in full for this portion of the work[.]***

In other words, the trial court held that the Subcontract, based upon the Subcontract payment clauses similar to Conte, was "Paid-If-Paid" requiring payment by Owner to the General Contractor as a condition precedent to the General Contractor's obligation to pay the Subcontractor.

The Subcontractor appealed and the appellate court reversed, finding there was no condition precedent of Owner payment to the General Contractor (the Subcontract was "Pay-When-Paid", requiring the General Contractor to pay the Subcontractor despite the fact that the Owner failed to pay the General Contractor).

The appellate court found Section

C of the parties' Subcontract relevant, which provided that "[the] Contractor agrees to pay the Subcontractor for the full faithful and complete performance of this Subcontract the sum of [Subcontract Amount] subject to additions and deductions for changes agreed upon in writing signed by [General Contractor] or determined as hereinafter set forth, **and further agrees** to make all partial and final payments on account thereof solely in accordance with the terms and provisions of the Subcontract Documents including, but without restriction thereto, the provisions of Section D, Article 5 of this Subcontract." (Emphasis added).

The appellate court held that the use of the "**and further agrees**" language created two separate obligations of the General Contractor: (1) to pay the Subcontractor for "full, faithful and complete performance" and (2) to make "partial and final payments on account thereof solely in accordance with the subcontract documents, including Article 5 of the Subcontract."

Based on the appellate court's interpretation, Sections 5.1 and 5.2 of the Subcontract addressed amounts and timing of payments, but not the fundamental requirement that the General Contractor pay the Subcontractor. The appellate court held, therefore, that the General Contractor was obligated to pay the Subcontractor despite the Owner's failure to pay the General Contractor.

Because determination of whether Subcontract payment terms are "Pay-If-Paid" or "Pay-When-Paid" requires an analysis of the contracting parties' intent from the clear and ordinary language contained within the subcontract and case-by-case analysis, it is wise for both contractors and subcontractors to review your subcontract forms and understand which party bears the risk of owner failure to pay for work performed. ❀



Jessica Newbold
IMSCA Legislative
Consultant



Spring 2017 Legislative Update

For the third session in a row, Illinois lawmakers left Springfield without passing a state budget. Just like previous years, Speaker Madigan announced the House will remain in “continuous session” to work toward an agreement on a spending and revenue plan through June. The House’s first budget hearing is scheduled for June 8th in Chicago. By going beyond the May 31st deadline, the already difficult task of finding enough votes to support a tax increase and massive spending cuts needed to balance the budget will become even more difficult. After May 31st, a three-fifths majority is required; which translates to 6 more votes in the Senate and 11 more votes in the House.

The Senate kept the proposed “grand bargain” alive throughout session and passed portions of it on to the House. Senate Democrats approved a \$37.3 billion spending plan they argued matched the spending plan outlined by Governor Rauner in his February budget address. The Senate also approved \$5.4 billion in higher taxes to help balance the budget which included raising the income tax rate and extending the sales tax to certain services. These revenue streams were included in **SB 9** – where the construction industry successfully removed the inclusion of the sales tax on home repair and maintenance. Despite passage of these measures in the Senate, House Democrats were reluctant to embrace the spending plan because Governor Rauner

stated he would veto the package if it reached his desk – and they lack enough votes to override a veto on their own.

The reason for the legislature’s failure to pass a budget remains the same. Governor Rauner and Speaker Madigan refuse to negotiate with each other to put an end to the crippling budget impasse. Instead, both men continue to throw accusations at each other. Governor Rauner continues his demands that an approved spending plan must contain structural changes that include pension reform, workers compensation reform, and tax reforms – among others. Speaker Madigan argues the House did attempt to meet the Governor halfway by approving measures to streamline the state’s procurement process (**SB 8**), local government consolidation (**SB 3**), education funding reform (**SB 1**) and legislation allowing the state to sell the Thompson Center. Governor Rauner’s response was these measures accomplish nothing more than creating good headlines and soundbites to keep the Democratic majority intact. Speaker Madigan stated the Governor simply doesn’t know how to accept a “win”. Governor Rauner has also warned he will not sign another stopgap budget, which many believe is what will be presented sometime in June before the new fiscal year begins on July 1st.

At the end of the day, the failure of the Illinois General Assembly to work together

is resulting in devastation to citizens and businesses throughout the state. Many segments of our society are being put at risk including schools, those who need access to social services, senior citizens and those who are losing their jobs as a direct result of the budget impasse. The state's backlog of unpaid bills grows by the day, and bond agencies continue to downgrade our bond rating. This has to stop – and we can only hope the Governor, the Speaker and lawmakers recognize this sooner rather than later. In addition to monitoring movement in the ongoing budget impasse, IMSCA also introduced legislation seeking retainage reform – **SB 1832 (Sen. Mulroe)**. Our initiative would have required retainage on construction contracts of more than 5% be placed in a construction trust fund. IMSCA staff worked with our opponents from the Illinois Bankers Association, Illinois REALTORS®, Illinois Credit Union League, Community Bankers Association and the Illinois Land Title Association to discuss our positions. Unfortunately, we were unable to come to an agreement that would allow the bill to move forward this year.

Spring session was peppered with many legislative themes including: employer paid family/sick leave, equal pay, procurement reform, performance contracting and expansion of the design build construction model.

FAMILY LEAVE AND SICK LEAVE **SB 1296/HB 2771**

(Sen. Hutchinson/Rep. Mitchell)

HB 2771 and SB 1296 sought to create the “Healthy Workplace Act” and would require employers to provide paid sick leave to their employees – both full and part time. There was a wide business industry coalition of opponents to this legislation, including IMSCA. Despite calls from the opposition, HB 2771 remains in the House on concurrence vote.

SB 1721 (Sen. Biss)

SB 1721 sought to create the

Family Leave Insurance Act. If passed, this legislation would allow employees to take up to 12 weeks of paid family leave within any 24 month period. This legislation was assigned to the Senate Labor Committee – but was not advanced. IMSCA opposed this initiative.

EQUAL PAY

HB 2462 (Rep. Moeller/Sen. Biss)

HB 2462 will prohibit an employer from screening job applicants based on their wage or salary history. It also prohibits employers from seeking the salary history of job applicants from previous employers. Like previously mentioned legislation, this bill also received opposition from the business community. Despite the long list of opponents, this bill passed both chambers.

HB 3539 (Rep.

Halpin/Sen. Biss)

HB 3539 sought to amend the Illinois Procurement Code to require bidders, including contractors, to obtain an Equal Pay Certificate from the Department of Employment Security before a contract could be issued. The Equal Pay certificates would cost bidders \$150 to obtain. IMSCA argued contractors shouldn't be required to spend money to enter into a contract with the state. Further, IMSCA believed the Equal Pay certificates would be another avenue for bids to be thrown out for missing paperwork. IMSCA requested the bill be amended to exclude contractors who are signatories of a bona fide collective bargaining agreement. The bill wasn't amended and was held on third reading in the Senate.

HB 3744 (Rep. Conyears- Ervin/Sen. Hunter)

HB 3744 sought to amend the Illinois

Procurement Code to require at least 10% of man hours performing construction services be performed by individuals who reside in areas of poverty. If passed, HB 3744 would have created an additional costly administrative burden for contractors and subcontractors. IMSCA opposed this legislation. This bill was held on third reading in the Senate.

PROCUREMENT REFORM

SB 8 (Sen. Harmon/Rep. Riley)

SB 8 cleans up some of the inconsistencies among the procurement portfolios, decreases time periods for reviewing/approving bids and increases the small purchase threshold from \$10,000.00 to \$100,000.00. The point of contention for the construction industry was the inclusion of language that would debar contractors from bidding on



state construction projects for 10 years for any violation of the procurement code. These violations could have been as simple as missing paperwork or a lapsed registration. Members of the construction industry felt this language was extremely strong and were successful in getting it removed from the bill. This legislation passed both chambers.

PERFORMANCE CONTRACTING

HB 2582/SB 950 (Rep. Pritchard/

Sen. Althoff) sought to amend the Illinois Procurement Code to allow the Department of Central Management Services (CMS) and the

Spring 2017 Legislative Update

continued from page 8

Capital Development Board (CDB) to enter into energy performance contracts for 20 years. Construction industry representatives, including IMSCA, met with CMS staff to discuss our concerns. The interested parties worked toward an agreed amendment that included a 15 year limit to the contract term – which wasn't advanced. However, **SB 41 (Sen Cullerton/Rep. Currie)** was amended, and includes our agreed language of a 15 year term limit and also provides a definition of "energy savings contracts". **SB 41** passed both chambers.

SB 1287 (Sen. Mulroe)

SB 1287 amends the School Construction Code and seeks to reform energy performance contracting as it pertains to school construction. This proposal was met with opposition from performance contracting companies, the Illinois Association of School Boards and the Sierra Club. SB 1287 was held on second reading.

DESIGN BUILD

In addition to energy performance contracting legislation, there was also an interest in expanding the use of design build. Representative Jones sponsored **HB 3289** which sought to expand the use of the design build delivery model to local school districts, which raised many concerns for the design and construction industry. HB 3289 wasn't advanced this session. **HB 2755 (Rep. Evans)** sought to allow the Department of Transportation to use the design build delivery method – but under a completely different model used by other state agencies such as the Capital Development Board (CDB). IMSCA opposed HB 2755 which did not advance this session. A similar bill, **SB 1320 (Sen. Sandoval/Rep. Evans)** passed the Senate but didn't advance in the House.

Finally, **SB 262 (Sen. Clayborne/Rep. Davis)** was aimed at the telecommunication industry to ensure BEP diversity goals are met by their

industry. A point of concern for IMSCA was the inclusion of language that would have reduced the recently passed cure period from 10 days to 5 days to address these BEP program bid deficiencies. The construction industry successfully negotiated a 10 day cure period with Senator Clayborne in 2015. We felt our previous agreement was made in good faith, and requested SB 262 be amended to restore the 10 day cure period. SB 262 was amended to include our changes and passed both chambers.

Your IMSCA lobbying team would like to thank all of our IMSCA members for your support and assistance this legislative session. We called on many of you for your expertise and opinions on many of these proposals, and also depended on your participation in our Calls to Action. Your support and interest is appreciated. We will continue to provide legislative updates as the Illinois General Assembly remains in "continued session". ❀

False Claims & Whistleblowers

continued from page 4

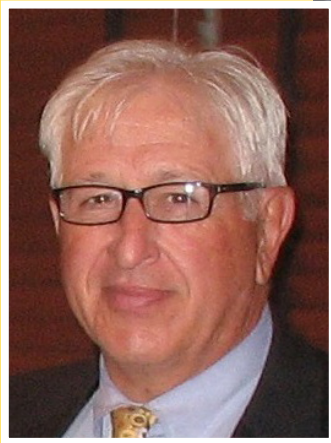
Brothers Transfer, Inc., was sentenced to 17 months in jail in connection with a scheme to defraud the City of Chicago's MWBE program. Brunte Brothers Transfer, Inc. was a certified MBE. Brunte supposedly used his company as a minority past through for sewer cleaning and videotaping service contracts for the City of Chicago. Although this case was initiated by the Office of the Inspector General and conducted with the Federal Bureau of Investigation, Mr. Brunte was still indicted for fraud. It was determined that although Brunte Brothers was supposed to be cleaning and

videotaping City of Chicago sewers, it did not actually perform the work specified in the contract. Therefore, it was determined that Brunte Brothers was not performing a commercially full function because its work was actually being performed by a non-minority company. Mr. Brunte pleaded guilty to the charged scheme and along with the prison sentence was ordered to pay \$533,749.00 in restitution.

As a final note, it must be stressed that simply using a certified DBE on a project does not prevent a False Claims Act lawsuit if the DBE is not performing a commercially useful

function. It is no longer sufficient to merely show that a DBE is being used to meet specific diversity goals on a construction project. The DBE must also perform a commercially useful function or the company, and any upstream contractor employing that company, could very easily find itself on the front pages of the local newspaper. ❀

The author wishes to acknowledge that part of this discussion will be published in the upcoming 2017 edition of Construction Law: Transactional Considerations (IICLE®).



Louis Giordano

Executive Vice President,
IMSCA

A “Thank You” from your Executive Vice President – Louie Giordano

It has been a pleasure and a privilege to serve as IMSCA Executive Vice President for thirty years. As I reflect on my time in this position, I want to thank IMSCA members for their support and friendship over the years. I have forged relationships and created memories with many of you that I will cherish always.

Over the past thirty years, IMSCA accomplished a great deal and tackled many important issues on behalf of Illinois subcontractors. Our list of accomplishments include, overturning an Illinois Supreme Court ruling – Cypress Creek. This was an uphill battle for us and many believed we wouldn't be successful. Despite the odds against us, we forged on and got the job done. IMSCA's success can be attributed to not only our hard work – but also for consistently communicating our positions to legislators with honesty and integrity. At the end of the day, the only thing you have is your word. During our negotiations with legislators on Cypress Creek, I was told “I will support you because you have never been dishonest with me”. It is that type of service I have been honored to provide to IMSCA so that we can be successful on issues that matter to our members.

Another accomplishment I am particularly proud of is securing the construction industry's ability to participate in workers compensation negotiations. Workers compensation has traditionally been negotiated through the “agreed bill

process” where those at the table included the Illinois Retail Merchants Association and the Illinois Manufacturers Association. It never occurred to anyone that workers compensation is very important to the construction industry as well. I am proud that IMSCA has been given a seat at the table for these discussions.

I can't stress enough the importance of contractor involvement in accomplishing IMSCA's legislative goals. I implore each of our association members to continuously encourage your member contractors to engage in the legislative process. The involvement of individual contractors is the most important activity in assuring IMSCA remains legislatively successful. Please encourage contractors to meet their elected officials. This can be done by attending a fundraiser, community event, or simply scheduling a meeting in their office. Legislators listen to feedback from their constituents – and this involvement is crucial to IMSCA's continued success.

It is bittersweet for me to announce that while my health is improving, it is time for me to retire. Thirty years passed very quickly and it is my honor to have spent those years serving IMSCA. I am confident that IMSCA's reputation will continue to precede itself and IMSCA will continue to remain a successful legislative force representing the subcontracting industry. Thank you again – to all of you. ❀