



SUBSTANCE

ILLINOIS MECHANICAL & SPECIALTY CONTRACTORS ASSOCIATION

SUMMER 2023



IMSCA PRESIDENT

WHATEVER IT TAKES: IMSCA LOBBY DAY 2023 MADE AN IMPACT!



S.J. Peters, IMSCA President

The work, mission and impact of IMSCA was fully displayed at our 2023 Lobby Day in Springfield on April 26. Not a moment was wasted as virtually every member segment of the Illinois signatory construction industry converged on our State Capitol for a packed day of discussion, information and advocating for legislative goals beneficial to our IMSCA affiliates. Making the event even more substantial was the fact that ICIC concurrently met and lobbied (by design, on purpose) on pertinent topics, followed later by our jointly hosted legislative reception.

With an abundant and strategically planned schedule, the business portion

of the IMSCA meeting was admittedly (and deliberately) brief and to the point. Though unintentional, I apparently may have set a record for one of the fastest executed meetings led by an IMSCA President. However, Executive Director Jessica Newbold Hoselton's subsequent thorough and insightful explanations of all significant House and Senate Bills, in my view, provided precisely the proper preparation our "delegations" of IMSCA lobbyists needed and utilized for their visits with the state legislators.

The tone for our tasks at hand was ably set during the luncheon by our guest speaker, Patrick Pfingsten with his aptly titled presentation: "Breaking Through the Noise of Illinois Politics." The founder of Pf Communications and publisher of the frank and colorful daily political report known as Illinoize provided a wide and interesting array of perspectives and analyses of the comings and goings (and the goings-on) across Illinois and in our large metropolitan areas (mainly Chicago!). Pfingsten fielded audience questions and comments throughout, resulting in a compelling and perceptive exploration of our state's unique blend of politics and people who make it all happen.

A basic rule for success in lobbying (I've been told) is to keep the message clear and avoid the clutter of an overabundance of topics. We were in an ideal position to adhere to that principle. SB 133 with the goal of modifying Retainage on public construction projects was our focal point. Thanks to materials developed by Jessica, providing an explanation and especially citing the example of IMSCA's success getting the Private Retainage legislation passed a few

years back made for solid reasoning why it makes sense and how freeing up funding can facilitate more work.

An early highlight was our meeting with Senator David Koehler (D-Peoria), whose constituent was in PCA's delegation – new IMSCA officer Tammy Rich Stimson (GA Rich & Sons). Koehler's conversation with us prompted him to offer becoming a co-sponsor, and he kept his word the next day. He even took a photo with our group for his social media channels. As was the case for many of us, we made efforts to meet with both House and Senate representatives. If unavailable, we spoke with staff members and left materials and business cards for further follow-up. Reports from fellow IMSCA lobbyists were favorable. The afternoon was deemed by most as very worthwhile.

The closing reception co-hosted by IMSCA and ICIC welcomed dozens of legislators, as well as VIPs and key staff. As a bonus, Lt. Governor Juliana Stratton made a special appearance, and mingled with our members and posed for photos. Conversations about SB 133 and other legislative initiatives continued throughout the social event, and (a good sign) a number of honored guests and IMSCA members lingered for a period of time after the reception had officially ended.

In closing, our thanks to everyone who attended and supported IMSCA's 2023 Lobby Day through their participation, generous sponsorships, and willingness to promote our legislative goals with the elected officials and their support staff. Well done! We look forward to next year.



Lobby Day for IMSCA members involved visiting legislators from the Illinois General Assembly on the afternoon of 4/26/23. From left: IMSCA Board Member and IL PHCC & PCA contractor Tammy Rich Stimson (GA Rich & Sons); PCA Executive Director & current IMSCA President S.J. Peters; CISCO Communications Director Jennifer Rice; SMACNA Greater Chicago Executive VP Tony Adolfs; PCA Second VP Rick Kuhn (RJ Kuhn Plumbing & Heating); and PCA First VP Kelly Castrogiovanni (Terry Plumbing Co.)

EXECUTIVE DIRECTOR



As IMSCA's Executive Director, **Jessica Newbold Hoselton** manages the day-to-day operations of IMSCA and serves as the association's chief lobbyist. Jessica represents the interests of the sub-contracting industry at the Illinois state capitol by monitoring and taking action on legislation that impacts the Illinois construction industry. Jessica received her B.A. in Political Science from Southern Illinois

University-Carbondale, and her M.A. in Public Policy & Administration from Purdue University.

SPECIAL COUNSEL



James T. Rohlfsing is a partner in the national law firm of Saul Ewing Arnstein & Lehr, and a member of the firm's Construction Practice Group and Litigation Practice Group. Mr. Rohlfsing represents subcontractors and other participants in the construction industry. He is editor of Illinois Construction Law Manual, a treatise published by Thomson Reuters. Mr. Rohlfsing is the current general counsel as

well as the past president of the Illinois Mechanical & Specialty Contractor's Association (IMSCA), the largest organization for subcontractors in Illinois. He is an active member of the ABA Construction Forum, the Society of Illinois Construction Attorneys (SOICA), the Chicago Bar Association's Construction Law committee, and the Association of Subcontractors and Affiliates in Chicago. He has drafted and assisted in passing Illinois legislation critical to the construction industry and he has testified on numerous occasions on construction law issues before committees of the Illinois Legislature.

PRESIDENT



S.J. Peters has served as Executive Director of the PCA of Greater Chicago (Plumbing Contractors Association) covering 17 counties in and around Chicago since 2006. He is a Trustee on the Plumbers Local 130 UA Pension & Welfare Trust Funds in Northern Illinois. Peters previously spent 15 years as VP/Communications Director for the United Food & Commercial Workers Intl. Union (UFCW Locals 881 & 1546) in

Chicagoland. S.J. is a Board Trustee for the UAC (Union Affiliated Contractors of the National Plumbing-Heating-Cooling Contractors - PHCC); and an Officer (Secretary) for CISCO (Construction Industry Service Corporation). He also spent a decade on the board of the Plumbing Contractors of America - an enhanced service division of the MCAA (Mechanical Contractors Association of America). A graduate of Loyola University and an Illinois native raised in Brookfield, S.J.'s career began in mass communications. After working on-air at major market radio stations, he next served for 2 years as Communications Director for the Central Educational Network (PBS-Midwest Region).

VICE PRESIDENT



Karsten Pawlik is Vice President of Operations at Alpine Demolition Services, LLC (Alpine), a position he has held for the past 20 years. Alpine is a selective, structural and infrastructure demolition company serving primarily the Chicagoland Area. Karsten has degrees in Civil Engineering from the University of Florida and a MBA from Northern Illinois University. Karsten is past president at ASA

Chicago, former board member of Fox Valley AGC and a current board member at the National Demolition Association.

TREASURER



Todd Byxbe is the Vice President of Miller Engineering Company located in Rockford, IL where he has been employed for nearly 30 years. Todd serves on the Board of Directors for the Sheet Metal and Air Conditioning Contractors National Association (SMACNA National). In addition, Todd serves as SMACNA National Midwest Political Liaison where he is responsible for

meeting with US Senators and Representatives to achieve continued growth for the construction industry and the advancement and influence of SMACNA.

SECRETARY



Tammy Rich Stimson loves being a part of a 2nd generation family-owned business. Over her 27-year tenure at G.A. Rich & Sons, Inc., Tammy has been presented with many opportunities to grow both in the business and in leadership roles with the Illinois Plumbing Heating Cooling Contractors (ILPHCC). Tammy started her career as an assistant project manager/estimator and bid runner.

Over the years, she has worn many hats and held various positions such as Safety Director, Lead Estimator, and Chief Financial Officer; currently serving as the President of G.A. Rich & Sons, Inc. Working in a family-owned business has allowed her to be involved in PHCC at the local, state & national levels, including serving as Illinois' first woman president. Her service to the industry earned her the Larry Dore Member of the Year Award in 2011. Tammy also has a passion for serving others and does so through various organizations in her community. Her commitment to community service earned her the 25 Women in Leadership Award in 2013.

LEGISLATIVE REPRESENTATION FOR OVER 2,000 CONSTRUCTION EMPLOYERS

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IMSCA

Illinois Mechanical & Specialty Contractors Association

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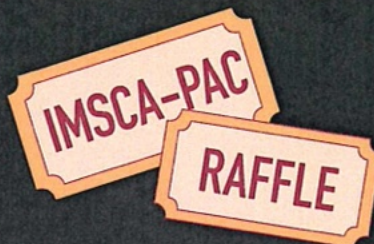
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ILLINOIS LEGISLATURE PASSES RESTRICTION ON RETAINAGE FOR PUBLIC JOBS

- By James T. Rohlfing

On May 25, 2023, the Illinois legislature passed HB 2878, a colossal 195-page bill, that impacts numerous public procurement laws, including curbing the percentage of retainage that local governments may withhold from contractors on public construction projects in Illinois. On June 22, 2023, the bill was set to Governor Pritzker and, if signed by the governor, will become law January 1, 2024. The new restrictions on retainage were only a portion of the changes to the Public Construction Bond Act (30 ILCS 550/1), the law requiring the state of Illinois, as well as all Illinois counties, and local governments to obtain a surety bond from every contractor who performs work for them, guaranteeing the contract is fully performed and that the subcontractors and laborers who perform the work are paid.

“Only local governments will be subject to the new restrictions.”

Under the new law, retainage on public works: i) could not exceed ten percent (10%) for the first half of the contract; ii) must be reduced to five percent (5%) when the project is half complete; and iii) may not exceed five percent (5%) for all payments thereafter. These restrictions apply to retainage held from prime contractors, as well as retainage withheld from first and second tier subcontractors on public projects. So, for payments made during the first half of a project by the public entity, the prime contractor and the first tier subcontractor, retainage of up to 10% of the payment may be held, but once the contract is fifty percent complete, retainage in excess of 5% of the balance of work completed must be paid to the contractor, and no more than 5% may be withheld from the remaining payments due under the contract. Only

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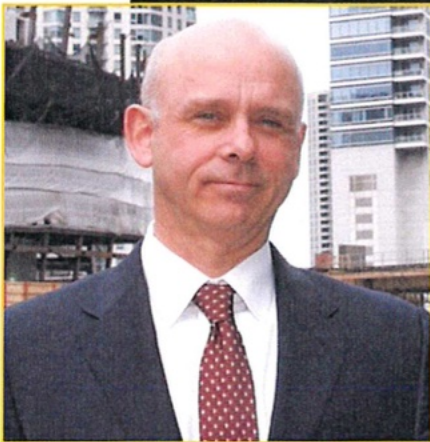
local governments will be subject to the new restrictions. Local governments include “... every county, township, municipality, municipal corporation, school district, school board, forest preserve district, park district, fire protection district, sanitary district and all other local governmental units.” 50 ILCS 505/2. Proponents of the measure requested that it only apply to local governments because the Illinois Capital Development Board and some other entities that contract on behalf of the state have been voluntarily holding retainage approximately equal to the restrictions under the new proposed law for many years.

Generally, retainage is the practice of withholding a portion of interim and final payments due for construction work, after a contractor has completed all or a portion of the work, to give the owner additional security that the work will be properly completed. In recent decades, most states have enacted laws limiting the retainage that may be withheld on both public and private construction projects. Proponents of those measures have prevailed with arguments that previous retainage levels were excessive, unnecessarily burdensome to contractors and economically disadvantageous to the construction industry. In fact, in 2019, almost identical retainage restrictions were enacted in Illinois for most private construction projects. The backers of retainage reform on Illinois public works made the additional argument that owners do not need retainage for public jobs, because Illinois law already mandates contractors furnish a surety bond guaranteeing full performance of their contractual obligations. Both HB 2878 and the law that restricted retainage on private projects were initiatives of the Illinois Mechanical & Specialty Contractors Association (“IMSCA”), the largest association of subcontractors in Illinois. IMSCA points out that in the modern construction industry, profit margins are much less

than they were 150 years ago when the practice of retainage was adopted and, therefore, the percent of retainage withheld should also be smaller.

HB 2878 modified the Public Construction Bond Act in additional ways, and because the retainage restrictions under the proposed new law only apply to projects for which a bond is required, understanding when a bond will be required under the soon to be modified Bond Act is essential to knowing when retainage is restricted under the proposed law. For a trial period, until January 1, 2029, the threshold at which a bond is required will be increased from \$50,000 to \$150,000 for all public works, except those let by the Department of Transportation (“IDOT”) and the Illinois State Toll Highway Authority (“ISTHA”), and for those entities the threshold will be \$500,000. On January 1, 2029, the threshold would return to its current level of \$50,000. The law would impose a reporting requirement on IDOT and ISTHA tracking contract defaults, surety bonds, and lien claims, presumably to gather information about projects and the effect of the new law so the legislature will have additional data if it should decide to revisit the threshold requirements and other changes under the Bond Act before the trial period ends.

The reduction of retainage on public projects in Illinois that would be brought about by the enactment of HB 2878, would bring Illinois in line with the majority of states’ public retainage practices. It would also be roughly equivalent to the retainage currently permissible on most private projects in Illinois. Because the retainage restrictions would apply only to projects on which the local governments had been provided a surety bond, the owners on those projects would still have adequate protection in the event of a contractor default. ■



James T. Rohlfs is a partner in the national law firm of Saul Ewing Arnstein & Lehr, and a member of the firm’s Construction Practice Group and Litigation Practice Group. Mr. Rohlfs represents subcontractors and other participants in the construction industry. He is editor of *Illinois Construction Law Manual*, a treatise published by Thomson Reuters. Mr. Rohlfs is the current general counsel as well as the past president of the Illinois Mechanical & Specialty Contractor’s Association (IMSCA), the largest organization for subcontractors in Illinois. He is an active member of the ABA Construction Forum, the Society of Illinois Construction Attorneys (SOICA), the Chicago Bar Association’s Construction Law committee, and the Association of Subcontractors and Affiliates in Chicago. He has drafted and assisted in passing Illinois legislation critical to the construction industry and he has testified on numerous occasions on construction law issues before committees of the Illinois Legislature.



THE DIGITAL JOURNEY OF THE ILLINOIS CAPITAL DEVELOPMENT BOARD

- by CDB Director Jim Underwood

The Illinois [Capital Development Board](#) (CDB) is in its fourth year of the six-year Rebuild Illinois capital program, the largest capital program in the state's history. Rebuild Illinois provides significant funding for critical deferred maintenance projects at state owned facilities, universities, and community colleges. Rebuild Illinois also provides much needed investments for the construction of new state facilities and higher education institutions, including major renovations of existing state facilities and capital renewal projects for public universities to meet the dynamic needs of today's workforce. Through this program, the Capital Development Board is managing 683 active projects in various stages of design and construction (May 2023).

Prioritizing the state's evolving needs is critical to providing better capital project and program management. To utilize technology to better serve our user agencies, the Capital Development Board embarked on a transformational journey, leveraging the e-Builder cloud technology to boost efficiency, increase transparency, and ensure consistent, reliable delivery of public services.

As new technologies are being introduced every day, it's vital for the public sector to keep up with this pace of change. Digital transformation offers a host of advantages - from cost savings and increased efficiency to improved accessibility and transparency of public services. It also allows public organizations to adapt

quickly to changes in societal needs and expectations, fostering a stronger, more trustful relationship between government and citizens.

For CDB, digital transformation is not merely a matter of technological advancement. It signifies a strategic, cultural shift towards leveraging technology to enhance performance, engage with user agencies more effectively, and deliver more value to the public.

Capital Development Board's digital transformation journey began with the introduction of [Qualifications-Based Selection](#) (QBS) and online contractor bidding. This innovative approach was a significant departure from traditional paper-based responses, revolutionizing the way CDB interacts with the design industry.

With QBS, CDB is focused on selecting architects and engineers on their qualifications rather than price. This leads to higher-quality project results, improved risk management, and a better value for public funded vertical capital infrastructure investments. Transitioning this process to an online platform not only increased its efficiency but also enhanced transparency, ensuring a fair and competitive selection process.

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One of the most significant advancements in CDB's digital transformation journey has been the improved interaction with various user agencies. By creating digital channels for communication and collaboration, CDB has fostered a more integrated approach toward strategic capital planning and project delivery. The digital platform has enabled user agencies to easily prioritize capital project requests, access project details, track progress, and provide inputs in real time, creating a more collaborative and efficient working environment.

Another key achievement of CDB's digital transformation journey has been a substantial reduction in the time taken for vendor selection. By automating various parts of the selection process, CDB has expedited decision-making, decreased administrative burdens, and made the process more efficient, thereby delivering projects on time and within budget.

As the CDB looks towards the future, it aims to utilize the power of cloud technologies further to continue improving its processes and services. One such plan is the use of data analytics. By leveraging big data, CDB can gain more profound insights into capital program and portfolio management, project performance, procurement trends, and potential areas of improvement. This, in turn, will inform more strategic decision-making, optimize resource allocation, and enhance service delivery.

Additionally, CDB plans to incorporate Power BI dashboards into its operations. These dashboards will provide visual, real-time insights into various program and project metrics, allowing stakeholders to easily track project progress, identify potential issues, and make informed decisions.

Finally, CDB is looking at improving cost controls, which will be the next phase. By updating its toolset to track Project Budgets, Commitments, and Invoices, CDB will be able to anticipate cost overruns and schedule delays. The new solution is expected to be fully integrated with the State's Enterprise Accounting System, SAP.

To support the Industry, CDB's implementation consultant, OnIndus, is providing monthly training for new potential contractors and consultants to learn how to bid and submit on future CDB projects. Information about these training sessions can be found [here](#).

Additionally, the [OnIndus](#) consultant team is currently hosting office hours three times per week to support the ongoing usage of the system. These will be expanded in the coming months to allow for external contractors and consultants to drop in and receive live support in utilizing the tool.

If anyone has questions or concerns about the CDB's e-Builder platform, how to get oriented and training utilizing the system, and what to expect in the coming months, please contact the team at cdb@onindus.com.

The Capital Development Board's digital transformation journey epitomizes how the public sector can leverage technology to improve efficiency, enhance transparency, and deliver more value to the public. As the Capital Development Board continues to innovate and adapt, it sets a strong example for other public entities to find opportunities to improve processes and become more efficient. ■

Jim Underwood is the Executive Director at the Illinois Capital Development Board (CDB), which is the vertical construction management agency for the State of Illinois. Jim completed a 4-year apprenticeship with International Brotherhood of Electrical Workers IBEW Local 146 Decatur in 1982 and worked 13 years as a journeyman wireman before becoming an assistant business manager/organizer with the local in 1995. He earned a BA in Labor Studies in 2000 and started a career in state government in 2001. CDB oversees new construction and renovation projects at over 8,000 state-owned buildings. The agency responds to capital improvement needs identified by other State agencies, institutions of higher education, and governmental units, which are approved by the Governor and enacted by the General Assembly.





KEY SUBCONTRACT PROVISIONS – FAIRNESS OR LEVERAGE?

- By W. Matthew Bryant

The work of subcontractors is largely guided by the written contracts to which they agree, making those contracts important to their company's success. Ideally, contracts should be balanced, and they should allocate risk to the party able to control the risk, but that is often not the case. Though subcontractors do not always have the leverage to negotiate fair terms, by understanding a few key provisions frequently included in construction subcontracts, subcontractors will be better equipped to negotiate those terms or, alternatively, be prepared to adjust their pricing and performance to account for risky terms.

Two important and frequently-encountered clauses of which subcontractors should be aware are clauses governing whether and when a contractor must pay a subcontractor, and clauses incorporating in the subcontract other documents "by reference," often without providing the subcontractor an opportunity to even review them.

"Pay-when-paid" vs. "pay-if-paid" clauses

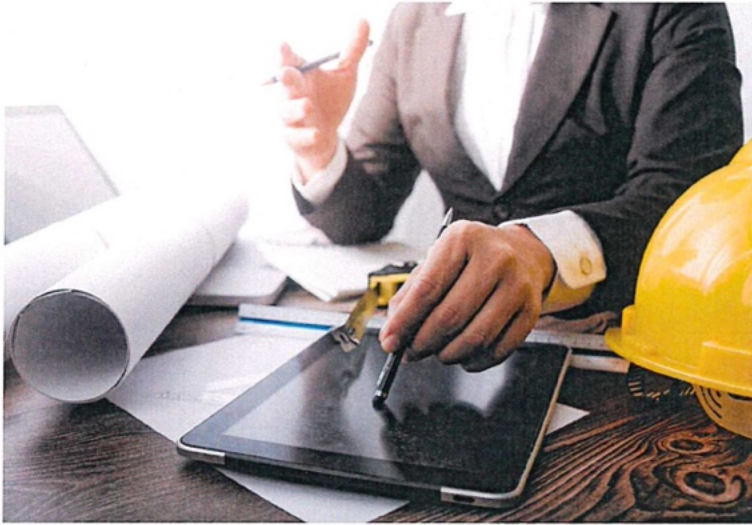
Payment is a contentious issue on many projects, and a critical issue for subcontractors incurring costs for materials and labor to perform the work under a subcontract. Contractors understandably want to use the owner's funds, rather than their own, to pay

subcontractors. Subcontractors are typically unconcerned about the source of funds, as long as payment is made for the subcontractor's work. Contractors often insert a clause in a subcontract that provides the contractor will not pay the subcontractor until after the owner pays the contractor for the subcontractor's work. There are two main variations of this payment contingency clause. One is called a "pay-when-paid" clause, and the other is referred to as a "pay-if-paid" clause. Though they sound similar, the effects of the two clauses differ greatly.

A "pay-when-paid" clause provides merely that a contractor will pay a subcontractor after the contractor receives payment from the owner. So, a pay-when-paid clause affects only the timing of payment. Under the Illinois Contractor Prompt Payment Act, a contractor must pay a subcontractor within 15 days after the contractor receives payment from the owner for the subcontractor's work, or risk the statutory penalty under the Act. But even if the owner never pays the contractor, the subcontractor will still be entitled to payment for its work within a reasonable time after completing it.

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A “pay-if-paid” clause is different. In most cases, it makes the contractor’s receipt of payment from the owner a requirement before the contractor has any contractual obligation to pay the subcontractor, even if the subcontractor has fully performed its work. The contractor effectively transfers the risk of the owner’s nonpayment to the subcontractor. Arguably this is unfair to the subcontractor because the subcontractor agreed to work for the contractor, and the subcontractor does not have a direct contract right against the owner. However, Illinois courts will assume that the contractor and subcontractor recognized this risk and agreed to the negotiated pay-if-paid term in the subcontract.



Illinois law disfavors pay-if-paid clauses because of the harsh result of denying payment to a subcontractor despite the subcontractor having performed work. If there is a question about whether the parties intended a pay-when-paid clause (governing when the contractor pays the subcontractor), or a pay-if-paid clause (excusing the contractor from making payment to the subcontractor unless the owner pays the contractor), Illinois courts will consider the clause to be a pay-when-paid clause.

Because pay-if-paid clauses are disfavored and courts will enforce them only if they are clearly intended by the contractor and subcontractor, they are frequently written to reflect that the owner’s payment to the contractor is an “express condition precedent” to the contractor’s obligation to pay the subcontractor. The subcontract may also expressly refer to the subcontractor agreeing to accept the risk that the owner does not pay for the subcontractor’s work.

If a subcontract contains a pay-if-paid clause, and an owner does not pay a contractor for the subcontractor’s work, the subcontractor may not be completely without remedy. Even if a subcontractor cannot claim a contractual right to payment from

the contractor because of a pay-if-paid clause, a subcontractor may still have a right to record and enforce a mechanics lien for its work. Section 21(e) of the Illinois Mechanics Lien Act provides that a pay-if-paid clause will not bar exercise of the subcontractor’s mechanics lien rights. So, in spite of the pay-if-paid provision of the subcontract, the subcontractor can record a mechanics lien against the property to collect for its performed work. Further, there is some authority under Illinois law that when an owner fails to pay a contractor due to the contractor’s breach of contract, a non-breaching subcontractor may be able to defeat the pay-if-paid provision in its subcontract.

Incorporation of other documents by reference

Some forms of construction contracts are short, but include a list of documents “incorporated by reference” that effectively make the contract longer. One reason for incorporating documents by reference is to ensure consistency of the contract requirements for each of the many project participants. Incorporating documents by reference also limits the possibility that errors creep in from use of different revisions of documents, or through mistakes in transcription.

Documents incorporated by reference in subcontracts frequently include general conditions, special conditions, supplemental conditions, plans, specifications, and the Owner-Contractor contract. Each of these documents will be binding on the subcontractor, even if the subcontractor has not in fact read or even seen the documents. A subcontractor should read and review all the documents incorporated into its contract so that the subcontractor knows what its obligations are before agreeing to perform them.

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If a subcontractor does not review all of the contract documents, the subcontractor may find out after performing its work that there was an additional obligation that it did not perform, and that the missing or different work will be supplied or corrected at the subcontractor's expense.

Under some standard industry form documents, for example the commonly-used AIA A201-2017 General Conditions, a subcontractor's bid will not be incorporated as a binding contract document unless it is specifically listed as incorporated by reference. So a subcontractor may find that, except to the extent provisions of the bid are set forth separately in the subcontract, all of the subcontractor's qualifications and exceptions set forth in its bid are not part of the contract documents that govern the work the subcontractor is to perform.

Shop drawings are also usually not incorporated as binding contract documents. Under the commonly-used AIA contract forms, a subcontractor prepares shop drawings to show how the subcontractor plans to perform its work under the contract documents. Then the subcontractor submits the shop drawings for review by the project's design professional. The design professional then reviews the shop drawings and provides comments or notes about whether the shop drawings are consistent with the project's "design concept," which is usually not a well-defined term. But even if the design professional does not object to the shop drawings (often using the formulation "no exceptions taken" instead of formally "approved"), the subcontractor is not relieved of responsibility for performing its work according to the binding contract documents. So even if the subcontractor performs the work in accordance with the reviewed shop drawings, the subcontractor will remain liable for work that departs

from the requirements of the binding contract documents.

Because a contract may incorporate many additional documents, there is a possibility that one document may contain portions that are inconsistent with portions of other documents. For example, one document may call for use of copper piping throughout a project, while another document may call for use of PVC piping. One way to address this possibility is with an "order of precedence" clause. An order of precedence clause sets forth which contract document prevails when a conflict occurs between the documents. For example, an order of precedence clause will provide frequently that a provision in a subcontract agreement will prevail over an inconsistent provision in a bidding document, or that the requirement of a specification will prevail over an inconsistent provision in the plans. But a court will enforce the order of precedence clause the parties use in their agreement, even if the order of precedence does not follow the customary industry standard order, so a subcontractor should be vigilant about which documents will control over other contract documents in the event of conflicting requirements.

Conclusion

In the construction industry's version of the Golden Rule, he who has the gold makes the rules. Sometimes a subcontractor cannot negotiate or otherwise change an upstream contract to more-properly allocate risks. Especially when this happens, the subcontractor should recognize contract provisions that have potential to increase the subcontractor's risk, such as payment clauses and incorporation of documents beyond the text of the subcontract agreement. The subcontractor can then adjust its performance under the contract documents to minimize its exposure to contractual risk. ■



W. Matthew Bryant focuses his practice on construction law. He writes and negotiates construction contracts for private and public projects, representing participants including owners, architects, engineers, general contractors, and subcontractors. He resolves construction project performance and payment disputes, including surety bond claims and mechanics lien claims. He also represents owners, contractors, and subcontractors in litigation matters including defense and prosecution of breach of contract, warranty, and construction defect claims. He has defended design professionals against claims of professional negligence. He has written and spoken on many construction-related topics, including contract negotiation, public construction, and licensure of construction professionals.

STATE CAPITOL REPORT

Jessica Newbold Hoselton, IMSCA Executive Director

The Illinois General Assembly concluded the spring 2023 legislative session on Saturday, May 27th. In total, more than 6,500 bills were introduced this year, 4,498 House bills and 2,985 Senate bills – 565 bills were approved by both chambers that will be sent to Governor Pritzker for approval. The legislature has 30 days to present a bill to the Governor, and the Governor has 60 days after receiving the bill to sign, veto or issue an amendatory veto.

On June 7th, Governor Pritzker signed the FY 24 operating budget into law that was approved by the Illinois General Assembly (SB 250 and HB 3817). Lead budget negotiators for the super-majority Democrats describe the FY 24 spending plan as balanced and fiscally responsible; while Republicans in both chambers were critical of the plan and did not vote in favor of it. **The FY 24 operating budget appropriates \$50.6 billion in general revenue funds and \$4 billion in new capital appropriations.** In addition, lawmakers voted to expand the state's bonding authority (HB 3551) to cover capital projects and infrastructure investments. The approved spending plan represents a continuation of the Rebuild Illinois program and other ongoing capital initiatives. Illinois anticipates receiving billions of dollars from the federal Infrastructure Investment and Jobs Act (IIJA) that will be invested in transportation, water, broadband, clean energy, and other capital improvement projects.

The FY 24 budget includes the following line items for capital improvements throughout Illinois:

- \$4.6 billion for the FY 24 Road Program. This includes approximately \$3.4 billion in pay-as-you-go revenue and \$1.2 billion in bond funds.
- \$300 million in new funding for the I-190 Blue Line Modernization Project.
- Supports the IIJA lead service line replacement loans at \$230.2 million, as well as \$10 million in new IEPA funding to provide lead service line inventory and planning grants to communities around the state.
- Reappropriates \$100 million at DCEO for community-driven broadband expansion to help close the digital divide.
- Reappropriates \$86 million in funding for orphaned well plugging from Rebuild Illinois and IIJA.
- Increases RTA Operating Assistance Grants to \$18 million.
- Provides an additional \$1.5 million for RTA reduced fares.

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**Jessica Newbold Hoselton,
IMSCA Executive Director**

If you have any questions regarding this information, please do not hesitate to contact Jessica Newbold Hoselton by calling 217.523.4361 or by email at jnewbold@boldnewstrat.com.

- Provides an additional \$5 million for Amtrak operating assistance for state-supported routes.

In addition, the FY 24 spending plan includes a \$250 million investment into early childhood education, provides additional MAP grant funding for community college students, invests in business development, and makes full payments to the state's required debt obligations, including pensions and the remaining back logged bills.

Lawmakers also addressed other important issues during the spring 2023 legislative session, including a comprehensive procurement omnibus bill. **HB 2878 Senate Amendments 2 and 3 (Rep. Hoffman/Sen. Castro)** makes significant changes to the Illinois Procurement Code, Public Construction Bond Act and other statutes that are important to contractors. HB 2878 as amended includes the following provisions:

- **IMSCA's proposed retainage reduction language (IMSCA's 2023 top legislative priority).** The provision amends the Public Construction Bond Act to provide that **retainage may be withheld at a rate of 10% for the first half of a public construction project but reduced to 5% upon 50% completion.** This provision will apply to every county, township, municipality, municipal corporation, school district, school board, forest preserve district, park district, fire protection district, sanitary district, and all other local governmental units.
- **Single Prime Procurement.** Beginning January 1, 2024, the Capital Development Board (CDB) can determine if the single prime delivery method is to be pursued; includes language allowing CDB to use single prime procurement and establishes factors to be considered by CDB. Parameters of use for institutions of higher education to use the single prime delivery method remain intact through January 1, 2026.
- **Veterans Preferences.** Amends the definition of "small business". Changes the definition to a business with gross sales of less than \$150 million.
- **Creates the Reimagining Hotel Florence Act.** Allows the Illinois Department of Natural Resources to enter a public/private partnership that will allow Hotel Florence to be reactivated.
- **Contractor Diversity.** Requires corporations that contract with the State to include as part of its annual report to the Commission on Diversity, Equity and Inclusion a list of its professional services suppliers (legal, accounting, consulting, etc.) by category; corporations who submit supplier diversity reports to the Illinois Commerce Commission are exempted from this requirement. This provision sunsets on July 1, 2028.
- **Requests for Waiver of Aspiration Goals – BEP.** Requests for waivers will be evaluated as to whether or not "good faith" can be established.
- **Public Institutions of Higher Education - Exemptions.** Provides that the following expenditures made by institutions of higher education are exempt from the Procurement Code: (i) procurement expenditures for contracts entered into under the Public University Energy Conservation Act; and (ii) procurement expenditures for advertising or for the distribution of advertising.
- **Public Private Partnership for Transportation Act.** Amends the Act to remove the term "transportation agency" and replaces it with "responsible public entities". Responsible public entity means "the means the Department of Transportation, the Illinois State Toll Highway Authority, and any county, municipality, or other unit of local government".
- **Public Construction Bond Act.** Amends the Public Construction Bond Act to increase the bond threshold from \$50,000 to \$150,000 for all public construction projects; allows local governments to require a bond for projects under \$150,000 by approval of an ordinance or resolution; increases the bond threshold for all Illinois Department of Transportation and Illinois State Tollway projects to \$500,000. These provisions sunset on January 1, 2029.
- **Vendor Political Contribution Limits.** Makes various changes to current provisions; provides that each business entity whose aggregate pending bids and proposals on State contracts total more than \$50,000 shall register with the State Board of Elections and are prohibited from providing political contributions to constitutional office holders (Governor, Lieutenant Governor, Attorney General, Secretary of State, Comptroller and Treasurer).

HB 2878 as amended received bi-partisan support in both chambers. The bill will soon head to Governor Pritzker for his approval.

SB 1570 as amended (Sen. Lightford, Rep. DeLuca) grants municipalities and school districts statutory authority to utilize the design build delivery method. This bill includes scope and performance criteria for design build contracts, a two-phase procedure for selection of contracts, requirements for submission of proposals, procedures for awarding contracts and requirements of reports, evaluation of contracts, and provides that a design-build entity may not replace, remove, or modify any identified member of the proposer's team unless authorized to do so. Existing design-build statutes include the Capital Development Board, Public Building Commission, Chicago Park District, Park Districts, Forest Preserve Districts and most recently, county governments. The Capital Development Board law was approved as part of a broad

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industry coalition, including IMSCA, and served as the template for the remaining statutes.

SB 2192 (Sen. Villivalam, Rep. Davis) amends the Illinois Procurement Code to provide that if a bidder has failed to be awarded a contract after 4 consecutive bids to provide the same services to a single agency, the applicable Chief Procurement Officer (CPO) for that agency shall provide in writing the reasons why the 4 bids were rejected. The CPO shall submit a certified copy to the bidder the reason(s) for the rejection. As amended, this bill applies to the Department of Transportation, the Capital Development Board, and the State Toll Highway Authority.

SB 2368 as amended (Sen. Koehler, Rep. Johnson) creates a baseline building code for commercial construction. As amended, SB 2368 applies to “non-building code jurisdictions”; which is defined as “any area of the State in a municipality or county having a jurisdiction that: (i) has not adopted a building code; or (ii) is required to but has not identified its adopted building code to the Board under Section 10.18 of the Capital Development Board Act”. SB 2368 as amended also includes language referring to specific existing building codes such as the International Building Code, Energy Efficient Building Code, Illinois Stretch Energy Code, Illinois Accessibility Code, and the Illinois Plumbing Code.

HB 2300 (Rep. Nichols/Sen. Castro) amends the Illinois Works Apprenticeship initiative. The Illinois Works program allows contractors to earn bid credits toward future projects for employing apprentices on public projects who have completed the Illinois Works Pre-apprenticeship program. Some provisions of the Act became effective on June 28, 2019, and others became effective on December 10, 2019. The enabling legislation (SB 534) was approved in conjunction with the Rebuild Illinois capital program to ensure minorities had access to apprenticeship programs and the opportunity to participate in the impending influx of public construction projects. The program is administered by the Department of Commerce and Economic Opportunity (DCEO) and includes projects managed by state agencies including IDOT and CDB. HB 2300 as amended adds graduates of two additional pre-apprenticeship programs to meet the goals established by the program (Illinois Climate Works and the Highway Construction Careers Training Program), changes penalties for “failure to comply” with the program to “intentional failure to comply”, and contractors and union locals will be provided a list of program graduates to they can be contacted for employment opportunities.

HB 2845 (Rep. Vella/Sen. Loughran Cappel) amends the Prevailing Wage Act to provide that the definition of “public works”

also includes the removal, hauling, and transportation of biosolids, lime sludge, and lime residue from a water treatment plant or facility and the disposal of biosolids, lime sludge, and lime residue removed from a water treatment plant or facility at a landfill.

HB 3448 as amended (Rep. Evans, Jr., Sen. Castro) amends the Wage Payment & Collection Act to provide that a notice shall be posted in one or more places accessible to all laborers, workers, and mechanics on the job site a summary of specified requirements of the Act and information pertaining to the filing of a complaint. HB 3448 as amended further provides that one copy of the notice at a job site shall satisfy the notice requirement for the primary contractor and all subcontractors.

HB 3491 (Rep. Hanson, Sen. Preston) amends the Prevailing Wage Act to provide that any laborer, worker, or mechanic who is employed by the contractor or by any lower tier subcontractor and is paid for services in a sum less than the prevailing wage rates for the work performed on a project shall have a right of action for whatever difference there may be between the amount paid and the prevailing wage rates required to be paid. It is important to read the entire Act regarding the changes proposed by HB 3491 as sections (h), (i), and (j) provide clarity to what party is responsible for failure to provide notice and pay the prevailing wage.

HB 3792 (Rep. Walsh, Jr./Sen. Stadelman) amends the Prevailing Wage Act to provide that the definition of “public works” includes all construction projects involving fixtures or permanent attachments affixed to light poles that are owned by a public body, including street light poles, traffic light poles, and other lighting fixtures paid for wholly or in part with public funds.

House Joint Resolution 23 (Rep. Stava-Murray/Sen. Cunningham) is an initiative of the International Union of Operating Engineers Local 150. The resolution received bi-partisan support in both chambers and allows the Illinois Department of Transportation to pursue a Public Private Partnership to fund a construction project expanding I-55. The proposed expansion includes the I-55 corridor from I-355 to I-90/I-94. In addition, the proposed expansion includes the use of “managed lanes”; which is a type of highway lane that is administered via a management scheme such as lane use restrictions and variable tolling.

The spring 2023 legislative session was a busy one for IMSCA. All in all, it was a successful one for our association. **Thank you to everyone who participated in discussions on these issues and others that required IMSCA's attention.** Legislators will return to Springfield on October 24-26 and November 7-9 for fall veto session. ■