

## **DBE Contract Requirements: An Update and Refresher on Compliance with the Business Enterprise for Minorities, Females and Persons with Disabilities Act**

**Annual Legal Update for Illinois  
Colleges Virtual Conference**

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**Kenneth M. Florey**  
[kflorey@robbins-schwartz.com](mailto:kflorey@robbins-schwartz.com)

**Howard A. Metz**  
[hmetz@robbins-schwartz.com](mailto:hmetz@robbins-schwartz.com)

**Christopher R. Gorman**  
[cgorman@robbins-schwartz.com](mailto:cgorman@robbins-schwartz.com)

**Chicago**  
55 West Monroe Street, Suite 800  
Chicago, IL 60603  
p 312.332.7760  
f 312.332.7768

**Champaign-Urbana**  
301 North Neil Street, Suite 400  
Champaign, IL 61820  
p 217.363.3040  
f 217.356.3548

**Collinsville**  
510 Regency Centre  
Collinsville, IL 62234  
p 618.343.3540  
f 618.343.3546

**Lisle**  
550 Warrenville Road, Suite 460  
Lisle, IL 60532  
p 630.929.3639  
f 630.783.3231

**Rockford**  
2990 North Perryville Road, Suite 4144B  
Rockford, IL 61107  
p 815.390.7090

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# DBE Contract Requirements: An Update and Refresher on Compliance with the Business Enterprise for Minorities, Females and Persons with Disabilities Act

Presented by Kenneth M. Florey, Howard A. Metz and Christopher R. Gorman  
Annual Legal Update for Illinois Colleges Conference  
September 17, 2021

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## An Overview of the Business Enterprise Act and Recent Amendments



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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

## What is the Business Enterprise Act?

- The Business Enterprise for Minorities, Females, and Persons with Disabilities Act (30 ILCS 575/1, *et seq.*), or “the Business Enterprise Act, is a law requiring state agencies and public institutions of higher education including community colleges to set aspirational goals to increase the participation of businesses owned by minorities, females, and persons with disabilities in contracts that these public bodies award.

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## How does the Business Enterprise Act Apply to Community Colleges?

- The Act was amended on August 25, 2015 to specially include community colleges, as well as to establish aspirational goals, compliance requirements and reporting obligations for community colleges and other institutions of higher education.

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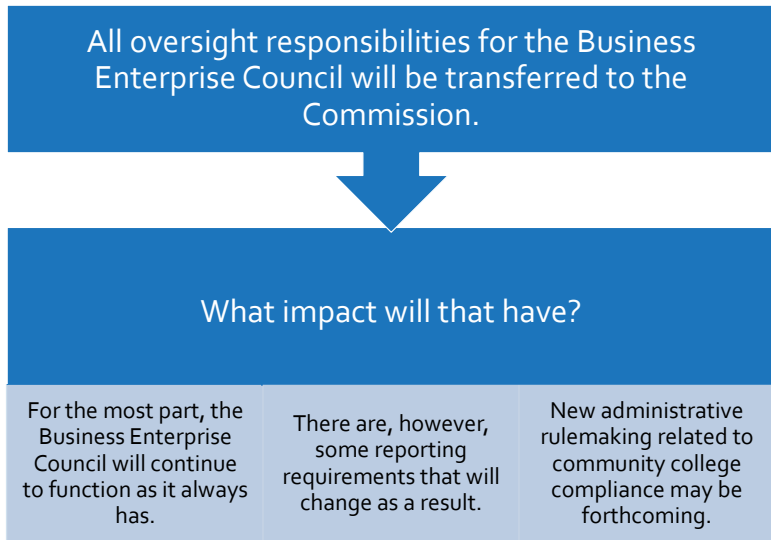
## What Recent Amendments to the Business Enterprise Act Affect Community Colleges?

- On March 23, 2021, Public Act 101-0657 further amended the Business Enterprise Act. Major changes affecting community colleges include:
  - Increasing the aspirational goals set for the award of contracts to qualifying businesses.
  - Requiring not only a plan to meet a community college's aspirational goals but a plan "to increase the diversity of the vendors engaged in contracts...with a particular focus on the most underrepresented in contract awards."
  - Establishing a new oversight body of the Business Enterprise Council (the "Council")—the Commission on Equity and Inclusion (the "Commission"), which was created under the Commission on Equity and Inclusion Act.

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## What Recent Changes to the Business Enterprise Act Affect Community Colleges?



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## What Recent Changes to the Business Enterprise Act Affect Community Colleges?

- On June 25, 2021, enactment of a trailer bill further amended the Business Enterprise Act (now P.A. 102-0029), clarified the role of the newly established administering agency and further revised amendments made in P.A. 101-0657.
- P. A. 102-0029 reversed one of the most significant changes of P.A. 101-0657, the elimination of the “good faith effort” standard for waivers.

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## How is this Amended Act Enforced?



Until June 30, 2024, the Act's enforcement remains the same, with some responsibilities being assumed by the Commission rather than the Council.



Some additional reporting requirements relating to utilization plans suggest that the Commission may play a broader oversight role.

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## Complying with the Newly Amended Business Enterprise Act



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## What Businesses Qualify under the Act?

For each of the applicable categories (minority, female, and persons with disabilities), the business must be at least 51% owned by one or more persons who fits that criteria (minority, female, or person with a disability).

The business must also be managed and have its daily operations controlled by one or more of the persons who fits that criteria.

Businesses that are owned by at least 51% of any combination of minority persons, females, or persons with disabilities also qualify, even if none of the classes alone hold a 51% interest on their own.

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## What Contracts Remain Subject to the Act?



The Act continues to apply to any contract required by law for the award of a State contract.



As explained below, certain waivers and exemptions continue to apply to contracts entered by community colleges.

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## What Contracts Remain Subject to the Act?

- **Construction Contracts** – “all State contracts entered into by a ... public institution of higher education for the repair, remodeling, renovation or construction of a building or structure.”
- **Professional Service Contracts** – contracts for insurance services, investment services, information technology services, accounting services, architectural and engineering services, and legal services.
- **State Contracts** – “all contracts entered into by ... any public institution of higher education including community college districts, regardless of the source of the funds with which the contracts are paid.”

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## Does the Source of Funds for the Contract Matter?

- **No.** The new definition of “state contracts” explicitly states that state contracts means “all contracts entered into ... regardless of the source of funds with which the contracts are paid...” State construction contracts are defined as “state contracts” that concern construction activities.
- The Act does acknowledge that if any contract subject to the Act becomes subject to any federal laws or regulations which conflict with the Act’s requirements, then the federal laws and regulations shall apply.



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## What “Aspirational Goals” Are Established by the Business Enterprise Act?

- In 2015, the Business Enterprise Act was amended to add the word “aspirational” when establishing goals for the award of contacts by community colleges and other State agencies.
- The term distinguished goals from quotas, which would be illegal.
- As a result, the procedures and efforts of community colleges in attempting to meet the goals will be critical in gauging compliance.

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## What are the “Aspirational Goals” for Contracting under the Business Enterprise Act?

- As a result of Public Act 101-0657, the aspirational goals under the Business Enterprise Act are increasing on January 1, 2022.

Type of Contracts	Total % of MFD* Contracts	Minority Owned Businesses	Female Owned Businesses	Persons with Disability Owned Businesses
State Contracts	<del>20%</del> 30%	<del>11%</del> 16%	<del>7%</del> 10%	<del>2%</del> 4%
Construction Contracts	<del>20%</del> 30%		At least 50% of the total minority and female contracts	
Professional Services Contracts	20% (collectively)			

\*MFD – Businesses owned by minorities, females, and persons with disabilities.

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## Are the Aspirational Goals Subject to Change?

- Yes.** After the recent amendments, all aspirational goals are contingent upon the results of the most-recent disparity study conducted by the State, which community colleges will need to monitor in order to adjust their goals.

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## How are the Percentages under the Amended Act Calculated?

- The applicable percentages are based on the “total dollar amount” for each category of contracts. For community colleges, the Act’s aspirational goals for professional service contracts apply to the total collective amount spent on all contracts for said services.

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## What are the Reporting Requirements for Community Colleges?

- All community colleges must continue to:
  - File annual compliance plans and an annual report with the ICCB. 
  - Notify the Council of proposed contracts for professional and artistic services.
  - Use bid forms identifying the bidder’s percentage of disadvantaged business utilization plans and percentage of business enterprise program utilization plan.

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## What are the Reporting Requirements for Community Colleges?

- All annual reports must include:
  - A description of a college's utilization of businesses owned by minorities, females, and persons with disabilities during the preceding fiscal year, as well as a mid-fiscal year report on the utilization to date for the current fiscal year.
  - A self-evaluation of the college's efforts to meet its goals.

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## Are there New Reporting Requirements under the Amended Act?

- **Yes.** In addition to complying with the previous reporting requirements, community colleges should report all plans and implementation procedures for increasing the use of professional services *for approval to the Commission* on annual basis.

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## Are Community Colleges' Goals and Compliance Publicly Reported?

- **Yes.** The Act requires the Business Enterprise Council to file an annual report summarizing each college's goals, expenditures subject to the goals, and goals attained.



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## Can a Community College or Contractor Still Request Exemptions?

- **Yes.** The Commission does not replace the Business Enterprise Council and will still allow the Business Enterprise Council, on its own initiative or at the request of a college, to permit individual contracts or classes of contracts be wholly or partially exempt from the contracting goals of the Act.
- The exemption must be made in writing and must be based on a determination that there are insufficient numbers of businesses owned by minorities, females, and persons with disabilities to ensure adequate competition and an expectation of reasonable prices on bids or proposals for said contracts.
- For individual contracts, this determination must be made prior to the advertisement for bids or solicitation for proposals.
- The Business Enterprise Council can also grant waivers to contractors, subject to a change in the criteria for waivers.

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## Can a Community College or Contractor Still Obtain a Waiver?

- **Yes.** Waiver requests are still submitted to the Council but must be submitted prior to the contract award.
- Waiver determinations will be made in consultation with the Commission.
- While earlier amendments under P.A. 101-0657 would have required a stricter standard for granting waivers, P.A. 102-0029 reestablished the good-faith standard for compliance with the Act.
- However, a request for a waiver will need to include some additional evidence on the part of the contractor.

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## What New Requirements Apply to a Request for a Waiver?

- Waiver request will require the contractor to provide:
  - a clear demonstration that the contractor selected portions of the work to be performed by eligible businesses owned by minorities, women, and persons with disabilities, solicited through all reasonable and available means eligible businesses, and negotiated in good faith with interested eligible businesses;
  - documentation demonstrating that businesses owned by minorities, women, and persons with disabilities are not rejected as being unqualified without sound reasons based on a thorough investigation of their capabilities;
  - documentation demonstrating that the contract proposals being offered by businesses owned by minorities, women, and persons with disabilities are excessive or unreasonable;
  - A list of businesses owned by minorities, women, and persons with disabilities that the contractor has used in the current and prior fiscal years.

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## Bidding Considerations Under the Amended Business Enterprise Act



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## How Do Community Colleges Comply with the Business Enterprise Act?

- **Comply with the Bidding Requirements**
  - Require a utilization plan even for non-construction solicitations.
  - Notify the Council of proposed contracts for professional and artistic services.
- **Analyze Bids and Utilization Plans**
  - Determine whether a bid is responsive, responsible, competitive, and whether service are likely to be completed.
  - Determine whether the utilization plan or waiver request is included in the bid response.
- **Accept or Reject Bids**

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## How Do Community Colleges Comply with the Business Enterprise Act?

- **Reporting**
  - Notify the Commission of all nonresponsive bids.
  - File annual compliance plans and utilization reports.
- **Post-Award Review**
  - Review a contractor's compliance with its utilization plan by evaluating the contractor's fulfillment of contract goals for participation.
  - Report any contractor who is not in compliance with the contract goals to the Commission.

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## Do the Amendments Affect What Contracts Should be Bid?

- **No.** Whether a contract should be bid will depend on the bidding requirements of the Public Community College Act (110 ILCS 805/3-27.1).
  - Section 3-27.1 of the Act requires community colleges to publicly bid all contracts for the purchase of supplies, materials or work involving expenditure over \$25,000 or a lower amount as required by board policy.

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## Do the Amendments Affect Contracts that are Exempt from Bidding?

- **No.** Whether a contract is exempt from bidding will depend on the bidding exemptions under the Public Community College Act (110 ILCS 805/3-27.1).
- Exemptions include:
  - Equipment previously owned by another entity
  - Perishable foods and beverages
  - Duplicating machines or supplies
  - Natural gas
  - Printing of finance committee reports and departmental reports

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## Do the Amendments Affect Contracts that are Exempt from Bidding?

- Bidding exemptions continued.
  - Information technology (use, purchase, delivery, and/or installation of data processing equipment)
  - Goods and services procured from another governmental agency
  - Contracts for goods or services which are economically procurable from only one source
  - Services of individuals possessing a high degree of professional skill
  - Emergency expenditures (upon approval of  $\frac{3}{4}$  of Trustees)

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## Do the Amendments Affect Contracts that are Exempt from Bidding?

- Bidding Exemptions Relevant to Construction under the Public Community College Act (110 ILCS 805/3-27.1)
  - Small Remodeling Project Exception
  - Change Orders
  - Dealer Maintenance
  - Emergencies
  - Professionals

**EXEMPT**

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## Did Bidding Procedures Change under the Amendments?

- **Mostly, no.** Bidding procedures used by community colleges remain mostly the same.
  - Invitation to bid must be advertised in a newspaper published in the community college district at least 10 days before the deadline to submit bids.
  - Bidder must receive at least three days' notice of the time and place of the bid opening.
  - Bids must be sealed by the bidder and opened by a Board member or college employee at the public bid opening where bids are announced.

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Evaluation of Bids  
and Awarding  
Contracts under  
the Recent  
Amendments



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What Bids are  
Eligible for an  
Award?

- Under the Public Community College Act, contracts awarded by community colleges shall be awarded to the "lowest responsible bidder considering conformity with specifications, terms of delivery, quality, and serviceability, except when exempt from bidding."

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Does the Business Enterprise Act Impose any Additional Requirements?

- For any contract that must be bid, any public notice must include: (1) the bidder's name; (2) the bid amount; (3) the bid's percentage of disadvantaged business plan; and (4) the bid's percentage of business enterprise program utilization plan. (30 ILCS 575/7(6)).

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Do the Amendments Impose any Additional Requirements?



- **Yes.** The amended Business Enterprise Act requires community colleges to examine any contract bid or proposal for State contracts to determine if the bid or proposal is responsible, competitive, and whether the services to be provided are likely to be completed based on pricing.
- If not responsive, the entire bid or proposal must be deemed non-responsive *and* reported to the Commission.

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## Do the Amendments Impose any Additional Requirements?

- In addition, a community college must:
  - Notify the Commission of any bid or offer that fails to include a utilization plan or that includes a utilization plan with deficiencies.
  - Notify the Commission of all utilization plan deficiencies on submitted bids or proposals for State contracts.
  - Notify the Commission of all bids or offers that fail to include a utilization (for all non-construction solicitations that include BEP participation goals).

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## Do the Amendments Impose any Additional Requirements?

- In addition, all non-construction solicitations that include Business Enterprise Program participation goals must require bidders or offerors to include utilization plans, which are due at the time of bid or offer submission.
  - A failure to include a utilization plan renders the bid or offer non-responsive.
  - If the plan fails to demonstrate good faith efforts to meet the goals set forth in the solicitation, businesses will be allowed 10 days to cure the deficiency.
  - The deficiency can only be cured by using subcontractors certified by the Business Enterprise Program at the time of bid submission.
  - Submission of a blank utilization plan renders a bid or offer non-responsive and is not curable.

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## What Other Issues Need to be Considered?



- Aspirational Goals and the “Lowest Responsible Bidder” Requirement
  - How can a college aspire to hit the aspirational goals if the college is required to award contracts to the lowest responsible bidder?

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## How is a Contract Awarded as a result of Bidding?

- Lowest
  - Alternate bids.
- Responsive
  - Material defects – nonwaivable.
  - Minor variances – waivable
- Responsible
  - Pre-qualification of bidders
- Post-Bid, Pre-Award Negotiations

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*S.N. Nielsen  
Company v.  
Public Building  
Commission of  
Chicago, 81  
Ill.2d 290  
(1990)*

- The plaintiff in this case was the low bidder for the construction contract to build a college in Chicago. The Public Building Commission ("PBC") was the defendant and awarded the contract to the third lowest bidder based on a formula awarding credits for minority employees.
- The Illinois Supreme Court held that the PBC's consideration of the contractors' affirmative action measures complied with the "lowest responsible bidder" standard. The Court stated that a contractor's affirmative action is something that "may be expected or demanded under the terms of the contract", particularly when antidiscrimination statutes demonstrate a legislative intention to consider the social responsibility of a contractor in matters of public bidding. Further, the Court stated that the term "responsible" was broader than strictly "financially responsible" and that in proper circumstances, the contract could be awarded to one who is not the lowest bidder, when in the public interest and in the exercise of the public body's discretion.

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*Court Street  
Steak House,  
Inc. v. County  
of Tazewell, 163  
Ill.2d 159  
(1994)*

- In *Tazewell*, the plaintiff was the low bidder on a food-service contract for the Tazewell County Jail who filed a lawsuit challenging the County's award of the contract to the second lowest bidder, a not-for-profit corporation that provided food service training for the mentally handicapped. Plaintiff alleged that it was the low bidder and that the County did not have discretion to award the contract to the second lowest bidder even though the company was a not-for-profit corporation.
- Relying on the reasoning in *Nielsen*, the Illinois Supreme Court held the County's award of the contract to the second lowest bidder did not violate the competitive bidding statute because the County was also benefited through the food service training for the mentally handicapped. The Court also stated that additional benefits which show proper concern for the welfare of the public body does not indicate an arbitrary preference for one contractor over another.

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Questions?



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# Robbins Schwartz

## **KENNETH M. FLOREY**

**PARTNER, CHICAGO & LISLE**

312.332.7760

kflorey@robbins-schwartz.com

Ken Florey concentrates his practice representing public and private clients, including municipalities, school districts, community colleges, townships, libraries, private owners, contractors and design professionals regarding land use, municipal law, construction, tax, finance and litigation. Ken has also started offering his services as a mediator with an emphasis on construction disputes.

Ken was the Chair of the DuPage County Bar Association's Local Government Committee. He was appointed Special Assistant Attorney General to prosecute and defend construction litigation claims on behalf of the Illinois Capital Development Board. Ken is also a member of the Illinois ASBO Service Associate Advisory Committee. He served as a Trustee for the Village of Lombard for eight years and is a member of the Lombard Fire and Police Commission.

**MEDIATOR CERTIFICATE: NORTHWESTERN UNIVERSITY 2017**

### **AWARDS**

Illinois Leading Lawyer, Construction Law; Governmental, Municipal, Lobbying & Administrative Law; Land Use, Zoning & Condemnation Law; and School Law

Illinois Association of School Business Officials, Above and Beyond Award

Illinois Institute for Local Government Law, Litigation Award

### **RECENT PUBLICATIONS**

Contributing author, "Joint Purchasing Everything You Want to Know but Are Afraid to Ask!" *UPDATE Magazine*, Illinois ASBO (2019)

Contributing author, "How Far Does the Law Allow Schools to Go?" *UPDATE Magazine*, Illinois ASBO (2018)

Contributing author, "Top 11 Public Bidding Questions & Solutions" *UPDATE Magazine*, Illinois ASBO (2018)

Co-author, "School Construction from Start to Finish: A Project Checklist," *School Business Affairs Magazine*, ASBO (2018)

Contributing author, "Top 11 Public Bidding Questions," *UPDATE Magazine*, Illinois ASBO (2018)

Contributing author, "Meditation a Win-Win for Clients and their Attorneys in Construction Litigation," *Chicago Daily Law Bulletin* (2018)



### **PRACTICE AREAS**

Commercial Law  
Construction Law  
Education Law  
Energy Law  
Litigation  
Mediation  
Municipal Law  
Public Finance & Taxation  
Real Estate Development  
Zoning, Planning & Land Use

### **EDUCATION**

J.D., DePaul University  
College of Law; Managing  
Editor, *DePaul Journal of  
Art and Entertainment  
Law*

B.A., University of Illinois  
at Urbana-Champaign

### **ADMITTED TO PRACTICE**

U.S. District Court for the  
Northern District of  
Illinois

Supreme Court of Illinois



Contributing author, "Organization, Finance, and Property," Illinois School Law, IICLE (2017)

"Construction Project and Contract Pitfalls" *Update Magazine*, Illinois ASBO (2017)

"The Good, the Bad and the Ugly of School Bidding Requirements," *UPDATE Magazine*, Illinois ASBO (2016)

"Settlement Crumbles; Appeals Court Declines to Put Pieces Back Together," *Chicago Daily Law Bulletin* (2015)

"On Public Display: Advertising in Schools," *UPDATE Magazine*, Illinois ASBO (2015)

#### **RECENT PRESENTATIONS**

*Foolproof Contract that Abide by State Laws*, 2019 Illinois ASBO Annual Conference (May 2019)

*Construction Contracts: Boilerplate Language Landmines You May Not Know*, NBI (February 2019)

*Legal, Legislative and Ethics Update*, ICCTA (November 2018)

*Purchasing Processes, Problems & Solutions*, Illinois ASBO (September 2018)

*Navigating Property Tax Assessment Complaints and the PTAB*, Illinois ASBO & IASPA (October 2018)

*Construction Disputes: Bring Home a Win for Your School District*, ASBO International (October 2018)

*Construction Project Problems or Solutions After Construction is Done*, Illinois ASBO (October 2018)

*Construction and Purchasing Disputes and Resolutions*, ASBO International Conference (September 2018)

*Construction, Bidding and Purchasing in Township Government*, Township Officials of Illinois Online Seminar (August 2018)

*Administrators Legal Session II*, Concordia University (August 2018)

*Construction Disputes and Resolutions*, Illinois ASBO Conference (May 2018)

*Top Solutions and Problems for Bidding and Construction*, Illinois ASBO Annual Conference (May 2018)

*Lead Testing Update: Everything You Need to Know*, Illinois ASBO Conference, (May 2018)

# Robbins Schwartz

## HOWARD A. METZ

PARTNER, CHICAGO

312.332.7760

hmetz@robbins-schwartz.com

Howard Metz counsels and represents school districts, community colleges, park districts and municipalities with respect to real estate, commercial transactions, construction law and land use and zoning matters. He has resolved construction cases involving issues such as disputed architectural fees, construction defects, bidding disputes and construction delays. Howard has also litigated issues involving zoning laws and municipal control over school property.



### RECENT PUBLICATIONS

Contributing author, "Joint Purchasing Everything You Want to Know but Are Afraid to Ask!" *UPDATE Magazine*, Illinois ASBO (2019)

Contributing author, "Public Body Social Media Rules Make Retention, Ready Retrieval Imperative," *Chicago Daily Law Bulletin* (2019)

Contributing author, "How Far Does the Law Allow Schools to Go?" *UPDATE Magazine*, Illinois ASBO (2018)

Co-author, "School Construction from Start to Finish: A Project Checklist," *School Business Affairs Magazine*, ASBO (2018)

Contributing author, "Organization, Finance, and Property," *Illinois School Law*, IICLE (2017)

"Look Before You Leap: Evaluating Your Joint Purchasing Options," *UPDATE Magazine*, Illinois ASBO (2016)

Contributing author, "School Property and Environmental Issues," *Illinois School Law*, IICLE (2010 and 2012)

### RECENT PRESENTATIONS

*Foolproof Contract that Abide by State Laws*, 2019 Illinois ASBO Annual Conference (May 2019)

*Construction Contracts: Boilerplate Language Landmines You May Not Know*, NBI (February 2019)

### PRACTICE AREAS

Commercial Transactions  
Construction Law  
Education Law  
Finance  
Municipal Law  
Real Estate Development

### EDUCATION

J.D., IIT Chicago-Kent  
College of Law

B.S., University of Iowa

### ADMITTED TO PRACTICE

U.S. District Court for the  
Northern District of Illinois

Supreme Court of Illinois

# Robbins Schwartz

## **CHRISTOPHER R. GORMAN**

**ASSOCIATE, CHICAGO**

312.332.7760

cgorman@robbins-schwartz.com

Chris practices in the firm's commercial, construction, and real estate practice groups, representing public sector clients in commercial transactions, contracting, construction and related transactional matters. Chris has also served in the firm's labor and employment practice group and counseled employers in all aspects of labor and employment law, including labor relations, collective bargaining, grievance and dispute resolution, workplace investigation, employee discipline, terminations and reductions in force, and employment discrimination. Chris also advises clients on board governance and compliance with the Illinois Freedom of Information Act and Open Meetings Act.

Prior to joining Robbins Schwartz, Chris served as in-house counsel for a nonprofit organization, a charter school management organization and a state regulatory agency overseeing higher education financing.

### **RECENT PUBLICATIONS**

Contributing author, "Labor Issues in the Transactional Side of the Project," *Construction Law: Transactional Considerations 2021 Edition*, IICLE (2021)

"Continuing Controversy Over FCC's Efforts to Improve Broadband Connectivity," *Energy, Utilities, Telecommunications and Transportation Newsletter*, Illinois State Bar Association (2021)

"The Future of For-Profit Online Charter Schools," *Labor and Employment Law Quarterly*, American Bar Association (2016)



### **PRACTICE AREAS**

Commercial Transactions  
Construction Law  
Labor & Employment  
Real Estate Development

### **EDUCATION**

J.D., University of  
Minnesota Law School

B.A., University of  
Minnesota – Twin Cities;  
Presidential Scholar

### **ADMITTED TO PRACTICE**

Supreme Court of Illinois

### **ORGANIZATIONS**

Chicago Bar Association

Illinois State Bar  
Association