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**RSNLT****LAW ALERT**

## Prevailing Wage Act Amendments Increase Potential Liability for Public Bodies

**January 4, 2010**

Several amendments to the Prevailing Wage Act (820 ILCS 130/1 et seq.) became effective on January 1, 2010 for public works projects. One of the amendments provides that public bodies may be subject to penalties and fines for failure to include a clause in a construction contract notifying the contractor that payment of prevailing wages will be required.

### **A. Notice of Prevailing Wage Requirements to be Included on Purchase Orders.**

The previous version of the Prevailing Wage Act ("the Act") required public bodies to insert a clause in the construction contract specifications requiring contractors to pay not less than prevailing wages on public works projects. *820 ILCS 130/4*. The new version of the Act recognizes that not all public works projects are bid with comprehensive specifications. As such, the amendment (Public Act 096-0437) requires that, when the project is not publicly bid, the public body must insert a clause in the purchase order or other document that notifies the contractor that prevailing wages must be paid.

**Failure to include notice to the contractor may render the public body subject to interest, penalties, or fines.** If a complaint of violation of the Act is made, the amended Act requires the Illinois Department of Labor ("IDOL") to determine whether proper written notice of the Act's requirements was given to the contractor by the public body. If proper notice was not given, then the public body shall be responsible for the interest, penalties, or fines that the contractor otherwise would have been liable had the proper notice been given. Notwithstanding, the contractor is still liable for any back wages owed to its employee(s).

To provide guidance on adequate notice, the IDOL has published the following sample language that the public body may include in public works contracts and purchase orders:

*"This contract calls for the construction of a "public work," within the meaning of the Illinois Prevailing Wage Act, 820 ILCS 130/.01 et seq. ("the Act"). The Act requires contractors and subcontractors to pay laborers, workers and mechanics performing services on public works projects no less than the "prevailing rate of wages" (hourly cash wages plus fringe benefits) in the county where the work is performed. ..."*

The suggested language, coupled with the threat of penalties and fines, requires public bodies to determine, on a case-by-case basis, whether a particular contract calls for a "public work" as defined by the Act. Since the above language resolutely states that the "contract calls for the construction of a 'public work'" such language can only appear in contracts where payment of prevailing wages is required. On the other hand, alternative language designed for more generic contracts - such as "This contract *may* call for the construction of a 'public work'" - may be deemed insufficient to constitute notice under the Act, and thereby would possibly render the public body to fines and penalties.

Given the possible fines and penalties which public bodies may be subjected to for failing to include a proper clause in the contract, we suggest that all public works contract documents be reviewed, and, if necessary, amended to include legally adequate language, whether or not the project is bid.

### **B. The Definition of "Public Works" Is Clarified to Include All Publically Funded Fixed Work.**

The previous version of the Act specified that publicly funded projects for construction of fixed works were included within the definition of "public works" requiring payment of prevailing wages. 820 ILCS 130/2. The Act then enumerated particular sources of funding that fell within the ambit of "public funds" that would trigger the requirements of the Act. The amendment (Public Act 096-0058) adds a generic clause simply requiring that all projects for construction of fixed works financed in whole or in part with "bonds, grants, loans, or other funds" are included within the definition of "public works."

Practically speaking, this amendment is essentially a clarification meant to solidify the requirement that all projects by a public body for construction of fixed works that are publicly funded are subject to prevailing wage requirements, regardless of the particularities of the funding source.

Note that the definition of "public works" is very broad under the Act. Essentially, any improvements to real property or facilities for which public funds are used qualify as a public work.

### C. Demolition Is Considered a "Public Work."

The Act has been amended to provide that demolition of fixed works is additionally considered part of the definition of "public works" (Public Act 096-0186).

### D. Subcontractors' Payment Bonds to Guarantee Payment of Prevailing Wages.

The previous version of the Act mandated that the public body require the contractor's payment bond to guarantee faithful payment of prevailing wages. 820 ILCS 130/4(c). The amendment (Public Act 096-0437) revises the Act to include the same requirement for subcontractors' payment bonds.

It appears that this change is only relevant when subcontractor bonds are otherwise required.

This *Law Alert* was prepared by Scott A. Strange, an associate in our Chicago office.

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