

# **SCHOOL DISTRICT PURCHASING AND CONTRACTING**

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## RECENT CHANGES TO THE PREVAILING WAGE ACT

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### I. INTRODUCTION TO THE PREVAILING WAGE ACT

The Prevailing Wage Act, 820 ILCS 130/0.01, et seq. (the “Act”), applies to all public bodies, including school districts. Whenever a school district undertakes a project involving “public works,” the Act requires that prevailing wages be paid to all laborers, workers and mechanics employed by or on behalf of the school district. 820 ILCS 130/1. The Act defines the prevailing wage as “a wage of no less than the general prevailing hourly rate as paid for the work of a similar character in the locality in which the work is performed.” 820 ILCS 130/1.

There are limitations on which laborers, workers and mechanics are deemed to be employed by or on behalf of the school district in connection with a “public works” project. The Act provides that prevailing wages must only be paid to such laborers, workers and mechanics who are directly employed by contractors or subcontractors in actual construction work on the site of the building or construction job, as well as those who are engaged in the transportation of materials and equipment to and from the site. However, prevailing wages are not required to be paid to those employees of sellers, suppliers, and manufacturers of materials and equipment who are only involved in the transportation of such materials and equipment. 820 ILCS 130/3.

When the Prevailing Wage Act applies, each contractor and subcontractor must keep records of the prevailing wages paid to their employees, submit a monthly certified payroll to the school district, and make such records available to the school district for inspection upon seven business days’ notice. 820 ILCS 130/5. Any officer, agent or representative of a school district, and any agent or representative of a contractor, who willfully violates, or omits to comply with any provision of the Prevailing Wage Act is guilty of a Class A misdemeanor. 820 ILCS 130/6.

### II. RECENT CHANGES TO THE ACT

Effective January 1, 2010, the Prevailing Wage Act was amended in several respects. First, the definition of “public works” was broadened. Second, in situations where work is awarded to a contractor without public bid, project specifications, or a contract, the Act was amended to require the school district to give the contractor written notice that prevailing wages must be paid. These amendments are discussed below.

#### A. The Definition of “Public Works” Now Includes All Publicly Funded Fixed Works, and Demolition Work.

Public Act 096-0058, which became effective January 1, 2010, broadened the definition of “public works” in the Act. As amended, “public works” now includes: (1) all fixed works constructed by any public body; and (2) all projects financed in whole or in part with “bonds, grants, loans or other funds made available by or through the State or any of its political subdivisions.” 820 ILCS 130/2 (emphasis added). This new definition of “public works” makes it clear that if a school district is constructing and/or financing a “fixed works” project, the Act applies and prevailing wages must be paid. Whether a public project involves “fixed works” must be determined on a case-by-case basis, and most projects involving the construction, renovation, improvement or expansion of school facilities are “fixed works” within the meaning of the Act. The Act also applies to “any maintenance, repair, assembly, or disassembly work performed on equipment whether owned, leased, or rented.” 820 ILCS 130/2.

The definition of “public works” was further expanded by Public Act 096-0186, which also became effective January 1, 2010. Under this amendment, the definition of “public works” is expanded to include “all fixed works constructed or demolished by any public body.” 820 ILCS 130/2. Again, whether a project involves the demolition of a “fixed work” must be determined on a case-by-case basis.

**B. A School District Must Give the Contractor Written Notice of Prevailing Wage Applicability.**

Prior to January 1, 2010, the Act required school districts to insert into their project specifications a clause providing that not less than the prevailing rate of wages shall be paid to all laborers, workers and mechanics performing work under the contract. 820 ILCS 130/4(a). Public Act 096-0437, effective January 1, 2010, recognizes that not all fixed work contracts are publicly bid with comprehensive terms, conditions, and specifications that include a prevailing wage clause. Thus, under Public Act 096-0437, when a school district awards work to a contractor without a public bid, project specifications, or a contract, the school district “shall . . . provid[e] the contractor with written notice on the purchase order related to the work to be done or on a separate document indicating that not less than the prevailing rate of wages . . . shall be paid . . .” 820 ILCS 130/4(a-2) (emphasis added).

If the school district fails to provide proper written notice to the contractor under Section 4 of the Act, the Department of Labor shall order the public body to pay any interest, penalties and fines that would have been owed by the contractor if proper written notice were provided. 820 ILCS 130/4(a-3). A school district’s failure to give proper written notice does not relieve the contractor of the duty to pay prevailing wages and comply with the Act. 820 ILCS 130/4(a-3).

To provide guidance to school districts and other public bodies, the Department of Labor suggests the following statement as an example of written notice that can be incorporated into the contracts, purchase orders or other written notices to the contractor regarding the applicability of the Act:

"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. For information regarding current prevailing wage rates, please refer to the Illinois Department of Labor's website at: <http://www.state.il.us/agency/idol/rates/rates.HTM>.

All contractors and subcontractors rendering services under this contract must comply with all requirements of the Act, including but not limited to, all wage, notice and record keeping duties."

(See <http://www.state.il.us/agency/idol/forms/pdfs/contract.pdf>.)

Given this new written notice requirement and the penalties for noncompliance, it is important that all "public works" bid packages, contracts, and purchase orders be reviewed for a determination of whether the Act applies and whether proper written notice to the contractor has been made in accordance with the Act.

C. Subcontractors' Payment Bonds Must Guarantee Payment of Prevailing Wages.

Prior to January 1, 2010, school districts were required to ensure that the contractor's payment bond guaranteed that the contractor pay prevailing wages. 820 ILCS 130/4. Public Act 096-0437 amends the Act to include the same requirement for payment bonds furnished by subcontractors. This amendment is only relevant when subcontractor bonds are required for a project.

## REVERSE AUCTIONS

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Governor Pat Quinn has signed into law Public Law 96-795 which allows public bodies, including school districts, to conduct reverse auctions for some purchases. This law takes effect on July 1, 2010.

In an ordinary auction, buyers bid up the purchase price to obtain a good or service. On the other hand, in a reverse auction, sellers bid down their proposed sale price in order to be awarded the contract.

The new law states that public bodies may procure supplies or services through a competitive electronic auction bidding process. Note that the new law perceives that the bidding process will be purely electronic.

To initiate the process, the public body's purchasing officer must explain in writing to his or her governing board the purchasing officer's determination that the use of such a process will be in the best interest of the public body. The public body must then publish that determination in the same manner that they would publish an invitation for bids.

The invitation for bids must include (i) a procurement description, (ii) all contractual terms, whenever practical, and (iii) conditions applicable to the procurement, including a notice that bids will be received in an electronic auction manner. Public notice of the invitation for bids must be given in the same manner as the public body's other invitations for bids.

Bids are to be accepted electronically as designated in the invitation for bids. The process must provide for disclosing each bidder's bid price to the other bidders during the auction. This will facilitate reduction of the other bidders' prices.

Similar to regular bidding, at the conclusion of the auction, public bodies must make the record of the bid prices received, as well as the name of each bidder, open to public inspection.

The contract must be awarded within 60 days after the auction by written notice to the lowest responsible bidder, or all bids must be rejected.

It is important to note that this Act does not apply to (i) procurements of professional and artistic services such as architectural and accounting services (ii) telecommunications services, communication services, and information services, or (iii) contracts for construction projects.

## SCHOOL DISTRICT BIDDING

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### A. The Duty to Publicly Bid

Section 10-20.21 of The School Code, 105 ILCS 5/10-20.21, provides school districts with the authority:

To award all contracts for purchase of supplies, materials or work or contracts with private carriers for transportation of pupils involving expenditures in excess of ~~\$10,000~~ \$25,000 or a lower amount as required by board policy to the lowest responsible bidder considering conformity with specifications, terms of delivery, quality, and serviceability, ... except the following:

- (i) contracts for the services of individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important role;
- (ii) contracts for the printing of finance committee reports and departmental reports;
- (iii) contracts for the printing or engraving of bonds, tax warrants and other evidences of indebtedness;
- (iv) contracts for the purchase of perishable foods and beverages;
- (v) contracts for materials and work which have been awarded to the lowest responsible bidder after due advertisement, but due to unforeseen revisions, not the fault of the contractor for materials and work, must be revised causing expenditures not in excess of 10% of the contract price;
- (vi) contracts for the maintenance or servicing of, or provision of repair parts for, equipment which are made with manufacturer or authorized service agent of that equipment where the provision of parts, maintenance or servicing can best be performed by the manufacturer or authorized service agent;
- (vii) purchases and contracts for the use, purchase, delivery, movement, or installation of data processing equipment, software, or services and telecommunications and interconnect equipment, software, and services;
- (viii) contracts for duplicating machines and supplies;
- (ix) contracts for the purchase of natural gas when the cost is less than that offered by a public utility;
- (x) purchases of equipment previously owned by some entity other than the district itself;

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- (xi) contracts for repair, maintenance, remodeling, renovation or construction, or a single project involving an expenditure not to exceed ~~\$20,000~~ \$50,000 and not involving a change or increase in the size, type or extent of an existing facility;
- (xii) contracts for goods or services procured from another governmental agency;
- (xiii) contracts for goods or services which are economically procurable from only one source, such as the purchase of magazines, books, periodicals, pamphlets and reports, and for utility services such as water, light, heat, telephone or telegraph;
- (xiv) where funds are expended in an emergency and such emergency expenditure is approved by 3/4 of the members of the board;
- (xv) State master contracts authorized under Article 28A of the School Code;
- (xvi) contracts providing for the transportation of pupils with special needs or disabilities, which contracts must be advertised in the same manner as competitive bids and awarded by first considering the bidder or bidders most able to provide safety and comfort for the pupils with special needs or disabilities, stability of service, and any other factors set forth in the request for proposal regarding quality of service, and then price.

All competitive bids in excess of ~~\$10,000~~ \$25,000 or a lower amount as required by board policy must be sealed by the bidder and must be opened by a member or employee of the school board at a public bid opening at which the contents of the bids must be announced.

Each bidder must receive at least 3 days notice of the time and place of such bid opening.

Due advertisement includes, but is not limited to, at least one public notice at least 10 days before the bid date in a newspaper published in the district, or if no newspaper is published in the district, in a newspaper of general circulation in the area of the district.

## B. The Bidding Process

### 1. Bid Submittals

#### a. Sealed Bids

Illinois statute requires that the bids be “sealed by the bidder” to eliminate the possibility of fraud or favoritism in the expenditure of public funds.

#### b. Faxed Bids

State law generally requires that sealed bids be submitted. In the absence of specific statutory authority, facsimile or other electronically transmitted bids should not be accepted or considered.

c. Timeliness of Bids

It is the duty of the bidder to submit the bid within the time frame established by the notice to bid and the bid documents and deliver it to the appropriate place.

It is within the discretion of the owner to accept a late bid. In *Statewide Roofing, Inc. v. Eastern Suffolk Board of Cooperative Educational Services*, 661 N.Y.Supp.2d 922 (1997), a low bid was delivered by UPS before bid time to the correct location and addressed to “purchasing officer.” However, a custodian signed for the package but delivered it to the wrong office. The bid was discovered after bids were publicly opened and read.” The purchasing agent confirmed the time of delivery by UPS and then opened the bid. The court held that the “non-public” opening of the bid was not an impediment to an award of the contract.

In *Power Systems Analysis, Inc. v. City of Bloomer*, 197 Wis.2d 214, 541 N.W.2d 214 (Wis.App. 1995) the city properly exercised its discretion to accept a bid one and one-half hours late where fraud, collusion and favoritism were prevented and the public received the best work at the lowest price.

d. Modification, Withdrawal or Re-submittal of Bids Before Bid Opening

The bid instructions may allow the contractor to withdraw his bid prior to opening. A bid submittal may constitute an irrevocable offer which may not be withdrawn. *Elsinore Union Elementary School District v. Kastoff*, 6 Cal.Rptr. 1, 276 P.2d 112, 115 (1955).

The current AIA Document A701 [Instruction to Bidders] provides:

4.4.2 Prior to the time and date designated for receipt of Bids, a Bid submitted may be modified or withdrawn by notice to the party receiving Bids at the place designated for receipt of Bids. Such notice shall be in writing over the signature of the bidder. Written confirmation over the signature of the Bidder shall be received, and date- and time-stamped by the receiving party on or before the date and time set for receipt of Bids. A change shall be so worded as not to reveal the amount of the original Bid.

4.4.3 Withdrawn Bids may be resubmitted up to the date and time designated for the receipt of Bids provided that they are then fully in conformance with these Instructions to Bidders.

2. Public Opening and Reading of the Bids

Illinois law generally requires that a public officer or employee publicly open the bids and publicly announce the contents of the bids. 105 ILCS 5/10-20.21.

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AIA A701 provides: “5.5 Opening of the Bids. At the discretion of the Owner, if stipulated in the advertisement or Invitation to Bid, the properly identified Bids received on time will be publicly opened and will be read aloud. An abstract of the bids will be made available to Bidders.”

In *Statewide Hi-Way Safety, Inc. v. New Jersey Dept. of Transportation*, 283 N.J.Super. 223, 661 A.2d 826 (A.D. 1995), state law required that the bids shall state the “hour, date, and place where the sealed proposals will be received and publicly opened and read. The Cost Plus contract consisted of two components which had to be determined to ascertain the lowest bid. DOT’s failure to total the two components at the bid opening and read it publicly constituted a material deviation from the statutory requirements. The bid award was set aside.

a. Withdrawal or Modification After the Bids Are Received

AIA A701 provides: “4.4.1 A Bid may not be modified, withdrawn or canceled by the Bidder during the stipulated time period following the time and date designated for the receipt of Bids, and each bidder so agrees in submitting a Bid.”

A competitive bid which contains a material variance is an unresponsive bid and may not be corrected after the bids are opened in order to make it responsive. *Leo Michuda & Sons Co. v. Metropolitan Sanitary District of Greater Chicago*, 97 Ill.App.3d 340, 344-345, 52 Ill.Dec. 869, 873, 422 N.E.2d 1078, 1082 (1st Dist. 1981).

3. Awarding the Bid – Criteria

a. Lowest

The public interest is the focus of the inquiry. However, disputes may arise when the public entity has unfettered discretion to manipulate the criteria of awarding the bid (e.g., alternates) so as to choose its favored contractor. Care must be exercised to establish the methodology of choosing a lose bidder before the bids are opened.

b. Responsive

A responsive bid is one which is in strict compliance with the Bidding Documents.

i. Material Defects – Nonwaivable

A two-pronged test determines whether a bid noncompliance constitutes a material and nonwaivable irregularity. First, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements; and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary

common standard of competition. 10 McQuillan, Municipal Corporations §29.65, at 462-463 [3d ed rev'd].

A public entity when confronted with a material deviation in the bid submittal has two choices: First, award to the next lowest responsible bidder; or second, reject all bids and re-advertise.

- A Contractor's submittal of a 5% bid bond in lieu of the specified 10% bid bond was a nonwaivable material variance. *Bodine Electric of Champaign v. City of Champaign*, 305 Ill.App.3d 431, 238 Ill.Dec. 368, 711 N.E.2d 471 (4th Dist. 1999).

- The Army Corps of Engineers' award of a contract, which failed to include a completed bid submittal package and allowed a re-submittal six days after the bid opening, was set aside as "irrational." The submittal lacked a commitment to hold the bid open for the requisite period of time and a promise to furnish bonds. *Firth Construction Co., Inc v. United States*, 36 Fed. C. 268 (1996).

- In *Williams Brothers Construction, Inc. v. Public Building Commission of Kane County*, 243 Ill.App.3d 949, 184 Ill.Dec. 14, 612 N.E.2d 890 (2nd Dist. 1993) an injunction was denied where the unsuccessful bidder failed to show that successful bidder's failure to list its subcontractors on the bid form was a material and nonwaivable variance from the specifications.

- Failure to list minority and small business subcontractors with the bid submittal was considered a material deviation requiring rejection of the bid. The omission purportedly gave the low bidder an advantage over its competitors. It allowed the low bidder to negotiate with minority subcontractors after it was designated the low bidder. *Leo Michuda & Sons, Co. v. Metropolitan Sanitary District*, 97 Ill.App.3d 340, 52 Ill.Dec. 869, 422 N.E.2d 1078, 1082 (1st Dist. 1981).

- The finding that a failure of the president to include his signature on all but one bid submittal document was considered a material deviation, was vacated and dismissed for mootness. *George W. Kennedy & Co. v. City of Chicago*, 135 Ill.App.2d 306, 90 Ill.Dec. 113, 481 N.E.2d 913, vacated and dismissed, 112 Ill.2d 70, 96 Ill.Dec. 700, 491 N.E.2d 1160 (1986). We believe that multiple signatures of the president and the bid bond adequately provided security to the public entity of execution and performance of the contract. Inadvertent omission of one signature should be considered an immaterial deviation and waivable.

## ii. Minor Variances – Waivable

A variance which neither deprives the public entity of its guarantee that the contract will be performed nor grants the successful bidder an advantage over competitors constitutes merely a technical irregularity that can be waived. Courts have recognized

that competitive bidding should be administered in a manner so as not to thwart the primary purpose of achieving economy.

- In *Tec Electric, Inc. v. Franklin Lakes Board of Education*, 284 N.J. Super 480, 665 A.2d 803 (1995) the court suggested that “where the irregularity is not substantial, it may be the duty as well as the right of the municipality to waive it.” In *Tec Electric*, the bidder omitted a one-page document entitled Pre-qualification Affidavit which is part of the state’s statutory qualification scheme. The affidavit requires the bidder to state that there has been no material adverse change in the qualification information. The ten item bidder checklist prepared by the Board of Education did not list the Pre-qualification Affidavit as an item. The check list included a determination by the Department of Treasury, Division of Building and Construction that the bidder was qualified as required by New Jersey law. *Tec Electric* included all of the ten specified items. The pre-qualification affidavit was to be sent to the Department of the Treasury for a determination of whether a change in status had occurred. Here, the court found that *Tec Electric* and its surety were financially and contractually committed to the project; the omission did not influence the amount of any other contractor’s bid; there was no evidence of manipulation of the bidding process for competitive advantage. Finally, the court held that refusal to waive the defect was an abuse of discretion.

- See dissent on waiver of defects, *George W. Kennedy & Co. v. City of Chicago*, 135 Ill.App.2d 306, 90 Ill.Dec. 113, 119-20, 481 N.E.2d 913, 919-20.

- In *Thompson Electronics v. Easter Owens/Integrated Systems, Inc. & Will County Public Building Commission*, 301 Ill. App.3d 203, 234 Ill.Dec. 362, 702 N.E.2d 1016 (3rd Dist. 1998), the award of a security alarm contract to an unlicensed security company was not considered a material variance requiring the award of the contract be set aside.

### c. Responsible

Responsibility is assessed based upon the contractor’s past history and technical experience on similar sized and/or complex projects, its financial and bonding capacity, the depth and experience of its labor forces and management personnel.

In *Court Street Steak House v. County of Tazewell*, 163 Ill.2d 159, 205 Ill.Dec. 490, 643 N.E.2d 781 (1994), social responsibility was considered an appropriate factor in considering the award of a food service contract. Food service training for the mentally handicapped was considered a reasonable basis on which to award a public contract. The dissent accurately suggests that without establishing as part of the specifications social responsibility as a criteria for award of the contract and a clear methodology for measuring responsibility, such a factor could form the basis of manipulating the award. We suggest that public entities follow the recommendation of the dissent. See also, 30 ILCS 500/45-35 (Preferences for sheltered workshops for the severely handicapped).

#### d. Alternate Bids

Without alternate bidding, the base bid provides the only means of comparison; the low responsible responsive bidder is awarded the contract after the bids are opened. The possibility of favoritism is eliminated because the identity of the bidders is not known in advance, and there are no changes after bids are opened. A problem can arise if alternate bids are used for comparison after the bids are opened but before an award is made. Alternates can be used to manipulate the process to create a favored low bidder. Comparisons based on alternate bids also give the appearance of favoritism because the bidders are known when the comparisons are made. When the bidders are known the process degenerates into a contest of influence.

The methodology of awarding contracts with alternatives should be established in advance of bid opening. Manipulation of alternates could allow dishonesty, favoritism, improvidence, fraud or corruption to occur where award of contract is other than the lowest base contract bidder. An award of contract based strictly on the base contract work was upheld in *Tilden-Gil Constructors, Inc. v. City of Cathedral City*, 59 Cal.App.4th 404, 68 Cal.Rptr. 902 (1997)[Unpublished Opinion]. A Public Owner should rank or prioritize an award based upon pre-defined financial ability which is announced at the time of the bid opening. Alternatively, a blind bidder pool can be established by coding the name of the bidders during determination of the alternatives selected. *FTR International v. City of Pasadena*, 53 Ca.App.4th 634, 62 Cal.Rptr.2d 1 (1997).

#### e. Post-Bid Pre-Award Negotiations

Once the bidding process produces a lowest responsible bidder, there is no supervening public interest or policy consideration which precludes negotiating and modifying a post-bid, pre-award price concession from the low bidder in the absence of favoritism, improvidence, fraud or corruption. See *Acme Bus Corp. v. Board of Education*, 91 N.Y.2d 51, 666 N.Y.S.2d 996, 689 N.E.2d 51 (1997) [Public owner may engage in post bid negotiations with the lowest bidder]. Units of local government and the state have authority to negotiate a price reduction with the lowest responsible bidder. 720 ILCS 5/33E-12(3). The implication is that alterations of the terms and conditions may not be negotiated.

#### f. When is Acceptance?

A contract exists when the public owner awards the contract and notifies the contractor of the award. Execution of the agreement is merely a formality. *David Copperfield's Disappearing, Inc. v. Haddon Advertising Agency*, 897 F.2d 288 (7th Cir. 1990) [Since the essential terms of the agreement of the parties had been finalized, the execution of a written contract was not intended as a condition precedent to a contract.] The factors considered by the court include: (1) whether this is the type of business arrangement that is reduced to writing; (2) whether the amount of money involved was substantial; (3) whether significant provisions were not previously discussed or agreed upon; and (4) whether the parties' negotiations show that a writing was anticipated. The parties'

conduct and statements following their oral agreement were therefore relevant to the question of whether a binding contract ever came into existence.

Under the Illinois Procurement Code a contract is formed when written notice is served upon the lowest responsible responsive bidder. 30 ILCS 500/20-10(g). In the typical public bid, the terms and conditions of the contract are set forth in excruciating detail in the bid package. The contract should merely incorporate by reference the bid package.

g. Pre-qualification of Bidders

The Capital Development Board currently has express authority to pre-qualify bidders. 30 ILCS 505/6. Under the Illinois Procurement Code, the Capital Development Board, the Department of Transportation, Public Institutions of Higher Education and Central Management Services may pre-qualify bidders. Notwithstanding pre-qualification, the Act suggests that “any qualified suppliers” may be awarded the contract. 30 ILCS 500/30-20.

4. Rejecting the Bid

a. Discretion “to reject any and all bids.”

It is within the public owner’s discretion to reject all bidders. 65 ILCS 5/9-3-26. Any and all bids received in response to an advertisement may be rejected by the purchasing agent...if the public interest may otherwise be served thereby. 65 ILCS 5/8-10012.

b. Documenting the Basis for Awarding/Rejecting Bid

The awarding authority’s intent is measured at the time the awarding authority awards or rejects the bid. *Stubbs v. City of Aurora*, 160 Ill.App.351, 360 (2nd Dist. 1911). The recommendation of the purchasing officer at the time of award or rejection by the awarding authority establishes the rationale for their decision. A well articulated memorialization which establishes the rationale for the decision will form the basis for successful judicial review. See 30 ILCS 500/20-40.

c. Constitutionally Impermissible Basis for Rejecting Bids

Discrimination based upon race, sex or national origin cannot be the basis of rejecting a bid. Similarly, a past history of filing contract claims without some evidence of abuse is not a basis for rejecting bids. *Matter of Nova Group Inc.*, No. B-282947 (U.S. Comptroller General, 1999). See 775 ILCS 10/1 et seq.

d. Bid Mistakes

1. Circumstances Warranting Judicial Relief From a Bid Mistake

The Illinois Supreme Court in *John J. Calnan Co. v. Talsma Builders, Inc.*, 67 Ill.2d 213, 10 Ill.Dec. 242, 367 N.E.2d 695 (1977) established three elements which must be plead and proven before a contract will be rescinded for mistake by one of the parties. "First, the mistake must relate to a material feature of the contract; second, it must have occurred despite the exercise of reasonable care; and third, the other party must be placed in status quo." *Wil-Fred's, Inc. v Metropolitan Sanitary District of Greater Chicago*, 57 Ill.App.3d 16, 14 Ill.Dec. 697, 372 N.E.2d 946, 950-551 (1st Dist. 1978) adds a fourth element, i.e., the mistake is of such grave consequence that enforcement of the contract would be unconscionable (which appears to be superfluous).

The State of Illinois has adopted bid mistake procedures which are very similar to the Federal Acquisition and Requisition procedures. An acquisition officer who receives a bid which is patently in error must request verification of the bid submittal from the bidder. 44 Ill.Admin. Code § 1.1310.

a. Material Feature of the Contract

A survey of Illinois bid mistake cases suggests that a mistake in the order of magnitude of equal to or greater than 10% of the total value of the bid is considered by the courts as a material mistake. Courts are not inclined to grant relief when the mistake is less than 10% of the total value of the bid. A \$31,000 error in a \$237,000 contract was considered material in *John J. Calnan Co. v. Talsma*, 67 Ill.2d 213, 367 N.E.2d 695 (1977). An error greater than 10% was determined material where the total contract was \$337,928 in *Community Consolidated School v. Meneley Construction Co.*, 86 Ill.App.3d 1101, 42 Ill.Dec. 571, 409 N.E.2d 55 (4th Dist. 1980). In *Wil-Freds, Inc. v. Metropolitan Sanitary District*, 57 Ill.App.3d 16, 14 Ill.Dec. 667, 372 N.E.2d 946 (1st Dist. 1978), a 17% disparity existed between the mistaken bid and the next lowest bidder. In *People ex rel. Department of Public Works and Buildings v. South East National Bank of Chicago*, 131 Ill.App.2d 238, 266 N.E.2d 778 (1st Dist. 1971) a 10% error occurred on a \$322,510 bid.

b. Neglect in the Preparation of the Bid

The bidder must demonstrate it exercised reasonable care in the preparation of the bid. The bidder must establish that a check or verification procedure was in place and utilized when the bid was prepared.

i. Excusable Neglect

Courts have recognized excusable neglect in the preparation of bid submittals. Time has been recognized as a critical factor excusing neglect. The last minute receipt of a subcontractor's proposal which is mistakenly entered on the tally sheet and then onto the bid submittal form resulted in bid relief. A secretary erroneously entered \$2,617 instead of the quoted \$26,170 for the cost of the equipment. Immediately upon the public announcement of the bids, the general contractor notified the public entity that a mistake had been made and requested to withdraw its bid. Relief was granted. *People*

ex rel. Department of Public Works & Buildings v. South East National Bank, 131 Ill.App.2d 238, 266 N.E.2d 778, 779 (1st Dist. 1971)[“Where the mistake is due to clerical or arithmetic error, the courts are unanimous in granting recession or other appropriate relief.” 266 N.E.2d at 781].

In John J. Calnan Co. v. Talsma, 67 Ill.2d 213, 367 N.E.2d 695 (1977), the subcontractor did not discover the mistake until four months after the request for a bid was made. The vice president admitted that the company had a review or double check system in place but was not utilized for the bid in question. The court concluded that reasonable care was not exercised in the preparation of the bid. In Community Consolidated School v. Meneley Construction Co., 86 Ill.App.3d 1101, 42 Ill.Dec. 571, 573, 409 N.E.2d 55 (4th Dist. 1980), the court concluded that “logic and standard practice in the community would require checking for the type of error that in fact occurred.”

#### c. Maintaining the Status Quo

The ability of the Owner to award the contract to the next lowest bidder is sufficient to establish maintenance of the status quo. The owner’s argument that the loss of the lowest bid will not preserve the bargain has been declared to be of no consequence. Early discovery of the mistake and the ability of the owner to enter into a contract with the next lowest bidder has been held sufficient to fulfill the requirement of maintaining the status quo. Community Consolidated School v. Meneley Construction Co., 86 Ill.App.3d 1101, 42 Ill.Dec. 571, 573, 409 N.E.2d 55 (4th Dist. 1980); Santucci Construction Company v. County of Cook, 21 Ill.App.3d 527, 315 N.E.2d 565, 570 (1st Dist. 1974); Wil-Fred’s Inc. v. Metropolitan Sanitary District, 57 Ill.App.3d 16, 14 Ill.Dec. 667, 372 N.E.2d 946, 952 (1st Dist. 1978)[Notice within 48 hours].

Relief will not be granted when significant delay impairs the Owner’s ability to award the contract to the next lowest bidder. In John J. Calnan Co. v. Talsma Builders, Inc., 67 Ill.2d 213, 10 Ill.Dec. 242, 367 N.E.2d 695 (1977), after a four month delay in notifying the general contractor of a bid mistake after work had commenced, the court held that the general contractor could not be returned to the status quo.

#### d. The Owner’s Knowledge of the Mistake

Where the owner has reason to suspect the mistake due to the disparity in the bids or the disparity in the bid as compared to the architect’s estimate, or where the owner has specific knowledge of the mistake, relief is generally granted. A \$235,000 (26%) disparity between the low bidder and the next bid of \$41,118,375 was sufficient to put the owner on notice of the material error. Wil-Fred’s Inc. v. Metropolitan Sanitary District, 57 Ill.App.3d 16, 14 Ill.Dec. 667, 674, 372 N.E.2d 946, 952 (1st Dist. 1978).

#### e. Unconscionability

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.

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Although unconscionability is not an element, the materiality of the mistake is a significant equitable factor and must be equated to the gravity or consequences of the mistake.

## 2. Circumstances not Warranting Judicial Relief

### a. Unilateral Mistakes

A unilateral mistake is not grounds for relief. However, Illinois courts will allow relief for a mistake of fact, i.e., clerical errors, such as arithmetical computations, transpositions, a misplaced decimal point, typographical errors or errors that result from transferring figures from a take-off sheet to the bid form. Relief may be given if the bid mistake arose out of misleading specifications. *Wil-Fred's Inc. v. Metropolitan Sanitary District*, 57 Ill.App.3d 16, 372 N.E.2d 946, 14 Ill.Dec. 667 (1st Dist. 1978). Bid mistake is a common reason for the low bidder to withdraw its bid or refuse to enter into a contract. In some instances, a court will allow a bidder to reform its bid and perform the contract where the mistake was not due to negligence or without such negligence as would preclude relief. *Illinois Department of Public Works & Buildings v. South East National Bank*, 131 Ill.App.2d 238, 266 N.E.2d 778, 781 (1st Dist. 1971)(Recession granted).

### b. Errors in Business Judgment

Relief is not given for a poor business decision.

### c. Establishing a Bid Mistake

#### i. Bidder's Burden of Proof

Evidence of the conditions giving rise to an excusable mistake must be clear, convincing and positive. *Crilly v. Board of Education*, 54 Ill.App. 71 (1894). A bid mistake must be proven by "clear and positive" evidence. *Wil-Fred's Inc. v. Metropolitan Sanitary District*, 57 Ill.App.3d 16, 14 Ill.Dec. 667, 672, 372 N.E.2d 946, 951 (1st Dist. 1978).

#### ii. The Owner's Response to a Claim of Bid Mistake

Upon notification by a bidder that a bid mistake has occurred, the owner must immediately demand submittal of the original bid preparation documentation which demonstrates the error, coupled with a detailed explanation of the error. Promptly thereafter, a meeting should be held for the bidder to explain and demonstrate by the documentation how the error occurred. Only then should the owner decide whether to allow the bidder to withdraw the bid because of mistake.







## BID HYPOTHETICAL #2

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School District X published notice that it would open bids for its transportation contract on June 1<sup>st</sup> at 10:00 a.m. at the district office. Identify the proper responses in the following scenarios:

1. A bidder submitted a sealed bid, but prior to June 1<sup>st</sup> requested that they be allowed to withdraw and/or modify their bid. May the district allow the bidder to do this?
2. At the bid opening, a bidder arrives with its sealed bid at 10:05 a.m. May the district accept this bid?
3. At 11:30 a.m., the district receives a bid delivered via FedEx. May the district accept this bid?
4. After the bids are opened, the district realizes that all bids came in over budget. What options are available?
5. After the bids are opened, the low bidder realizes that they made a mistake and asks the district to be allowed to withdraw their bid. What options are available?



