

STATUTORY REQUIREMENTS FOR PUBLIC WORKS CONTRACTS

by Paul V. Rost and Rayn A. Moehlman

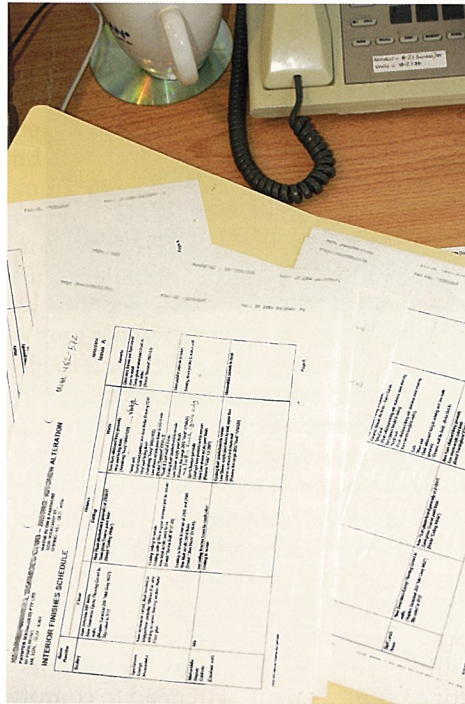
NEW STATE LAW REQUIREMENTS GIVE LOCAL GOVERNMENTS AN OPPORTUNITY TO REVIEW EXISTING BIDDING DOCUMENTS AND CONTRACTS

During the 2008 and 2009 legislative sessions, the Missouri General Assembly enacted House Bill 1549 (2008) and its follow-up bill, House Bill 390 (2009), which address the issue of illegal aliens. These bills add requirements designed to prevent illegal aliens and employers that hire illegal aliens from deriving benefits from contracts let by municipalities and other political subdivisions to the ever-growing list of statutory requirements for public contracts, including contracts for public works projects.

With the last of these new statutory requirements for public works contracts becoming effective on August 28, 2009, municipal officials are presented with an opportunity to review not only new requirements for public works contracts imposed by the recent legislation, but all such statutory requirements. This article will generally address the new, old, and perhaps overlooked statutes containing mandatory requirements for all public works contracts and/or the calls for bids for such contracts. However, each public works contract is unique, and public officials should consult legal counsel to ensure compliance with statutory requirements for every public works contract let by a municipality.

OSHA TRAINING; §292.675¹

This new section, which became effective on August 28, 2009, requires all "on-site employees" of contractors and subcontractors working on a public works project to have taken a ten-hour, OSHA-approved construction safety course provided by the contractor or subcontractor. The ten-hour OSHA training program is a one-time requirement for each employee. Thus, on-site employees must either complete the



program within 60 days of beginning work or "hold documentation of prior completion of the program." For each public works project, the statute directs the municipality to specify the statute's requirements in the **resolution or ordinance** and in the **call for bids** for the contract, as well as in the **contract** itself.²

Violations of §292.675 are investigated by the Missouri Department of Labor and Industrial Relations (MoDOLIR) with any penalties assessed by MoDOLIR forfeited to the municipality in the amount of \$2,500 plus \$100 per day, per employee found working on the project without the necessary training. Any employee found working without the training will have 20 days to complete the program before the employee is removed from the project and penalties start to accrue. A municipality must withhold penalty amounts assessed by the MoDOLIR from payments due to the contractor under the contract. Notice of these penalty provisions also

must be set forth within the terms of the contract.

PARTICIPATION IN WORK AUTHORIZATION PROGRAM; §285.530

Effective January 1, 2009, this section compels a contractor, "[a]s a condition for the award of any contract or grant in excess of five thousand dollars" to submit two affidavits concerning the contractor's employment of illegal aliens. The first affidavit must affirm that the contractor is enrolled and participates in a "federal work authorization program with respect to the employees working in connection with the contracted services." This "federal work authorization program" currently refers to the "E-Verify" program administered by the federal Department of Homeland Security.³ In addition to this affidavit, the contractor must provide documentary proof supporting its affidavit.⁴ The other affidavit required under this section must affirm that the contractor "does not knowingly employ any person who is an unauthorized alien in connection with the contracted services."

As noted above, these affidavits are a **condition** for the award of any contract in excess of \$5,000. As such, a municipality must receive the affidavits and supporting documentation **before** awarding a contract to a contractor. To ensure that bidding contractors are aware of these requirements and actually provide the affidavits and documentation to the municipality before the contract is awarded, in addition to setting forth these requirements within the language of the contract/bid documents themselves, a municipality should include a form affidavit within the bid documents that are distributed by the municipality to potential bidding contractors, to be filled out as part of the bid submission.⁵ By including these requirements in the bid documents, any bid that fails to include the necessary affidavits and documentation can be rejected as a non-responsive bid.

WE'RE IN THE FIELD TO FINISH BUSINESS

- DATA COLLECTION
- UTILITY MAPPING

- ASSET MANAGEMENT
- CUSTOM APPLICATIONS



WWW.MIDLANDGIS.COM 501 North Market Maryville, MO Phone: 660.562.0050

Under §285.530.2, contractors must only provide the required “affidavits” on an annual basis. Thus, any contractor who has previously provided the affidavits to the municipality within the past year in connection with a previous project of the municipality does not need to provide those affidavits again. However, §285.530.2 does not appear to extend the same annual-basis-only provision to the required “documentation” showing a contractor’s participation and enrollment in E-Verify. Subsection 2 only refers to “affidavits” being provided on an annual basis. Consequently, bidding contractors should provide the necessary documentary proof of enrollment and participation with every public works contract upon which it bids in the municipality.

PROOF OF LAWFUL PRESENCE; §208.009

Nestled neatly within Chapter 208 of the Missouri statutes dealing with public health and welfare benefits, Section 208.009 prohibits any illegal alien from receiving state or local “public benefits” and requires all applicants **at the time of application** for such public benefits to provide “proof that the applicant is a citizen or a permanent resident of the United States or is lawfully present in the United States.” At first glance, this prohibition would not seem to have any connection to public works contracts. A closer inspection of Sec-

tion 208.009, however, reveals that the definition of “public benefit” includes not only welfare, health, disability, housing, or food assistance benefits but also “any ... contract ... provided by an agency of state or local government...” As a result, it appears that bidders on public works contracts, as “applicants” for a public benefit, will need to comply with the requirements of §208.009 to be eligible for an award of a public works contract.

According to the statute, affirmative proof can be established through (1) a Missouri driver’s license, (2) any “documentary evidence recognized by the department of revenue when processing an application for a driver’s license”⁶ or, (3) “any document issued by the federal government that confirms an alien’s lawful presence in the United States.” The statute goes on to say that, alternatively, if an applicant cannot provide any of the documentary proof set forth above at the time of application, the applicant can receive “temporary public benefits” for ninety (90) days by providing an affidavit “on or consistent with forms prepared by the ... local government agency administering the ... local public benefits” affirming that the applicant is lawfully present within the United States.⁷ **An affidavit is not required if the applicant has provided the necessary documentary proof at the initial time of application.**⁸

One potential problem is where a contract is awarded based on an affidavit of lawful presence and the contractor does not provide the necessary documentary proof of lawful presence within the 90 days provided by statute for “temporary public benefits.” In such situation, the city would be wise to seek guidance from legal counsel and/or the state before awarding a contract likely not to be performed in less than 90 days or, where a contract has been awarded, before continuing under the contract. At a minimum, a municipality should put in place procedures to ensure that no contract with a contractor who has provided an affidavit of lawful presence continues beyond 90 days without the city receiving the necessary verifications from the contractor.

Likewise, determining who must provide the affirmative proof of lawful presence when the applicant is not an individual, but a business entity like a corporation or L.L.C., presents its own set of challenges for the municipality. Obviously, a legal entity such as a corporation cannot provide a driver’s license, passport, or a “document issued by the federal government that confirms an alien’s lawful presence.” One possible approach may be to deem the “applicant” to be the person responsible for submitting and signing the corporation’s bid submission within the bid documents. This person would then be required to submit the necessary “affirmative proof” along with the contractor’s bid submission. This approach likely reflects the spirit of the statute as the authorized representative is more likely than not to be an owner or other high-ranking company official. Unfortunately, no official guidance addressing these questions has been issued and legal counsel should be consulted to ensure compliance with the statute.

While this section does not require any specific provisions to be included within the bid documents or the contract itself, it is advisable to include language incorporating the requirements of §208.009 within the bid documents to ensure that bidding contractors are submitting the necessary documentation and to provide for efficient collection of such documentation by the municipality.

To avoid bidding contractors filling out and submitting unneeded affidavits of lawful presence (and to

encourage them to timely submit the required documentary proof of lawful presence), municipal officials should consider not including a form affidavit of lawful presence in the bid documents. Instead, the bid documents can state that if needed, a form affidavit of lawful presence can be obtained from the municipality upon request.

PROMPT PAYMENT ACT; §34.057

The provisions of the Prompt Payment Act are a long-standing and familiar part of the statutory requirements for public works contracts. This Act requires the public owner to make at least monthly progress payments to a contractor (unless the contract provides for one lump sum). The Act also sets a maximum retainage that can be withheld by a public owner of 10 percent (10%) although in most cases the retainage must be set at 5 percent (5%) **absent a determination by the public owner and the architect/engineer "that a higher rate is needed to ensure performance of the contract."** Other requirements include 30-day time limits on payments of monthly invoices and on final payment upon completion of the contract. Failure to pay within the statutory time limits will subject the public owner to paying 1.5 percent (1.5%) interest per month 18 percent (18%) annual rate on overdue amounts until paid.

PAYMENT BOND; §107.170

To address the fact that mechanic's liens cannot be filed on public projects,⁹ §107.170 requires a municipality (and other public entities) to require a payment bond from a contractor on every project with estimated costs in excess of \$25,000. This bond is conditioned "for the payment of any and all materials, incorporated, consumed or used in connection with the construction of such work, and all insurance premiums, both for compensation, and for all other kinds of insurance, said work, and for all labor performed in such work whether by subcontractor or otherwise." It is essential that municipalities require and obtain the necessary payment bond from all contractors on public works projects because a failure to require such bond could result in public officials being held personally liable to subcontractors and suppliers whom the general contractor fails to provide payment.¹⁰

The statute provides express authority for public entities to indemnify public officials charged with carrying out the requirements of §107.170.

PREVAILING WAGE; §290.210 ET SEQ.

While the responsibility to pay the prevailing wage to laborers working on public works projects ultimately falls on a contractor, the Missouri Prevailing Wage Law imposes several requirements on municipalities and other public bodies who let contracts for such projects. A municipality's duties start before a contract is even let. "Before advertising for bids or undertaking such construction," a public body must request MoDOLIR to "determine the prevailing rates of wages for workmen for the class or type of work called for by the public works, in the locality where the work is to be performed."¹¹ The department's determination of the prevailing wages must be "attached to and made a **part of the specifications for the work**" and the public body must specify the prevailing wages (including the rate for holiday and overtime work) in the **resolution or ordinance and in the call for bids for the contract.**¹² In addition, the contract itself must contain language (1) requiring the contractor to pay no less than the prevailing wage to laborers performing work under the contract and (2) setting forth the penalties forfeited to the public body for vio-

lations of the Prevailing Wage Act, i.e., one hundred dollars (\$100) per worker, per day.¹³ Public bodies must withhold penalty amounts from payments due to contractor under the contract.¹⁴ Finally and "[i]n addition to all other reporting requirements of sections 290.210 to 290.340," prior to the beginning of any work on a public works project, the public body is required to notify MoDOLIR "of the scope of the work to be done, the various types of craftsmen who will be needed on the project, and the date work will commence on the project."¹⁵

EXCESSIVE UNEMPLOYMENT; § 290.550-580

Section 290.560 RSMo provides that "[w]henver there is a period of excessive unemployment in this state, every person who is charged with the duty, either by law or contract, of constructing or building any public works project or improvement for the state or ... municipal corporation ... shall employ only Missouri laborers and laborers from nonrestrictive states on such project or improvement.¹⁶ This statute further requires "every contract let by any such person shall contain a provision requiring that such labor be used," subject to certain exceptions regarding availability of laborers. Because a municipality's governing body and officials charged with administering public



America's Tank Maintenance Company!

Utility Service Co., Inc. (USCI), whose origins date back to 1963, is the premier provider of professional water tank services. USCI maintains thousands of potable water tanks under full service asset management programs coast to coast. USCI provides tank funding and procurement services for new tanks and site management services for antennas on both existing and new tanks.
Now Utility Service Co., Inc. introduces...

WaterMix
The Registered Chemical Water

Improve your water quality by minimizing organics, stabilizing disinfectant residuals, eliminating thermal water stratification and maximizing filter media efficiency.

<p><i>Eastern MO</i> Eric Stechmann • 816.529.8459 estechmann@utilityservice.com Jefferson City, MO</p>	<p><i>Western MO</i> Tom Stechmann • 314.420.4912 tstechmann@utilityservice.com Liberty, MO</p>
---	---

www.utilityservice.com

Municipal Code Corporation
There for you
wherever the day takes you
www.municode.com
info@municode.com
800-262-2633



works contract are arguably “person[s] who [are] charged with the duty ... by law ... of constructing or building [a] public works project,” a public works contract let by a municipality should include such a provision.

Enforcement of these statutes falls to MoDOLIR, who is authorized to sue for injunctions to prevent the awarding of a contract or stop work on a project where the excessive unemployment statutes are being violated.¹⁷ The MoDOLIR recently enforced these provisions, requiring contractors on a Springfield City Utilities project to replace approximately 150 workers from restrictive states who were working on the project.¹⁸

AMERICAN PRODUCTS; §34.353

This section requires “each contract made by a public agency for construction, alteration, repair, or maintenance of any public works shall contain a provision that any manufactured goods or commodities used or supplied in the performance of that contract or any subcontract thereto shall be manufactured or produced in the United States.” This section provides exceptions for contracts for less than \$25,000 or various situations where certain American products are of limited availability or would impose specified increases in cost.

This section also provides an opportunity for municipalities to opt out of its requirements where the “executive head of the public agency certifies in writing that ... [t]he political subdivision has adopted a formal written policy to encourage the purchase of products manufactured or produced in the United States.” In order to take advantage of this exception and avoid the administrative processes necessary to utilize the other exceptions provided in the statute, the municipality would need to formally adopt a written policy

encouraging purchase of American products. Many municipalities may already have such a policy within their purchasing codes or manuals.¹⁹ The statute does not provide to whom a certification from the executive head must be provided, but does require that certifications be maintained by the public agency for a period of three years. While a provision requiring purchase of American products may not need to be included in the contract where the municipality has taken advantage of the local “American products” policy exception, municipalities should consider including a notice of its policy and certification in its bid documents to show that the statutory requirements have been considered and addressed. □

Paul V. Rost is a founding shareholder of Cunningham, Vogel & Rost, P.C., a Missouri-based law firm that represents municipalities and other local government interests throughout the region. Mr. Rost is the city attorney for the cities of Green Park, Warson Woods, and Wentzville, and the village of Marlborough in Missouri. **Ryan A. Moehlman** is an associate attorney with Cunningham, Vogel & Rost, P.C. practicing in municipal law in Missouri and Illinois. Contact information: 75 W. Lockwood, Suite One, St. Louis, MO 63119; (314) 446-0800; www.municipalfirm.com.

(Endnotes)

1 All statutory references are to Missouri Revised Statutes, 2009 Supplement, unless otherwise indicated.

2 § 292.675.4 (“The public body shall specify the requirements of this section in the resolution or ordinance and in the call for bids for the contract. The contractor to whom the contract is awarded and any subcontractor under such contractor shall require all on-site employees to complete the ten-hour training program required under subsection 2 of this section or such employees must hold documentation of prior completion of the program. The public body awarding the contract shall include this requirement in the contract”) The section is unclear as to what “resolution or ordinance” is being referenced – putting the contract out for bid or awarding the contract.

3 DHS E-Verify website: www.uscis.gov/e-verify

4 Ostensibly, documentation of par-

ticipation and enrollment provided to the contractor from E-Verify.

5 See 15 CSR 15.020, “Form of Affidavit.”

6 Currently the list of Documents Required to Apply for or Renew a Missouri Driver License, Nondriver License, or Instruction Permit can be found at <http://dor.mo.gov/mvdl/drivers/idrequirements.pdf>.

7 This alternative temporary affidavit of lawful presence under § 208.009 is different from the mandatory affidavits required under § 285.530 affirming a contractor’s participation in a federal work authorization program and non-employment of illegal aliens.

8 § 208.009.4 R.S.Mo.: “An applicant who *cannot provide* the proof required under this section at the time of application *may alternatively* sign an affidavit under oath....” (Emphasis added)

9 See *Collins & Hermann, Inc. v. TM2 Const. Co., Inc.*, 263 S.W.3d 793, 796 (Mo.App. E.D. 2008) (“The purpose of Section 107.170 has long been to afford to those furnishing labor or material on public work the same measure of protection as is afforded by the mechanic’s lien law where the building or improvement is not of a public character.”)

10 See *Union Pacific R. Co. v. St. Louis Marketplace, Ltd. Partnership*, 212 F.3d 386, 390-91 (8th Cir. 2000) (Official immunity did not protect city officials, Mayor and Comptroller, who were charged with performing ministerial duty of requiring payment bond from a contractor.)

11 § 292.250.1 R.S.Mo.

12 *Id.*

13 *Id.*

14 *Id.*

15 § 290.262.10 RSMo.

16 List of restrictive states: Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Iowa, Maine, Massachusetts, Mississippi, Montana, Nevada, New Jersey, North Dakota, Oklahoma, South Dakota, U.S. Virgin Islands, West Virginia and Wyoming. *Frequently Asked Questions - Excessive Unemployment*, MoDOLIR, http://www.dolir.mo.gov/ls/faq/faq_PublicWorksEmployment.asp. (Accessed July 29, 2009).

17 § 290.580 R.S.Mo.

18 *DOLIR News*, MoDOLIR, http://www.dolir.mo.gov/Newsreleases/DOLIR_News/NewsLetter/06-09/DN_6-091.htm. (Accessed July 30, 2009).

19 See e.g., Harrisonville City Code § 130.020.E.13; Hollister City Code § 145.100; Warson Woods § 130.150.