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New Amendment to Prevailing Wage Act

Do Prevailing Wages now have to be used on Private Projects that receive Public Incentives?

On April 28th, 2009, Senate Bill 0223 passed through both houses. This bill amends the language of the Prevailing Wage Act (820 ILCS 130/2) in what appears to be an attempt by the legislature to expand the use of prevailing wages. The bill expands the definition of "Public Works" to include 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.

The bill could have significant impact on local government TIFs, SSAs, BDDs, and other private projects that receive local government incentives. Before passage of this bill, "Public Works" were much more narrowly defined and did not include funds provided by the Tax Increment Allocation Redevelopment Act, or TIF Act (65 ILCS 5/11-74.4). This new bill appears to be an attempt by the state legislature to apply the Prevailing Wage Act to any use of municipal funds in support of private projects.

The bill's attempt to broaden the applicability of the Prevailing Wage Act however, may not be successful because application of the Prevailing Wage Act requires that a two pronged test be met. The first prong of the test identifies what wages are covered under the Act. The Act applies to "wages of laborers, mechanics and other workers employed in any public works, ... by any public body and to anyone under contracts for public works."

The Second part of the qualifying test determines what bodies are governed by the Act. "Public body" is defined by the Act as "the State or any officer, board or commission of the State or any political subdivision or department thereof, or any institution supported in whole or in part by public funds, and includes every county, city, town, village, township, school district, irrigation, utility, reclamation improvement or other district and every other political subdivision, district or municipality of the state whether such political subdivision, municipality or district operates under a special charter or not." (820 ILCS 130/2). This second prong of the two-part test may prove to be a problem for those hoping that this latest amendment would broaden the prevailing wage requirement.

Over the years much debate has occurred over whether a private institution qualifies as a "public body" simply by receiving economic development funds from local governments. Two prominent examples of the debate on this topic can be found in the 1951 case of Zickuhr v. Bowling and the 2000 Illinois Attorney General's Opinion 018. Because the Prevailing Wage Act itself does not clearly define an "institution supported in whole or in part by public funds," these two authorities have attempted to clarify this issue. In the Zickuhr case, the 2nd district of Illinois appellate court said that this definition does not include private projects; while the non-binding opinion of the Illinois Attorney General's office states that even non-governmental entities that receive public funds for the construction of a fixed work must use Prevailing Wages as defined by the Act.

This latest amendment to the Prevailing Wage Act does not, in our opinion, clarify the definition of an "institution supported in whole or in part by public funds" and therefore may thwart the intended purpose of the amendment by allowing for a private developer to receive public funds without being subject to the Prevailing Wage Act. How courts will decide the effect of this amendment on this issue is yet to be determined, but we believe that the amendment has done little to change the current state of the law on this critically important issue.

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Paul Nicolosi is partner of his family's 60-year old municipal law firm, [Nicolosi & Associates, LLC](http://www.nicolosi.com), which has offices in Chicago's Loop and in Rockford, Illinois. Together with its affiliated planning and financial consulting practice, [The Buckley Companies](http://www.buckley.com), Nicolosi & Associates is able to provide unique blend of services to local governments with creative solutions that help them achieve results. The members of both firms have professional degrees in Law and Accounting; are licensed Architects, Planners and Real Estate Brokers; are Financial Analysts; and trained Project Coordinators.

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