

COMMUNITY COLLEGE BIDDING

I. THE DUTY TO PUBLICLY BID

Section 3-27.1 of *The Public Community College Act*, 110 ILCS 805/3-27.1, ("Act") provides Illinois community colleges with the authority to award all contracts for purchase of supplies, materials, or work involving an expenditure in excess of \$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; after due advertisement, except the following:

- a) Contracts for the services of individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important part;
- b) Contracts for the printing of finance committee reports and departmental reports;
- c) Contracts for the printing or engraving of bonds, tax warrants and other evidences of indebtedness;
- d) 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;
- e) Contracts for the maintenance or servicing of, or provision of repair parts for, equipment which are made with the 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;
- f) Purchases and contracts for the use, purchase, delivery, movement, or installation of data processing equipment, software, or services and telecommunications and inter-connect equipment, software, and services;
- g) Contracts for duplicating machines and supplies;
- h) Contracts for the purchase of natural gas when the cost is less than that offered by a public utility;
- i) Purchases of equipment previously owned by some entity other than the district itself;
- j) Contracts for repair, maintenance, remodeling, renovation, or construction, or a single project involving an expenditure not to exceed \$50,000 and not involving a change or increase in the size, type, or extent of an existing facility;
- k) Contracts for goods or services procured from another governmental agency;
- l) Contracts for goods or services which are economically procurable from only one source, such as for the purchase of magazines, books, periodicals, pamphlets and reports, and for utility services such as water, light, heat, telephone or telegraph;

- m) Where funds are expended in an emergency and such emergency expenditure is approved by 3/4 of the members of the board; and
- n) Contracts for the purchase of perishable foods and perishable beverages.

All competitive bids must be sealed by the bidder and must be opened by a member or employee of the 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, and "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.

Electronic bid submissions shall be considered a sealed document for competitive bid requests if they are received at the designated office by the time and date set for receipt for bids. However, bids for construction purposes are prohibited from being submitted electronically. Electronic bid submissions must be authorized by specific language in the bid documents in order to be considered and must be opened in accordance with electronic security measures in effect at the community college at the time of opening. Unless the electronic submission procedures provide for a secure receipt, the vendor assumes the risk of premature disclosure due to submission in an unsealed form.

The provisions of Section 3-27.1 do not apply to guaranteed energy savings contracts entered into under Article V-A, nor do the provisions of Section 3-27.1 prevent a community college from complying with the terms and conditions of a grant, gift, or bequest that calls for the procurement of a particular good or service, provided that the grant, gift, or bequest provides all funding for the contract, complies with all applicable laws, and does not interfere with or otherwise impair any collective bargaining agreements the community college may have with labor organizations.

In addition, community colleges may participate in joint purchases of personal property, supplies and services jointly. See Section 3-27.2 of *The Public Community College Act*.

Purchases made pursuant to these provisions shall be made in compliance with the *Local Government Prompt Payment Act*. See Section 3-27.3 of *The Public Community College Act*.

II. THE BIDDING PROCESS

A. Bid Submittals

1. Sealed Bids

Bids must be "sealed by the bidder" to eliminate the possibility of fraud or favoritism in the expenditure of public funds.

2. Electronic Bids

The Act now provides for the acceptance of bids sealed by a bidder, except for construction purposes.

3. 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 some circumstances. 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.

4. 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.

B. 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.

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.

Consider, too, the following *Illinois Freedom of Information Act* exemption pertaining to bids:

(h) Proposals and bids for any contract, grant, or agreement, including Information which if were disclosed would frustrate procurement or give an advantage to any person proposing to enter into a contractor agreement with the body, until an award or final selection is made. Information prepared by or for the body in preparation of a bid solicitation shall be exempt until an award or final selection is made.

5 ILCS 140/7(1)(h). However, also consider materials marked “confidential” or “proprietary,” and whether they are properly or improperly so marked.

1. 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).

C. Awarding the Bid – Criteria

1. 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.

a. 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).

2. Responsive

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

a. Material Defects – Non-waivable

A two-pronged test determines whether a bid noncompliance constitutes a material and non-waivable 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 non-waivable 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 non-waivable 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.

b. 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; and 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 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. 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.

e. 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.

D. Rejecting the Bid

1. Discretion "to reject any and all bids."

Under the *Illinois Municipal Code*, 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.

2. 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.

3. 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 the Illinois *Public Works Employment Discrimination Act*, 775 ILCS 10/1 *et seq.*

E. 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.

1. 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.

2. 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.

a. 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."

3. 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*.

4. 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).

5. Unconscionability

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.

F. Circumstances not Warranting Judicial Relief

1. 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).

2. Errors in Business Judgment

Relief is not given for a poor business decision.

3. Establishing a Bid Mistake

a. 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).

b. 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.

ETHICS AND CONFLICTS OF INTEREST FOR PUBLIC OFFICERS

I. INTRODUCTION

Public officers are expected to adhere to the highest standards of ethical conduct. It is unethical for public officers to use the knowledge and power of their positions to further their private interests. When private interests compete with the performance of duty, a conflict of interest arises. Conflicts of interest are prohibited by common law and statute not only to prevent the actual abuse of power for an officer's own benefit, but also to prevent the officer from being placed in a situation that carries within it the potential of abuse.

II. PROHIBITED INTERESTS IN CONTRACTS

Public officers may not have an interest in contracts with the governmental body they serve, subject to a few, limited exceptions. The common law rules prohibiting interests in contracts by public officers is codified in statutory form in the Public Officer Prohibited Activities Act, which provides:

No person holding any office, either by election or appointment under the laws or Constitution of this State, may be in any manner financially interested directly in his own name or indirectly in the name of any other person, association, trust, or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. No such officer may represent, either as agent or otherwise, any person, association, trust, or corporation, with respect to any application or bid for any contract or work in regard to which such officer may be called upon to vote. Nor may any such officer take or receive, or offer to take or receive, either directly or indirectly, any money or other thing of value as a gift or bribe or means of influencing his vote or action in his official character.

50 ILCS 105/3(a).

Contracts made in violation of the Illinois conflict of interest statutes are void. A public officer who violates a conflict of interest statute is guilty of a Class 4 felony which is punishable by up to three years in prison and a fine of up to \$10,000. In addition, the officer is removed from public office.

III. EXCEPTIONS ALLOWING INTERESTS IN CONTRACTS

The conflict of interest statutes include several exceptions to their prohibitions which allow public officers to have a limited interest in contracts. The Public Officer Prohibited Activities Act prescribes narrow conditions under which elected or appointed officers may sell goods and services to the public body they serve.

- A. Interested members may provide materials, merchandise, property, services, or labor to the municipality if the contract is with a person, firm, partnership, association, corporation, or cooperative association in which the interested member has less than a 7½ % share in the ownership and (1) the interested

member publicly discloses the nature and extent of the interest prior to or during deliberations concerning the proposed award of the contract; (2) the interested member abstains from voting on the award of the contract; and (3) those members presently holding office approve the contract by a majority vote. In addition, if the amount of the contract exceeds **\$1,500**, the contract must be awarded after sealed bids to the lowest responsible bidder or awarded without bidding if the amount is less than \$1,500. The contract may not be awarded if it would cause the aggregate amount of all contracts awarded to the same person, firm, association, partnership, corporation, or cooperative association in the same fiscal year to exceed **\$25,000**.

- B. Another exception exists when the amount of the contract does not exceed **\$2,000** and the award of the contract would not cause the aggregate amount of all contracts awarded to the same person, firm, association, partnership, corporation, or cooperative association in the same fiscal year to exceed **\$4,000**. Again, the interested member (1) must publicly disclose the nature and extent of the interest prior to or during the deliberations concerning the proposed award of the contract; (2) must abstain from voting on the award of the contract; and (3) the award of the contract must be approved by a majority vote of the governing body of the municipality.
- C. An elected officer may provide goods and services if the contract is with a person, firm, partnership, association, corporation, or cooperative association in which the interested member has less than a **1%** share in the ownership and (1) the interested member publicly discloses the nature and extent of the interest before or during deliberations concerning the proposed award of the contract; (2) the interested member abstains from voting on the award of the contract; and (3) those members presently holding office approve the contract by a majority vote.
- D. **Public utility service contracts** awarded when one or more members of the governing body are employees of or hold an ownership interest of no more than **7 ½ %** in the public utility company are not barred by statute.

IV. COMMON LAW CONFLICTS OF INTEREST

The conflict of interest statutes reflect long-standing common law doctrine that the faithful performance of official duties is best secured if governmental officers, like any other persons holding fiduciary positions, are not called upon to make decisions that could result in a personal advantage or disadvantage to their individual interests. Common law conflicts of interest may exist even in circumstances that do not violate the Illinois conflict of law statutes.

V. CONFLICT OF INTEREST COURT DECISIONS

Illinois courts have interpreted the common law and state statutes prohibiting public officials from having an interest in contracts. Although opinions of the attorney general are not binding on the courts, they are influential, especially if the opinion involves a question of first impression and the reasoning is persuasive.

Many of the following cases and opinions were decided before the exceptions allowing some permissible interests were added to the conflict of interest statutes. However, the decisions are still highly informative for their analysis of the law as applied to particular

fact situations. Because conflict of interest cases are very “fact driven,” predicting whether a particular situation constitutes a prohibited conflict of interest is often difficult.

A. Direct Conflict of Interest

The conflict of interest statutes state that public officers may not have an interest **directly** in their own names in any contract, work, or business of the public body they serve with a few, limited exceptions as explained above. In the following cases, the issue was whether the public officer had such a direct conflict of interest.

1. A park district commissioner owned an aviation business that was a tenant of the park district airport. *Croissant v. Joliet Park District*, 141 Ill. 2d 449 (1990). As a commissioner he had voted to purchase a new tug, or tractor, for use at the airport and had voted to participate in a block grant program for airport expansion. The Illinois Supreme Court held that the commissioner did not have a conflict of interest under the Corrupt Practices Act (precursor to the Public Officer Prohibited Activities Act) because the commissioner was not himself financially interested, either directly or indirectly, in the contract or the performance of the work. Even though, as the owner of an aviation business he could make use of the airport facilities, the benefit to him was no different from the **benefits enjoyed by the public at large**. Compare this result with the following cases in which the courts found conflict of interest violations because the public officers reaped some personal benefit from their official positions.
2. A tenant of a public housing authority was appointed to a two-year term as a commissioner of the same housing authority. In *Brown v. Kirk*, 64 Ill. 2d 144 (1976), the Illinois Supreme Court found that since the interests of a housing authority commissioner would “center on the points at which management policies and functions of the authority come into contact with individual tenants,” a conflict of interest existed. The court said the authority of a commissioner could include the selection and retention of tenants, a determination of rents to be charged, the services and other benefits to be furnished, and the enforcement of the rules governing the conduct and rights of the tenants. Therefore, the tenant, as a housing commissioner, would benefit herself by her vote, because her personal interests were always directly or indirectly involved in her vote on the commission.
3. Another case decided by the Illinois Supreme Court finding a prohibited conflict of interest was *People v. Scharlau*, 141 Ill. 2d 180 (1990). In *Scharlau*, city commissioners negotiated and approved a settlement of a federal lawsuit against the city. In the settlement they included an arrangement for their own employment with the city. The court stated that the commissioners had a duty to act in the best interests of the city and to refrain from using their positions as city commissioners for their own personal benefit. The court found that the commissioners, in negotiating and approving their own employment with the city, had obtained a personal advantage in violation of state statutes.
4. A similar situation arose in *Mulligan v. Village of Bradley*, 131 Ill. App. 3d 513 (3rd Dist. 1985), in which a former village president resigned to take an

employment position with the village as administrator. As village president, he had urged the other board members to vote in favor of creating the position of village administrator and to offer the position to him. Four trustees had voted in favor of creating the new position and two trustees had voted against it. The village president had not voted. The Third District Appellate Court of Illinois held that the employment contract was void and unenforceable because it violated conflict of interest statutes that prohibit an elected or appointed official from having an interest in a contract on which he may be called on to vote or when the consideration of the contract is paid from the public treasury. The fact that the village president abstained from voting to create the new position and to offer it to himself did not cure the conflict of interest.

B. Conflicts of Interest Where No Contract Is Executed

The existence of an actual executed contract is not always necessary to find a conflict of interest violation. In the following appellate court case and Illinois Attorney General opinion, the question was whether a conflict of interest violation may exist when there is no contract.

1. A forest preserve commissioner held a one-fourth interest in land the commission sought to acquire in *People v. Savaiano*, 66 Ill.2d 7 (1977). As chairman of the commission's finance committee, Savaiano chaired meetings during which negotiations were conducted with his co-owners. The finance committee and the three co-owners came to a verbal understanding that the land would be purchased for \$6,750 an acre and the owners would receive mining royalties. Before the deal was consummated, Savaiano sold his interest in the land at a price of \$6,500 per acre to another party. Eleven days later, the commission approved the purchase of the land for \$6,750, but without the mining royalties. The sale to the commission was never completed, presumably because the final offer did not adhere to the verbal agreement reached with the owners with regard to the mining royalties. Instead, the commission instituted condemnation proceedings.

Despite extensive negotiations and a tentative understanding between the parties, no contract was ever executed or completed. The commissioner argued that there must be a contract or there can be no conflict of interest crime since the statute prohibits a public official from being interested "in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote." The Illinois Supreme Court held that the commissioner's conduct was within the spirit and letter of the prohibitory language of the statute. Further, the Court concluded that the word "contract" in the statute "should be construed to include the whole bargaining process which leads up to the completion of a binding contract or agreement with the governmental agency."

2. The Illinois Attorney General was asked to give an opinion on whether a trustee of a public library district whose property was sought after for purchase by the library district, would be violating the Public Officer Prohibited Activities Act if the library district obtained the property through

eminent domain. The attorney general found that the initiation of a condemnation action on a parcel of property does not create a contract and, consequently, a vote by the library district to commence a condemnation proceeding would not constitute a vote on a contract in which a public officer holds an interest. The attorney general said the key factor that distinguished the eminent domain proceeding from the voluntary sale of the property, a transaction that would have been a conflict of interest violation, was the interposition of the court in the process.

Although not finding a statutory conflict of interest, the attorney general advised that the trustee abstain in all matters relating to the proposed condemnation of his property because of a well-established principle under the common law that a member of a public body who has a personal interest in a matter under consideration by the body is prohibited from acting or voting thereon. *Illinois Attorney General Opinion No. 92-012 (1992)*.

C. Indirect Conflicts of Interest

The conflict of interest statutes provide that public officers may not be interested **indirectly** in the name of any other person, association, trust, or corporation in any contract, work, or business of the public body, or in the sale of any article. The reasoning behind this prohibition is that one should not do indirectly that which is directly prohibited.

1. In *Cohen v. Keane*, 64 Ill. 2d 559 (1976), the plaintiff alleged that Keane used inside knowledge gained from his position as alderman and chairman of the committee on finance of the city council to ascertain the location of various proposed land development projects. Acting through others, he purchased, at scavenger sales, various tax delinquent parcels located within those areas. Legal title to these properties was placed in land trusts in which Keane held a substantial beneficial interest. Some of the property he acquired at that time was subject to the liens of unpaid special assessments. Keane recommended to the city council, without disclosure of his interest, that the council clear those liens and the council adopted his recommendations. After the liens had been cleared, Keane used his official position and influence to induce several other governmental units to purchase the properties which he had purchased. The Supreme Court of Illinois stated that if these allegations had been proved against a defendant occupying a fiduciary position in the private sector, they would establish that the defendant had exploited his fiduciary position for his personal benefit. A public officer's fiduciary responsibility cannot be less than that of a private individual. Keane's private interest would necessarily affect his judgment, as well as that of other aldermen whose vote might have been different had they known of Keane's personal interest. Therefore, the Court reversed the lower court's dismissal of the complaint saying that these were important matters which the public was entitled to have considered.
2. Concerns about indirect conflicts of interest sometime arise when public officers' spouses are employed by the governing unit they serve. In *People v. Simpkins*, 45 Ill. App. 3d 202 (5th Dist. 1977), a mayor's wife was

employed as a water department clerk of the same city. The mayor was charged with having an interest in a city contract by virtue of his alleged interest in his wife's employment with the city. The Fifth District Appellate Court of Illinois stated that in almost every instance when the question had been presented to courts of various jurisdictions, the mere fact of relationship, without more, had not been held to constitute a conflict of interest. In finding no conflict of interest under these circumstances, the court said that the general rule is that "the wife's interest is not necessarily the husband's interest, provided the contract is not a mere subterfuge for his own pecuniary interest."

3. Another case discussed whether the mere existence of a marital relationship created a conflict of interest on the part of a board of education member whose spouse was employed by the board. In *Hollister v. North*, 50 Ill. App. 3d 56 (4th Dist. 1977), the Fourth District Appellate Court of Illinois cited the result in the *Simpkins* case and the general rule that one spouse's interest is not necessarily the other's. The court said that since the law provides that a married woman has the right to contract as if she were single, and a right to her earnings as her own separate property, the court could not find that a husband, as a matter of law, had an interest in his wife's contracts and earnings.
4. In another situation involving a school board member and a spouse employed by the school district, the Illinois Attorney General found no *per se* conflict of interest. The marital relationship, in itself, does not give rise to an interest in a contract within the meaning of the conflict of interest statutes. The attorney general stated that husbands and wives, as a matter of law, have no interest in their spouse's contracts. *Illinois Attorney General Opinion No. 80-035 (1980)*.
5. In another opinion, the Illinois Attorney General found no direct conflict of interest as a result of a marital relationship, but found that the public officer had committed an indirect conflict of interest violation. A commissioner of a home equity assurance program, on more than one occasion, voted on proposals to award advertising contracts to a firm owned by his wife. In furtherance of the contract, the wife's firm placed paid advertisements on behalf of the commission in a newspaper published by a company that employed the commissioner as its comptroller. The attorney general stated that nothing indicated that the commissioner had an ownership interest in his spouse's firm, or that the business was a subterfuge to disguise a pecuniary interest of the commissioner. In the absence of such facts, the wife's interest, standing alone, did not constitute a *per se* violation of the Public Officer Prohibited Activities Act.

However, the attorney general found a violation of the Act because the commissioner possessed an indirect pecuniary interest in the contract. The contract was awarded with the knowledge and intent that the funds would be used for the purchase of advertisements in the newspaper employing the commissioner. An employee is deemed to have at least an indirect pecuniary interest in the contracts of his or her employer. The attorney general stated that when a member of a governing body anticipates that he

or his employer will benefit financially from a contract awarded by the body, that knowledge will naturally affect his judgment in determining to award the contract. *Illinois Attorney General Opinion No. 93-014 (1993)*.

D. Public Officers as Employees of Parties Awarded Contracts

The next section continues the discussion of situations in which public officers themselves were employees of an entity conducting business with the officer's governmental unit. The following cases and opinions expand on the idea that employees may have indirect interests in the contracts of their employers.

1. A city council awarded a contract for the construction of pavement to a contractor who, at the time the contract was made, employed nine out of eleven members of the city council. The Supreme Court of Illinois in the case of *People v. Sperry*, 314 Ill. 205 (1924), held that the city officers were indirectly interested in the contract because they "had such an interest in the business and welfare of the contractor in this case as would naturally tend to affect their judgment in the determination to let the contract and to pass upon the question whether or not the same was completed in full accord with the terms thereof." The city officers testified they had acted in the best interests of the city. The court stated that a showing of intentional bad faith or fraudulent intent in the officers' decision to award the contract was not necessary. The court said the contract was one that the statutes declare to be void and under the law the court must declare the contract void even though it may appear that it was as good a contract on behalf of the city as the city officers could have obtained.
2. In *Kruse v. Streamwood Utilities Corp.*, 34 Ill. App. 2d 100 (1st Dist. 1962), members of a village board of trustees, by a unanimous vote, granted a 30-year sewer and water license to an engineering corporation. At the time the license was granted, the trustees were employees or officials of the corporation and had been employees or officials of the partnership which preceded the formation of the engineering corporation. The First District Appellate Court of Illinois found an indirect conflict of interest because the trustees had a pecuniary interest in the installation of the water and sewer pipes.
3. The previous two cases dealt with situations in which public officers were employees of a private business entity. The following attorney general opinion discusses whether a public officer employed by another governmental unit has a conflict of interest when the two conduct business. A village trustee who contracted with a county for police services and also worked as a part-time deputy sheriff for the county did not have a prohibited pecuniary interest according to the Illinois Attorney General. *Illinois Attorney General Opinion No. 96-011 (1996)*. The attorney general said it was clear that if a village contracted with a private corporation that employed a village trustee, rather than another public body, the village trustee would have a prohibited conflict of interest. However, public employees typically do not have the sort of financial interest in the contract of their employer that a private firm's employees may have. Numerous cases have held that an interest that violates the conflict of interest statutes

must be “certain, definable, pecuniary or proprietary; it must be financial in nature.” Contracts between public bodies do not necessarily benefit employees financially, since the salary or wages for such employees are not likely to depend upon such contracts.

The attorney general said that although there was no *per se* violation of the conflict of interest statutes here, the possibility existed that under certain circumstances there could be an indirect interest. For example, if the county board were to establish the number of part-time deputies the sheriff may appoint based, either formally or informally, upon the number of police service contracts the county enters into with local municipalities.

In addition to a potential indirect conflict of interest, the attorney general further elaborated that the trustee/deputy sheriff could have a common law conflict of interest. The common law recognizes conflicts of interest other than those covered by statute. Therefore, the attorney general suggested that the village trustee abstain from voting or acting on matters from which he may personally benefit as a part-time deputy sheriff for the county.

E. Common Law Conflict of Interest

Another opinion of the Illinois Attorney General found a common law conflict of interest where there was no statutory conflict of interest.

The Illinois Attorney General found a common law conflict of interest, but no violation of the Public Officer Prohibited Activities Act, in a situation involving the chairman of a county board's insurance committee. The chairman was an independent insurance agent leasing office space from an insurance agency that was awarded the county's health insurance contract after competitive bidding. Although the chairman of the insurance committee was in a position to vote or otherwise act upon the award of the insurance contract in his capacity as a county board member, the attorney general said that the particular circumstances did not demonstrate that he had a pecuniary interest, either direct or indirect, in the contract. The chairman was not an employee of the agency and he received no commission or other compensation from the agency's contracts. Unlike an employee, the chairman's income was not dependent upon the profitability of the agency, and he did not share, even indirectly, in the profits of its business.

However, the attorney general noted that the chairman maintained a close business relationship with the insurance agency. As chairman, he was in a position to influence the recommendations of the insurance committee, which, in turn, may economically benefit the insurance agency. By being in a position to help steer business to the agency, he may indirectly benefit himself in his business relationship with the agency. In order to avoid the potential for abuse of official power in these circumstances, the attorney general said that the chairman must disqualify himself from voting or otherwise acting in any way in his capacity as chairman of the insurance committee upon matters in which that insurance agency was interested. *Illinois Attorney General Opinion No. 93-010 (1993)*.

VI. THE STATE OFFICIALS AND EMPLOYEES ETHICS ACT (5 ILCS 430/1 *et seq.*)

A. Introduction

The State Official and Employees Ethics Act (the "Act") was signed into law on November 19, 2003 and significant amendments were adopted effective December 9, 2003. The Act sets standards of conduct for State officers and employees and covers a wide variety of conduct relative to State officers and employees.

The affirmative requirements of the Act are more limited as applied to local governments ("governmental entities"). Specifically, Section 70-5 of the Act requires governmental entities to adopt an ethics ordinance or resolution that is no less restrictive than Sections 5-10 and 5-15 of the Act. Thus, an ethics ordinance or resolution adopted by a governmental entity in accordance with Section 70-5 will prohibit, among other things:

- Employees from intentionally performing any prohibited political activity during any compensated time (other than vacation, personal or compensatory time off);
- Employees from intentionally misappropriating any government property or resources by engaging in any prohibited political activity for the benefit of any campaign for elective office or any political organization;
- Elected officials, department heads, supervisors or employees from intentionally misappropriating the services of any government employee by requiring the employee to perform any prohibited political activity (i) as part of that employee's duties, (ii) as a condition of employment, or (iii) during any time off that is compensated by the governmental body (such as vacation, personal or compensatory time off);
- Employees from being required at any time to participate in any prohibited political activity in consideration for being awarded any additional compensation or employee benefit, in the form of a salary adjustment, bonus, compensatory time off, continued employment, or otherwise; and
- Employees from being awarded any additional compensation or employee benefit, in the form of a salary adjustment, bonus, compensatory time off, continued employment, or otherwise, in consideration for the employee's participation in any prohibited political activity.

VII. ETHICAL CONCERNS

A. Gift Ban

Employees, their spouses and family members living at home may not intentionally solicit or accept gifts from prohibited sources. Employees who receive gifts in violation of the ban should attempt to return them or donate an amount equal to the value of the gift to an appropriate charity. 5 ILCS 430/10-30.

A “gift” is defined as “any gratuity, discount, entertainment, hospitality, loan, forbearance, or other tangible or intangible item having monetary value including, but not limited to, cash, food and drink, and honoraria for speaking engagements related to or attributable to government employment or the official position of an employee, member, or officer.” 5 ILCS 430/1-5.

A “prohibited source” includes any person or entity: (1) who is seeking official action by the officer or employee or an officer, State agency or other employee who is directing the employee; (2) who does business or seeks to do business with an officer or employee or an officer, State agency or other employee who is directing the employee; (3) who conducts activities regulated by an officer or employee or an officer, State agency or other employee who is directing the employee; (4) who has interests that may be substantially affected by the performance or non-performance of the official duties of the officer or employee; (5) is registered or required to be registered under the Lobbyist Registration Act; or (6) is an agent of, a spouse of, or an immediate family member who is living with a “prohibited source.” 5 ILCS 430/1-5.

1. Exceptions to the gift ban include:

- Gifts available on the same conditions to the general public;
- Anything for which market value is paid;
- Lawfully made campaign contributions;
- Educational material or missions;
- Travel expenses for a meeting to discuss business;
- Gifts from a relative;
- Gifts given on the basis of personal friendship, unless the recipient has reason to believe that, under the circumstances, the gift was provided because of the official position or employment of the recipient or his or her spouse and not because of the personal friendship;
- Food or refreshments not exceeding \$75 per person in value on a single calendar day; provided that the food or refreshments are (i) consumed on the premises from which they were purchased or prepared, or (ii) catered.

- Food, lodging, transportation or other benefits related to outside business or employment activities;
- Intra-governmental and inter-governmental gifts;
- Bequests, inheritances, and other transferences at death; and
- Any item or items from any one prohibited source during any calendar year having a cumulative total value of less than \$100.00. Each of the exceptions listed above is mutually exclusive and independent of every other.

2. How to determine the “value” of a gift

One of the exceptions to the gift ban is anything for which the officer, member, or State employee pays the market value. This suggests that the proper value of a gift is not what the gift costs the giver, nor the subjective value that the employee places on the gift, but rather what the “market” would pay for the gift.

Ex. A prohibited source software company might be able to reproduce copies of a computer program for only a few dollars. The employee might have little use for the program and value it as insignificant. In the market, however, consumers might pay hundreds or even thousands of dollars for the software. As far as the Act is concerned, market value is what matters. When in doubt, the best practice is to use market value.

VIII. CRIMINAL OFFENSES (720 ILCS 5/) Criminal Code of 2012.

NOTE: The following list of state statutes is not intended to be comprehensive. It highlights significant statutes that frequently affect municipal officials’ activities.

A. Official Misconduct - 720 ILCS 5/33-3

A public officer or employee commits misconduct when, in his official capacity he commits any of the following acts:

- a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or
- b) Knowingly performs an act which he knows he is forbidden by law to perform; or
- c) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or
- d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

A public officer or employee or special government agent convicted of violating any provision of this Section forfeits his office or employment or position as a special government agent. In addition, he commits a Class 3 felony.

In *People v. Howard*, 228 Ill.2d 428, 888 N.E.2d 85 (2008), the Mayor of the City of Pekin, was charged with official misconduct, based on while acting in his official capacity and with the intent to obtain a personal advantage for himself, the mayor knowingly performed an act in excess of his lawful authority in that he used credit of the City of Pekin to receive cash to gamble at the Paradise Casino contrary to Article 8, Section 1 of the Constitution of the State of Illinois which provides that public funds, property or credit shall be used only for public purposes. The defendant argued that a violation of the state constitution cannot serve as a predicate unlawful act for the offense of official misconduct. The Illinois Supreme Court disagreed and upheld the defendant's conviction for official misconduct. The Court noted that it "has stated that the Illinois Constitution is the "supreme law" of this state. See *Chicago Bar Ass'n v. Illinois State Board of Elections*, 161 Ill.2d 502, 508, 204 Ill.Dec. 301, 641 N.E.2d 525 (1994); *Burritt v. Commissioners of State Contracts*, 120 Ill. 322, 328, 11 N.E. 180 (1887). In recognizing that "[t]he constitution is the supreme law" in the past, we have also stated that "every citizen is bound to obey it and every court is bound to enforce its provisions." *People ex rel. Miller v. Hotz*, 327 Ill. 433, 437, 158 N.E. 743 (1927)".

B. Public Contracts (bid rigging) - 720 ILCS 5/33E

The statute prohibits public officials from:

- Knowingly disclosing to any interested person any information related to the terms of a sealed bid, unless such disclosure is also made generally available to the public.
- Knowingly conveying, either directly or indirectly, outside of the publicly available information, to any person any information concerning the specifications for such contract or the identity of any particular potential subcontractors, when inclusion of such information concerning the specifications or contractors in the bid or offer would influence the likelihood of acceptance of such bid or offer
- Either directly or indirectly, knowingly informing a bidder or offeror that the bid or offer will be accepted or executed only if specified individuals are included as subcontractors, unless following procedures established (i) by federal, State or local minority or female owned business enterprise programs or (ii) pursuant to Section 45-57 of the Illinois Procurement Code.
- Knowingly awarding a contract based on criteria which were not publicly disseminated via the invitation to bid, when such invitation to bid is required by law or ordinance, the pre-bid conference, or any solicitation for contracts procedure or such procedure used in any sheltered market procurement procedure adopted pursuant to statute or ordinance
- Knowingly either:
 - Providing, attempting to provide or offering to provide any kickback;
 - Soliciting, accepting or attempting to accept any kickback; or
 - Including, directly or indirectly, the amount of any kickback prohibited by paragraphs (1) or (2) of this subsection (a) in the contract price

charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to any unit of State or local government for a public contract.

- Receiving an offer of a kickback, or has been solicited to make a kickback, and failing to report it to law enforcement officials, including but not limited to the Attorney General or the State's Attorney for the county in which the contract is to be performed.
- Participating, sharing in, or receiving directly or indirectly any money, profit, property, or benefit through any contract with the municipality, with the intent to defraud the municipality

C. Penalties

Violations are Class 3 and Class 4 felonies.

The municipality may, in a civil action, recover a civil penalty from any person who knowingly engages in conduct which violates the kickback provision in twice the amount of each kickback involved in the violation. This does not limit the ability of the municipality to recover monies or damages regarding public contracts under any other law or ordinance.