

# MISSOURI CITY/COUNTY MANAGEMENT ASSOCIATION



## 2010 SPRING CONFERENCE



## STATUTORY REQUIREMENTS FOR PUBLIC WORKS CONTRACTS



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# STATUTORY REQUIREMENTS FOR PUBLIC WORKS CONTRACTS

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*During the 2008 and 2009 legislative sessions, the Missouri General Assembly took on the issue of employment of illegal aliens by enacting House Bill 1549 (2008) and its follow-up bill, House Bill 390 (2009). These laws added to the ever-growing list of requirements for public contracts (including public works contracts) new provisions aimed at preventing and/or dis-incentivizing the hiring of illegal aliens by requiring proof of lawful presence and prohibiting illegal aliens and employers from deriving benefits from contracts let by municipalities, counties, and other political subdivisions.*

*With the addition of these statutory requirements, municipal and county officials should familiarize themselves with these new enactments and re-familiarize themselves with the whole collection of applicable statutory requirements. This summary addresses the new, old, and perhaps overlooked statutes that contain mandatory requirements not only for public works contracts, but also for RFPs and other calls for bids for such contracts. While this summary broadly covers a range of pertinent topics, each public works contract is unique and public officials should consult legal counsel to ensure that the documentation for each public works project complies with all statutory requirements.*

## **A. Contract Requirements.**

### **1. Section 432.070 R.S.Mo. Contracts, execution of by counties, towns--form of contract**

No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.

### **2. Contract must be:**

- a. Within the scope of the County/City's powers or expressly authorized by law;
- b. Supported by consideration (i.e. money, promise to do work, other promises);
- c. Contract must be BEFORE work is performed (see also Art. III, §39 Mo.Const. limiting power "to grant or to authorize . . . any extra compensation, fee or allowance to a public officer, agent, servant or *contractor* after service has been rendered . . .");
- d. In writing, stating the consideration;
- e. Dated
- f. Signed by the parties

### **3. Case law tells us that:**

- **Mayor cannot sign before he receives authority.** *Shadowood Development Co., Ltd. v. City of Lake St. Louis*, 668 S.W.2d 647 (Mo.App. 1984) (Sewer construction contract)

signed by the acting mayor and later “accepted” by motion of board of aldermen did not establish enforceable contract where the board of aldermen had not specifically authorized mayor to contract with companies for sewer construction).

- **Requirements are mandatory.** Statute requiring that contracts with city be in writing and duly executed is mandatory, not directory, and contract not so made is void. *State ex rel. City of Mansfield v. Crain* 301 S.W.2d 415 (Mo.App.1957); *Burger v. City of Springfield* 323 S.W.2d 777 (Sup.1959).
- **Can’t pay contractor and contractor is not entitled to be paid for work done without a written contract.** There can be no recovery for labor, material and supplies furnished to a city in the absence of a written contract, or for work already performed. *Montague Compressed Air Co. v. City of Fulton* 148 S.W. 422, 166 Mo.App. 11 (1912); *Brown Coal Co. v. City of New Madrid* 208 S.W. 109 (App.1915); *Schueler v. Kirkwood* 177 S.W. 760, 191 Mo.App. 575 (1915); *Likes v. Rolla* 167 S.W. 645, 184 Mo.App. 296 (1914).
- **Partial compliance not enough.** Copy of minutes of special meeting of board of alderman of city at which board voted and accepted architect as architect for new civic center, and written contract prepared and signed by architect only, three months after special meeting, did not constitute contract in writing sufficient to bind city, notwithstanding that minutes were signed by mayor and an assistant, where there was no authorizing ordinance. *Sorkin v. City of St. Clair* 800 S.W.2d 817 (App. E.D. 1990).
- **Attempt to ratify contract may not save it.** An oral contract made by county or municipal corporation in violation of this section is void ab initio and cannot be given force by ratification. *Fleshner v. Kansas City* 156 S.W.2d 706, 348 Mo. 978 (Sup. 1941).

#### B. OSHA Training - § 292.675 R.S.Mo.

1. All “on-site employees” of contractors and subcontractors working on a public works project must have taken a 10-hour, OSHA-approved construction safety course.

[http://www.osha.gov/dte/outreach/construction\\_generalindustry/courses.html](http://www.osha.gov/dte/outreach/construction_generalindustry/courses.html)

- See also, **Attachment 1** – “Required Safety Training Information for Employers on Public Works Projects” -- Missouri Department of Labor and Industrial Relations (“MoDOLIR”)
2. The OSHA training program is a one-time requirement for each employee.
  3. On-site employees must either complete the program within sixty (60) days of beginning work or “hold documentation of prior completion of the program.”
  4. For each public works project, the public entity should include 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.

§ 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.”

Since Subsection 4 is unclear as to which “resolution or ordinance” is being referenced—putting the contract out for bid or awarding the contract- setting out these requirements in both would appear to alleviate any compliance issue.

5. Violations of § 292.675 are investigated by the Missouri Department of Labor and Industrial Relations (“MoDOLIR”)
  - a. Penalties are assessed by the Department in the amount of \$2,500.00 plus \$100.00 per day, *per employee* found working on site without evidence of the necessary training;
  - b. Penalties are forfeited to the public entity.
6. A non-complying employee has 20 days to complete the training before the employee is removed from the project and penalties start to accrue.
7. The public entity must withhold penalties assessed by MoDOLIR from payments due to the contractor.
8. Notice of the penalty provisions must be set forth in the contract.

### **C. Participation in a Federal Work Authorization Program - § 285.530**

1. Section 285.530 requires a contractor, “[a]s a condition for the *award* of any contract or grant in excess of” **\$5,000.00** submit affidavit(s) affirming (and provision of documentation), affirm its enrollment and participation in a federal work authorization program with respect to the employees working in connection with the contracted services and that the business does not knowingly employ any person who is an unauthorized alien in connection with the contracted services.
2. Note that MoDOLIR’s regulations (15 CSR 60-15.020) appear to require that the affidavit be submitted at the time of *bidding* on a project -- “Any *bid or response* to a request for proposal (RFP) for the award of any contract for services in excess of \$5,000 by any City to a business entity shall be accompanied by an affidavit.”
3. First affirmation—contractor is enrolled and participates in a “federal work authorization program”--
  - a. This “federal work authorization program” or “FWAP” refers to the “E-Verify” program administered by DHS and U.S. Citizenship & Immigration Services.

DHS E-Verify website:

[http://www.dhs.gov/files/programs/gc\\_1185221678150.shtm](http://www.dhs.gov/files/programs/gc_1185221678150.shtm)

US CIS E-Verify website: [www.uscis.gov/e-verify](http://www.uscis.gov/e-verify)

- b. The contractor must also provide to the contracting public entity documentary proof - documentation of participation and enrollment provided to the contractor from E-Verify - supporting the FWAP affidavit.
4. Second affirmation—contractor “does not knowingly employ any person who is an unauthorized alien in connection with the contracted services.”
5. These affidavits are a **condition** to the award of any contract in excess of \$5,000, but as directed by the regulations, may need to be provided by all bidders at the time of bid submission.
6. The municipality or county must receive the affidavits and supporting documentation before awarding any contract. To facilitate this, the local government should:
  - a. Include the requirements in the contract/bid documents
  - b. Include a form affidavit in the bid package to be completed and submitted by bidding contractors as part of their bid submission. See
    - <http://www.mocities.com/OneStopShop/documents/AFFIDAVITContractor000> -- See **Attachment 2 “Affidavit”**
    - <http://www.mocities.com/OneStopShop/documents/AFFIDAVITOFWORKAUTHORIZATION.OA> -- See **Attachment 3 “Affidavit of Work Authorization”**
    - Also, 15 CSR 60-15.020, “Form of Affidavit.” See **Attachment 4, 15 CSR 60-15.010-050**
  - c. By setting out the requirements in the bid documents, any bid that fails to include the necessary affidavits and documentation can be rejected as a non-responsive bid.
7. Contractors need only provide the required “affidavits” on an **annual** basis (§285.530.2)
  - a. Contractor who has provided the affidavits within the past year in connection with a previous project for such entity does not need to provide the affidavits again.
  - b. Text of statute does **not**, however, extend the same annual-basis-only provision to the required “documentation” showing a contractor’s participation and enrollment in E-Verify.
    - i. Consequently, bidding contractors must the necessary documentary proof of enrollment and participation in E-Verify for every public works contract upon which it bids.

#### **D. Proof of Lawful Presence - § 208.009**

1. Prohibits any illegal alien from receiving state or local “public benefits,” and

2. Requires all applicants *at the time of application* for such public benefits to provide “**affirmative proof** that the applicant is a citizen or a permanent resident of the United States or is lawfully present in the United States.”
3. Definition of “public benefit” includes not only welfare, health, disability, housing, and food assistance benefits, but also “any...**contract**...provided by a ... local government...”
  - a. As a result, bidders on public works contracts, as “applicants” for a public benefit, must also comply with the requirements of Section 208.009 to be eligible for an award of a public works contract.
  - b. Does not include municipal permit or contracts or agreements between public utility providers and their customers. §208.009.2
4. **Affirmative proof** can be established through (i) a Missouri driver's license, (ii) any “documentary evidence recognized by the department of revenue when processing an application for a driver's license,” or (iii) “any document issued by the federal government that confirms an alien's lawful presence in the United States.” §208.009.3

Currently the list of acceptable **documents** for proof can be found at <http://dor.mo.gov/mvdl/drivers/idrequirements.htm#documentsrequired>

5. Alternatively, an applicant can receive “**temporary public benefits**” for 90 days by providing an affidavit
  - a. “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.
  - b. 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.
  - c. ***This affidavit is not required if the applicant has provided the necessary documentary proof at the time of initial application.***
    - Section 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)
6. Potential problem if contract awarded is based on an affidavit of lawful presence and the contractor fails to provide the necessary documentary proof of lawful presence within the 90-day period provided by statute:
  - a. To avoid this problem, the local government should seek guidance from legal counsel and/or the State ***before*** awarding a contract that is likely not to be performed in less than 90 days or, if the contract has already been awarded, before continuing under the contract.

- b. At a minimum, the local government should put in place procedures that ensure that no contract with a contractor who has provided an affidavit of lawful presence extends beyond 90 days without first receiving the necessary verifications from the contractor.
- 7. Determining who must provide the affirmative proof of lawful presence when the applicant is not an individual, but a business entity, presents its own set of challenges for the local government agency.
  - a. One 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.
  - b. This person would then be required to submit the necessary “affirmative proof” along with the contractor’s bid submission.
  - c. Unfortunately, no official guidance addressing these questions has been issued and legal counsel should be consulted to ensure compliance with the statute.
- 8. It is advisable to include language incorporating the requirements of Section 208.009 within the bid documents:
  - a. To ensure that bidding contractors are submitting the necessary documentation, and
  - b. To provide for efficient collection of such documentation by the municipality or county.
- 9. Bid documents can state that if needed, a form affidavit of lawful presence can be obtained from the municipality upon request.

**E. Prompt Payment Act; § 34.057**

- 1. Requires the public owner to make at least monthly progress payments to a contractor (unless the contract provides otherwise).
- 2. Sets a maximum 10% retainage that can be withheld by a public owner, but **in most cases the retainage must be set at 5%** *unless there is an affirmative determination by the public owner and the architect/engineer “that a higher rate is needed to ensure performance of the contract.”*
- 3. Other requirements include 30-day time limits on payments of monthly invoices and on final payment.
- 4. Failure to pay within the statutory time limits will subject the public owner to paying 1.5% interest per month (18% annual rate) on overdue amounts until paid.

**F. Payment Bond - § 107.170**

- 1. Requires public entities to obtain from the contractor a **payment bond** on every project with estimated costs **in excess of \$25,000.00**

2. “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.” *Collins & Hermann, Inc. v. TM2 Const. Co., Inc.*, 263 S.W.3d 793, 796 (Mo. App. E.D. 2008). **Public buildings, lots or other public property owned by traditional government body and devoted to public use are not subject to mechanics' lien.** *Redbird Engineering Sales, Inc. v. Bi-State Development Agency of Missouri-Illinois*, 806 S.W.2d 695 (Mo.App. E.D. 1991).
3. Bond is “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.”
4. Critical that public entities **require and receive** the necessary payment bond from all contractors on public works projects because failure to do so can result in public officials being held personally liable to subcontractors and suppliers to whom the general contractor fails to make payment.
  - 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.)
  - The statute provides express authority for public entities to indemnify public officials charged with carrying out the requirements of § 107.170.

**G. Prevailing Wage; § 290.210 et seq.**

1. The Missouri Prevailing Wage law imposes several requirements on municipalities and other public bodies who let contracts for such projects.
2. Local Government’s duties start before a contract is even let.
  - a. “**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.” § 292.250.1 R.S.Mo.
  - b. 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.** § 292.250.1 R.S.Mo.
3. 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 violations of the Prevailing Wage Act, *i.e.*, one hundred dollars (\$100.00) per worker, per day. § 292.250.1 R.S.Mo.
4. Public bodies must withhold penalty amounts from payments due to the contractor under the contract. § 292.250.1 R.S.Mo.

5. In addition to all other reporting requirements of sections 290.210 to 290.340," prior to the initiation of any work on a public works project, the public body is required to notify MoDOLIR of the:
  - a. Scope of the work to be done,
  - b. Various types of craftsmen who will be needed on the project, and
  - c. Date work will commence on the project." §290.262.10 R.S.Mo.
6. MoDOLIR website is very helpful; for forms, checklists (see **Attachment 5**) and other relevant information to Prevailing Wage Laws, go to:

[http://www.labor.mo.gov/DLS/WageAndHour/PrevailingWage/prevailing\\_wage\\_bodies.asp](http://www.labor.mo.gov/DLS/WageAndHour/PrevailingWage/prevailing_wage_bodies.asp)

#### **H. Excessive Unemployment - Section 290.550 - .580 R.S.Mo.**

1. Provides that "[w]henever 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 any political subdivision, municipal corporation...shall employ only Missouri laborers and laborers from nonrestrictive states on such project or improvement.
  - 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.
  - [http://www.labor.mo.gov/DLS/WageAndHour/PrevailingWage/excessive\\_unemployment.asp](http://www.labor.mo.gov/DLS/WageAndHour/PrevailingWage/excessive_unemployment.asp) (Accessed 04.07.10).
  - See **Attachment 6, MoDOLIR Summary "Public Works During Excessive Unemployment"**
2. Requires that "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.
3. Because a public entity's governing body and officials charged with administering public 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 or county should include such a provision.
4. Enforcement of these statutes falls to MoDOLIR. When the excessive unemployment statutes are being violated. Section 290.580 R.S.Mo.
  - a. authorized to sue for injunctions to prevent the awarding of a contract or to stop work on a project
  - b. example of enforcement action - MoDOLIR required contractors on a Springfield city utilities project to replace approximately 150 workers from restrictive states who were working on the project.



May 22, 2009

## Contractors required to use Missouri employees

Law prohibits workers from certain states during times of high joblessness.

*News-Leader staff*

The Missouri Department of Labor has required contractors working on Springfield City Utilities' new power plant to replace about 150 out-of-state workers with workers who qualify under state law.

The law bars workers from certain other states from employment on Missouri public works projects during periods of high unemployment, according to the department.

Scott Miller, CU manager of power supply, said the removal and replacement of those workers didn't affect the Southwest 2 project.

"There was no loss of schedule and no additional cost to the project," Miller said.

"We have 360 employees on site, and we didn't notice any impact when they were replaced. It was pretty seamless."

Miller said several contractors working on the power plant project had to replace workers.

The Missouri Department of Labor took action after receiving complaints about out-of-state workers at the \$600 million project.

Twenty-two states including Illinois, Iowa and Oklahoma, have laws that restrict Missouri laborers from working on public works projects in those states during high unemployment.

Accordingly, Missouri Law states that during such periods, public works projects may only employ Missourians or workers from nonrestrictive states.

Missouri has been experiencing excessive unemployment since October of 2007. Missouri Law defines excessive unemployment as two consecutive months of 5 percent unemployment or more.

As part of its enforcement of Missouri's Prevailing Wage Laws, the Labor Department's Division of Labor Standards investigates compliance with the excessive unemployment laws and can seek an injunction to stop a project that is in violation of the law.

"With so many Missourians out of work, it is absolutely critical that we ensure our tax dollars are not going to help the economies of states that discriminate against Missourians," said Larry Rebman, director of the Department of Labor and Industrial Relations.

"We will continue to protect Missouri's workforce by enforcing the law."

### **I. American Products - Section 34.353 R.S.Mo.**

1. 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."
2. Provides an exception for contracts under \$25,000 and some other specific exceptions, *e.g.*:

- a. In situations when certain American products are of limited availability, or
  - b. Their acquisition would impose cost increases above a certain percentage.
3. Also provides an opportunity whereby public entities may opt out of the above requirement by having “the executive head of the public agency certif[y] 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.”
  4. To take advantage of this exception, the public entity would have to prepare and formally adopt a written policy encouraging its vendors, contractors, etc. to purchase American products and have such policy certified by the mayor, county executive, as applicable.
  5. Many municipalities may already have such a policy within their purchasing codes or manuals.
    - *See e.g.*, Harrisonville City Code § 130.020.E.13; Hollister City Code § 145.100; Warson Woods § 130.150.
  6. The statute requires that such certificate be maintained by the public entity for a period of three years.
  7. Even though a provision requiring purchase of American products may not have to be included in a contract where the municipality has taken advantage of the policy exception set forth in Section 34.353.3(5), public entities should consider including in its bid documents:
    - a. Notice of its policy and
    - b. A copy of the certificate

to evidence that these statutory requirements have been met.

**J. Section 285.232 R.S.Mo. -- Transient employers, proof of tax clearance--list of transient employers**

1. Applies to “any county, city, town, village or any other political subdivision which requires a building permit for a person to perform certain construction projects”
2. Local Government is to require a transient employer to show proof that the employer has been issued a tax clearance and has filed a financial assurance instrument as required by section 285.230 before such entity issues a building permit to the transient employer.
3. “**transient employer**” = employer (as defined in sections 143.191, RSMo, 287.030, RSMo, and 288.032, RSMo,) making payment of wages taxable under chapters 143, RSMo, 287, RSMo, and 288, RSMo, *who is not domiciled in this state* and who *temporarily transacts any business within the state*, but shall not include any employer who is not subject to Missouri income tax because of the provisions of 15 U.S.C. 381.

4. If any transient employer obtains a building permit without providing such proof, provides a fraudulently obtained tax clearance or a fraudulent financial assurance instrument or through any misrepresentation or any other fraudulent act or in any way violates the provisions of sections 285.230 to 285.234, the Missouri DOR shall request a *temporary restraining order* to stop further performance of on the project and ask the court to order that payments due to transient employer be equitably distributed in satisfaction of the transient employer's obligations pursuant to sections 285.230 to 285.234. Upon issuance of such order by a court of competent jurisdiction, the person for whom the work is being performed may engage another contractor as provided by law or any provision of contract and the person shall not be deemed to be in violation of the contract with such transient employer removed by the court. Nothing in this section shall be construed to create or constitute a liability to or a cause of action against a city or county in regard to the issuance of any license pursuant to this section.
5. Missouri department of revenue shall at least quarterly submit for publication in the Missouri Register a list of construction contractors performing work on construction projects in Missouri who are known by the department to be deemed transient employers pursuant to section 285.230. The department shall also update such list monthly and make such list available upon request without cost to any person.
  - <http://dor.mo.gov/tax/business/register/transemp.pdf>

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# Attachment 1

## **Required Safety Training Information for Employers on Public Works Projects**

# **Attachment 2**

## **Affidavit Section 285.530**

# **Attachment 3**

## **Affidavit of Work Authorization**

# **Attachment 4**

**15 CSR 60-15.010-050**

# Attachment 5

## Missouri Public Works Check-Off List

# **Attachment 6**

## **Public Works During Excessive Unemployment**