



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

December 29, 2000

Jim Ryan

ATTORNEY GENERAL

FILE NO. 00-018

LABOR:

Application of Prevailing Wage
Act to Grant Recipients

Mr. Robert M. Healey
Director
Illinois Department of Labor
One West Old State Capitol Plaza, Room 300
Springfield, Illinois 62701

Dear Mr. Healey:

You have inquired regarding the applicability of the Prevailing Wage Act (820 ILCS 130/0.01 et seq. (West 1998)) to construction projects undertaken by non-governmental entities which either receive public funds in return for furnishing services to the public or receive grants from governmental agencies. The second part of your question specifically concerns the applicability of the Prevailing Wage Act to projects undertaken by recipients of grant monies under the "Illinois FIRST" program. For the reasons hereinafter stated, it is my opinion that a non-governmental entity which provides services to the public and in return receives public funding for its support will

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be considered a "public body" to which the provisions of the Prevailing Wage Act will be applicable. Further, it is my opinion that the acceptance of a one-time grant of public funds by a not-for-profit corporation or other private entity for construction of a fixed work, even if the entity does not otherwise receive sufficient public financial support to be considered a "public body", will nonetheless subject the entity to the provisions of the Act with respect to that project.

The purpose of the Prevailing Wage Act is to ensure that workers receive a decent wage in order to encourage the efficient and expeditious completion of public works. (Opportunity Center of Southeastern Illinois v. Bernardi (1990), 204 Ill. App. 3d 945, appeal denied, 136 Ill. 2d 546 (1991).) Hence, section 3 of the Prevailing Wage Act (820 ILCS 130/3 (West 1998)) provides, in pertinent part:

"Not less than the general prevailing rate of hourly wages for work of a similar character on public works in the locality in which the work is performed * * * shall be paid to all laborers, workers and mechanics employed by or on behalf of any public body engaged in the construction of public works.
* * *"

As used in the Prevailing Wage Act, the terms "public works" and "public body" are defined as follows:

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" * * *

'Public works' means all fixed works constructed for public use by any public body, other than work done directly by any public utility company, whether or not done under public supervision or direction, or paid for wholly or in part out of public funds. 'Public works' as defined herein includes all projects financed in whole or in part with bonds issued under the Industrial Project Revenue Bond Act (Article 11, Division 74 of the Illinois Municipal Code), the Industrial Building Revenue Bond Act, the Illinois Development Finance Authority Act, or the Build Illinois Bond Act, and all projects financed in whole or in part with loans or other funds made available pursuant to The Build Illinois Act.

* * *

'Public body' means the State or any officer, board or commission of the State or any political subdivision or department thereof, or any institution supported in whole or in part by public funds, authorized by law to construct public works or to enter into any contract for the construction of public works, and includes every county, city town, village, township, school district, irrigation, utility, reclamation improvement or other district and every other political subdivision, district or municipality of the state whether such political subdivision, municipality or district operates under a special charter or not.

* * *

(Emphasis added.) (820 ILCS 130/2 (West 1999 Supp.))

I note that some interpretations of section 2 of the Act have construed the first sentence of the definition of

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"public works" so that the last phrase, "or paid for wholly or in part out of public funds", is considered an alternative to "constructed for public use by any public body". The legislative history of the Act, however, clearly demonstrates that the last phrase of the first sentence was intended to be a part of the public utility exception which immediately precedes that phrase. (See Laws 1941, vol. 1, p.703, § 2, effective July 1, 1941; Laws 1961, p. 2919, § 1, effective August 8, 1961; Laws 1963, p. 1951, § 1, effective July 25, 1963.) Therefore, "public works" generally include (1) fixed works (2) which are constructed for public use (3) by a public body. Although certain language in Opportunity Center of Southeastern Illinois v. Bernardi (1990), 204 Ill. App. 3d 945, appeal denied, 136 Ill. 2d 546 (1991), might be read as dispensing with the requirement that construction be by a public body, a careful reading of the entire opinion does not support that conclusion. The court therein clearly held that the plaintiff organization was a public body because it was supported in part by public funds. (Opportunity Center of Southeastern Illinois v. Bernardi, 204 Ill. App. 3d at 950.) Only after so finding did the court discuss the elements of a "public work". In the context of the opinion, therefore, it had already been determined that the Opportunity Center was a "public body", for purposes of the Act.

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There is no question but that the Prevailing Wage Act is applicable to the construction of any fixed work contracted for by the State or any of its agencies or political subdivisions, as well as to projects financed through any of the Acts specifically referenced in the second sentence of the statutory definition of "public works". In order to determine when the Act is applicable to a non-governmental entity for a project which is not funded pursuant to one of the specified Acts, however, it is necessary to consider: (1) whether the entity is an "institution supported in whole or in part by public funds", as that phrase is used in the definition of "public body"; and (2) whether the project is encompassed by the term "public works".

Three reported Illinois cases have analyzed whether a particular project constructed by a non-governmental entity is subject to the Act. In the earliest case, Zickuhr v. Bowling (1981), 97 Ill. App. 3d 534, it was held that a warehouse constructed by a private corporation, although financed by municipal bonds issued under the Industrial Project Revenue Bond Act, was not a "public work" as that term is used in the Prevailing Wage Act and, therefore, the Act was not applicable to its construction. (The Prevailing Wage Act, however, was subsequently amended to include projects funded pursuant to the Industrial Project Revenue Bond Act as "public works" (see Public Act 86-

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799, effective January 1, 1990).) In reaching this conclusion, the court stated:

" * * *

* * * Public works as defined in the statute are projects constructed by a public body for a public use. Although the public may benefit from the construction of the warehouse, the use of the warehouse is private in nature. Moreover, the actual contracting and construction of the warehouse is done by private industry, not a public body. The public body is no more than a financing conduit.

* * * "

Thereafter, in People ex rel. Bernardi v. Illini Community Hospital (1987), 163 Ill. App. 3d 987, appeal denied, 119 Ill. 2d 574 (1988), it was held that because a nonprofit, nonsectarian hospital received a portion of its revenue from tax monies assessed for its benefit, it was a "public body" which was subject to the Act with respect to the construction of a canopy at the hospital emergency room entrance, despite the fact that no public funds were used in the specific construction project. Lastly, in Opportunity Center of Southeastern Illinois, Inc. v. Bernardi (1990), 204 Ill. App. 3d 945, the court followed the decision in People ex rel. Bernardi v. Illini Community Hospital, holding that the remodeling of a building housing a private, nonprofit corporation which provided programs for handicapped and

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developmentally disabled adults, and which was supported by tax monies in addition to receiving over one half of its revenue from contracts with and grants from the State, was covered by the Act.

From these cases, it may be concluded that a non-governmental entity which receives public funding through tax proceeds or contracts to provide public services, and which engages in the construction of a fixed work for a public use, must comply with the provisions of the Prevailing Wage Act, even if the specific project is not financed with public funds. With respect to whether an entity is an "institution supported in whole or in part by public funds", I would note that there are numerous non-governmental entities which are organized and operated for the purpose of furnishing services for the benefit of the public generally and which receive significant compensation from government grants and contracts for furnishing those services. For example, non-governmental entities routinely furnish substance abuse counseling, mental health treatment and health services to the public pursuant to contracts with governmental agencies. In many circumstances, if those services were not provided pursuant to contract, governmental agencies might be obligated to provide them directly. Although such service providers may or may not receive tax revenue, depending upon the nature of the services provided, they nonetheless derive revenue

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from contracts for the provision of services to the public on behalf of governmental entities, and therefore are considered to be "supported in whole or in part by public funds", for purposes of the Act. Such was the case in Opportunity Center of Southeastern Illinois v. Bernardi, in which the court noted that the Opportunity Center received the majority of its revenue from governmental grants and contracts, and this factor weighed heavily in the court's decision. Opportunity Center of Southeastern Illinois v. Bernardi, 204 Ill. App. 3d at 949-50.

Unfortunately, it is not possible to fashion a bright line test to determine the level of public funding which is sufficient to consider a non-governmental entity to be "supported in whole or in part by public funds". Conceivably, the level of public funding of an entity could be so insignificant that it would be considered de minimis, even if continuous and longstanding. As a general principle, however, the receipt of even small amounts of public funding on a regular basis is sufficient to bring a non-governmental entity within the definition of "public body", for purposes of the Act. Thus, in People ex rel. Bernardi v. Illini Community Hospital, the court rejected the hospital's argument that because only "a small portion of its budget was met by tax monies", it would be unfair to require compliance with the provisions of the Act. Similarly, in opinion No. S-1151, issued

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September 27, 1976 (1976 Ill. Att'y Gen. Op. 287), Attorney General Scott concluded that a hospital which had received funds from the county in previous years was subject to the Act even if no funds had been requested or received for the year in which construction was undertaken, stating:

" * * *

It should be clear that if the hospital still retains funds received from the county in [previous years], its existence and operations are to some degree maintained by such public funds and it would therefore be supported in part by public funds. I conclude that the word 'supported' as used in the definition of 'public body' encompasses not only the receipt of public funds while undertaking 'public work', but also the possession of public funds received prior to the institution of a 'public work' which to any degree enables the institution to maintain itself and its operation. The fact that an institution has ceased to receive public funds does not conclusively determine whether it is or is not a 'public body' for purposes of the Act.

* * *

(1976 Ill. Att'y Gen. Op. 287, 288-89.) "

Therefore, a non-governmental entity may be considered to be "supported in whole or in part by public funds" even when those funds make up only a small part of the entity's total funding.

At the opposite end of the spectrum are non-governmental entities which do not ordinarily receive public funding, but which may accept a one-time grant to fund all or a

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part of a particular project. Whether the amount of financial support received by an institution is sufficient to justify considering the entity to be "supported in whole or in part by public funds", for purposes of the Act, can only be determined on a case by case basis. For example, the receipt of a one-time grant funding even the full cost of a research project conducted by a member of the faculty at a private college would hardly seem sufficient public support to justify considering the college to be a "public body", for purposes of applying the Prevailing Wage Act to unrelated, privately-funded construction projects. On the other hand, if the college routinely receives grants of public funds for various purposes, then it may properly be required to comply with the provisions of the Act. See People ex rel. Bernardi v. Illinois Community Hospital.

Although the Act does not require that a non-governmental entity be wholly or continuously supported by public funds before its provisions become applicable, it does contemplate the receipt of regular and/or significant support. Thus, an occasional, relatively insignificant receipt of public funds for purposes not directly related to the construction of public works will not be sufficient public support to subject a non-governmental entity to the requirements of the Act. What, however, of a non-governmental entity which does not regularly receive signifi-

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cant public funding but receives public funding under Illinois FIRST for the construction of a fixed work?

In responding to this aspect of your inquiry, it is helpful to describe the Illinois FIRST program, which is a " * * * five-year, \$12 billion public works program designed by Governor Ryan to address Illinois' aging and deteriorating roads and bridges, unfunded highway construction projects, dilapidated mass transit systems and school construction and repair needs. The program will also fund the clean-up of urban brownfields and other environmental hazards, the upgrade of sewer systems and the improvement of quality-of-life projects throughout the state."

("Governor's 'Illinois FIRST' Program Approved By General Assembly," Press Release, May 21, 1999, at 1.) The Illinois FIRST program was created by Public Act 91-036, effective June 15, 1999; Public Act 91-037, effective July 1, 1999; Public Act 91-038, effective June 15, 1999; and Public Act 91-039, effective June 15, 1999. The primary components of the Illinois FIRST program are: (1) a \$4.1 billion supplement to the State's existing surface and air transportation program for roads, rail and air infrastructure; (2) a \$4.1 billion allocation for bus, rail and other mass transportation infrastructure needs in Northeastern Illinois and other cities with established transit districts; (3) a \$2.2 billion allocation to the State's existing school

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construction fund; and (4) a \$1.6 billion allocation to the "Fund for Illinois' Future" to be used for projects in local communities to bolster the State's economy, promote a clean environment and improve the overall quality of life throughout Illinois.

("Governor's 'Illinois FIRST' Program Approved By General Assembly," Press Release, May 21, 1999, at 2-3.) The Illinois FIRST program is funded by the assessment of certain fees, the collection of prescribed taxes, the issuance of general obligation and other bonds and the transfer of monies from the State's General Revenue Fund.

Of particular importance to your inquiry is the "Fund for Illinois' Future", a special fund in the State Treasury, to which the General Assembly authorized the transfer of \$260,000,000 from the State General Revenue Fund on June 15, 1999, and the transfer of an additional \$260,000,000 from the General Revenue Fund on July 15, 2000. It is anticipated that the General Assembly will continue to appropriate or transfer funds into the Fund for Illinois' Future to support projects under the Illinois FIRST program. Monies in the Fund for Illinois' Future are to be used for "* * * the making of grants and expenditures for planning, engineering, acquisition, construction, reconstruction, development, improvement, and extension of public infrastructure in the State of Illinois, including grants

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to local governments for public infrastructure, grants to public elementary and secondary school districts for public infrastructure, grants to universities, colleges, community colleges, and non-profit corporations for public infrastructure, and expenditure for public infrastructure of the State and other related purposes, including but not limited to expenditures for equipment, vehicles, community programs, and recreational facilities". (30 ILCS 105/6z-47 (West 1999 Supp.)) Although there is no definitive list of Illinois FIRST programs, Public Act 91-020, generally effective July 1, 1999, and Public Act 91-706, generally effective July 1, 2000, provide a summary of many of the Illinois FIRST projects, including those receiving monies from the Fund for Illinois' Future, for the first two fiscal years of the program.

As an illustration of the circumstances giving rise to your inquiry, you have indicated that a religious-based private university located in Illinois recently received an Illinois FIRST grant from the Illinois Board of Higher Education to renovate its student health and fitness center. The grant was for \$500,000, which constitutes some four percent of the project's total costs. The grant was made from monies held in the Fund for Illinois' Future. The university applied for the grant after it initiated a capital campaign, hired architects and

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secured a contractor for the project. With reference to these facts, you have inquired whether the university or other similarly-situated non-governmental entities which receive grant monies for construction projects from a governmental agency are subject to the provisions of the Prevailing Wage Act.

Initially, I note that article VIII, section 1. of the Illinois Constitution of 1970 prescribes that "[p]ublic funds, property or credit shall be used only for public purposes". I will assume that in reviewing grant applications and awarding grant monies under the Illinois FIRST program, or any of the State's other grant programs, the Board of Higher Education, the Illinois Department of Commerce and Community Affairs or the pertinent State agency involved in administering the particular grant program has made a preliminary determination that a public purpose will be served by awarding public funds for a specific, proposed project or to a particular requestor. Having received such funds, it must be determined whether the grant recipient is subject to the provisions of the Prevailing Wage Act.

The general rule laid down in Zickuhr v. Bowling is that a non-governmental entity which engages in the construction of a fixed work funded in whole or part through a public program will be subject to the Act only if the work will have a "public use". Thus, because the warehouse which was the subject of that

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case was to be used solely by the entity for conducting its private business, the court concluded that the Act was not applicable to its construction. Although the court did not define "public use", it noted that it was not synonymous with "public purpose and public benefit".

There is, however, a significant distinction between the funding at issue in Zickuhr v. Bowling and that of the Illinois FIRST grants. In the former, a municipality lent its credit to raise funds for construction under favorable terms. As noted by the court, however, the municipality was merely "a financing conduit". (Zickuhr v. Bowling, 97 Ill. App. 3d at 540.) It did not contribute its own funds, or funds of any other public body, to the construction. In essence, therefore, because the private business concern was obligated to repay the loan, it ultimately paid for the construction with its own funds.

Your question, however, concerns grants (not loans) of public funds which are being made to various non-governmental entities under Illinois FIRST. As noted above, the Constitution prohibits the expenditure of public funds for private purposes. Moreover, the public policy of the State, as embodied in the Prevailing Wage Act, favors the payment of prevailing wages to workers engaged in the construction of fixed works paid for in whole or in part with public funds. The application of the Act

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to non-governmental entities which constructed works which were not patently for a "public use", in the sense of an unlimited public right to enjoy them, was upheld in People ex rel. Bernardi v. Illinois Community Hospital and Opportunity Center of South-eastern Illinois v. Bernardi. Where, as in the Illinois FIRST programs, the State dedicates its own funds to the construction of fixed works by a non-governmental entity, it may require that the recipients comply with the public policy as enunciated by the General Assembly.

Moreover, it is noteworthy that after the decision in Zickuhr v. Bowling, the General Assembly amended the definition of "public works" to include, inter alia, projects financed under the Industrial Project Revenue Bond Act, the funding mechanism at issue in that case, as well as several similar bond Acts. An amendment to a statute is an appropriate source for determining the original legislative intent of a statute, and where the statute is amended soon after questions have arisen regarding its interpretation, it is logical and reasonable to regard the amendment as a legislative interpretation of the original statute. People v. Badoud (1988), 122 Ill. 2d 50, 56-7.

Although not conclusive evidence that the judicial interpretation of section 2 in Zickuhr v. Bowling was inconsistent with the legislature's intent, the subsequent amendment of

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that statute is indicative of a perceived need by the General Assembly to clarify its terms. Since the pivotal issue in that case was "public use" of a fixed work, the amendment suggests that it was not the original intent of the General Assembly to condition the application of the Prevailing Wage Act upon that single factor. This issue is not, however, critical to the resolution of this question in these circumstances.

As discussed above, the grant monies for the university health and fitness center's renovation came directly from monies appropriated to the Fund for Illinois' Future, a special fund in the State Treasury created by the transfer of monies from the State's General Revenue Fund. In contrast to the funding mechanism used in Zickuhr v. Bowling, where municipal bonds were issued but public funds and tax revenues were not involved, the renovation of the student health and fitness center at the private university was to include the use of \$500,000 in public funds and tax revenues transferred to the Fund for Illinois' Future from the State's General Revenue Fund. It is my opinion that, at least with respect to this particular renovation project, the university will be considered a "public body" within the statutory definition, because it has received State grant funds and therefore is an "institution supported in whole or in part by public funds".

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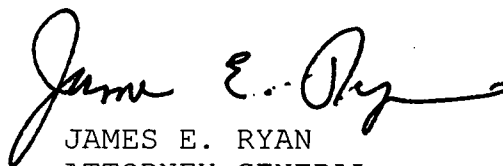
Moreover, a review of the information submitted by the university to the Illinois Board of Higher Education indicates that the renovated "* * * facility will not only serve as home to the * * * [university's] sports teams but serves as the home for a number of community services such as concerts, the National Youths Sports Program conducted for at-risk youth, and sports camps, just to name a few". By its own admission, the university anticipates granting at least limited public access to the student health and fitness center for a number of community events. Therefore, it is my opinion that the student health and fitness center will also have a "public use", as discussed in Zickuhr v. Bowling.

In summary, it is my opinion that the Prevailing Wage Act is applicable to the construction of public works by non-governmental entities which receive significant public funding, whether in the form of tax revenues, payment for the provision of services benefitting the public or grants. Application of the Act to entities which receive isolated, one-time grants of public funds for specific purposes must be considered on a case by case basis to determine whether the public funding is sufficient to rise to the level of public support for the institution itself, in which case all public works constructed by the entity will be subject to the provisions of the Act. Where a non-governmental

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entity which is not otherwise subject to the Act receives a grant of public funds for the construction of a fixed work, the provisions of the Act will be applicable to that project.

Sincerely,

A handwritten signature in cursive script, reading "James E. Ryan". The signature is written in dark ink and is positioned above the printed name and title.

JAMES E. RYAN
ATTORNEY GENERAL