



# False Claims & Whistleblowers



**Margery Newman** concentrates her practice in construction law including complex construction litigation in both the private and public sectors, and related business litigation.

Margery's clients are primarily owners, general contractors, specialty trade contractors and disadvantaged business enterprises. She places particular emphasis in client counseling on the drafting and negotiation of construction contracts, mechanics' lien claims and foreclosure actions, construction defects and DBE certification and compliance. Margery is an attorney at Bryce, Downey & Lenkov LLC and can be reached at [mnewman@bdlfirm.com](mailto:mnewman@bdlfirm.com) or 312.327.0041.

Due to a historical unwillingness to utilize minority and female owned businesses in the construction industry, public bodies in Illinois have instituted diversity programs. These programs are designed to increase the number of minority and female owned businesses in the construction industry. For ease of reference both of these groups will be referred to as Disadvantaged Business Enterprises or DBEs.

In order for a DBE to become certified, it must meet certain requirements. Specifically, a DBE must own at least 51% of its company, manage the day-to-day operations of the company and control the business of the company. It is not, however, sufficient for a DBE to be merely certified in order to avoid certification problems. The certified company must also perform a commercially useful function. A commercially useful function occurs when a DBE is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing and supervising the work involved in its contract.

Recently, a cottage industry has arisen in the construction industry revolving around allegations that certain DBEs are fronts or are not performing commercially useful functions. Specifically, the False Claim Act (FCA) imposes liability on persons and companies who attempt to defraud the public agencies overseeing DBE programs. People who report such fraud may benefit financially. This cottage industry is made up

primarily of current or former disgruntled employees, competitors, or other people who believe they are in possession of information that the DBE is a front or a sham or not performing a commercially useful function.

These people, statutorily referred to as Relators, are commonly known as Whistleblowers.

On the Federal side, the FCA is the government's primary tool in combating fraud because the government is entitled to recover treble damages and civil penalties of not less than \$5,000.00 and not more than \$10,000.00. When individuals make FCA claims, this is called a qui tam action. As of 2012, over 70% of all FCA actions were initiated by Whistleblowers who stand to receive a percentage (up to 30%) of any damages recovered from the fraudulent DBE.

Illinois promotes Whistleblower actions by financially encouraging Whistleblowers. For example, the Relator/Whistleblower in the recent Perdel Construction case received \$2,000,000.00 as part of a \$14,000,000.00 settlement. Perdel Contracting Co. was a certified WBE that specialized in concrete and carpentry. In 2016, Perdel's owner was found guilty of allowing her company to be claimed as a subcontractor on two City of Chicago construction projects without actually performing any work. The owner's activities were uncovered following a 2008 Whistleblower lawsuit brought under the False Claims Act by a former Perdel project manager.

In 2014, Jesse Brunte, owner of Brunte



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# Spring 2017 Legislative Update

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Capital Development Board (CDB) to enter into energy performance contracts for 20 years. Construction industry representatives, including IMSCA, met with CMS staff to discuss our concerns. The interested parties worked toward an agreed amendment that included a 15 year limit to the contract term – which wasn't advanced. However, **SB 41 (Sen Cullerton/Rep. Currie)** was amended, and includes our agreed language of a 15 year term limit and also provides a definition of "energy savings contracts". **SB 41** passed both chambers.

## **SB 1287 (Sen. Mulroe)**

SB 1287 amends the School Construction Code and seeks to reform energy performance contracting as it pertains to school construction. This proposal was met with opposition from performance contracting companies, the Illinois Association of School Boards and the Sierra Club. SB 1287 was held on second reading.

## **DESIGN BUILD**

In addition to energy performance contracting legislation, there was also an interest in expanding the use of design build. Representative Jones sponsored **HB 3289** which sought to expand the use of the design build delivery model to local school districts, which raised many concerns for the design and construction industry. HB 3289 wasn't advanced this session. **HB 2755 (Rep. Evans)** sought to allow the Department of Transportation to use the design build delivery method – but under a completely different model used by other state agencies such as the Capital Development Board (CDB). IMSCA opposed HB 2755 which did not advance this session. A similar bill, **SB 1320 (Sen. Sandoval/Rep. Evans)** passed the Senate but didn't advance in the House.

Finally, **SB 262 (Sen. Clayborne/Rep. Davis)** was aimed at the telecommunication industry to ensure BEP diversity goals are met by their

industry. A point of concern for IMSCA was the inclusion of language that would have reduced the recently passed cure period from 10 days to 5 days to address these BEP program bid deficiencies. The construction industry successfully negotiated a 10 day cure period with Senator Clayborne in 2015. We felt our previous agreement was made in good faith, and requested SB 262 be amended to restore the 10 day cure period. SB 262 was amended to include our changes and passed both chambers.

Your IMSCA lobbying team would like to thank all of our IMSCA members for your support and assistance this legislative session. We called on many of you for your expertise and opinions on many of these proposals, and also depended on your participation in our Calls to Action. Your support and interest is appreciated. We will continue to provide legislative updates as the Illinois General Assembly remains in "continued session". ❀

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Brothers Transfer, Inc., was sentenced to 17 months in jail in connection with a scheme to defraud the City of Chicago's MWBE program. Brunte Brothers Transfer, Inc. was a certified MBE. Brunte supposedly used his company as a minority past through for sewer cleaning and videotaping service contracts for the City of Chicago. Although this case was initiated by the Office of the Inspector General and conducted with the Federal Bureau of Investigation, Mr. Brunte was still indicted for fraud. It was determined that although Brunte Brothers was supposed to be cleaning and

videotaping City of Chicago sewers, it did not actually perform the work specified in the contract. Therefore, it was determined that Brunte Brothers was not performing a commercially full function because its work was actually being performed by a non-minority company. Mr. Brunte pleaded guilty to the charged scheme and along with the prison sentence was ordered to pay \$533,749.00 in restitution.

As a final note, it must be stressed that simply using a certified DBE on a project does not prevent a False Claims Act lawsuit if the DBE is not performing a commercially useful

function. It is no longer sufficient to merely show that a DBE is being used to meet specific diversity goals on a construction project. The DBE must also perform a commercially useful function or the company, and any upstream contractor employing that company, could very easily find itself on the front pages of the local newspaper. ❀

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*The author wishes to acknowledge that part of this discussion will be published in the upcoming 2017 edition of Construction Law: Transactional Considerations (IICLE®).*