



# LiUNA!

## MIDWEST REGIONAL OFFICE

1 North Old State Capitol Plaza • Suite 525 • Springfield, IL 62701  
Phone: (217) 522-3381 • Fax: (217) 522-6588

TERRY O'SULLIVAN  
General President

ARMAND E. SABITONI  
General Secretary-Treasurer

### Vice Presidents:

TERRENCE M. HEALY

RAYMOND M. POCINO

JOSEPH S. MANCINELLI

ROCCO DAVIS

Special Assistant to the  
General President

VINCENT R. MASINO

DENNIS L. MARTIRE

ROBERT E. RICHARDSON

RALPH E. COLE

JOHN F. PENN

OSCAR DE LA TORRE

SERGIO RASCON

ROBERT F. ABBOTT

SAMUEL STATEN, JR.

PAUL V. HOGROGIAN

THEODORE T. GREEN  
General Counsel

HEADQUARTERS:  
905 16th Street, NW  
Washington, DC  
20006-1765  
202-737-8320  
Fax: 202-737-2754  
www.liuna.org

## Comments of the LiUNA Midwest Region to the Illinois Power Agency Regarding Implementation of PA 102-0662 Prevailing Wage Act Requirements

The enactment of Public Act 102-0662 establishes new labor standards for renewable energy facilities that are the subject of future renewable energy credit delivery contracts, specifically the application of Prevailing Wage Act (PWA) requirements and a requirement that project labor agreements be utilized in the construction of utility-scale wind and solar projects and brownfield solar projects. While these requirements will be new to the Illinois Power Agency (IPA), the IPA can rely on the experience, precedent and processes set by other state agencies on these topics, most notably the Illinois Department of Labor (IDOL), for not only the Adjustable Block Program (ABP), but for utility-scale procurements, as well.

PA 102-0662 amends Section 1-75 of the IPA Act stating that renewable energy facilities "for which a renewable energy credit delivery contract... signed after the effective date of this amendatory Act... **shall be subject to the prevailing wage requirements included in the Prevailing Wage Act...**" (emphasis added). **These requirements include not only payment of the wages and benefits that prevail in the area in which a PWA-covered project is located, but all of the components of the PWA,** including the notification of the applicability of the PWA to a project, the reporting of those payments via Certified Transcripts of Payroll (CTPs) and any penalties that may result from the underpayment of such wages and benefits.

(NOTE: To be covered by the PWA, a project must be considered a "public works". The fact that PA 102-0662 extends PWA coverage to certain renewable energy facilities demonstrates the General Assembly's intent that such projects are to be considered public works. HB 3666, which passed the General Assembly last month and is pending the Governor's consideration, removes any doubt about this question by explicitly amending 820 ILCS 130/2 to add "... renewable energy projects required to pay the prevailing wage pursuant to the Illinois Power Agency Act..." to the definition of "public works".)

*Feel the Power*

### **Notification of PWA Applicability**

The IPA proposes to include confirmation of the applicability of PWA requirements as part of Part I of the ABP project application process. The IPA also suggests Part II of the ABP application process may require the Approved Vendor to attest that the PWA requirements on a covered project have been met. While these are excellent ideas, **the IPA should take additional actions to ensure greater awareness of and, thus, better compliance with, the IPA Act's new PWA requirements.**

The PWA requires entities subject to the Act to notify contractors (and those contractors to notify their subcontractors) when a project is covered by the PWA:

*"The public body or other entity awarding the contract shall cause to be inserted in... the contract a stipulation to the effect that not less than the prevailing rate of wages... shall be paid to all laborers, workers, and mechanics performing work on the contract."*

[820 ILCS 130/4(e)]

*"It shall also be mandatory upon the contractor to whom the contract is awarded to insert into each subcontract... a written stipulation to the effect that not less than the prevailing rate of wages shall be paid to all laborers, workers, and mechanics performing work under the contract. It shall also be mandatory upon each subcontractor to cause to be inserted into each lower tiered subcontract... a stipulation to the effect that not less than the prevailing rate of wages shall be paid to all laborers, workers, and mechanics performing work under the contract."*

[820 ILCS 130/4(g)]

Therefore, in addition to inserting an acknowledgement of PWA applicability into its applications, **the IPA should require Approved Vendors in a renewable energy credit delivery contract to include statements of PWA applicability in any contracts they enter into for the construction of renewable energy facilities.** This will not only ensure that contractors (and the subcontractors of those contractors) are properly notified of PWA applicability, it is also in the Approved Vendor's best interest because, under the PWA, any entity awarding a public works contract that fails to provide such notice is responsible for the interest or penalties that result from workers being paid less than prevailing wages:

*"Where a complaint is made and the Department of Labor determines that a violation occurred, the Department of Labor shall determine if proper written notice under this Section 4 was given. If proper written notice was not provided to the contractor by the public body or other entity, the Department of Labor shall order the public body or other entity to pay any interest, penalties or fines that would have been owed by the contractor if proper written notice were provided."*

[820 ILCS 130/4(g)]

*"Where a complaint is made and the Department of Labor determines that a violation has occurred, the Department of Labor shall determine if proper written notice under this Section 4 was given. If proper written notice was not provided to the subcontractor by the contractor, the Department of Labor shall order the contractor to pay any interest, penalties, or fines that would have been owed by the subcontractor if proper written notice were provided..."*

[820 ILCS 130/4(j)]

### **Application of Prevailing Wages**

As a service to the Approved Vendors of PWA-covered renewable energy facilities, **the IPA should make clear the scope of the PWAs applicability.**

All wind and greenfield solar projects involve much more than the erection of wind turbines or the installation of racking systems and solar panels. Extensive site preparation work, both before and after the construction of the actual renewable energy facility, is required to complete a project. That site work includes, but is not limited to, the clearing of trees and brush, erosion control, land surveying, road construction and/or improvement, the installation or replacement of drainage tiles and fencing and the seeding and landscaping of the project area. Traffic control is also a crucial element of larger renewable energy facilities, particularly wind farms. All of the aforementioned tasks are part of the facility's construction and, therefore, will be covered by the PWA should that facility benefit from a renewable energy credit delivery contract.

### **Documentation of Payment of Prevailing Wages**

Certified Transcripts of Payroll (CTPs) are elemental to the enforcement of the PWA: without CTPs the PWA simply cannot be effectively enforced. While the IPA is considering an approach that would require the Approved Vendor to provide a copy of each CTP for the duration of a facility's construction as a component of Part II of ABP project application, this alone is not sufficient and could deny underpaid workers payment of back wages for, in the case of larger projects, upwards of two years or more.

As a result, it is critical that CTPs on PWA-covered renewable energy facilities be filed in a timely fashion and in a publicly accessible manner. Therefore, **in addition to any verification process performed by the Program Administrator, the IPA should require Approved Vendors to instruct contractors to file CTPs in each month that follows a month in which construction on PWA-covered renewable energy facilities is performed pursuant to existing PWA requirements:**

*"Any contractor and each subcontractor who participates in public works shall:*

*...*

*no later than the 15th day of each calendar month file a certified payroll for the immediately preceding month..."*

*[820 ILCS 130/5(a)(2)]*

That same section of **the PWA specifically requires CTPs to be filed electronically with the IDOL.** It states that CTPs shall be filed:

*"... with the public body in charge of the project until the Department of Labor activates the database created under Section 5.1 at which time certified payroll shall only be submitted to that database..." (emphasis added)*

*[820 ILCS 130/5(a)(2)]*

Section 5.1 of the PWA directs the IDOL to "develop and maintain an electronic database capable of accepting and retaining certified payrolls under this Act..." **According to the IDOL's website, its Certified Transcript of Payroll Portal has been operational since September 1, 2020 so the PWA has**

**required electronic filing of all CTPs since that time. Thus, entities performing construction on PWA-covered renewable energy facilities should similarly file CTPs via the IDOL's CTP Portal.**

CTPs will be even more critical in the enforcement of the PWA on renewable energy facility construction. Unlike most public works projects, the bidding process for the construction of renewable energy facilities will not be public, so the contractors that are awarded these projects will be virtually unknown to the public, thus increasing the likelihood that the workers on these projects will be unaware of their rights under the PWA. The enforcement of the PWA on these projects will be further complicated by the fact that many of these projects will be well off of the beaten path, break ground on schedules unknown to the public and, in the case of smaller projects, be completed in a relatively short period of time. All of these factors decrease the likelihood that the public will be aware that construction on a PWA-covered renewable energy facility ever occurred and that the workers on these projects can be made aware of their rights under the Act.

Furthermore, the IDOL does not have the wherewithal to actively enforce the PWA, so it cannot and will not review whether a PWA-covered renewable energy facility project – or any PWA-covered project – is in compliance with the PWA. The IDOL, therefore, only investigates potential PWA violations for which official complaints are filed. For all of these reasons, if CTPs are not filed with the IDOL in the manner required by the PWA, there will be little ability to monitor compliance with the PWA and to protect the rights of workers.

#### **Verification of Payment of Prevailing Wages**

The IPA proposes to require Approved Vendors to attest that the requirements of the PWA have been met during Part II of the ABP application process. The IPA asks stakeholders how the Program Administrator can confirm that PWA requirements are met on the entirety of the project. This is an intuitive question as one very common tactic of PWA avoidance employed by unscrupulous contractors is underreporting the number of workers employed on a project.

To combat this, **the IPA and/or the Program Administrator should request from the Approved Vendor the estimated start date of the facility construction, the list of contractors and subcontractors to be used on the project, the scopes of work that each will perform and the value of their respective bid packages.** This will allow the Program Administrator to determine when the filing of CTPs should begin and what entities should be filing them. It could also give the Program Administrator a basic idea of the wage classifications that should be reflected on the CTPs. For example, if XYZ Contractor will be doing site work and road construction on a wind farm, then the CTPs that XYZ Contractor files should reflect hours worked by workers with the prevailing wage classifications of laborer and operating engineer. If 123 Contractor is erecting the turbines then their CTPs should list workers with the classifications of laborer, operator, ironworker, etc.

This leads to another PWA topic about which the IPA seeks input: verification of proper classification of the work performed. As the IDOL is the ultimate arbiter of when a violation of the PWA occurs, the Program Administrator should confer with and defer to the decisions of the IDOL as part of their verification process. In fact, it would behoove the Program Administrator to leave the issue of verifying prevailing wage classifications to the IDOL entirely. During the verification process **the Program Administrator could consult with the IDOL to simply ascertain whether a PWA complaint is pending or has been found meritorious on a particular facility's construction. Should the Program Administrator,**

however, believe a PWA violation occurred after completion of its verification process then it should notify the IDOL.

The proposed approach of determining benchmark hours of construction labor per kilowatt of installed capacity is a good one. However, given the above comments, we recommend using them as a yardstick for measuring total construction hours rather than for each prevailing wage classification. As for ascertaining what the total hours worked should be, it may make more sense to let the first several PWA-covered projects for each type and size of project set the standard for total project hours rather than soliciting input on this topic from anyone outside of the contractor community.

### **IPA Actions in the Event of a PWA Violation**

The IPA seeks stakeholder input regarding “facilities that were completed before submittal of Part I of the ABP project application, and which did not pay prevailing wages for the project...” The intent of PA 102-0662 is clear: it added Section 1-75(c)(1)(Q) to the IPA Act to state that “Each facility... for which a renewable energy credit delivery contract is signed after the effective date of this amendatory Act... shall be subject to the prevailing wage requirements included in the Prevailing Wage Act...” **All workers who perform construction work on a PWA-covered facility are entitled to payment of prevailing wages, regardless of whether the ABP application process was completed prior to construction.** Therefore, such workers are entitled to receive back pay just as any other workers who are paid less than prevailing wages are entitled to be made whole. Further, any contractor that makes such an underpayment will be in violation of the PWA and liable for any penalties and interest that accrues due to the underpayment. And (as discussed above) in the event that the Approved Vendor did not notify the contractor that the PWA applied to such a project it would be the Approved Vendor that would be responsible for any fines and interest that result from a violation. Suffice it to say that it would benefit all parties to be aware of their obligations before commencing construction.

This topic raises a general question about the IPAs approach toward Approved Vendors and contractors that are found in violation of the PWA during the construction of a PWA-covered facility. **Will the IPA take any action against an entity that violates the PWA?** Will Approved Vendors that use contractors that violate the PWA or fail to notify contractors of PWA requirements (or fail to do either repeatedly) be in jeopardy of having the associated renewable energy credit delivery contract voided? Will they be prohibited from entering into future renewable energy credit delivery contracts or be prohibited for a period of time? Will contractors who violate the PWA (or violate it repeatedly) during the construction of a PWA-covered facility be prohibited from performing construction on similar facilities? All of these possibilities and others should be considered by the IPA as part of its efforts to ensure the IPA Act’s new PWA requirements are followed.

### **Project Labor Agreements**

Though not a topic of the October 14, 2021 Request for Stakeholder Feedback, PA 102-0662 requires the IPA to administer several types of projects that require project labor agreements (PLAs):

- The Act amends the IPA Act requiring utility-scale wind and solar projects and all brownfield solar projects that are constructed “pursuant to Agency procurement events occurring after the effective date of this amendatory Act... (to) be from facilities built by general contractors that must enter into a project labor agreement...” (Section 1-75(c)(1)(Q)(2));

- Further, Section 1-75(c)(1)(l) of the IPA Act was amended to allow the “renewable resources that are delivered via a high voltage direct current converter station located in Illinois” to be deemed generated in Illinois “if the high voltage direct current transmission line... was constructed with a project labor agreement...”; and
- Section 1-75(c-5)(2)(G) was added to the IPA Act to state that “the applicant... will negotiate a project labor agreement for the construction of the new renewable energy facility and associated energy storage facility...”

**Several state statutes have similar PLA requirements and some further stipulate that the PLA must be executed with the “applicable local building trades council”. It should be noted that the latter stipulation was not included in PA 102-0662.** This is important to note particularly in the case of wind facility construction because the vast majority of wind farms built in Illinois have been built under one of two national Agreements to which several building trades unions – but not an entire building trades council – are signatory. Interpreting the PLA provisions that were added to the IPA Act to require PLAs to be executed with the local building trades council would, therefore, overturn years of jurisdictional precedent and create confusion in what are relatively settled work assignments.