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Environmental Violations May Keep Companies From Doing Business With The State Of Illinois

The Illinois General Assembly recently amended the Illinois Procurement Code to add a debarment provision for persons who are found to have committed a willful or knowing violation of the Illinois Environmental Protection Act (the "Act"). Public Act 93-0575 (effective January 1, 2004). The provision provides as follows:

Unless otherwise provided, no person or business found by a court or the Pollution Control Board to have committed a willful or knowing violation of Section 42 of the Environmental Protection Act shall do business with the State of Illinois or any State agency from the date of the order containing the finding of violation until five years after that date, unless the person or business can show that no person involved in the violation continues to have any involvement with the business.

30 ILCS 500/50-12(a). The provision will be self enforcing. The new provision requires that:

Every bid submitted to and contract executed by the State shall contain a certification by the bidder or contractor that the bidder or contractor is not barred from being awarded a contract under this Section and that the contractor acknowledges that the contracting State agency may declare the contract void if the certification completed pursuant to this subsection (c) is false.

30 ILCS 500/50-12(c). After January 1, 2004, persons or businesses found to have committed willful or knowing violations of the Act will join others the State has in the

past barred from contracting with the State, such as those convicted of bribery and other felonies (and those that owe the State money!).

This new provision is troubling given the manner in which the courts and the Pollution Control Board have interpreted "willful or knowing" within the context of an environmental violation. A willful or knowing violation of an environmental requirement is not necessarily a crime. The Courts have said a person knowingly violates an environmental requirement when the individual acts knowingly whether or not the person appreciates that the action will be in violation of the law. *See Kampen v. Dept. of Transportation*, 103 Ill. Dec. 884, 502 N.E.2d 31 (2nd Dist. 1986) (interpreting a provision of the Illinois Hazardous Materials Transportation Act). In addition, the Illinois Pollution Control Board has said that a person commits a knowing violation of the Act if the violation continues after the person has been notified. *See, e.g., People v. Panhandle Eastern Pipe Line Company*, PCB 99-191 (November 15, 2001) (where the Board found that Panhandle had committed a repeat and knowing violation of the Act by failing to obtain a permit and to install controls immediately after learning of a possible violation even though the company had applied for the permit and was waiting for the IEPA to act before proceeding).

The Board's cases have been in the context of Section 42(f) of the Act, which allows the Board or a court to award the State's attorney or the Attorney General attorneys' fees and costs from a person proven to have committed a willful, knowing or repeated violation of the Act. 415 ILCS 5/42(f). Whether the Board and the courts will use a dif-

ferent analysis now that the consequences of a finding that a person committed a willing or knowing violation of the Act are more severe is unclear.

The new debarment provision is also likely to raise several issues based on how it is written. The provision appears to apply to persons found within the last five years to have committed knowing or willful violations, not simply to those who are so determined after the effective date of the new law. In addition, there appears to be no mechanism to determine if the debarment ends sooner based on the ambiguous phrase “no person involved in the violation continues to have any involvement in the business.” The provision may cause employers to take actions to terminate employees in order to be free from the possibility of debarment (which may raise issues under employment laws).

A person or business otherwise barred from doing business with the state may be allowed to do so only in one specifically limited circumstance. Such a person or business can only do work for the State “if it is shown that there is no practicable alternative to the State to contracting with that person or business.” 30 ILCS 500/50-12(b). Since such a person or business will necessarily have limited information about all “practicable alternatives” available to the State, this exception is not likely to be available in practice, except where the State is determined to direct the work to a particular company.

One thing is certain about the new debarment provision. Companies and individuals facing enforcement for violations of the Environmental Protection Act will need to structure carefully their defense and any possible settlement to avoid a finding by the Board or a court that the violation was knowing or willful. This will arm the enforcement agencies with leverage to force otherwise unacceptable settlement terms on a party. It will also lead to vigorous litigation when a settlement cannot be reached in order to avoid a finding of willful or knowing violation.

If you have any questions, or require additional information, please contact an environmental, safety and health attorney in the Chicago office.

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