

Virginia Legislative Update

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Proposed Laws That May Impact Virginia Construction Businesses

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The Virginia General Assembly convened on January 13, 2016. Below is a sample of bills now pending before the General Assembly that may impact the rights and obligations of companies in the construction industry.

PUBLIC PROCUREMENT

HB 449 Procurement of Construction by Certain Localities Using Competitive Negotiation. Authorizes any locality with a population in excess of 200,000 to enter into contracts using competitive negotiation for non-transportation-related construction valued at more than \$500,000 but less than \$2 million, provided such locality uses procedures consistent with the VPPA for the procurement of nonprofessional services.

HB 796 VDOT to Use Practical Design Standards. Requires DOT to use “practical design standards” based on a life-cycle cost approach for any highway system project. “Practical design standards” are defined as standards that incorporate maximum flexibility in application of standard to reduce the cost of project delivery while preserving and enhancing safety and mobility.

HB 887 / SB 586 Requirements for Use of Construction Management. Restricts the use of construction management unless: (i) the total project cost is \$50 million or more; (ii) a written determination is provided stating that competitive sealed bidding is not practicable or fiscally advantageous; (iii) the contract is entered into prior to the schematic phase of design; (iv) construction management experience is not required or considered as part of the award; (v) price is the primary determining factor for award of the contract; and (vi) proposals provide for the participation of small, women-owned, and minority-owned businesses in the project. Where project cost will not exceed \$50 million, a public body may use competitive negotiation to procure construction on a construction management basis only if: (i) all of the above requirements are met; (ii) the project is of substantial historical value or interest or significantly unique or extremely complex in nature; (iii) the public body notifies Department of General Services or the local governing body of its intent to procure construction on a construction management basis; and (iv) the Department of General Services or the local governing body makes a specific written finding that all requirements are met.

HB 888 Requirements for Use of Construction Management. Restricts the use of construction management to project in which: (i) the total project cost is \$50 million or more; (ii) a written determination is provided stating that competitive sealed bidding is not practicable or fiscally advantageous; (iii) the contract is entered into prior to the schematic phase of design; (iv) construction management experience is not required or considered as part of the award; (v) price is the primary determining factor for award of the contract; and (vi) proposals provide for the participation of small, women-owned, and minority-owned businesses in the project; and (vii) the project is of substantial historical value or interest or significantly unique or extremely complex in nature. Provides for a waiver process.

HB 907 Term Contracts for A&E Services. Provides an exemption from monetary caps on architectural and engineering services for transportation district commissions.

HB 1108 Experience Modification Restriction. Prohibits the use of any experience modification factor as a condition of eligibility to participate in a solicitation for construction services, even for those projects not covered by the VPPA. "Experience modification factor" is defined as a value assigned to an employer by a rate service organization per its uniform experience rating plan required by Va. Code § 38.2-1913.

HB 1166 Small Purchase Procedures for Transportation Related Construction. Authorizes the establishment of purchase procedures not using competitive sealed bidding or competitive negotiation for a single or term contract less than \$25,000 for transportation-related construction.

HB 1218 Waiver of Bond Requirements By Localities. Authorizes localities to waive bid, performance and payment bond requirements for nontransportation-related construction contracts between \$100,000 and \$500,000 without prequalification.

HB 1373 Purchase of Intellectual Property From Unsuccessful Design-Builder Proposer. Allows local public bodies to purchase the intellectual property or other work product of a proposer, provided that the locality makes a determination in advance and in writing that it will be advantageous to purchase the intellectual property of an unsuccessful proposer, prequalification is limited to five contractors, and the RFP includes a notice that the locality may acquire the intellectual property rights of an unsuccessful proposer.

SB 169 Request for Proposals for Architectural or Engineering Services. Provides that offerors in the selection process for architectural or engineering services shall not be required to list any exceptions to proposed contractual terms and conditions until after the qualified offerors are ranked.

SB 311 Use of Best Value Procurement. Authorizes any public body to use best value concepts in procurement. The RFP must contain a notice to potential offerors that the procurement decision will be made on a best value procurement basis, describe the criteria that will be considered in evaluating the proposals and the rating or weighting system that will be used in evaluating the proposals, Price must be weighted at least 51 percent as a factor.

SB 418 Authorizing Cooperative Procurement for Artificial Turf. Authorizes the purchase of installation of artificial turf or other athletic surfaces and all associated and necessary using cooperative procurement.

SB 465 Consideration of Alternative Technical Concepts during RFP Process. Provides the submission and consideration of "alternative technical concepts" during the RFP process for a design-build transportation project. "Alternative technical concepts" are defined as proposed changes to agency-supplied design, scope or construction criteria that provide a solution that is equal to or better than the requirements in the RFP.

SB 518 Preference to Participants in Virginia Registered Apprentice Program. Allows localities to give preference to the lowest responsive and responsible bidder who is within three percent of the lowest bid price, is a Virginia resident, and participates in the Virginia Registered Apprentice program of the Virginia Department of Labor and Industry.

EMPLOYMENT

HB 4 / SB 448 Constitutional Amendment for Voter Referendum; Right to Work. Provides for a referendum at the November 8, 2016, election to approve or reject an amendment to prohibit any agreement or combination between an employer and a labor union or labor organization in which: (i) nonmembers of the union or organization are denied the right to work for the employer; (ii) membership to the union or organization is made a condition of employment or continuation of employment by such employer; or (iii) the union or organization acquires an employment monopoly in any such enterprise.

HB 7 Paid Sick Leave Requirement. Requires employers with 25 or more full-time employee equivalents to provide those employees working at least 18 hours per week with paid sick leave benefits

at specified minimum accrual rates - one hour of paid sick leave benefit for every 50 hours he works. An employer may elect to provide benefits more generous than those required by this measure. An employer that knowingly fails to provide such paid sick leave to its employees is subject to a civil penalty not to exceed \$1,000 per violation.

HB 55 State-Mandated Health Benefit Plans; Small Employer Definition. Revises the definition of "small employer" to include employers who employ an average of 50 or fewer employees. Deletes the prior definition of "small employer." The measure has an emergency clause.

HB 66 Grants for Earning Workforce Training Credentials; New Economy Industry Credential Assistance Training Grants. Establishes a program that would pay grants of \$2,000 to individuals who complete eight hours of community service and who subsequently complete a noncredit workforce training program and earn a credential in a high-demand field. The grant would be limited to payment of tuition charged for the training program, the cost of any required textbooks, and the cost of any examination required to earn the credential. The bill has a delayed effective date of January 1, 2017

HB 691 Additional Hours to Report Work-Related Injuries. Extends from eight to 24 hours the time period in which an employer is required to notify the Virginia Department of Labor and Industry of any work-related incident resulting in hospitalization, amputation, or loss of an eye.

HB 7431 Employers to Provide DOL with Employment Records Upon Request. Requires employers to provide to the Commissioner of Labor, upon request, employment records that the employer is required to keep under state or federal law.

HJ 2 Constitutional Amendment (Second Resolution following 2015 Session Referral); Right to Work. Provides that any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization are denied the right to work for the employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is against public policy and constitutes an illegal combination or conspiracy and is void.

SB 483 Removes VOSH Vicarious Liability For Unlicensed Subcontractors. Prohibits the Commissioner of Labor and Industry from issuing a citation or assessing a penalty against an employer for a violation of occupational safety and health law if the violation is imputed to the employer vicariously as the result of the failure of the employer's contractor or subcontractor to obtain a contractor's license or maintain a copy of the contractor's license on site. The exemption from liability applies only if the employer did not have actual knowledge of the failure.

WAGES

HB 145 Prevailing Wage Provisions. Prohibits states agencies from requiring contractors to pay wages, salaries, benefits, or other remuneration to persons in connection with a public works project at a rate that is based on the wages and benefits at prevailing wage rates. The measure further states that it is the policy of the Commonwealth not to implement, adopt, enforce, or require any program, policy, or provision that requires a public works contract that requires the payment of wages or other remuneration at a rate based on the prevailing wage, whether modeled on the federal Davis-Bacon Act or similar state law.

HB 264 Prohibiting Localities from Requiring Contractors to Provide Certain Compensation or Benefits. Prohibits localities from establishing provisions that would require a wage floor or any other employee benefit or compensation above what is otherwise required by state or federal law to be provided by a contractor to its employees as part of a contract with the locality. The prohibition would not apply to contracts for economic development incentives in which the company receiving the incentives is required to maintain a certain stated wage level for its employees.

HB 597 Minimum Wage Increase. Increases the minimum wage to \$10.00 per hour effective July 1, 2016, to \$13 per hour effective July 1, 2017, and to \$15 per hour effective July 1, 2018, unless a higher minimum wage is required by the federal Fair Labor Standards Act.

HB 623 Minimum Wage Increase. Increases the minimum wage to \$10.10 per hour effective July 1, 2016, unless a higher minimum wage is required by the federal Fair Labor Standards Act. The increase would apply only to an employee who is over age 25 and employed by and employer with more than 15 employees.

HB 995 Local Alternative Minimum Wage. Authorized localities to require a local alternative minimum wage, up to and including \$10 per hour beginning July 1, 2016; thereafter, the maximum local alternative minimum wage shall be adjusted based on the CPI. If the federal minimum wage exceeds the levels specified in an alternative local minimum wage requirement, the federal minimum wage will prevail.

SB 88 Minimum wage. Increases the minimum wage to \$8.00 per hour effective July 1, 2016, to \$9.00 per hour effective July 1, 2017, and to \$10.10 per hour effective July 1, 2018, unless a higher minimum wage is required by the federal Fair Labor Standards Act (FLSA). The measure also provides that the cash wage paid to a tipped employee shall not be less than 50 percent of the minimum wage and that the tip credit shall equal the difference between the cash wage required to be paid to a tipped employee and the minimum wage.

SB 129 Minimum wage. Increases the minimum wage from its current federally mandated level of \$7.25 per hour to \$8.00 per hour effective July 1, 2016, to \$9.00 per hour effective July 1, 2017, and to \$10.10 per hour effective July 1, 2018, unless a higher minimum wage is required by the federal Fair Labor Standards Act.

HB 995 Local Alternative Minimum Wage. Authorized localities to require a local alternative minimum wage, up to and including \$10 per hour beginning July 1, 2016; thereafter, the maximum local alternative minimum wage shall be adjusted based on the CPI. If the federal minimum wage exceeds the levels specified in an alternative local minimum wage requirement, the federal minimum wage will prevail.

LICENSURE

HB 964 Exemptions from Contractor Licensing Requirements. Exempts from the contractor licensing requirements any person who performs construction, removal, repair, or improvement of real property who is retained by a licensed contractor, provided that such person (i) is authorized to transact business in the Commonwealth; (ii) possesses a valid business license; (iii) carries workers' compensation insurance and other required insurance coverage; and (iv) the work performed by such person is under the direct supervision and control of the retaining licensed contractor.

WORKERS' COMPENSATION

HB 253 Certificate of Workers' Compensation Compliance. Removes the requirement that contractors verify workers' compensation compliance before receiving a local license to do business and makes such requirement a condition of receiving a state contractor's license.

HB 44 Injuries Presumed to be in Course of Employment. Revises the provision creating a presumption, in the absence of a preponderance of evidence to the contrary, that an injury is work related if an employee is physically or mentally unable to testify and there is unrebutted prima facie evidence that the injury was work related. This measure clarifies that the employee's inability to testify refers to testimony about how the accident occurred and limits the measure's application to circumstances where the employee's inability to testify is because of injuries from the accident.

HB 207 / SB 474 Recovering Damages from Other Party. Expands the type of persons against whom an injured employee may bring a cause of action to recover damages for injury, occupational disease, or

death to include statutory co-employees. The measure provides that a determination of whether a person is a stranger to the employer's work shall be made without regard to whether the person was performing work that is part of the trade, business, or occupation of the injured employee's employer. The measure affirms that an "other party" shall not include the injured employee's employer or a fellow employee.

SMALL BUSINESS

HB 971 Small Business Certification Requirements. Changes the definition of small business beginning July 1, 2017 to meet the standards established by the regulations of the U.S. Small Business Administration. Also provides for the adoption of regulations beginning July 1, 2017 that will relate certification to the dominant business activity of each small business entity. The bill includes a definition of "dominant business activity," provides for the Department to enter into a Memorandum of Understanding with appropriate agencies establishing provisions for the sharing of information, consistent with the requirements of state and federal law, and requires the Secretary of Commerce and Trade to evaluate the effect of the implementation of the new definition at three-year intervals, reporting to the Governor and General Assembly by December 1, 2020, and December 1, 2023.

SB 119 Small Business Certification Requirements. Changes the definition of small business to require the business and its affiliates to meet the small business size standards established by the regulations of the U.S. Small Business Administration. Currently, a small business is required to have 250 or fewer employees or average annual gross receipts of \$10 million or less averaged over the previous three years.

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