

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 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 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 964 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.

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 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.

LABOR AND 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 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.

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 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.

LICENSURE

HB 907 Exemptions from Contractor Licensing Requirements. Exempts from the contractor licensing requirements any person who performs construction, removal, repair, or improvement of real property who 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 un rebutted 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 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.

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