

2017 Virginia Legislative Update

Session Update No. 2 **February 6, 2017**

Pending Bills That May Impact Virginia Construction Businesses

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The Virginia General Assembly now has all bill submissions before it. Cross-over is set for February 8, 2017. Noted below are some bills that still are pending and that, if passed, could impact the rights and obligations of companies in the construction industry.

PUBLIC PROCUREMENT

HB 1530 Certification of Small, Women-owned, and Minority-owned Businesses and Employment Services Organizations; Appeals. Removes the exemption from the Administrative Process Act (the Act) currently granted to regulations adopted by the Director of the Department of Small Business and Supplier Diversity to implement certification programs for small, women-owned, and minority-owned businesses and employment services organizations. The bill requires that such regulations provide a right to appeal the denial of an initial certification or the revocation of an existing certification as provided in Article 3 (§ 2.2-4018 et seq.) of the Act.

HB 1596 Prevailing Wage Provisions Prohibits. Prohibits state agencies from requiring bidders, offerors, contractors, or subcontractors to pay wages and benefits on a public works project at a rate that is based on the wages and benefits prevailing for the corresponding classes of laborers and mechanics employed, unless otherwise required under federal law. 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 1667 Prohibition On Gender Identity and Sexual Orientation Nondiscrimination Provisions. Prohibits agencies and other public bodies from requiring a contractor for a public contract to agree to nondiscrimination provisions with respect to gender identity or sexual orientation. The bill also provides civil immunity for any business or nonprofit organization that does not provide any benefit or accommodation with respect to gender identity or sexual orientation.

HB 1693 Architectural and Engineering Services Contracts. Increases the maximum permissible fee for any single project encompassed in a contract for architectural or professional engineering services relating to multiple construction projects from \$100,000 to \$150,000.

HB 1712 Cooperative Procurement for Energy Performance-Based Contracting. Authorizes a public body to purchase energy conservation or operational efficiency measures from an energy performance-based contract entered into by another public body pursuant to the Energy and Operational Efficiency Performance-Based Contracting Act even if the entity did not participate in the request for proposals if the request for proposals specified that the procurement was being conducted on behalf of other public bodies too. The measure permits the use of cooperative procurement for energy conservation or operational efficiency measures, but not excluding roof replacement.

HB 1753 Prohibiting Practices To Require Contractors to Provide Certain Compensation or Benefits. Prohibits local governing bodies from establishing provisions for procurement 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 one or more of the contractor's employees as part of a contract with the locality. The bill provides that localities shall not be prohibited from entering into 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 1858 Certification of small, women-owned, and minority-owned businesses. Authorizes the Director of the Department of Small Business and Supplier Diversity to adopt regulations that provide a process for evaluating existing certification programs of other states, the District of Columbia, and territories of the United States, in addition to evaluating existing local, state, and private sector certification programs that meet the minimum requirements established by the Department for certification of small, women-owned, and minority-owned businesses, and to mandate certification without any additional paperwork of any such business that has obtained certification under any of those certification programs and any business that has obtained certification under any federal certification program.

HB 1880 Competitive Negotiation for Professional Services. Provides that for competitive negotiation for professional services, a public body may conduct negotiations simultaneously with the top two ranked firms if the public body does not request or discuss nonbinding estimates of total project costs at the discussion stage and as long as such process is set forth in the Request for Proposal.

HB 1929 Public-Private Transportation Act Roads To Include Funding for State Police Law Enforcement. Requires all comprehensive agreements resulting in privately funded roads open for public transportation to include a provision ensuring funding for adequate staffing, defined in the bill, for general law enforcement by the Virginia State Police

HB 2017 Waiver of Bid, Performance, and Payment Bonds by Localities. Adds technical amendments to a locality's authorization to waive bid, performance, and pay bonding for nontransportation-related construction contracts in excess of \$100,000 but less than \$500,000 without having to undertake a prequalification process.

HB 2366, HB 2392, SB 1129 & SB 1275 Construction Management Contracts. Restricts the use of construction management procurements by public bodies unless: (i) the total contract value is \$40 million or more; (ii) there is a written determination that competitive sealed bidding is not practicable or fiscally advantageous; (iii) the contract is entered into prior to the schematic phase of design; (iv) prior alternative procurement method experience is not required as a prerequisite for an award; and (v) price is the primary determining factor for award of the contract. The bill provides that for projects where the total estimated contract value is not expected to exceed \$40 million, a public body may use competitive negotiation to procure construction on a construction management basis if the above requirements are met and (1) the project is of substantial historical value or significantly unique or complex in nature and (2) there is a written finding of compliance from the local governing body, Director of the Department of General Services, or contracting officer (as applicable). The bill also establishes an appeal procedure, prohibits combining multiple construction projects for the purpose of exceeding the \$40 million threshold, contains public notice and information requirements, and establishes reporting and internal review requirements. Each bill contains minor variations.

HB 2396 SWaM goals. Provides that contracts and subcontracts awarded to employment services organizations shall be credited toward an agency's and a contractor's small business, women-owned, and minority-owned (SWaM) business contracting and subcontracting goals. Under current law, such contracts are credited only to a contractor's SWaM goals.

SB 1528 Small and Microbusiness Program. Codifies Executive Order 20 (2014) establishing a statewide small business and microbusiness procurement enhancement program and establishes a statewide goal of 42 percent of small and microbusiness utilization in procurement orders, prime contracts, and subcontracts. The bill also provides for (i) a set-aside for competition among all small

businesses for state agency purchases up to \$100,000 for goods and nonprofessional services and up to \$50,000 for professional services and (ii) a set-aside for competition among microbusinesses for purchases under \$10,000.

SB 1538 Participation Credit for employment services organizations. Provides that contracts and subcontracts awarded to employment services organizations shall be credited toward the small business, women-owned, and minority-owned business contracting and subcontracting goals of state agencies as well as state contractors.

SB 1334 Limits on Small Business Enhancement Programs. Provides that any enhancement or remedial measure authorized by the Governor for state public bodies may allow for small businesses certified by the Department of Small Business and Supplier Diversity or a subcategory of small businesses established as a part of the enhancement program to have a price preference over noncertified businesses competing for the same contract award, provided that the certified small business or the business in such subcategory of small businesses does not exceed the low bid by more than five percent.

SB 1548 Authorizes Cooperative Procurement Through Virginia Sheriffs' Association. Provides that a public body may purchase from the contract of the Virginia Sheriffs' Association.

PROFESSIONAL REGULATION

HB 2145 Regulation of Land Surveyors. Provides for the licensure of land surveyor photogrammetrists.

HB 2242 Review of Regulations and Sunset Mechanism. Requires all (i) final regulations adopted before July 1, 2017, by any regulatory board within the Department of Professional and Occupational Regulation (the Department) to expire on July 1, 2022, and (ii) propose and final regulations promulgated by any regulatory board within the Department on or after July 1, 2017, to contain a sunset provision such that the regulations shall expire within five years of their effective date. The bill provides that on or before July 1, 2021, the Board for Professional and Occupational Regulation (the Board) shall review the regulations on such timetable as determined by the Board to enable it to make specific determinations outlined in the bill. The bill requires that by July 1, 2021, the Board shall submit a report of its findings, including any recommendations, to the Joint Commission on Administrative Rules (the Commission), which shall exercise the powers granted to it under the Administrative Process Act and the Commission's enabling law. Any recommendations of the Commission for the continuation, modification, suspension, or rescission of any such regulation shall be submitted to the Governor and the General Assembly by October 15, 2021.

HB 2335 Penalties For Multiple Licensing Violations. Provides that, in addition to existing penalties for unlicensed activity, any second or subsequent violation by any person who undertakes work without a valid Virginia contractor's license or certificate when a license or certificate is required shall constitute a Class 6 felony.

SB 1113 Optional Bonding for Class A and B Contractors. Allows applicants for Class A and Class B contractor licenses to demonstrate financial responsibility by posting a surety bond for both initial application for licensure and subsequent renewals in lieu of providing a financial statement. The bill provides a process for recovery on a surety bond of a contractor who has elected to post such a bond.

SB 1130 Department of Small Business and Supplier Diversity Certification Programs. Changes the definition of small business, beginning July 1, 2018, to meet the small business size standards established by the U.S. Small Business Administration and provides for the adoption of regulations to establish certification based on the "dominant business activity" of each small business entity.

HB 1979 / SB 1193 Class D Contractor Registration and Responsibility for Contracting with Unlicensed Person. Defines a Class D contractor and requires a Class D contractor to be registered by the Board for Contractors. The bill also provides that any contractor who directly employs or otherwise contracts with an unlicensed person for work requiring a contractor's license shall be solely responsible for any monetary penalty or other sanction resulting from employing or contracting with an unlicensed or unregistered person based upon such person's failure to obtain or maintain the required license or registration.

SB 1542 Occupational Health and Safety Civil Penalty Increases. Increases the maximum amount of civil penalties that may be assessed by the Commissioner of Labor and Industry for certain violations of from \$7,000 to \$12,471 and for willful or repeated violations of such laws from \$70,000 to \$124,709. The measure also requires the Commissioner annually to increase the maximum civil penalty amounts, starting in 2018, by an amount that reflects the percentage increase, if any, in the consumer price index from the previous calendar year.

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