

ASSOCIATED BUILDERS AND CONTRACTORS, VIRGINIA CHAPTER

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REPORT: 2010 GENERAL ASSEMBLY OF VIRGINIA

February 19, 2010

The General Assembly of Virginia has reached the midpoint of the 2010 session. Midnight, February 16, 2010 marked the “crossover” deadline for the House of Delegates and Senate to complete action on all legislative proposals (excluding budget amendments) introduced in their respective chambers. Surviving initiatives have now shifted from the chamber in which they were introduced and approved, to the alternate chamber for consideration.

Needless to say, the projected \$4.2 billion deficit in the 2010-2012 biennial budget has cast a shadow over deliberations. In most cases, legislative proposals posing a fiscal impact of any significance upon the state budget have been summarily rejected, regardless of their public policy merits or lack thereof. It is clear, given the Administration’s and House of Delegates’ firm opposition to any new taxes, that the pending debate over the manner and means by which to achieve a balanced budget will center primarily upon proposed cuts, consolidations and reductions aimed at recognizing greater efficiency and cost savings in the delivery of governmental services, as well as the possible implementation of new or increased fees tied directly to specific services. Governor McDonnell has proposed a number of cost savings options to help close the budget gap, including: reductions of approximately \$731 million in K-12 public education focused to the maximum extent practicable on non-instructional spending; cuts of approximately \$316 million in a number of health and human resources programs; a reduction in state contributions to the Virginia Retirement System for state employees totaling approximately \$786 million; and \$180 million in savings resulting from a required five-day unpaid furlough per year over the next two years of certain state employees. The House and Senate are scheduled to submit their respective budget plans by February 21, 2010.

In the midst of one of the most challenging financial periods faced by the Commonwealth in recent memory, it is worth noting the discouraging number of legislative proposals that have been put forth having negative implications for Virginia employers. Imposing additional burdens or encumbrances upon the very engine that will pull the state out of its financial straits may seem absurd, but legislators have spent considerable time on measures that would do just that. Fortunately, many of the more onerous proposals have been modified, set aside for the time being, or defeated outright.

Over the last thirty-eight days, the state legislature has considered a wide range of proposals impacting the construction industry. The following provides a review and update on some of the significant proposals that ABC-VA has addressed, and continues to monitor.

ILLEGAL IMMIGRATION: ABC-VA has addressed a number of initiatives relating to undocumented workers that are yet again aimed at placing additional responsibilities and costly burdens upon Virginia employers.

SB 225 (Barker) –Verification of Legal Presence - This proposal sought to require all contractors and subcontractors engaged in contracts with agencies of the Commonwealth and local government to register and participate in the federal E-Verify work authorization program, in order to verify the employment status of their employees and independent contractors with which they may be

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working. Under this bill, failure to do so would bar such contractors or subcontractors from eligibility for prequalification to compete for state or local, publicly-funded contracts. This measure was rejected by the Senate Committee on Commerce and Labor.

HB 737 (Albo) – E-Verify Requirement – In its original form, this measure sought to establish a broad mandate for the utilization of the federal E-Verify work authorization program by requiring all agencies of the Commonwealth; local governments; businesses engaged in state or local public contracts exceeding \$600 in value; and private sector employers with 15 or more employees to register and participate in the program. This initiative called for the utilization of the E-Verify program for all newly hired employees scheduled to work within the Commonwealth, on and after December 1, 2010. Employers failing to comply with this mandate would be subject to the suspension or revocation of their applicable state license and local business license. In response to opposition expressed by the business community, and in light of the fate of SB 225, this proposal has been amended to only apply to agencies of the Commonwealth and local government. The amended version of HB 737 has been approved by the House of Delegates and is currently before the Senate Committee on Commerce and Labor.

HB 30 (Putney) – E-Verify Budget Amendment – Del. Scott Lingamfelter has proposed an amendment to the House Budget Bill that would require employers and non-profit organizations that contract with the Commonwealth to utilize the federal E-Verify program to confirm the legal status of all new hires. Any employer found to be in non-compliance, would be prohibited from contracting with state or local government entities for a period of ten (10) years. This proposed amendment is currently before the House Committee on Appropriations - [Putney \(Chairman\)](#), [Morgan](#), [Tata](#), [Ingram](#), [May](#), [Sherwood](#), [Cox](#), [M.K.](#), [Landes](#), [Jones](#), [O'Bannon](#), [Lingamfelter](#), [Poindexter](#), [Massie](#), [Abbitt](#), [Phillips](#), [Scott](#), [J.M.](#), [Joannou](#), [Brink](#), [Ware](#), [O.](#), [Howell](#), [A.T.](#), [BaCote](#), [Dance](#). ABC-VA members are encouraged to contact the members of this committee and urge them to reject this amendment. Key points of opposition include: the requirement to utilize the E-Verify program would place a costly administrative burden upon employers; the reliability and accuracy of the E-Verify system has been called into question; and at the very least the proposed penalty for non-compliance is extremely excessive.

TAXATION: Two initiatives addressing the usually non-controversial task of conforming Virginia's tax code to the federal Internal Revenue Code generated concern in the business community by also calling for an exception to conformance that would eliminate a significant federal tax deduction for companies involved in manufacturing, construction and the provision of engineering and architectural services.

HB 614 (Purkey) and SB 545 (Colgan) – IRC Conformity and Elimination of Section 199 Deduction - In addition to advancing the date as of which the Virginia tax code conforms with the Internal Revenue Code (IRC), each of these measures included an exception that would effectively eliminate the current deduction allowed under Section 199 of the IRC for domestic production activities. Elimination of this deduction would essentially result in a \$60 million tax increase on affected businesses over the next two years. Fortunately, in the face of strong opposition by a coalition of business groups, led by the Virginia Manufacturers Association, both of these initiatives were amended to strip out the provisions calling for the elimination of the Section 199 deduction. Many thanks to ABC-VA members who took the time to contact members of the House Committee on Finance and the Senate Committee on Finance to express their opposition to these provisions. The amended version of HB 614 was approved by the House Committee on Finance and referred to the House Committee on

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Appropriations. The amended version of *SB 545* was approved by the Senate Committee on Finance and passed to the floor of the Senate where it was approved on a unanimous vote. *SB 545* will now be considered before the House Committee on Appropriations - [Putney \(Chairman\)](#), [Morgan](#), [Tata](#), [Ingram](#), [May](#), [Sherwood](#), [Cox](#), [M.K.](#), [Landes](#), [Jones](#), [O'Bannon](#), [Lingamfelter](#), [Poindexter](#), [Massie](#), [Abbitt](#), [Phillips](#), [Scott](#), [J.M.](#), [Joannou](#), [Brink](#), [Ware](#), [O.](#), [Howell](#), [A.T.](#), [BaCote](#), [Dance](#). ABC-VA members are encouraged to contact the members of this committee and urge them to approve the amended versions of *HB 614* and *SB 545*, maintaining the Section 199 IRC Domestic Production Deduction.

PUBLIC PROCUREMENT: ABC-VA has addressed a wide range of proposed amendments to Virginia's Public Procurement Act during the first half of this year's session.

ABC-VA opposed the following bills which were ostensibly aimed at enhancing the overall transparency, accountability and integrity of programs established by the Commonwealth and local government entities to facilitate the participation of small, women-owned, minority-owned or service disabled veteran-owned (SWAM) businesses. *HB 615 (Lohr) - SWAM Contractor Requirements* – This measure sought to amend provisions of the Virginia Public Procurement Act regarding the solicitation and awarding of contracts to SWAM-certified businesses, by requiring that all public contracts entered into with a SWAM-designated business stipulate that no more than 20% of the contracted work will be subcontracted to any business that does not meet the definition of a SWAM-certified business. *HB 615* was “passed by indefinitely” by the House Committee on General Laws. *SB 619 (Obenshain) – SWAM Contractor Requirements* – This initiative sought a similar restriction by requiring that all state contracts awarded to SWAM-certified businesses include a requirement that no more than 60% of the contracted work be subcontracted to another contractor, except under special circumstances. Despite amendments aimed at addressing business concerns, *SB 619* was ultimately rejected by the Senate Committee on Finance.

ABC-VA agrees that a need may indeed exist for enhanced oversight of programs aimed at facilitating the participation of SWAM-certified businesses in public procurement. However, we opposed these initiatives because the proposition of establishing the strict contractual restrictions which they called for would only serve to impair the full competitive participation of SWAM-certified businesses in public contracts, as well as that of the subcontractors (be they SWAM-certified or not) with which they may choose to do business.

SB 703 (Marsden) – Preference for Hiring Local Residents - Introduced with the support of organized labor, this measure sought to amend the Public Procurement Act in order to authorize a locality to develop and implement a bidding system that would provide a preference to construction contractors that hire residents of such locality or the Commonwealth. ABC-VA joined other construction industry groups in opposing this bill due to the potential burden that it would place upon contractors to comply with a patchwork of local rules and regulations stipulating local hiring requirements and preferences. Clearly, the market dictates that contractors hire the best qualified employees possible, regardless of residency, in order to provide the highest quality, and most competitive services possible to both private sector and public sector customers. This bill represented an ill-advised intrusion into such private employment decisions and would have ultimately increased the cost of construction for localities choosing to implement such a hiring preference. It is important to note that local government representatives did not publicly support this initiative. While the spirit of this measure may have been admirable, the practical implications of implementing such hiring preferences would be fraught with unintended negative consequences. Despite the patron's proposed amendment to attempt to make

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the bill less restrictive by authorizing a locality to establish a bid preference for contractors hiring residents of the Commonwealth (rather than the given locality), the Senate Committee on General Laws and Technology agreed to “carry-over” SB 703 to the 2011 session.

HB 789 (Villanueva) – Competitive Negotiation Contract Limits – The Virginia Public Procurement Act includes an implied preference for construction services to be procured through a competitive sealed bidding process. The Act also provides for the use of competitive negotiation to procure construction services under certain circumstances and limitations, based upon a determination made by a public body that competitive sealed bidding is either not practicable or not fiscally advantageous to the public. As originally introduced, *HB 789* sought to amend provisions of the Act that authorize the use of competitive negotiation procurements for construction services when the contract is not expected to exceed \$1 million. Specifically, this measure initially called for increasing this dollar volume threshold from \$1 million to \$10 million.

ABC-VA has consistently taken the position that the use of competitively negotiated procurements for construction services utilizing design-build or construction management contracts may indeed at times best serve the public interest. However, ABC-VA also clearly appreciates that the preference for the use of competitive sealed bidding in public procurement affords the greatest opportunity for participation and competition in the process. In response to concerns regarding the somewhat excessive increase in the dollar volume threshold called for under *HB 789*, Del. Villanueva agreed to amend his proposal to seek a more limited increase in the threshold from \$1 million to \$1.5 million. ABC-VA concurred with this amendment. *HB 789* was approved by the House of Delegates as amended, and is currently before the Senate Committee on General Laws and Technology.

LABOR & EMPLOYMENT: ABC-VA has monitored numerous proposals impacting current labor and employment statutes, including the following measure that goes to the core of ABC’s merit shop philosophy.

HB 280 (Albo) – Fraud to Accomplish Vote on Union Organization: This measure was introduced in response to some troubling activities undertaken by certain parties in obvious anticipation of the pending consideration of the federal Employee Free Choice Act / Card Check Bill. As originally introduced, *HB 280* sought to provide that any individual who (i) knowingly and intentionally fails to provide full and complete information regarding the consequences of a signature or a vote, or an affirmation by another, or (ii) by fraud, material artifice, trickery, or deception causes or assists in causing a vote to be taken by non-union employees on whether to organize a union, is guilty of a Class 1 misdemeanor. Of course, representatives of organized labor expressed strong and fervent opposition to this measure. Unfortunately, in spite of its refreshingly straightforward approach, *HB 280* ran into some difficulties centered upon questions of preemption by existing federal labor law. Regrettably, after numerous attempts by the patron to adjust the language of the bill to address such concerns, the House Committee on Courts of Justice decided to “carry over” *HB 280* to the 2011 session. ABC-VA commends Del. Albo for introducing this measure and we have communicated our willingness to work with him on reworking this proposal for next year’s session.

CONTRACTS: A perennially controversial and divisive contractual issue that came to the fore during the 2009 General Assembly session and was ultimately referred for study to the Virginia Housing Commission, was raised yet again before this year’s session.

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HB 1258 (Albo) – Indemnification / Hold-Harmless Clause Prohibition - Under current law, any provision in a contract for construction services by which the contractor performing the prescribed work purports to indemnify or hold-harmless another party to the contract against liability for damage arising out of bodily injury or property damage caused by, or resulting solely from the negligence of such other party, is considered to be against public policy and is void and unenforceable. *HB 1258* is aimed at modifying this provision to provide that any provision in any contract “or in payment and performance bonds or other documents” relating to the provision of construction services that purport to indemnify or hold-harmless another party to the contract against liability for damage arising out of bodily injury or property damage “caused by or resulting” from the negligence of such other party or independent contractors is void and unenforceable.

This measure also calls for a further amendment to the current statute to provide that “any provision in a contract for construction services that requires the contractor performing such work to provide insurance coverage, or to name a party to the contract as an additional insured, for the purpose of providing coverage for indemnity prohibited by this statute, to be void and unenforceable”. And finally, this initiative also seeks to clarify that the provisions of this statute shall not affect the validity of any insurance contract, workers’ compensation policy, any general agreements of indemnity required by sureties as a condition of execution of bonds for construction contracts, or any other agreement issued by an admitted insurer.

Discussions and debates over agreeable indemnification or hold-harmless provisions to be included in contracts for construction services inherently strike divisions between owners and general contractors, as well as between general contractors and subcontractors. In light of the apparent progress made on this issue during the 2009 Virginia Housing Commission study, the House Committee on General Laws with the full concurrence of the patron, agreed to continue *HB 1258* to the 2011 session and to refer it to the Virginia Small Business Commission for further study. ABC-VA looks forward to actively participating in the pending discussions.

NOTE: ABC-VA members are encouraged to take an active role in the legislative process. You may contact any member of the General Assembly of Virginia through the following link: [Contact Your Legislator](#).

For additional information on any of the issues outlined above, please contact Harold B. Kelly, Vice President, ABC-VA at (804) 346-4222

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