

Legislative Change Impacts Public School Construction

The 2007 legislative session of the Virginia General Assembly made various statutory changes that affect the contracting industry. One change concerns criminal background certification for contractors who work at Virginia public schools. This requirement creates a new set of challenges for contractors who bid for and perform work on the grounds of public schools in the Commonwealth.

The change to Va. Code § 22.1-296.1 (C), effective July 1, 2007, will create a requirement that a contractor performing work on public school property during regular school hours, or during school sponsored activities, certify *not only* that none of its employees have been convicted of any felony or a crime involving the sexual molestation, abuse or rape of a child, but that *all persons* in the employee of sub-contractors who perform work on that site have no such convictions. Additionally, making a materially false statement in such a certification, whether intentional or otherwise, is a Class 1 misdemeanor, grounds for revocation of the contract by the school board, and grounds for revocation of the contractor's professional license.

The practical challenges created by this expansion of the certification requirements are both numerous and obvious. However, making a few relatively simple changes prior to July 1, 2007 could save you from potential trouble after this new statute goes into effect.

First, the new statutory language essentially requires that you perform background checks on

all of your job applicants and employees in order to avoid the harsh penalties for making a false statement during the bid process. Such independent verification of an applicant's criminal history is the only way to be relatively assured that a potential employee has accurately stated his or her criminal history.

While many larger contractors already perform criminal background checks as a routine part of their employment process, this background check imposes a new burden on smaller general contractors and subcontractors. However, such a burden is light compared to the penalties found in the statute.

The scope of the background check required is still to be determined. At a minimum, you should check the applicant or employee's home state criminal records and any federal criminal database that exists. There are companies to assist you in obtaining the necessary information.

Second, the statute's language creates a practical requirement that you require certification from *every downstream subcontractor* hired for a project meet the new statutory requirements as well. Without such certification from downstream contractors, any general contractor (or upstream subcontractor) has opened itself up to serious



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legal consequences. Because of the potential consequences of an incorrect certification, this certification requirement must be a standard contractual term of your contract akin to an insurance requirement or payment terms.

Third, the new statutory language does not limit the class of felonies to those involving children. The expansive nature of the certification requirement limits the construction industry's ability to assist in giving former convicts a second chance. However, this requirement only applies to employees performing work on construction sites at public elementary, middle and high schools. You need not fire all of your employees with distant felony convictions. Instead, you should move them to job sites that are not subject to the strict certification requirements found in this code section.

Finally, this new statutory language makes such certification a required part of the bid process. All contractors who wish to work on a public school project in the Commonwealth need to build the cost of background checks into their price when bidding a public school job in order to avoid losing money on the project. At the very least, you should consider whether the additional risks and costs make the project worth bidding in the first place.

DISCLAIMER

This newsletter is not intended to be an exhaustive explanation of every aspect of the law on this subject nor is it intended as legal advice. You should consult an attorney for specific advice.

These statutory changes will also create an enforcement challenge for the police and Commonwealth Attorneys tasked with its enforcement. No police force has the manpower to monitor activities at every school construction site. Practically speaking, this statute is likely to be enforced in a manner similar to the seat belt laws. In other words, it is likely to be enforced as an add-on to prosecution of an offender against children found to have been working on a public school construction site. In such a case, a general contractor who has made the required statutory certification could be prosecuted criminally when it becomes clear the certification was incorrect.

Because the statutory change has yet to go into effect, the final implications of it cannot yet be fully appreciated. Consultation with an attorney who has a working knowledge of the construction industry and the statutes that affect it will keep you from running afoul of these and other new requirements imposed by the General Assembly.

For further information on this evolving situation please contact Chris Hill at DuretteBradshaw, PLC at: chill@durettebradshaw.com or (804) 916-6591. ■

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Thank you.