August 7, 2023

Joe Damico
Director
Department of General Services
1100 Bank Street, Suite 420
Richmond, Virginia 23219

Mr. Damico,

The member institutions of VASCUPP respectfully request that the following information is shared with the Procurement Working Group. This attached, is a list of the legislation related to construction procurement introduced to the General Assembly since 2015**.**

Best Regards,
John McHugh
VASCUPP President

2015 General Assembly Session

HB1540 (Albo) – Did not pass

- **Virginia Public Procurement Act (VPPA); methods of procurement; job order contracting and cooperative procurement.** Clarifies that small purchase procedures include the procurement of construction and that any such procedures shall not waive compliance with the Uniform State Building Code. The bill also increases contract amounts for job order contracting and provides that (i) order splitting with the intent of keeping a job order under the maximum dollar amounts prescribed is prohibited, (ii) no public body shall issue or use a job order solely for the purpose of providing professional architectural or engineering services that constitute the practice of architecture or the practice of engineering; however, professional architectural or engineering services may be included on a job order where such professional services are (a) incidental and directly related to the job and (b) no more than 25 percent of the construction cost, not to exceed $60,000, and (iii) job order contracting shall not be used for construction, maintenance, or asset management services for a highway, bridge, tunnel, or overpass. The bill removes the provision that allows a public body to discuss nonbinding estimates of total project costs, life-cycle costing, and, where appropriate, nonbinding estimates of price for services. The bill provides that negotiations may be held on proposed terms and conditions set out in the Request for Proposal. The bill also clarifies the provisions of the VPPA related to cooperative procurement and requires that by October 1, 2017, the Department of Small Business and Supplier Diversity; public institutions of higher education having level 2 or 3 authority under the Restructured Higher Education Financial and Administrative Operations Act of 2005; any state agency utilizing job order contracting; and the Virginia Association of Counties, the Virginia Municipal League, and the Virginia Association of Governmental Purchasing, on behalf of local public bodies working cooperatively, report their respective experiences and findings relating to (1) the appropriateness and effectiveness of job order contracting in general, (2) the project cost limitations set forth in subsections B and D of § 2.2-4303.1 as added by this bill, and (3) the architectural and professional engineering term contract limits set forth in § 2.2-4303.1 to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology. The bill further provides that its provisions shall not apply to any solicitation issued or contract awarded before July 1, 2015, except that the provisions of subsection B of § 2.2-4303.2, as added by this bill, shall apply to any renewal of a job order contract. The bill contains numerous technical amendments.

HB1835 (Gilbert) / SB1371 (Ruff) – Passed

- **Virginia Public Procurement Act (VPPA); methods of procurement; job order contracting and cooperative procurement.** Clarifies that small purchase procedures include the procurement of non-transportation-related construction and that any such procedures shall not waive compliance with the Uniform State Building Code. The bill adds independent agencies of the Commonwealth to the definition of public body under the VPPA. The bill also increases contract amounts for job order contracting and provides that (i) order splitting with the intent of keeping a job order under the maximum dollar amounts prescribed is prohibited; (ii) no public body shall issue or use a job order, under a job order contract, solely for the purpose of receiving professional architectural or

engineering services that constitute the practice of architecture or the practice of engineering as those terms are defined in § 54.1-400; however, professional architectural or engineering services may be included on a job order where such professional services are (a) incidental and directly related to the job, (b) do not exceed $25,000 per job order, and (c) do not exceed $75,000 per contract term; and (iii) job order contracting shall not be used for construction, maintenance, or asset management services for a highway, bridge, tunnel, or overpass. The bill clarifies the provisions of the VPPA relating to cooperative procurement and requires that by October 1, 2017, the Department of Small Business and Supplier Diversity, public institutions of higher education having level 2 or 3 authority under the Restructured Higher Education Financial and Administrative Operations Act of 2005, any state agency utilizing job order contracting, and the Virginia Association of Counties, the Virginia Municipal League, and the Virginia Association of Governmental Purchasing, on behalf of local public bodies, working cooperatively, report their respective experiences and findings relating to the appropriateness and effectiveness of job order contracting in general, the job order project cost limitations as added by this bill, and the architectural and professional engineering term contract limits to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology. The bill also requires, for construction projects in excess of $2 million, that a public body, including public institutions of higher education, provide its justification for use of any procurement method other than competitive sealed bidding to the Director of the Department of General Services. The bill requires the State Corporation Commission (SCC) to develop a process for the administrative review of its procurement decisions that is consistent with the Constitution of Virginia. The bill further provides that its provisions shall not apply to any solicitation issued or contract awarded before July 1, 2015, except that the provisions of subsection B of § 2.2-4303.2, as added by the bill, shall apply to any renewal of a job order contract. The bill contains numerous technical amendments and is a recommendation of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act.

2016 General Assembly Session

HB887 (Albo) / SB586 (Ruff) – Did not pass

- **Virginia Public Procurement Act; requirements for use of construction management.** Restricts the use of construction management procurements by public bodies 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) proposers provide for the participation of small, women-owned, and minority-owned businesses in the project. The bill provides that for projects where the total project cost is not expected to exceed $50 million, a public body may use competitive negotiation to procure construction on a construction management basis if (i) the above requirements are met; (ii) the project is (a) of substantial historical value or interest or (b) significantly unique or extremely complex in nature; (iii) prior to any solicitation for such project, the public

body notifies in writing the Director of the Department of General Services in the case of state public bodies, or the local governing body in the case of a local public body, of its intent to procure construction on a construction management basis; and (iv) the Director of the Department of General Services or the local governing body, as the case may be, makes a finding that the public body is in compliance with the requirements of this subsection, which finding shall be on a per project basis and shall be in writing. The findings for state public bodies shall be made by the Director under existing regulations and guidelines established by the Department of General Services. In addition, the bill defines "public body" for the purposes of the use of construction management for construction to include (i) public institutions of higher education that have executed a valid management agreement under the Restructured Higher Education Financial and Administrative Operations Act of 2005 (§ 23-38.88 et seq.) and (ii) localities and school divisions that were previously exempt based on the adoption of alternative policies and procedures based on competitive principles and generally applicable to procurement of goods and services by the locality or school division.

HB888 (Albo) – Stricken

- **Public procurement; requirements for certain construction projects; use of construction management.** Restricts the use of construction management procurements by public bodies to contracts of $50 million or more, provided that such contracts involve projects that, among other requirements, are (i) of substantial historical value or interest or (ii) significantly unique or extremely complex in nature. State public bodies may request a waiver from the restriction on a project-by-project basis from the Director of the Department of General Services. In the case of procurement by localities, a waiver may be granted by the local governing body. The bill defines "public body" for the purposes of the use of construction management for construction to include public institutions of higher education under the Restructured Higher Education Financial and Administrative Operations Act of 2005 (§ 23-38.88 et seq.) and any public body that has implemented the provisions of the Virginia Public Procurement Act pursuant to § 2.2-4302.

2017 General Assembly Session

HB887 (Albo) / SB586 (Ruff) – Did not pass

- **Virginia Public Procurement Act; requirements for use of construction management.** Restricts the use of construction management procurements by public bodies 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) proposers provide for the participation of small, women-owned, and minority-owned businesses in the project. The bill provides that for projects where the total project cost is not expected to exceed $50 million, a public body may use competitive negotiation to procure construction on a construction management basis if (i) the above requirements are met; (ii) the project is (a) of substantial historical value or interest or (b) significantly unique or extremely complex in nature; (iii) prior to any solicitation for such project, the public body notifies in writing the Director of the Department of General Services in the case of

state public bodies, or the local governing body in the case of a local public body, of its intent to procure construction on a construction management basis; and (iv) the Director of the Department of General Services or the local governing body, as the case may be, makes a finding that the public body is in compliance with the requirements of this subsection, which finding shall be on a per project basis and shall be in writing. The findings for state public bodies shall be made by the Director under existing regulations and guidelines established by the Department of General Services. In addition, the bill defines "public body" for the purposes of the use of construction management for construction to include (i) public institutions of higher education that have executed a valid management agreement under the Restructured Higher Education Financial and Administrative Operations Act of 2005 (§ 23-38.88 et seq.) and (ii) localities and school divisions that were previously exempt based on the adoption of alternative policies and procedures based on competitive principles and generally applicable to procurement of goods and services by the locality or school division.

HB2366 (Albo) / SB1129 (Ruff) – Passed

- **Public procurement; requirements for use of construction management and design-build procurement methods.** Establishes requirements for the procurement of construction using the construction management and design-build procurement methods by state and local public bodies and covered institutions of higher education, as defined in the bill, and the conditions under which such methods may be used. Public bodies must comply with procedures adopted by the Secretary of Administration for construction management or design-build projects. State public bodies and covered institutions must adopt procedures that include, among other things, a requirement that the state public body or covered institution make a written determination in advance that competitive sealed bidding is not practicable or fiscally advantageous and document the basis for the determination to use the construction management or design-build procurement method. The bill requires the Department of General Services (DGS) to evaluate the proposed procurement method of state public bodies and covered institutions and provide a recommendation regarding the procurement method within five days of receipt of the written determination. If a state public body or covered institution elects to proceed with the project using a construction management or design-build contract despite a DGS recommendation to the contrary, the state public body or covered institution must provide to DGS in writing its reasons for doing so. For local public bodies, construction management contracts may be used for projects whose cost is expected to be less than $10 million, provided that the project is a complex project and the project procurement method is approved by the local governing body. The bill also requires DGS to report to the Governor and certain General Assembly committees annually by December 1 information pertaining to (i) the agency's evaluation of projects submitted by state public bodies and covered institutions and (ii) all completed capital projects in excess of $2 million.

HB2392 (James) – Stricken

- **Virginia Public Procurement Act; preferred procurement method for construction**. Eliminates competitive sealed bidding as the preferred method for procuring construction.

2018 General Assembly Session

HB774 (Landes) / SB317 (Ruff) – Did not pass

- **Public procurement; contracting for construction on a construction management basis**. Authorizes state public bodies and public institutions of higher education to enter into contracts for construction on a construction management basis where the estimated cost is expected to be greater than $40 million of actual construction costs without following certain statutory procedures. Under current law, such bodies are required to comply with the procedures whenever such bodies determine to use construction management. The bill also changes the threshold for local public bodies to contract for construction using construction management from $10 million to $40 million. The bill also amends the components of the definition "complex project" by (i) removing references to multifaceted program, unique equipment, and specialized building systems, (ii) adding unconventional building systems, (iii) clarifying that the accelerated schedule component of the definition must be due to regulatory mandates, and (iv) requiring that any historic designation be properly registered.

HB1271 (Sickles) – Did not pass

- **Public procurement; construction management and transportation construction services.** Authorizes state public bodies and public institutions of higher education to enter into contracts for construction on a construction management basis and without following certain statutory procedures when the estimated cost is expected to be greater than $40 million. Under current law, such bodies are required to comply with the procedures whenever they use construction management. The bill also increases from $10 million to $40 million the threshold of expected actual construction costs above which local public bodies may contract for construction on a construction management basis. The bill amends the components of the definition of "complex project" by (i) removing references to unique equipment and specialized building systems, (ii) adding unconventional building systems, (iii) specifying that the accelerated schedule component of a project must be due to regulatory mandates, and (iv) requiring that any historic designation be properly registered.

2019 General Assembly Session

HB2308 (Fowler) / SB1688 (Ruff) – Did not pass

- **Virginia Public Procurement Act; public institutions of higher education; disclosure required by certain offerors.** Requires every offeror who submits a proposal to a public institution of higher education for any construction project that (i) has a total cost of $5 million or more and (ii) uses a procurement method other than competitive sealed bidding to disclose any contributions the offeror has made to the public institution of higher education or any private foundation that exists solely to support the public institution of higher education within the previous five-year period.

2020 General Assembly Session

HB890 (Sickles) / SB341 (Locke) – Passed

- **Construction management contracts; use by local public bodies.** Removes the provision limiting the use of construction management contracts by local public bodies to projects with a cost expected to exceed $10 million and provides that construction management may be utilized on projects where the project cost is expected to be less than the project threshold established in the procedures adopted by the Secretary of Administration for using construction management contracts.

2021 General Assembly Session

- N/A

2022 General Assembly Session

HB19 (Fowler) / SB210 (Petersen)

- **Virginia Public Procurement Act; public institutions of higher education; disclosure required by certain offerors; civil penalty**. Requires every offeror who is awarded a contract by a public institution of higher education for any construction project that has a total cost of $5 million or more to disclose any contributions the offeror has made within the previous five-year period totaling $25,000 or more to the public institution of higher education or any private foundation that exists solely to support the public institution of higher education. The bill provides that no protest of an award shall lie for a claim that the selected offeror was awarded a contract solely based on such offeror's contribution to the public institution of higher education. The bill imposes a $500 civil penalty on any offeror that knowingly fails to submit the required disclosure. The provisions of the bill relating to such disclosure of gifts made by an offeror to a public institution of higher education or any private foundation that exists solely to support the public institution of higher education expire on June 30, 2027.

2023 General Assembly Session

HB2450 (J. Campbell) / SB1491 (Bell) – Passed

- **Virginia Public Procurement Act; construction management; contract requirements.** Excludes construction management contracts involving infrastructure projects from the requirement that no more than 10 percent of the construction work be performed by the construction manager with its own forces and that the remaining 90 percent of the construction work be performed by subcontractors of the construction manager.

HB1957 (Leftwich) / SB954 (Petersen) – Did not pass (W/ Letter)

- **Virginia Public Procurement Act; construction management and design-build contracting; applicability.** Requires a two-step process consisting of (i) a preconstruction contract and (ii) competitive sealed bidding for construction services for certain projects totaling less than $125 million. Complex projects, defined in the bill, may request an exemption from the provisions of the bill and relevant law from the Secretary of Administration. If a complex project totals more than $125 million, the bill provides that an exemption from the provisions of the bill and relevant law is not required. Finally,

the bill states that competitive sealed bidding is the preferred method of procurement for construction services in the Commonwealth.

MDB STRATEGIES
LEGISLATIVE & GOVERNMENT AFFAIRS

August 6, 2023

The Honorable Members, Public Body Procurement Workgroup
Via Email

RE: SB 954, Construction Management

Dear Public Body Procurement Workgroup:

On behalf of the Virginia Contractor Procurement Alliance (VCPA) I am writing to thank you all for listening to our presentation and meeting with us separately to discuss the disturbing and long-term misuse of the Construction Management (CM) method of procurement.

In our presentation we shared facts that prove without question the following:

1) CM does not provide the best method of procurement for construction projects over $5 million which are not historical, extremely large or extremely complex in nature. Historic usage of CM in higher education proves that for projects that are not fit for CM, higher education has over spent at least 15 – 25% or more based on DGS's own annually published cost data base.

2) CM is a subjective, non-competitive method of procurement which over the course of its usage has excluded a large portion of mostly mid-sized General Contractors from competing for Virginia higher education, state and local construction projects over $5 million.

After years of thoughtful consideration, we are confident the below changes will allow CM to be continued to use for appropriate projects while at the same time protecting Virginia's taxpayers from projects that are not suited for CM. Our recommendations are as follows:

1) <u>CM Pre-Approval Requirement</u>

Empower one person to be responsible for pre-approving any CM project in Virginia at the state and higher ed level, including tier 3 schools. The Secretary of Administration (SOA) is the only person suited for that responsibility.

2) <u>Increase the CM Threshold</u>

Increase the threshold for CM approval from $26 million to $125 million. If a project is above the threshold any entity may use CM without SOA approval. If the project is under the threshold the owner must receive pre-approval from the SOA or the project may not move forward as funding will be withheld. Please remember that

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higher education projects, except those funded by their foundations are paid for by the Commonwealth of Virginia.

3) **CM Criteria for Usage**

Revise the CM language for complex and historical to be significantly more prohibitive. Also, ensure that CM experience shall not be a prerequisite or used in the scoring process for prequalification or award of a contract.

Thank you very much for your time and consideration to this issue which incredibly important to Virginia's taxpayers. If at any time you wish to meet, we will make ourselves available at your request.

Sincerely,

Matt Benka

CC: The Honorable Glenn Youngkin
The Honorable Winsome Sears
The Honorable Jason Miyares
The Honorable Members of the House Appropriations Committee
The Honorable Members of the Senate Finance Committee
The Honorable Members of the House General Laws Committees
The Honorable Members of the Senate General Laws Committee