REPORT OF THE VIRGINIA DEPARTMENT OF GENERAL SERVICES

Report of the Public Body Procurement Workgroup on Whether the Issue of Nonpayment Between General Contractors and Subcontractors Necessitates Legislative Corrective Action (Chapter 727, 2022)

TO THE GENERAL ASSEMBLY OF VIRGINIA

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Public Body Procurement Workgroup

Report of the Public Body Procurement Workgroup on Whether the Issue of Nonpayment Between General Contractors and Subcontractors Necessitates Legislative Corrective Action

Pursuant to Clause 2 of Chapter 727 of the
Acts of Assembly of 2022 [SB 550]

November 2022

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I. Introduction

The second enactment of Chapter 727 of the Acts of Assembly of 2022 (SB 550), patroned by Senator John J. Bell, directed the Department of General Services' (DGS') Public Body Procurement Workgroup (Workgroup) to review whether the issue of nonpayment between general contractors and subcontractors necessitates legislative corrective action. The legislation set a deadline of December 1, 2022 for the Workgroup to submit a report with its findings and any legislative recommendations to the General Assembly.

In response to this legislation, stakeholders were identified and four Workgroup meetings were held at which SB 550 was discussed. This report summarizes the information presented to the Workgroup by stakeholders and subject matter experts and the Workgroup's findings and recommendations.

II. Background

Overview of Public Body Procurement Workgroup Authority and Duties

Item 85 of the 2022 Appropriations Act directs DGS to lead, provide administrative support to, and convene an annual public body procurement workgroup to review and study proposed changes to the Code of Virginia in the areas of non-technology goods and services, technology goods and services, construction, transportation, and professional services procurements. The Appropriations Act language specifies that the Workgroup's membership shall be composed of the following individuals or their designees:

- Director of the Department of Small Business and Supplier Diversity;
- Director of the Department of General Services;
- Chief Information Officer of the Virginia Information Technologies Agency;
- Commissioner of the Virginia Department of Transportation;
- Director of the Department of Planning and Budget;
- President of the Virginia Association of State Colleges and University Purchasing Professionals; and
- President of the Virginia Association of Governmental Procurement.

Additionally, the Appropriations Act language requires that a representative from each of the following provide technical assistance to the Workgroup:

- Office of the Attorney General's Government Operations and Transactions Division;
- Staff of the House Appropriations Committee;
- Staff of the Senate Committee on Finance and Appropriations; and
- Divisions of Legislative Services.

The Appropriations Act language outlines two avenues by which bills may be referred to the Workgroup for study. First, the Chairs of the House Committees on Rules, General Laws, and Appropriations, as well as the Senate Committees on Rules, General Laws and Technology, and Finance and Appropriations, can refer legislation by letter to the Workgroup for study. Second,

the Chairs of the House Committees on Rules and Appropriations, as well as the Senate Committees on Rules and Finance and Appropriations, can request that the Workgroup review procurement-related proposals in advance of an upcoming legislative session to assist in obtaining a better understanding of the legislation's potential impacts. Additionally, bills may also be referred to the Workgroup by the General Assembly, which can pass a bill that includes an enactment clause directing the Workgroup to study a particular topic. This is the avenue by which the Workgroup was asked to study SB 550.

Overview of SB 550

SB 550, effective January 1, 2023, addresses two primary issues: (i) the responsibility of a general contractor to pay a subcontractor when the public body or owner has not paid the general contractor and (ii) *when* must payment occur. Prior to the enactment of SB 550, aside from the provisions of the Prompt Payment Act in the Virginia Public Procurement Act discussed below, Virginia law was silent as to payment liability and timing provisions in contracts between private parties. This left private parties free to negotiate and agree upon their own such contractual terms. As such, over time parties began to include "pay-if-paid" and "pay-when-paid" clauses in their contracts that made the public body's or owner's payment to the general contractor a condition precedent or trigger to payment being due from the general contractor to the subcontractor. The effect of these contract provisions was to shift the risk of a public body's or owner's nonpayment from the general contractor to the subcontractor.

SB 550 makes two major changes to current law. First, it prohibits "pay-if-paid" clauses in contracts between general contractors and subcontractors. It holds the general contractor liable for making payment to the subcontractor regardless of whether the general contractor has received payment for the subcontractor's work from the public body or owner. Second, it establishes timelines for when (a) owners must make payment to general contractors on private contracts and (b) general contractors (and any other higher-tier contractor) must make payment to subcontractors on private contracts. SB 550 appears intended to apply only to public and private *construction* contracts and to all tiers in the contracting chain.

a. Public Contracts

Under current law, the Prompt Payment Act (Article 4 (§ 2.2-4347 et seq.) of Chapter 43 of Title 2.2 of the Code of Virginia) in the Virginia Public Procurement Act (VPPA) requires a general contractor and each higher-tier contractor on a public project to take one of two actions within seven days of receiving payment from a state agency or local government for work performed by a subcontractor on the project: (i) pay the subcontractor its proportionate share of the total payment received or (ii) notify the agency and subcontractor in writing of its intention to withhold all or a part of the payment with the reason for nonpayment (see Va. Code § 2.2-4354). The Prompt Payment act has been in place for several decades and is based on similar prompt payment requirements on federally funded contracts (see 31 U.S.C. § 3905(b)).

SB 550 amends current law by requiring any contract awarded by a state agency or local government to include a payment clause that obligates a contractor on a construction contract to be liable for the "entire amount owed" to any subcontractor with which it contracts. SB 550

prohibits "pay-if-paid" clauses in such contracts by providing that "[p]ayment by the party contracting with the contractor shall not be a condition precedent to payment to any lower-tier subcontractor, regardless of that contractor receiving payment for amounts owed to that contractor." The bill permits contractors to withhold amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract, but, to do so, the bill requires the contractor to notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment and provide the reason for nonpayment.

b. Private Contracts

As mentioned above, aside from the provisions of the Prompt Payment Act in the Virginia Public Procurement Act discussed above, the Code of Virginia is currently silent as to payment liability and timing provisions in contracts between private parties. SB 550 amends current law pertaining to contracts between private parties in several ways.

First, SB 550 requires that any construction contract between an owner (defined by the bill as "a person or entity, other than a public body as defined in § 2.2-4301, responsible for contracting with a general contractor for the procurement of a construction contract") and a general contractor include a provision that requires the owner to pay the general contractor within 60 days of receiving an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced. The bill permits owners to withhold amounts that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract, but, to do so, the bill requires the owner to notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or a part of the general contractor's payment and provide the reason for nonpayment. The bill imposes interest penalties on owners who do not make timely payment. Additionally, the bill makes clear that its provisions are not intended to interfere with any retainage provisions that are also included in such contract.

Further, SB 550 provides that any contract in which there is at least one general contractor and one subcontractor shall be deemed to include a provision under which any higher-tier contractor is liable to any lower-tier subcontractor with whom the higher-tier contractor contracts for satisfactory performance of the subcontractor's duties under the contract. The bill prohibits "pay-if-paid" clauses in such contracts by providing that "[p]ayment by the party contracting with the contractor shall not be a condition precedent to payment to any lower-tier subcontractor, regardless of that contractor receiving payment for amounts owed to that contractor[.]" The bill provides an exception to such requirement, however, in circumstances in which the party contracting with the contractor is insolvent or a debtor in bankruptcy. Additionally, SB 550 addresses *when* payment must be made by a general contractor to a subcontractor. The bill requires higher-tier contractors to pay lower-tier subcontractors within the earlier of (i) 60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced or (ii) seven days after receipt of amounts paid by the owner to the general contractor or by the higher-tier contractor to the lower-tier contractor for work performed by a subcontractor pursuant to the terms of the contract. The bill permits contractors to withhold amounts otherwise reducible pursuant to a breach of contract by the subcontractor, but, to do so, the bill requires the general contractor to notify the subcontractor, in writing, of his intention to withhold all or a part

of the subcontractor's payment and provide the reason for nonpayment, and specifically identify the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance. The bill imposes interest penalties on general contractors who do not make timely payment. Finally, the bill makes clear that its provisions are not intended to interfere with any retainage provisions that are also included in such contracts that are construction contracts.

Study Participants/Stakeholders

The Workgroup's Appropriations Act language directs it to hear from stakeholders identified by the patron of referred legislation and other interested individuals. As such, the Workgroup's staff contacted Senator Bell, the patron of SB 550, and the Chairs of each of the committees through which SB 550 passed during the 2022 Regular Session of the General Assembly (Senator Barker, Chair of the Senate Committee on General Laws and Technology; Senator Howell, Chair of the Senate Committee on Finance and Appropriations; Delegate Leftwich, Chair of the House Committee on General Laws; and Delegate Knight, Chair of the House Committee on Appropriations) to solicit the names of stakeholders whom they would like to be included the Workgroup's review of SB 550. The Workgroup's staff compiled the names of the stakeholders identified by Senator Bell and the committee Chairs into a stakeholder email distribution list, which it used to communicate information about the Workgroup's study of SB 550 and opportunities for public comment to the stakeholders. The Workgroup's staff also added any interested individual to the stakeholder email distribution list upon request of such individual.

The stakeholder email distribution list was composed of the following individuals:

- The Honorable John J. Bell – Senate of Virginia
- The Honorable Bill D. Wiley – Virginia House of Delegates
- Brandon Robinson – Chief Executive Officer, Associated General Contractors of Virginia, Inc.
- Kyler Hedrick – Policy Manager, Associated General Contractors of Virginia
- Patrick Cushing – Attorney, Williams Mullen, Representing the American Institute of Architects Virginia Chapter (AIA VA) and the American Council of Engineering Companies of Virginia (ACEC VA)
- Lew Bryant – Chief Financial Officer, JE Liesfeld Contractor, Inc.
- Joe Piacentino – Chief Financial Officer, Colonial Webb Contractors Co.
- Carson Rogers, President and CEO, Chewning + Wilmer
- Matthew D. Benka – President of MDB Strategies LLC, Representing the Virginia Contractor Procurement Alliance
- Lindsay Berry – Head of Virginia Public Policy, Amazon Web Services
- Derek Mekkawy – Senior Corporate Counsel, Amazon Web Services
- Julia Hammond – Government Relations Principal, Cozen O'Connor Public Strategies
- Robert Bohannon – Director of Government Affairs, Hunton Andrews Kurth
- Eric Link – Senior Attorney and Director of Government Affairs, Hunton Andrews Kurth

- Pat Dean – President, Associated Builders and Contractors of Virginia
- David Bailey – David Bailey Associates, Representing the Alliance for Construction Excellence
- D.L. "Ike" Casey – Executive Director, American Subcontractors Association of Metro Washington
- Paul R. Denham – President and Chief Executive Officer, Southern Air, Inc.
- Scott Kowalski – Attorney, Petty, Livingston, Dawson & Richards, P.C. / Board Member, Associated Builders and Contractors Virginia Chapter
- Helene Dreiling – Interim head of American Institute of Architects Virginia Chapter
- Nancy Israel – American Council of Engineering Companies of Virginia
- Jeff Palmore – Capitol Square Strategies, LLC
- Kara Alley – Government Affairs Specialist with Spotts Fain Consulting
- Keith Martin – Executive Vice President of Public Policy & Government Relations and General Counsel for the Virginia Chamber of Commerce / Executive Director of the Virginia Chamber Foundation
- Fred H. Codding – Iron Workers Employers Association / Alliance for Construction Excellence
- James S. Turpin – David Bailey Associates

III. Workgroup Meetings on SB 550

The Workgroup held four meetings at which it discussed SB 550. At its July 14, 2022 meeting, the Workgroup's staff presented a draft Work Plan for the organization of the Workgroup's study of SB 550. Additionally, Senator Bell, the patron of SB 550, provided remarks to the Workgroup. He emphasized that his goal and the goal of the stakeholders who support SB 550 is to simply ensure that subcontractors who do quality work get paid for their work. He noted that SB 550 is based upon laws that have been in place in other states for decades but acknowledged that SB 550 was tweaked many times during Session and became difficult and complex due to all of its working parts and all of the stakeholders involved, leading to unintended consequences. He expressed his hope that consideration of the bill by the Workgroup will be the key to getting the bill right and noted that he is open to any ideas the Workgroup has for making the bill better.

The Workgroup also received public comment on SB 550 at this meeting. Paul Denham, President and Chief Executive Officer of Southern Air, spoke to the Workgroup to express his support for SB 550. He acknowledged that the bill may need some technical amendments, but he asked the Workgroup to recommend leaving the general intent of the bill unchanged. Patrick Cushing with Williams Mullen spoke to the Workgroup on behalf of the American Institute of Architects Virginia Chapter (AIA VA) and the American Council of Engineering Companies of Virginia (ACEC VA). He highlighted some technical issues with SB 550 and explained how those technical issues make it difficult for his clients to discern whether the bill even applies to them. Kyler Hedrick, representing the Associated General Contractors of Virginia, shared that his group was unable to get to a point where they could support SB 550 during Session and expressed his appreciation to the Workgroup for taking on the task of studying the bill and seeing where it may be improved. Matt Benka spoke to the Workgroup on behalf of the Virginia Contractor Procurement Alliance. He shared that they are very opposed to the provisions of SB

550 that apply to private contracts and he asked the Workgroup to consider recommending that such provisions be removed from the Code. Finally, Jack Dyer, President of the Virginia Contractor Procurement Alliance and Chairmen of the Board of Gulf Seaboard General Contractors, spoke to the Workgroup on behalf of both organizations and expressed their opposition to SB 550. He expressed particular concern about the General Assembly having legislated, through SB 550, required contractual terms for contracts between private parties. He stressed that private parties should be free to negotiate and agree upon contractual terms of their choosing.

The Workgroup reserved the entirely of its second meeting on SB 550, held on July 28, 2022, to receiving public comment from stakeholders. Five stakeholders spoke in support of SB 550. They included Lew Bryant with J.E. Liesfeld Contractor, Inc.; Fred Codding with the Iron Workers Employers Association (IWEA) and the Alliance for Construction Excellence (ACE); Paul Denham, the President and Chief Executive Officer of Southern Air, Inc.; Joe Piacentino with Colonial Webb Contractors Co.; and Carson Rogers with Chewning + Wilmer, Inc. Jack Dyer, President of the Virginia Contractor Procurement Alliance and Chairmen of the Board of Gulf Seaboard General Contractors was the only stakeholder to speak in opposition to SB 550. Finally, three stakeholders who either support SB 550 in part and oppose it in part, or are neutral as to its provisions, spoke to the Workgroup. First, Brandon Robinson with AGCVA shared three suggestions that AGCVA has for improving SB 550 or otherwise making changes to the law that could help to address the issues of nonpayment in a way that shares the risk throughout all of the parties involved. Second, Patrick Cushing with Williams Mullen spoke to the Workgroup again on behalf of AIA VA and ACEC VA and reiterated his previous comments concerning his clients' concerns regarding the lack of clarity as to whether the provisions of SB 550 are intended to apply to them. He shared that if the intent is for SB 550 to only apply to the contractor community in the context of traditional construction, his clients would like for the Workgroup to recommend that clarifying language to that effect be added to SB 550. Finally, Doug Petersen, President of EE Reed Construction East Coast and Chairman of the Board for the Association of Builders and Contractors of Virginia (ABC VA) shared that ABC VA supports the intent of SB 550, but they believe changes need to be made to the bill to address some unintended consequences.

At its third meeting on SB 550, held on August 31, 2022, the Workgroup heard two presentations. The first presentation was from Curtis Manchester, Senior Assistant Attorney General with the Construction Section at the Office of the Attorney General. Mr. Manchester provided the Workgroup with an overview of how the former provisions of the Prompt Payment Act in the Virginia Public Procurement Act (pre-SB 550) came to be, and then shared with the Workgroup some of the technical issues the Construction Section sees with SB 550 and some potential ramifications of the bill they foresee. He walked the Workgroup through several suggested technical amendments that Construction Section identified for improving the clarity of the changes made to the Code by SB 550. The second presentation was from Jessica Budd, Legal Policy Analyst with DGS and staff to the Workgroup. Ms. Budd provided a brief overview of SB 550 and explained how it changes current law. Ms. Budd then presented a list of twelve potential technical amendments to SB 550 for the Workgroup's consideration to aid in making its provisions clearer and more consistent, and thereby better effectuate what appears to have been the General Assembly's original legislative intent surrounding SB 550.

After hearing the two presentations, the Workgroup considered and discussed all of the public comment, written comments, presentations, and other information that it had received thus far on SB 550 and began developing its findings and recommendations. After agreeing upon preliminary language for its final recommendations, the Workgroup provided an additional opportunity for public comment.

The first stakeholder to comment was Fred Codding with IWEA and ACE. Mr. Codding spoke to the Workgroup to reiterate his previous comments regarding the General Assembly's willingness in recent years to take actions affecting private contracts. He emphasized that recently the General Assembly has taken strong bipartisan positions on waiver of mechanics lien claims and bond claims and made such provisions in private contracts unenforceable.

The final stakeholder to comment was Scott Kowalski, a construction lawyer in Lynchburg, Virginia with Petty, Livingston, Dawson & Richards, P.C. and a member of the Board of Directors of Associated Builders & Contractors (ABC) of Virginia. Mr. Kowalski concurred with Mr. Codding's comments that over the last 10 to 15 years the General Assembly, at the behest of the construction industry, has placed itself in between private parties by stepping in to prohibit waivers of mechanics liens and waivers of bond rights, prohibit cost withholding across contracts, and prohibit certain indemnity provisions in construction contracts. He stressed that SB 550 is not the first foray into private contracting that the General Assembly has taken. Mr. Kowalski also provided the Workgroup with some brief preliminary comments on the proposed technical amendments presented by Ms. Budd and considered by the Workgroup.

Finally, at its fourth meeting on SB 550, held on September 19, 2022, the Workgroup voted to approve the language of the final recommendations that it had developed at its previous meeting by a vote of 5-0-1.[1]

See Appendices B, C, D, and E for the meeting materials, including meeting minutes for each of the four meetings.

IV. Summary of Information Presented to the Workgroup

As discussed above, the second enactment of SB 550 directed the Workgroup to review whether the issue of nonpayment between general contractors and subcontractors necessitates legislative corrective action and report its findings and any legislative recommendations to the General Assembly by December 1, 2022. Below is a summary of the testimony and written comments that the Workgroup received pertaining to this task.

Comments in Support of SB 550

Lew Bryant with J.E. Liesfeld Contractor, Inc. shared that he believes that the final version of SB 550 is fair to both subcontractors and general contractors, and appropriately reassigns the financial risks associated with construction. He acknowledged that suggestions have been made that there are problems with the language of the bill, but he noted his disagreement with such suggestions. He stressed that the intent of the bill is to guarantee payment to subcontractors for

[1] Yes: Mr. McHugh, Ms. Pride, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

work properly done and urged the Workgroup, in whatever decisions they may make, to keep the intent of the bill alive and not let it be diminished into something that is not effective and contrary to what was originally intended.

Fred Codding with IWEA and ACE stated that nonpayment between general contractors and subcontractors is a frequent issue and shared that it often arises in the context of nonpayment or extremely slow payment for change orders and retainage. He shared his belief that it is unfair that the payment of change orders and retainage puts all of the burden on the subcontractor. He noted that a number of other states have also addressed prompt pay issues, and stressed that these are complicated issues that need to be addressed in order for small, minority, and disadvantaged subcontractors to be successful on public work in the Commonwealth. He stated that state agencies are often the major culprit behind the nonpayment issues. He recommended that the Workgroup initiate a study to determine how small businesses can be treated fairly with regard to payment for work done, and with regard to change orders and retainage, in particular. Mr. Codding then discussed the history of "pay-if-paid" clauses and other clauses that are included in contracts between general contractors and subcontractors that disadvantage subcontractors, and he noted how the General Assembly has taken action over the years to pass laws deeming some such clauses, including waivers of mechanics lien claims and bond claims, void and unenforceable in order to protect subcontractors and their suppliers. He argued that SB 550 falls in line with those actions previously taken by the General Assembly.

Paul Denham, the President and Chief Executive Officer of Southern Air, explained that subcontractors are often insulated from the owner and are asked by the general contractor to not have any direct contact with the owner. As such, subcontractors do not have a seat at the table from which to be able to discern whether there is a problem with the owner, general contractor, or project and whether or not they will be paid. He further explained that if companies such as his sign contracts with pay-if-paid condition precedent clauses, they give away significant rights if something goes wrong at the end of the job. He shared that it is rare that something does in fact go wrong and these clauses come into play, but, in situations in which it does they cannot afford to have signed away their right to compensation. He also stressed that sometimes the problem causing the nonpayment is not even the result of something that his company has done wrong but is instead the result instead of something the general contractor or another subcontractor has done. He explained that in such situations, the general contractor has the ability to not pay its subcontractors across the board because, in essence, the general contractor has not been paid by the owner. He concluded his remarks by acknowledging that SB 550 may need some technical amendments, but he stated that he believes that the bill is fair as written because it covers the responsibility on the owner to pay the general contractor and on the general contractor to pay the subcontractors. He asked that the general intent of the bill be left unchanged. See Appendix C for more extensive written comments submitted by Mr. Denham to the Workgroup.

Joe Piacentino with Colonial Webb Contractors Co. shared that his company works with both owners and general contractors on both public and private projects in Virginia. He stressed that if his company does not pay its employees weekly and their vendors timely, their employees will not report for work and their vendors will stop supplying the materials they need for their projects. Additionally, he noted that they often subcontract portions of their work to small, minority, and disadvantaged businesses, and his company cannot withhold payment to such

businesses because such businesses do not have the cash flow to finance the work while everyone awaits payment from the general contractor. He stated that most of their customers pay them within a reasonable amount of time, but occasionally a general contractor will not pay them for months or even years citing the contractual pay-if-paid condition precedent clause as the reason for not paying.

Mr. Piacentino explained that as a subcontractor, his company has no relationship with the project owner who ultimately funds the work. He stressed that general contractors are in the best position to vet the ability of an owner to pay, but, nevertheless, general contracts traditionally pass the risk of nonpayment by the owner down to the subcontractors who are doing the work. He further noted that when an owner runs out of money or cannot secure permanent financing to finish a project, by the time payment to the subcontractor becomes past due the subcontractor typically has several months of work in place before the subcontractor is contractually permitted to stop work. He emphasized that SB 550 motivates the general contractor to do a better job of managing payment risk and stopping the subcontractor from working as soon as the owner stops funding the job. He acknowledged that on private work subcontractors have the option of filing a lien when there is nonpayment, but he stressed that pursuing the lien takes years of civil litigation during which the subcontractor must still cash flow the project.

Mr. Piacentino then discussed change orders. He explained that most contracts between subcontractors and general contractors require subcontractors to perform change order work under a construction change directive before the general contractor secures a change from the owner. He shared, as an example, that his company is currently working on a public project in Virginia on which they have done $1.4 million worth of change order work directed by the general contractor. He stated that the general contractor is in a dispute with the public owner about whether the work constitutes a change to their contract. Meanwhile, his company has funded the work for over a year without being paid in order to keep the job on schedule and install systems that will work in the building. He emphasized that if the general contractor is ultimately unable to negotiate a change order with the public owner, his company will have to seek recovery through arbitration. He stressed that SB 550 would have kept his company paid and kept the project moving and would have motivated the general contractor to work harder with the owner to resolve their differences. He concluded his remarks by stressing that SB 550 is necessary in Virginia to ensure that subcontractors who actually do the work on a project get paid in a timely manner.

Carson Rogers with Chewning + Wilmer, Inc. shared his opinion that there is no fair reason for pay-if-paid clauses to be in contracts between general contractors and subcontractors. He stated that they simply serve the industry at a point above subcontractors. He noted that the financial stability of a project is not something that is within the control of the project's subcontractors. Echoing others' comments, he emphasized that his company cannot force pay-if-paid clauses down onto his employees and suppliers, and he stressed the importance of cash flow. He shared that he has experienced very limited success throughout his career in trying to negotiate with general contractors for better and fairer contract terms and emphasized that the supporters of SB 550 are simply asking for a fair contracting opportunity. Addressing change orders, he explained that language in the contract between the general contractor and the subcontractor often permits the general contractor to require the subcontractor to change the

work prior to the general contractor having negotiated a proper contract amendment with the owner. He stressed that there may be occasions in which the general contractor has wrongly directed the subcontractor to initiate a change in work. He noted that when a pay-if-paid clause is in the contract between the general contractor and the subcontractor the general contractor may not be particularly motivated to resolve a dispute with an owner over a change order, especially in situations in which the general contractor is at faut. He concluded his remarks by reiterating that the supporters of SB 550 are simply asking to be paid for their work that has been properly and timely completed.

Finally, Brain Conrad, Chief Operation Officer of Lee Hy Paying and President of the Richmond Area Municipal Contractors Association (RAMCA), provided written comments to the Workgroup in which he stated that RAMCA, which includes both members who are general contractors and members who are subcontractors, strongly believes that subcontractors should not have to bear the lion's share of the risk on projects and should be compensated for work they perform that is delivered defect free. Echoing other supporters' comments, he noted that subcontractors have no relationship with – and are often prohibited from having contact with – an owner. He stressed that pay-if-paid clauses have become ubiquitous in construction contracts, making it harder for subcontractors to work with general contractors that do not utilize them. He also discussed the challenges that subcontractors have with receiving payment from general contractors on change order work performed on public projects. He argued that SB 550 brings equity to this issue by ensuring that subcontractors receive payment in a timely manner for their change order work. See Appendix C for the entirety of the written comments submitted by Mr. Conrad to the Workgroup.

Comments in Opposition to SB 550

Matt Benka spoke to the Workgroup on behalf of the Virginia Contractor Procurement Alliance and expressed their opposition to SB 550 as it relates to private contracting. He emphasized that remedies already exist for instances in which subcontractors are not paid by general contractors and asked the Workgroup to recommend removing from the Code the provisions enacted by SB 550 that pertain to private contracts.

Jack Dyer, President of the Virginia Contractor Procurement Alliance and Chairman of the Board of Gulf Seaboard General Contractors, shared with the Workgroup that he is very opposed to SB 550. He made several arguments as to why he believes the bill is unnecessary. First, he pointed to comments made by the bill's patron, Senator Bell, during Session in which Senator Bell acknowledged that there is not an issue of nonpayment by Virginia companies. He reminded the Workgroup that Senator Bell told the legislature that SB 550 is targeted at large out-of-state general contractors who come into Virginia to do work and leave without paying their subcontractors, not Virginia companies. Second, he referred to comments made by one of the other stakeholders to the Workgroup in which the stakeholder told the Workgroup that the issue of nonpayment between general contractors and subcontractors is rare. Further, he pointed out that when nonpayment does occur, there are already several existing remedies available to subcontractors under current law (e.g., subcontractors may file a lawsuit for breach of contract in court, file a lien, pursue performance and payment bonds, etc.), making SB 550 unnecessary.

Mr. Dyer also made several arguments regarding why he believes that the bill is inappropriate. He decried what he sees as the General Assembly overreaching by legislating terms in contracts between private parties. He stressed that if a party to a contract does not agree with one or more of the contract terms, such party should either negotiate for different terms or not sign the contract. Additionally, he stressed that SB 550 does not address the key issues that the stakeholders in favor of SB 550 have repeatedly pointed to as causing the problem of nonpayment – change orders and retainage. He recommended that if subcontractors want to enhance their ability to resolve issues of nonpayment with general contractors, they should ask the General Assembly to enhance the existing remedies he mentioned earlier rather than pursue the policy in SB 550.

Mr. Dyer drew the Workgroup's attention to the fact that SB 550 will become effective on January 1, 2023, which is before the General Assembly will have an opportunity to make any changes to the bill. He spoke to the Workgroup about what he anticipates will be consequences of the policy changes made by SB 550. He expressed concern that small businesses will be hurt by the bill because general contractors will now become very selective about which subcontractors they will work with in an effort to mitigate their risk. He noted that general contractors will now only contract with subcontractors who can provide performance and payment bonds and who are capable of doing the work. Additionally, he argued that SB 550 will hurt small general contractors because they typically do not have the cash flow to pay their subcontractors prior to receiving payment from the owner. He also expressed his concern that higher risks will lead to higher costs across the board. He concluded his remarks by emphasizing that he and his company want to be a part of the solution for making sure that subcontractors are paid, but reiterated his opinion that SB 550 is not the solution.

Comments Reflecting Both Support in Part and Opposition in Part

Doug Petersen, President of EE Reed Construction East Coast and Chairman of the Board for the Association of Builders and Contractors of Virginia (ABC VA) shared that ABC VA represents the largest membership of contractors in their industry and they support SB 550. He expressed concern, however, that the bill will have unintended consequences that could put companies out of business. Specifically, he noted that if general contractors are required to pay their subcontractors within 60 days, some general contractors who have not received payment from the owner within that time frame will not have the financial ability to make those payments and will subsequently be put out of business. He concluded his remarks by stressing that everyone needs to come together as an industry and reach a consensus on the language of the bill so that it protects all parties involved.

Brandon Robinson with AGCVA explained that AGCVA is a trade association that represents general contractors, specialty contractors, and anyone within the industry who works in commercial construction. He shared that from the beginning of the conversation on SB 550, AGCVA has acknowledged that nonpayment is an issue for subcontractors and has sought to find a solution that honors three principles – it (i) protects subcontractors, (ii) protects general contractors, and (iii) protects the freedom to contract as much as possible. He noted that those principals have guided AGCVA's efforts to try to find a reasonable solution to the issue of nonpayment that shares the risk. Mr. Robinson emphasized that before trying to find a solution to

the issue of nonpayment, it is important to first acknowledge the root of the issue. He explained that the root cause of the issue lies with owners who do not pay, after which the issue becomes how the nonpayment trickles down to the general contractor and subcontractors.

Mr. Robinson shared that AGCVA has three suggestions for improving SB 550 or otherwise making changes to the law that could help to address the issue of nonpayment in a way that shares the risk throughout all of the parties involved. He explained that AGCVA arrived at these recommendations by bringing their members, who include both subcontractors and general contractors, together in a room multiple times to work through the issue and try to find solutions they could all agree upon.

Their first recommendation is to provide general contractors with the ability to fully analyze an owner's financial situation. He explained that SB 550 prohibits pay-if-paid clauses in contracts between general contractors and subcontractors, and this in turn shifts an undue portion of the financial risk of a construction project from owners and subcontractors to the general contractor. He argued that given this increased risk, general contractors should be given tools to vet an owner's financial situation as comprehensively as possible prior to committing to a contract. Additionally, Mr. Robinson suggested that general contractors could consider requiring a payment bond from owners to help mitigate their increased risk.

Mr. Robinson explained that their second recommendation pertains to the text of SB 550 itself and is more technical in nature. He briefly explained that AGCVA believes that the language in subsections B and C of § 11-4.6 needs to be made more consistent. Creating such consistency, he noted, would lead to more clarity and fairness in spreading the financial risk of nonpayment by the owner down throughout the tiers.

Finally, Mr. Robinson explained that their third recommendation is to amend Virginia's mechanics lien statute to make it a more accessible recourse for payment. He noted that in comparison to other states, Virginia's mechanics lien statute is unnecessarily limited. He stated that Virginia is the only state in the country that has a 150-day lookback period, and this significantly limits the ability of subcontractors, especially those that might be on the jobsite early in a job, to perfect the lien. He shared that North Carolina, which is often pointed to as an example of a state that has prohibited pay-if-paid clauses since the late 1980s, has a longer timeline for their mechanics liens - they allow up to 120 days, whereas Virginia is capped at 90 days.

Mr. Robinson concluded his remarks by emphasizing that these recommendations represent ideas that all contractors could agree upon to enable the financial risk of a project to be shared more fairly throughout the tiers and prevent the issues that were the impetus for SB 550. See Appendix C for more extensive written comments submitted by AGCVA to the Workgroup.

Comments Pertaining to Legal and Technical Issues with SB 550

Patrick Cushing with Williams Mullen spoke to the Workgroup on behalf of AIA VA and ACEC VA. He highlighted some technical issues with SB 550, particularly with regard to inconsistencies in the definitions that apply to Va. Code § 2.2-4354 pertaining to public

contractors versus those that apply to Va. Code § 11-4.6 pertaining to private contracts, and explained how those technical issues make it difficult for his clients to discern whether the bill even applies to them. He shared that if the intent is for SB 550 to only apply to the contractor community in the context of traditional construction and not design services or the design vertical in design-bid-build scenarios, his clients would like for the Workgroup to recommend that clarifying language to that effect be added to SB 550.

Curtis Manchester, Senior Assistant Attorney General with the Construction Section at the Office of the Attorney General, provided comments to the Workgroup regarding some of the issues the Construction Section sees with SB 550, as well as some of what they see as its potential ramifications. He emphasized that his comments were not to be construed as an opinion from Attorney General Miyares or the Office of the Attorney General as a whole but were rather comments from the Construction Section based upon its experience handling day-in and day-out issues involving public procurement and public construction. His comments touched upon three areas – (i) the amendments made by SB 550 to the VPPA, (ii) the amendments made by SB 550 to Title 11, and (iii) comments made by others regarding SB 550.

First, though, Mr. Manchester provided an overview to the Workgroup of how the former provisions of the Prompt Payment Act in the VPPA came to be. He noted that the VPPA was passed after an extensive two-year study undertaken by a task force chaired by DGS. The task force included members from both the private sector and public sector. He explained that the study included an extensive review of all of the procurement laws to understand how the state was procuring goods and construction. He noted that the task force issued a final report in 1980 and he shared some of the findings in the final report with the Workgroup. First, he highlighted that the task force made no finding or recommendation that general contractors should pay subcontractors notwithstanding nonpayment from the owner. Any payment arrangements were left to the contracts developed by the contracting parties, other than any new VPPA curtailment. Regarding the potential for nonpayment to subcontractors, he noted that the task force found it sufficient to temper such risk by requiring general contractors to post payment bonds on public projects. He highlighted that the task force also protected general contractors by allowing for permissive retainage of a percentage of the amount due in progress payments in order to ensure faithful performance of the subcontract by the subcontractor. The task force emphasized that the hallmark of public procurement must be competition for public work, meaning access of public owners to competitive bids or competitive negotiation offers. The more competition for the award of contracts, the better the choices for the public owners and the better use of public funds. He stated that the task force concluded its report by noting that it had strived to provide a comprehensive framework for public procurement at every level in Virginia.

Mr. Manchester further explained that after the report was issued and the VPPA was passed in 1980, there was a two-year delayed effective to allow for additional public comment and consideration. The VPPA eventually became law in 1982. He noted that shortly thereafter, the General Assembly amended the VPPA to add what is known as the Prompt Payment Act provisions. He explained that those provisions require that once a public owner releases funds to a general contractor, the general contractor must issue those funds downstream to its subcontractor or provide a reason for nonpayment within seven days. He emphasized that those

Prompt Payment Act provisions remain in effect today, even though SB 550 has added a new layer of requirements over top of them.

Moving on to discuss the amendments to the law made by SB 550, he explained that they essentially serve to make unenforceable traditional payment clauses known as "pay-if-paid" or "pay-when-paid." He explained that "pay-if-paid" clauses establish payment by the owner to the general contractor as a condition precedent to the general contractor's payment being due to the subcontractor. He emphasized that SB 550 makes these clauses unenforceable. He further explained that "pay-when-paid" clauses are distinct and have historically been found to be a reasonable timing mechanism between parties for the payment of sums. He noted that such clauses do not place the financial burden on the general contractor to front payments to the subcontractor before the general contractor has itself received payment from the owner.

Mr. Manchester then discussed some potential negative ramifications from SB 550's requirement that general contractors make payment to a subcontractor notwithstanding whether they themselves have received payment from the owner. First, he noted that such requirement may deter some general contractors from participating in public contracting. He explained that they may feel that they are unable to shoulder the financial burden, or they simply may not want to deal with it. Second, he noted that such requirement is likely to lead to a decrease in the number of bidders for certain projects depending upon the value of the project or the capacity of the contractor. Third, he noted that such requirement is likely to lead to an increase in bid amounts due to the fact that general contractors will now be shouldering a new financial burden. Fourth, he noted that such requirement will likely similarly lead to an increase in prices for construction management at-risk fees. Finally, he noted that such requirement could affect general contractors' bonding capacity. He emphasized that all of these effects would, unfortunately, serve to undermine the VPPA's goal of maximizing competition and would increase costs for public construction.

Noting the Construction Section's agreement with many of the comments they have read or heard regarding issues with the wording of the amendments made by SB 550, Mr. Manchester then walked the Workgroup through some technical amendments that they have identified that could improve the clarity of the changes made by SB 550. First, he noted that lines 11-12 of the bill require a payment clause that obligates a contractor to be liable for the "entire amount owed" to any subcontractor. He stated that "entire amount owed" seems a bit unclear because amounts are either owed or not owned. He stressed that the amendments made by SB 550 did not delete the permissive retainage provisions for general contractors and subcontractors on public projects, so if the phrase "entire amount owed" was intended to affect those provisions it did not have such affect. He emphasized that it is unclear what effect the "entire amount owed" language is intended to have.

Second, he pointed the Workgroup to the narrow description on lines 12-13 of the bill of the basis upon which a general contractor may withhold money from a subcontractor. He explained that those lines state that general contractors shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract. He noted that this point is obvious, but there may be additional legal reasons beyond noncompliance with the terms of the subcontract for which the contractor could legitimately withhold payment. For example, the

subcontractor could have filed for bankruptcy or have agreed to allow set-off of debts owed by the subcontractor on other projects. He stressed that there are many other legal reasons for which parties may want or need to withhold payment.

Third, Mr. Manchester noted that lines 14-16 of the bill contain a directive to the general contractor that if it intends to withhold payment, it must notify the subcontractor of such intention and provide the reason for nonpayment. He highlighted that the bill, however, does not indicate what event triggers the requirement to provide such notice nor a timeframe within which such notice must be given.

Moving on to SB 550's amendments to Title 11 dealing with private contracts, Mr. Manchester stated that the Construction Section was struck by the fact that the new law restricts the freedom of private parties on private projects that do not involve public funds to agree to the payment terms between them. The amendments establish timeframes within which owners must pay general contractors and general contractors must pay others. He noted that the amendments made by SB 550 were clearly a policy choice made by the General Assembly, but SB 550 does not appear to the Construction Section to be a law dealing with police power, health, safety, crime, taxation, etc. He noted that private parties have historically, under English common law and Virginia law, had freedom to contract and to arrange the commercial terms between them.

Regarding SB 550's amendments to § 11-4.6, Mr. Manchester expressed a desire for more clarity as to the scope of contracts to which they apply. He noted that there are two issues in this regard. First, lines 45-49 of the bill define "construction contract" as meaning "a contract between a general contractor and a subcontractor relating to the construction … of a building … [or] of projects other than buildings." He questioned what the term "relating to" means and what it covers. He stated that he believes that some of the participants in the industry have very rightfully raised the issue of whether this definition applies to their contracts. He noted that it is the Construction Section's understanding that the General Assembly's intent was not to cover contracts for professional services, including architectural, professional engineering, and other professional services. He explained that the Construction Section believes that clarifying the definition of "construction contract" in § 11-4.6 would not be just a technical amendment but would really be a substantive matter that the Workgroup should consider if the General Assembly is going to revisit this matter. Second, he noted that the Construction Section noticed inconsistencies in SB 550's amendments to § 11-4.6 in that subsection B refers to "construction contracts" whereas subsection C refers to "any contract." He stated that he does not believe the General Assembly intended for the provisions of subsection C to apply to "any contract" because the rest of the amendments made by SB 550 deal exclusively with construction contracts. He suggested that technical amendments be made to improve the clarity of the bill regarding these two issues.

Mr. Manchester noted that § 11-4.6 has the same issue as § 2.2-4354 in the VPPA above regarding the narrow description of the basis upon which a general contractor may withhold money from a subcontractor. He reiterated that there can be many other legal reasons pursuant to which a general contractor is required or may wish to withhold payment. He suggested that adding "or other legal basis" may assist in clarifying the reasons for which payment may be withheld. Relatedly, he also noted that subsection B and subsection C use inconsistent language

to denote the reasons for which a general contractor may withhold payment. He noted that line 73 in subsection C of the bill states that a higher-tier contractor shall not be liable for amounts otherwise reducible "pursuant to a breach of contract by the subcontractor" whereas line 58 in subsection B states that a private owner is not required to pay amounts invoiced that are subject to withholding for the general contractor's "noncompliance with the terms of the contract" and line 13 in § 2.2-4354 states that a contractor on a public contract shall not be liable for amounts otherwise reducible due to the subcontractor's "noncompliance with the terms of the contract." He shared that the Construction Section suggests improving the clarity and uniformity of the provisions of the Code added by SB 550 in order to make them more understandable by all parties.

The final technical amendment that Mr. Manchester discussed pertains to the inconsistent payment deadlines in subsections B and C for owners and general contractors. He noted that subsection B requires owners to pay within 60 days of receipt of an invoice, whereas subsection C requires contractors to pay within 60 days of satisfactory completion of the work or seven days after receiving the owner's money. He stressed that this inconsistency will likely cause confusion, and that unless "satisfactory completion of the work" is defined in the contract such clause may be unclear or unwieldy to use.

Finally, Mr. Manchester discussed some of the public comments made by others regarding SB 550. First, he noted that he agrees with stakeholders' comments that the provisions of SB 550 should be amended to clarify whether or not they apply to contracts for professional services. He shared that he believes this is a legitimate concern. Second, he mentioned stakeholder comments that were made at previous Workgroup meetings suggesting that the Workgroup or the General Assembly should consider making changes to Virginia's mechanics lien laws. He explained that mechanics lien laws allow persons who provided materials or labor on a project and who were not paid to place a lien on the real estate on which they worked and ultimately have the property sold to pay them. He noted that often private property owners have no idea who worked on their project, did not know that such individuals were unpaid, and had no privity of contract with them. He explained that these laws provide a right against landowners where there is no such right under common law. He noted that he was providing this background information in order to caution that any review of this area of the law or any consideration of potential changes to it should be done via a study featuring multiple stakeholders, including commercial property owners, lenders, and others that are beyond the membership of the Workgroup. He stressed that because this area of law is so technical with regards to timing and rights, and because it can significantly impact private landowners, any potential changes to it would best be reviewed by a group such as the Boyd-Graves Conference.

Following Mr. Manchester's presentation, Jessica Budd, Legal Policy Analyst and staff to the Workgroup, gave a presentation to the Workgroup on potential technical amendments that it could consider recommending to the General Assembly to improve SB 550's clarity, consistency, and implementation. She highlighted that one of the common themes in both the written and oral comments that the Workgroup has received from stakeholders on SB 550 is that some of its language is unclear, inconsistent, and confusing, leading to issues with interpreting and implementing its provisions. As such, she explained that the Workgroup's staff compiled the

following list of potential technical amendments to SB 550 based on such comments and on suggestions made by the stakeholders and others.

After providing the Workgroup with a brief overview of SB 550 and how it amends current law, Ms. Budd began going through the list of potential technical amendments. She explained that the list is organized into three categories – those amendments affecting the bill generally across both sections contained in the bill, those amendments affecting § 2.2-4354 of the VPPA dealing with public contracts, and those amendments affecting § 11-4.6 dealing with private contracts. She highlighted that one of the big themes of the amendments is that many of them seek to make the language of SB 550 more uniform. She explained that it is an important legislative drafting principle is to use the same language in each place in a bill where the same meaning is intended. She emphasized that this is important because the Cannons of Statutory Construction, which courts use to interpret statutes, hold that when a legislature uses different language (words, phrases, terms, etc.) in various places in a bill, it must have intended a different meaning in each such place. She noted to the Workgroup that there appear to be several places in SB 550 where the legislature intended to say and mean the same thing, but ultimately used different language in each place. Based on the comments from stakeholders and others, these inconsistencies have led to difficulties with interpreting and implementing the bill's provisions.

Ms. Budd then discussed the first category of potential amendments – those that affect the bill generally across both of the Code sections that it amends. She explained that the first potential technical amendment would be to make the definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" that are applicable to SB 550's payment liability and timing provisions pertaining to public contacts in § 2.2-4354 and to SB 550's payment liability and timing provisions pertaining to private contracts in § 11-4.6 uniform. She noted that one of the challenges with the way that SB 550 was written is that it inserts the new provisions of Code into existing Code sections that each already have their own distinct sets of definitions that apply to them (the definitions in § 2.2-4301 and § 2.2-4347 in the VPPA apply to § 2.2-4354 and § 11-4.6 contains its own set of definitions). The issue is that each of these sets of definitions are different from one another. As a result, in practice the payment liability and timing provisions added to the Code by SB 550 will ultimately end up applying to different pools of individuals depending upon whether the contract at issue is public or private because the definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" that apply to each type of contract are different. As an example, Ms. Budd highlighted both the VPPA and § 11-4.6 define "contractor/general contractor" and "subcontractor," but § 11-4.6 explicitly excludes materials suppliers from its definitions of "general contractor" and "subcontractor" whereas the corresponding definitions in the VPPA do not have this exclusion. As a result, materials suppliers on public contracts will be subject to SB 550's payment liability and timing provisions, but not materials suppliers on private contracts. To provide another example, she highlighted that the definitions of "construction" area also different in the VPPA versus § 11-4.6. She noted that these differences were likely not intended by the General Assembly, as it appears that the General Assembly intended to impose similar payment liability and timing provisions for both public contracts and private contracts. She explained that these differences in application seem to simply be a product of how the bill was drafted by inserting the new provisions of SB 550 into existing Code sections and thereby co-opting the existing – but different – definitions that already applied to those Code sections. She

stressed that regardless, these inconsistencies in the application of the bill's provisions depending upon whether the contract at issue is public or private is confusing and makes the bill challenging to implement. To alleviate these issues, she suggested that the Workgroup consider recommending to the General Assembly that it use uniform definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" for both the section of the bill pertaining to public contracts (§ 2.2-4354) and the section of the bill pertaining to private contracts (§ 11-4.6).

Ms. Budd then noted that the second potential technical amendment to SB 550 also pertains to the definitions in the VPPA and in § 11-4.6. She reminded the Workgroup that it received testimony from stakeholders stating that it appears to them that the General Assembly intended to exclude contracts for professional services, including contracts for architectural or professional engineering services, from the scope of the bill but the language of the bill does not make this exclusion explicit. As such, she noted that the Workgroup could consider recommending to the General Assembly that it add language to the definitions applicable to § 2.2-4354 in the VPPA and § 11-4.6 to clarify that such contracts are excluded from the scope of the bill.

Moving on to the third potential technical amendment, Ms. Budd mentioned that it touches directly upon the theme that she mentioned earlier of attempting to clarify the bill by making the language of the bill more uniform in the places where it appears that the legislature intended to convey the same concept. She noted that SB 550 includes language in three places that expresses the concept that an owner/general contractor shall not be liable for paying a general contractor/subcontractor, as applicable, when the general contractor/subcontractor has not complied with the terms of the contract.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

Lines 12-13: Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

Lines 57-58: An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

Lines 72-73: Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor.

In each of these three places, however, the language is worded differently. To make the bill easier to interpret, as well as bring consistency to its implementation, she stated that the

Workgroup could consider recommending to the General Assembly that it amend this language to make it uniform in all three places in which it appears in the bill.

Regarding the fourth potential technical amendment, Ms. Budd noted that SB 550 similarly includes language in three places that establishes a requirement that that an owner/general contractor must provide notice to its general contractor/subcontractor, as applicable, if the owner/general contractor wishes to withhold payment from the general contractor/subcontractor.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

Lines 14-16: However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

Lines 59-62: However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

Lines 74-78: However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.

She noted that again, however, the language in each of these three places is worded differently. She suggested again that in an effort to make the bill easier to interpret and more consistent in its implementation, the Workgroup could consider recommending to the General Assembly that it amend this language to make it as uniform as possible and appropriate in each of the three places in which it appears in the bill.

Ms. Budd shared that the fifth potential technical amendment is also related to the notice requirement and would be to establish a timeline for *when* the notice of withholding payment must be given. She emphasized that the notice provisions currently in the bill establish the *requirement* to provide notice if payment will be withheld, but they do not establish a *timeline* for when such notice must be provided. To address this issue, she suggested that the Workgroup could consider recommending that the General Assembly establish such a timeline. She noted

that one option for such a timeline could be to link the timeline for providing the notice with the deadlines already established by SB 550 for when payment must be provided. For example, the language could be amended to state that a general contractor must (i) pay the subcontractor or **(ii) provide notice, in writing, of the general contractor's intention to withhold all or a portion of the subcontractor's payment** within the earlier of (a) 60 days after receiving an invoice from the subcontractor or (b) seven days after receiving payment from the owner.

Ms. Budd then moved on to the second category of potential technical amendments – those that would affect § 2.2-4354 of the VPPA dealing with public contracts. She explained that the first such amendment would be to reconcile the provisions of Code added by SB 550 to subdivision 1 with the existing provisions of the Prompt Payment Act that were moved by SB 550 to subdivision 2. She noted that Mr. Manchester also touched upon this issue in his remarks to the Workgroup. Ms. Budd explained that the existing provisions of the Prompt Payment Act that were moved to subdivision 2 have been in place for many years and apply to *all* types of contracts – goods, services, construction, etc. They require a contractor to take one of two actions within seven days of receipt by the contractor of payment from a public body on a public project: (i) pay its subcontractor its proportionate share of the total payment received or (ii) notify the agency and the subcontractor in writing of its intention to withhold all or a part of the payment otherwise due to the subcontractor with the reason for nonpayment. The new provisions added by SB 550 in subdivision 1, however, apply *only* to construction contracts. As such, when discerning the provisions of law applicable to construction contracts, subdivisions 1 and 2 must be read together. Ms. Budd noted that the first sentence in subdivision 1 on lines 11-12 of the bill requires the contractor to be liable for the "entire amount owed" to any subcontractor with which it contracts. This is different, however, from the "proportionate share" language in subdivision 2. She emphasized that it is unclear how the "entire amount owed" language is intended to interact with the "proportionate share" language, and she noted that the Workgroup could consider recommending that the General Assembly clarify this issue.

Further, Ms. Budd echoed Mr. Manchester's earlier comments to the Workgroup regarding the interaction of the new provisions of Code added to subdivision 1 with the existing provisions of the VPPA pertaining to retainage. She noted that SB 550 does not repeal the VPPA's existing provisions pertaining to retainage, but the words "entire amount owed" added by SB 550 in subdivision 1 could lead to confusion about the permissibility of retainage provisions in construction contracts. She highlighted that subsection B (on lines 63-64) and subsection C (on lines 84-85) of § 11-4.6 include the following language in order to dispel any such confusion in the context of private contracts: "Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract." She suggested that in an effort to alleviate any confusion and make the bill more consistent throughout both sections that it amends, the Workgroup could consider recommending to the General Assembly that it also include this language in subdivision 1 of § 2.2-4345.

Ms. Budd further noted that while (i) subdivision 2 (the existing provisions of the Prompt Payment Act) establishes the obligation of the general contractor to either (a) pay the subcontractor or (b) provide notice to the subcontractor that it intends to withhold payment within seven days of the general contractor having received payment from the public body and (ii) subdivision 1 establishes the obligation of the general contractor to pay the subcontractor

regardless of whether the general contractor has received payment from the public body, neither subdivision 1 nor subdivision 2 establish ***when*** the general contractor must pay the subcontractor in instances in which the general contractor has not received payment from the public body. An argument could be made that the provisions of subsection C of § 11-4.6 (which require a general contractor, when it has not been paid by the owner, to pay the subcontractor within "60 days from the date of satisfactory completion of the work for which the subcontractor has invoiced") provide the deadline for payment in such instances, but it is not entirely clear that the provisions of subsection C of § 11-4.6 were intended by the General Assembly to apply to subcontracts on public contracts. As such, Ms. Budd suggested that the Workgroup could consider recommending that the General Assembly add clarifying language to § 2.2-4354 to establish a clear deadline for when payment is due from general contractors to subcontractors on public contracts in circumstances in which the general contractor has not received payment from the public body.

Ms. Budd explained that the final potential technical amendment to § 2.2-4354 pertains to the interest clause in subdivision 4. The current language in subdivision 4 requires general contractors to pay interest to their subcontractors on all amounts owed by the general contractor that remain unpaid after seven days following receipt by the general contractor of payment from the public body for work performed by the subcontractor under the contract. Similarly, subsection B (on lines 62-63) and subsection C (on lines 82-84) of § 11-4.6 require owners and general contractors to pay interest on past-due amounts. She stated that if the Workgroup recommends adding language to § 2.2-4354 to clarify ***when*** payment is due to a subcontractor in instances in which the general contractor has not been paid by the public body, the Workgroup could consider also recommending that the interest clause in subdivision 4 be expanded to require general contractors to pay interest on amounts that are not paid by such deadline.

Ms. Budd then discussed the third category of potential technical amendments – those that would affect § 11-4.6 dealing with private contracts. She shared that the first potential technical amendment would be to correct the catchline for § 11-4.6. She explained that before SB 550 added the provisions to § 11-4.6 dealing with payment liability and timing, § 11-4.6 only dealt with issues surrounding the liability of a contractor for the wages of a subcontractor's employees. She noted that this is reflected in the catchline for § 11-4.6, which simply says: § 11-4.6. Liability of contractor for wages of subcontractor's employees. She explained that the catchline was not updated by SB 550 to reflect the new provisions the bill added to § 11-4.6 dealing with payment liability and timing. As such, she suggested that to add clarity to § 11-4.6 the Workgroup could consider recommending to the General Assembly that it update the catchline to reflect ***both*** the existing provisions of § 11-4.6 *and* the new provisions added by SB 550.

Moving on to the second potential technical amendment to § 11-4.6, Ms. Budd explained that the Workgroup could consider recommending that the General Assembly fix the subsection and subdivision lettering in § 11-4.6 to separate out the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees from the new provisions added by SB 550 dealing with owners' and general contractors' payment liability and timing. She explained that when the new provisions were added to § 11-4.6 by SB 550, they were each assigned their own subsection (B and C), and the existing subsections in § 11-4.6 dealing with

the liability of a contractor for the wages of a subcontractor's employees were simply re-lettered (from B, C, D, and E to D, E, F, and G) to accommodate the new provisions. She stressed that not only would it be helpful for interpreting and understanding § 11-4.6 to reconfigure it by assigning the provisions added by SB 550 dealing with payment liability and timing their *own* subsection and subdivisions within such subsection and the provisions dealing with the liability of a contractor for the wages of a subcontractor's employees *their* own subsection and subdivisions within such subsection, doing so would help to resolve an issue on line 106 where the language states, "The provisions of this ***section*** shall only apply if …" Ms. Budd emphasized that such sentence is clearly intended to only apply to the provisions of the bill related to the liability of a contractor for the wages of a subcontractor's employees and *not* the new provisions of § 11-4.6 dealing with payment liability and timing, but the reference to the entire section creates confusion. To help the Workgroup visualize these potential changes, Ms. Budd pointed the Workgroup to a draft of these changes that she included in the meeting materials. See Appendix D for the draft.

Ms. Budd stressed the third potential technical amendment to § 11-4.6's importance for both clarifying the language of the bill and aligning the language of the bill more closely with what appears to have been the intent of the General Assembly regarding the scope of the application of its provisions. She explained that when looking at SB 550 as a whole, it appears that the General Assembly intended for SB 550's payment and liability provisions to apply only to *construction* contracts. She noted that line 11 in § 2.2-4354 in the VPPA dealing with public contracts refers specifically to "a contractor on a ***construction*** contract." Similarly, line 54 in subsection B of § 11-4.6 establishes requirements for ***construction*** contracts between an owner and a general contractor on private projects. Additionally, the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees pertain only to ***construction*** contracts. However, the language on line 65 in subsection C of § 11-4.6 that establishes the requirements for contractors between a general contractor and a subcontractor on private projects refers to "Any contract in which there is at least one general contractor and one subcontractor …". She explained that as such, subsection C, as written, would apply to any contract between a general contractor and a subcontractor – i.e., goods, services, etc. – not *just* construction contracts. She noted that based on the language used throughout the rest of SB 550 and in the existing provisions of § 11-4.6 that is limited only to construction contracts, the broad scope of the application of the provisions of subsection C of § 11.4-6 does not appear to have been intentional and instead appears to have simply been a mistake. To address this issue, she stated that the Workgroup could consider recommending to General Assembly that it amend the language in subsection C of § 11-4.6 to clarify that its provisions only apply to *construction* contracts.

Moving on, Ms. Budd explained that the fourth potential technical amendment to § 11-4.6 would be to resolve the inconsistency in the timelines for payment that are set out in subsection B for owners and in subsection C for contractors. She noted that on lines 55-57, subsection B of § 11-4.6 requires payment "within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced." However, on lines 69-70 subsection C of § 11-4.6 requires payment within "60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced …" She noted that not only are these provisions confusing and inconsistent, but they also establish different

payment requirements for owners versus general contractors where there appears to be no logical reason for having such differences. To resolve these inconsistencies, she suggested that the Workgroup could consider recommending to the General Assembly that it amend this language to make it uniform.

Lastly, Ms. Budd explained that the final potential technical amendment to § 11-4.6 – and SB 550 in total – would be to resolve the inconsistent and confusing terminology used in subsection C of § 11-4.6. She noted that subsection C of § 11-4.6 uses all of the following terms: "general contractor;" "subcontractor;" "higher-tier contractor;" "lower-tier subcontractor;" "lower-tier contractor;" and "contractor." She stressed that this mix of terminology is difficult to follow, and it is unclear if each of these terms is intended to refer to a distinct entity or if some of them are intended to overlap. She suggested that to clarify subsection C and allow for easier implementation of the bill's provisions, the Workgroup could consider recommending to the General Assembly that it amend subsection C of § 11-4.6 (i) to use only the terms "general contractor" and "subcontractor" (similar to § 2.2-4354 in the VPPA dealing with public contracts) and (ii) by inserting the following language from § 2.2-4354 from the VPPA to make clear that the provisions of subsection C apply throughout all of the tiers: Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

V. Workgroup Findings and Recommendations

After hearing the presentations at its fourth meeting on August 31, 2022, Ms. Gill invited the Workgroup to discuss how they would like to proceed with the Workgroup's task of developing findings and potential legislative recommendations on the question of whether the issue of nonpayment between general contractors and subcontractors necessitates legislative corrective action. The Workgroup engaged in considerable debate regarding the scope of SB 550's charge to the Workgroup. Ultimately, the Workgroup decided that the second enactment clause of SB 550 charges the Workgroup with establishing a forum to (i) hear from affected stakeholders regarding issues with the practical implementation of SB 550 and (ii) develop recommendations based on such stakeholder feedback to assist the legislature with better effectuating its original legislative intent. The Workgroup decided that it is beyond the scope of SB 550's charge to it for it to delve into issues regarding whether the General Assembly should have made the policy change effectuated by SB 550 in the first place. As such, Ms. Gill requested that the Workgroup's staff go through again each of the potential technical amendments that were presented to the Workgroup earlier so that the Workgroup could discuss each one and potentially vote on them.

As such, Ms. Budd walked the Workgroup through each of the potential technical amendments that she previously presented, and the Workgroup debated and voted on each amendment as she went through them. The Workgroup requested to tweak the language of some of the amendments presented by Ms. Budd, but ultimately voted in favor of recommending each of the amendments that she presented except for one.

The Workgroup chose not to recommend the second proposed amendment to § 2.2-4354, presented by Ms. Budd, which consisted of recommending to the General Assembly that it expand the interest clause in subdivision 4 to require general contractors, in instances in which the general contractor has not been paid by the public body, to pay interest on past-due amounts. As the Workgroup debated this amendment, Ms. Budd further explained that the current language in subdivision 4 requires general contractors to pay interest to their subcontractors on all amounts owed by the general contractor that remain unpaid after seven days following receipt by the general contractor of payment from the public body for work performed by the subcontractor under the contract. Similarly, subsection B (on lines 62-63) and subsection C (on lines 82-84) of § 11-4.6 require owners and general contractors to pay interest on past-due amounts. To bring further consistency to the bill, she explained that the Workgroup could consider recommending that the interest clause in subdivision 4 be expanded to require general contractors, in instances in which the general contractor has not been paid by the public body, to pay interest on past-due amounts. She noted that such amendment would more closely align the provisions of § 2.2-4354 to the corresponding provisions of subsection C of § 11.4.6. Mr. McHugh commented that he believes that it is not the Workgroup's place to make this recommendation. Ms. Innocenti concurred with Mr. McHugh's remarks and stated that it is outside of the scope of their relationship regarding privity of contract with the subcontractor. Ms. Haley suggested that the Workgroup note this issue as a distinction made by the bill between the provisions of § 2.2-4354 and § 11-4.6, but not recommend that the General Assembly consider taking any action to address the distinction. The Workgroup voted 6-0-1[2] in favor of Ms. Haley's suggestion.

The Workgroup voted 6-0-1[3] in favor of each of the remaining amendments presented by Ms. Budd, except for the amendment suggested by Ms. Budd to resolve the inconsistency in § 11-4.6 between the timelines for payment that are set out in subsection B for owners and in subsection C for contractors, Mr. McHugh noted his agreement with the recommendation and suggested to the Workgroup that it specifically recommend that the General Assembly consider using the language "receipt of invoice" in both places. Mr. Wade asked whether "receipt of invoice" is clearer and easier to interpret for practitioners than "satisfactory completion." Mr. McHugh answered in the affirmative and said that "receipt of invoice" aligns with the Prompt Payment Act in the VPPA, as well as standard requirements. He explained that it is more of a standard practice than "satisfactory completion."

> Lines 55-57 [§ 11-4.6(B)]: Requires payment "within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced."
>
> Lines 69-70 [§ 11-4.6(C)]: Requires payment within "60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced …"

All members of the Workgroup agreed with Mr. McHugh's suggestion except for Mr. Heslinga. Mr. Heslinga stated that he is not sure that the legislature did not intend this inconsistency. Regarding the language on lines 55-57, he said that he could imagine that the

[2] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.
[3] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

legislature thought that an owner would need to receive an invoice from a general contractor in order to know when the owner needs to pay the general contractor. Regarding the language on lines 69-70, however, he said that general contractors should know when their subcontractors have completed their work, so there would be no need to require the subcontractor to send the general contractor an invoice. He stated that he supports flagging the inconsistency for the legislature so that it can determine whether it was intended, but not recommending that the legislature consider making the language uniform and using the "receipt of invoice" language in both places. As such, the Workgroup voted 5-1-1[4] in favor of recommending that the General Assembly consider (i) reconciling the inconsistency between the timelines for payment that are set out on lines 55-57 in subsection B for owners and on lines 69-70 in subsection C for contractors and (ii) reconciling such inconsistency by using the "receipt of invoice" language used on lines 55-57 in subsection B as the trigger for payment in both subsections.

Lastly, in the context of considering the uniformity of the application of SB 550's amendments to § 2.2-4354, the Workgroup engaged in discussion as to whether all local public bodies and public institutions of higher education are subject to such provisions. The Workgroup determined that this is a complex issue and asked that it be brought to the attention of the General Assembly for its consideration.

Finally, at its fifth meeting on September 19, 2022, the Workgroup reviewed draft language prepared by the Workgroup's staff of the recommendations that it had approved in concept at its previous meeting. After reviewing the draft language, the Workgroup voted to approve the following final recommendations on SB 550 by a vote of 5-0-1[5]:

I. AMENDMENTS PERTAINING TO ALL OF SB 550

Recommendation #1:

The Workgroup recommends that the General Assembly consider making the definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" that are applicable to SB 550's payment liability and timing provisions pertaining to public contacts in § 2.2-4354 and to SB 550's payment liability and timing provisions pertaining to private contracts in § 11-4.6 uniform.

Recommendation #2:

The Workgroup recommends that the General Assembly consider clarifying whether contracts for professional services, including architectural or professional engineering services, should be included within the scope of SB 550's payment liability and timing provisions.

Recommendation #3:

The Workgroup recommends that the General Assembly consider making the following language in SB 550 uniform in order to enhance the clarity and consistency of the bill:

[4] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, and Ms. Gill. No: Mr. Heslinga. Abstain: Mr. Saunders.
[5] Yes: Mr. McHugh, Ms. Pride, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

Lines 12-13: Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract.

Lines 57-58: An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract.

Lines 72-73: Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor.

Recommendation #4:

The Workgroup recommends that the General Assembly consider making the following language in SB 550 uniform where appropriate and intended in order to enhance the clarity and consistency of the bill:

Lines 14-16: However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

Lines 59-62: However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment.

Lines 74-78: However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.

Recommendation #5:

The Workgroup recommends that the General Assembly consider establishing a timeline for when the notice of withholding payment must be given.

II. AMENDMENTS PERTAINING TO § 2.2-4354 – PUBLIC CONTRACTS

Recommendation #6:

The Workgroup recommends that the General Assembly consider reconciling the provisions added by SB 550 in subdivision 1 of § 2.2-4354 with the existing provisions of the Prompt Payment Act that were moved to subsection 2 of § 2.2-4354 and, in doing so, consider clarifying (i) the type of contracts to which each subdivision applies, (ii) how the "entire amount owed" language in subdivision 1 is intended to interact with the "proportionate share" language in subdivision 2, (iii) that the "entire amount owed" language in subdivision 1 is not intended to affect the VPPA's retainage provisions, and (iv) when a general contractor must pay a subcontractor when the general contractor has not been paid by the public body.

III. AMENDMENTS PERTAINING TO § 11-4.6 – PRIVATE CONTRACTS

Recommendation #7:

The Workgroup recommends that the General Assembly consider updating the catchline of § 11-4.6 to reflect both the provisions of § 11-4.6 that existed prior to the amendments made by SB 550 and that are still in effect (dealing with the liability of a contractor for the wages of a subcontractor's employees) and the new provisions added by SB 550 (dealing with payment liability and timing between private owners, general contractors, and subcontractors).

Recommendation #8:

The Workgroup recommends that the General Assembly consider amending the subsection and subdivision lettering in § 11-4.6 to separate out the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees from the new provisions added by SB 550 dealing with owners' and general contractors' payment liability and timing in order to make § 11-4.6 easier to interpret.

Recommendation #9:

The Workgroup recommends that the General Assembly consider clarifying that the provisions of subsection C of § 11-4.6 applies only to construction contracts.

Recommendation #10:

The Workgroup recommends that the General Assembly consider (i) reconciling the inconsistency between the timelines for payment that are set out on lines 55-57 in subsection B of § 11-4.6 for owners and on lines 69-70 in subsection C of § 11-4.6 for general contractors and (ii) reconciling such inconsistency by using the "receipt of invoice" language used on lines 55-57 in subsection B as the trigger for payment in both subsections.

Recommendation #11:

The Workgroup recommends that the General Assembly consider clarifying the inconsistent and confusing terminology used in subsection C of § 11-4.6 by amending it (i) to use only the terms "general contractor" and "subcontractor" (similar to § 2.2-4354 in the VPPA dealing with public contracts) and (ii) by inserting the following language from § 2.2-4354 in the VPPA that would make the provisions of subsection C apply throughout all of the tiers: Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

VI. Conclusion

The Workgroup would like to thank the stakeholders and interested parties who participated in its study of SB 550 for their participation, as well as thank the subject matter experts from DGS and OAG who provided presentations and technical expertise to the Workgroup for their assistance.

Appendix A: Text of Chapter 727 of the Acts of Assembly of 2022 [SB 550]

This appendix contains the text of Chapter 727 of the Acts of Assembly of 2022 [SB 550]. The second enactment of the bill contains the Workgroup's study mandate.

CHAPTER 727

An Act to amend and reenact §§ 2.2-4354 and 11-4.6 of the Code of Virginia, relating to contracts; payment clauses to be included; right to payment of subcontractors.

[S 550]

Approved April 27, 2022

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4354 and 11-4.6 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-4354. Payment clauses to be included in contracts.

Any contract awarded by any state agency, or any contract awarded by any agency of local government in accordance with § 2.2-4352, shall include:

1. *A payment clause that obligates a contractor on a construction contract to be liable for the entire amount owed to any subcontractor with which it contracts. Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract. However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment. Payment by the party contracting with the contractor shall not be a condition precedent to payment to any lower-tier subcontractor, regardless of that contractor receiving payment for amounts owed to that contractor. Any provision in a contract contrary to this section shall be unenforceable.*

2. A payment clause that obligates the contractor to take one of the two following actions within seven days after receipt of amounts paid to the contractor by the state agency or local government for work performed by the subcontractor under that contract:

a. Pay the subcontractor for the proportionate share of the total payment received from the agency attributable to the work performed by the subcontractor under that contract; or

b. Notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

~~2.~~ *3.* A payment clause that requires (i) individual contractors to provide their social security numbers and (ii) proprietorships, partnerships, and corporations to provide their federal employer identification numbers.

~~3.~~ *4.* An interest clause that obligates the contractor to pay interest to the subcontractor on all amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor of payment from the state agency or agency of local government for work performed by the subcontractor under that contract, except for amounts withheld as allowed in subdivision ~~1~~ *2*.

~~4.~~ *5.* An interest rate clause stating, "Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent per month."

Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

A contractor's obligation to pay an interest charge to a subcontractor pursuant to the payment clause in this section shall not be construed to be an obligation of the state agency or agency of local government. A contract modification shall not be made for the purpose of providing reimbursement for the interest charge. A cost reimbursement claim shall not include any amount for reimbursement for the interest charge.

§ 11-4.6. Liability of contractor for wages of subcontractor's employees.

A. As used in this section, unless the context requires a different meaning:

"Construction contract" means a contract between a general contractor and a subcontractor relating to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance thereto, including moving, demolition, and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings.

"General contractor" and "subcontractor" have the meanings ascribed thereto in § 43-1, except that those terms shall not include persons solely furnishing materials.

"Owner" means a person or entity, other than a public body as defined in § 2.2-4301, responsible for contracting with a general contractor for the procurement of a construction contract.

B. In any construction contract between an owner and a general contractor, the parties shall include a provision that requires the owner to pay such general contractor within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced. An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract.

However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment. Failure of an owner to make timely payment as provided in this subsection shall result in interest penalties consistent with § 2.2-4355. Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract.

C. Any contract in which there is at least one general contractor and one subcontractor shall be deemed to include a provision under which any higher-tier contractor is liable to any lower-tier subcontractor with whom the higher-tier contractor contracts for satisfactory performance of the subcontractor's duties under the contract. Such contract shall require such higher-tier contractor to pay such lower-tier subcontractor within the earlier of (i) 60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced or (ii) seven days after receipt of amounts paid by the owner to the general contractor or by the higher-tier contractor to the lower-tier contractor for work performed by a subcontractor pursuant to the terms of the contract. Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor. However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance. Payment by the party contracting with the contractor shall not be a condition precedent to payment to any lower-tier subcontractor, regardless of that contractor receiving payment for amounts owed to that contractor, unless the party contracting with the contractor is insolvent or a debtor in bankruptcy as defined in § 50-73.79. Any provision in a contract contrary to this section shall be unenforceable. Failure of a contractor to make timely payment as provided in this subsection shall result in interest penalties consistent with § 2.2-4355. Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract.

~~B.~~ *D.* Any construction contract entered into on or after July 1, 2020, shall be deemed to include a provision under which the general contractor and the subcontractor at any tier are jointly and severally liable to pay any subcontractor's employees at any tier the greater of (i) all wages due to a subcontractor's employees at such rate and upon such terms as shall be provided in the employment agreement between the subcontractor and its employees or (ii) the amount of wages that the subcontractor is required to pay to its employees under the provisions of applicable law, including the provisions of the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.) and the federal Fair Labor Standards Act (29 U.S.C. § 201 et seq.).

~~C.~~ *E.* A general contractor shall be deemed to be the employer of a subcontractor's employees at any tier for purposes of § 40.1-29. If the wages due to the subcontractor's employees under the terms of the employment agreement between a subcontractor and its employees are not paid, the general contractor shall be subject to all penalties, criminal and civil, to which an employer that fails or refuses to pay wages is subject under § 40.1-29. Any liability of a general contractor pursuant to § 40.1-29 shall be joint and several with the subcontractor that failed or refused to pay the wages to its employees.

~~D.~~ *F.* Except as otherwise provided in a contract between the general contractor and the subcontractor, the subcontractor shall indemnify the general contractor for any wages, damages, interest, penalties, or attorney fees owed as a result of the subcontractor's failure to pay wages to the subcontractor's employees as provided in subsection ~~B~~ *D*, unless the subcontractor's failure to pay the wages was due to the general contractor's failure to pay moneys due to the subcontractor in accordance with the terms of their construction contract.

~~E.~~ *G.* The provisions of this section shall only apply if (i) it can be demonstrated that the general contractor knew or should have known that the subcontractor was not paying his employees all wages due, (ii) the construction contract is related to a project other than a single family residential project, and (iii) the value of the project, or an aggregate of projects under one construction contract, is greater than $500,000. As evidence a general contractor may offer a written certification, under oath, from the subcontractor in direct privity of contract with the general contractor stating that (a) the subcontractor and each of his sub-subcontractors has paid all employees all wages due for the period during which the wages are claimed for the work performed on the project and (b) to the subcontractor's knowledge all sub-subcontractors below the subcontractor, regardless of tier, have similarly paid their employees all such wages. Any person who falsely signs such certification shall be personally liable to the general contractor for fraud and any damages the general contractor may incur.

2. That the Department of General Services shall convene the Public Body Procurement Workgroup (the Workgroup) to review whether the issue of nonpayment between general contractors and subcontractors necessitates legislative corrective action. The Workgroup shall report its findings and any legislative recommendations to the General Assembly on or before December 1, 2022.

3. That the provisions of the first enactment of this act shall become effective on January 1, 2023,

and shall apply to construction contracts executed on or after January 1, 2023.

Appendix B: July 14, 2022 Meeting Materials

This appendix contains the meeting materials from the July 14, 2022 Workgroup meeting.

1. Agenda
2. Public Body Procurement Workgroup 2022 Proposed Work Plan
3. Appropriations Act Language Establishing the Public Body Procurement Workgroup
4. Written Public Comments
    a. Comments from the Alliance for Construction Excellence
5. Approved Meeting Minutes

Public Body Procurement Workgroup

http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/

Meeting # 1
Thursday, July 14, 2022, 9:30 a.m.
Conference Rooms C, D, and E
James Monroe Building
101 N 14th St, Richmond, Virginia 23219

AGENDA

I. Call to Order; Remarks by Department of General Services

Joe Damico. Director
Department of General Services

Sandra Gill, Deputy Director
Department of General Services

II. Overview of Workgroup Authority and Duties

Jessica Budd, Staff
Department of General Services

III. Introduction of Workgroup Members, Representatives, and Staff

IV. Review of Proposed Work Plan

Jessica Budd, Staff
Department of General Services

V. Presentation on SB 550

The Honorable John J. Bell, Patron
Senate of Virginia

VI. Presentation on SB 575

Baxter Carter, Chief of Staff to The Honorable T. Montgomery "Monty" Mason, Patron
Senate of Virginia

VII. Discussion

VIII. Public Comment

IX. Adjournment

Members

Department of General Services
Virginia Information Technologies Agency
Department of Planning and Budget
Virginia Association of State Colleges and University Purchasing Professionals
Department of Small Business and Supplier Diversity
Virginia Department of Transportation
Virginia Association of Government Purchasing

Representatives

Office of the Attorney General
Senate Finance Committee
House Appropriations Committee
Division of Legislative Services

Staff

Jessica Budd, Legal Policy Analyst, DGS
Jessica Hendrickson, Director of Policy and Legislative Affairs, DGS

Public Body Procurement Workgroup

http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/

2022 PROPOSED WORK PLAN

Meeting #1 – July 14, 2022

1. Overview of Workgroup Authority and Duties
2. Introduction of Workgroup Members, Representatives, and Staff
3. Review of Proposed Work Plan

During the 2022 Regular Session, the General Assembly passed two bills that direct the Public Body Procurement Workgroup to conduct studies.

- SB 550 (Chapter 727 of the 2022 Acts of Assembly) was patroned by Senator Bell and requires certain payment clauses to be included in public and private contracts. The second enactment clause of the bill directs the Workgroup to review whether the issue of nonpayment between general contractors and subcontractors necessitates legislative corrective action and report its findings and any legislative recommendations to the General Assembly on or before December 1, 2022.
- SB 575 (Chapter 789 of the 2022 Acts of Assembly) was patroned by Senator Mason and requires all agencies of the Commonwealth to (i) utilize a total cost of ownership (TCO) calculator to assess and compare the total cost to purchase, own, lease, and operate light-duty internal combustion-engine vehicles (ICEVs) versus comparable electric vehicles (EVs) prior to purchasing or leasing any light-duty vehicles and (ii) purchase or lease an EV unless the calculator clearly indicates that purchasing or leasing an ICEV has a lower cost of ownership. The third enactment clause of the bill directs the Workgroup to evaluate the appropriateness of requiring all agencies of the Commonwealth to use the TCO calculator prior to purchasing or leasing any medium-duty or heavy-duty vehicles. The bill directs the Workgroup to consult with relevant stakeholders, including at least one medium-duty or heavy-duty vehicle technology provider with experience in real-world deployments, and consider (a) the current commercial market for medium-duty and heavy-duty electric vehicles; (b) the unique characteristics of medium-duty and heavy-duty vehicles, including charging infrastructure and operational duty cycles; (c) the potential volume of medium-duty and heavy-duty vehicles purchased by DGS and agencies of the Commonwealth; (d) the availability of public TCO calculators for medium-duty and heavy-duty vehicles and their suitability for use by DGS and agencies of the Commonwealth; and (e) any other information it determines relevant to its evaluation. The bill requires the Workgroup to report its findings and any recommendations to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology on or before December 1, 2022.

4. Presentation on SB 550
    - The Honorable John J. Bell, Senate of Virginia, Patron
5. Presentation on SB 575
    - Baxter Carter, Chief of Staff to The Honorable T. Montgomery "Monty" Mason, Senate of Virginia, Patron

Meeting #2 – July 28, 2022 (Tentative)

1. Receive Public Comment from Stakeholders on SB 550.
2. Receive Public Comment from Stakeholders on SB 575.

Meeting #3 – August 11, 2022 (Tentative)

1. Consideration of the presentations, testimony, and written comments and other information previously received by the Workgroup on SB 550.
2. Development of findings and recommendations on SB 550.
3. Consideration of the presentations, testimony, and written comments and other information previously received by the Workgroup on SB 575.
4. Development of findings and recommendations on SB 575.

Meeting #4 – August 30, 2022 (Tentative)

1. Finalize the Workgroup's findings and recommendations on SB 550. Staff provide overview of final report.
2. Finalize the Workgroup's findings and recommendations on SB 575. Staff provide overview of final report.

December 1, 2021

1. Report on the Workgroup's findings and recommendations on SB 550 due to the General Assembly.
2. Report on the Workgroup's findings and recommendations on SB 575 due to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology.

2022 Special Session I

Budget Bill - HB30 (Chapter 2)

Department of General Services

Item 85	First Year - FY2023	Second Year - FY2024
Administrative and Support Services (79900)	**$6,124,171**	**$6,148,833**
General Management and Direction (79901)	$3,690,527	$3,690,527
Information Technology Services (79902)	$2,433,644	$2,458,306
Fund Sources:		
General	$6,000,865	$6,000,865
Enterprise	$123,306	$147,968

Authority: Title 2.2, Chapter 11 and Chapter 24, Article 1, Code of Virginia.

A.1. The Department shall lead, provide administrative support to, and convene an annual public body procurement workgroup to review and study proposed changes to the Code of Virginia in areas of non-technology goods and services, technology goods and services, construction, transportation, and professional services procurements. The workgroup shall consist of the Director of the Department of Small Business and Supplier Diversity, Director of the Department of General Services, the Chief Information Officer of Virginia Information Technology Agency, Commissioner of the Virginia Department of Transportation, Director of the Department of Planning and Budget, the President of the Virginia Association of State Colleges and University Purchasing Professionals (VASCUPP), the President of the Virginia Association of Governmental Purchasing or their designees; a representative from the Office of the Attorney General Government Operations and Transactions Division, a staff member of the Virginia House Appropriations Committee, Senate Finance and Appropriations Committee, and Division of Legislative Services.

2. The workgroup is charged with hearing legislation referred by letter from the Chairs of the House Rules, General Laws, and Appropriations Committees, and Chairs of the Senate Rules, General Laws and Technology, and Finance and Appropriations Committees. The workgroup will hear from stakeholders identified by the patron of the referred legislation and other interested individuals to discuss the legislation's impacts to: 1) small businesses to include women and minorities; 2) the Commonwealth's budget; and 3) the Commonwealth's procurement processes. Such meetings will be open to the public. In addition, the Chairs of the House Rules and House Appropriations Committees and Chairs of Senate Rules and Senate Finance and Appropriations Committees may request the workgroup review procurement related proposals in advance of upcoming legislative sessions to better understand potential impacts prior to the start of the annual General Assembly Session.

B. The Department of General Services, in collaboration with the Virginia Information Technologies Agency, shall inventory state agency call center contractual staffing solutions currently in place, and make recommendations on the benefit of developing a statewide standing call center staffing augmentation contract. The agencies shall report findings and recommendations to the Chairs of the House Appropriations and Senate Finance and Appropriations Committees by December 31, 2022.

Statement to the Public Body Procurement Workgroup
SB 550 – Payment to Subcontractors
July 13, 2023

There is an inherent problem in construction because subcontractors are forced to finance construction projects for about fifty percent of each project. This association has developed a paper, which is available upon request, that shows many subcontractors must expend $247,000 on a $500,000 job before receiving their first payment. How can a business afford to do this?

Some established Subcontractors have learned how to manage their cash flow so that they can front most of the construction costs on a commercial project. This financial structure, however, is deadly for new, minority, women and other disadvantaged subcontractors who want to compete in the marketplace.

The financing problem is systemic, a problem with the entire system; from the funding source, to the owner, to the GC, to the Subcontractor. Unless the Commonwealth finds a solution to this problem, financing will continue to prevent the growth of small and disadvantaged construction subcontractors.

The most important solution this Work Group needs to consider involves the payment of change orders. Change orders are required or requested to complete the project to the owner's satisfaction. Once an owner directs a change order, the general contractor must proceed with that work while the pricing for the extra work is reviewed and accepted by the owner. The change order approval process is commonly delayed for months and may even be used as a negotiating tool at the project close-out. Therefore, the subcontractor, the entity performing the change order, goes deeper into negative cash flow on the project.

No additional work can be directed to be performed ***until*** the necessary additional funds are in the project budget ***and*** the change order has been approved and ready to be funded once the additional work has been completed, (NOT at the end of the project to be used as leverage to offset back-charges, etc.). Until this happens the Subcontractors will continue to finance the additional work performed.

A third issue to address is the elimination of retainage as we now know it. As noted above, subcontractors are already financing 50% of the project. On top of that burden their payment requests are reduced by 5% retainage on public work and 10% on private work until final acceptance.

We ask the workgroup to consider ways to address the funding process, change orders and retainage so that all subcontractors in the Commonwealth can survive and thrive in a healthy construction environment.

Who is ACE – the Alliance for Construction Excellence?

- National Electrical Contractors Association (NECA) – Annandale Virginia
- Mechanical Contractors Association of Metropolitan Washington (MCA)
- Atlantic Coast Chapter – National Electrical Contractors Association (NECA)
- American Subcontractors Association of Metro Washington (ASA)
- Mechanical Contractors Association, Inc. (MCA)
- Iron Workers Employers Association of VA, MD, and D.C. (IWEA)
- Mid-Atlantic Chapter - Sheet Metal and Air Conditioning Contractors' National Association (SMACNA)

Please visit our Website http://allianceforconstructionexcellence.com/

For More Information Contact:

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804-405-8108 or dbailey@capitolsquare.com

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Ike Casey, Executive Director of ASA of Metro Washington

571/237-7101 or ike@asamw.org

*****

JT Thomas, National Electrical Contractors Association and ACE Chairman

(703) 658-4383 or JT@wdcneca.org

Meeting Minutes

Public Body Procurement Workgroup

Meeting # 1

Thursday, July 14, 2022, 9:30 a.m.
Conference Rooms C, D, and E
James Monroe Building
101 N 14th St, Richmond, Virginia 23219

http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/

The Public Body Procurement Workgroup (the Workgroup) met in-person in Conference Rooms C, D, and E in the James Monroe Building in Richmond, Virginia, with Sandra Gill, Deputy Director of the Department of General Services, presiding. The meeting began with remarks from Joe Damico, Director of the Department of General Services, followed by presentations, discussion, and public comment. Materials presented at the meeting are available through the Workgroup's website.

Workgroup members and representatives present at the meeting included Sandra Gill (Department of General Services), Vernice Love (Department of Small Business and Supplier Diversity), Dan Wolf (Virginia Information Technologies Agency), Lisa Pride (Virginia Department of Transportation), Jason Saunders (Department of Planning and Budget), Patricia Innocenti (Virginia Association of Governmental Purchasing), John McHugh (Virginia Association of State Colleges and University Purchasing Professionals), Leslie Haley (Office of the Attorney General), Andrea Peeks (House Appropriations Committee), Mike Tweedy (Senate Finance and Appropriations Committee), and Joanne Frye (Division of Legislative Services).

I. Call to Order; Remarks by Department of General Services

Joe Damico. Director
Department of General Services

Sandra Gill, Deputy Director
Department of General Services

II. Overview of Workgroup Authority and Duties

Jessica Budd, Staff
Department of General Services

Jessica Budd, staff to the Workgroup, provided an overview of the language in the Appropriations Act that establishes the Workgroup, its authority and duties, and it's membership. She explained that the Appropriations Act language directs the Department of General Services to lead, provide administrative support to, and convene an annual public body procurement work group to study and review proposed changes to the Code of Virginia in the areas of non-technology goods and services, technology goods and services, construction, transportation, and professional services procurements. She described the three avenues through which bills or potential legislation may be referred to the Workgroup for study, explained that the Appropriations Act language directs the Workgroup to hear from stakeholders identified by the patron of the referred legislation and other interested parties, and described the factors the that Appropriations Act language directs the Workgroup to consider when studying referred legislation. Finally, Ms. Budd explained that the Appropriations Act language establishes the membership of the Workgroup and she listed the Workgroup members.

III. Introduction of Workgroup Members, Representatives, and Staff

IV. Review of Proposed Work Plan

Jessica Budd, Staff
Department of General Services

Ms. Budd provided an overview of the Workgroup's proposed work plan for the year. She explained that four total meeting are planned for the year, and stated that plan for the first meeting is to begin diving into the two bills that the Workgroup has been directed to study this year by the 2022 Regular Session of the General Assembly.

Ms. Budd gave a brief overview of the first bill, SB 550 from Senator Bell, and explained that the second enactment clause of the bill directs the Workgroup to review whether the issue of nonpayment between general contractors and subcontractors necessitates legislative corrective action and report its findings and any legislative recommendations to the General Assembly on or before December 1, 2022. She noted that Senator Bell would be appearing before the Workgroup shortly to provide more information on SB 550 and his hopes for the Workgroup's study of the bill.

Ms. Budd then gave a brief overview of the second bill, SB 575 from Senator Mason, and explained that the third enactment clause of the bill directs the Workgroup to evaluate the appropriateness of requiring all agencies of the Commonwealth to use a total cost of ownership (TCO) calculator prior to purchasing or leasing any medium-duty or heavy-duty vehicles. She stated that the bill directs the Workgroup to consult with relevant stakeholders, including at least one medium-duty or heavy-duty vehicle technology provider with experience in real-world deployments, and consider (a) the current commercial market for medium-duty and heavy-duty electric vehicles; (b) the unique characteristics of medium-duty and heavy-duty vehicles, including charging infrastructure and operational duty cycles; (c) the potential volume of medium-duty and heavy-duty vehicles purchased by DGS and agencies of the Commonwealth; (d)

the availability of public TCO calculators for medium-duty and heavy-duty vehicles and their suitability for use by DGS and agencies of the Commonwealth; and (e) any other information it determines relevant to its evaluation. She noted that the bill requires the Workgroup to report its findings and any recommendations to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology on or before December 1, 2022. She shared that Senator Mason's Chief of Staff, Baxter Carter, would also be appearing before the Workgroup momentarily to share some remarks about SB 575 on Senator Mason's behalf.

Ms. Budd then provided the tentative meeting dates for the next three Workgroup meetings and shared the anticipated work plans for each meeting. She noted that the second meeting will be dedicated to receiving public comment and presentations from stakeholders and other interested parties on both bill. At the third meeting, the plan is for the Workgroup to consider and discuss all of the presentations, testimony, and written comments and other information that it has received up to that point and begin developing its findings and recommendations on both bills. Finally, at the fourth meeting the plan is for the Workgroup to finalize its findings and recommendations and for staff to provide an overview of the final report for each bill. Ms. Budd concluded by reiterating that the final reports for both bills are due to the General Assembly on December 1, 2022.

V. Presentation on SB 550

The Honorable John J. Bell, Patron
Senate of Virginia

Senator Bell began his remarks on SB 550 by thanking the Administration, the members of the General Assembly, and all of the stakeholders who have been involved with SB 550. He stated that what he and the stakeholders who support SB 550 are trying to do is simple – ensure that subcontractors who do quality work get paid for their work – and that the bill is crafted from laws that have been in existence for thirty or forty years in surrounding states. He acknowledged, however, that the bill was tweaked many times during Session and became difficult and complicated due to all of the working parts and people involved. He stated that oftentimes complicated bills have unintended consequences, and he believes this happened with SB 550. As such, he feels that consideration of the bill by the Workgroup is the key to really getting the bill right. He stated that he is wide open to anything the Workgroup comes up with to make the bill better and concluded his remarks by thanking the Workgroup for their work.

VI. Presentation on SB 575

Baxter Carter, Chief of Staff to The Honorable T. Montgomery "Monty" Mason, Patron
Senate of Virginia

Baxter Carter, Chief of Staff to Senator Mason, shared remarks on SB 575 on Senator Mason's behalf since he was unable to attend the Workgroup meeting. He stated that SB 575 was drafted with the goal of being a cost saving measure for the state. He emphasized that he anticipates the bill will have positive benefits for year to come. He shared that during discussion of the bill, his office was made aware early on that there may be some challenges with applying the provisions of the bill to medium-duty and heavy-duty vehicles. He stated that as the bill moved through the legislative process, concerns mounted about the availability of total cost of ownership (TCO) calculators for medium-duty and heavy-duty vehicles, how effective any such calculators that may exist are, and whether truck manufacturers are ready to be included in the process. He shared that it was for these reasons that medium-duty and heavy-duty vehicles were carved out of the bill and that the enactment clause was added to the bill directing the Workgroup to study these issues. He concluded his remarks by thanking the Workgroup for its efforts and expressing his confidence that the Workgroup will consider the issues thoroughly and produce quality recommendations.

VII. Discussion

Mike Tweedy, staff member of the Senate Finance and Appropriations Committee, asked whether it is common that contractors do not pay their subcontracts and if DGS knows the extent to which it happens. Ms. Gill responded that DGS does not have the information to determine whether it is common or not and noted that one of the purposes of the Workgroup is to gather such information.

Jason Saunders, representing the Department of Planning and Budget, mentioned that SB 550 seems to focus solely on payments between contractors and subcontractors specifically on construction contracts. He asked whether it is the intent of the Workgroup to also focus only on construction contracts, or if the Workgroup intends to look at other types of contracts as well. Ms. Gill responded that she believes it is appropriate to limit the Workgroup's discussion to construction contracts.

VIII. Public Comment

Matt Benka addressed the Workgroup on behalf of the Virginia Contractor Procurement Alliance, which represents many mid-size general contractors in Virginia. He stated that they are very opposed to SB 550 as it relates to private work and emphasized that remedies already exist for instances in which subcontractors are not paid by general contractors. He asked that the Workgroup recommend removing from the bill the portions of it that pertain to private contracts.

Patrick Cushing from Williams Mullen spoke to the Workgroup on behalf of AIA Virginia and ACEC Virginia. He shared that at this point in time his clients do not have a position on the underlying substance of SB 550 because they are uncertain as to whether the provisions of the bill apply to them. Mr. Cushing highlighted for the Workgroup some technical issues with the bill that lead to questions as to whether the terms "construction contract" and "contractor on a construction contract" include "design" and "architects

and engineers," respectively. He noted that Va. Code § 11-4.6 contains definitions of "construction contract," "general contractor," and "subcontractor," but those definitions are not included in the provisions of the bill amending Va. Code § 2.2-4354 in the Virginia Public Procurement Act. He inquired as to whether it was the intent of the bill's patron and the stakeholders who advocated for the bill to have those definitions also apply to Va. Code § 2.2-4354. He reiterated that his clients, who include both firms that act as general contractors and those that act as subcontractors, truly cannot get to a position on the bill until those questions are answered regarding whether the provisions of the bill are intended to apply to them and some language clarifying that issue is added to the bill.

Steven Koerner, Vice President of Policy for AMPLY Power, spoke to the Workgroup on behalf of Advanced Virginia Economy regarding SB 575. He highlighted that often total cost of ownership (TCO) calculators do not take into account opportunities for managed charging of fleets. He stated that unlike many vehicles that have to charge at home or on the go, fleet charging can be managed to reduce overall cost for fleet operation and maintenance. He shared that in their experience, managed charging can reduce fuel costs by up to 85 percent compared to unmanaged charging. Mr. Koerner directed the Workgroup to a white paper that his organization put together that highlights the differences between managed and unmanaged charging and the cost savings that can be realized with managed charging. He emphasized that these cost savings can tip the balance in terms of comparing the total cost of ownership for internal combustion engine vehicles versus electric vehicles. He stressed that managed charging can also assist with managing duty cycles and can lead to higher overall availability of the vehicle.

Paul Denham, the President and CEO of Southern Air, a large mechanical, electrical, and plumbing contractor in Virginia that participates as a subcontractor on both public and private contracts, spoke to the Workgroup in support of SB 550. He stressed that companies like his are often insulated from the owner and are asked by the general contractor to not have any direct contact with the owner. As such, companies like his do not have a seat at the table from which to be able to determine whether there is a problem with the owner or general contractor, whether there is a problem with the project, and whether or not they will be paid. He emphasized that if another subcontractor or the general contractor on a project has a problem and the owner decides not to pay based on a contract breach or a contract problem that may have no relation to his company's performance, the general contractor has the ability to not pay the subcontractors across the board because, in essence, the general contractor has not been paid by the owner. Mr. Denham acknowledged that the bill may need technical amendments, but he asked that the general intent of the bill be left as-is.

Kyler Hedrick, representing the Associated General Contractors of Virginia, stated that during the 2022 Regular Session of the General Assembly his association, which represents both general contractors and subcontractors, tried to get to a point where they could support SB 550, but they were unable to during the truncated timeframe of Session. He expressed his appreciation to the Workgroup for taking on the task of looking at the bill and seeing where it can be improved. He emphasized that his association's three

goals are to protect general contractors, protect subcontractors, and preserve the freedom to contract.

Jack Dyer, President of the Virginia Contractor Procurement Alliance and Chairmen of the Board of Gulf Seaboard General Contractors, spoke to the Workgroup on behalf of both organizations in opposition to SB 550. He began his remarks by noting that the provisions of SB 550 that amend § 2.2-4354 in the Virginia Public Procurement Act do not change the provisions of existing law that require general contractors to pay their subcontractors within seven days after the general contractor has received payment from the state agency or local government for work performed by the subcontractor. As such, he stated that the Virginia Public Procurement Act still establishes a condition precedent for subcontractor payment. He then mentioned that several stakeholders raised the issues of change orders and retainage during Session and in subsequent comments to the Workgroup. He stressed that those issues are entirely different issues than the ones addressed by SB 550. Mr. Dyer then brought to the Workgroup's attention the fact that SB 550 will become effective on January 1, 2023, which is before the General Assembly will have an opportunity to make any changes to the bill. He concluded his remarks by stating that the bill has many problems and by expressing his confusion as to why the General Assembly felt they could overreach and get into the middle of a private contractual relationship between two private parties.

IX. Adjournment

Ms. Gill adjourned the meeting at 10:13 a.m. and noted that the next Workgroup meeting is scheduled for Thursday, July 28, 2022 at 9:30 a.m. in Conference Rooms C, D, and E in the James Monroe Building in Richmond, Virginia.

For more information, see the Workgroup's website or contact that Workgroup's staff at pwg@dgs.virginia.gov.

Appendix C: July 28, 2022 Meeting Materials

This appendix contains the meeting materials from the July 28, 2022 Workgroup meeting.

1. Agenda
2. Written Public Comments
    a. Comments from Brian Conrad, Chief Operating Officer of the Richmond Area Municipal Contractors Association
    b. Comments from the Associated General Contractors of Virginia, Inc.
    c. Comments from Paul Denham, President of Southern Air, Inc.
    d. Comments from the Alliance for Construction Excellence
    e. Comments from Barry E. DuVal, President and Chief Executive Officer of the Virginia Chamber of Commerce
    f. List of Supporters of SB 550
3. Approved Meeting Minutes

Public Body Procurement Workgroup

http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/

Meeting # 2
Thursday, July 28, 2022, 9:30 a.m.
Conference Rooms C, D, and E
James Monroe Building
101 N 14th St, Richmond, Virginia 23219

AGENDA

I. Call to Order; Remarks by Chair

Sandra Gill, Deputy Director
Department of General Services

II. Approval of Meeting Minutes from the July 14, 2022 Workgroup Meeting

III. Public Comment on SB 550

IV. Public Comment on SB 575

V. Discussion

VI. Adjournment

Members

Department of General Services
Virginia Information Technologies Agency
Department of Planning and Budget
Virginia Association of State Colleges and University Purchasing Professionals
Department of Small Business and Supplier Diversity
Virginia Department of Transportation
Virginia Association of Government Purchasing

Representatives

Office of the Attorney General
Senate Finance Committee
House Appropriations Committee
Division of Legislative Services

Staff

Jessica Budd, Legal Policy Analyst, DGS
Jessica Hendrickson, Director of Policy and Legislative Affairs, DGS

Richmond Area Municipal Contractors Association
9702 Gayton Road, Suite 332, Richmond, Virginia 23238
Telephone (804) 346-0522
www.ramca.info

July 27, 2022

To: Public Body Procurement Workgroup

Re: SB 550 (Bell)

On behalf of the many supporters of the SB 550 (Bell), we write to outline the issues and some of the background that led to this legislation being enacted. Our members have increasingly seen "paid if paid" language in contracts for subcontractors, meaning that the general contractor will pay the subcontractor for work once the owner pays the general contractor. This language protects the general contractor in the event of non-payment from an owner, but places subcontractors at risk of non-payment, after they have completed the work. Subcontractors have no relationship with – and are often prohibited from having contact with – an owner. Paid if paid clauses have become ubiquitous in construction contracts, making it harder for subcontractors to work with general contractors that do not utilize them.

We strongly believe subcontractors should not have to bear the lion's share of the risk in these instances and should be compensated for work they perform that is delivered defect free. Subcontractors expend payroll, purchase materials, and purchase or lease equipment, and non-payment puts them at great financial risk. Without SB 550, private projects subcontractors can lien the work and wait for a general contractor and owner to go to arbitration, in the hopes of recouping a fraction of their costs if they are not paid.

For public projects, subcontractors are prohibited from placing liens on the work, and while the risk is less, subcontractors have issues being paid by general contractors on change order work. Most subcontracts require the subcontractor to proceed with change order work under a directive from the general contractor in advance of the public owner approving or funding the change. This provision ensures that the project proceeds without delay but places the burden of financing the change on the subcontractor. It can be months, or even years, before the change gets formalized into an approved change order. SB 550 brings equity to this issue, ensuring the subcontractor gets paid in a timely manner for their change order work.

SB 550 simply levels the playing field on public and private projects, ensuring that subcontractors receive timely payment for the work they perform. It is important to note that many members of our association, and other companies that supported SB 550, also work as general contractors. They too would be required to adhere to the requirements in the bill, and feel they are fair and reasonable.

We met several times with representatives from Associated General Contractors of Virginia (AGCVA) before and during the 2022 session of the Virginia General Assembly to try and find some consensus on the issue. We also had several discussions with the Virginia Contractor Procurement Alliance. Unable to find any middle ground on any meaningful solutions that would remedy the situation, we worked with the Associated Builders and Contractors (ABC) of Virginia, as well as more than 250

Virginia companies and a dozen trade associations on the final product that passed the General Assembly and was signed into law by Governor Youngkin. Supporters of SB 550 are included with this letter.

We appreciate the efforts that DGS, the Virginia General Assembly, and Governor Youngkin and his staff have put into this issue. We also stand ready to work with this workgroup on any outstanding issues related to nonpayment between general contractors and subcontractors.

Best Regards,

Brian Conrad

Chief Operating Officer, Lee Hy Paving
President of RAMCA 2022 - 2023

July 26, 2022

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

Dear Public Body Procurement Workgroup Members,

On behalf of the Associated General Contractors of Virginia (AGCVA), we appreciate the opportunity to provide public comment on Senate Bill 550, which prohibits pay-if-paid provisions from construction contracts.

As the trade association that represents both general contractors and specialty contractors, AGCVA is in the unique position of representing members on both sides of the issue. AGCVA recognizes the issue of subcontractors not being paid for work completed. AGCVA's guiding principles have been to find a solution that 1) protects general contractors, 2) protects specialty contractors, and 3) preserves the freedom to contract.

When SB 550 was filed during this year's legislative session, AGCVA found fundamental and technical issues that were difficult to resolve within the limited timeframe of session. Despite good-faith efforts on both sides to reach a compromise and several revisions that moved the legislation in a positive direction, AGCVA still had several concerns with the final bill.

The General Assembly's decision to delay the bill's enactment and refer it to this workgroup has afforded stakeholders the valuable time needed to continue working toward a solution that serves the greatest amount of people in the industry without creating unintended consequences. Today, AGCVA is pleased to share several recommendations for the workgroup to consider:

1. **Provide contractors the ability to fully analyze an owner's financial situation.**

   As written, SB 550's prohibition of pay-if-paid provisions shifts an undue portion of the financial risk of a construction project from owners and subcontractors to the general contractor. Given the increased risk, it seems reasonable to provide general contractors the prerogative to vet an owner's financial situation as comprehensively as possible prior to committing to a contract.

   However, despite a rigorous vetting process, it is currently impossible for a general contractor and his or her subcontractors to know the full scope of an owner's finances. Owners currently have the discretion to strike financial disclosure clauses from contracts, which leaves all contractors little recourse for full financial transparency. From AGCVA's perspective, if pay-if-paid clauses are deemed unenforceable in Virginia, an owner's ability to strike financial disclosure clauses from contracts should also be unenforceable.

   Further, the workgroup could consider a mechanism for payment guarantee from the owner. Owners routinely require general contractors to purchase a payment bond and general contractors may require similar of their subcontractors, so requiring something similar of owners could help mitigate the increased risk of the general contractor.

2. **Establish consistency and clarity of the payment conditions for the owner-general contractor-subcontractor relationship.**

While SB 550 was introduced to address issues of nonpayment, the inconsistent payment conditions as outlined in the legislation could make compliance more difficult and would likely generate more disputes.

Section B of §11-4.6 outlines a straightforward timeline for an owner to pay a general contractor, stipulating payment "within 60 days of the receipt of an invoice following satisfactory completion of the portion of work for which the general contractor has invoiced." It then permits withholding by the owner "for the general contractor's noncompliance with the contract" and requires written notice of withholding payment "with reasonable specificity."

However, section C establishes inconsistent and more convoluted payment conditions from higher-tier contractors to lower-tier contractors:

- While Section B only applies to construction contracts (a defined term), Section C applies to "any contract in which there is at least one general contractor and one subcontractor." This difference in language is a potential source of confusion.

- Instead of the Section B language of "receipt of an invoice following satisfactory completion," the payment timeline in Section C runs from "60 days of the satisfactory performance of the work for which the subcontractor has invoiced or seven days after receipt of amounts paid … for work performed by a subcontractor pursuant to the terms of the contract." The language defining the timeline for payment differs from Section B, leading to inconsistency, confusion, and different timelines and conditions for payment.

- The higher-tier contractor's ability to withhold payment in Section C appears to be more limited than an owner's ability to withhold payment in Section B for no apparent reason. In fact, it requires a high-tier contractor to understand what portion of its work was performed by sub-subcontractors, which is often unrealistic and not always readily apparent on a project. The standard for withholding by an owner set forth in Section B should equally apply to higher-tier contractors in Section C.

The issues with the confusing language and inconsistent requirements on payment timelines and conditions could be vastly improved by simply mirroring the payment timeline language from section B and using it in section C.

3. **Amend Virginia's mechanic's lien statute to make it a more accessible recourse for payment.**

A mechanic's lien is a tool that all contractors can and do utilize to ensure payment for work completed. While lien rights exist in every state to provide contractors a recourse for payment, Virginia's mechanic's lien statute is unnecessarily limited. First, the deadline to file a mechanic's lien is only 90 days. Second, the mechanic's lien can only include sums for labor and materials furnished within 150 days prior to the last date they were furnished. Even worse, a single unintended error that breaches the 150-day rule would invalidate the entire mechanic's lien. Given the harsh consequences, the 150-day rule does not seem to serve a practical purpose other than to arbitrarily obfuscate the process to file a mechanic's lien. Virginia is the only state with this 150-day rule.

With the added burden that contractors now face to make payment even when an owner may not have paid for work performed, the mechanic's lien statute should also clarify that the higher-tier contractor can take an assignment and enforce the lien of the lower-tier contractor in order to better protect themselves and encourage payment. Such a right may exist in common law, but the better course of action is to make Virginia's mechanic's lien law clear on this issue.

While SB 550 does not specifically address the mechanic's lien statute, AGCVA recommends amending it to strike the 150-day rule, extend the deadline to 120 days, and expressly permit a right of assignment of a lien. These revisions would strengthen Virginia's mechanic's lien statute and better equip contractors regardless of tier with a more formidable recourse for payment.

AGCVA envisions an environment where the risks of a construction contract are minimized and equitably shared between owners, general contractors, and subcontractors. Thank you for your consideration of AGCVA's recommendations, and please do not hesitate to reach out if you have any questions.

Sincerely,

The Associated General Contractors of Virginia (AGCVA)
11950 Nuckols Road
Glen Allen, Virginia 23059

Southern Air, INC.

2655 Lakeside Drive • P.O. Box 4205 • Lynchburg, VA 24502 • (434) 385-6200 • Service Division (434) 385-7700
http://southern-air.com • License Numbers: VA 2701001733 • WV 001545 • NC L.34582 & U.33082

Statement to the Public Body Procurement Workgroup
SB 550 – Payment to Subcontractors
July 28, 2022

Southern Air is a large mechanical and electrical subcontractor operating primarily in the Commonwealth of Virginia. We contract with General Contractors and Construction Managers for both public and private projects of widely varying amounts ranging up to $25 million. I am speaking in support of SB 550 as passed. As a matter of principle, Southern Air will not sign an unconditional Pay if Paid clause with any contracts. We make this intent clear in any preproposal meetings and it is included in all our proposal letters. We will accept Pay if Paid only on the condition of insolvency or bankruptcy of the owner. We spend an inordinate amount of time negotiating this one item and always get the modifications approved in our contract. Many smaller subcontractors do not have the sophistication to perform these negotiations or feel powerless with a much larger customer and relent to the standard contract terms and sign pay if paid clauses. This exposes them to undue risk in the project and would likely bankrupt any of these companies with a single nonpayment event of any size. This nonpayment could be from no fault on their part. This includes many SWAM subcontractors that are being placed at risk just when the Commonwealth is trying to increase their numbers and support their growth. Over the last twenty-five years, Southern Air cannot attest to any nonpayment in this area because we refuse to sign contracts with these clauses as they have become more prevalent.

Many prime contractors have argued the mechanics lien laws provide protection for the lower tier subs. The mechanics lien laws do now contain language which supersedes the pay if paid clauses. This provides protection only if a lower tier subcontractor who can follow the highly time sensitive mechanics lien requirements. If a subcontractor is not timely or does not perfect the lien exactly as the law demands this protection is void. Following these lien laws is difficult at best for a highly sophisticated lower tier sub, which is why liens are often prepared and filed by attorneys. This is an additional and often unaffordable expense to small subcontractors. It is very difficult for a smaller sub who is just trying to run their business. This is another fact that puts SWAM subcontractors at risk. By the letter of the law there is protection under the mechanics lien, however, the reality of perfecting these liens is very challenging in real time. Further, liens are only available on private projects. On public projects, payment bonds provide some protection, but the state of the law is unclear on whether bond sureties can rely on pay if paid clauses in subcontracts.

Southern Air, INC. 2655 Lakeside Drive P.O. Box 4205 Lynchburg, VA 24502-0205 (434) 385-6200

The pay if paid clause is used by prime contractors to shift risk down to subcontractors. This forces the subcontractor community to provide financing for the project, an unreasonable burden when the owner's virtually sole obligation in a construction project is to finance the work. The American Bar Association states these clauses "are customarily viewed extremely disfavorably; as the risk transfer downward to the lower tier subcontractors is usually viewed as inequitable and patently unfair." They go on to state the shifting or risk to lower tier subs is also unfair because they are not in privity with the owner and unable to enforce payment clauses in the prime contract. We often find clauses in our subcontracts where the prime will forbid us from communicating with the owner. How are we, as a lower tier sub, able to evaluate the risk at the beginning or throughout a project if we do not have any direct contract or knowledge of the owner and the owner/prime contractor relationship. The Prime contractor is the Captain of the ship and should act as such and not pass the buck to his crew, the lower tier subs, who have no vision of the voyage.

As subcontractors, we must pay our employees on a weekly basis. We must pay our equipment and material vendors typically within thirty days of receipt of any equipment or materials. These vendors perform credit evaluations of our company and would not be willing to accept agreements with us that state we will pay them if and when we get paid. Our obligations to our employees are similarly restricted – they would not work for us if we told them their paychecks were at risk every pay period if a GC failed to pay us. Why should the lower tier subcontractors bear the potential burden of financing the project any further if for some reason the owner is unwilling to pay the Prime. This nonpayment could be for a dispute about problems with the prime contractor or other subcontractors and no fault of ours. These clauses put all subcontractors at undue risk for a situation over which they have no control. Why is it fair for a prime contractor who typically in today's construction world has very little skin in the game in that they self-perform little if any of the construction in the field. Most prime contractors have very few employees on the project and buy very little in the way of equipment and materials. The prime contractors' financial exposure is very small in comparison to all the lower tier subcontractors on the project. These clauses put the firms doing all the work at risk for nonpayment with no control over the situation. How is this fair?

In summary, we feel the General Assembly got this one right. The responsibility for payment should remain with the prime who has contracted with the owner. This law complements similar legislation with our neighbors in North and South Carolina. We ask the working committee to allow this law to stand as written. It is only fair to ask the prime to fulfill his duty as captain of the ship.

Paul Denham, President
Southern Air
(434) 385-6200
paul.denham@southern-air.com

2nd Statement to the Public Body Procurement Workgroup
SB 550 – Payment to Subcontractors
July 28, 2023

ACE and ASAMW respectfully ask that this work group re-frame their discussion on nonpayment. SB550 addresses the major problem of a subcontractor not receiving payment for work properly completed according to the construction documents. Because of SB550 the subcontractor will not be the sole entity responsible for payment. SB550 places the general contractor and owner in a position to also accept responsibility for payment for work completed.

The larger issue this work group should address is change orders; in other words, how to assure subcontractors receive timely payment when the owner directs a change to the construction that is not included in the scope of the subcontractor's work. This is a major issue on both public and private contracting and a major issue in non-payment between general contractors and subcontractors.

ACE and ASAMW suggest that this work group initiate a study to determine:

1. The magnitude of the problem of payment of change orders on state construction.
2. How payment issues such as payment of change orders prevents small, disadvantaged and minority subcontractors from successfully competing on construction projects for the Commonwealth.
3. Possible solutions other states have used to insure payment to subcontractors.

ACE and ASAMW will assist with this study as much as possible.

Who is ACE – the Alliance for Construction Excellence?

- National Electrical Contractors Association (NECA) – Annandale Virginia
- Mechanical Contractors Association of Metropolitan Washington (MCA)
- Atlantic Coast Chapter – National Electrical Contractors Association (NECA)
- American Subcontractors Association of Metro Washington (ASA)
- Mechanical Contractors Association, Inc. (MCA)
- Iron Workers Employers Association of VA, MD, and D.C. (IWEA)
- Mid-Atlantic Chapter - Sheet Metal and Air Conditioning Contractors' National Association (SMACNA)

For More Information Contact:

David Bailey, David Bailey Associates

804-405-8108 or dbailey@capitolsquare.com

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Fred Codding, Iron Workers Employers Association, Fairfax, VA

703/591-1870 or fhcodding@erols.com

*****

Ike Casey, Executive Director of ASA of Metro Washington

571/237-7101 or ike@asamw.org

*****

JT Thomas, National Electrical Contractors Association and ACE Chairman

(703) 658-4383 or JT@wdcneca.org

VIRGINIA CHAMBER

THE VOICE of BUSINESS

July 27, 2022

Public Body Procurement Workgroup
Department of General Services
James Monroe Building
101 N 14th St.
Richmond, Virginia 23219

Dear Workgroup Members:

With more than 28,000 member companies, the Virginia Chamber of Commerce is the leading non-partisan business advocacy organization in the Commonwealth. The Chamber is dedicated to working with our state leaders to champion long-term economic growth in Virginia. I write to provide public comment regarding your review of SB 550.

The Virginia Chamber has members who are owners of projects, members who are contractors, and members who are subcontractors. Therefore, the Chamber has widespread interest among our membership in this legislation. We are grateful to Senator Bell, Delegate Wiley, and Governor Youngkin and his team for their work on this legislation.

SB 550 deals with both public sector construction contracting and contracts for construction projects between private companies. As you also know, the Public Body Procurement Workgroup was created to evaluate changes to the public procurement process and is made up of individuals with expertise in public procurement.

We hope, as you consider the issues with which you are charged by the General Assembly, that you will seek significant private sector input for any proposed changes related to private party construction contracts. We hope this input will include representatives of the owner community, the contractor community, and the subcontractor community.

Virginia is proud of its pro-business reputation, and an important part of preserving our business climate is ensuring that the state does not create regulatory burdens or excessive constraints in the dealings between private actors in business transactions.

Thank you for your work on these important issues.

Best regards,

Barry E. DuVal
President and CEO

SUPPORTERS OF SB550

Trade Associations

Associated Builders and Contractors - Virginia Chapter (ABC VA)

Alliance for Construction Excellence (ACE)

American Subcontractors Association (ASA)

Hampton Roads Utility and Heavy Contractors Association (HRUHCA)

Heavy Construction Contractors Association (HCCA)

Iron Workers Employers Association (IWEA)

Old Dominion Highway Contractors Association (ODHCA)

National Electrical Contractors Association (NECA) – Atlantic Coast Chapter

Precast Concrete Association of Virginia (PCAV)

Sheet Metal and Air Conditioning Contractors Association (SMACNA) – Mid-Atlantic Chapter

Richmond Area Municipal Contractors Association (RAMCA)

Virginia Asphalt Association (VAA)

Corporations

A&A Contractors, LLC.
A&M Drywall Construction Inc.
Abbey Commercial Flooring
Ace Hydroseeding
Acme Mechanical Contractors of VA, Inc.
Advanced Drainage Systems, Inc.
Airway Sheet Metal Company, Inc.
Aldridge Electric, Inc.
Alkat Electrical Contractors, Inc.
Alpha & Omega Hauling, LLC.
Anderson Mechanical Services, Inc
Annandale Balancing Company, Inc
Annandale Millwork and Allied Systems Corporation
Atlantic Constructors
Austin Electric Company
AVA Electric Co., Inc.
B.G. Nelson, Inc.
B&S Contracting, Inc.
Badger Daylighting Corp
Bagby Electric of Virginia Inc.
Barfield Concrete, Inc
Beckstrom Electric
Bell Companies
Benchmark Utility Services
BESCO Electric
Biggs Construction Company, Inc.
BION, inc.
Bissette Construction Corporation
Blackwater Electric
Blair Brothers, Inc.
Blakemore Construction Corporation
Blasting Services, LLC.
Blue Ridge Roofing, Inc.
Boring Contractors, Inc.
Boschen Masonry
Bract Retaining Walls and Excavating
Branscome Incorporated
Bruce Howard Contracting
Bryant-Ritter Electric Corporation
BSA Contractors LLC
Burnett & Jensen Corp.
C.A. Liebert, Inc.
G&C Quality Plumbing, Inc.
C.T. Purcell Excavating, LLC
Calvert Masonry, Inc.
Canada Contracting Company, Inc.
Carter Machinery
Castle Equipment
Cedar Mountain Stone Corp.
Carl M. Henshaw Drainage Products Inc.
Central Site and Utilities, Inc.
CCCI-Gov, Inc.
CD Hall Construction, Inc.
CEA Insulation, Inc.
Century Concrete
Chemung Contracting Corp.
Chewning & Wilmer
CJGeo

SUPPORTERS OF SB550

Cleveland Cement
Clover Contracting, Inc
Coastal Electric Corp.
Colonial Construction Materials
Colonial-Webb Contractors
Colony Construction, Inc.
Commercial Electric
Commonwealth Landcare
Concreate, Inc.
Concrete Pipe & Precast (CP&P)
Contemporary Electrical Services, Inc.
Cranemasters, Inc.
D.H. Griffin Companies
D.M. Conlon
Dan-Kel Concrete Cutting
Dailey Roofing
Davis & Green, Inc.
Design Electric, Inc.
Dino's Prestige Painting, LLC.
Direct Current
Draper Aden Associates
Drillcore, LLC.
Dwight Snead Construction Company, Inc.
Dynalectric Company
E.G. Middleton, Inc.
E.J. Wade Construction
East River Construction, Inc.
EMC Mechanical Services, LLC.
Engineered Services, Inc
Engineering Design Associates
Ennis Electric Company, Inc.
Environmental Waste Specialists, Inc.
Eric'sons, Inc.
F.G. Pruitt, Inc.
F. Richard Wilton Contractor
Faulconer Construction
Ferguson
Ferrara Equipment
Finish Line Environmental
Firestop of Virginia, Inc.
Folkes Electrical Construction
Fort Meyer Construction
FortyTwo Contracting
Freestate Electric
Fridley Brothers, Inc.
G.L. Howard, Inc.
G.J. Hopkins | Lacy
Gaitan Construction Solutions, Inc.
George Urban Heating & Air
Gillies Creek Industrial Recycling
Glidewell Bros., Inc.
Goodman Excavating, LLC.
H.W. Blankenship & Sons, Inc.
Hallmark Iron Works, Inc.
Haislip Corporation
Hanley Energy
Hazzard Electrical
Howell's Heating & Air
Hudson Sheet Metal Co Inc
Hurricane Fence
Hyper Clean Duct Cleaning LLC
Independence Excavating, Inc.
Integrated Scaffolding Concepts
Instrumentation & Control Systems Engineering, Inc (ICSE)
Iron Sheepdog
Ivener Management Group, LLC
J.E. Liesfeld Contractor, Inc.
J.L. Minter Electrical Contractor
J.R. Caskey, Inc.
J.R. Tharpe Trucking Co., Inc
J.S.G Corporation
James River Air Conditioning Co.
James River Equipment
James River Interiors
James River Nurseries
JE Richards
JRC Mechanical, LLC
Julius Branscome, Inc.
KC Insulation
KP Glass Construction
L2 Construction Services
Landscape Supply, Inc.
LaRs Group
Lawrence Equipment
Lee Hy Paving Corporation
Lloyd Concrete Services, Inc
Long Fence Co., Inc.
Louis Smith Construction
Luck Ecosystems
Luck Stone Companies
M&E Contractors, Inc.
MasTec North America, Inc.
Metheny Contracting, Inc.

SUPPORTERS OF SB550

Mid Atlantic Steel Erectors, Inc
Mid-Atlantic Concrete, Inc.
Miller Electric Company
Momentum Earthworks
Nansemond Pre-Cast Concrete Co., Inc.
Nationwide Electrical Services, Inc.
NET100, Ltd
New Field, Inc.
New River Electrical Corp.
No Days Off, LLC.
NOVA Power Systems
O'Dorisio Carpentry & Concrete, LLC.
Oldcastle Infrastructure
Old Dominion Abatement & Demolition
Old Dominion Firestopping
Old Domion Heat Trace
Old Dominion Insulation
Paramount Mechanical Corporation
Petke Construction Company, Inc.
PerLectric, Inc.
Permatile Concrete Products
Pillar Construction, Inc.
Potomac Testing
Power Solutions
Possie B. Chenault, Inc.
Precision Electric
Preferred Insurance Services, Inc.
Press Mechanical Contractors, Inc.
Preston H. Roberts, Inc.
Pruitt Corporation
Pryor Hauling, Inc.
Quality Wall Systems, Inc.
R-TEC Services, LLC.
Reese Transportation
Richard L. Crowder Construction, Inc.
Richardson-Wayland Electrical Corp.
Richmond Lot Striping & Sealcoating
Richmond Traffic Control, Inc.
River City Site Solutions, LLC.
RJ Smith Construction Inc.
RJ Smith Demolition Inc.
RJ Smith General Contracting Inc
RMM Enterprises
Rosendin Electric, Inc.
RSG Landscaping & Lawncare
RTL Electric Company Inc
Rudy L. Hawkins Electrical
Ruston Paving Company, Inc.
Ryan Incorporated Central
S&B Concrete, Inc.
S.B. Cox, Inc.
S.L. Williamson Company, Inc.
Sargent Corporation
Saunders Contracting Services, Inc
Shoosmith Construction, Inc.
SLS3 LLC
Slurry Pavers, Inc.
Smith, Currie & Hancock LLP
Southers Concrete, Inc.
Southland Industries
Southland Insulators, Inc.
Sparkle Painting Co., Inc.
Stable Foundations
Stamie E. Lyttle Co.
Stanley Construction Co, Inc.
SteelFab of Virginia, Inc.
Steele Foundation, LLC
Stillwater Construction Group
Stocks Management Group
Superior Iron Works, Inc.
Tate & Hill
Thompson Greenspon
Timmons Group
Titan Mechanical Inc.
Titan Plumbing, Inc.
Tribble Electric, Inc.
Tolley Electrical Corporation
Torque Supply
Ty's Hauling & Paving, Inc.
Tysons Service Corporation
United Masonry, Incorporated of Virginia
USA Civil Inc.
USA Iron and Metal Inc.
USA Logistics and Leasing Inc.
USA Materials Inc.
Venture Electric Company
W.E. Jackson Electrical Contractor
W-L Construction & Paving, Inc.
W.O. Grubb Steel Erection, Inc.
W.R. O'Neal Electric, Inc.
W.S. Connelly & Co., Inc.
Wayne Insulation Co., Inc.
WC Spratt, Inc.
Wells Paving & Seal Coating

SUPPORTERS OF SB550

Whitescarver Engineering Co.
William T. Cantrell, Inc.
William A. Hazel Incorporated
Wolf Contractors Inc
Woodfin Heating, Inc.
Wright's Iron, Inc.
WW Nash
Yard Works
Youngblood, Tyler & Associates, P.C.

Meeting Minutes

Public Body Procurement Workgroup

Meeting # 2

Thursday, July 28, 2022, 9:30 a.m.
Conference Rooms C, D, and E
James Monroe Building
101 N 14th St, Richmond, Virginia 23219

http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/

The Public Body Procurement Workgroup (the Workgroup) met in-person in Conference Rooms C, D, and E in the James Monroe Building in Richmond, Virginia, with Sandra Gill, Deputy Director of the Department of General Services, presiding. The meeting began with remarks from Ms. Gill, followed by public comment. Materials presented at the meeting are available through the Workgroup's website.

Workgroup members and representatives present at the meeting included Sandra Gill (Department of General Services), Matthew James (Department of Small Business and Supplier Diversity), Joshua Heslinga (Virginia Information Technologies Agency), Lisa Pride (Virginia Department of Transportation), Jonathan Howe (Department of Planning and Budget), Patricia Innocenti (Virginia Association of Governmental Procurement), John McHugh (Virginia Association of State Colleges and University Purchasing Professionals), Leslie Haley (Office of the Attorney General), Kim McKay (House Appropriations Committee), and Adam Rosatelli (Senate Finance and Appropriations Committee). Joanne Frye, representing the Division of Legislative Services, was absent.

I. Call to Order; Remarks by Chair

Sandra Gill, Deputy Director
Department of General Services

Ms. Gill called the meeting to order and asked each of the Workgroup's members and representatives to introduce themselves. Ms. Gill then reminded the Workgroup's members and representatives that they are welcome to ask the stakeholders questions as they provide their comments, and reminded them that this is their opportunity to obtain clarification on the issues before the Workgroup so that the Workgroup will have all of the information that it needs in order to make informed decisions and recommendations at the Workgroup's final meeting. She also requested the stakeholders to direct their comments to the Workgroup's members and representatives, and to be respectful of the other stakeholders when providing their comments.

II. Approval of Meeting Minutes from the July 14, 2022 Workgroup Meeting

Mr. Heslinga made a motion to approve the meeting minutes from the July 14, 2022 meeting of the Workgroup. The motion was seconded by Ms. Pride and unanimously approved by the Workgroup.

III. Public Comment on SB 550

Next, Workgroup heard public comment from stakeholders on SB 550. It began by hearing comments from stakeholders in support of SB 550.

The first stakeholder to comment in support of SB 550 was Lew Bryant with J.E. Liesfeld Contractor, Inc. Mr. Bryant shared that stakeholders began meeting to discuss the issues behind SB 550 in October 2021, which was several months before the start of the 2022 Regular Session of the General Assembly. He noted that after several rounds of discussion, there seemed to be no common ground among all of the stakeholders. As a result, the supporters of the ideas behind SB 550 then found themselves in front of the legislature lobbying for the bill during Session. He stated that he believes that the final version of SB 550 is fair to both subcontractors and general contractors, and appropriately reassigns the financial risks associated with construction. He noted that it has been suggested that there are problems with the language of the bill, but he stated that he disagrees with such suggestions. He stressed that the intent of the bill is to guarantee payment to subcontractors for work properly done. He urged the Workgroup, in whatever decision they may make, to keep the intent of the bill alive and not let it be diminished into something that is not effective and other than what was originally intended.

The second stakeholder to comment in support of SB 550 was Fred Codding with the Iron Workers Employers Association (IWEA). He also spoke on behalf of the Alliance for Construction Excellence (ACE). He stated that nonpayment between general contractors and subcontractors is a frequent issue, and that it often arises in the context of nonpayment or extremely slow payment for change orders and retainage. He expressed that it is unfair that the payment of change orders and retainage puts all of the burden on the subcontractor. He noted that a number of other states have also addressed prompt pay issues, and that these are complicated issues that need to be addressed in order for small, minority, and disadvantaged subcontractors to be successful on public work in the Commonwealth. He stressed that state agencies are often the major culprit behind the nonpayment issues. He shared that his organization's recommendation to the Workgroup is that it initiate a study to determine how small businesses can be treated fairly in the payment for work done, for change orders, and for retainage. Mr. Codding discussed the history of "pay-if-paid" and other clauses that disadvantage subcontractors that are included in contracts between general contractors and subcontractors, and noted how the General Assembly has taken action over the years to pass laws deeming such clauses void and unenforceable in order to protect subcontractors and their suppliers. He argued that SB 550 falls in line with those actions by the General Assembly.

The third stakeholder to comment in support of SB 550 was Paul Denham, the President and CEO of Southern Air. Mr. Denham explained that if companies such as his sign contracts with pay-if-paid condition precedent clauses, which are the subject of SB 550, they are giving away significant rights at the end of a job if something goes wrong. He stated that it is rare that something does in fact go wrong on a job and these clauses end up coming into play, but when it does, they cannot afford to have signed away their right to compensation. He stressed that the problem on a job that is causing nonpayment may not have even been a result of something that his company did, but instead the result instead of something the general contractor or another subcontractor has done. He concluded his remarks by stating that he believes SB 550 is fair as written because it covers the responsibility on the owner to pay the general contractor and on the general contractor to pay the subcontractors.

The fourth stakeholder to comment in support of SB 550 was Joe Piacentino with Colonial Webb Contractors Co. He shared that his company works with both owners and general contractors on both public and private projects in Virginia. He stressed that if his company does not pay its employees weekly and their vendors timely, their employees will not report for work and the vendors will stop supplying the materials they need for their projects. Additionally, he stated that they often subcontract portions of their work to small, minority, and disadvantaged businesses, and his company cannot withhold payment to such businesses because such businesses do not have the cash flow to finance the work while everyone awaits payment from the general contractor. He stated that most of their customers pay them within a reasonable amount of time, but occasionally a general contractor will not pay them for months or even years, citing the contractual pay-if-paid condition precedent clause as the reason for not paying.

Mr. Piacentino explained that as a subcontractor, his company has no relationship with the project owner who ultimately funds the work. He stressed that general contractors are in the best position to vet the ability of an owner to pay, but, nevertheless, general contracts traditionally pass the risk of nonpayment by the owner down to the subcontractors who are doing the work. He further noted that when an owner runs out of money or cannot secure permanent financing to finish a project, by the time payment to the subcontractor becomes past due, the subcontractor typically has several months of work in place before the subcontractor is contractually permitted to stop work. He emphasized that SB 550 motivates the general contractor to do a better job of managing payment risk and stopping the subcontractor from working as soon as the owner stops funding the job. He acknowledged that on private work subcontractors have the option of filing a lien when there is nonpayment, but he stressed that pursuing the lien takes years of civil litigation during which the subcontractor must still cash flow the project.

Mr. Piacentino then discussed change orders. He explained that most contracts between subcontractors and general contractors require subcontractors to perform change order work under a construction change directive before the general contractor secures a change from the owner. He shared, as an example, that his company is currently working on a public project in Virginia on which they have done $1.4 million worth of change order work directed by the general contractor. He stated that the general contractor is in a

dispute with the public owner about whether the work constitutes a change to their contract. Meanwhile, his company has funded the work for over a year without being paid in order to keep the job on schedule and install systems that will work in the building. He emphasized that if the general contractor is ultimately unable to negotiate a change order with the public owner, his company will have to seek recovery through arbitration. He stressed that SB 550 would have kept his company paid and kept the project moving, and would have motivated the general contractor to work harder with the owner to resolve their differences. He concluded his remarks by stressing that SB 550 is absolutely necessary in Virginia to ensure that subcontractors who actually do the work on a project get paid in a timely manner.

The final stakeholder to comment in support of SB 550 was Carson Rogers with Chewning + Wilmer, Inc., an electrical construction contractor and subcontractor that has been in business in Richmond, Virginia since 1924. He stated that there is no fair reason for pay-if-paid clauses to be in contracts between general contractors and subcontractors, and they simply serve the industry at a point above subcontractors. He stressed that the issue of the financial stability of a project is an issue that is not within the control of the projects' subcontractors. Like other commenters, he stated that his company cannot force pay-if-paid clauses down on his employees and suppliers, and stressed the importance of cash flow. Mr. Rogers emphasized that the supporters of SB 550 are simply asking for a fair contracting opportunity. He shared that during his career he has experienced very limited success in trying to negotiate with general contractors for better and fairer contract terms.

Mr. Rogers then discussed change orders. He explained that language in the contract between the general contractor and the subcontractor often permits the general contractor to require the subcontractor to change the work prior to the general contractor negotiating a proper contract amendment with the owner. He stressed that there are occasions where the general contractor may be at fault for directing the subcontractor to initiate the change in work. Mr. Rogers questioned the motivation of the general contractor to resolve disputes with owners over change orders, especially in situations where the general contractor may have been at fault.

Mr. Rogers concluded his remarks by reiterating that the supporters of SB 550 are simply asking to be paid for their work that has been properly and timely completed. He encouraged general contractors, going forward, to work with reputable vendors and properly vet them before entering into a contract with them.

The Workgroup then heard comments from stakeholders in opposition to SB 550. The only stakeholder to testify in opposition was Jack Dyer, President of the Virginia Contractor Procurement Alliance and Chairman of the Board of Gulf Seaboard General Contractors. Mr. Dyer stressed that he is very opposed to the bill. He began his comments by recalling testimony from Senator Bell, the patron of SB 550, during Session in which Senator Bell explained that SB 550 is targeted at large out-of-state general contractors who are coming into Virginia to do work and who are leaving without paying their subcontractors. Mr. Dyer stressed that Senator Bell acknowledged that there is not an

issue of nonpayment by Virginia companies. Mr. Dyer also referenced comments made by stakeholders in support of SB 550 earlier in the Workgroup meeting in which they stated that the issue of nonpayment between general contractors and subcontractors is rare.

Mr. Dyer then reiterated some of his prior comments from the Workgroup's previous meeting. He strongly emphasized his confusion as to why the General Assembly believes that it can overreach and get into the middle of a private contractual relationship between two private parties. He stressed that contracts are legal agreements entered into by the parties to the contract, and if one of the contracting parties does not like some or all of the terms of the contract, such party should not sign the contract. He also reiterated his previous comments that the issues of change orders and retainage, mentioned by several of the stakeholders who commented in support of SB 550, are not addressed by SB 550.

Next, Mr. Dyer expressed concern that the provisions of SB 550 will hurt small businesses. He stated that in light of the changes made by SB 550, general contractors are now going to become very selective about which subcontractors they will work with in order to mitigate their risk. He stressed that general contractors are going to contract only with subcontractors who can provide payment and performance bonds and who are capable of doing the work. Mr. Dyer further stated that SB 550 will hurt small general contractors because they do not have the cash flow to pay their subcontractors prior to receiving payment from the owner. He also expressed his concern that higher risk will mean higher costs across the board.

Mr. Dyer then addressed existing remedies for nonpayment by general contractors and made some recommendations for additional remedies that could be explored in lieu of the policy in SB 550. Mr. Dyer stressed that there are existing remedies for nonpayment by general contractors (e.g. filing a lawsuit for breach of contract in court, filing a lien, pursuing performance and payment bonds, etc.) and stressed that subcontractors need to utilize those remedies and take whatever action is needed to perfect their claims. He recommended that if subcontractors want to enhance their ability to resolve issues of nonpayment with general contractors, subcontractors should ask the General Assembly to enhance the laws governing those existing remedies rather than pursue the policy in SB 550. Mr. Dyer then highlighted another potential remedy for subcontractors to pursue if they have not been paid by general contractors. He explained that every contractor in Virginia is required to obtain a contractor's license from the Board of Contractors (the Board) at the Department of Professional and Occupational Regulation. He shared that both the Board's regulations and the Code of Virginia list certain acts that licensed contractors are prohibited from doing. He suggested strengthening those regulations and/or Code provisions to further prohibit licensed contractors from not paying their subcontractors. As a result, if a general contractor were to not pay a subcontractor, the subcontractor could file a complaint with the Board regarding nonpayment by the general contractor and the Board could revoke the general contractor's license. He emphasized that the threat alone of potentially losing their license may motivate general contractors to quickly and fairly resolve disputes over nonpayment.

Mr. Dyer concluded his remarks by emphasizing that as a general contractor for forty years, his company has paid their subcontractors and wants to maintain great relationships with their subcontractors. He stressed that they want to be a part of the solution for making sure that subcontractors get paid, but SB 550 is not the solution.

The Workgroup then heard comments from stakeholders who either support SB 550 in part and oppose it in part, or are neutral as to its provisions.

The first stakeholder to comment was Brandon Robinson with the Associated General Contractors of Virginia (AGCVA). He explained that AGCVA is a trade association that represents general contractors, specialty contractors, and anyone within the industry that works in commercial construction. He shared that from the beginning of the conversation on SB 550, AGCVA has acknowledged that nonpayment is an issue for subcontractors and has sought to find a solution to the problem that follows three principles – it (i) protects subcontractors, (ii) protects general contractors, and (iii) protects the freedom to contract as much as possible. He emphasized that those three principals have guided their efforts to try to find a reasonable solution that shares the risk.

Mr. Robinson highlighted that in trying to find a solution to the issue of nonpayment, it is first important to acknowledge the root of the issue. Candidly, he stated that the root cause of the issue lies with owners who do not pay. The issue then becomes how the nonpayment trickles down to the general contractor and subcontractors. Mr. Robinson shared that AGCVA has three suggestions for improving SB 550 or otherwise making changes to the law that could help to address the issue of nonpayment in a way that shares the risk throughout the parties involved. He stated that AGCVA arrived at these recommendations by bringing together their members, who are both subcontractors and general contractors, in a room multiple times to work through the issue and try to find solutions that they could all agree upon.

The first recommendation Mr. Robinson discussed is to provide contractors with the ability to fully analyze an owner's financial situation. He explained that SB 550 prohibits pay-if-paid clauses in contracts between general contractors and subcontractors, and this in turn shifts an undue portion of the financial risk of a construction project from owners and subcontractors to the general contractor. He argued that given this increased risk, general contractors should be given tools to vet an owner's financial situation as comprehensively as possible prior to committing to a contract. Additionally, Mr. Robinson suggested that general contractors could consider requiring a payment bond from owners to help mitigate their increased risk.

The second recommendation Mr. Robinson discussed pertains to the text of SB 550 itself and is more technical in nature. Mr. Robinson briefly explained that AGCVA believes the language in subsections B and C of § 11-4.6 needs to be made more consistent. Creating such consistency, he noted, would lead to more clarity and fairness in spreading the financial risk of nonpayment by the owner down throughout the tiers.

Finally, Mr. Robinson explained that the third recommendation is to amend Virginia's mechanics lien statute to make it a more accessible recourse for payment. He noted that in comparison to other states, Virginia's mechanics lien statute is unnecessarily limited. He stated that Virginia is the only state in the country that has a 150-day lookback period, and that this really limits the ability of subcontractors, especially those that might be on the jobsite early in a job, to perfect the lien. He shared that North Carolina, which is often pointed to as an example of a state that has prohibited pay-if-paid clauses since the late 1980s, has a longer timeline for their mechanics liens - they allow up to 120 days, whereas Virginia is capped at 90 days. Mr. Robinson concluded by emphasizing that these sets of recommendations represent ideas that all contractors could agree upon to enable the financial risk of a project to be shared more fairly throughout the tiers and prevent the issues that were the impetus for SB 550.

The next stakeholder to comment was Patrick Cushing with Williams Mullen, speaking on behalf of the American Institute of Architects of Virginia (AIA VA) and the American Council of Engineering Companies of Virginia (ACEC VA). Mr. Cushing referenced his prior comments at the Workgroup's previous meeting regarding his concerns about how some of the language in SB 550 applies on the design side of contracting, as well as his concerns regarding some discrepancies in the definitions that apply to § 2.2-4354 versus § 11-4.6. He shared that since the last meeting of the Workgroup, it became clear after a discussion among his organization's membership that if the intent of the bill is for it to only apply to the contractor community in terms of traditional construction (general contractor-subcontractor relationship) and not design services or the design vertical in design-bid-build scenarios, his organizations would like to make sure that such intent is clarified in the bill. He stated that there are going to be some situations in design-build and other alternative procurements in which a design firm may sit as a subcontractor or in the seat of the general contractor, and at this time his organizations are neutral on those substantive portions of the bill. They plan to stay engaged, however, to ensure that the language in this bill addresses what everyone believes it is intending to address.

Mr. Cushing concluded his remarks by sharing that he has heard varying interpretations and perspectives on what the provisions of SB 550 do and do not do, and to whom it does and does not apply. He suggested that it may be beneficial to have a presentation to the Workgroup outlining the provisions of the bill and their application to assist the Workgroup with understanding the bill and therefore being able to evaluate it. He reminded the Workgroup that the second enactment clause of SB 550 makes the Workgroup responsible for determining whether there needs to be any legislative changes to the bill.

The final stakeholder to comment on SB 550 was Doug Petersen, the President of EE Reed Construction East Coast and the Chairman of the Board for the Association of Builders and Contractors of Virginia (ABC VA). Mr. Petersen shared that ABC VA represents the largest membership of contractors in their industry and they support SB 550. Nevertheless, he noted that some changes need to be made to the bill. He expressed concerns that the bill will have unintended consequences that could put companies out of business. Specifically, he stated that if general contractors are forced to pay their

subcontractors within 60 days, some contractors who have not yet received payment from the owner within that time frame will not have financial ability to make those payments and will be put out of business. He concluded his remarks by stressing that everyone needs to come together as an industry and reach a consensus on the language of the bill so that it protects all parties involved.

IV. Public Comment on SB 575

The Workgroup then heard public comment from stakeholders on SB 575.

The first stakeholder to comment in support of SB 575 was Cher Griffith Taylor, Senior Electric Vehicle Specialist with the Electrification Coalition, which she explained is a nonpartisan, nonprofit organization that advances policies and actions to accelerate the adoption of electric vehicles (EVs) in order to reduce the economic, public health, and national security risks caused by America's dependence on oil. Ms. Taylor noted that fleet managers prioritize costs as they assess which vehicles on their fleet should be replaced and which new ones to procure. She stressed that fleet managers' goal is to ensure that staff have access to vehicles they need in order to complete their daily tasks at maximum operational effectiveness while promoting fiscal responsibility by incurring the lowest overall cost. She stated that the Electrification Coalition supports data-driven decision making and appreciates the Workgroup's focus on total cost of ownership (TCO) calculations.

Ms. Taylor noted that TCO calculations support fleet managers' needs to consider the all-inclusive cost of vehicles, from their purchase price to vehicle maintenance and operation. She stated that EVs are superior to internal combustion engine vehicles (ICEVs) in terms of efficiency and operational costs. She explained that this is because electricity is domestically produced and relatively stable and low in price compared to oil, which is a price-volatile, global commodity, and because EVs have far fewer moving parts. She further explained that these operational savings extend over the life of the vehicle, but do not always offset the high upfront cost of EVs, which often imposes a barrier to adoption. As such, she stated that a TCO analysis is highly recommended prior to vehicle procurement because it can clearly highlight the total cost differences.

Ms. Taylor shared that Electrification Coalition is one of several entities that has developed a TCO tool. She stated that their tool is called the Dashboard for Rapid Vehicle Electrification, or the DRVE Tool, and is publicly available for no cost. She explained the DRVE Tool is highly customizable for users and supports comparisons between ICEVs and EVs for light-duty, heavy-duty, and medium-duty vehicles. She further explained that the DRVE Tool works by mapping each current vehicle to a user-defined electric vehicle and then providing a comprehensive TCO analysis that compares both vehicles' retail price, operational costs (which really focuses on fuel price versus electricity rates), depreciation, applicable taxes, fees, typical maintenance costs, and a variety of other factors over the service life of the vehicle. She stated that the results are expressed in nominal cost per mile, which is a uniform basis of measurement and comparison and which makes it easy for fleet managers to compare vehicles with

different characteristics. She also described some additional publicly available TCO calculators that are offered by other organizations.

Ms. Taylor noted that the shift to medium-duty and heavy-duty EVs is accelerating through improved technology, private sector investment, opportunities to capitalize in the competitive global market, and meeting federal and state climate goals, and as the market for medium-duty and heavy-duty EVs grows, these models will be incorporated into the DRVE Tool and other publicly available TCO calculators. She stressed that it is critical for fleets to use TCO calculators for medium-duty and heavy-duty vehicles because these assets typically have 10-year or longer retirement ages, which means that the decision to add ICEV assets into these vehicle classes will lock the fleet into unpredictable fuel procurement cycles.

Ms. Taylor concluded her remarks by stressing that the DRVE Tool is appropriate for use by state agencies because it was developed with public fleets in mind. She noted that it automatically pulls retail prices and technical specifications on both ICEVs and EVs from federal open source databases including the Department of Energy and the National Highway Traffic Safety Administration, and that it is capable of including in its analysis such factors as cash purchases, the terms of a lease agreement, state or local rebates or incentives, and the cost of EV charging infrastructure. She encouraged the Workgroup to review the tool and offered to provide a preview of it to the Workgroup's members.

The next stakeholder to comment in support of SB 575 was Lena Lewis, Energy and Climate Policy Advisor for the Virginia Chapter of the Nature Conservancy. She began her remarks by stating that the Nature Conservancy supports SB 575 because it is a fiscally-responsible way for the state to lead by example and in making the transition to EVs as they become economically feasible. Regarding SB 575's requirement that the Workgroup assess the appropriateness of requiring DGS and all state agencies to use a TCO calculator to assess and compare the total cost to purchase, own, lease, and operate medium-duty and heavy-duty internal combustion-engine vehicles versus comparable electric vehicles prior to purchasing or leasing any medium-duty or heavy-duty vehicle, Ms. Lewis posed four questions to assist the Workgroup with its analysis. First, she suggested that the Workgroup consider whether it is appropriate to consider TCO at all when procuring medium-duty and heavy-duty vehicles. She stated that her answer to this question is "yes," because doing so is fiscally responsible. Second, she asked whether a TCO calculator should be used to compare different models of conventional diesel and gas-powered vehicles. She stated that her answer to this question is "yes" in light of the number of cost inputs and variables involved. Third, she asked whether the TCO calculator should have the capability of comparing the TCO of conventional vehicles to EVs. She answered in the affirmative, reasoning that if you are going to use a calculator, you might as well use one that is capable of comparing not only conventional vehicles to one another, but also comparing them to electric medium-duty and heavy-duty vehicles. Finally, she stated that if the answer to the first three questions is "yes," which TCO calculator should be used?

Ms. Lewis then recommended that the Commonwealth use the Electrification Coalition's DRVE Tool for comparing the TCO between medium-duty and heavy-duty ICEVs and EVs. She stated that this tool stood out in her research of publicly available TCO tools for medium-duty and heavy-duty TCO tools as being up to the job and user friendly. She offered, however, to coordinate a stakeholder subgroup to evaluate TCO calculators for their ability to handle the specific characteristics of medium-duty and heavy-duty vehicles and make recommendations to the Workgroup.

Ms. Lewis concluded her remarks by stating that she does not expect that a TCO analysis will result in the procurement of electric medium-duty and heavy-duty vehicles very often in the first couple of years because the economics still typically favor conventional vehicles. She stated that it would be helpful for state agencies to begin using TCO calculators for medium-duty and heavy-duty vehicles now, though, because it would help them begin to get the hang of using them, provide opportunities for feedback to the software designers, and allow state agencies to recognize the financial trend as it starts to shift in favor of electric medium-duty and heavy-duty vehicles. She stressed that it would make financial sense for DGS to be ready to seize the moment as soon as the economics shift favorably towards electric medium-duty and heavy-duty vehicles and not years afterwards.

Finally, Chris Nolan with McGuire Woods Consulting commented on behalf of Volvo Trucks of North America. He did not take a positon on the bill, but instead listed some factors that his client would like for the Workgroup to consider in deciding whether state agencies should be required to use a TCO calculator prior to purchasing or leasing medium-duty or heavy-duty vehicles. Mr. Nolan noted that Volvo employs around 3,700 people in Virginia, primarily in Roanoke and Dublin. He stated that in Roanoke, under the Mack brand, Volvo produces medium-duty trucks, and in Dublin, Volvo produces Class 8 heavy-duty trucks. He highlighted that the Dublin plant is the plant that produces all of Volvo Trucks' products for the North American market. As such, he stressed that Volvo is a very important asset to Virginia. He noted that Volvo sells both ICEVs and EVs, and began selling a heavy-duty EV product in 2021. He stated that Volvo believes that EVs are going to make up more of the medium-duty and heavy-duty market as time goes on, and as a company their goal is for 35 percent of their sales to be EVs by 2030. As such, they want EVs to be put in the best light possible and for there to be the fairest and most accurate comparison between ICEVs and EVs as possible.

He stressed that Volvo supports public and private buyers using a TCO calculator when deciding whether to electrify a fleet, provided that the TCO calculator provides a true comparison between ICEVs and EVs. He noted, however, that Volvo believes that there are significant differences between light-duty vehicles compared to medium-duty and heavy-duty vehicles, and that those differences may make it more difficult to obtain a true comparison between ICEVs and EVs when using a TCO calculator for medium-duty and heavy-duty vehicles. As such. Mr. Nolan explained that Volvo is the entity that asked for medium-duty and heavy-duty trucks to be broken out of SB 575 during Session, as well as for adding the language to the bill directing the Workgroup to assess whether it is

appropriate to require state agencies to use a TCO calculator prior to purchasing or leasing medium-duty or heavy-duty vehicles.

In describing the differences light-duty vehicles and medium-duty and heavy-duty vehicles, Mr. Nolan began by highlighting the differences in the markets for each type of vehicle. He stated that over 15 million light-duty vehicles were sold last year, and that over 400,000 of those were battery EVs. Regarding heavy-duty trucks, however, he stated that according to DMV data, 221,000 Class 8 heavy-duty trucks were sold last year, but less than one-hundred of those were EVs. He emphasized that the factors that are considered when deciding whether to buy a light-duty ICEV or EV are quite different from the factors that are considered when deciding whether to buy a diesel or electric medium-duty or heavy-duty vehicle. He noted that the decision regarding medium-duty and heavy-duty vehicles is largely dictated by the vehicle's intended use, and that when a person or a state agency purchases a heavy-duty truck, the truck is often configured for a very specific use. Additionally, with regards to state purchasing, Mr. Nolan questioned whether the state purchases large numbers of medium-duty and heavy-duty vehicles at one time like they do with light-duty vehicles, or whether the state purchases just one or two or a few medium-duty and heavy-duty vehicles at one time. The size of the procurements can affect the price the state pays for the vehicles.

Mr. Nolan then discussed the unique characteristics of medium-duty and heavy-duty vehicles that a TCO calculator would need to accommodate. He first mentioned charging infrastructure. He noted that there is a significant difference in the charging infrastructure needed for light-duty vehicles compared to the charging infrastructure needed for medium-duty and heavy-duty vehicles. He explained that it is relatively easy to set up a charging infrastructure to charge a light-duty car or truck overnight. With medium-duty and heavy-duty vehicles, however, he stated that it is important to have charging infrastructure that supports rapid charging. He noted that the cost for such infrastructure can begin at $25,000 and that the state may have to work with the power company to ensure that the grid can support such infrastructure. He emphasized that this is a key difference between light-duty EVs and medium-duty and heavy-duty EVs, and he questioned whether this is something that TCO calculators account for. Mr. Nolan then discussed maintenance plans. He noted that in the market for heavy-duty EVs, manufacturers offer maintenance plans, through which the manufacturer takes on more responsibility for the maintenance of the vehicle, in an effort to make heavy-duty EVs more cost competitive. He said that such maintenance plans are a key selling-point, but there is an upfront cost for them. He questioned whether this cost is considered in TCO calculators. Next, he discussed the federal excise tax, which is 12 percent federal surcharge for Class 8 heavy-duty vehicles. He explained that he believes the state may be subject to this tax, and that this tax would significantly affect the cost heavy-duty EVs because they are on average two and one-half times more expensive than their diesel equivalents. He stressed that this added cost must be captured by a TCO calculator in order to have a true apples-to-apples comparison between heavy-duty diesel vehicles and heavy-duty EVs. Another difference he noted between medium and heavy-duty vehicles compared to light-duty vehicles is that there is a requirement to use diesel exhaust fluid to cut down on emission when filling up Class 7 and Class 8 trucks. Such cost would also

need to be reflected in a TCO calculator for medium-duty and heavy-duty vehicles. Additionally, he noted that EVs carry higher insurance costs, and such cost must also be reflected in the calculator. Finally, Mr. Nolan mentioned that Volvo would like to ensure that product lines and prices are accurately reflected in the TCO calculator. He stressed that the TCO calculator should be transparent, accurate, and fair to all manufacturers. He emphasized the importance of making sure that the TCO calculator has a complete, updated (perhaps even updated in real-time) list of the product lines and corresponding prices. He highlighted the difference between obtaining such data from pre-set inputs that are straight from publicly available data versus picking up the phone and calling the dealer to obtain such data based on the configuration that you intend for the use of the vehicle.

Mr. Nolan concluded his remarks by noting that these are the items that Volvo would like to see addressed if the state were to move in the direction of requiring agencies to use a TCO calculator prior to purchasing medium-duty and heavy-duty vehicles. He reiterated that Volvo supports the use of a TCO calculator as long as it is fair and accurate, and publicly available for validation by the original equipment manufacturer. He noted that Virginia may be the first state to require the use of a TCO calculator prior to purchasing medium-duty and heavy-duty vehicles, and, as such, Virginia may be in the position of setting a precedent for other states.

V. Discussion

There was no discussion among the Workgroup members.

VI. Adjournment

Ms. Gill adjourned the meeting at 10:56 a.m. and noted that the next Workgroup meeting is scheduled for Thursday, August 11, 2022 at 9:30 a.m. in Conference Rooms C, D, and E in the James Monroe Building in Richmond, Virginia.

For more information, see the Workgroup's website or contact that Workgroup's staff at pwg@dgs.virginia.gov.

Appendix D: August 31, 2022 Meeting Materials

This appendix contains the meeting materials from the August 31, 2022 Workgroup meeting.

1. Agenda
2. PowerPoint Presentation from Workgroup Staff – Potential Technical Amendments to SB 550
3. Handout from Workgroup Staff – List of Potential Technical Amendments to SB 550
4. Draft Bill from Workgroup Staff – Example of Potential Amendments to Correct the Catchline and Subsections in Va. Code § 11-4.6
5. Approved Meeting Minutes

Public Body Procurement Workgroup

http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/

Meeting # 4
Wednesday, August 31, 2022, 9:30 a.m.
Conference Rooms C, D, and E
James Monroe Building
101 N 14th St, Richmond, Virginia 23219

AGENDA

I. **Call to Order; Remarks by Chair**

Sandra Gill, Deputy Director
Department of General Services

II. **Approval of Meeting Minutes from the August 11, 2022 Workgroup Meeting**

III. **Comments on SB 550 from the Construction Section of the Office of the Attorney General**

Curtis Manchester, Senior Assistant Attorney General
Office of the Attorney General

IV. **Presentation on Potential Technical Amendments to SB 550**

Jessica Budd, Staff
Department of General Services

V. **Consideration and Discussion of Public Comment, Written Comments, and Other Information Received by the Workgroup on SB 550**

VI. **Findings and Recommendations on SB 550**

VII. **Public Comment**

VIII. **Discussion**

IX. **Adjournment**

Members

Department of General Services
Virginia Information Technologies Agency
Department of Planning and Budget
Department of Small Business and Supplier Diversity
Virginia Department of Transportation
Virginia Association of Government Purchasing

Virginia Association of State Colleges and
University Purchasing Professionals

Representatives

Office of the Attorney General
Senate Finance Committee
House Appropriations Committee
Division of Legislative Services

Staff

Jessica Budd, Legal Policy Analyst, DGS
Jessica Hendrickson, Director of Policy and Legislative Affairs, DGS

Potential Technical Amendments to SB 550

1

Quick Overview of SB 550

- EFFECTIVE DATE:
  - January 1, 2023
- APPLIES TO:
  - SB 550 appears intended to apply to –
    - Public construction contracts
    - Private construction contracts
      - All tiers in the contracting chain
- ADDRESSES TWO ISSUES:
  - First, *who* has the responsibility for paying a subcontractor when the public body or owner, as applicable, does not pay the general contractor?
  - Second, *when* must payment occur?

2

Quick Overview of SB 550

- CURRENT LAW:
  - Public Contracts –
    - Virginia's Prompt Payment Act (Article 4 (§ 2.2-4347 et seq.) of Chapter 43 of Title 2.2 of the Code of Virginia) has been in place for many years and requires a contractor and each subcontractor to take one of two actions within seven days of receipt of payment on a public project:
      - 1. Pay the subcontractor the proportionate share of the total payment received; OR
      - 2. Notify the agency and subcontractor in writing of its intention to withhold all or a part of the payment with the reason for nonpayment.
        - See Va. Code § 2.2-4354.
    - This is based on similar prompt payment requirements on federally funded contracts. (31 U.S.C. § 3905(b))

3

Quick Overview of SB 550

- CURRENT LAW (Cont.):
  - Public Contracts –
    - Traditionally, Virginia has generally not legislated contractual terms between private parties and left private parties to negotiate and agree upon their own terms.
    - As such, over time parties began to include "pay-if-paid" clauses in their contracts that make the public body's or owner's (as applicable) payment to the general contractor a condition precedent to payment being due to a subcontractor. The effect of these contract provisions is to shift the risk of a public body's/owner's nonpayment from the general contractor to the subcontractor.

4

Quick Overview of SB 550

- CHANGES MADE TO CURRENT LAW BY SB 550:
  - 1. SB 550 prohibits "pay-if-paid" clauses in subcontracts between general contractors and subcontractors. It holds the general contractor liable for making payment to the subcontractor regardless of whether the general contractor has received payment for the subcontractor's work from the public body/owner.
  - 2. SB 550 establishes timelines for when –
    - a. owners must make payment to general contractors [private contracts]; AND
    - b. general contractors must make payment to subcontractors (and subcontractors must make payments to sub-subcontractors, and so on) [private contracts].

5

Potential Technical Amendments to SB 550 – Three Categories

- Generally
- Public Contracts - § 2.2-4354
- Private Contracts - § 11-4.6

6

Potential Technical Amendments to SB 550 - Generally

1. Make the definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" uniform in their application to both public contracts (§ 2.2-4354) and private contracts (§ 11-4.6).

	Public Contracts - VPPA	Private Contracts – Title 11
DEFINITIONS		
Construction defined?	Yes - § 2.2-4301 "Construction" means building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.	No
Construction contract defined?	No	Yes - § 11-4.6(A) "Construction contract" means a contract between a general contractor and a subcontractor relating to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance thereto, including moving, demolition, and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings.
Contractor/subcontractor defined?	Yes - § 2.2-4347 "Contractor" means the entity that has a direct contract with any "state agency" as defined herein, or any agency of local government as discussed in § 2.2-4352. "Subcontractor" means any entity that has a contract to supply labor or materials to the contractor to whom the contract was awarded or to any subcontractor in the performance of the work provided for in such contract.	Yes - § 11-4.6 (A) "General contractor" and "subcontractor" have the meanings ascribed thereto in § 43-1, except that those terms shall not include persons solely furnishing materials. §43-1 = As used in this chapter, the term "general contractor" includes contractors, laborers, mechanics, and persons furnishing materials, who contract directly with the owner, and the term "subcontractor" includes all such contractors, laborers, mechanics, and persons furnishing materials, who do not contract with the owner but with the general contractor.

7

Potential Technical Amendments to SB 550 – Generally

- 2. Clarify that contracts for professional services, including architectural or professional engineering services, are not included in the scope of the bill.

8

Potential Technical Amendments to SB 550 – Generally

- 3. Make the "noncompliance/breach" language uniform.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

> **Lines 12-13**: Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

> **Lines 57-58**: An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

> **Lines 72-73**: Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor.

9

Potential Technical Amendments to SB 550 – Generally

- 4. Make the "notice" language uniform.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

> **Lines 14-16**: However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

> **Lines 59-62**: However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

> **Lines 74-78**: However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.

10

Potential Technical Amendments to SB 550 – Generally

- 5. Establish a timeline for when notice of withholding payment must be given.

The notice provisions establish the ***requirement*** to provide notice if payment will be withheld, but they don't establish a ***timeline*** for when that notice must be provided.

* The Workgroup could consider recommending that such timelines be established. One option for establishing these timelines could be to link the timeline for providing the notice with the deadlines already established by SB 550 for when payment must be provided. For example, the language could be amended to state that a general contractor must (i) pay the subcontractor or **(ii) provide notice, in writing, of the general contractor's intention to withhold all or a portion of the subcontractor's payment** within the earlier of (a) 60 days after receiving an invoice from the subcontractor or (b) seven days after receiving payment from the owner.

11

Potential Technical Amendments to SB 550 – Public Contracts (§ 2.2-4354)

- 1. Reconcile the provisions added by SB 550 in subdivision 1 with the existing provisions of the Prompt Payment Act that were moved to subsection 2.

§ 2.2-4354. Payment clauses to be included in contracts.

Any contract awarded by any state agency, or any contract awarded by any agency of local government in accordance with § 2.2-4352, shall include:

1. *A payment clause that obligates a contractor on a construction contract to be liable for the entire amount owed to any subcontractor with which it contracts. Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract. However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment. Payment by the party contracting with the contractor shall not be a condition precedent to payment to any lower-tier subcontractor, regardless of that contractor receiving payment for amounts owed to that contractor. Any provision in a contract contrary to this section shall be unenforceable.*

2. A payment clause that obligates the contractor to take one of the two following actions within seven days after receipt of amounts paid to the contractor by the state agency or local government for work performed by the subcontractor under that contract:

a. Pay the subcontractor for the proportionate share of the total payment received from the agency attributable to the work performed by the subcontractor under that contract; or

b. Notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

12

Potential Technical Amendments to SB 550 – Public Contracts (§ 2.2-4354)

- 2. Subdivision 4 (interest clause) – Amend to require general contractors to pay interest on amounts that are past-due in situations in which the general contractor has not been paid by the public body.

3. ~~3.~~ *4.* An interest clause that obligates the contractor to pay interest to the subcontractor on all amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor of payment from the state agency or agency of local government for work performed by the subcontractor under that contract, except for amounts withheld as allowed in subdivision ~~1~~ *2*.

13

Potential Technical Amendments to SB 550 – Private Contracts (§ 11-4.6)

- 1. Fix catchline for § 11-4.6.

§ 11-4.6. Liability of contractor for wages of subcontractor's employees.

Potential amendment:

§ 11-4.6. ~~Liability of contractor for wages of subcontractor's employees~~ Required contract provisions in construction contracts.

14

Potential Technical Amendments to SB 550 – Private Contracts (§ 11-4.6)

- 2. Fix subsection/subdivision lettering to separate out the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees from the new provisions added by SB 550 dealing with owners' and general contractors' payment liability and timing.

15

Potential Technical Amendments to SB 550 – Private Contracts (§ 11-4.6)

- 3. Clarify that subsection C of § 11-4.6 applies only to "any ***construction*** contract," not "any contract".
  - Line 11 [§ 2.2-4354 (VPPA) – Public Contracts]: "1. A payment clause that obligates a contractor on a ***construction*** contract …"
  - Line 54 [§ 11-4.6(B) – Private Contracts]: "In any ***construction*** contract between an owner and a general contractor …"
  - Line 65 [§ 11-4.6(C) – Private Contracts]: "Any contract in which there is at least one general contractor and one subcontractor …"

16

Potential Technical Amendments to SB 550 – Private Contracts (§ 11-4.6)

- 4. Resolve the inconsistency between the timelines for payment that are set out in subsection B for owners and in subsection C for contractors.

  Lines 55-57 [§ 11-4.6(B)]: Requires payment "within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced."

  Lines 69-70 [§ 11-4.6(C)]: Requires payment within "60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced …"

17

Potential Technical Amendments to SB 550 – Private Contracts (§ 11-4.6)

- 5. Resolve the inconsistent and confusing terminology used in § 11-4.6(C).
  - § 11-4.6(C) uses all of the following terms: "general contractor;" "subcontractor;" "higher-tier contractor;" "lower-tier subcontractor;" "lower-tier contractor;" and "contractor."
  - § 11-4.6(C) could be simplified by just referring to "general contractor" and "subcontractor" and inserting this language similar to this provision from § 2.2-4354 in the VPPA:

    Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

18

Questions?

19

List of Potential Technical Amendments to SB 550

Generally

1. Make the definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" uniform in their application to both public contacts (§ 2.2-4354) and private contracts (§ 11-4.6).

	Public Contracts - VPPA	Private Contracts – Title 11
DEFINITIONS		
Construction defined?	Yes - § 2.2-4301 "Construction" means building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.	No
Construction contract defined?	No	Yes - § 11-4.6(A) "Construction contract" means a contract between a general contractor and a subcontractor relating to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance thereto, including moving, demolition, and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings.
Contractor/subcontractor defined?	Yes - § 2.2-4347 "Contractor" means the entity that has a direct contract with any "state agency" as defined herein, or any agency of local government as discussed in § 2.2-4352. "Subcontractor" means any entity that has a contract to supply labor or materials to the contractor to whom the contract was awarded or to any subcontractor in the performance of the work provided for in such contract.	Yes - § 11-4.6 (A) "General contractor" and "subcontractor" have the meanings ascribed thereto in § 43-1, except that those terms shall not include persons solely furnishing materials. §43-1 = As used in this chapter, the term "general contractor" includes contractors, laborers, mechanics, and persons furnishing materials, who contract directly with the owner, and the term "subcontractor" includes all such contractors, laborers, mechanics, and persons furnishing materials, who do not contract with the owner but with the general contractor.

2. Clarify that contracts for professional services, including architectural or professional engineering services, are not included in the scope of the bill.

3. Make the "noncompliance/breach" language uniform.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

Lines 12-13: Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

Lines 57-58: An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

Lines 72-73: Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor.

4. Make the "notice" language uniform.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

Lines 14-16: However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

Lines 59-62: However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

Lines 74-78: However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.

5. Establish a timeline for when notice of withholding payment must be given.

Public Contracts - § 2.2-4354

1. Reconcile the provisions added by SB 550 in subdivision 1 with the existing provisions of the Prompt Payment Act that were moved to subsection 2.
    a. Clarify the *type* of contracts to which each subdivision applies – subdivision 1 only applies to construction contracts, but subdivision 2 applies to all contracts (including construction contracts).
    b. "Entire amount owed" (subdivision 1) vs. "proportionate share" (subdivision 2).
    c. Clarify that "entire amount owed" does not affect retainage.
    d. Reconcile subdivisions 1 and 2 with § 11-4.6 (C)?
        i. When must a contractor pay a subcontractor when the general contractor has not been paid by the public body?
2. Subdivision 4 (interest clause) – Amend to require general contractors to pay interest on amounts that are past-due in situations in which the general contractor has not been paid by the public body.

Private Contracts - § 11-4.6

1. Fix catchline for § 11-4.6.
    a. Current catchline = § 11-4.6. Liability of contractor for wages of subcontractor's employees.
2. Fix subsection/subdivision lettering to separate out the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees from the new provisions added by SB 550 dealing with owners' and general contractors' payment liability and timing.
3. Clarify that subsection C of § 11-4.6 applies only to "any ***construction*** contract," not "any contract."
4. Resolve the inconsistency between the timelines for payment that are set out in subsection B for owners and in subsection C for contractors.

    Lines 55-57 [§ 11-4.6(B)]: Requires payment "within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced."

    Lines 69-70 [§ 11-4.6(C)]: Requires payment within "60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced …"

5. Resolve the inconsistent and confusing terminology used in § 11-4.6(C). § 11-4.6(C) uses all of the following terms: "general contractor;" "subcontractor;" "higher-tier contractor;" "lower-tier subcontractor;" "lower-tier contractor;" and "contractor." § 11-4.6(C) could be simplified by just referring to "general contractor" and "subcontractor" and inserting this language similar to this provision from § 2.2-4354 in the VPPA:

    Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject

to the same payment and interest requirements with respect to each lower-tier subcontractor.

Bill #

A BILL to amend and reenact § 11-4.6 of the Code of Virginia, relating to contracts; required clauses.

Be it enacted by the General Assembly of Virginia:

1. That § 11-4.6 of the Code of Virginia is amended and reenacted as follows:

§ 11-4.6. ~~Liability of contractor for wages of subcontractor's employees~~ Required contract provisions in construction contracts.

A. As used in this section, unless the context requires a different meaning:

"Construction contract" means a contract between a general contractor and a subcontractor relating to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance thereto, including moving, demolition, and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings.

"General contractor" and "subcontractor" have the meanings ascribed thereto in § 43-1, except that those terms shall not include persons solely furnishing materials.

"Owner" means a person or entity, other than a public body as defined in § 2.2-4301, responsible for contracting with a general contractor for the procurement of a construction contract.

B. 1. In any construction contract between an owner and a general contractor, the parties shall include a provision that requires the owner to pay such general contractor within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced. An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract. However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment. Failure of an owner to make timely payment as provided in this subsection shall result in interest penalties consistent with § 2.2-4355. Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract.

~~C.~~ .2 Any contract in which there is at least one general contractor and one subcontractor shall be deemed to include a provision under which any higher-tier contractor is liable to any lower-tier subcontractor with whom the higher-tier contractor contracts for satisfactory performance of the subcontractor's duties under the contract. Such contract shall require such higher-tier contractor to pay such lower-tier subcontractor within the earlier of (i) 60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced or (ii) seven days after receipt of amounts paid by the owner to the general contractor or by the higher-tier contractor to the lower-tier contractor for work performed by a subcontractor pursuant to the

terms of the contract. Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor. However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance. Payment by the party contracting with the contractor shall not be a condition precedent to payment to any lower-tier subcontractor, regardless of that contractor receiving payment for amounts owed to that contractor, unless the party contracting with the contractor is insolvent or a debtor in bankruptcy as defined in § 50-73.79. Any provision in a contract contrary to this section shall be unenforceable. Failure of a contractor to make timely payment as provided in this subsection shall result in interest penalties consistent with § 2.2-4355. Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract.

~~D.~~ C. 1. Any construction contract between a general contractor and its subcontractor and any lower tier subcontract entered into on or after July 1, 2020, shall be deemed to include a provision under which the general contractor, its subcontractor, and the subcontractor at any lower tier are jointly and severally liable to pay the employees of any subcontractor at any lower tier the greater of (i) all wages due to a subcontractor's employees or to the lower tier subcontractor's employees at such rate and upon such terms as shall be provided in the employment agreement between the subcontractor and its employees or (ii) the amount of wages that the subcontractor or any lower tier subcontractor is required to pay to its employees under the provisions of applicable law, including the provisions of the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.) and the federal Fair Labor Standards Act (29 U.S.C. § 201 et seq.).

~~E.~~ 2. A general contractor shall be deemed to be the employer of a subcontractor's employees at any tier for purposes of § 40.1-29. If the wages due to the subcontractor's employees under the terms of the employment agreement between a subcontractor and its employees are not paid, the general contractor shall be subject to all penalties, criminal and civil, to which an employer that fails or refuses to pay wages is subject under § 40.1-29. Any liability of a general contractor pursuant to § 40.1-29 shall be joint and several with the subcontractor that failed or refused to pay the wages to its employees.

~~F.~~ 3. Except as otherwise provided in a contract between the general contractor and the subcontractor, the subcontractor shall indemnify the general contractor for any wages, damages, interest, penalties, or attorney fees owed as a result of the subcontractor's failure to pay wages to the subcontractor's employees as provided in ~~subsection D~~ subdivision C 1, unless the subcontractor's failure to pay the wages was due to the general contractor's failure to pay moneys due to the subcontractor in accordance with the terms of their construction contract.

~~G.~~ 4. The provisions of this ~~section~~ subsection shall only apply if (i) it can be demonstrated that the general contractor knew or should have known that the subcontractor was not paying his employees all wages due, (ii) the construction contract is related to a project other than a single family residential project, and (iii) the value of the project, or an aggregate of projects under one construction contract, is greater than $500,000. As evidence a general contractor or

subcontractor, regardless of tier, may offer a written certification, under oath, from the subcontractor in direct privity of contract with the general contractor or subcontractor stating that (a) the subcontractor and each of his sub-subcontractors has paid all employees all wages due for the period during which the wages are claimed for the work performed on the project and (b) to the subcontractor's knowledge all sub-subcontractors below the subcontractor, regardless of tier, have similarly paid their employees all such wages. Any person who falsely signs such certification shall be personally liable to the general contractor or subcontractor for fraud and any damages the general contractor or subcontractor may incur.

Meeting Minutes

Public Body Procurement Workgroup

Meeting # 4

Wednesday, August 31, 2022, 9:30 a.m.
Conference Rooms C, D, and E
James Monroe Building
101 N 14th St, Richmond, Virginia 23219

http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/

The Public Body Procurement Workgroup (the Workgroup) met in-person in conference rooms C, D, and E in the James Monroe Building in Richmond, Virginia, with Sandra Gill, Deputy Director of the Department of General Services (DGS), presiding. The meeting began with remarks from Ms. Gill, followed by presentations, discussion, and public comment. Materials presented at the meeting are available through the Workgroup's website.

Workgroup members and representatives present at the meeting included Sandra Gill (Department of General Services), Matthew James (Department of Small Business and Supplier Diversity), Joshua Heslinga (Virginia Information Technologies Agency), Lisa Pride (Virginia Department of Transportation), Jason Saunders (Department of Planning and Budget), Patricia Innocenti (Virginia Association of Governmental Procurement), John McHugh (Virginia Association of State Colleges and University Purchasing Professionals), Leslie Haley (Office of the Attorney General), Adam Rosatelli (Senate Finance and Appropriations Committee) and Amigo Wade (Division of Legislative Services). Andrea Peeks, representing the House Appropriations Committee, was absent.

I. Call to Order; Remarks by Chair

Sandra Gill, Deputy Director
Department of General Services

Ms. Gill called the meeting to order and reminded the Workgroup that it will be focusing on SB 550 at this meeting and its task to review whether the issue of nonpayment between general contractors and subcontractors necessitates legislative corrective action. She requested that stakeholders who have already provided public comment to the Workgroup at previous meetings limit their comments to any new information that they wish to share with the Workgroup.

II. Approval of Meeting Minutes from the August 11, 2022 Workgroup Meeting

Mr. Heslinga made a motion to approve the meeting minutes from the August 11, 2022 meeting of the Workgroup. The motion was seconded by Mr. Wade and unanimously approved by the Workgroup.

III. Comments on SB 550 from the Construction Section of the Office of the Attorney General

Curtis Manchester, Senior Assistant Attorney General with the Construction Section at the Office of the Attorney General, provided comments to the Workgroup on SB 550. He emphasized that his comments are not to be construed as an opinion from Attorney General Miyares or the Office of the Attorney General as a whole, but are rather comments from the Construction Section based upon its experience handling day-in and day-out issues involving public procurement and public construction. He shared that the goal of his comments is to provide awareness to the Workgroup of some of the issues the Construction Section sees with SB 550, as well as some of its potential ramifications. He noted that his comments touch upon three areas – (i) the amendments made by SB 550 to the Virginia Public Procurement Act (VPPA), (ii) the amendments made by SB 550 to Title 11, and (iii) comments made by others regarding SB 550.

First, though, Mr. Manchester provided an overview to the Workgroup of how the former provisions of the Prompt Payment Act in the VPPA came to be. He noted that the VPPA was passed after an extensive two-year study undertaken by a task force chaired by DGS. The task force included members from both the private sector and public sector. He explained that the study included an extensive review of all of the procurement laws to understand how the state was procuring goods and construction. He noted that the task force issued a final report in 1980 and shared some of the findings in the final report with the Workgroup. First, he highlighted that the task force made no finding or recommendation that general contractors should pay subcontractors notwithstanding nonpayment from the owner. Any payment arrangements were left to the contracts developed by the contracting parties, other than any new VPPA curtailment. Regarding the potential for nonpayment to subcontractors, he noted that the task force found it sufficient to temper such risk by requiring general contractors to post payment bonds on public projects. He highlighted that the task force also protected general contractors by allowing for permissive retainage of a percentage of the amount due in progress payments in order to ensure faithful performance of the subcontract by the subcontractor. The task force emphasized that the hallmark of public procurement must be competition for public work, meaning access of public owners to competitive bids or competitive negotiation offers. The more competition for the award of contracts, the better the choices for the public owners and the better use of public funds. He stated that the task force concluded its report by noting that it had strived to provide a comprehensive framework for public procurement at every level in Virginia.

Mr. Manchester further explained that after the report was issued and the VPPA was passed in 1980, there was a two-year delayed effective to allow for additional public

comment and consideration. The VPPA eventually became law in 1982. He noted that shortly thereafter, the General Assembly amended the VPPA to add what is known as the Prompt Payment Act provisions. He explained that those provisions require that once a public owner releases funds to a general contractor, the general contractor must issue those funds downstream to its subcontractor or provide a reason for nonpayment within seven days. He emphasized that those Prompt Payment Act provisions remain in effect today, even though SB 550 has added a new layer of requirements over top of them.

Moving on to discuss the amendments to the law made by SB 550, he explained that they essentially serve to make unenforceable traditional payment clauses known as "pay-if-paid" or "pay-when-paid." He explained that "pay-if-paid" clauses establish payment by the owner to the general contractor as a condition precedent to the general contractor's payment being due to the subcontractor. He emphasized that SB 550 makes these clauses unenforceable. He further explained that "pay-when-paid" clauses are distinct and have historically been found to be a reasonable timing mechanism between parties for the payment of sums. He noted that such clauses do not place the financial burden on the general contractor to front payments to the subcontractor before the general contractor itself has received payment from the owner.

Mr. Manchester then discussed some potential negative ramifications from SB 550's requirement that general contractors make payment to a subcontractor notwithstanding whether they themselves have received payment from the owner. First, he noted that such requirement may deter some general contractors from participating in public contracting. He explained that they may feel that they are unable to shoulder the financial burden or they simply may not want to deal with it. Second, he noted that such requirement is likely to lead to a decrease in the number of bidders for certain projects depending upon the value of the project or the capacity of the contractor. Third, he noted that such requirement is likely to lead to an increase in bid amounts due to the fact that general contractors will now be shouldering a new financial burden. Fourth, he noted that such requirement will likely similarly lead to an increase in prices for construction management at-risk fees. Finally, he noted that such requirement could affect general contractors' bonding capacity. He emphasized that all of these effects would, unfortunately, serve to undermine the VPPA's goal of maximizing competition and would increase costs for public construction.

Noting the Construction Section's agreement with many of the comments that they have read or heard regarding issues with the wording of the amendments made by SB 550, Mr. Manchester then walked the Workgroup through some technical amendments that they have identified that could improve the clarity of the changes made by SB 550. First, he noted that lines 11-12 of the bill require a payment clause that obligates a contractor to be liable for the "entire amount owed" to any subcontractor. He stated that "entire amount owed" seems a bit unclear, because amounts are either owed or not owned. He stressed that the amendments made by SB 550 did not delete the permissive retainage provisions for general contractors and subcontractors on public projects, so if the phrase "entire amount owed" was intended to affect those provisions it did not have such affect. He

emphasized that it is unclear what effect the "entire amount owed" language is intended to have.

Second, he pointed the Workgroup to the narrow description on lines 12-13 of the bill of the basis upon which a general contractor may withhold money from a subcontractor. He stated that those lines state that general contractors shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract. He noted that this point is obvious, but there may be additional legal reasons beyond noncompliance with the terms of the subcontract for which the contractor could legitimately withhold payment. For example, the subcontractor could have filed for bankruptcy or have agreed to allow set-off of debts owed by the subcontractor on other projects. He stressed that there are many other legal reasons for which parties may want or need to withhold payment.

Third, Mr. Manchester noted that lines 14-16 of the bill contain a directive to the general contractor that if it intends to withhold payment, it must notify the subcontractor of such intention and provide the reason for nonpayment. He highlighted that the bill, however, does not indicate what event triggers the requirement to provide such notice nor a timeframe within which such notice must be given.

Moving on to SB 550's amendments to Title 11 dealing with private contracts, Mr. Manchester stated that the Construction Section was struck by the fact that the new law restricts the freedom of private parties on private projects that do not involve public funds to agree to the payment terms between them. The amendments establish timeframes within which owners must pay general contractors and general contractors must pay others. He noted that the amendments made by SB 550 were clearly a policy choice made by the General Assembly, but SB 550 does not appear to the Construction Section to be a law dealing with police power, health, safety, crime, taxation, etc. He noted that private parties have historically, under English common law and Virginia law, had freedom to contract and to arrange the commercial terms between them.

Regarding SB 550's amendments to § 11-4.6, Mr. Manchester expressed a desire for more clarity as to the scope of contracts to which they apply. He noted that there are two issues in this regard. First, lines 45-49 of the bill define "construction contract" as meaning "a contract between a general contractor and a subcontractor *relating to* the construction … of a building … [or] of projects other than buildings." He posited the question as to what "relating to" means. He asked what it covers. He stated that he believes that some of the participants in the industry have very rightfully raised the issue of whether this definition applies to their contracts. He noted that it is the Construction Section's understanding that the General Assembly's intent was not to cover contracts for professional services, including architectural, professional engineering, and other professional services. He explained that the Construction Section believes that clarifying the definition of "construction contract" in § 11-4.6 would not be just a technical amendment, but would really be a substantive matter that the Workgroup should consider if the General Assembly is going to revisit this matter. Second, he noted that the Construction Section noticed inconsistencies in SB 550's amendments to § 11-4.6 in that

subsection B refers to "construction contracts," whereas subsection C refers to "any contract." He expressed that he does not believe that the General Assembly intended for the provisions of subsection C to apply to "any contract" because the rest of the amendments made by SB 550 deal exclusively with construction contracts. He suggested that technical amendments be made to improve the clarity of the bill regarding these two issues.

Mr. Manchester noted that § 11-4.6 has the same issue as § 2.2-4354 in the VPPA above regarding the narrow description of the basis upon which a general contractor may withhold money from a subcontractor. He reiterated that there can be many other legal reasons pursuant to which a general contractor is required to or may wish to withhold payment. He suggested that adding "or other legal basis" may assist in clarifying the reasons for which payment may be withheld. Relatedly, he also noted that subsection B and subsection C use inconsistent language to denote the reasons for which a general contractor may withhold payment. He noted that line 73 in subsection C of the bill states that a higher-tier contractor shall not be liable for amounts otherwise reducible "pursuant to a breach of contract by the subcontractor[,]" whereas line 58 in subsection B states that a private owner is not required to pay amounts invoiced that are subject to withholding for the general contractor's "noncompliance with the terms of the contract" and line 13 in § 2.2-4354 states that a contractor on a public contract shall not be liable for amounts otherwise reducible due to the subcontractor's "noncompliance with the terms of the contract." He stated that the Construction Section suggests improving the clarity and uniformity of the provisions of the Code added by SB 550 in order to make them more understandable by all parties.

The final technical amendment that Mr. Manchester discussed pertains to the inconsistent payment deadlines in subsections B and C for owners and general contractors. He noted that subsection B requires owners to pay within 60 days of *receipt of an invoice*, whereas subsection C requires contractors to pay within 60 days of *satisfactory completion of the work* or seven days after receiving the owner's money. He stressed that this inconsistency will likely cause confusion, and that unless "satisfactory completion of the work" is defined in the contract, such clause may be unclear or unwieldy to use.

Finally, Mr. Manchester discussed some of the public comments made by others regarding SB 550. First, he noted that he agrees with stakeholders' comments that the provisions of SB 550 should be amended to clarify whether or not they apply to contracts for professional services. He said that he believes is a legitimate concern. Second, he mentioned stakeholder comments that were made at previous Workgroup meetings suggesting that the Workgroup or the General Assembly should consider changes to Virginia's mechanics lien laws. He explained that mechanics lien laws allow persons who provided materials or labor on a project and who were not paid to place a lien on the real estate on which they worked and ultimately have the property sold to pay them. He noted that often private property owners have no idea who worked on their project, did not know that such individuals were unpaid, and had no privity of contract with them. He explained that these laws provide a right against landowners where there is no such right under common law, and noted that he was explaining these things in order to caution that

any review of this area of the law or any consideration of potential changes to it should be done via a study featuring multiple stakeholders, including commercial property owners, lenders, and others that are beyond the membership of the Workgroup. He stressed that because this area of the law is so technical with regards to timing and rights, and because it can significantly impact private landowners, any potential changes to it would best be reviewed by a group such as the Boyd-Graves Conference.

The Workgroup had no questions for Mr. Manchester.

IV. Presentation on Potential Technical Amendments to SB 550

Next, Jessica Budd, staff to the Workgroup, gave a presentation to the Workgroup regarding potential technical amendments that it could consider recommending to the General Assembly to improve SB 550's clarity, consistency, and implementation. She noted that her presentation would overlap somewhat with some of the technical amendments identified earlier by Mr. Manchester, but she stated that she hoped that hearing them again would make it easier for the Workgroup to understand them.

Ms. Budd highlighted that one of the common themes that the Workgroup has heard in both the written and oral testimony that it has received from stakeholders on SB 550 is that some of its language is unclear, inconsistent, and confusing, leading to problems with its interpretation and implementation. As such, the Workgroup's staff compiled this list of potential technical amendments to SB 550 based on comments and suggestions made by stakeholders and others. She pointed the Workgroup to a handout that she created listing each of the amendments.

Before going through the list of potential technical amendments, however, Ms. Budd provided the Workgroup with a quick overview of SB 550. She explained that its effective date is January 1, 2023 and that it appears intended to apply to both public and private construction contracts and all tiers in the contracting chain. She then noted that SB 550 addresses two primary issues: (i) *who* has the responsibility for paying a subcontractor when the public body or owner, as applicable, does not pay the general contractor and (ii) *when* must payment occur. She then walked the Workgroup through the status of the law prior to the enactment of SB 550, and how SB 550 changed such law. She explained that the biggest changes SB 550 made were to (a) prohibit "pay-if-paid" clauses in subcontracts between general contractors and subcontractors and hold general contractors liable for making payment to subcontractors regardless of whether the general contractor has received payment for the subcontractor's work from the public body/owner and (b) establish timelines for when (1) owners must make payment to general contractors on private contracts and (2) general contractors (and any other higher-tier contractor) must make payment to subcontractors on both public and private contracts.

Ms. Budd then turned to the list of potential technical amendments to SB 550. To assist with the Workgroup with following her presentation, she pointed it to a handout that she created listing the amendments in three categories – those that would affect the bill

generally across both sections contained in the bill, those that would affect § 2.2-4354 of the VPPA dealing with public contracts, and those that would affect § 11-4.6 dealing with private contracts. She noted that one of the big themes of the amendments is that many of them seek to make the language of SB 550 more uniform. She explained that an important legislative drafting principle is to use the same language when you intend to mean the same thing. She stressed that this is important because the Cannons of Statutory Construction hold that when a legislature uses different language (words, phrases, terms) in various places, it must have intended to mean something different in each place. Courts will interpret the statute using this principle. She explained to the Workgroup that as she goes through the amendments, they will see that there are several places in SB 550 where it appears that the legislature intended to say the same thing in multiple places in the bill, but it ended up using different language in each place. This inconsistency, she stressed, leads to difficulties with interpreting and implementing the provisions of the bill.

The first category of amendments Ms. Budd discussed were those that affect the bill generally across all sections. She explained that the first potential amendment would be to make the definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" uniform in their application to both public contacts (§ 2.2-4354) and private contracts (§ 11-4.6). She noted that one of the challenges with the way that SB 550 was written is that the bill inserts the new provisions of Code into existing Code sections, and these existing Code sections already had their own sets of definitions that apply to each of them separately – the VPPA and § 11-4.6. The problem is that each of those sets of definitions are different from one another. As such, the payment liability and timing provisions added to the Code by SB 550 end up applying to different pools of individuals depending upon whether the contract at issue is public (which is governed by § 2.2-4354 and the definitions in the VPPA) or private (which is governed by § 11-4.6 and the definitions in that section).

For example, Ms. Budd highlighted both the VPPA and § 11-4.6 define "contractor/general contractor" and "subcontractor," but § 11-4.6 explicitly excludes materials suppliers from its definitions of "general contractor" and "subcontractor." She noted that the corresponding definitions in the VPPA do not have this exclusion. She explained that as a result, materials suppliers on public contracts will be subject to SB 550's payment liability and timing provisions, but not materials suppliers on private contracts. She asked the Workgroup to consider whether the legislature intended these differences. She stated that the answer is most likely "no" – it appears that the legislature intended to impose similar payment liability and timing provisions for both public contracts and private contracts, and these differences in application seem to simply be a product of how the bill was drafted by inserting the new provisions of SB 550 into existing Code sections and thereby co-opting the existing (but different) definitions that already applied to those Code sections. As another example, she pointed out that the definitions of "construction" are different in the VPPA versus § 11-4.6. She again asked the Workgroup to consider whether this difference was intentional. She said it most likely was not, but either way these inconsistencies in the application of the bill's provisions depending upon whether the contract at issue is public or private is confusing and makes the bill challenging to implement. To alleviate these issues, she suggested that the

Workgroup could consider recommending to the General Assembly that uniform definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" be used for both the section pertaining to public contracts (§ 2.2-4354) and the section pertaining to private contracts (§ 11-4.6).

Ms. Budd explained that the second potential technical amendment to SB 550 also deals with the definitions in the VPPA and in § 11-4.6. She noted that the Workgroup has received testimony that it appears that it was the intent of the General Assembly to exclude contracts for professional services, including contracts for architectural or professional engineering services, from the scope of the bill, but the language of the bill does not make this exclusion explicit. As such, she noted that the Workgroup could consider recommending to the General Assembly that language be added to the definitions applicable to § 2.2-4354 in the VPPA and § 11-4.6 to clarify that such contracts are excluded from the scope of the bill.

Ms. Budd explained that third potential technical amendment hits directly on the theme she mentioned earlier regarding making the language of the bill more uniform where it appears that the legislature intended to convey the same concept. Ms. Budd noted that SB 550 includes language in three places that expresses the concept that an owner/general contractor shall not be liable for paying a general contractor/subcontractor, as applicable, when the general contractor/subcontractor has not complied with the terms of the contract.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

Lines 12-13: Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

Lines 57-58: An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

Lines 72-73: Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor.

In each of these three places, however, the language is worded differently. To make the bill easier to interpret, as well as bring consistency to its implementation, she stated that the Workgroup could consider recommending to the General Assembly that this language be amended to make it uniform in all three places in which it appears in the bill.

Regarding the fourth potential technical amendment, Ms. Budd noted that SB 550 similarly includes language in three places in the bill that establishes a requirement that that an owner/general contractor must provide notice to its general contractor/subcontractor (as appropriate) if the owner/general contractor wishes to withhold payment from the general contractor/subcontractor.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

Lines 14-16: However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

Lines 59-62: However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

Lines 74-78: However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.

Again, however, the language in each of these three places is worded differently. She suggested again that to make the bill easier to interpret and more consistent in its implementation the Workgroup could consider recommending to the General Assembly that this language be amended to make as uniform as possible and appropriate in all three places in which it appears in the bill.

Also on the subject of the notice requirement, Ms. Budd explained that the fifth potential technical amendment would be to establish a timeline for *when* the notice of withholding payment must be given. She emphasized that the notice provisions currently in the bill establish the ***requirement*** to provide notice if payment will be withheld, but they do not establish a ***timeline*** for when such notice must be provided. To address this issue, she suggested that the Workgroup could consider recommending that the General Assembly

establish such a timeline. She noted that one option for establishing a timeline could be to link the timeline for providing the notice with the deadlines already established by SB 550 for when payment must be provided. For example, the language could be amended to state that a general contractor must (i) pay the subcontractor or **(ii) provide notice, in writing, of the general contractor's intention to withhold all or a portion of the subcontractor's payment** within the earlier of (a) 60 days after receiving an invoice from the subcontractor or (b) seven days after receiving payment from the owner.

Ms. Budd then moved on to discussing potential technical amendments to § 2.2-4354 in the VPPA, which deals with public contracts. The first such amendment would be to reconcile the provisions added by SB 550 in subdivision 1 with the existing provisions of the Prompt Payment Act that were moved to subsection 2. Ms. Budd noted that Mr. Manchester also touched on this topic.

Ms. Budd explained that the existing provisions of the Prompt Payment Act that were moved to subdivision 2 have been in place for many years, and they apply to ***all*** types of contracts – goods, services, construction, etc. They require a contractor to take one of two actions within seven days of receipt by the contractor of payment from a public body on a public project: (i) pay its subcontractor its proportionate share of the total payment received or (ii) notify the agency and the subcontractor in writing of its intention to withhold all or a part of the payment with the reason for nonpayment. The new provisions added by SB 550 in subdivision 1, however, apply *only* to construction contracts. As such, when discerning the provisions of law applicable to construction contracts, subdivisions 1 and 2 must be read together.

Ms. Budd noted that the first sentence in subdivision 1 on lines 11-12 of the bill requires the contractor to be liable for the "entire amount owed" to any subcontractor with which it contracts. This is different from the "proportionate share" language in subdivision 2, however. She highlighted that it is unclear how the "entire amount owed" language is intended to interact with the "proportionate share" language, and she noted that this is something that the Workgroup could consider recommending that the General Assembly clarify.

Additionally, she noted that as Mr. Manchester mentioned, SB 550 does not repeal the VPPA's retainage provisions, but the words "entire amount owed" in subdivision 1 create confusion on this point. She highlighted that subsection B (on lines 63-64) and subsection C (on lines 84-85) of § 11-4.6 include the following language in order to dispel any such confusion in that section: "Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract." She suggested that to alleviate any confusion and make the bill more consistent throughout both sections, the Workgroup could consider recommending to the General Assembly that this language also be included in subdivision 1 of § 2.2-4345.

Ms. Budd further noted that while subdivision 2 (the existing provisions of the Prompt Payment Act) establishes the obligation of the general contractor to either (i) pay the subcontractor or (ii) provide notice to the subcontractor that it intends to withhold

payment within seven days of the general contractor having received payment from the public body, and subdivision 1 establishes the obligation of the general contractor to pay the subcontractor regardless of whether the general contractor has received payment from the public body, neither subdivision 1 nor subdivision 2 establish ***when*** the general contractor must pay the subcontractor in instances in which the general contractor has not received payment from the public body. An argument could be made that the provisions of subsection C of § 11-4.6 (which requires a general contractor, when it has not been paid by the owner, to pay the subcontractor within "60 days from the date of satisfactory completion of the work for which the subcontractor has invoiced") provide the deadline for payment in such instances, but it is not entirely clear that the provisions of subsection C of § 11-4.6 are intended to apply to subcontracts on public contracts. As such, she suggested that the Workgroup could consider recommending that the General Assembly add clarifying language to § 2.2-4354 to establish a clear deadline for when payment is due from general contractors to subcontractors on public contracts in circumstances in which the general contractor has not received payment from the public body.

Ms. Budd explained that the final potential technical amendment to § 2.2-4354 pertains to the interest clause in subdivision 4. The current language in subdivision 4 requires general contractors to pay interest to their subcontractors on all amounts owed by the general contractor that remain unpaid after seven days following receipt by the general contractor of payment from the public body for work performed by the subcontractor under the contract. Similarly, subsection B (on lines 62-63) and subsection C (on lines 82-84) of § 11-4.6 require owners and general contractors to pay interest on past-due amounts.

She stated that if the Workgroup recommends adding language to § 2.2-4354 to clarify ***when*** payment is due to a subcontractor in instances in which the general contractor has not been paid by the public body, the Workgroup could consider also recommending that the interest clause in subdivision 4 be expanded to require general contractors to pay interest on amounts that are not paid by such deadline.

Ms. Budd then moved on to discuss potential technical amendments to § 11-4.6, which deals with private contracts. She noted that the first technical amendment would be to correct the catchline for § 11-4.6. She explained that before SB 550 added the provisions to § 11-4.6 dealing with payment liability and timing, § 11-4.6 only dealt with issues surrounding the liability of a contractor for the wages of a subcontractor's employees. Ms. Budd noted that this is reflected in the catchline for § 11-4.6, which simply says: § 11-4.6. Liability of contractor for wages of subcontractor's employees. She explained that the catchline was not updated by SB 550 to reflect the new provisions the bill added to § 11-4.6 dealing with payment liability and timing. As such, she suggested that to add clarity to § 11-4.6 the Workgroup could consider recommending to the General Assembly that it update the catchline to reflect *both* the existing provisions of § 11-4.6 *and* the new provisions added by SB 550.

Regarding the second potential technical amendment to § 11-4.6, Ms. Budd explained that the Workgroup could consider recommending that the General Assembly fix the

subsection and subdivision lettering in § 11-4.6 to separate out the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees from the new provisions added by SB 550 dealing with owners' and general contractors' payment liability and timing. She explained that when the new provisions were added to § 11-4.6 by SB 550, they were each assigned their own subsection (B and C), and the existing subsections in § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees were simply re-lettered (from B, C, D, and E to D, E, F, and G) to accommodate the new provisions. She stressed that not only would it be helpful for interpreting and understanding § 11-4.6 to reconfigure it by assigning the provisions added by SB 550 dealing with payment liability and timing their *own* subsection and subdivisions within such subsection and the provisions dealing with the liability of a contractor for the wages of a subcontractor's employees *their* own subsection and subdivisions within such subsection, doing so would help to resolve an issue on line 106 where the language states, "The provisions of this ***section*** shall only apply if …" Such sentence is clearly intended to only apply to the provisions of the bill related to the liability of a contractor for the wages of a subcontractor's employees and *not* the new provisions of § 11-4.6 dealing with payment liability and timing, but the reference to the entire section creates confusion. To help the Workgroup visualize these potential changes, Ms. Budd pointed the Workgroup to a draft of these changes that was included in the meeting materials.

Ms. Budd noted that the third potential technical amendment would be very important for both clarifying the language of the bill and aligning the language of the bill more closely with what appears to have been the intent of the General Assembly regarding the scope of the bill. She explained that when looking at SB 550 as a whole, it appears that SB 550's payment liability and timing provisions were intended to apply only to *construction* contracts. She noted that line 11 in § 2.2-4354 in the VPPA dealing with public contracts refers specifically to "a contractor on a ***construction*** contract." Similarly, line 54 in subsection B of § 11-4.6 establishes requirements for ***construction*** contracts between an owner and a general contractor on private projects. Additionally, the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees pertain only to ***construction*** contracts. However, the language on line 65 in subsection C of § 11-4.6 that establishes the requirements for contractors between a general contractor and a subcontractor on private projects refers to "Any contract in which there is at least one general contractor and one subcontractor …". She explained that as such, subsection C, as written, would apply to any contract between a general contractor and a subcontractor – i.e., goods, services, etc. – not *just* construction contracts. She noted that based on the language used throughout the rest of SB 550 and in the existing provisions of § 11-4.6 that is limited only to construction contracts, the broad scope of subsection C of § 11.4-6 does not appear to have been intentional and instead appears to have simply been a mistake. To address this issue, she stated that the Workgroup could consider recommending that the General Assembly amend the language in subsection C of § 11-4.6 to clarify that its provisions only apply to *construction* contracts.

Moving on, Ms. Budd noted that the fourth potential technical amendment to § 11-4.6 would be to resolve the inconsistency in the timelines for payment that are set out in

subsection B for owners and in subsection C for contractors. She explained that on lines 55-57, subsection B of § 11-4.6 requires payment "within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced." However, on lines 69-70 subsection C of § 11-4.6 requires payment within "60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced …" She noted that not only are these provisions confusing and inconsistent, but they also establish different payment requirements for owners versus general contractors where there seems to be no logical reason for having such differences. To resolve this inconsistency, she suggested that the Workgroup could consider recommending that the General Assembly amend this language to make it uniform.

Finally, Ms. Budd explained that the final potential technical amendment to § 11-4.6 (and SB 550 in total) would be to resolve the inconsistent and confusing terminology used in subsection C of § 11-4.6. She noted that subsection C of § 11-4.6 uses all of the following terms: "general contractor;" "subcontractor;" "higher-tier contractor;" "lower-tier subcontractor;" "lower-tier contractor;" and "contractor." This mix of terminology is difficult to follow, and it is unclear if each of these terms is intended to refer to a distinct entity or if some of them are intended to overlap. She suggested that to clarify subsection C and allow for easier implementation of the bill's provisions, the Workgroup could consider recommending that the General Assembly amend subsection C of § 11-4.6 (i) to use only the terms "general contractor" and "subcontractor" (similar to § 2.2-4354 in the VPPA dealing with public contracts) and (ii) by inserting the following language from § 2.2-4354 from the VPPA that would make the provisions of subsection C apply throughout all of the tiers: Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

V. Consideration and Discussion of Public Comment, Written Comments, and Other Information Received by the Workgroup on SB 550

Ms. Gill then invited the Workgroup members to discuss how they would like to proceed with their task. Mr. Heslinga thanked both of the presenters for their presentations highlighting the legal issues surrounding SB 550. He noted that there are a lot of issues or potential issues, but, to him, some of the issues are of a different degree than others. He stated that some of the issues pertain to language that is just confusing, while some of the issues pertain to language that is inconsistent. He stressed that he does not know which inconsistencies were intended by the General Assembly and which were not. He also stated that it is not clear to him which of the issues rise to the level of potentially causing stakeholders problems and necessitating legislative correction action versus which of the issues are inevitably going to be worked out in court cases related to the statutes. He concluded by stating that he is not quite sure how the Workgroup is to address the points he made, but that he wanted to express that, notwithstanding the great presentations, he was left with a number of questions about the various issues raised.

Ms. Gill then asked Mr. Heslinga his opinion as to how the Workgroup should proceed with working through the issues that he raised. Mr. Heslinga responded by acknowledging that the Workgroup is charged with making recommendations on SB 550. He referred to comments by Mr. Manchester that some of the issues raised in public comment on SB 550 should be studied and addressed in a different group, such as the Boyd-Graves Conference. He stated that if this Workgroup is the appropriate venue, then perhaps there needs to be a meeting for all of the lawyers, including private lawyers who may have interests or viewpoints, to really sit down and work through the issues. He noted that that is something that could happen under the auspices of this Workgroup, but it could also happen during the legislative process. He concluded by stating that he is not sure that he has all of the answers, but that he does have questions about how the Workgroup is to proceed at this point.

Addressing Mr. Heslinga's comments about having some of the issues surrounding SB 550 studied by the Boyd-Graves Conference, Ms. Gill noted that Mr. Manchester raised that proposal during his remarks concerning changes that had been proposed by stakeholders to Virginia's mechanics lien statutes. Ms. Gill stated that she agrees with Mr. Manchester's comments that issues surrounding Virginia's mechanics lien statutes are beyond the scope of the Workgroup, but she stated that she is not sure that she would say that the recommendations for technical amendments to SB 550 that were raised by the Construction Section of the Office of the Attorney General or by the Workgroup's staff are outside of the purview of the Workgroup since the Workgroup was directed to look at SB 550 and determine if legislative corrective action is needed. She stressed that any recommendations that the Workgroup would make to the General Assembly would not be directives to the General Assembly telling them that they *have* to make the suggested changes, but would simply be recommendations for changes for their consideration.

Ms. Haley concurred with Ms. Gill's remarks concerning the scope of the Workgroup's charge. She indicated that she believes that providing limited technical amendments that clean up the current policy and legislation is within the scope of what the Workgroup has been asked to do, but she noted that the Workgroup could also include in its report additional comments and recommendations that have been made by stakeholders during public comment that go beyond those limited technical amendments. She stated that such information could simply be offered for the General Assembly's consideration as they may consider further policy or technical amendments to SB 550. Ms. Gill concurred with Ms. Haley's comments.

Mr. Wade indicated his agreement, as well. He reminded the Workgroup of how quickly the legislative process moves and stated that he sees the enactment clause in SB 550 that directs the Workgroup to study SB 550 as essentially establishing a forum to (i) hear from affected stakeholders regarding issues with the practical implementation of SB 550 and (ii) develop recommendations based on such stakeholder feedback to assist the legislature with ultimately achieving its legislative intent. He noted that the presentations today encapsulate that concept – based on information received from the stakeholders, here are some recommendations for addressing the points they raised and better

effectuating the legislature's original intent. He indicated that it is common for the General Assembly to pass legislation that makes a significant policy change and for it to need to come back the following year to make changes to make the new laws more workable for stakeholders. He shared that he does not think it is the role of the Workgroup based on its charge with regards to SB 550 to delve into issues of whether the General Assembly should have made the policy change in the first place.

The Workgroup indicated its agreement with Mr. Wade's remarks. Ms. Gill then asked the Workgroup if it would like to have staff go through each of the potential technical amendments so that the Workgroup could discuss and possibly vote on them one-by-one. The Workgroup indicated its agreement.

VI. Findings and Recommendations on SB 550

Ms. Budd then walked the Workgroup through each of the potential technical amendments that she previously presented, and the Workgroup debated and voted on each amendment.

Generally

1. **Make the definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" uniform in their application to both public contacts (§ 2.2-4354) and private contracts (§ 11-4.6).**

   The Workgroup voted 6-0-1[1] to in favor of recommending to the General Assembly that it consider making the definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" that are applicable to SB 550's payment liability and timing provisions pertaining to public contacts in § 2.2-4354 and to SB 550's payment liability and timing provisions pertaining to private contracts in § 11-4.6 uniform so that all of SB 550's provisions apply more consistently across all groups of stakeholders.

2. **Clarify that contracts for professional services, including architectural or professional engineering services, are not included in the scope of the bill.**

   After brief discussion and a suggestion from Mr. Heslinga and Mr. Wade to slightly alter the wording of the recommendation, the Workgroup voted 6-0-1[2] in favor of recommending that the General Assembly consider clarifying *whether* contracts for professional services, including architectural or professional engineering services, should be included within the scope of the bill.

[1] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.
[2] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

3. Make the "noncompliance/breach" language uniform.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

> **Lines 12-13**: Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

> **Lines 57-58**: An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

> **Lines 72-73**: Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor.

The Workgroup voted 6-0-1[3] in favor of recommending to the General Assembly that it consider making the language that appears in three places in the bill (on lines 12-13, 57-58, and 72-73) and that provides that the owner or general contractor, as appropriate, shall not be liable to the general contractor or subcontractor, as appropriate, if the general contractor or subcontractor has not complied with the terms of the contract more uniform in order to enhance the clarity and consistency of the bill.

4. Make the "notice" language uniform.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

> **Lines 14-16**: However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

> **Lines 59-62**: However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment.

[3] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

> **Lines 74-78**: However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.

Ms. Budd noted that this potential technical amendment is a little more nuanced than the previous one because it appears that it may have been possible that the General Assembly intended some of the variations in the language in each of these three sentences, but she indicated that there is still likely some unintentional differences in some of the language and that removing those unintentional differences would assist with making the bill clearer and more consistent. As such, she recommended that the recommendation be tweaked to say that the Workgroup recommends that the General Assembly consider making the language that appears in three places in the bill (on lines 14-16, 59-62, and 74-78) and that establishes the requirement that owner or general contractor, as appropriate, provide notice to the general contractor or subcontractor, as appropriate, that it intends to withhold funds more uniform where *appropriate and intended* in order to enhance the clarity and consistency of the bill. The Workgroup voted 6-0-1[4] in favor of such recommendation.

5. Establish a timeline for when notice of withholding payment must be given.

The Workgroup voted 6-0-1[5] in favor of recommending to the General Assembly that it consider establishing a timeline for when notice of withholding payment must be given.

Public Contracts - § 2.2-4354

1. Reconcile the provisions added by SB 550 in subdivision 1 with the existing provisions of the Prompt Payment Act that were moved to subsection 2.
- **a. Clarify the *type* of contracts to which each subdivision applies – subdivision 1 only applies to construction contracts, but subdivision 2 applies to all contracts (including construction contracts).**
- **b. "Entire amount owed" (subdivision 1) vs. "proportionate share" (subdivision 2).**
- **c. Clarify that "entire amount owed" does not affect retainage.**
- **d. Reconcile subdivisions 1 and 2 with § 11-4.6 (C)?**
  - **i. When must a general contractor pay a subcontractor when the general contractor has not been paid by the public body?**

In the context of considering the uniformity of the application of SB 550's amendments to § 2.2-4354, the Workgroup engaged in discussion as to whether all local public bodies

[4] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.
[5] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

and public institutions of higher education are subject to such provisions. The Workgroup determined that this is a complex issue and needs to be highlighted for the General Assembly for its consideration in its report.

The Workgroup voted 6-0-1[6] in favor of recommending to the General Assembly that it consider reconciling the provisions added by SB 550 in subdivision 1 with the existing provisions of the Prompt Payment Act that were moved to subsection 2 and, in doing so, consider clarifying (i) the type of contracts to which each subdivision applies, (ii) how the "entire amount owed" language in subdivision 1 is intended to interact with the "proportionate share" language in subdivision 2, (iii) that the "entire amount owed" language in subdivision 1 is not intended to affect the VPPA's retainage provisions, and (iv) when a general contractor must pay a subcontractor when the general contractor has not been paid by the public body.

2. Subdivision 4 (interest clause) – Amend to require general contractors to pay interest on amounts that are past-due in situations in which the general contractor has not been paid by the public body.

Ms. Budd further explained that the current language in subdivision 4 requires general contractors to pay interest to their subcontractors on all amounts owed by the general contractor that remain unpaid after seven days following receipt by the general contractor of payment from the public body for work performed by the subcontractor under the contract. Similarly, subsection B (on lines 62-63) and subsection C (on lines 82-84) of § 11-4.6 require owners and general contractors to pay interest on past-due amounts. To bring further consistency to the bill, she explained that the Workgroup could consider recommending that the interest clause in subdivision 4 be expanded to require general contractors, in instances in which the general contractor has not been paid by the public body, to pay interest on past-due amounts. She noted that such amendment would more closely align the provisions of § 2.2-4354 to the corresponding provisions of subsection C of § 11.4.6.

Mr. McHugh commented that he believes that it is not the Workgroup's place to make this recommendation. Ms. Innocenti concurred with Mr. McHugh's remarks and stated that it is outside of the scope of their relationship regarding privity of contract with the subcontractor. Ms. Haley suggested that the Workgroup note this issue as a distinction made by the bill between the provisions of § 2.2-4354 and § 11-4.6, but not recommend that the General Assembly consider taking any action to address the distinction. The Workgroup voted 6-0-1[7] in favor of Ms. Haley's suggestion.

[6] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.
[7] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

Private Contracts - § 11-4.6

1. **Fix catchline for § 11-4.6.**
    a. **Current catchline = § 11-4.6. Liability of contractor for wages of subcontractor's employees.**

    Mr. Heslinga inquired as to whether the Code Commission has the authority to update the catchline of § 11-4.6 to reflect the new provisions that were added to it by SB 550. Mr. Wade responded that the Code Commission does have such authority, but the catchline is more likely to get updated during the drafting process if a member of the General Assembly requests a bill that amends § 11-4.6.

    The Workgroup voted 6-0-1[8] in favor of recommending to the General Assembly that it consider updating the catchline of § 11-4.6 to reflect ***both*** the existing provisions of § 11-4.6 (dealing with the liability of a contractor for the wages of a subcontractor's employees) *and* the new provisions added by SB 550 (dealing with payment liability and timing between private owners, general contractors, and subcontractors).

2. **Fix subsection/subdivision lettering to separate out the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees from the new provisions added by SB 550 dealing with owners' and general contractors' payment liability and timing.**

    The Workgroup voted 6-0-1[9] in favor of recommending that the General Assembly consider amending the subsection and subdivision lettering in § 11-4.6 to separate out the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees from the new provisions added by SB 550 dealing with owners' and general contractors' payment liability and timing, which would help to make § 11-4.6 easier to interpret and implement.

3. **Clarify that subsection C of § 11-4.6 applies only to "any *construction* contract," not "any contract."**

    The Workgroup voted 6-0-1[10] in favor of recommending that the General Assembly consider clarifying that subsection C of § 11-4.6 applies only to construction contracts.

4. **Resolve the inconsistency between the timelines for payment that are set out in subsection B for owners and in subsection C for contractors.**

    Lines 55-57 [§ 11-4.6(B)]: Requires payment "within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced."

[8] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.
[9] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.
[10] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

Lines 69-70 [§ 11-4.6(C)]: Requires payment within "60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced …"

Mr. McHugh noted his agreement with the recommendation and suggested that the Workgroup specifically recommend that the General Assembly consider using the language "receipt of invoice" in both places. Mr. Wade asked whether "receipt of invoice" is clearer and easier to interpret for practitioners than "satisfactory completion." Mr. McHugh answered in the affirmative and said that "receipt of invoice" aligns with the Prompt Payment Act in the VPPA, as well as standard requirements. He said that it is more of a standard practice than "satisfactory completion."

All members of the Workgroup agreed with Mr. McHugh's suggestion except for Mr. Heslinga. Mr. Heslinga stated that he is not sure that the legislature did not intend this inconsistency. Regarding the language on lines 55-57, he said that he could imagine that the legislature thought that an owner would need to receive an invoice from a general contractor in order to know when the owner needs to pay the general contractor. Regarding the language on lines 69-70, however, he said that general contractors should know when their subcontractors have completed their work, so there would be no need to require the subcontractor to send the general contractor an invoice. He concluded by stating that he supports flagging the inconsistency for the legislature so that it can determine whether it was intended, but not recommending that the legislature consider making the language uniform and using the "receipt of invoice" language in both places.

The Workgroup voted 5-1-1[11] in favor of recommending that the General Assembly consider (i) reconciling the inconsistency between the timelines for payment that are set out on lines 55-57 in subsection B for owners and on lines 69-70 in subsection C for contractors and (ii) reconciling such inconsistency by using the "receipt of invoice" language used on lines 55-57 in subsection B as the trigger for payment in both subsections.

5. **Resolve the inconsistent and confusing terminology used in § 11-4.6(C). § 11-4.6(C) uses all of the following terms: "general contractor;" "subcontractor;" "higher-tier contractor;" "lower-tier subcontractor;" "lower-tier contractor;" and "contractor." § 11-4.6(C) could be simplified by just referring to "general contractor" and "subcontractor" and inserting this language similar to this provision from § 2.2-4354 in the VPPA:**

   Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

   The Workgroup voted 6-0-1[12] in favor of recommending that the General Assembly consider amending subsection C of § 11-4.6 (i) to use only the terms "general contractor"

[11] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, and Ms. Gill. No: Mr. Heslinga. Abstain: Mr. Saunders.
[12] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

and "subcontractor" (similar to § 2.2-4354 in the VPPA dealing with public contracts) and (ii) by inserting the following language from § 2.2-4354 from the VPPA that would make the provisions of subsection C apply throughout all of the tiers: Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

Ms. Budd then noted that this was her final suggested recommendation, but reminded the Workgroup that Mr. Manchester had suggested additional technical amendments in his remarks to the Workgroup earlier in the meeting. She asked if the Workgroup would like to take up those recommendations as well. Ms. Haley responded that if the Workgroup is open to it, her office could work on putting together some language for the Workgroup to consider. Ms. Gill responded in the affirmative.

Ms. Gill then asked the Workgroup if it would like to engage in any further discussion. Referring to comments concerning the potential effects of SB 550 on public procurement, such as increased costs, decreased competition, and impacts to bonding capacity made by Mr. Manchester in his presentation to the Workgroup, Ms. Pride asked if the Workgroup is open to flagging such issues as potential unintended consequences of SB 550 in its report to the General Assembly. Ms. Haley responded that some of the stakeholders made similar comments in their testimony before the Workgroup, and she feels that it is appropriate for the Workgroup to summarize the public comment received by the Workgroup in its final report. The Workgroup agreed.

VII. Public Comment

The Workgroup then heard public comment from stakeholders.

Fred Codding with the Iron Workers Employers Association (IWEA) and the Alliance for Construction Excellence (ACE) stated that he was disturbed by a comment made during one of the presentations stating that the General Assembly has traditionally left private parties to negotiate and agree upon their own contractual terms. He told the Workgroup that in recent years the General Assembly has taken some strong positions in a bipartisan way on waiver of mechanics lien claims and bond claims and made such provisions in private contracts unenforceable. He concluded by reiterating that while the General Assembly may not have traditionally been involved much in private contracts, it certainly has been in recent years.

Scott Kowalski, a construction lawyer in Lynchburg, Virginia with Petty, Livingston, Dawson & Richards, P.C. and a member of the Board of Directors of Associated Builders & Contractors (ABC) of Virginia, began his remarks by concurring with Mr. Codding's comments that over the last 10 to 15 years the General Assembly, at the behest of the construction industry, has placed itself in between private parties by stepping in to prohibit waivers of mechanics liens and waivers of bond rights, prohibit cost withholding across contracts, and prohibit certain indemnity provisions in construction contracts. He stressed that SB 550 is not the first foray into private contracting that the General

Assembly has taken. Mr. Kowalski further commented that ABC did not receive the proposed technical amendments until this morning, so they would like to reserve their ability to comment on the outcome of the discussion and recommendations made by the Workgroup today. He did note, however, that the most important amendment from ABC's perspective is the two timing of payment provisions. He stressed that if the owner is paying timely in accordance with the statute, the general contractor has the ability to also pay timely in accordance with the statute and not be placed into a predicament. He stressed that that is a big concern for ABC's members and, he thinks, for all of the contracting community.

There was no further public comment.

VIII. Discussion

There was no further discussion among the Workgroup members.

IX. Adjournment

Ms. Gill adjourned the meeting at 11:10 a.m. and noted that the next Workgroup meeting is scheduled for Monday, September 19, 2022 at 9:30 a.m. in conference rooms C, D, and E in the James Monroe Building in Richmond, Virginia.

For more information, see the Workgroup's website or contact that Workgroup's staff at pwg@dgs.virginia.gov.

Appendix E: September 19, 2022 Meeting Materials

This appendix contains the meeting materials from the September 19, 2022 Workgroup meeting.

1. Agenda
2. Draft of Final Recommendations for SB 550
3. Draft Meeting Minutes

Public Body Procurement Workgroup

http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/

Meeting # 5
Monday, September 19, 2022, 9:30 a.m.
Conference Rooms C, D, and E
James Monroe Building
101 N 14th St, Richmond, Virginia 23219

AGENDA

I. **Call to Order; Remarks by Chair**

Sandra Gill, Deputy Director
Department of General Services

II. **Approval of Meeting Minutes from the August 31, 2022 Workgroup Meeting**

III. **Public Comment on Draft Recommendation for SB 575**

IV. **Finalize Recommendations on SB 575**

V. **Public Comment on Draft Recommendations for SB 550**

VI. **Finalize Recommendations on SB 550**

VII. **Introduction of Study of SB 272 – Review and recommend policies related to the climate impact of concrete**

Sandra Gill, Deputy Director
Department of General Services

VIII. **Public Comment**

IX. **Discussion**

X. **Adjournment**

Members

Department of General Services
Virginia Information Technologies Agency
Department of Planning and Budget
Virginia Association of State Colleges and University Purchasing Professionals
Department of Small Business and Supplier Diversity
Virginia Department of Transportation
Virginia Association of Government Purchasing

Representatives

Office of the Attorney General
Senate Finance Committee
House Appropriations Committee
Division of Legislative Services

Staff

Jessica Budd, Legal Policy Analyst, DGS
Jessica Hendrickson, Director of Policy and Legislative Affairs, DGS

Public Body Procurement Workgroup

Draft of Final Recommendations for SB 550

I. AMENDMENTS PERTAINING TO ALL OF SB 550

Recommendation #1:

The Workgroup recommends that the General Assembly consider making the definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" that are applicable to SB 550's payment liability and timing provisions pertaining to public contacts in § 2.2-4354 and to SB 550's payment liability and timing provisions pertaining to private contracts in § 11-4.6 uniform.

Recommendation #2:

The Workgroup recommends that the General Assembly consider clarifying whether contracts for professional services, including architectural or professional engineering services, should be included within the scope of SB 550's payment liability and timing provisions.

Recommendation #3:

The Workgroup recommends that the General Assembly consider making the following language in SB 550 uniform in order to enhance the clarity and consistency of the bill:

> Lines 12-13: Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract.
>
> Lines 57-58: An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract.
>
> Lines 72-73: Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor.

Recommendation #4:

The Workgroup recommends that the General Assembly consider making the following language in SB 550 uniform where appropriate and intended in order to enhance the clarity and consistency of the bill:

> Lines 14-16: However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall

notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

Lines 59-62: However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment.

Lines 74-78: However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.

Recommendation #5:

The Workgroup recommends that the General Assembly consider establishing a timeline for when the notice of withholding payment must be given.

II. AMENDMENTS PERTAINING TO § 2.2-4354 – PUBLIC CONTRACTS

Recommendation #6:

The Workgroup recommends that the General Assembly consider reconciling the provisions added by SB 550 in subdivision 1 of § 2.2-4354 with the existing provisions of the Prompt Payment Act that were moved to subsection 2 of § 2.2-4354 and, in doing so, consider clarifying (i) the type of contracts to which each subdivision applies, (ii) how the "entire amount owed" language in subdivision 1 is intended to interact with the "proportionate share" language in subdivision 2, (iii) that the "entire amount owed" language in subdivision 1 is not intended to affect the VPPA's retainage provisions, and (iv) when a general contractor must pay a subcontractor when the general contractor has not been paid by the public body.

III. AMENDMENTS PERTAINING TO § 11-4.6 – PRIVATE CONTRACTS

Recommendation #7:

The Workgroup recommends that the General Assembly consider updating the catchline of § 11-4.6 to reflect both the provisions of § 11-4.6 that existed prior to the amendments made by SB 550 and that are still in effect (dealing with the liability of a contractor for the wages of a subcontractor's employees) and the new provisions added by SB 550 (dealing with payment liability and timing between private owners, general contractors, and subcontractors).

Recommendation #8:

The Workgroup recommends that the General Assembly consider amending the subsection and subdivision lettering in § 11-4.6 to separate out the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees from the new provisions added by SB 550 dealing with owners' and general contractors' payment liability and timing in order to make § 11-4.6 easier to interpret.

Recommendation #9:

The Workgroup recommends that the General Assembly consider clarifying that the provisions of subsection C of § 11-4.6 applies only to construction contracts.

Recommendation #10:

The Workgroup recommends that the General Assembly consider (i) reconciling the inconsistency between the timelines for payment that are set out on lines 55-57 in subsection B of § 11-4.6 for owners and on lines 69-70 in subsection C of § 11-4.6 for general contractors and (ii) reconciling such inconsistency by using the "receipt of invoice" language used on lines 55-57 in subsection B as the trigger for payment in both subsections.

Recommendation #11:

The Workgroup recommends that the General Assembly consider clarifying the inconsistent and confusing terminology used in subsection C of § 11-4.6 by amending it (i) to use only the terms "general contractor" and "subcontractor" (similar to § 2.2-4354 in the VPPA dealing with public contracts) and (ii) by inserting the following language from § 2.2-4354 in the VPPA that would make the provisions of subsection C apply throughout all of the tiers: Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

DRAFT Meeting Minutes

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The Public Body Procurement Workgroup (the Workgroup) met in-person in conference rooms C, D, and E in the James Monroe Building in Richmond, Virginia, with Sandra Gill, Deputy Director of the Department of General Services (DGS), presiding. The meeting began with remarks from Ms. Gill, followed by presentations, discussion, and public comment. Materials presented at the meeting are available through the Workgroup's website.

Workgroup members and representatives present at the meeting included Sandra Gill (Department of General Services), Matthew James (Department of Small Business and Supplier Diversity), Joshua Heslinga (Virginia Information Technologies Agency), Lisa Pride (Virginia Department of Transportation), Jason Saunders (Department of Planning and Budget), , John McHugh (Virginia Association of State Colleges and University Purchasing Professionals), Leslie Haley (Office of the Attorney General), Andrea Peeks, (House Appropriations Committee), Adam Rosatelli (Senate Finance and Appropriations Committee) and Joanne Frye (Division of Legislative Services). Elizabeth Dooley with the Virginia Association of Governmental Procurement was absent.

I. Call to Order; Remarks by Chair

Sandra Gill, Deputy Director
Department of General Services

Ms. Gill called the meeting to order and informed the Workgroup that today it will receive public comment and finalize its recommendations on SB 575 and SB 550. She noted that the draft language of the final recommendations for SB 575 and SB 550 was shared with the Workgroup and members of the public for their review in advance of today's meeting. She requested that stakeholders who have already provided public comment to the Workgroup at previous meetings limit their comments to any new information that they wish to share with the Workgroup.

II. Approval of Meeting Minutes from the August 31, 2022 Workgroup Meeting

Mr. Heslinga made a motion to approve the meeting minutes from the August 11, 2022 meeting of the Workgroup. The motion was seconded by Mr. James and unanimously approved by the Workgroup.

III. Public Comment on Draft Recommendations for SB 575

Ms. Gill invited stakeholders to provide public comment on the draft recommendations for SB 575. There was no public comment.

IV. Finalize Recommendations on SB 575

Draft of Final Recommendation for SB 575

The Workgroup finds that it is not appropriate at this time to require DGS and all other state agencies to use a TCO calculator for medium-duty and heavy-duty vehicles, but the Workgroup recommends that the General Assembly consider directing VDOT, DRPT, and other state agencies to (i) investigate and determine the appropriate factors that need to be included in a TCO calculator for medium-duty and heavy-duty vehicles and (ii) determine when it may be appropriate to implement a requirement that state agencies use a TCO calculator for medium-duty and heavy-duty vehicles.

Next, Ms. Gill asked the Workgroup for their comments on the draft version of the Workgroup's final recommendation for SB 575. Mr. McHugh asked whether the Workgroup had intended to use the term "TCO calculations" instead of "TCO calculator" in the final recommendation. Mr. Heslinga noted that SB 575 uses the term "calculator." Ms. Gill echoed Mr. Heslinga's comment and stated that for consistency she recommends sticking with the term "calculator" in the final recommendation. The rest of the Workgroup members indicated their agreement with Ms. Gill's recommendation. Mr. McHugh then also indicated his agreement. There was no further discussion on the draft version of the final recommendation for SB 575.

Mr. Heslinga then made a motion for the Workgroup approve the final recommendation on SB 575. The motion was seconded by Ms. Pride. The motion carried by a vote of 5-0-1.[1]

V. Public Comment on Draft Recommendations for SB 550

Ms. Gill then invited stakeholders to provide public comment on the draft recommendations for SB 550. There was no public comment.

[1] Yes: Mr. McHugh, Ms. Pride, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

VI. Finalize Recommendations on SB 550

Draft of Final Recommendations for SB 550

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Next, Ms. Gill asked the Workgroup for their comments on the draft versions of the Workgroup's final recommendations for SB 555. There was no discussion by the Workgroup.

Mr. Heslinga then made a motion for the Workgroup approve all of the final recommendations on SB 550. The motion was seconded by Ms. James. The motion carried by a vote of 5-0-1.[2]

[2] Yes: Mr. McHugh, Ms. Pride, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

VII. Introduction of Study of SB 272 – Review and recommend policies related to the climate impact of concrete

Ms. Gill shared with the Workgroup that its next study will be of SB 272 from the 2022 Regular Session of the General Assembly. She noted that the bill was introduced by Senator Hashmi. She informed the Workgroup that it will take this bill up for study at a future meeting.

VIII. Public Comment

There was no public comment.

IX. Discussion

There was no further discussion among the Workgroup members.

X. Adjournment

Ms. Gill adjourned the meeting at 9:41 a.m. and noted that the Workgroup's staff will send drafts of the final reports for SB 575 and SB 550 to the Workgroup's members for their review prior to submitting them to the General Assembly by their December 1, 2022 due dates.

For more information, see the Workgroup's website or contact that Workgroup's staff at pwg@dgs.virginia.gov.
