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D.C. JOBS BILL HAS FAR-REACHING IMPLICATIONS FOR CONTRACTORS

BY JUANITA F. FERGUSON, ESQUIRE

Developers, general contractors and subcontractors doing business in the District of Columbia ("District") should exercise caution before entering into certain agreements to provide construction-related services. The District of Columbia Workforce Intermediary Establishment and Reform of First Source and Living Wage Amendment Act of 2011, commonly referred to as the Amended First Source Act, is the most recent legislation passed by the District to reduce unemployment and to increase the taxpaying base in the city.

The term "first source" is not new to the construction community, however, the amended law promises to have a much greater impact than the original law passed in 1984. Under the original Act, if a beneficiary, i.e. party to an agreement with the District, received at least \$100,000 in contracts or other financial assistance from the District, the beneficiary had to agree to fill 51 percent of all new construction jobs, apprenticeships or trainee positions for the funded projects with District residents. In other words, the "first source" for finding employees to fill new job vacancies was unemployed residents registered with the District's Department of Employment Services ("DOES").

One of the challenges for parties subject to the First Source Act has always been eliminating the perception that construction jobs require no skill and can be performed by anyone. Another challenge is that the mechanisms in place to assist beneficiaries in filling vacancies do not always assure beneficiaries' ability to comply with the law. Contractors should be able to look to DOES for a bank of qualified persons for construction jobs, as well as assistance when the contractor's own recruitment efforts do not produce the desired results of a qualified labor pool. Success in that area has not always been consistent.

Under the Amended First Source Act, for every construction or non-construction contract or project valued between \$300,000 and \$5,000,000 that receives funds from the District or federal funds that are administered by the District, 51 percent of a contractor's new hires shall be District residents. For every government-assisted project or contract that receives government assistance totaling \$5,000,000 or more, at least 20 percent of journey worker hours shall be performed by District residents, at least 60 percent of apprentice hours shall be performed by District residents, at least 51 percent of the skilled laborer hours shall be performed by District residents, and at least 70 percent of common laborer hours shall be performed by District residents.

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Stringent reporting obligations have been enacted to monitor beneficiaries' efforts to comply with the Amended First Source Act. From the beginning of a project or contract until construction is completed and a certificate of occupancy is issued, monthly compliance reports must be submitted by beneficiaries to DOES. This includes, but is not limited to, information on the number of employees hired to work on a project, the number of new jobs created, the number of employees transferred from other jobs, the number of job openings listed with DOES, the total direct and indirect labor costs of the project or contract, the number of District residents hired for the reporting period, and the social security number, job title, hire date and referral source for all new hires. For projects or contracts totaling \$5,000,000 or more, certified copies of payrolls of all contractors working on a project must be submitted to DOES.

While the Amended First Source Act provides waivers for those who make good faith efforts to comply with the Act but are unable, the penalties for noncompliance with the Amended First Source Act are significant. The District Mayor may impose a penalty equal to one-eighth of one percent of the total amount of the direct and indirect labor costs of the project or contract for each percentage by which a beneficiary fails to meet hiring requirements. If a beneficiary receives a second violation of the hiring requirements within a 10-year time period, the Mayor is required to automatically debar the violator from being considered for contract awards for a period of not more than five years, and the violator may be considered ineligible for consideration of government-assisted projects for a period of not more than five years.

The Amended First Source Act has caused concern throughout the construction community. It is not an uncommon sentiment that smaller employers will not be able to meet the reporting requirements due to the fact that either the personnel necessary to compile the data are not in place or the cost to maintain the records will add to the bottom line costs that must be passed on to owners of projects. Additionally, opponents of the legislation are adamant that the mandatory hiring percentages are impossible for any sized employer to meet given the limited number of District residents

that are qualified and/or have the skills to work in the construction industry. Finally, those persons who might otherwise be hired to work on a project but are not District residents will be denied the opportunity to work on construction projects for which they might otherwise have been eligible.

It remains to be seen whether the Amended First Source Act will result in increased job opportunities for District residents or the demise of contracting businesses for failure to comply with the requirements of the law. One thing is certain – if you plan to do business in the District, it is essential you familiarize yourself with the requirements of the Amended First Source Act in order to make an intelligent bid for work and to navigate safely through the procedural requirements that could have a lasting impact on your ability to participate in future projects, whether within the District or another jurisdiction.

Juanita F. Ferguson is an Associate in the law firm of Bean, Kinney & Korman in Arlington, Virginia. She practices in the area of litigation and has litigated construction defects, mechanic's liens, premises liabilities, negligence, and employment and insurance defense matters. She can be reached at jferguson@beankinney.com and 703-525-4000.

PROPOSED AMENDMENT TO VIRGINIA'S CONSTITUTION COULD LIMIT GOVERNMENT'S USE OF EMINENT DOMAIN

BY LAUREN K. KEENAN, ESQUIRE

The Virginia General Assembly recently voted in support of two identical bills - HJ-3 in the House of Delegates and SJ-3 in the Senate - that propose to amend the Commonwealth's Constitution to further restrict the Government's use of eminent domain.

SJ-3 passed in the state Senate, and HJ-3 passed in the House of Delegates. Each house is now considering the other's identical bill (which are expected to pass). If both houses pass the bills, the amendment will be placed on the ballot in November as a referendum to Virginia voters who will ultimately decide the issue.

Article I, Section 11 of Virginia's Constitution currently mirrors the Fifth Amendment to the U.S. Constitution, providing that "just compensation must be paid whenever property is taken or damaged for public use." In 2005,

the U.S. Supreme Court decided the highly controversial case, *Kelo v. City of New London*, where the town of New London, Connecticut, was permitted to take private property for an economic development project. Lawmakers in many states, including Virginia, felt that the Supreme Court decision stretched the power of eminent domain too far and that economic development was not the same as “public use.” Since that decision, opponents of the *Kelo* decision have been working to counter its effects within Virginia.

The proposed amendment seeks to contract the power of eminent domain in Virginia and limit the use of the power to strict public uses only. The suggested language of the amendment makes it clear that economic development would no longer qualify as a public use. In addition, property owners would receive reimbursement for the fair market value of their property, as well as any “lost profits” and “lost access.” The amendment would also shift the burden of proof to the government taker, who would be required to prove that their taking is in fact for public use. There would be no presumption in favor of public uses.

Those in favor of the amendment feel it is a positive step toward safeguarding against the abuse of the power of eminent domain found in *Kelo*. Supporters believe the amendment will serve to protect the individual property owner’s constitutional rights.

In contrast, those opposed to the amendment fear it will make economic development projects too costly and tie the hands of local governments who rely on the power of eminent domain. Local governments feel pressured to complete projects that improve job growth within their communities and increase tax revenues. The proposed amendment will make these efforts more challenging. Projects that were clearly designated “public uses” before will now be open to scrutiny and court review under the new amendment.

Ultimately, the voters are likely to have the final say on this already controversial topic. Supporters and opponents of the legislation alike are gearing up for a passionate debate. One thing is certain, whatever decision Virginia does make is likely to impact eminent domain law throughout the U.S., as other states are

watching to see how this all unfolds leading up to the election in November.

Lauren K. Keenan is an Associate in the law firm of Bean, Kinney & Korman in Arlington, Virginia, practicing in the areas of land use law and estate planning. She can be reached at lkeenan@beankinney.com and 703-525-4000.

MEET OUR ATTORNEYS - JOHN G. KELLY



Mr. Kelly is a shareholder of the firm and focuses his practice on real property law including commercial real estate financing, acquisitions, sales and leasing, and general corporate law.

Mr. Kelly represents investors, lenders and developers in connection with their real estate investments nationwide.

This representation has included transactions involving the construction and development of office buildings, shopping centers, hotels, and other investment-grade properties, including the review of due diligence on behalf of both lenders and purchasers.

With respect to leasing, Mr. Kelly represents both landlords and tenants nationwide in substantial office, retail, industrial and government leasing transactions. Mr. Kelly’s lending experience includes the representation of both lenders and borrowers in complex financial transactions secured by real or personal property, including the negotiation of the initial loan documents and advising with respect to workout strategies and foreclosures.

Mr. Kelly’s sales and acquisition experience includes the representation of sellers of large office buildings located throughout Virginia, Maryland and Washington, D.C., representing of purchasers of hotels, and the representation of a purchaser of large tracts of undeveloped land in Fairfax and Loudoun Counties, Virginia.

With respect to general corporate law, Mr. Kelly has

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represented business buyers and sellers in sophisticated asset purchase and stock purchase transactions.

Mr. Kelly has regularly contributed to publications including Virginia Builder Magazine, Real Estate Finance and Investment, and Commercial Leasing Law and Strategy. Recent examples of published articles include: "A Landlord's Duty to Mitigate in the District of Columbia, Maryland and Virginia," Commercial Leasing Law and Strategy, October 2011; "Deed-in-Lieu Transactions," Real Estate Finance & Investment, December 20, 2010; "EPA publishes final All Appropriate Inquiries Rule," Virginia Builder, March 2006; "It's time to remedy problems found in many purchase agreements," Virginia Builder, March 2008; and "Averting foreclosure with a deed-in-lieu

Mr. Kelly is actively involved in the community and is on the Board of Directors of Shelter House, Inc. which is a community based non-profit organization dedicated to serving homeless families in Fairfax County, Virginia. He is also on the Board of Directors of Fellowship Square Foundation, Inc., which is a foundation that devotes itself to providing housing and related services to low and very low income persons through ownership and/or management of housing projects.

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