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Proposed Regulation Agency Background Document

Agency name	Board for Contractors
Virginia Administrative Code (VAC) Chapter citation(s)	18 VAC 50-22-260
VAC Chapter title(s)	Board for Contractors Regulations
Action title	Amend Prohibited Acts
Date this document prepared	April 12, 2022

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

The Board for Contractors seeks to amend the Prohibited Acts, specifically, the provisions of 18 VAC 50-22-260 B9 in order to include language that would allow time and material contracts as well as cost-plus contracts. This would allow contractors who utilize these types of contracts to comply with the provisions of the prohibited act which currently requires that the contract contain a statement of the total cost. The amended language contains language to include specific hourly rate and percentage markups, and caps on the total cost. This will align the contract requirements issued by the Board for Contractors with industry standards.

The goal of this regulatory change is to address various types of contracts currently in use throughout the construction industry to be acceptable.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

There are no acronyms or technical definitions used in this form that are not specifically identified.

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

The current regulations do not provide for contracts other than a fixed price contract. This has resulted in licensees trying to adapt their contract to meet the current regulatory standard or to simply ignore the regulations, use a contract that does not comply with the regulations and risk being found in violation.

The Board was approached by several licensees inquiring as to how to write a contract that would be in compliance with the regulations. At a training class, board staff were approached by participants asking that the Board explore the possibility of reviewing the regulations. There have been a large increase in violations for contract, specifically cost plus and time and material contracts. At its June 8, 2021 meeting the Committee of the Board for Contractors recommended that the Board explore the possibility of amending the regulations. At its July 20, 2021 meeting, the Board voted to begin the regulatory review process to include cost plus and time and material contractors to 18 VAC 50-22-260 B9. At its March 22, 2022 meeting the Board approved the proposed regulations.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

§ 54.1-1102 A of the Code of Virginia provides the Board for Contractors with the authority to promulgate regulations not inconsistent with the statute necessary for the licensure of contractors.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

As the construction industry has evolved, more contractors are moving away from the fixed price contract concept. A significant number of new home builders have shifted to cost-plus contracts and an equally significant number of trade-related and repair contractors have moved to time and materials contracts. This has been exacerbated by the volatility of the construction materials market. By amending the language to include provisions for different contracts, licensees will be able to utilize all types of contracts available within the industry.

One of the requirements of the licensee when using Cost-plus and time and material contract will be to include certain information within their contract to educate the consumer on the type of contract being presented to them. This will allow the consumer to make an informed decision if they want to enter into that type of contract or not.

This regulatory change, while currently used and accepted throughout the industry, will eliminate regulatory violations.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

18 VAC 50-22-260 B9 provides the minimum requirements of a written contract for those engaged in residential contracting as defined in the chapter, with one of those requirements being to provide a statement of the total cost of the contract. The proposed amendment would add specific language to include cost-plus and time and material contracts

Issues

Identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

There are no disadvantages to the public or the Commonwealth.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.

No requirements that exceed applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

Other State Agencies Particularly Affected

No other state agency will be particularly affected.

Localities Particularly Affected

No other locality will be particularly affected.

Other Entities Particularly Affected

No other entities will be particularly affected.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is change versus the status quo.

Impact on State Agencies

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including:</p> <ul style="list-style-type: none"> a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources 	<p>There are no projected additional costs resulting from this regulation change. Some cost savings may be realized. Potentially, there may be fewer complaints against contractors that are not meeting the minimum requirements of written contracts with their residential customers. The number of actual complaints affected is indeterminate. Cost savings could be approximately \$150 per complaint. There are approximately 125 complaints per year for violations of all requirements of contracts. Any possible reduction in complaints would be a small proportion of these complaints. Realized savings are expected to be less than \$5,000 per year.</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>There are no savings and no changes to costs, fees, or revenues of other state agencies resulting from this regulatory change.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>The primary benefits of the regulatory change to DPOR and the Board for Contractors is that the contract requirements issued by the Board will align with industry standards and the types of contracts currently in use throughout the construction industry. This could reduce the number of regulatory violations related to contracts.</p>

Impact on Localities

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>There are no savings and no changes to costs, fees, or revenues of localities resulting from this regulatory change.</p>
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Benefits the regulatory change is designed to produce.	None.
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Impact on Other Entities

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	Contractors performing residential work will be affected by this regulatory change. No other individuals, businesses or other entities are affected
Agency’s best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	As of April 1, 2022 there are up to 54,179 licensed contractors that could be effected. At least half of the licensed contractors could be considered small businesses.
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.	No other costs are expected for individuals and businesses.
Benefits the regulatory change is designed to produce.	The amendments will allow the licensees to use cost-plus, and time and material contracts as are commonly used throughout the industry. The regulatory change is accepted throughout the industry. The public will have access to cost-plus, and time and material contracts from licensees which will be required to explain the contracts and help the consumers make an informed decision.

Summary:

The Board for Contractors is amending the regulations for Contractors. The Board proposes to address various types of contracts that are used throughout the construction industry to be acceptable. The revision to the prohibited acts provisions will allow residential contractors to comply with the provisions by allowing time and material contracts as well as cost-plus contracts. Also, the revisions will include specific hourly rate and percentage markups, and caps on the total cost of the contracts. There may be a minor reduction in costs to DPOR as a result of these changes.

All costs incurred in support of board activities and regulatory operations are paid by the Department of Professional and Occupational Regulation (DPOR) and funded through fees paid by applicants and regulants. All boards within DPOR must operate within the Code provisions of the Callahan Act (54.1-

113), and the general provisions of 54.1-201. Each regulatory program's revenues must be adequate to support both its direct costs and a proportional share of agency operating costs. DPOR allocates costs to its regulatory programs based on consistent, equitable, and cost-effective methodologies. The Board has no other source of income.

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

There are no alternatives to this regulatory action that would meet the requirements of its purpose or would address the current issues being experienced.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the regulatory change.

This regulatory change has been analyzed and it's been determined that amending the regulations to include a total of three types of contracts permitted to be used by residential contractors establishes less stringent requirements for licensees.

Periodic Review and Small Business Impact Review Report of Findings

If you are using this form to report the result of a periodic review/small business impact review that is being conducted as part of this regulatory action, and was announced during the NOIRA stage, indicate whether the regulatory change meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), e.g., is necessary for the protection of public health, safety, and welfare; minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and is clearly written and easily understandable.

In addition, as required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, discuss why the agency's decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.

This document is not being used to announce a periodic review or a small business impact review.

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.

Commenter	Comment	Agency response
<p>W. L. Pangburn, President & Managing Member of Historic Contracting, LLC (DBA) Savoy Properties</p>	<p>We are very concerned, as many of my fellow builders are, with the building materials market volatility. Pricing has escalated far beyond controllable means. We have in excess of 2.5 million of new construction residential homes to build in the Richmond area and will not issue our contracts to our investor clients as we can not guarantee that the contract amount will hold by the time the materials are delivered to the job site. We are planing to add language to our contract that would allow for the contract amount to be modified to recapture the material cost increases between the time of contract execution and actual delivery dates, plus standard and reasonable overhead and profit. Conversely, should the material amount drop below the original contracted amount then a credit would be issued to the client.</p> <p>In my opinion, T & M would not be practical on large projects. Very accurate cost accounting methods would have to be adhered to, insuring the process is accurate and fair to both parties. Copies of all material receipts and payroll logs with time sheets would have to be used and all of this only adds to the operating overhead and accounting of the project.</p> <p>If we are to be permitted to use the contract language that I am proposing, it would only be used when suppliers will not or can not hold firm to their quoted material amounts. At this time several of our larger suppliers are holding their</p>	<p>After review and discussion at its meeting on March 23, the Board thanked Mr. Pangburn for his comment.</p>

	<p>present quotes until March 15, 2022. Material need not be delivered to hold the price, but a purchase order issued and the quote signed off and accepted by us, the contractor and them, the supplier.</p> <p>We are all working through very challenging times and we all will have to work together for a successful and reasonable outcome. I appreciate all of your efforts to recognize the negative forces that we are faced with as building contractors and the fact that you, as a governing body, are willing to create an open forum to entertain ideas and suggestions that will clear a path for our collective continued success.</p>	

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

The Board for Contractors is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, (iii) the potential impacts of the regulation, and (iv) the agency's regulatory flexibility analysis stated in that section of this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to Marjorie King c/o Board for Contractors, 9960 Mayland Drive, Suite 400, Richmond, Virginia 23233, telephone (804) 367-2785, fax (866) 430-1033, email: contractor@dpor.virginia.gov. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will be held following the publication of this stage, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://commonwealthcalendar.virginia.gov/>). Both oral and written comments may be submitted at that time.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or

agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the proposed regulation. If existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
18 VAC 50-22-260	N/A	B9b – A statement of total cost of the contract and the amounts and schedule for progress payments including a specific statement on the amount of the down payment	Two additional types of contracts widely accepted by the construction industry will be added; cost-plus and time and material contracts. Licensees will be able to utilize all types of contracts available within the industry and not be in violation.