

DESIGN/BUILD: Drafting the Plan

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I. Overview of the Design/Build Method

A. Design/Build Defined

Design/build is a construction delivery process in which all of the design and construction responsibilities are placed in a single entity. Traditionally, an owner hires an architect/engineer to produce a design and then circulates the completed contract documents to general contractors for competitive bidding. Under design/build, the design and construction roles are combined into one entity. Design/build is one of the fastest growing construction delivery systems today.

In the public sector, Va. Code Ann. § 11-37 defines “design-build contract” as “a contract between a public body and another party in which the party contracting with the public body agrees to both design and build the structure, roadway or other item specified in the contract.”

B. The Parties and Their Respective Roles

1. The Owner. The entity which establishes the need for a facility and controls the related expenditure of funds.
2. Program Administrator. An individual or group capable of preparing a definitive and complete program analysis of a project based on the owner's/user's needs. This is a developing area of expertise in the design/build field for architects and consultant groups.
3. Architect. The design professional who conceives a design solution for the owner's needs based on agreed program requirements and develops design documents for, or as part of, the design/build team.
4. Design/Builder. The entity which determines the cost and provides the material, labor and management resources for construction of the facility based upon the architect's design.

5. Construction Manager. Someone experienced in construction who, on behalf of the owner, oversees the schedule and efforts of the design/builder to achieve established cost and time objectives.

C. The Benefits of Design/Build

1. Single-Point Responsibility. Under design/build, the key functions, design and contracting, normally done separately, are put together or merged and carried out by one entity. The design/build team is responsible for adherence to budget and schedule. In theory, this should result in less risk, less litigation and fewer administrative burdens.
2. Reduction of Claims For Extras. Requests for change orders should be significantly reduced because the designer and contractor are one entity. Therefore, the design/builder cannot request extra compensation on account of design mistakes or construction assumptions.
3. Warranty of Performance. Design/build teams can offer overall performance warranties and, where appropriate, are better able to coordinate warranties with remedies, e.g., liquidated damages clauses. Unlike traditional building methods, the design/build team can warrant a particular result for a project. For example, in building a manufacturing facility, the design/builder is able to warrant certain production levels due to its control over both design and construction. If actual production levels fall short, then liquidated damages can be tied to the difference between actual production and contracted production. Putting together an overall warranty is easier because one entity is responsible for the entire effort. Without design/build delivery, it would be very difficult to secure an overall warranty from the architect and/or the contractor.
4. Improved Relationships. The combination of the architect and the contractor working together as the design/builder makes for better communication and understanding. Plans and specifications do not communicate expertise; having the architect and contractor working together is a benefit.

5. Shorter Project Delivery Time. When design/build is utilized, construction can commence before design completion, resulting in quicker delivery time (e.g., building foundations can be constructed while interiors are still under design). Further, construction costs are reduced.
6. Design/Build is What Today's Owners Want. Contractors and architects perceive that owners want to procure the construction of their facilities through design/build.

D. The Risks of Design/Build

1. Adverse Owner and Design/Build Team Relationship. Normally, the owner contracts with an architect to design the project and administer the construction process. The owner depends upon the architect and views the architect as being the owner's representative. In design/build, the architect and contractor have joined forces and, as a result, the owner is left without a personal advisor. The architect can no longer be expected to protect the owner's rights in connection with the contractor. In the design/build process, the owner loses the checks and balances between the designer and contractor which otherwise exist on a traditional design/bid/build project. However, a possible solution is for the owner to retain a construction consultant or construction manager.
2. Bidding. Generally, design/build is not easily conducive to the competitive bidding process. (Note, however, that the trade contracts can be competitively bid.) The design/builder is chosen at the commencement of the project and there is very little competitive pressure. Thus, it is difficult for the owner to be sure if the design/build contractor will design and construct the project for the lowest cost. By statute, however, the Commonwealth and other public bodies are permitted to let design/build contracts use competitive negotiation, as opposed to the typical competitive sealed bid process. See Va. Code Ann. §§ 11-41.2 and 11-41.2:2.
3. Design/Build Restrictions. State and local laws may pose particular requirements upon the design/build process. Design/builders should note that laws and registration requirements which affect design/build are not uniform and

may vary from state to state. The design/builder must comply with licensing requirements and insurance/bonding issues must be considered.

In Virginia, licensing requirements for architects, engineers and contractors are found in Chapters 4 and 11, respectively, of the Virginia Code.

4. Insurance. Design/builders should not assume that their standard insurance policies provide sufficient protection, much less any coverage, of their design/build work. For example, a contractor's commercial general liability policy may not provide coverage for an owner's claim of passive economic loss (such as delay damages) or design defects. Therefore, a design/builder should review its insurance policies to confirm it is protected from losses for design errors and omissions, and should further confirm whether the policies must be in effect at the time a claim is made (and not merely when the error or omission occurred).

E. Form of Design/Build Contract

There are a variety of familiar standard form contracts used in the construction industry: the AIA series, the AGC series, the Engineers Joint Contract Documents Committee series and the Construction Management Association of America series. These contracts should be viewed only as prototypes for a design/build project and should be modified on a project-specific basis. Many factors must be considered in drafting the design/build contract, such as: standards of quality, criteria for acceptance, the scope of the project, design/construction constraints, definition of the owner's program and underlying design assumptions.

F. Payment to the Design/Builder

Several different payment methods exist. The more commonly used methods are as follows:

1. Cost-Plus-Fixed Fee. A lump sum payment is made after completion of design. Final payment is deferred until the plans and specifications are definite. Construction costs are reimbursed and a fee is calculated thereon. This method allows the design/build team to better estimate the cost of the project.

2. Lump Sum or Not-to-Exceed Price for the Entire Contract. With this method, the design/build team assumes cost responsibility for the entire project. The “Commonwealth may enter into contracts on a fixed price design-build basis,” Va. Code Ann. § 11-41.2(a), and “any public body other than the Commonwealth may enter into a contract for construction on a fixed price or not-to-exceed price design-build basis,” Va. Code Ann. § 11-41.2:2.
3. Five-Phase Payment System. With an architect-led team, a five-phase payment system consists of payments at the conclusion of the (a) programming phase, (b) design development phase, (c) construction drawing phase, (d) bidding phase, and (e) construction supervision phase.

II. **Statutes and Regulations**

Virginia architects, engineers and contractors who wish to form a team as design/builders need to be aware of state licensing and registration requirements. Many states are passing legislation to accommodate the design/build approach and to allow design/build to be used on public work; in others, the design/build team has to determine if it is legally recognized as an entity and allowed to offer design/build services and, if so, what restrictions exist. The Virginia requirements follow.

A. **The Architect/Engineer**

1. Licensing the Architect/Engineer. Rules pertaining to the practice of architecture and engineering are found in Chapter 4 of Title 54.1 of the Virginia Code.
 - a. Architect and Engineer.

Va. Code Ann. § 54.1-400 defines “architect” and “professional engineer” as follows:

“Architect” means a person who, by reason of his knowledge of the mathematical and physical sciences, and the principles of architecture and architectural design, acquired by professional education, practical

experience, or both, is qualified to engage in the practice of architecture and whose competence has been attested by the Board through licensure as an architect.

“Professional engineer” means a person who is qualified to practice engineering by reason of his special knowledge and use of mathematical, physical and engineering sciences and the principles and methods of engineering analysis and design acquired by engineering education and experience, and whose competence has been attested by the Board through licensure as a professional engineer.

b. License Required

Pursuant to Va. Code Ann. § 54.1-406, architects and engineers generally must be licensed:

- 1) Unless exempted by § 54.1-401, 54.1-402, or § 54.1-402.1, a person shall hold a valid license prior to engaging in the practice of architecture or engineering which includes design, consultation, evaluation or analysis and involves proposed or existing improvements to real property.
- 2) Unless exempted by § 54.1-401 or § 54.1-402.1, a person shall hold a valid license prior to engaging in the practice of land surveying.
- 3) Unless exempted by § 54.1-402, any person, partnership, corporation or other entity offering to practice architecture, engineering, or land surveying without being registered or licensed in accordance with the provisions of this chapter, shall be subject to the provisions of § 54.1-111 of this title.

c. Design/Build Contractor Not Required to be Licensed as Architect or Engineer.

However, Va. Code Ann. § 54.1-406(F) provides that:

[n]otwithstanding the provisions of [54.1-406], a contractor who is licensed pursuant to the provisions of Chapter 11 (§ 54.1-1100 et seq.) of this title shall not be required to be licensed or registered to practice in accordance with this chapter when negotiating design-build contracts or performing services other than architectural, engineering or land surveying services under a design-build contract. The architectural, engineering or land surveying services offered or rendered in connection with such contracts shall only be offered and rendered by an architect, engineer or land surveyor licensed in accordance with this chapter.

d. Limitation of Liability.

Oftentimes, a design firm includes a clause in its contract with the owner expressly limiting its liability to the design professional's fee or some other fixed amount. It appears that such a clause may be ineffective in Virginia. First, a design firm (corporation, partnership, sole proprietorship, limited liability company, or other entity) may practice architecture and engineering "provided such practice . . . is rendered through its officers, principals or employees who are correspondingly licensed." Va. Code Ann. § 54.1-411(A). Second, "[n]o such [design firm] shall [1] limit the liability of any licensee . . . for damages arising from his acts or [2] limit such [firm] from liability for acts of its employees or agents." *Id.* Thus, one could argue that, because a firm only acts through its employees or agents, and a design firm may not limit its liability for the acts of these employees or agents, the firm is precluded from limiting its liability. In order to protect itself, the

design firm should ensure that its insurance policies provide sufficient coverage.

e. Registration of Architects and Engineers.

Except for certain limited exceptions,

any person, corporation, partnership, limited liability company, or other entity offering or rendering the practice of architecture, engineering, land surveying or offering the title of certified landscape architecture shall register with the Board for Architects, Professional Engineers, Land Surveyors and Landscape Architects. As a condition of registration, the entity shall name at least one licensed architect, professional engineer, land surveyor or certified landscape architect for such profession offered or rendered. The person or persons named shall be responsible and have control of the regulated services rendered by the entity.

Va. Code Ann. § 54.1-411.

B. The Contractor

1. Licensing the Contractor. Rules regarding the licensing of contractors are found in Chapter 11 of Title 54.1 of the Virginia Code. A contractor is

any person, that for a fixed price, commission, fee, or percentage undertakes to bid upon, or accepts, or offers to accept, orders or contracts for performing, managing, or superintending in whole or in part, the construction, removal, repair or improvement of any building or structure permanently annexed to real property owned, controlled, or leased by another person or any other improvements to such real property.

Va. Code Ann. § 54.1-1100. Like architects and engineers, contractors must be licensed:

No person shall engage in, or offer to engage in, contracting work or operate as an owner-developer in the Commonwealth unless he has been licensed under the provisions of this chapter. Prior to a joint venture engaging in, or offering to engage in, contracting work or operating as an owner-developer in the Commonwealth, (i) each contracting party of the joint venture shall be licensed under the provisions of this chapter or (ii) a license shall be obtained in the name of the joint venture under the provisions of this chapter.

Va. Code Ann. § 54.1-1103(A).

Contracting for construction without a license can have dire consequences in Virginia. For example, “[c]ontracting for, or bidding upon the construction, removal, repair or improvements to or upon real property owned, controlled or leased by another without a license” constitutes a Class 1 misdemeanor. Va. Code Ann. § 54.1-1115. In addition, a defendant to a contractor’s lawsuit or suit in equity may successfully assert the contractor’s lack of a license as a defense, unless the contractor “gives substantial performance within the terms of the contract in good faith and without actual knowledge of the licensure requirements of this chapter.” Va. Code Ann. § 54-1-1115(C). In interpreting this statute, the Supreme Court of Virginia held that “evidence of notice to a corporate officer that some licensure requirement exists in Virginia is insufficient as a matter of law to constitute the ‘actual knowledge of this section’ . . . as a prerequisite to the imposition of the statutory bar to a contractor’s recovery.” The Court further held that “[t]he legislative history and the case law together evidence an intention to strike a balance: to penalize those whose violations of the statutory scheme are knowing, but to excuse those who perform in good faith and whose violations are inadvertent.” *J.W. Woolard Mechanical & Plumbing, Inc. v. Jones Development Corp.*, 235 Va. 333, 367 S.E.2d 501 (1988).

C. Licensing the Design/Build Entity

The Virginia Code addresses the licensing of design businesses and contractors in Chapters 4 and 11, respectively, of Title 54.1 (discussed above). However, Virginia statutes do not provide much guidance, if any, as to the specific licensing or registration requirements of design/build entities. It appears that there is no express restraint on the design/build delivery process imposed by Virginia law. In fact, it seems clear that the Code recognizes the use of design/build in both public and private contracting. For example, Va. Code Ann. § 54.1-406(F) provides that a contractor licensed under Chapter 11 need not be licensed as an architect or engineer (under Chapter 4) “when negotiating design-build contracts or performing services other than architectural, engineering or land surveying services under a design-build contract.” In addition, pursuant to Va. Code Ann. §§ 11-41.2 and 11-41.2:2, both the Commonwealth and other public bodies may enter contracts on a design/build basis. As long as both the individual design and contractor licensing requirements are complied with, design/build is a viable option in Virginia.

D. Design/Build on Virginia Public Projects

Both the Commonwealth and other public bodies in Virginia may enter into design/build contracts.

1. Design/Build Contracts with the Commonwealth. Va. Code Ann. § 11-41.2 provides that the Commonwealth may enter into fixed-price design/build contracts. The Secretary of Administration is required to adopt appropriate procedures. A copy of the Secretary of Administration’s Procedures for Utilizing Design-Build Contracts (“Secretary of Administration’s Procedures”) is reproduced in Appendix II. In order to use design/build, the departments, agencies and institutions of the Commonwealth must request authority to do so. The request must justify how design/build is more advantageous to the Commonwealth than competitive sealed bidding.

Procurement of a design/build contract is a two-step competitive negotiation process. In the first step, the offerors submit their qualifications. The Commonwealth then must select no more than five offerors to submit proposals. This first step is, in essence, a prequalification of offerors. In

the second step, the Commonwealth issues a Request for Proposal. The offerors then submit Technical and Cost Proposals. The Commonwealth evaluates the Technical Proposals and may negotiate amendments to the offerors' Cost Proposals. "Award of the D/B Contract shall be made to the offeror which submits an acceptable Technical Proposal at the lowest cost" Secretary of Administration's Procedures ¶ D(3)(g).

Design/build contracts may be approved for the construction of those projects described in paragraph B of the Secretary of Administration's Procedures: "warehouse/storage buildings, garage/maintenance shops, general mercantile buildings, single-story administrative buildings, recreational and concession buildings, exhibition and agricultural buildings and housing."

2. Design Contracts with Public Bodies Other Than the Commonwealth.

Va. Code Ann. § 11-41.2:2(A) provides that

[a]ny public body other than the Commonwealth may enter into a contract for construction on a fixed price or not-to-exceed price design/build . . . basis provided the public body complies with the requirements of this section and has obtained the approval of the Design/Build Construction Management Review Board (the Review Board) pursuant to § 11-41.2:5.

Prior to issuing a Request for Proposal for a design/build project, the public body must adopt "procedures governing the selection, evaluation and award of design/build . . . contracts." *Id.* These procedures must include a two-step competitive negotiation process "consistent with the applicable provisions of the Design/Build Selection Procedures of paragraph D of Chapter IX (Special Construction Procedures) of the Capital Outlay Manual of the Commonwealth." Va. Code Ann. §11-41.2:2(A)(1)(b).¹

¹ Chapter IX (Special Construction Procedures) of the Capital Outlay Manual of the Commonwealth no longer contains the Secretary of Administration's Procedures (reproduced in Appendix II hereto). The Capital Outlay Manual has been replaced with the Construction and Professional Services Manual for Architects/Engineers. Thus, it appears that the design/build procedures described in Va. Code Ann. § 11-41.2:2(A)(1)(b) must be consistent with the Secretary of Administration's Procedures.

Furthermore, the public body must document that a design/build contract is more advantageous than a competitive sealed bid contract, the body will benefit from using a design/build contract, and “competitive sealed bidding is not practical or fiscally advantageous.” Va. Code Ann. § 11-41.2:2(A)(2). Once approved by the Review Board, the “contract shall be awarded to the fully qualified offeror who submits an acceptable proposal at the lowest cost in response to the Request for Proposal.” *Id.* at § 11-41.2:2(B). The creation, composition, terms and duties of the Review Board are described in Va. Code Ann. §§ 11-41.2:3, 41.2:4, and 41.2:5. A copy of the Review Board’s Rules and Regulations is reproduced in Appendix III.

E. Federal Government’s Use of Design/Build

The federal government uses the design/build approach for the same reasons as other owners. Decisions of the various Boards of Contract Appeals and Comptroller General opinions make clear that use of design/build is a viable procurement method. *Pitt-Des Moines, Inc.*, ASBCA No. 42838, 96-1 BCA ¶ 27,941 (1995), and *M.A. Mortenson Co.*, ASBCA No. 39978, 93-3 BCA ¶ 26,189 (1993), discussed in detail below, concern the government’s responsibility for supplying faulty preliminary design information to the design/builder.

The text of 41 U.S.C. § 253m, which expressly authorizes the use of design/build by executive agencies, is reproduced in Appendix IV. As described in § 253m, the contracting officer must first make a determination that “two-phase selection procedures are appropriate for use for entering into a contract for design and construction of a public [project].” The agency must develop a scope of work statement to include in its solicitation so as to provide “prospective offerors with sufficient information regarding the Government’s requirements.” In the first phase, the offeror submits a technical proposal, which includes the offeror’s technical approach and qualifications, but not detailed design or price information. The agency evaluates the technical proposals based on the factors identified in the solicitation (which do not include cost-related factors). The agency then selects those offerors to participate in the second phase, in which the offerors submit design concepts. The agency evaluates the phase two proposals and makes its selection.

III. Choosing the Appropriate Design/Build Entity

A. Organizing the Design/Build Entity

There are a variety of ways to organize a design/build team. Six options are discussed below. Precaution should be taken in deciding which entity is best. Each situation is different and the design and construction team members should discuss the benefits and risks of each form of organization. Many factors must be analyzed, such as management control, insurance, liability, tax advantages and employee classification/treatment. In addition, state laws may have an effect on the type of entity chosen.

1. General Partnership. This entity is conducive to the design/build format. "A partnership is an association of two or more persons to carry on as co-owners a business for profit" Va. Code Ann. § 50-6(1). The general partnership is very flexible and can be very easily organized. Terms and conditions can be structured in various ways with regard to capital contributions, profits and management control. However, the risks of a partnership are many. Agency risks exist in the partnership context in that each partner is responsible for the acts of the other, which would not normally be the case in architect- or contractor-led teams. Furthermore, the partners are exposed to joint and several liability. Va. Code Ann. § 50-15(1).
2. Limited Partnership. This is "a partnership formed by two or more persons . . . having one or more general partners and one or more limited partners." Va. Code Ann. § 50-73.1. The general partner manages the partnership and has the same exposure to liability as in a general partnership. Va. Code Ann. § 50-73.29. The limited partners are basically silent partners exposing only their investment in the limited partnership to liability and avoiding personal liability. Va. Code Ann. § 50-73.24. The architect and the contractor can utilize the limited partnership to satisfy their particular situation. However, the design team would want to be active in the partnership; a way to avoid the potential liability is to form a corporation to act as the general partner. It is unclear, however, whether Va. Code Ann. § 54-4111(A) allows an architect or architectural firm to limit liability through formation of a limited partnership.

3. Joint Venture. “A joint venture exists where two or more parties enter into a special combination for the purpose of a specific business undertaking, jointly seeking profit, gain, or other benefit, without any actual partnership or corporate designation. . . . [T]he rules of law governing the rights, duties, and liabilities of joint venturers are substantially the same as those which govern partnerships.” *Roark v. Hicks*, 234 Va. 470, 475, 362 S.E.2d 711 (1987). Under design/build, the architect firm and the contractor firm would associate for this purpose in a joint venture. Members can be any recognized entity. At the conclusion of the project, the joint venture usually dissolves. The principal benefits are that this entity is easy to create and dissolve, rights and responsibilities can easily be allocated and the contribution of each co-venturer can make the entity competitive in the marketplace. Problems arise in the area of management control. The biggest risk is that the joint venture members are jointly and severally liable for the acts of each other. Courts generally treat this entity as a general partnership when it comes to liability and tax issues. The design/builders should note that, prior to engaging in contracting work, “(i) each contracting party of the joint venture shall be licensed under the provisions of this chapter or (ii) a license shall be obtained in the name of the joint venture under the provisions of this chapter.” Va. Code Ann. § 54.1-1103(A).
4. Limited Liability Company. A limited liability company is a combination of a corporation and limited partnership. It has the limited liability benefits of a corporation, Va. Code Ann. § 13.1-1019, and the tax advantages of a partnership. In addition, an LLC can be comprised of individuals or business entities, or both. Virginia has adopted the Limited Liability Company Act, Va. Code Ann., §§ 13.1-1000 through 13.1-1073, and the Professional Liability Company Act, Va. Code Ann. §§ 13.1-1100 through 13.1-1123. It is unclear, however, whether Va. Code Ann. § 54-4111(A) effectively prevents an architect from limiting his liability through formation of a limited liability company.
5. Subcontracting for Design or Construction Services. Occasionally, construction companies will subcontract the design work to a licensed designer who then functions, in effect, as a subcontractor of the contractor. Thus, the contractor is offering design/build services, albeit by

retaining the designer as a consultant rather than as a member of the team. Likewise, there are instances in which the designer may retain a contractor as its consultant to provide construction services for construction of the design prepared by the designer. In either case, the subcontractor, by virtue of the economic loss rule (discussed below), is protected from claims by the owner and third-parties for economic loss resulting from negligent acts.

B. The Design/Build Joint Venture

Probably the most efficient entity through which to offer design/build services is the joint venture. The joint venture affords the flexibility required for a successful design/build project and also offers the advantage of terminating at the conclusion of the project. The entities which comprise the joint venture can be the same entities in which the designer and contractor individually conduct their businesses, or the designer and contractor may create separate entities for the express purpose of being partners in the design/build joint venture. For example, the contractor may wish to avoid mixing his normal general contracting business with his design/build business and therefore will create a separate construction entity that will be used for offering design/build services. Likewise, the designer may create an entity for the express purpose of performing design/build work. These two new entities combine in a joint venture to offer the client design/build services.

The contractor member of the team will also want to review the insurance coverage maintained by the design member of the team. Recognizing that the design/build process exposes the team (and team members) to liability for design defects, something which the contractor traditionally is not concerned about, the contractor will want to ensure that the design team member has sufficient design liability coverage for the type and size of project under consideration. Indemnification and hold harmless agreements between team members may play a role in dealing with the risk of design exposure that the contractor faces in the design/build process.

As previously noted, state law may regulate the practice of design/build. The relevant laws to consider are both the law of the jurisdiction in which the project is built and, if different, the law of the jurisdiction in which the design/build entity operates. While these jurisdictions may often be the same, there could be

differences, for example, where a design/build entity's principal place of business is in one state but it designs and builds a project in another state.

In the final analysis, choosing the appropriate entity by which design/build services are to be offered involves both business and legal decisions and must take into account a variety of factors including flexibility, tax considerations, state laws, issues of liability, bonding requirements, insurance requirements, accounting issues and other business concerns. The successful design/builder will seek the advice of knowledgeable and experienced advisers in all of these disciplines in order to choose the most appropriate entity through which to offer design/build services.

IV. DESIGN/BUILD LIABILITY

A. Liability Limitations

Through the use of limitation of liability clauses, design/builders may:

- exclude implied warranties,
- reduce the viability of third-party actions,
- exclude liability for consequential damages,
- require the owner to maintain builder's risk insurance,
- limit liability for defective work to the cost of redesign or repair, and
- set caps on damages.

The liability of the owner to the design/build team will vary depending on the owner's involvement in the process. Under normal circumstances, owner involvement is limited; therefore, potential liability is diminished.

Reasons for which the design/build team could be liable to the owner include:

- contractual liability (e.g., indemnity, breach of contract or damage to the work itself);
- professional negligence or malpractice (where there is injury to person or damage to property);
- breach of warranty; or
- in rare situations, strict liability, if it is determined that the design/builder created an inherently dangerous product.

B. Architect's Duties and Responsibilities

In the traditional case, the architect's duties and responsibilities are defined by his contract with the client. The architect usually provides design services and supervises construction.

1. Architect Does Not Guarantee a Perfect Plan or Satisfactory Result. In *Surf Realty Corp. v. Standing*, 195 Va. 431, 78 S.E.2d 901 (1953), *superceded by statute on unrelated issue*, *J.W. Woolard Mechanical & Plumbing, Inc. v. Jones Development Corp.*, 235 Va. 333, 367 S.E.2d 501 (1988), the Virginia Supreme Court described an architect's design responsibilities as follows:

An architect, in the preparation of plans and drawings, owes to his employer the duty to exercise his skill and ability, his judgment and taste, reasonably and without neglect. In his contract of employment he implies that he possesses the necessary competency and ability to enable him to furnish plans and specifications prepared with a reasonable degree of technical skill. He must possess and exercise the care of those ordinarily skilled in the business and, in the absence of a special agreement, he is not liable for fault in construction resulting from defects in the plans because he does not imply or guarantee a perfect plan or a satisfactory result.

195 Va. at 442-43 (citations omitted; emphasis added.)

Although an architect does not generally guarantee a perfect plan or satisfactory result, it will usually be the case that where a satisfactory result is not achieved, the architect will not have exercised a reasonable degree of technical skill. However, in *Surf Realty*, the Supreme Court held that the architect was not responsible for the failure of the sliding roof, principally because the owner's actions "played an undetermined role in the faulty operation of the roof." *Id.* at 444; *see also Bott v. Moser*, 175 Va. 11, 7 S.E.2d 217 (1940) (architect cannot recover in quantum meruit when he

prepares plans and specifications which do not comply with zoning ordinances).

2. Owner May Be Responsible for Defective Design. Although the design/builder assumes both design and construction responsibility in its contract with the owner, if the owner provides faulty preliminary information on which the design is based, then the owner may be responsible for the defective design and liable to the design/builder for extra costs. Two federal public contract cases illustrate this fact pattern.

In *Pitt-Des Moines, Inc.*, ASBCA No. 42838, 96-1 BCA ¶ 27,941 (1995), the federal government entered into a fixed-priced contract with the contractor “to design, develop, fabricate, and install a large acoustical tank . . . in an existing building identified as Building 5 at the Naval Research Laboratory, Washington D.C. The work included major structural modifications to Building 5 as needed for the installation and housing of the tank”

The Request for Proposal included four drawings which purportedly depicted the existing building. The RFP warned that the drawings “may not be accurate and shall be field checked.” The contractor claimed that the drawings “were not clearly legible and lacked sufficient detail to permit [the contractor] to accurately calculate the actual approximate weight of Building 5.”

In the response to the contractor’s request for additional drawings, the government stated that no such additional drawings were available. The contractor attempted to investigate the condition of Building 5; however, it was denied access due to asbestos removal work.

After its review of the drawings, the contractor “concluded that the wall thickness, although not uniform, averaged fourteen inches, and on this basis, calculated the estimated weight of the walls.” Based on its calculation of the “weight of the walls with an additional safety factor for variation in the actual weight of the building,” the contractor proposed the use of 28 auger cast piles to underpin the building, and the contractor submitted a cost proposal based on this design. Thereafter, the government awarded the design/build contract. After the contract was awarded, the government “stumbled across” additional drawings and provided them to the contractor. Building 5’s dimensions represented in the newly-discovered drawings varied significantly from those in

the drawings provided with the RFP. The new dimensions indicated that the building was substantially heavier than the contractor originally estimated and, as a result, the contractor redesigned the project with a 48 auger cast pile design.

The contractor claimed that it experienced a Type 1 differing site condition: “subsurface or latent physical conditions at the site differing materially from those indicated in the contract.” The Armed Services Board of Contract Appeals found that the contractor’s interpretation of the RFP drawings was reasonable. In response, the government argued that the design/builder failed “to obtain additional and better drawings,” failed “to properly field check the drawings during its site visit,” and “failed to adequately investigate the conditions potentially affecting the planned work.” The Board first discussed the Site Investigation and Conditions Affecting the Work clause of the contract. Under this clause, “potential contractors are required to take all steps reasonably necessary to ascertain the nature and location of the work, and to satisfy themselves as to the general and local conditions affecting the work. However, [the contractor] is not required to conduct a costly or time-consuming technical investigation to determine the accuracy of the Government drawings.” This rule applies to the normal design/bid/build project format, and the Board of Contract Appeals expressly held that the rule also applies to a design-builder.

The Board held that the contractor’s “pre-proposal attempts to obtain better drawings and its pre-proposal site investigation were reasonable.” The BCA noted that, although the RFP warned offerors that the drawings might not be accurate and should be field-checked, the contractor was denied access to Building 5. The Board concluded that the contractor reasonably investigated the site conditions, reasonably relied on the RFP drawings, and that the “actual subsurface conditions of . . . Building 5 . . . were not reasonably foreseeable at the time [the contractor] prepared its proposal.” Accordingly, the Board held that the actual wall thickness of Building 5 was a Type 1 differing site condition and that the contractor was entitled to the increased costs resulting therefrom.

In *M. A. Mortenson Co.*, ASBCA No. 39978, 93-3 BCA ¶ 26,189 (1993), the Armed Services Board of Contract Appeals held the government liable for a design/builder's increased costs in constructing the foundation of a building as a result of the faulty information contained in the government's drawings included with its Request for Proposal. The drawings included with the RFP represented approximately "35% of a complete working drawings effort," and the successful offeror was to prepare "100% complete construction documents for review and approval." The RFP indicated that the RFP drawings and Design Criteria set forth in the RFP could be used as the basis for the offeror's proposal; "[h]owever, the successful proposer [was] required to verify and validate the accuracy of the preliminary design information." The Design Criteria identified three alternative designs for the structural system. To prepare its proposal, the contractor generated a take-off of quantities of structural concrete and reinforcing steel "from the quantities indicated in the Project Drawings." The Board found that this take-off was realistic and concluded "that [the contractor's] interpretation that it could rely on the information in question was reasonable." In response to the government's argument that the contractor should have had a structural engineer review the drawings prior to submitting its proposal and that the contractor should have included a contingency to cover any increase in quantities, the Board stated that "[t]he contract required [the contractor] to verify and validate the design as part of the design work, not the proposal effort." The Board framed the issue as follows: "whether the Government warranted the adequacy of the information on the Project Drawings (specific sizes and quantities of structural concrete and reinforcing steel) for purposes of proposing on the construction phase of the work." In this case, the Board held that the government had warranted the adequacy of the Project Drawings, and thus held the government liable for the contractor's costs for increased quantities of structural concrete and reinforcing steel.

Architect's Supervisory Responsibilities. In *Gravelly v. Providence Partnership*, 549 F.2d 958 (4th Cir. 1977), the United States Court of Appeals for the Fourth Circuit discussed an architect's responsibilities under Virginia law. In *Gravelly*, a hotel guest sued an architect for breach of warranty after the guest fell on a spiral stairway, "allegedly

caused by fault in the architect's design of the stairway and the adjacent area and in his supervision of its construction." *Id.* at 958 (emphasis added). With respect to the architect's design responsibilities, the Court of Appeals quoted from *Surf Realty*. In discussing the architect's supervisory responsibilities, the Court of Appeals stated that "the ordinary engagement to supervise does not rise to the force of a warranty; the architect is only 'charged with the duty to exercise reasonable care, technical skill and ability in the performance of his contract.'" *Id.* at 959 (citation omitted; emphasis added). Because there was no "special agreement" under which the architect guaranteed a perfect plan or satisfactory results, the Court of Appeals held that the guest's warranty claim should not have been submitted to the jury. (The court went on to state that even if a "warranty of expertness" existed under Virginia law, this warranty would not run to the benefit of the guest, who was not in privity of contract with the architect. Va. Code Ann. § 8-654.4 (now 8.01-223) only eliminates the requirement of privity of contract in negligence actions, not claims for breach of warranty.)

An architect's supervisory responsibilities may be more than merely assuring that construction complies with the plans and specifications. In *Virginia Military Institute v. King*, 217 Va. 751, 232 S.E.2d 895 (1977), after holding that the project owner's claim for defective design was time-barred, the Virginia Supreme Court held that the owner stated a cause of action against the architects for failure to properly supervise construction. The Court stated that the relevant "contract provisions contemplated supervision by the architects not only to assure compliance by the contractor with the plans and specifications, but also to detect any defects in the design and recommend to the owner any necessary changes and corrections as construction progressed." *Id.* at 761.

In contracting with [the owner], the architects undertook to perform in good faith and with reasonable care and competence the services for which they were engaged. [The owner] had a right to expect reasonable care and competence not only in preparing plans but in making certain that the construction was properly completed pursuant to the

plans and specifications to provide a structure in the final form and condition contemplated by the parties. The architects were obligated to report any serious problem with the design before construction was completed if they reasonably should have known of the problem.

In their supervision of construction, the architects were limited agents of the owner without authority to make alterations in the plans or to bind the owner except as provided in their contract. The architects are not correct, however, in contending that the plans, once approved, were immutable. Under the contract, change orders were anticipated, and the architects were required to make recommendations to the owner as to all change orders. Moreover, the contract requires supervisory inspections by the architects, at least twice each month, and more frequently if indicated. [The Manual for Planning and Execution of Capital Outlays] provided that “the person responsible for the design of the project should participate in these inspections.” It seems clear that these contract provisions contemplated supervision by the architects not only to assure compliance by the contractor with the plans and specifications, but also to detect any defects in the design and recommend to the owner any necessary changes and corrections as construction progressed. It is inconceivable that the supervisory obligations could be satisfied by a ridged [sic] adherence to plans in which inspection of the project under construction revealed obvious and egregious errors. . . .

[A]lthough a contractor does not impliedly warrant that he has the skill or knowledge of an architect and ordinarily is not liable for consequences of changes in the architect’s plans made with the owner’s consent, if the consequences are so obvious and well known to his trade that he should know of them, it is his duty to make a full and fair disclosure to the owner. There is all the more reason to impose upon an architect the duty of disclosing to the owner the consequences of errors in design or construction

that are so obvious and well known to his profession that he should know of them. [The owner,] while not bargaining for infallibility on the part of the architects, could reasonably expect them to disclose defects which they observed or should have observed in the construction, whether such defects arose from errors in design or deviations from the plans and specifications.

Id. at 760-62 (emphasis added; citations omitted); see also, *Nelson v. Commonwealth*, 235 Va. 228, 368 S.E.2d 239 (1988) (discussing architect's construction administration duties).

C. Contractor's Duties and Responsibilities

1. The Spearin Doctrine

The Spearin doctrine was created in 1918 in *United States v. Spearin*, 248 U.S. 132 (1918). In *Spearin*, the Supreme Court held that, "if [a] contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *Id.* at 136. The court stated further that "[t]he duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view." *Id.* at 137. In essence, the owner warrants that the plans or specifications are accurate and the contractor's reliance thereon will not expose the contractor to liability for non-conformance. Virginia follows the *Spearin* doctrine. See *Southgate v. Sanford & Brooks Co.*, 147 Va. 554, 137 S.E. 485 (1927) (Virginia Supreme Court quotes approvingly from *Spearin*).

A contractor is required to follow the plans and specifications furnished by the owner, and the contractor is not responsible for the design. "For such a defect [in the design] a building contractor cannot be held responsible, for it is his duty to follow the plans and specifications furnished as his guide by the architect as the agent of the owner. The theory of the [owner] that because of the contract for the erection of a complete building, the loss arising from such an accident should fall upon the contractor, is unsound, in cases like this where the loss was caused, not by any fault of the contractor, but because of the defective plans of the

architect . . .” *Adams v. Tri-City Amusement Co., Inc.*, 124 Va. 473, 476-77, 98 S.E. 647 (1919). “Generally, a construction contractor who has followed plans and specifications furnished by the owner which have proved defective or insufficient will not be responsible to the owner for loss or damage which results solely from the defective or insufficient plans and specifications in the absence of negligence on the contractor’s part, or any express guarantee or warranty by him as to their being sufficient or free from defects.” *Greater Richmond Civic Recreation, Inc. v. A. H. Ewing’s Sons, Inc.*, 200 Va. 593, 595, 106 S.E.2d 595 (1959)(emphasis in original).

In relation to design/build, the design/build team, not the owner, warrants the accuracy of the design. Simply put, the owner is contracting with the design/build entity for design and construction services. The plans and specifications are created by the team; the owner merely gives the desired goal or program and some basic information.

2. Contractor’s Standard of Care. In *Mann v. Clower*, 190 Va. 887, 59 S.E.2d 78 (1950), the owners claimed that the contractor defectively constructed the project. The Virginia Supreme Court approved of the trial court’s jury instruction that if the jury believed the contractor “failed to perform any item of work in a workmanlike manner and in accordance with good usage and accepted practices in building construction of a similar character in the community in which the work was done,” then the jury should find in favor of the owners. 190 Va. at 900. In addition, the Supreme Court stated that, “[i]n building and construction contracts it is implied that the building shall be erected in a reasonably good and workmanlike manner and when completed shall be reasonably fit for the intended purpose.” *Id.* at 901 (quoting 17 C.J.S. Contracts § 329).
3. Contractor’s Duty to Notify Owner of Effect of Changes. A contractor may not remain silent during construction when he should know of adverse effects which will result from changes in the plans. In *Mann v. Clower*, 190 Va. 887, 59 S.E.2d 78 (1950), the owners claimed that the contractor used “lighter joists, rafter beams and cinder blocks than those specified in the plans.” 190 Va. at 902. The Virginia Supreme Court held that the trial court improperly instructed

the jury that if it believed the use of such lighter materials would probably result in the “collapse of any portion of the building,” [the contractor] was, “by virtue of the nature of his undertaking under the contract, chargeable with knowledge of such danger and was under the legal duty to so notify the [owners], and that if [the contractor] failed to do so he was liable to them although they may have agreed to the change.” *Id.* The Supreme Court held that this jury instruction was an incorrect statement of the law because it made the builder the insurer or guarantor of the consequences of the departure from the plans, regardless of whether he possessed any engineering knowledge or skill on the subject, or knew or should have known of such consequences, or whether he held himself out or represented to the owners that he had such qualifications or knowledge.

In our opinion this was an erroneous statement of the contractor’s obligation and liability to the owners. A contractor or builder does not impliedly warrant that he has the engineering skill or knowledge of an architect, and ordinarily he is not liable for the consequences arising from changes made, with the full knowledge and consent of the owner, in the plans and specifications prepared by an architect.

But the consequences of the change may be so obvious or well known to his trade that the contractor or builder, from his experience or the nature of his undertaking, should know of them, in which event it is his duty to make a full and fair disclosure thereof to the owner.

Consequently, the instruction should have told the jury that before making the change the contractor should have obtained the owners’ consent thereto, after having fully and fairly advised them of the probable consequences which he knew, or should have known from his experience or the nature of the undertaking, would result from the change.

Id. at 902-03 (emphasis added; citation omitted).

D. Economic Loss Rule: The Contract-Negligence Dichotomy

While owners assert breach of contract and negligence claims against architects and contractors, the courts typically reject the negligence claim because of the economic loss rule. “It is settled in the Commonwealth that no cause of action exists in [cases involving a claim solely for economic losses] absent privity of contract.” *Copenhaver v. Rogers*, 238 Va. 361, 366, 384 S.E.2d 593 (1989).

1. Representative Cases. In *Blake Construction Co., Inc. v. Alley*, 233 Va. 31, 353 S.E.2d 724 (1987), the defendant architects relied on the economic loss rule in support of their position that the contractor’s claim against them was barred. The architects argued that “a party not in privity may not recover damages where there is no physical injury to person or property.” 233 Va. at 33. Because the plaintiff contractor had a contract with the owner, and not the defendant architects, the architects argued that the contractor’s negligence claim was barred. The Virginia Supreme Court stated:

The architect’s duties both to owner and contractor arise from and are governed by the contracts related to the construction project. While such a duty may be imposed by contract, no common-law duty requires an architect to protect the contractor from purely economic loss. There can be no actionable negligence where there is no breach of a duty ‘to take care for the safety of the person or property of another.’ . . . The parties involved in a construction project resort to contracts and contract law to protect their economic expectations. Their respective rights and duties are defined by the various contracts they enter. Protection against economic losses caused by another’s failure properly to perform is but one provision the contractor may require in striking his bargain. Any duty on the architect in this regard is purely a creature of contract. Under the common law

there could be no recovery by [contractor] from [architect] in tort for only economic loss in the absence of privity.

Id. at 34-36 (emphasis added). The *Blake* Court held that the contractor's claim of damages of nearly four million dollars caused by the architect's alleged negligent performance of its duties constituted a claim for economic loss and, thus, the contractor could not maintain its negligence action. Because the contractor did not claim damages to person or property, Va. Code Ann. § 8.01-223, which provides that lack of privity is no longer a defense in actions for damages for injuries to person or property resulting from negligence, was inapplicable.

The Virginia Supreme Court again discussed the application of the economic loss rule in *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 374 S.E.2d 55 (1988). The question certified to the Virginia Supreme Court from the United States Court of Appeal for the Fourth Circuit summarizes the relevant facts and issues: "Does Virginia law permit recovery by a home purchaser against the pool installer and the architect for damages to the indoor swimming pool and to the foundation of the house caused by a leaking pool, where the pool installer and the architect were not in privity of contract with the home purchaser, on the basis that the damages were injuries to property and not economic losses?" The purchaser was not in privity of contract with the pool installer or architect because the purchaser had contracted with a design/builder who, in turn, contracted with the installer and architect.

In answering this certified question in favor of the pool installer and architect, the Virginia Supreme Court stated:

The controlling policy consideration underlying tort law is the safety of persons and property - the protection of persons and property from losses resulting from injury. The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for. If that distinction is kept in mind, the damages claimed in a particular case may more readily be classified between claims for injuries to persons

or property on one hand and economic losses on the other. The plaintiffs here allege nothing more than disappointed economic expectations. They contracted with a builder for the purchase of a package. The package included land, design services, and construction of a dwelling. The package also included a foundation for the dwelling, a pool, and a pool enclosure. The package is alleged to have been defective - one or more of its component parts was sufficiently substandard as to cause damage to other parts. . . . This is a purely economic loss, for which the law of contracts provides the sole remedy.

236 Va. at 425. The plaintiffs, therefore, could not recover their economic loss based on the negligence of persons with whom they were not in privity of contract.

For a recent discussion of whether a plaintiff may recover economic losses as consequential damages resulting from the sale of goods under Virginia's Uniform Commercial Code, see *Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc.*, 1997 Va. LEXIS 79 (Sept. 12, 1997). In *Beard*, a subcontractor sought to recover consequential damages caused by the manufacturer's breach of warranty of merchantability with respect to plumbing fittings. The subcontractor did not purchase the fittings directly from the manufacturer, and thus there was no privity of contract. The Virginia Supreme Court held that privity was required for the subcontractor to recover the claimed economic losses resulting from the manufacturer's breach of warranty.

2. Privity of Contract is Irrelevant to Application of Economic Loss Rule. At first blush, it would appear by necessary implication that, when privity of contract exists, economic losses may be recovered under a negligence theory. In fact, the Virginia Supreme Court stated as such in dicta in *Ward v. Ernst & Young*, 246 Va. 317, 435 S.E.2d 628 n.3 (1993): “[t]he clear implication of the economic loss rule is that . . . when privity exists, economic losses may be recovered under a negligence theory”. A closer reading of Virginia case law, however, leads one to the conclusion that the economic loss rule prevents recovery in negligence for economic losses regardless of whether the plaintiff is in

privity of contract with the defendant. After quoting footnote 3 from *Ward*, the United States District Court for the Western District of Virginia, in *Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co.*, 1997 U.S. Dist. LEXIS 2797 (W.D. Va. 1997), stated that, “[i]n spite of the dicta in the *Ward* case, I believe that the Virginia Supreme Court would apply the economic loss rule here [where the plaintiff claims solely economic losses in its negligence action against defendant and plaintiff and defendant are in privity of contract.]”

The Virginia Supreme Court appears to have followed this more expansive definition of the economic loss rule in *Virginia Military Institute v. King*, 217 Va. 751, 232 S.E.2d 895 (1977). In its Motion for Judgment, the Virginia Military Institute (VMI) claimed that its economic losses were caused by defendant architect’s negligent design of a building. VMI had entered into a written contract with the architect with respect to the design and construction of an Alumni Building. The Supreme Court held that, while VMI’s action sounded in tort, it was, in fact, an action for breach of contract and was governed by contract law. Likewise, in *Pender Veterinary Clinic v. Patton, Harris, Rust & Associates*, 22 Va. Cir. 237 (1990), the Fairfax County Circuit Court dismissed a property owner’s claim of negligent design against the architect because “[d]amages for economic loss may only be redressed by the law of contracts. Negligence in the performance of duties imposed by contract is governed by the law of contracts.” The Court “did not, nor was it required to make a finding that there was no privity between [the owner] and the defendants.” Finally, the City of Richmond Circuit Court stated that “*Rotonda Condominium [Unit Owners Association v. Rotonda Associates*, 238 Va. 85, 380 S.E.2d 876 (1989)] made it clear that privity of contract, a missing element in *Blake Construction and Sensenbrenner*, makes no difference with regard to negligence actions being available to recover purely economic losses.” *P&T Associates v. Paciulli, Simmons & Associates, Ltd.*, 27 Va. Cir. 405 (1992); see also *Rosenblum v. Santa Fe Development Corp.* 29 Va. Cir. 215 (1992)(court dismissed plaintiff’s negligence count against defendant with whom plaintiff was in privity of contract because of the economic loss rule).

3. Some Tort Actions Allow Recovery of Economic Loss. The economic loss rule “does not purport to foreclose a right to recover an economic loss in . . . tort actions [other than negligence] such as those for fraud, conspiracy to injure another in a trade, business, or profession, or tortious interference with contract.” *Ward v. Ernst & Young*, 246 Va. 317, 435 S.E.2d 628 n.2 (1993).
4. Economic Loss Rule Protects Employees of the Design/Builder. When an owner contracts directly with the design/builder, the economic loss rule protects the individual architects or constructors who perform services. Assuming the individual architect defectively designs a structure or the individual employee of the contractor defectively constructs the structure which results only in economic loss, (1) an owner may not sue the individual for negligence because of the economic loss rule and (2) the owner cannot usually sue the individual for breach of contract because there is no contract with the individual. See, e.g., *Gerald M. Moore & Son, Inc. v. Drewry*, 251 Va. 277, 467 S.E.2d 811 (1996). An example of a negligence claim against an architect which was not dismissed by virtue of the economic loss rule may be found in *Gravelly v. Providence Partnership*, 549 F.2d 958 (4th Cir. 1977), where the United States Court of Appeals for the Fourth Circuit allowed a hotel guest to maintain his negligence action against the architect for faulty design and supervision of construction, despite the fact that the guest had no contract with the architect, because the guest suffered personal injury allegedly caused by the defective design and faulty supervision.
5. Liability Exposure of the Design/Builder. Although the economic loss rule provides much protection for the design/builder from claims of negligence resulting in economic loss, the design/builder remains potentially liable:
 - To the owner for breach of contract.
 - To the owner for negligence which results in personal injury or property damage.
 - To a third-party for breach if the third-party proves that he is an intended beneficiary of the contract between the design/builder and owner. “[A]nyone for

whose benefit the contact was made may sue upon it.” *Ward v. Ernst & Young*, 246 Va. 317, 329, 435 S.E.2d 628 (1993). The right of an intended beneficiary to sue on a contract to which he is not a party is codified in Va. Code Ann. § 55-22.

- To third-parties for negligence which results in personal injury or property damage.

E. Virginia Statutes of Limitation and Repose

1. Statutes of Limitations.

Written Contract Five Years - Va. Code Ann. § 8.01-246(2)

Unwritten Contract Three Years - Va. Code Ann. § 8.01-246(4)

Injury to Person Two Years - Va. Code Ann. § 8.01-243(A)

Injury to Property Five Years - Va. Code Ann. § 8.01-243(B)

2. Commonwealth Not Within Statutes of Limitations. Va. Code Ann. § 8.01-231 provides that “[n]o statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed a bar to any proceeding by or on behalf of the same.”

3. Accrual of Cause of Action. The determination of the date of accrual of a cause of action, from which the limitations period begins to run, is essential. Va. Code Ann. § 8.01-230 defines the accrual of a cause of action as follows:

In every action for which a limitation period is prescribed, the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person, when the breach of contract or duty occurs in the case of damage to property and not when the resulting damage is discovered, except where

the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250, or other statute.

Virginia has “followed the general rule that the applicable period of limitation begins to run from the moment the cause of action arises rather than from the time of discovery of injury or damage, and [the] difficulty in ascertaining the existence of a cause of action is irrelevant.” *Virginia Military Institute v. King*, 217 Va. 751, 759, 232 S.E.2d 895 (1977).

Determining when the breach occurred is not always an easy task. For example, in *King*, the owner claimed that the architects breached the contract by improperly designing the project (specifically, in providing for the use of limestone) and supervising construction. With respect to the claim for defective design, the Virginia Supreme Court stated: “We cannot escape the conclusion that [the owner] has alleged a cause of action for improper design which accrued when the plans were finally approved. At that time, the architects had a right to demand and received payment for their services for that phase of their undertaking. At that time, if defect had been discovered, [the owner] could have initiated legal proceedings against the architects.” 217 Va. at 759. Thus, the Court dismissed that portion of the owner’s claim for defective design because it had failed to file suit within the limitations period. With respect to the owner’s breach of contract claim for improper supervision, however, the court held that the owner’s claim was not time-barred.

It is unnecessary for us to determine whether breach of the agreement to supervise occurred upon completion of the installation of limestone in June, 1969, upon completion of all stonework in September, 1969 or at a later date. An opportunity to take corrective action in any event was available until at least June, 1969, the architects breached their agreement to supervise no earlier than that date, and [the owner] timely filed its motion for judgment within the period of five years thereafter . .

Id. at 762.

In *Board of Fairfax County v. A. A. Beiro Construction Co., Inc.*, 223 Va. 161, 286 S.E.2d 232 (1982), the Virginia Supreme Court had to determine the date of accrual of an owner's cause of action against a contractor for defective construction of a roof, which was erected in the first of four phases of construction. The contractor claimed that, although the architect did not approve final payment until August 1973, the building was completed in August 1972. The owner did not file suit until January 1978.

The trial court, relying on *[King]*, held the cause accrued when the roof was completed, February, 1972 at the latest. We cannot agree. In *King*, an architect contracted both to design a building and supervise its construction. The contract, by its terms, was divisible, and we held a cause of action for negligent design accrued when that portion of the contract was completed. The contract in the present case was not divisible. The contractor retained the right to correct defects until the time the building was completed. . . . The [owner's] cause of action accrued, at the earliest, in August, 1973, when the architect issued the certificate of final payment.

223 Va. at 162.

Thus, a design/builder may protect itself somewhat, at least with respect to stale claims for defective design, by expressly separating its design and construction obligations such that the design/build contract is divisible.

4. Statute of Repose. "While some courts treat statutes of limitations and statutes of repose similarly, other courts recognize important distinctions between the two. The Supreme Court of Virginia falls in the latter group. . . . [A] statute of limitations bars only the remedy, whereas a statute of repose both extinguishes the right and bars the remedy." *Delon Hampton & Associates v. Washington Metropolitan Area Transit Authority*, 943 F.2d 355, 360 (4th Cir. 1991) (footnote omitted); see *School Board of the City of Norfolk v. United States Gypsum Co.*, 234 Va. 32, 37, 360 S.E.2d 324 (1987)("[a]lthough 'statutes of limitations' and 'statutes of repose' are terms

sometimes loosely employed as interchangeable, they are, in fact, different in concept, definition, and function”).

Va. Code Ann. § 8.01-250, Virginia’s construction statute of repose, provides as follows:

No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement . . . more than five years after the performance [or] furnishing of such services and construction.

The limitation prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property, nor to any person in actual possession and in control of the improvement as owner, tenant or otherwise at the time the defective or unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought; rather each such action shall be brought within the time next after such injury occurs as provided in §§ 8.01-243 and 8.01-246.

By its very terms, Va. Code Ann. § 8.01-250 applies only to tort actions. *Delon Hampton*, 943 F.2d at 362.

In dismissing the plaintiffs’ claim against a contractor for injuries suffered when a balcony fell (more than five years after the project was completed and a certificate of occupancy was issued), the Virginia Supreme Court stated that “we think the lapse of the statutory period [defined in § 8.01-250] was meant to extinguish all the rights of a plaintiff, including those which might arise from an injury sustained later and to grant a defendant immunity from liability for all the torts specified in the statute.” *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 52, 392 S.E.2d 817 (1990)(quoting *School Board of the City of Norfolk v. United States Gypsum Co.*, 234 Va. 32, 37, 360 S.E.2d 324 (1987))(emphasis in original).

The second paragraph of Va. Code Ann. § 8.01-250 excludes from its protection “the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property.” As the Supreme Court indicated in *Eagles Court Condominium Unit Owners Association v. Heatilator, Inc.*, 239 Va. 325, 389 S.E.2d 304 (1990), “ordinary building materials” are not machines or equipment. In addition, the *Eagles* Court noted that “[t]he designer and the installer of such machinery or equipment are entitled to the protection of the first sentence of the statute.” 239 Va. at 329.

APPENDIX I

SELECTED SECTIONS OF THE CODE OF VIRGINIA ANNOTATED

Title 8.01 (Civil Remedies and Procedure)

Chapter 3 (Actions)

§ 8.01-223. Lack of privity no defense in certain cases.

In cases not provided for in § 8.2-318 where recovery of damages for injury to person, including death, or to property resulting from negligence is sought, lack of privity between the parties shall be no defense.

Title 8.01 (Civil Remedies and Procedure)

Chapter 4 (Limitations of Actions)

§ 8.01-230. Accrual of right of action.

In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, when the breach of contract occurs in actions *ex contractu* and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250 or other statute.

§ 8.01-231. Commonwealth not within statute of limitations.

No statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed a bar to any proceeding by or on behalf of the same.

§ 8.01-243. Personal action for injury to person or property generally; extension in actions for malpractice against health care provider.

A. Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues.

B. Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within five years after the cause of action accrues.

C. The two-year limitations period specified in subsection A shall be extended in actions for malpractice against a health care provider as follows:

1. In cases arising out of a foreign object having no therapeutic or diagnostic effect being left in a patient's body, for a period of one year from the date the object is discovered or reasonably should have been discovered; and

2. In cases in which fraud, concealment or intentional misrepresentation prevented discovery of the injury within the two-year period, for one year from the date the injury is discovered or, by the exercise of due diligence, reasonably should have been discovered.

However, the provisions of this subsection shall not apply to extend the limitations period beyond ten years from the date the cause of action accrues, except that the provisions of § 8.01-229 (A)(2) shall apply to toll the statute of limitations in actions brought by or on behalf of a person under a disability.

§ 8.01-246. Personal actions based on contracts.

Subject to the provisions of § 8.01-243 regarding injuries to person and property and of § 8.01-245 regarding the application of limitations to fiduciaries, and their bonds, actions founded upon a contract, other than actions on a judgment or decree, shall be brought within the following number of years next after the cause of action shall have accrued:

1. In actions or upon a recognizance, except recognizance of bail in a civil suit, within ten years; and in actions or motions upon a recognizance of bail in a civil suit, within three years, omitting from the computation of such three years such time as the right to sue out such execution shall have been suspended by injunction, supersedeas or other process;
2. In actions on any contract which is not otherwise specified and which is in writing and signed by the party to be charged thereby, or by his agent, within five years whether such writing be under seal or not;
3. In actions by a partner against another for settlement of the partnership account or in actions upon accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants, within five years from the cessation of the dealings in which they are interested together;
4. In actions upon any unwritten contract, express or implied, within three years.

Provided that as to any action to which § 8.2-725 of the Uniform Commercial Code is applicable, that section shall be controlling except that in products liability actions for injury to person and for injury to property, other than the property subject to contract, the limitation prescribed in § 8.01-243 shall apply.

§ 8.01-250. Limitation on certain actions for damages arising out of defective or unsafe condition of improvements to real property.

No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance of furnishing of such services and construction.

The limitation prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property, nor to any person in actual possession and in control of the improvement as owner, tenant or otherwise at the time the defective or unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought; rather each such action shall be brought within the time next after such injury occurs as provided in §§ 8.01-243 and 8.01-246.

Title 11 (Contracts)

Chapter 7 (Virginia Public Procurement Act)

§ 11-41. Methods of procurement.

A. All public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction, shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law.

B. Professional services shall be procured by competitive negotiation.

C. 1. Upon a determination made by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, services, or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination.

Upon a written determination made in advance by

(i) the Governor or his designee in the case of a procurement by the Commonwealth or by a department, agency or institution thereof or

(ii) the local governing body in the case of a procurement by a political subdivision of the Commonwealth, that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services in subdivision 3 b of the definition of "competitive negotiation" in § 11-37. The basis for this determination shall be documented in writing.

2. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:

(i) By the Commonwealth, its departments, agencies and institutions on a fixed price design-build basis or construction management basis under § 11-41.2;

(ii) By any public body for the alteration, repair, renovation or demolition of buildings when the contract is not expected to cost more than \$500,000;

(iii) By any public body for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property; or

(iv) As otherwise provided in § 11-41.2:1.

D. Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The public body shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area or published in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first.

E. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The public body shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area or published in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable.

F. A public body may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts if the aggregate or the sum of all phases is not expected to exceed \$30,000; however, such small purchase procedures shall provide for competition wherever practicable.

G. Any local school board may authorize any of its public schools or its school division to enter into contracts providing that caps and gowns, photographs, class rings, yearbooks and graduation announcements will be available for purchase or rental by students, parents, faculty or other persons using nonpublic money through the use of competitive negotiation as provided in this chapter, competitive sealed bidding not necessarily being required for such contracts. The Superintendent of Public Instruction may provide assistance to public school systems regarding this chapter and other related laws.

H. Upon a determination made in advance by the local governing body and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public, such items may be purchased at the auction. The writing shall document the basis for this determination.

§ 11-41.2. Design-build or construction management contracts for Commonwealth authorized.

A. Notwithstanding any other provisions of law, the Commonwealth may enter into contracts on a fixed price design-build basis or construction management basis in accordance with the provisions of this section and § 2.1-51.31. Procedures to implement this section and any changes to such procedures shall be adopted by the Secretary of Administration after a public hearing and approval by the House Appropriations and Senate Finance Committees.

B. Procurement of construction by the design-build method shall be a two-step competitive negotiation process. In the first step, offerors shall be requested to submit their qualifications. Based upon the information submitted and any other relevant information which the Commonwealth may obtain, no more than five offerors deemed most suitable for the project shall be selected by the Commonwealth and requested to submit proposals.

C. Design-build contracts may be used by the Commonwealth only for those types of construction projects designated in the procedures adopted by the Secretary of Administration to implement this section.

§ 11-41.2:02. Fixed-price or not-to-exceed-price design-build and construction management contracts for juvenile correctional facilities authorized.

Notwithstanding the provisions of § 11-41.2, but subject to the procedures adopted by the Secretary of Administration to implement the provisions of that section, the Commonwealth may enter into contracts for juvenile correctional facilities on a fixed-price or not-to-exceed-price design-build basis or construction management basis, including related leases, lease/purchase contracts, agreements relating to the sale of securities to finance such facilities, and similar financing agreements.

§ 11-41.2:2. Design-build or construction management contracts for public bodies other than the Commonwealth; eligibility requirements; award of contract; records to be kept.

A. While the competitive sealed bid process remains the preferred method of construction procurement for public bodies in the Commonwealth, any public body other than the Commonwealth may enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis provided the public body complies with the requirements of this section and has obtained the approval of the Design-Build/Construction Management Review Board (the Review Board) pursuant to § 11-41.2:5.

Prior to making a determination as to the use of design-build or construction management for a specific construction project, the public body shall have in its employ or under contract a licensed architect or engineer with professional competence appropriate to the project who shall advise the public body regarding the use of design-build or construction management for that project and who shall assist the public body with the preparation of the Request for Proposal.

Prior to issuing a Request for Proposal for any design-build or construction management contract for a specific construction project, the public body shall:

1. Have adopted, by ordinance or resolution, written procedures governing the selection, evaluation and award of design-build and construction management contracts. Such procedures shall be consistent with those described in this chapter for the procurement of nonprofessional services through competitive negotiation. Such procedures shall also require Requests for Proposals to include and define the criteria of such construction project in areas such as site plans; floor plans; exterior elevations; basic building envelope materials; fire protection information plans; structural, mechanical (HVAC), and electrical systems; and special telecommunications; and may define such other requirements as the public body determines appropriate for that particular construction project. Except as may otherwise be approved by the Review Board, such procedures for:

a. Design-build construction projects shall include a two-step competitive negotiation process consistent with the applicable provisions of the Design-Build Selection Procedures of paragraph D of Chapter IX (Special Construction Procedures) of the Capital Outlay Manual of the Commonwealth developed by the Department of General Services through the Division of Engineering and Buildings. The provisions of the Capital Outlay Manual shall apply, mutatis mutandis, to such procedures for design-build construction projects.

b. Construction management projects shall include (i) selection procedures consistent with the applicable provisions of the Selection Procedures of paragraphs D and E of Chapter IX (Special Construction Procedures) of the Capital Outlay Manual of the Commonwealth and (ii) required construction management contract terms consistent with applicable provisions of the Required Construction Management Contract Terms of paragraph F of Chapter IX (Special Construction Procedures) of the Capital Outlay Manual. The provisions of the Capital Outlay Manual shall apply, mutatis mutandis, to such procedures for construction management projects.

2. Have documented in writing that for a specific construction project (i) a design-build or construction management contract is more advantageous than a competitive sealed bid construction contract; (ii) there is a benefit to the public body by using a design-build or construction management contract; and (iii) competitive sealed bidding is not practical or fiscally advantageous.

B. Once approved by the Review Board in accordance with § 11-41.2:5, the public body may award a design-build or construction management contract. Unless otherwise specified in the Request for Proposal, such contract shall be awarded to the fully qualified offeror who submits an acceptable proposal at the lowest cost in response to the Request for Proposal. The provisions of this subsection shall supersede any related provision in the Capital Outlay Manual.

C. The public body shall provide information as requested by the Review Board to allow post-project evaluation by the Review Board.

§ 11-41.2:3. Design-Build/Construction Management Review Board created; membership; terms; staffing; seal.

A. There is hereby created the Design-Build/Construction Management Review Board, hereinafter referred to as the Review Board, which shall be composed of nine members to be appointed by the Governor as follows: the Director of the Division of Engineering and Buildings of the Department of General Services, or his designee; two Class A general contractors selected from a list recommended by the Associated General Contractors; one architect and one engineer selected from a list recommended by the Consulting Engineers Council of Virginia, the Virginia Society of the American Institute of Architects, and the Virginia Society of Professional Engineers; and four representatives of public bodies other than the Commonwealth selected from a list recommended by the Virginia Municipal League and the Virginia Association of Counties. Each such list shall include the names of at least four persons who are experienced in competitive sealed bidding or competitive negotiation and in design-build

or construction management procedures. The Director of the Division of Engineering and Buildings or his designee shall be a nonvoting member of the Review Board, except in the event of a tie vote of the Review Board.

B. The initial terms of the Review Board shall be as follows: three members shall be appointed for two-year terms, three members shall be appointed for three-year terms and three members shall be appointed for four-year terms. Thereafter, all appointments shall be for terms of four years, except that appointments to fill vacancies shall be for the unexpired terms. No person shall be eligible to serve for more than two successive full terms, except the Director of the Division of Engineering and Buildings, who shall serve until a successor qualifies.

C. The Review Board shall elect its chairman and vice-chairman from among its members. Members shall receive no compensation for their services as members of the Review Board, but shall receive reasonable expenses.

D. The Review Board shall meet monthly to conduct its business as required by § 11-41.2:4. However, monthly meetings may be canceled by the chairman if there is no business before the Review Board. Five members shall constitute a quorum.

E. Such staff support as is necessary for the conduct of the Review Board's business shall be furnished by the Division of Engineering and Buildings of the Department of General Services pursuant to § 2.1-483.1:2.

F. The Review Board shall adopt a seal by which it shall authenticate its proceedings.

§ 11-41.2:4. Duties of the Design-Build/Construction Management Review Board; transitional provisions relating to regulations.

A. The Review Board shall have the following duties:

1. Review submissions by public bodies other than the Commonwealth of draft or adopted ordinances or resolutions to determine if the process for the selection, evaluation and award of a design-build or construction management contract is in compliance with the provisions of subdivision (A)(1) of § 11-41.2:2;
2. Determine if the public body has complied with the provisions of § 11-41.2:2 relating to the retention of a licensed architect or engineer;
3. Determine if the public body has complied with the requirements of § 11-41.2:2 and that the findings made by the public body pursuant to § 11-41.2:2 are not unreasonable;
4. Develop guidelines relating to the documents and information to be reviewed by the Review Board;
5. Make post-project evaluations of construction projects procured by design-build or construction management contracts entered into by public bodies other than the Commonwealth, including cost and time savings, effectiveness of the selection, evaluation and award of such contracts, and the benefit to the public body; and

6. Report to the General Assembly and the Governor on or before December 1, 1999, concerning the Review Board's evaluation of and findings regarding all design-build and construction management construction undertaken by public bodies other than the Commonwealth since July 1, 1996, and any recommendations relating to future use of design-build or construction management contracts by such public bodies.

B. On or before July 1, 1997, the Review Board shall adopt regulations, as it deems appropriate, based on the substantive requirements of Chapter IX of the Capital Outlay Manual of the Commonwealth, for a two-step competitive negotiation process which shall be applied to design-build and construction management projects undertaken by public bodies other than the Commonwealth. For construction management projects, such regulations shall also include applicable provisions of the Required Construction Management Contract Terms of the Capital Outlay Manual. Such regulations shall also allow the Review Board to approve deviations from provisions of the Capital Outlay Manual that it deems appropriate. Such regulations, upon final adoption, shall supersede the provisions of subdivisions (A)(1)(a) and (A)(1)(b) of § 11-41.2:2. Regulations of the Review Board shall be adopted in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.), except that regulations adopted pursuant to this subsection during the Review Board's first year of operation shall not be subject to the Administrative Process Act. Thereafter, all regulations shall be adopted in accordance with the Administrative Process Act.

§ 11-41.2:5. Review by the Review Board for design-build or construction management approval; effect of disapproval; review of Review Board decision.

The Review Board shall conduct such inquiry it deems appropriate and may require the submission of additional documents or information by the public body, in a form prescribed by the Review Board, to determine if the public body has complied with the provisions of § 11-41.2:2.

Within sixty days of the receipt of the request for review, the Review Board shall render a decision, unless a different timetable is agreed to by the public body. If the Review Board determines that the public body has complied with the provisions of § 11-41.2:2 and the findings made by the public body pursuant to subdivision (A)(2) of § 11-41.2:2 are not unreasonable, the Review Board shall approve such use. If the Review Board determines that (i) the public body has not complied with the provisions of § 11-41.2:2 or (ii) the findings made by the public body pursuant to subdivision (A)(2) of § 11-41.2:2 are unreasonable, it shall disapprove such use, and the public body shall not use a design-build or construction management contract to procure construction for the proposed project. If no decision is made by the Review Board within the sixty-day period or as otherwise agreed to by the public body, the proposed use of a design-build or construction management contract shall be deemed approved.

Any public body other than the Commonwealth which has been aggrieved by any action of the Review Board shall be entitled to a review of such action. Appeals from such actions shall be in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.).

Title 54.1 (Professions and Occupations)

Chapter 4 (Architects, Engineers, Surveyors, Landscape Architects & Interior Designers)

§ 54.1-400. Definitions.

As used in this chapter unless the context requires a different meaning:

“*Architect*” means a person who, by reason of his knowledge of the mathematical and physical sciences, and the principles of architecture and architectural design, acquired by professional education, practical experience, or both, is qualified to engage in the practice of architecture and whose competence has been attested by the Board through licensure as an architect.

The “*practice of architecture*” means any service wherein the principles and methods of architecture are applied, such as consultation, investigation, evaluation, planning and design, and includes the responsible administration of construction contracts, in connection with any private or public buildings, structures or projects, or the related equipment or accessories.

“*Board*” means the Board for Architects, Professional Engineers, Land Surveyors and Landscape Architects.

“*Certified interior designer*” means a design professional who meets the criteria of education, experience, and testing in the rendering of interior design services established by the Board through certification as an interior designer.

“*Certified landscape architect*” means a person who, by reason of his special knowledge of natural, physical and mathematical sciences, and the principles and methodology of landscape architecture and landscape architectural design acquired by professional education, practical experience, or both, is qualified to engage in the practice of landscape architecture and whose competence has been attested by the Board through certification as a landscape architect.

The “*practice of landscape architecture*” by a certified landscape architect means any service wherein the principles and methodology of landscape architecture are applied in consultation, evaluation, planning (including the preparation and filing of sketches, drawings, plans and specifications) and responsible supervision or administration of contracts relative to projects principally directed at the functional and aesthetic use of land.

“*Improvements to real property*” means any valuable addition or amelioration made to land and generally whatever is erected on or affixed to land which is intended to enhance its value, beauty or utility, or adapt it to new or further purposes. Examples of improvements to real property include, but are not limited to, structures, buildings, machinery, equipment, electrical systems, mechanical systems, roads, and water and wastewater treatment and distribution systems.

“Interior design” by a certified interior designer means any service rendered wherein the principles and methodology of interior design are applied in connection with the identification, research, and creative solution of problems pertaining to the function and quality of the interior environment. Such services relative to interior spaces shall include the preparation of documents for nonload-bearing interior construction, furnishings, fixtures, and equipment in order to enhance and protect the health, safety, and welfare of the public.

“Land surveyor” means a person who, by reason of his knowledge of the several sciences and of the principles of land surveying, and of the planning and design of land developments acquired by practical experience and formal education, is qualified to engage in the practice of land surveying, and whose competence has been attested by the Board through licensure as a land surveyor.

The *“practice of land surveying”* includes surveying of areas for a determination or correction, a description, the establishment or reestablishment of internal and external land boundaries, or the determination of topography, contours or location of physical improvements, and also includes the planning of land and subdivisions thereof. The term *“planning of land and subdivisions thereof”* shall include, but not be limited to, the preparation of incidental plans and profiles for roads, streets and sidewalks, grading, drainage on the surface, culverts and erosion control measures, with reference to existing state or local standards.

“Professional engineer” means a person who is qualified to practice engineering by reason of his special knowledge and use of mathematical, physical and engineering sciences and the principles and methods of engineering analysis and design acquired by engineering education and experience, and whose competence has been attested by the Board through licensure as a professional engineer. The *“practice of engineering”* means any service wherein the principles and methods of engineering are applied to, but are not necessarily limited to, the following areas: consultation, investigation, evaluation, planning and design of public or private utilities, structures, machines, equipment, processes, transportation systems and work systems, including responsible administration of construction contracts. The term *“practice of engineering”* shall not include the service or maintenance of existing electrical or mechanical systems.

“Responsible charge” means the direct control and supervision of the practice of architecture, professional engineering, or land surveying.

§ 54.1-401. Exemptions.

The following shall be exempted from the provisions of this chapter:

1. Practice of professional engineering and land surveying by a licensed architect when such practice is incidental to what may be properly considered an architectural undertaking.
2. Practice of architecture and land surveying by a licensed professional engineer when such practice is incidental to an engineering project.

3. Practice as a professional engineer, architect or certified landscape architect in this Commonwealth by any person not a resident of and having no established place of business in this Commonwealth, or by any person resident in this Commonwealth whose arrival is recent, provided that such person is otherwise qualified for such professional service in another state or country and qualifies in Virginia and files prior to commencement of such practice an application, with the required fee, for licensure as a professional engineer or architect or certification as a landscape architect. The exemption shall continue until the Board has had sufficient time to consider the application and grant or deny licensure or certification.

4. Engaging in the practice of professional engineering as an employee under a licensed professional engineer, engaging in the practice of architecture as an employee under a licensed architect, or engaging in the practice of land surveying as an employee under a licensed land surveyor; provided, that such practice shall not include responsible charge of design or supervision.

5. Practice of professional engineering, architecture or land surveying solely as an employee of the United States. However, the employee shall not be exempt from other provisions of this chapter if he furnishes advisory service for compensation to the public in connection with engineering, architectural or land surveying matters.

6. Practice of architecture or professional engineering by an individual, firm or corporation on property owned or leased by such individual, firm or corporation, unless the public health or safety is involved.

7. Practice of engineering solely as an employee of a corporation engaged in interstate commerce, or as an employee of a public service corporation, by rendering such corporation engineering service in connection with its facilities which are subject to regulation by the State Corporation Commission; provided, that corporation employees who furnish advisory service to the public in connection with engineering matters other than in connection with such employment shall not be exempt from the provisions of this chapter.

§ 54.1-402. Further exemptions from license requirements for architects and professional engineers.

A. No license as an architect or professional engineer shall be required pursuant to § 54.1-406 for persons who prepare plans, specifications, documents and designs for the following, provided any such plans, specifications, documents or designs bear the name and address of the author and his occupation:

1. Single- and two-family homes, townhouses and multi-family dwellings, excluding electrical and mechanical systems, not exceeding three stories; or
2. All farm structures used primarily in the production, handling or storage of agricultural products or implements, including, but not limited to, structures used for the handling, processing, housing or storage of crops, feeds, supplies, equipment, animals or poultry; or

3. Buildings and structures classified with respect to use as business (Use Group B) and mercantile (Use Group M), as provided in the Uniform Statewide Building Code and churches with an occupant load of 100 or less, excluding electrical and mechanical systems, where such building or structure does not exceed 5,000 square feet in total net floor area, or three stories; or

4. Buildings and structures classified with respect to use as factory and industrial (Use Group F) and storage (Use Group S) as provided in the Uniform Statewide Building Code, excluding electrical and mechanical systems, where such building or structure does not exceed 15,000 square feet in total net floor area, or three stories; or

5. Additions, remodeling or interior design without a change in occupancy or occupancy load and without modification to the structural system or a change in access or exit patterns or increase in fire hazard; or

6. Electric installations which comply with all applicable codes and which do not exceed 600 volts and 800 amps, where work is designed and performed under the direct supervision of a person licensed as a master's level electrician or Class A electrical contractor by written examination, and where such installation is not contained in any structure exceeding three stories or located in any of the following categories:

- a. Use Group A-1 theaters which exceed assembly of 100 persons;
- b. Use Group A-4 except churches;
- c. Use Group I, institutional buildings, except day care nurseries and clinics without life-support systems; or

7. Plumbing and mechanical systems using packaged mechanical equipment, such as equipment of catalogued standard design which has been coordinated and tested by the manufacturer, which comply with all applicable codes. These mechanical systems shall not exceed gauge pressures of 125 pounds per square inch, other than refrigeration, or temperatures other than flue gas of 300° F (150° C) where such work is designed and performed under the direct supervision of a person licensed as a master's level plumber, master's level heating, air conditioning and ventilating worker, or Class A contractor in those specialties by written examination. In addition, such installation may not be contained in any structure exceeding three stories or located in any structure which is defined as to its use in any of the following categories:

- a. Use Group A-1 theaters which exceed assembly of 100 persons;
- b. Use Group A-4 except churches;
- c. Use Group I, institutional buildings, except day care nurseries and clinics without life-support systems; or

8. The preparation of shop drawings, field drawings and specifications for components by a contractor who will supervise the installation and where the shop drawings and specifications (i) will be reviewed by the licensed professional engineer or architect responsible for the project or (ii) are otherwise exempted; or

9. Buildings, structures, or electrical and mechanical installations which are not otherwise exempted but which are of standard design, provided they bear the certification of a professional engineer or architect registered or licensed in another state, and provided that the design is adapted for the specific location and for conformity with local codes, ordinances and regulations, and is so certified by a professional engineer or architect licensed in Virginia; or

10. Construction by a state agency or political subdivision not exceeding \$75,000 in value keyed to the January 1, 1991, Consumer Price Index (CPI) and not otherwise requiring a licensed architect, engineer, or land surveyor by an adopted code and maintenance by that state agency or political subdivision of water distribution, sewage collection, storm drainage systems, sidewalks, streets, curbs, gutters, culverts, and other facilities normally and customarily constructed and maintained by the public works department of the state agency or political subdivision.

B. No person shall be exempt from licensure as an architect or engineer who engages in the preparation of plans, specifications, documents or designs for:

1. Any unique design of structural elements for floors, walls, roofs or foundations; or

2. Any building or structure classified with respect to its use as high hazard (Use Group H).

C. Terms used in this section, and not otherwise defined in this chapter, shall have the meanings provided in the Uniform Statewide Building Code in effect on July 1, 1982, including any subsequent amendments.

§ 54.1-403. Board members and officers; quorum.

The Board for Architects, Professional Engineers, Land Surveyors and Landscape Architects shall be composed of thirteen members as follows: three architects, three professional engineers, three land surveyors, two certified landscape architects and two certified interior designers. However, the two certified interior designer members initially appointed to the Board shall be qualified for certification pursuant to this chapter. Each interior designer appointment to the Board may be made from nominations submitted by the Council of Certified Virginia Interior Designers, who shall nominate three persons for each interior designer vacancy. In no case shall the Governor be bound to make any appointment from the nominees.

Board members shall have actively practiced or taught their professions for at least ten years prior to their appointments. The terms of Board members shall be four years. The Board shall elect a president from its membership.

Eight Board members, consisting of two engineers, two architects, two land surveyors, one certified landscape architect and one interior designer, shall constitute a quorum.

§ 54.1-404. Regulations; code of professional practice and conduct.

The Board shall promulgate regulations not inconsistent with this chapter governing its own organization, the professional qualifications of applicants, the requirements necessary for passing examinations in whole or in part, the proper conduct of its examinations, the implementation of exemptions from license requirements, and the proper discharge of its duties.

The regulations may include a code of professional practice and conduct, the provisions of which shall serve any or all of the following purposes:

1. The protection of the public health, safety and welfare;

2. The maintenance of standards of objectivity, truthfulness and reliability in public statements by professionals;
3. The avoidance by professionals of conflicts of interests;
4. The prohibition of solicitation or acceptance of work by professionals on any basis other than their qualifications for the work offered;
5. The restriction by the professional in the conduct of his professional activity from association with any person engaging in illegal or dishonest activities; or
6. The limitation of professional service to the area of competence of each professional.

§ 54.1-404.1. Education and experience requirements continued.

All applicants for licensure as an architect shall be governed by the Board's rules and regulations effective February 1, 1992, except § 3.3 (B) of VR 130-01-2, until December 31, 1997.

§ 54.1-405. Examinations and issuance of licenses and certificates.

The Board shall hold at least one examination each year at times and locations designated by the Board. A license to practice as a professional engineer, an architect, or a land surveyor, or a certificate to practice as a landscape architect shall be issued to every applicant who complies with the requirements of this chapter and the regulations of the Board. A license shall be valid during the life of the holder unless revoked or suspended by the Board. A license holder must register with the Board to practice in the Commonwealth. The licenses or certificates shall be signed by at least four members of the Board.

§ 54.1-406. License required.

A. Unless exempted by § 54.1-401, 54.1-402, or § 54.1-402.1, a person shall hold a valid license prior to engaging in the practice of architecture or engineering which includes design, consultation, evaluation or analysis and involves proposed or existing improvements to real property.

Unless exempted by § 54.1-401 or § 54.1-402.1, a person shall hold a valid license prior to engaging in the practice of land surveying.

B. Unless exempted by § 54.1-402, any person, partnership, corporation or other entity offering to practice architecture, engineering, or land surveying without being registered or licensed in accordance with the provisions of this chapter, shall be subject to the provisions of § 54.1-111 of this title.

C. Any person, partnership, corporation or other entity which is not licensed or registered to practice in accordance with this chapter and which advertises or promotes through the use of the words “architecture,” “engineering” or “land surveying” or any modification or derivative thereof in its name or description of its business activity in a manner that indicates or implies that it practices or offers to practice architecture, engineering or land surveying as defined in this chapter shall be subject to the provisions of § 54.1-111.

D. Notwithstanding these provisions, any state agency or political subdivision of the Commonwealth unable to employ a qualified licensed engineer, architect, or land surveyor to fill a responsible charge position, after reasonable and unsuccessful search, may fill the position with an unlicensed person upon the determination by the chief administrative officer of the agency or political subdivision that the person, by virtue of education, experience, and expertise, can perform the work required of the position.

E. Through June 30, 2002, any full-time, salaried employee of the Commonwealth or any political subdivision of the Commonwealth on June 30, 1992, who has graduated from an engineering, engineering technology, or related science curriculum of four years or more, and who has acquired a specific record of thirty years or more of approved progressive professional experience on engineering projects of a grade and character which the Board judges to be pertinent to acquiring professional skills, demonstrating that the individual is eminently qualified to practice engineering, shall qualify for an oral examination for licensure in accordance with the rules and regulations of the Board as adopted May 17, 1990.

F. Notwithstanding the provisions of this section, a contractor who is licensed pursuant to the provisions of Chapter 11 (§ 54.1-1100 et seq.) of this title shall not be required to be licensed or registered to practice in accordance with this chapter when negotiating design-build contracts or performing services other than architectural, engineering or land surveying services under a design-build contract. The architectural, engineering or land surveying services offered or rendered in connection with such contracts shall only be offered and rendered by an architect, engineer or land surveyor licensed in accordance with this chapter.

§ 54.1-407. Land surveying.

Notwithstanding the provisions of any regulation promulgated by the Board for Architects, Professional Engineers, Land Surveyors and Landscape Architects, a land surveyor shall not be required by Board regulations to set corner monumentation or perform a boundary survey on any property when (i) corner monumentation has been set or is otherwise required to be set pursuant to the provisions of a local subdivision ordinance as mandated by § 15.1-465 or subdivision 7 of subsection A of § 15.1-466, or where the placing of such monumentation is covered by a surety bond, cash escrow, set-aside letter, letter of credit, or other performance guaranty, or (ii) the purpose of the survey is to determine the location of the physical improvements on the said property only, if the prospective mortgagor or legal agent ordering the survey agrees in writing that such corner monumentation shall not be provided in connection with any such physical improvements survey. The provisions of this section shall apply only to property

located within the Counties of Arlington, Fairfax, King George, Loudoun, Prince William, Spotsylvania and Stafford; and the Cities of Alexandria, Fairfax, Falls Church, Fredericksburg, Manassas and Manassas Park.

§ 54.1-408. Practice of land surveying; subdivisions.

In addition to the work defined in § 54.1-400, a land surveyor may, for subdivisions, site plans and plans of development only, prepare plats, plans and profiles for roads, storm drainage systems, sanitary sewer extensions, and water line extensions, and may perform other engineering incidental to such work, but excluding the design of pressure hydraulic, structural, mechanical, and electrical systems. The work included in this section shall involve the use and application of standards prescribed by local or state authorities. The land surveyor shall pass an examination given by the Board in addition to that required for the licensing of land surveyors as defined in § 54.1-400. Any land surveyor previously licensed pursuant to subdivision (3) (b) of former § 54-17.1 may continue to do the work herein described without further examination.

Except as provided, nothing contained herein or in the definition of “practice of land surveying” in § 54.1-400 shall be construed to include engineering design and the preparation of plans and specifications for construction.

§ 54.1-409. Landscape architecture.

Resulting plans and specifications, submitted under the seal, stamp or certification of a certified landscape architect, may be accepted by local and state authorities, in connection with both public and private projects. However, no landscape architect, unless he is also licensed as a land surveyor, shall provide boundary surveys, plats or descriptions for any purpose, except in conjunction with or under the supervision of an appropriately licensed professional, who shall provide certification, as required.

Nothing contained herein or in the definition of “practice of landscape architecture” in § 54.1-400 shall be construed to restrict or otherwise affect the right of any nurseryman, uncertified landscape architect, landscape designer, land planner, community planner, landscape gardener, golf course designer, turf maintenance specialist or any other similar person from engaging in such occupation, or from rendering any service in connection therewith that is not otherwise proscribed. No person shall hold himself out as, or use the title of, “certified landscape architect,” unless he has been certified pursuant to the provisions of this chapter.

§ 54.1-410. Other building laws not affected; duties of public officials.

A. Nothing contained in this chapter or in the regulations of the Board shall be construed to limit the authority of any public official authorized by law to approve plans, specifications or calculations in connection with improvements to real property. This shall include, but shall not be limited to, the authority of officials of local building departments as defined in § 36-97, to require pursuant to the Uniform Statewide Building Code, state

statutes, local ordinances, or code requirements that such work be prepared by a person licensed or certified pursuant to this chapter.

B. Any public body authorized by law to require that plans, specifications or calculations be prepared in connection with improvements to real property shall establish a procedure to ensure that such plans, specifications or calculations be prepared by an architect, professional engineer, land surveyor or landscape architect licensed, certified or authorized pursuant to this chapter in any case in which the exemptions contained in §§ 54.1-401, 54.1-402 or 54.1-402.1 are not applicable.

Drafting of permits, reviewing of plans or inspection of facilities for compliance with an adopted code or standard by any public body or its designated agent shall not require the services of an architect, professional engineer, land surveyor or landscape architect licensed or certified pursuant to this chapter.

§ 54.1-411. Organization for practice; registration.

A. Nothing contained in this chapter or in the regulations of the Board shall prohibit the practice of architecture, engineering, land surveying or the offering of the title of certified landscape architecture by any corporation, partnership, sole proprietorship, limited liability company, or other entity provided such practice or certification is rendered through its officers, principals or employees who are correspondingly licensed or certified. No such organization shall limit the liability of any licensee or certificate holder for damages arising from his acts or limit such corporation, partnership, sole proprietorship, limited liability company, or other entity from liability for acts of its employees or agents. No such corporation, partnership, sole proprietorship, limited liability company, or other entity, or any affiliate thereof, shall, on its behalf or on behalf of any such licensee or certificate holder, be prohibited from (i) purchasing or maintaining insurance against any such liability; (ii) entering into any indemnification agreement with respect to any such liability; or (iii) receiving indemnification as a result of any such liability.

B. Except for professional corporations holding a certificate of authority issued in accordance with § 13.1-549, professional limited liability companies holding a certificate of authority issued in accordance with § 13.1-1111, and sole proprietorships that do not employ other individuals for which licensing is required, any person, corporation, partnership, limited liability company, or other entity offering or rendering the practice of architecture, engineering, land surveying or offering the title of certified landscape architecture shall register with the Board. As a condition of registration, the entity shall name at least one licensed architect, professional engineer, land surveyor or certified landscape architect for such profession offered or rendered. The person or persons named shall be responsible and have control of the regulated services rendered by the entity.

C. The Board shall adopt regulations governing the registration of persons, corporations, partnerships, limited liability companies, sole proprietors and other entities as required in subsections A and B which:

1. Provide for procedural requirements to obtain and renew registration on a periodic basis;
2. Establish fees for the application and renewal of registration sufficient to cover costs;

3. Assure that regulated services are rendered and controlled by persons authorized to do so; and
4. Ensure that conflicts of interests are disclosed.

Title 54.1 (Professions and Occupations)

Chapter 11 (Contractors)

§ 54.1-1100. Definitions.

As used in this chapter, unless the context requires a different meaning:

“Board” means the Board for Contractors.

“Class A contractors” perform or manage construction, removal, repair, or improvements when (i) the total value referred to in a single contract or project is \$70,000 or more, or (ii) the total value of all such construction, removal, repair, or improvements undertaken by such person within any twelve-month period is \$500,000 or more.

“Class B contractors” perform or manage construction, removal, repair, or improvements when (i) the total value referred to in a single contract or project is \$7,500 or more, but less than \$70,000, or (ii) the total value of all such construction, removal, repair or improvements undertaken by such person within any twelve-month period is \$150,000 or more, but less than \$500,000.

“Class C contractors” perform or manage construction, removal, repair, or improvements when (i) the total value referred to in a single contract or project is over \$1,000 but no more than \$7,500, or (ii) the total value of all such construction, removal, repair, or improvements undertaken by such person within any twelve-month period is no more than \$150,000. The Board shall require a master tradesmen license as a condition of licensure for electrical, plumbing and heating, ventilation and air conditioning contractors.

“Contractor” means any person, that for a fixed price, commission, fee, or percentage undertakes to bid upon, or accepts, or offers to accept, orders or contracts for performing, managing, or superintending in whole or in part, the construction, removal, repair or improvement of any building or structure permanently annexed to real property owned, controlled, or leased by another person or any other improvements to such real property.

“Department” means the Department of Professional and Occupational Regulation.

“Designated employee” means the contractor’s full-time employee who is at least eighteen years of age and who has successfully completed the oral or written examination required by the Board on behalf of the contractor.

“Director” means the Director of the Department of Professional and Occupational Regulation.

“Owner-developer” means any person who performs or supervises the construction, removal, repair or improvements of any building or structure permanently annexed to real property owned, controlled or leased by him or any other improvements to such property when either (i) the total value of all such improvements to or upon any single parcel of land is \$70,000 or more or (ii) the total value of all such improvements to or upon all real property undertaken by him within any twelve-month period is \$500,000 or more, but shall not include a person who performs or supervises the construction, removal, repair or improvement of (i) not more than one building upon his own real property and for his own use during any twenty-four-month period, (ii) a house upon his own real property as a bona fide gift to a member of his immediate family provided such member lives in the house for at least twenty-four months, (iii) industrial or manufacturing facilities for his own use, or (iv) any person who contracts with a duly licensed Class A contractor classified as a building contractor to perform such construction, removal, repair or improvements.

For purposes of this section, “immediate family” includes one’s mother, father, son, daughter, brother, sister, grandchild, grandparent, mother-in-law and father-in-law.

“Person” means any individual, firm, corporation, association, partnership, joint venture, or other legal entity.

“Value” means fair market value. When improvements are performed or supervised by a contractor, the contract price shall be prima facie evidence of value.

§ 54.1-1101. Exemptions.

The provisions of this chapter shall not apply to:

1. Any governmental agency performing work with its own forces;
2. Work bid upon or undertaken for the armed services of the United States under the Armed Services Procurement Act;
3. Work bid upon or undertaken for the United States government on land under the exclusive jurisdiction of the federal government either by statute or deed of cession;
4. Work bid upon or undertaken for the Department of Transportation on the construction, reconstruction, repair or improvement of any highway or bridge;
5. Any other persons who may be specifically excluded by other laws but only to such an extent as such laws provide; and
6. Any material supplier who renders advice concerning use of products sold and who does not provide construction or installation services.

All other contractors performing work for any government or for any governmental agency are subject to the provisions of this chapter and are required to be licensed as provided herein.

§ 54.1-1102. Board for Contractors membership; offices; meetings; seal; record.

A. The Board for Contractors shall be composed of thirteen members as follows: one member shall be a licensed Class A general contractor; the larger part of the business of one member shall be the construction of utilities; the larger part of the business of one member shall be the construction of commercial and industrial buildings; the larger part of the business of one member shall be the construction of single-family residences; the larger part of the business of one member shall be the construction of home improvements; one member shall be a subcontractor as generally regarded in the construction industry; one member shall be in the business of sales of construction materials and supplies; one member shall be a local building official; one member shall be a licensed plumbing contractor; one member shall be a licensed electrical contractor; one member shall be a licensed heating, ventilation and air conditioning contractor; and two members shall be citizen members. The terms of the Board members shall be four years.

The Board shall meet at least four times each year, once in January, April, July and October, and at such other times as may be deemed necessary. Annually, the Board shall elect from its membership a chairman and a vice-chairman to serve for a one-year term. Seven members of the Board shall constitute a quorum.

The Board shall promulgate regulations not inconsistent with statute necessary for the licensure of contractors and tradesmen and the certification of backflow prevention device workers, and for the relicensure of contractors and tradesmen and for the recertification of backflow prevention device workers, after license or certificate suspension or revocation.

The Board may adopt regulations requiring all Class A, B, and C residential contractors, excluding subcontractors to the contracting parties and those who engage in routine maintenance or service contracts, to use legible written contracts including the following terms and conditions:

1. General description of the work to be performed;
2. Fixed price or an estimate of the total cost of the work, the amounts and schedule of progress payments, a listing of specific materials requested by the consumer and the amount of down payment;
3. Estimates of time of commencement and completion of the work; and
4. Contractor's name, address, office telephone number and license or certification number and class.

In transactions involving door-to-door solicitations, the Board may require that a statement of protections be provided by the contractor to the homeowner, consumer or buyer, as the case may be.

The Board shall adopt a seal with the words "Board for Contractors, Commonwealth of Virginia." The Director shall have charge, care and custody of the seal.

B. The Director shall maintain a record of the proceedings of the Board.

§ 54.1-1103. Necessity for license; requirements for water well drillers and landscape irrigation contractors.

A. No person shall engage in, or offer to engage in, contracting work or operate as an owner-developer in the Commonwealth unless he has been licensed under the provisions of this chapter. Prior to a joint venture engaging in, or offering to engage in, contracting work or operating as an owner-developer in the Commonwealth, (i) each contracting party of the joint venture shall be licensed under the provisions of this chapter or (ii) a license shall be obtained in the name of the joint venture under the provisions of this chapter.

B. Except as provided in § 54.1-1117, the issuance of a license under the provisions of this chapter shall not entitle the holder to engage in any activity for which a special license is required by law.

C. When the contracting work is for the purpose of landscape irrigation or the construction of a water well as defined in § 62.1-255, the contractor shall be licensed, regardless of the contract amount, as follows:

1. A Class C license is required when the total value referred to in a single contract or project is no more than \$7,500, or the total value of all such water well or landscape irrigation contracts undertaken within any twelve-month period is no more than \$150,000;

2. A Class B license is required when the total value referred to in a single contract is \$7,500 or more, but less than \$70,000, or the total value of all such water well or landscape irrigation contracts undertaken within any twelve-month period is \$150,000 or more, but less than \$500,000; and

3. A Class A license is required when the total value referred to in a single contract or project is \$70,000 or more, or when the total value of all such water well or landscape irrigation contracts undertaken within any twelve-month period is \$500,000 or more.

§ 54.1-1104. Register of applicants.

The Director shall keep a register of all applicants showing their date of application, name, qualifications, place of business, place of residence, and whether such application was approved or refused. The books and register of the Board shall be prima facie evidence of all matters recorded therein.

§ 54.1-1106. Application for Class A license; fees; examination; issuance.

A. Any person desiring to be licensed as a Class A contractor shall file with the Department a written application on a form prescribed by the Board. The application shall be accompanied by a fee set by the Board pursuant to § 54.1-201. The application shall contain the name, place of employment, and business address of the proposed designated employee; information on the knowledge, skills, abilities, and financial position of the applicant; and an affidavit stating that the information on the application is correct. The Board shall determine whether the past performance record of the applicant, including his reputation for paying material bills and carrying out other contractual obligations, satisfies the purposes and intent of this chapter. The Board shall also determine whether the applicant has complied with the laws of the Commonwealth pertaining to the domestication of foreign corporations and all other laws affecting those engaged in the practice of contracting as set forth in this chapter. In addition, if the applicant is a sole proprietor, he shall furnish to the Board his name and address. If the applicant is a member of a partnership, he shall furnish to the Board the names and addresses of all of the general partners of the partnership. If the applicant is a member of an association, he shall furnish to the Board the names and addresses of all of the members of the association. If the applicant is a corporation, it shall furnish to the Board the names and addresses of all officers of the corporation. If the applicant is a joint venture, it shall furnish to the Board the names and addresses of (i) each member of the joint venture and (ii) any sole proprietor, general partner of any partnership, member of any association, or officer of any corporation who is a member of the joint venture. The applicant shall thereafter keep the Board advised of any changes in the above information.

B. If the application is satisfactory to the Board, the proposed designated employee shall be required by Board regulations to take an oral or written examination to determine his general knowledge of contracting, including the statutory and regulatory requirements governing contractors in the Commonwealth. If the proposed designated employee successfully completes the examination and the applicant meets or exceeds the other entry criteria established by Board regulations, a Class A contractor license shall be issued to the applicant. The license shall permit the applicant to engage in contracting only so long as the designated employee is in the full-time employment of the contractor. No examination shall be required where the licensed Class A contractor changes his form of business entity provided he is in good standing with the Board. In the event the designated employee leaves the full-time employ of the licensed contractor, no additional examination shall be required of such designated employee, except in accordance with § 54.1-1110.1, and the contractor shall within ninety days of that departure provide to the Board the name of the new designated employee.

C. The Board may grant a Class A license in any of the following classifications: (i) building contractor, (ii) highway/heavy contractor, (iii) electrical contractor, (iv) plumbing contractor, (v) HVAC contractor, (vi) specialty contractor, and (vii) owner-developer.

§ 54.1-1106.1. Violations of certain State Board of Health regulations; penalty.

The Board for Contractors shall consider violations of regulations of the State Board of Health relating to water wells as violations of this chapter, punishable by a fine of not more than \$1,000 or suspension or revocation of license. No contractor shall be subject to the monetary penalties provided by this section if he has been assessed a civil penalty for such violation pursuant to § 32.1-27.

§ 54.1-1108. Application for Class B license; fees; examination; issuance.

A. Any person desiring to be licensed as a Class B contractor shall file with the Department a written application on a form prescribed by the Board. The application shall be accompanied by a fee set by the Board pursuant to § 54.1-201. The application shall contain the name, place of employment, and business address of the proposed designated employee; information on the knowledge, skills, abilities, and financial position of the applicant; evidence of holding a current local license pursuant to local ordinances adopted pursuant to § 54.1-1117; and an affidavit stating that the information on the application is correct. The Board shall determine whether the past performance record of the applicant, including his reputation for paying material bills and carrying out other contractual obligations, satisfies the purpose and intent of this chapter. The Board shall also determine whether the applicant has complied with the laws of the Commonwealth pertaining to the domestication of foreign corporations and all other laws affecting those engaged in the practice of contracting as set forth in this chapter. In addition, if the applicant is a sole proprietor, he shall furnish to the Board his name and address. If the applicant is a member of a partnership, he shall furnish to the Board the names and addresses of all of the general partners of that partnership. If the applicant is a member of an association, he shall furnish to the Board the names and addresses of all of the members of the association. If the applicant is a corporation, it shall furnish to the Board the name and address of all officers of the corporation. If the applicant is a joint venture, it shall furnish to the Board the names and addresses of (i) each member of the joint venture and (ii) any sole proprietor, general partner of any partnership, member of any association, or officer of any corporation who is a member of the joint venture. The applicant shall thereafter keep the Board advised of any changes in the above information.

B. If the application is satisfactory to the Board, the proposed designated employee shall be required by Board regulations to take an oral or written examination to determine his general knowledge of contracting, including the statutory and regulatory requirements governing contractors in the Commonwealth. If the proposed designated employee successfully completes the examination and the applicant meets or exceeds the other entry criteria established by Board regulations, a Class B contractor license shall be issued to the applicant. The license shall permit the applicant to engage in contracting only so long as the designated employee is in the full-time employment of the contractor and only in the counties, cities, and towns where such person has complied with all local licensing requirements and for the type of work to be performed. No examination shall be required where the licensed Class B contractor changes his form of business entity provided he is in good standing with the Board. In the event the designated employee leaves the full-time employ of the licensed contractor, no additional examination shall be required of such designated employee, except in accordance with § 54.1-1110.1, and the contractor shall within ninety days of that departure provide to the Board the name of the new designated employee.

C. The Board may grant a Class B license in any of the following classifications: (i) building contractor, (ii) highway/heavy contractor, (iii) electrical contractor, (iv) plumbing contractor, (v) HVAC contractor, and (vi) specialty contractor.

§ 54.1-1108.1. Waiver of examination; designated employee.

Any Class A contractor licensed in the Commonwealth of Virginia prior to January 1, 1991, and in business on December 31, 1990, shall provide to the Board in writing the name of one full-time employee who is at least eighteen years of age and that employee shall be deemed to have fulfilled the requirement for examination in § 54.1-1106, so long as he remains a full-time employee of the contractor. The designated employee shall not be required to take an examination if the Class A contractor changes his form of business entity and is in good standing with the Board. Upon his leaving the employ of the contractor, the contractor shall name another full-time employee in accordance with § 54.1-1106.

Any Class B contractor registered in the Commonwealth prior to January 1, 1991, and in business on December 31, 1990, shall, within its current period of registration, provide on a form prescribed by the Board satisfactory information on the financial position, and knowledge, skills and abilities of the registered firm; the name of a full-time employee who is at least eighteen years of age and that employee shall be deemed to have fulfilled the requirement for examination in § 54.1-1108, so long as he remains a full-time employee of the contractor; and an affidavit stating that the information provided on the form is correct. The designated employee shall not be required to take an examination if the Class B contractor changes his form of business entity and is in good standing with the Board. If such employee leaves the employ of the contractor, the contractor shall name another full-time employee in accordance with § 54.1-1108.

§ 54.1-1108.2. Application for Class C license; fees; issuance.

A. Any person desiring to be licensed as a Class C contractor shall file with the Department a written application on a form prescribed by the Board. The application shall be accompanied by a fee set by the Board pursuant to § 54.1-201. The application shall contain information concerning the name, location, nature, and operation of the business, as well as information demonstrating that the applicant possesses the character and minimum skills to properly engage in the occupation of contracting, and an affidavit stating that the information on the application is correct.

B. The Board may grant a Class C license in any of the following classifications: (i) building contractor, (ii) highway/heavy contractor, and (iii) specialty contractor.

§ 54.1-1109. Expiration and renewal of license or certificate.

A license or certificate issued pursuant to this chapter shall expire as provided in Board regulations. Application for renewal of a license or certificate may be made as provided by Board regulations. The application shall be accompanied by a fee set by the Board pursuant to § 54.1-201.

§ 54.1-1110. Grounds for denial or revocation of license or certificate.

The Board shall have the power to require remedial education, suspend, revoke, or deny renewal of the license or certificate of any contractor who is found to be in violation of the statutes or regulations governing the practice of licensed or certified contractors in the Commonwealth.

The Board may suspend, revoke, or deny renewal of an existing license or certificate, or refuse to issue a license or certificate, to any contractor who is shown to have a substantial identity of interest with a contractor whose license or certificate has been revoked or not renewed by the Board. A substantial identity of interest includes but is not limited to (i) a controlling financial interest by the individual or corporate principals of the contractor whose license or certificate has been revoked or nonrenewed, (ii) substantially identical principals or officers, or (iii) the same designated employee as the contractor whose license or certificate has been revoked or not renewed by the Board. Additionally, the Board may suspend, revoke or deny renewal of an existing license or certificate, or refuse to issue a license or certificate to any contractor who violates the provisions of Chapter 5 (§ 60.2-500 et seq.) of Title 60.2 and Chapter 8 (§ 65.2-800 et seq.) of Title 65.2.

Any person whose license is suspended or revoked by the Board shall not be eligible for a license or certificate under any circumstances or under any name, except as provided by regulations of the Board pursuant to § 54.1-1102.

§ 54.1-1110.1. Re-examination of designated employee.

The Board shall have the power to require remedial education or may require a designated employee to retake the examination required by this chapter, in any case where the conduct of the designated employee, while in the employ of a licensed Class A or Class B contractor, has resulted in any disciplinary action by the Board against such contractor.

§ 54.1-1111. Prerequisites to obtaining building, etc., permit.

Any person applying to the building inspector or any other authority of a county, city, or town in this Commonwealth, charged with the duty of issuing building or other permits for the construction of any building, highway, sewer, or structure, or any removal, grading or improvement shall furnish prior to the issuance of the permit, either (i) satisfactory proof to such inspector or authority that he is duly licensed or certified under the terms of this chapter to carry out or superintend the same, or (ii) file a written statement, supported by an affidavit, that he is not subject to licensure or certification as a contractor, subcontractor, or owner-developer pursuant to this chapter. The applicant shall also furnish satisfactory proof that the taxes or license fees required by any county, city, or town have been paid so as to be qualified to bid upon or contract for the work for which the permit has been applied. It shall be unlawful for the building inspector or other authority to issue or allow the issuance of such permits unless the applicant has furnished his license or certificate number issued pursuant to this chapter or evidence of being exempt from the provisions of this chapter.

The building inspector, or other such authority, violating the terms of this section shall be guilty of a Class 3 misdemeanor.

§ 54.1-1112. Invitations to bid and specifications to refer to law.

All architects and engineers preparing plans and specifications for work to be contracted in Virginia shall include in their invitations to the bidder and in their specifications a reference to this chapter so as to convey to the invited bidder prior to the consideration of the bid (i) whether such person is a resident or nonresident of the Commonwealth, (ii) whether the proper license or certificate has been issued to the bidder, and (iii) the information required of the bidder to show evidence of proper licensure or certification under the provisions of this chapter.

§ 54.1-1113. Nonresident bidders to appoint statutory agent for service of process.

Before any nonresident person or any foreign corporation bids on any work in this Commonwealth, the nonresident person or foreign corporation, by written power of attorney, shall appoint the Director as his agent upon whom all lawful process against or notice to such nonresident person or foreign corporation may be served, and authorize the Director to enter an appearance on his behalf. Upon the filing of the power of attorney the provisions of §§ 13.1-763 through 13.1-766, with reference to service of process and notice, and judgments, decrees and orders, shall be applicable as to such nonresident person or foreign corporation.

§ 54.1-1114. Filing and hearing of charges.

Any person may file complaints against any contractor licensed or certified pursuant to this chapter. The Director shall investigate complaints and the Board may take appropriate disciplinary action if warranted. Disciplinary proceedings shall be conducted in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.). The Board shall immediately notify the Director and the clerk and building official of each city, county or town in the Commonwealth of its findings in the case of the revocation of a license or certificate, or of the reissuance of a revoked license or certificate.

§ 54.1-1115. Prohibited acts.

A. The following acts are prohibited and shall constitute the commission of a Class 1 misdemeanor:

1. Contracting for, or bidding upon the construction, removal, repair or improvements to or upon real property owned, controlled or leased by another person without a license or certificate.
2. Attempting to practice contracting in the Commonwealth, except as provided for in this chapter.
3. Presenting or attempting to use the license or certificate of another.
4. Giving false or forged evidence of any kind to the Board or any member thereof in an application for the issuance or renewal of a license or certificate.
5. Impersonating another or using an expired or revoked license or certificate.
6. Receiving or considering as the awarding authority a bid from anyone not properly licensed or certified under this chapter.

B. Any person who undertakes work without a valid license or certificate when a license or certificate is required by this chapter may be fined an amount not to exceed \$200 per day for each day that such person is in violation, in addition to the authorized penalties for the commission of a Class 1 misdemeanor.

C. No person shall be entitled to assert the lack of licensure or certification as required by this chapter as a defense to any action at law or suit in equity if the party who seeks to recover from such person gives substantial performance within the terms of the contract in good faith and without actual knowledge of the licensure or certification requirements of this chapter.

Failure to renew a license or certificate issued in accordance with this chapter shall create a rebuttable presumption of actual knowledge of such licensing or certification requirements.

§ 54.1-1115.1. Evidence of violation of the Virginia Uniform Statewide Building Code.

In any proceeding pursuant to § 54.1-1114, the Board shall consider any written documentation of a violation of the Uniform Statewide Building Code (§ 36-97 et seq.) provided by a local building official as evidence of a violation of such building code. Such written documentation shall not be prima facie evidence of a building code violation.

§ 54.1-1117. Licensing of certain contractors by cities, counties and towns; qualifications and procedure; registration of certain persons engaged in business of home improvement.

A. Except as to contractors currently licensed under the provisions of § 54.1-1106, the governing body of every city, county or town shall have the power and authority to adopt ordinances, not inconsistent with the provisions of this chapter, requiring every person who engages in, or offers to engage in, the business of home improvement or the business of constructing single- or multi-family dwellings, in such city, county or town, to obtain a license from such city, county or town.

B. The governing body of every city, county or town adopting ordinances pursuant to this section may require every applicant for such license, other than those currently licensed under the provisions of § 54.1-1106, (i) to furnish evidence of his ability and proficiency; and (ii) to successfully complete an examination to determine his qualifications. The governing body may designate or establish an agent or board and establish the procedures for an examination according to the standards set forth in this chapter and in the regulations of the Board for Contractors. Except contractors currently licensed under the provisions of § 54.1-1106, licensure may be refused to any person found not to be qualified. Persons not currently licensed pursuant to § 54.1-1106 may be required to furnish bond in a reasonable penal sum, with reasonable condition, and with surety as the governing body deems necessary. The governing body may provide for the punishment of violations of such ordinances, provided that no such punishment shall exceed that provided for misdemeanors generally.

C. For the purpose of this section the business of home improvement shall mean the contracting for and/or providing labor and material or labor only for repairs, improvements, and additions to residential buildings or structures accessory thereto where any payment of money or other thing of value is required.

Title 55 (Property and Conveyances)

Chapter 1 (Creation and Limitation of Estates; Their Qualities)

§ 55-22. When person not a party, etc., may take or sue under instrument.

An immediate estate or interest in or the benefit of a condition respecting any estate may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made for the benefit, in whole or in part, of a person with whom it is not made, or with whom it is made jointly with others, such person, whether named in the instrument or not, may maintain in his own name any action thereon which he might maintain in case it had been made with him only and the consideration had moved from him to the party making such covenant or promise. In such action the covenantor or promisor shall be permitted to make all defenses he may have, not only against the covenantee or promisee, but against such beneficiary as well.

APPENDIX IV
UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 4--PROCUREMENT PROCEDURES
SUBCHAPTER IV—PROCUREMENT PROVISIONS

§ 253m. Design-build selection procedures

(a) Authorization

Unless the traditional acquisition approach of design-bid-build established under the Brooks Architect-Engineers Act [40 U.S.C.A. § 541 et seq.] is used or another acquisition procedure authorized by law is used, the head of an executive agency shall use the two-phase selection procedures authorized in this section for entering into a contract for the design and construction of a public building, facility, or work when a determination is made under subsection (b) of this section that the procedures are appropriate for use.

(b) Criteria for use

A contracting officer shall make a determination whether two-phase selection procedures are appropriate for use for entering into a contract for the design and construction of a public building, facility, or work when the contracting officer anticipates that three or more offers will be received for such contract, design work must be performed before an offeror can develop a price or cost proposal for such contract, the offeror will incur a substantial amount of expense in preparing the offer, and the contracting officer has considered information such as the following:

- (1) The extent to which the project requirements have been adequately defined.
- (2) The time constraints for delivery of the project.
- (3) The capability and experience of potential contractors.
- (4) The suitability of the project for use of the two-phase selection procedures.
- (5) The capability of the agency to manage the two-phase selection process.
- (6) Other criteria established by the agency.

(c) Procedures described

Two-phase selection procedures consist of the following:

(1) The agency develops, either in-house or by contract, a scope of work statement for inclusion in the solicitation that defines the project and provides prospective offerors with sufficient information regarding the Government's requirements (which may include criteria and preliminary design, budget parameters, and schedule or delivery requirements) to enable the offerors to submit proposals which meet the Government's needs. If the agency contracts for development of the scope of work statement, the agency shall contract for architectural and engineering services as defined by and in accordance with the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.).

- (2) The contracting officer solicits phase-one proposals that—
- (A) include information on the offeror's—
 - (i) technical approach; and
 - (ii) technical qualifications; and

- (B) do not include—
 - (i) detailed design information; or
 - (ii) cost or price information.

(3) The evaluation factors to be used in evaluating phase-one proposals are stated in the solicitation and include specialized experience and technical competence, capability to perform, past performance of the offeror's team (including the architect-engineer and construction members of the team) and other appropriate factors, except that cost-related or price-related evaluation factors are not permitted. Each solicitation establishes the relative importance assigned to the evaluation factors and subfactors that must be considered in the evaluation of phase-one proposals. The agency evaluates phase-one proposals on the basis of the phase-one evaluation factors set forth in the solicitation.

(4) The contracting officer selects as the most highly qualified the number of offerors specified in the solicitation to provide the property or services under the contract and requests the selected offerors to submit phase-two competitive proposals that include technical proposals and cost or price information. Each solicitation establishes with respect to phase two—

(A) the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work (or both), and

(B) the evaluation factors and subfactors, including cost or price, that must be considered in the evaluations of proposals in accordance with subsections (b), (c), and (d) of section 303A [41 U.S.C.S. § 253a] of this title.

The contracting officer separately evaluates the submissions described in subparagraphs (A) and (B).

(5) The agency awards the contract in accordance with section 303B of this title [41 U.S.C.S. § 253b].

(d) Solicitation to state number of offerors to be selected for phase two requests for competitive proposals

A solicitation issued pursuant to the procedures described in subsection (C) of this section shall state the maximum number of offerors that are to be selected to submit competitive proposals pursuant to subsection (C) (4) of this section. The maximum number specified in the solicitation shall not exceed 5 unless the agency determines with respect to an individual solicitation that a specified number greater than 5 is in the Government's interest and is consistent with the purposes and objectives of the two-phase selection process.

(e) Requirement for guidance and regulations

The Federal Acquisition Regulation shall include guidance—

(1) regarding the factors that may be considered in determining whether the two-phase contracting procedures authorized by subsection (a) of this section are appropriate for use in individual contracting situations;

(2) regarding the factors that may be used in selecting contractors; and

(3) providing for a uniform approach to be used Government-wide.