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Protecting Yourself in a Volatile Labor Market

Build Houston

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Texas is a hot-bed for construction. In 2016, according to the Virtual Builders Exchange, Texas was second only to New York in construction expenditures, spending $44.4 billion. And there is no sign that the proliferation of construction is slowing down. New housing starts are up in Texas as a result of an influx of new employees moving to the area. The U.S. Census Bureau reported that Texas has experienced the largest population growth of any state between 2010 and 2016. This, in turn, increases demand on civil infrastructure thus requiring more construction. This explosion of growth in construction spending has taken place without consideration given to the rebuilding efforts arising from the aftermath of Hurricane Harvey.

At the same time, the demand for buildings and other infrastructure are having a serious impact on the Texas construction labor market. The unemployment rate in Texas, according to the Bureau of Labor Statistics, has dropped from an already healthy 4.8 percent in May 2017 to 3.9 percent in October 2017. This is essentially full employment.

Less available labor means higher labor costs, and it also means uncertainty in ensuring there will be sufficient manpower in place to perform the work already in the pipeline. From the project owner's perspective, a project without sufficient manpower means a delayed project, lost revenue and other complications. From the contractor's perspective, scarce labor can mean an inability to commit to projects and ever-increasing costs for the labor that is available. Further, it can mean an inability to increase manpower to overcome project delays, possibly subjecting the contractor to liability.

Multi-year master agreements setting forth agreed upon rates for labor can be used as a hedge against increasing labor costs. Including terms setting a not-to-exceed or guaranteed maximum price can further control costs and provide certainty.

Good leaders attract great workers. Keeping project managers and superintendents on the payroll will help keep foreman and laborers loyal. Properly written term employment agreements can help retain key employees and allow the contractor to leverage the relationships these employees have with foreman and laborers. The use of employment agreements are not without their risks. When an employment contract is in place the employer loses the ability to terminate the employee "at-will". Instead, the employer will be subject to the terms of the contract. Employment contracts need to be carefully drafted so that the employer has maximum flexibility in adjusting its staffing to its needs.

Further, employers can use covenants not to compete and solicit customers to retain employees who have received confidential information, specialized training, and/or good will (i.e. customer relationships). These agreements are enforceable in Texas but only to the extent reasonably necessary to protect these types of assets. Unlike other agreements, courts have discretion to determine whether the scope is reasonable and necessary and may reform the agreement to the extent it is held to be unreasonable and/or unnecessary. In doing so, courts often consider the importance and level of the employee (management versus entry level), whether the agreements constitute an industry-wide ban, and the breadth of the customer group that the employee is prohibited from calling on or serving.

While there are risks associated with a tight labor market, it is ultimately a sign of a robust economy and sustaining growth. The risks are not insurmountable and can be appropriately mitigated and managed by carefully using the available tools. There is no need to put a halt to projects on the horizon, but consideration should be given as to what changes you can make to better position yourself in response to the tightening labor market.