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**CHAPTER 26
CONSTRUCTION LAW**

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CHAPTER 26

CONSTRUCTION LAW

INTRODUCTION

THE SCOPE OF THIS CHAPTER

This Chapter examines the basic principles of construction law generally applicable to public works projects. We expect that this Chapter will be helpful in the preliminary review of construction contracts, the general administration of construction projects, and the identification and resolution of disputes.

Citations to Virginia cases are provided, where possible. Federal law (in the form of the federal courts and the various Boards of Contract Appeals) is cited in support of propositions not yet addressed by the Virginia courts. See Brinderson Corp. v. Hampton Roads Sanitation Dist., 825 F.2d 41, 45 (4th Cir. 1987) (noting that when interpreting a provision which takes language from a federal provision, Virginia courts "would recognize the principle that use of the same words in contracts derives life or meaning from earlier consistent judicial and administrative construction of them").

THE PARTIES TO THE CONSTRUCTION PROJECT

There are several options for structuring the web of contracts, legal relationships and attendant roles and responsibilities required for any significant construction project. Creating the appropriate structure and clearly delegating responsibilities among the participants is the critical first step in planning a construction project.

Ultimately, of course, the typical construction project will revolve around a contract for construction between the owner and contractor. That contract, however, is made up of documents, including detailed plans and specifications for construction prepared long before the construction contract is executed. The owner first enters into a separate contract for preparation of plans and specifications with a design professional, either an architect or engineer (referred to generally here as "A/E"). Depending on the nature and complexity of the project, as well as the in-house resources of the owner, the A/E may also be delegated certain responsibilities during construction which would otherwise be performed by the owner, such as inspection, pay application approval, administration of change orders, etc.

Though the arrangement described above is the most prevalent, it is certainly not the only option for structuring the relationships of the parties. For instance, in cases of unusually complex or distinct areas of work, the owner may contract with a number of prime contractors for different aspects of a construction project (referred to as a "multi-prime" arrangement). A construction management ("CM") firm may be retained if the owner feels that additional oversight of the project is required. Alternatively, the owner may opt for a design-build project, where the owner contracts with one party to design and construct the entire project. (See Section V for a discussion of the procedures for contracting with design-build and construction management firms under the Virginia Public Procurement Act.)

This Chapter is focused primarily on the relationship between the owner and prime contractor in the conventional arrangement where a single construction contractor is responsible for construction in accordance with plans and specifications prepared by the owner or an A/E.

ATTORNEY'S ROLE

With such a potentially large number of participants, a critical but frequently overlooked responsibility of the local government attorney is a careful review of the proposed contract documents before an Invitation to Bid ("ITB") or Request for Proposals ("RFP") is issued to assure that there are no overlapping or overlooked responsibilities. This review is especially important when, as frequently happens, a project's contract documents are cobbled together from various prior contracts and/or standard forms to produce a hodge-podge of ambiguous and conflicting terms predestined to cause confusion and disputes. This review must also assure that the owner does not through inadvertence delegate contract administration duties to a third-party participant, which may be best retained by the owner. For instance, the standard American Institute of Architects ("AIA") construction contract gives the Architect the final decision-making responsibility on all matters involving aesthetic effect. (AIA, Form A201 (1987), Article 4.2.13.)

Local government attorneys and procurement officials frequently prepare "Supplemental General Conditions" which are intended through deletions and substitutions to customize a standard form to the requirements of the owner on a particular project. When this is done on a case-by-case basis it can be an efficient and useful approach. As noted above, however, the repeated use of familiar but perhaps

inappropriate "pieces" from prior projects to assemble contract documents for a new project can result in unnecessary problems and potential disputes.

OTHER SOURCES OF INFORMATION

Standard Form Contracts/Standard Clauses

The AIA is the author of a popular standard form construction contract. The Commonwealth of Virginia also has a form contract entitled "General Conditions of the Contract for Capital Outlay Projects." Similar form contracts are available from various construction-related organizations. In addition, the specific construction clauses used by the federal government are set forth in the Federal Acquisition Regulations (FAR), Part 52.

Caution must be exercised when using any standard form contract. For example, the AIA contract incorporates widespread delegation of responsibilities to the design professional. Depending on the circumstances, such contract administration responsibilities might be more appropriately retained by the owner or assigned to an individual or organization other than the A/E responsible for the initial design.

Virginia Public Procurement Act

Chapter 25 of the LGA Handbook provides a detailed look at the Virginia Public Procurement Act, VA. CODE ANN. § 11-35 et. seq., which governs the entire field of public contracting in Virginia. Though references to the Act are included below, this Chapter is generally intended to address issues unique to construction contracts. Thus, reference to the overall requirements of the Virginia Public Procurement Act is essential.

OWNER AND CONTRACTOR

INTRODUCTION

Generally the most complex of the construction site relationships is that between the owner and contractor. This relationship is defined by the implied duties of the owner, the implied duties of the contractor and the express duties of both parties as established in the more prevalent and important contract provisions.

OWNER'S IMPLIED DUTIES AND WARRANTIES

Implied Warranty as to the Adequacy of the Specifications

As a general rule, the owner on a construction project warrants that the specifications supplied to the contractor will yield the desired results. Thus, if the contractor follows the specifications and a design problem is encountered, the owner is liable to the contractor for all the damages resulting therefrom. (See Section III.B for a detailed discussion of this implied warranty (a.k.a. Spearin Doctrine).

Duty of Cooperation and Non-Interference

Construction contracts are subject to the long standing principle of contract law that the parties to the contract shall not hinder, impede or otherwise interfere with the other party's performance of the contract. See Central Lunatic Asylum v. Flannagan, 80 Va. 110 (1885) (awarding damages to a construction contractor due to the owner's improper administration of the submission of a construction bond in accordance with the contract documents); see also Boggs v. Duncan, 202 Va. 877, 882, 121 S.E.2d 359, 363 (1961) (noting that "he who prevents a thing may not avail himself of the nonperformance which he has occasioned"). Contractors frequently pursue delay and disruption claims based upon allegations that the owner breached this implied duty by, for instance: failing to approve shop drawings or other required submittals in a timely fashion; failing to provide adequate access to the project site via easements or rights of way; or failing to deliver owner-finished materials or equipment on time.

On a multi-prime project, the owner's duty of cooperation and non-interference evolves into a duty of coordination and scheduling. The owner must carefully plan the work, such that each prime contractor has work available at the expected time and location. (For example, if the excavation contractor is delayed and the structural concrete contractor cannot start foundations on time, the owner has violated its duty of cooperation and non-interference to the structural contractor.) As noted above, owners often engage construction managers to handle coordination on multiple-prime projects.

Owners have attempted to escape this duty to coordinate by inserting disclaimer provisions in its contracts with the multiple

primes. These efforts have met with varying degrees of success, depending on the jurisdiction and the wording of the clause. The Virginia courts have yet to decide whether such disclaimers are enforceable, but in order to be effective a disclaimer of this duty must be very clear and specific.

. **CONTRACTOR'S IMPLIED DUTIES AND WARRANTIES**

. **Duty of Cooperation and Non-Interference**

The duty of cooperation and non-interference applies to the contractor as well as the owner. (See Section II.A.2.c.) In the contractor's case, the duty to cooperate extends to the subcontractors too. See, e.g., Welch v. McDonald, 85 Va. 500, 8 S.E. 711 (1888) (finding a clear breach of the duty of cooperation and non-interference where a contractor failed to provide necessary information to its subcontractor on a project to construct a jail.)

. **Implied Warranty of Workmanship and Materials**

The contractor warrants that the work undertaken will be completed in a workman-like manner, using adequate materials. See Mann v. Clowser, 190 Va. 887, 901, 59 S.E.2d 78, 84 (1950) (noting that the duty to complete the work "in a reasonably good and workmanlike manner" promises that the work will be done "in accordance with good usage and accepted practices in the community"); see also Clevert v. Jeff W. Soden, Inc., 241 Va. 108, 400 S.E.2d 181 (1991).

. **Duty to Schedule and Coordinate the Work**

Contractors are frequently in the position of coordinating the work of their own forces as well as those of their subcontractors.

. **Duty to Provide Adequate Supervision**

The contractor also has an implied duty to provide adequate supervision. Pebble Bldg. Co. v. G.J. Hopkins, Inc., 223 Va. 188, 288 S.E.2d 437 (1982). In Pebble, the court found that the contractor hampered the progress of a subcontractor by incompetent supervision and frequent changing of the supervisory personnel. Id. at 190. The Pebble court also found the contractor failed in its duty to coordinate the work. Id.

EXPRESS DUTIES BETWEEN CONTRACTOR AND OWNER -- STANDARD CONTRACT PROVISIONS OF NOTE

It is beyond the scope of this Chapter to address all of the express provisions that one should analyze when reviewing or drafting a construction contract. However, there are a few standard provisions that will appear (in some form) in most construction contracts which are crucial to contract administration and are frequently involved in disputes. Such provisions will be addressed below in individual sections. Obviously, the interpretation of any provision in a specific contract will turn on the wording of the clause in question and the particular factual circumstances. Several typical provisions and their key features and variations are discussed below.

Scope of Work Provisions

The definition of the scope of work may be the most legally significant portion of the construction contract and it deserves careful review by the local government attorney notwithstanding the technical appearance of the provision. The scope of work provides the boundary in which the contractor is expected to satisfactorily complete performance of a contract. It is generally in the best interest of the owner to make that boundary a strong one and, more importantly, one which is clearly understood by both parties. Although the owner must clearly establish the scope of work, the method and manner of performing the work are customarily within the domain of the contractor.

The scope of work clause is particularly important in projects with multiple prime contractors, as the owner must avoid assigning the same item of work to two parties or, worse yet, not assigning an item of work to anyone. The scope of work clause should clearly define the work that is to be completed and any related work that is NOT expected to be performed. References to specific specification sections is an effective method of assigning work because it lets the owner easily keep track of what work has and has not been contracted.

An undefined scope of work will inevitably result in challenges as to what is "beyond the scope" of a contractor's work. A shared understanding of the contractor's responsibilities under the contract will ease the burden of the change order process. (See Section III.C for a discussion of Changes to the Work.)

Scheduling Provisions

Depending on the relative complexity of the project, a provision imposing scheduling requirements upon the contractor should be included. It is important that the scheduling issues be dealt with thoroughly and clearly in the construction contract. A schedule methodology should be specified and the contractor's requirements for submitting the schedule should be clearly established. Because the method and manner of accomplishing the work are generally the contractor's responsibility, the owner is well advised to limit the schedule review and approval process to assuring compliance with the specified methodology and verifying the general reasonableness of the contractor's plan for meeting contract completion or milestone dates.

- **Bar Charts**

Bar chart schedules list major activities and indicate the beginning and end of each in a linear fashion. They are of limited use because they do not represent the relationship between the various activities nor identify the activities that are critical to timely completion of the project. See *Minmar Builders, Inc.* GSBICA No. 3430, 72-2 BCA ¶ 9599 (1972) (criticizing bar charts because they could not identify which activities were on the critical path of performance and threatening the schedule deadlines). Bar charts should only be used, if at all, on very simple construction projects.

- **Critical Path Method**

The Critical Path Method (CPM) scheduling technique is preferred in more complex and costly construction. Under CPM all project activities are identified and coordinated. Durations, including "early" and "late" start and finish dates are established and the logical relationship among the activities is determined. CPM schedules are now generally created on commercial computer programs. See *Continental Consolidated Corp.*, ENG BCA No. 2743 and 2766, 67-2 BCA ¶ 6624 (1967); *Continental Consolidated Corp.*, ENG BCA No. 2743 and 2766, 68-1 BCA ¶ 7003 (1968) (discussing the CPM scheduling technique). With the CPM method, the critical path is identified as the chain of activities which must be completed within the allotted time period or will result in delay to the entire project. Activities not on the critical path are said to have "float." If an activity has 15 days of float, it can be completed up to 15 days beyond its early completion

date without affecting project completion. See Joseph E. Bennett Co., GSBICA 2362, 72-1 BCA ¶ 9364, at 43,467 n.7 (1972) (explaining the use of the float as a management tool by the contractor to rearrange schedules and ensure that the critical path work is completed as scheduled).

Though the task of creating the schedule with a CPM format may be more arduous than other techniques, it allows for detailed and precise oversight of construction progress at all stages.

- **Updating Schedules**

Periodic updating of the schedule during performance to reflect actual construction progress is essential to maintain its effectiveness as a management tool. Accordingly, most contracts require monthly updates of the schedule to be submitted by the contractor. This allows the owner to verify that the appropriate progress is being made. Progress payments are frequently linked to CPM updates.

Parties to the contract should prudently monitor the performance progress with the completion schedules to prevent the contractor(s) from missing a deadline. See, e.g., Nelson v. Virginia, 235 Va. 228, 233, 368 S.E.2d 239, 242 (1988) (involving an architect's contractual duty to monitor performance progress). If an interim milestone or final completion are in jeopardy of slipping, efforts are required to overcome the delay by adjusting activity durations, resequencing activities, and/or increasing resources such as manpower or equipment.

- **Differing Site Conditions Clause**

The Differing Site Conditions clause is a significant risk allocation provision representing serious policy considerations by public owners. Differing site conditions and the operation of the clause are discussed at length at Section III.A.

- **Payment Provisions**

All construction contracts should include specific procedures governing how and when payments to the contractor should be

made. Typically, payments to the contractor are made on a monthly basis according to the progress of the work. Many payment provisions require submission of an updated schedule to verify progress. This ensures that the owner will be promptly made aware of any schedule problems.

The contractor is generally paid for only a portion of the work completed, with the rest of the money being held by the owner as retainage in the event of future problems. Under the Virginia Public Procurement Act, public owners are not permitted to hold any more than 5 percent retainage, and the contractor is subject to this limitation in contracting with its subcontractors. Va. Code Ann. § 11-56 (1993).

Suspension of Work Clause

The owner/contractor contract must contemplate the delays and interruptions which are virtually inevitable in complex construction projects. A typical Suspension of Work clauses provides:

The owner may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the owner.

If the performance of all or any part of the Work is, for an **unreasonable** period of time, suspended, delayed, or interrupted by the owner or the owner's Authorized Representative in the administration of this Contract, or by failure of any one of them to act within the time specified in this Contract, an adjustment shall be made for an increase in the actual time required for performance of the work by the Contractor, due solely to such unreasonable suspension, delay or interruption, and the Contract shall be modified in writing accordingly.

Though this clause does allow the suspension of the work at any time the owner deems convenient, it also requires that the contractor be compensated for any such delays that extend for an "unreasonable period of time."

The typical clause above insulates the

owner from liability for any contractor costs incurred during a suspension of reasonable duration. The determination of what constitutes a "reasonable" amount of time for a suspension of work will depend on several circumstances, including the overall project performance period and the status of work at the time of suspension.

Time Extension Clause

Certain delays encountered by a contractor are considered to be excusable because the events that caused the performance delays were unpreventable. A Time Extension clause will protect a contractor against liability (typically liquidated damages) for delays caused by events beyond its control. In turn, the owner benefits because the contractor does not have to place a contingency in its bid to protect against such uncertainties. A typical clause states:

The time during which the Contractor is delayed in the performance of the Work by the acts or omissions of the Owner, the Owner's Authorized Representatives or their employees or agents, acts of God, unusually severe and abnormal climatic conditions, fires, floods, epidemics, quarantine restrictions, strikes (not to exceed the actual duration of the strike), riots, civil commotions or freight embargoes, or other conditions beyond the Contractor's control and that the Contractor could not reasonably have foreseen and provided against, shall be added to the Contract Time; provided, however, that no claim by the Contractor for an extension of time for delays will be considered unless made in compliance with the requirements of this Article and other provisions of the Contract Documents.

The Contract Time shall be adjusted only for Change Orders pursuant to [cite to the "Changes" clause], [cite to the "Suspension of Work" clause], and excusable delays set forth above. In the event the Contractor requests an extension of the Contract Time, he shall furnish such justification and supporting evidence as the Owner may deem necessary for a determination of whether the Contractor is entitled to an extension of time under the provisions of the Contract.

The burden of proof to substantiate a claim for an extension of the Contract Time shall rest with the Contractor, including evidence that the cause was beyond his control. The Owner shall base his findings of fact and decision on such justification and supporting evidence and shall advise the Contractor in writing thereof.

The Contractor shall not be entitled to and hereby expressly waives any extension of time resulting from any condition or cause unless said request for extension of time is made in writing to the Owner within seven (7) days of the first instance of delay.

See R.G. Pope Constr. Co. v. Guard Rail of Roanoke, Inc., 219 Va. 111, 113, 244 S.E.2d 774, 776 (1978) (where the contract required that to claim an excusable delay under a general time extension clause, a contractor must establish that the delay: (1) was not foreseeable; (2) was beyond the control of the contractor; and (3) was not its fault).

Even if an excusable condition is specifically listed in the text of the clause, courts may still find the contractor liable for the delay damages in some instances. In Kobashigawa Shokai, ASBCA 13741, 69-2 BCA ¶ 7973 at 37,071 (1969), employee strikes caused delays in performance. Strikes were an enumerated, excusable condition in the contract, but the strike was induced by the contractor's failure to pay its employees. The board of contract appeals determined that the strike was not excused as being beyond the contractor's control and without its fault or negligence, so the contractor was liable for damages caused by the delay in performance. Id.

Termination for Default Clause

Most construction contracts include two options for terminating contractors: Termination for Default and Termination for Convenience. These two options have vastly different implications for both the owner and the contractor, and so the Termination for Convenience provision will be discussed at length in the following section.

A typical Termination for Default clause is quite lengthy, as

the need for specificity is great on an issue of such significance; a typical clause will provide:

The Owner may, upon ten (10) days written notice to the Contractor, terminate, without prejudice to any right or remedy of the Owner, the Contract for default, in whole or in part, and may take possession of the Work and complete the Work by contract or otherwise in any of the following circumstances:

- .1 If the Contractor refuses or fails to prosecute the Work or any part thereof with such diligence as will ensure the Substantial Completion of the Work within the Contract Time or fails to substantially complete the Work within said period;
- .2 If the Contractor is in default in carrying out any provision of the Contract for a cause within his or his Subcontractors' control;
- .3 If the Contractor fails to supply a sufficient number of properly skilled workmen or proper equipment or materials;
- .4 If the Contractor fails to make prompt payment to Subcontractors or for materials or labor;
- .5 If the Contractor disregards laws, permits, ordinances, rules, regulations, or orders of any public authority having jurisdiction;
- .6 If the Contractor breaches any provision of the Contract Documents;
- .7 The voluntary abandonment of the Project by the Contractor;
- .8 Judicial proceedings in any State and/or any United States Federal Court as follows:

- (1) The filing by the Contractor of a voluntary petition in bankruptcy or insolvency, or a petition for reorganization;
- (2) The consent to an involuntary petition in bankruptcy or the failure to vacate within sixty (60) calendar days from the date of entry thereof any order approving an involuntary petition by the Contractor;
- (3) The appointment of a receiver for all or any substantial portion of the property of the Contractor; and
- (4) The entering of an order, judgment or decree by any court of competent jurisdiction, on the application of a creditor, that adjudicates the Contractor as bankrupt or insolvent or approves a petition seeking reorganization, or appoints a receiver, trustee or liquidator of all or a substantial part of such party's assets, and such order, judgment or decree continues unstayed and in effect for any period of one hundred twenty (120) consecutive days.

Upon termination of this Agreement under this Article, the Contractor shall remove all of its employees and property from the Project in a smooth, orderly, and cooperative manner.

The right of the Contractor to proceed shall not be terminated under this provision because of any delays in the completion of the Work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor or his Subcontractors as specifically set forth in [cite to the "Delays and Time Extensions" provision].

If the Owner terminates the Contract, the

Contractor shall not be entitled to receive any further payment until the Work is finished. If the unpaid balance of the Contract Price exceeds the cost of completing the Work including compensation for additional managerial, administrative and inspection services and any damages for delay such excess amount shall be paid to the Contractor. If such expenses exceed the unpaid balance, the Contractor and his sureties shall be liable to the Owner for such excess amount.

If the right of the Contractor to proceed with the Work is partially or fully terminated, the Owner may take possession of and utilize in completing the Work such materials, appliances, supplies, plant and equipment as may be on the site of the terminated portion of the Work and necessary for the completion of the Work. If the Owner does not fully terminate the right of the Contractor to proceed, the Contractor shall continue to perform the part of the work that is not terminated.

There are certain elements of this sample provision which merit discussion:

- . **Drastic Measure**

Terminating the contractor for default is the most drastic remedy available to the owner and as such it is generally exercised with care. The owner's caution in default terminating contractors is justified by the great potential for delays and litigation. Delay results because, unless incomplete work can be finished with the public body's own forces, the replacement of the terminated contractor will require a new and likely time-consuming procurement action. Litigation is likely because the "responsibility" determinations on public works projects generally require contractors to disclose any prior instances of default terminations, which provides the contractor additional incentive to challenge the default termination.

- . **Notice to the Contractor**

Due to the drastic nature of a termination for default, the owner will generally be required to give notice to the contractor of its intentions to terminate its contract. In the sample clause provided above, the owner is required to give written notice to the contractor 10 days before exercising the termination right. This "cure period" gives the contractor an opportunity to avoid the termination by either: (1) demonstrating that he is not, in fact, in default; or (2) submitting a proposal for overcoming the default by, for instance, increasing manpower or working overtime to overcome delays.

- . **Owner's Remedies**

If corrective measures are not taken by the contractor and default occurs, the owner may seek remedies from the contractor's performance bond surety. See D.C. McClain, Inc. v. Arlington County, 249 Va. 131, 452 S.E.2d 659 (1995) (finding the surety liable on a performance bond where the contractor has defaulted and the owner has performed its obligations under the contract). An owner can also take over a defaulting contractor's equipment and finish the job itself, though this option is

rarely exercised unless there is a pressing need for a quick completion of the job. If reprocurement is required, all costs of the reprocurement are paid by the defaulting contractor.

Response by the Contractor

The contractor can contest the owner's notice of intention to default terminate in three ways: (1) by showing that the grounds for the default were not proper; (2) by showing that the default was excusable; or (3) by establishing that the owner waived the alleged default and forfeited the right to terminate the contract.

(1) To show an improper default, the contractor must prove that the reason for the default was either not enumerated in the termination provision and/or not supported by the facts.

(2) Attempts to show that the default was excusable occur most often when the default was predicated on failure to timely prosecute the work. To escape that determination, the contractor must show that it fits within one of the categories of excusable delay defined in the Time Extension clause.

(3) Waiver of the right to default occurs when the owner is aware of the circumstances giving rise to the option to default, but nonetheless does not default the contractor for some period of time during which the contractor detrimentally relies on the owner's failure to default terminate him. For example, if, after the occurrence of acts constituting grounds for default termination, the owner is negotiating with the contractor, encouraging continued performance, and/or issuing contract changes, then a waiver of the termination provision may be implied.

Termination for Convenience Clause

A Termination for Convenience clause empowers the owner to terminate a contract at any time if such termination is in

the owner's best interest or convenience. Owners can use this clause in the event of under- budgeting, a potential labor strike, or any event that may delay or burden performance. See W.C. English, Inc. v. Dep't of Transportation, 14 Va. App. 951, 420 S.E.2d 252 (1992) (upholding a contract clause allowing VDOT to terminate the contractor, absent a showing of contractor fault, if conditions beyond VDOT's control prevented performance of the contract as intended). Absent such a clause, termination of a non-defaulting contractor would constitute a breach of contract with all the attendant liabilities, including the contractor's lost profits on unperformed work.

A Termination for Convenience clause typically provides that the contractor will not be paid profit on the unperformed work. Such a clause should also provide for a partial termination in the event the owner wishes to eliminate only a portion of the scope of work. As with a Termination for Default clause, proper notice must be given of the termination as prescribed by the Termination for Convenience clause. See Richmond v. A.H. Ewing's Sons, Inc., 201 Va. 862, 869, 114 S.E.2d 608, 613 (1960) (stating that the city breached its contract for the construction of a building when it failed to give proper notice of termination as required by the contract clause).

Inspection of the Work Clause

Inspection clauses are necessary for the owner to survey performance of the contractor and its compliance with the plans and specifications. An owner should include a broad inspection clause that permits inspections by itself or its representatives at any reasonable time during the construction.

Besides owners' inspections, the standard inspection clause will require the contractor to conduct regular inspections and control the quality of performance. Construction contracts will typically include a provision similar to the following:

The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the Work called for by this Contract conforms to Contract requirements. The Contractor shall maintain complete inspection records and make them available to the Owner and Owner's Authorized Representative. All work is subject to

inspection and testing at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the Contract.

This clause, as written, encompasses all the work of the contractor, which includes the work of all the subcontractors. The importance of securing an inspection clause for all work being performed at the construction site should be self-evident. Allowing and requiring inspections ensures that the construction meets the owner's desires and expectations, helps to monitor and update performance schedules, and serves to detect, protect and limit liability for defects in construction performance.

- **Voluntary v. Mandatory Inspection**

The above clause grants the owner the right to inspect the work "at all places and at all reasonable times." It does not, however, give rise to any duty to inspect on the part of the owner. The importance of this distinction was underscored by the court in Continental Ins. Co. v. Virginia Beach, 908 F. Supp. 341 (E.D. Va. 1995), where the prime contract did impose upon the owner a duty to inspect. In Continental, the original contractor on the City's sewer project was terminated because it filed for bankruptcy. After the termination, the City discovered that it had overpaid for the work actually performed and that certain work was defective. These conditions would have been discovered had the City inspected the work before making payments, as was required under the contract. Due to the overpayments, the expense of the replacement contractor far exceeded the remaining contract balance, which operated to the prejudice of the surety. Therefore, the court held that the surety was released from its obligations under a performance bond. Id. at 348.

- **Specific Inspection Provisions**

The general inspection requirements set forth above can be supplemented with specific requirements tailored to the particular project. This is appropriate in cases where certain aspects of the construction merit special attention. Such provisions can dictate everything from the extent and timing of the inspections to the specific administrative form to be completed during the contractor's inspections.

- **Over-Inspection**

Despite the broad authority for owner inspections, the owner is limited by its implied duty of cooperation and non-interference. Over-zealous inspections may be considered interference with the contractor's work.

- **Changes Clause**

Due to the almost inevitable necessity to make changes to

the scope of work after contract award, every construction contract must have a mechanism for incorporating such changes. The Changes clause is discussed at length in Section III.C.

"No-Damage-for-Delay" Provisions

Many private construction contracts include "no-damage-for-delay" clauses which protect the owner from monetary claims by the contractor alleging owner-caused delays. Under such clauses the contractor is entitled only to time extensions, but no delay damages, when the owner is responsible for project delays. These clauses have been the subject of extensive litigation and some creative judicial decisions carving-out exceptions. Accordingly, many owners, based on a cost-benefit analysis are choosing not to include such a clause in their construction contracts.

The Virginia Public Procurement Act has made the decision easy for the public bodies of Virginia by declaring "no-damage-for-delay" clauses void as against public policy. VA. CODE ANN. § 11-56.2 (1993). The Act provides that no public construction contract entered into as of July 1, 1991, can include any provision which "purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent such delay is caused by acts or omissions of the public body, its agents or employees and due to causes within their control." VA. CODE ANN. § 11-56.2 (1993).

However, the same section of the Act requires contractors to pay a percentage of the costs incurred by the public body in "investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor's total delay claim which is determined through litigation or arbitration to be false or to have no basis in law or fact." VA. CODE ANN. § 11-56.2 (1993). This is obviously intended to serve as a major deterrent to the filing of excessive and unjustified delay claims by contractors. As such, specific reference to this provision in the construction contract might be advisable.

Disputes Provisions

While not a popular subject for owners

or contractors, disputes must be anticipated in the contract documents and an orderly method for their resolution must be established. Unresolved disputes can cause missed performance schedules and prolonged delays, which explains the requirement of the Va. Public Procurement Act that all public contracts include procedures for handling contract claims. VA. CODE ANN. § 11-69 (1993).

Several dispute resolution methods are available. Negotiated settlements, arbitration, mediation, administrative review, and litigation are the common techniques used to resolve disputes. Since construction contracts can provide for one or all of these methods of dispute resolution, there is no "standard" dispute provision. Therefore, the subsections below will discuss the various methods of dispute resolution, as well as the salient features of dispute resolution provisions.

. Authority to Use Alternative Dispute Resolution Methods

Dillon's Rule limits the authority of Virginia local governments to those powers expressly granted by statute or necessarily implied therefrom and/or incident thereto. For years, the various statutes detailing how public bodies could sue and be sued did not provide for alternative methods of dispute resolution, such as arbitration. Thus, the courts considered unenforceable any provision requiring a public body to arbitrate disputes. See W.M. Schlosser Co. v. School Board of Fairfax County, 980 F.2d 253 (4th Cir. 1992) and Spotsylvania County School Board v. Sherman Constr. Corp., 14 Va. Cir. 333 (1989) (both cases voiding arbitration clauses in construction contracts because VA. CODE ANN. § 22.1-71, which empowers school boards to sue and be sued on contracts, does not expressly provide for arbitration).

In 1987, VA. CODE ANN. § 15.1-508 was amended to empower counties to enter agreements calling for the arbitration of disputes. And in 1995, the Virginia Public Procurement Act was amended to authorize all public bodies to enter into contracts calling for alternative dispute resolution procedures, including arbitration and mediation. VA. CODE ANN. § 11-71.1 (Supp. 1995). However, the Act further provides that "such procedures entered into by the Commonwealth, or any

department, institution, division, commission, board or bureau thereof, shall be nonbinding and subject to § 2.1-127, as applicable, and such procedures entered into by school boards shall be nonbinding." VA. CODE ANN. § 11- 71.1 (Supp. 1995).

Arbitration

If arbitration is agreed upon as a dispute resolution technique, parties need to clearly define the scope of the arbitration and whether the arbitration will be optional or mandatory. Mandatory arbitration means only that it is a required step in the dispute resolution process, not that it is necessarily binding arbitration.

The interpretation of the arbitration provision in a construction contract, including determinations as to its scope, are the province of the courts. In Doyle & Russell, Inc. v. Roanoke Hosp. Ass'n, 213 Va. 489, 193 S.E.2d 662 (1973), it was stated that courts are entitled to pre-submission judicial determination of arbitrability of the issues or fact-finding before mandatory arbitration begins. Id. at 494 (stating that the additional language in the contract limited the broad mandatory arbitration clause, so that only findings of fact were subject to arbitration).

Mediation

In recent years the high cost of litigation has caused a tremendous increase in the use of mediation for dispute resolution. This is especially true in the construction industry, as mediation has proven to be particularly useful in the resolution of complex construction disputes.

The parties are generally free to fashion their own mediation procedures, but the standard scenario includes: (1) joint selection of a third-party mediator; (2) submission of written position statements; (3) a presentation session before the mediator by the parties, without cross-examination; (4) separation of the parties into "caucus" sessions during which the mediator "shuttles" between the parties seeking common ground and ultimate agreement. The key distinction between arbitration and mediation is that the mediator does

not render a decision. Instead, the mediator assists the parties in achieving a mutual agreement on their own. As such, it is crucial that the public body and contractor each enter mediation with a strong commitment to resolving their differences through compromise.

- **Administrative Review**

Where litigation is selected as the ultimate dispute resolution method, public bodies generally utilize an internal mechanism to review contractor claims and, if possible, resolve them before litigation commences. This administrative review is often a condition precedent in the initiation of litigation by the contractor.

_____ See Chapter 25 of the Handbook, "The Virginia Public Procurement Act," for a discussion of the administrative review process.

- **Notice Requirement**

Most dispute provisions will require the contractor to notify the owner upon (or within a certain number of days of) discovery of any injury or any circumstances which may lead to injury or damages. (See Section II.D.13 specifically discussing notice requirements.)

- **Claims Must be Submitted in Writing**

Dispute provisions generally require the contractor to submit all claims in writing. A written claim will distill the dispute and aid in the quick resolution thereof.

- **Requiring Continued Prosecution of the Work**

Another important aspect of the disputes provision is a requirement that the contractor continue to prosecute the work pending the resolution of the dispute.

- **Time Limit for a Decision by the Public Body**

Beyond requiring the inclusion of dispute resolution procedures in public contracts, the only specific requirement

of the Va. Public Procurement Act is that the contract set forth a limit on the time in which the public body must render its final, written decision. VA. CODE ANN. § 11-69B (1993).

Notice and Authorization Requirements in General

Many of the provisions noted above, as well as other common provisions of construction contracts, include requirements that the contractor give notice and/or get owner authorization before proceeding. For instance, under a standard construction contract the contractor must give notice of a differing site condition, anything that might become a claim, etc., and get authorization before beginning extra work for which the contractor requests compensation.

Need for Notice and Authorization Requirements

The frequency of these notice and authorization requirements in construction contracts is explained by the relatively unequal access to jobsite information between the contractor and the owner. The contractor is on-site performing the work and is thus generally aware of problems or potential problems well before the owner. In addition, jobsite information may be available for a very short time before it is literally paved over, excavated, or otherwise covered up. To ensure access to the information, the owner requires the contractor to appraise him of certain information as soon as it becomes known.

Beyond having the information, the notice and authorization provide the owner with the opportunity to examine the problem, take steps to eliminate or mitigate costs, collect information, keep records, suggest alternatives, and otherwise provide input to the situation.

Statutory Notice Requirements

Section 11-69 of the Va. Public Procurement Act requires that "contractual claims, whether for money or other relief, shall be submitted in writing no later than sixty days after final payment;

however, written notice of the contractor's intention to file such claim shall have been given at the time of the occurrence or beginning of the work upon which the claim is based." Thus, if there is not a notice requirement in the claims provision of the contract, the contractor would still be bound to give notice by the Act.

Judicial Enforcement of the Requirements

In general, Virginia courts will protect and enforce the written agreement of the parties. See, e.g., Smith v. Smith, 3 Va. App. 510, 514 (1986) (noting that where the terms of a contract "are clear and definite, it is axiomatic that they are to be applied according to their ordinary meaning.") Notice and authorization provisions are no exception. In fact, they are enforced more strictly in Virginia than in many other jurisdictions:

- () Atlantic & Danville Ry., 98 Va. 503, 512, 37 S.E. 13 (1900) (denying a contractor's claim for additional costs because of the contractor's failure to get the contractually required authorization before proceeding with extra work and noting that "[a]n obvious purpose of such a provision is to avoid subsequent disagreement, and prevent just such a controversy as has arisen in this case. . . . All are aware of the frequency with which it happens in the construction of buildings and other improvements that claims are made for alleged extra work, which give rise to disputes and litigation. Such a provision is a wise and not an unusual one in building contracts, and it is held by the authorities to be obligatory upon the parties, and not to be disregarded.");
- () McDevitt & Street Co. v. Marriott Corp., 713 F. Supp. 906 (E.D. Va. 1989) (barring contractor's claims for failure to comply with a 7-day notice provision and an authorization provision);
- () General Excavation, Inc. v. Fairfax County Board of Supervisors, 33 Va. Cir. 120 (1993) (flatly denying the contractor's claims for failure to provide the contractually and statutorily required notice of the

events giving rise to the claims);

() See also, United States v. Centex Constr. Co., 638 F. Supp. 411 (W.D. Va. 1985); Service Steel Erectors Co. v. SCE, Inc., 573 F. Supp. 177 (W.D. Va. 1983).

. **Waiver**

The only exception to Virginia's strict enforcement of notice provisions is the doctrine of implied waiver. However, as noted by the Court in Main v. Dep't of Highways, 206 Va. 143, 142 S.E.2d 524 (1965), it is a well-settled proposition that waiver and estoppel do not apply "to the rights of a State when acting in its sovereign or governmental capacity." Id. at 150.

Even if the waiver argument is allowed, the exception is a very narrow one. An implied waiver must be proven by "clear and unmistakable evidence." Service Steel, 573 F. Supp. at 179. A waiver can only be implied where there is an "intentional relinquishment of a known right, with both knowledge of its existence and an intention to relinquish it." May v. Martin, 205 Va. 397, 404, 137 S.E.2d 860, 865 (1964).

In the context of an authorization provision for extra work on a construction contract, an implied waiver requires a showing by the contractor that there was a definite agreement to pay for the extra work or some other action showing the intention of the owner to abandon its rights under the contract. Service Steel, 573 F. Supp. at 180.

Though the standard is not easy to meet, the court in Ross Eng. Co. v. Pace, 153 F.2d 35 (4th Cir. 1946), did determine that a contract provision had been waived because "[f]rom the beginning of the contract work the parties to the subcontract ignored the provisions as to written orders and proceeded with the work with little or no regard for them." Id. at 49.

. **POTENTIAL PERFORMANCE PROBLEMS**

. **DIFFERING SITE CONDITIONS**

A differing site condition (sometimes referred to as a changed condition) is a physical condition (other than weather conditions or some force majeure) discovered on the construction site which impedes performance, because the physical condition differs materially from what was reasonably anticipated during the bidding process and contract formation. These physical conditions may include unexpected subsurface conditions (such as additional rock, harder rock, excess sand, or groundwater), asbestos insulation, or environmental pollution located at a construction site.

. **General Rule: Contractor Bears the Risk of Unforeseen Difficulties During Performance**

When a differing site condition is encountered, the cost of performing the contract work generally increases. With the increase in cost comes the question of who should pay those costs. Absent a risk-shifting contract clause, any additional performance costs or delay costs caused by the unexpected physical condition at the construction site is assumed by the prime contractor. See United States v. Spearin, 248 U.S. 132 (1918) (noting that when "one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered."). This risk creates dilemmas for contractors during the bidding process, forcing them to make a judgment as to whether they should undergo expensive site investigations before being awarded the contract or rather include contingency amounts in their bid price. Fearing the prospect of inflated bids, owners will often include some type of risk-shifting provision in construction contracts.

Risk-Shifting Clauses - Owner Assumes Liability

A Differing Site Conditions clause (or Changed Conditions clause) minimizes the contractor's risk of assuming additional costs resulting from unexpected physical conditions by promising an equitable adjustment in the contract price and time if such conditions occur. Conversely, these clauses benefit the owner by ensuring the contractors submit more accurate bids without inflation for contingent risks. Foster Constr. C.A. & Williams Bros. Co. v. United States, 435 F.2d 873, 887 (Ct. Cl. 1970). As such, these clauses have become normal practice in the construction industry. A typical Differing Site Condition clause provides:

The Contractor shall promptly, and before the conditions are disturbed, give written notice to the Owner's Authorized Representative of (a) subsurface or latent physical conditions at the site which differ materially from those indicated in the Contract Documents, or (b) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in the work of the character provided for in the Contract and which were not reasonably anticipated as a result of the pre-bid investigation required in the ITB/RFP.

The Owner's Authorized Representative shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the cost or time of performance, the provisions of [cite to "Changes" clause] shall apply.

No request by the Contractor for a Change Order under this Article shall be allowed, unless the Contractor has given the written notice required.

No request by the Contractor for a Change Order under this Article shall be allowed if made after final payment under the Contract.

Under such a clause, differing site conditions fall into two distinct categories, generally known as

Type I and Type II, which correspond to the notations in the above clause of "(a)" and "(b)" respectively.

The difference between the contract representation and the actual condition must be significant. However, this is rarely an issue because if the difference is so slight as to cause little cost increase, then the claim is generally not pursued.

- **Representations in the Contract Documents**

The key element of the Type I differing site condition is the representation of the contract documents. This is what distinguishes Type I from Type II conditions. If the contract does not represent the expected conditions, then there cannot be a Type I differing site condition. However, the representation need not be express, according to the court in Foster Constr. C.A. & Williams Bros. Co. v. United States, 435 F.2d 873 (Ct. Cl. 1970). Other courts have concurred, finding implied representations to be the basis of a Type I differing site condition. See Stock & Grove, Inc. v. U.S., 493 F.2d 629 (Ct. Cl. 1974) (contract documents showed an embankment with various sizes and shapes of stone and directed the contractor to a particular quarry for the stone -- implied representation that the quarry contained adequate stone for the job); S & M-Traylor Bros., ENGBCA 3878, 82-1 BCA ¶ 15,484 (1982) (contract indications taken as a whole constituted an implied representation of the quality/characteristics of the soil to be excavated).

- **Reasonable Reliance or Unforeseeability**

The contract indications must induce the contractor to rely reasonably upon the site condition information to recover compensation under Type I conditions. If the contractor did not rely on the representation in formulating its bid or if he was unreasonable in relying on the information, then even an inaccurate representation cannot be said to have caused the damages suffered.

The reasonable reliance concept is also expressed in terms of the condition being "unforeseeable" under the circumstances. Courts will examine all of the information and expertise available to the contractor at the time of bidding to determine if the condition actually encountered should have been anticipated despite the contract indications. See Mojave Enter. v. United States, 3 Cl. Ct. 353 (1983). This is essentially the same inquiry as determining whether the reliance on the information was reasonable.

- **Exculpatory Clauses to Defeat Reasonable Reliance**

Owners occasionally attempt to limit Type I liability by including disclaimers advising the contractor not to rely on certain information provided with the contract documents. However, when the contract includes both a Differing Site Condition clause and exculpatory language, the courts generally disregard the disclaimer rather than permit it to write the Differing Site Condition clause out of the contract. See Foster Constr. C.A. & Williams Bros. Co. v. United States, 435 F.2d 873, 884 (Ct. Cl. 1970) (the following disclaimer was attached to geological data: "Note: Drill Hole Data shown for information only. The Bureau of Public Roads does not assume responsibility for the accuracy of the data"; held that the disclaimer did not bar Plaintiff's recovery for a Type I differing site condition). See also Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park, 506 A.2d 862 (Pa. 1986).

Type II Differing Site Conditions

If the contract does not contain any specific representations of subsurface or latent physical conditions, then the contractor must establish a Type II differing site condition to be entitled to an equitable adjustment. Under a Type II claim, the contractor must demonstrate that the actual condition encountered was unknown and of an unusual nature, differing materially from those ordinarily encountered and generally recognized. See, e.g., Charles T. Parker Constr. Co. v. United States, 433 F.2d 771, 778 (1970) (holding that an equitable adjustment was not justified because the rock formations which caused increased excavation costs were generally known and not unusual for the area.)

A Type II differing site condition claim is appropriate where the owner has not made any representations about the subsurface or latent conditions. Type II claims are less common because of a stiff burden in establishing what constitutes an unusual condition. Id. at 778.

The court in Parker set the parameters for proving a Type II claim, noting that the contractor must demonstrate: (1) the recognized and usual physical conditions at the site; (2) the physical conditions that were actually encountered; (3) a material difference between the two; and (4) a resultant increase in the cost of performance. Id.

. **Unknown Condition**

To assert a Type II condition, the condition must be unknown to the contractor at the time of bidding. The condition also cannot be reasonably anticipated by the contractor from the contract documents, by the contractor's experience, or by site investigation. See Shumate Constructors, Inc., VABCA No. 2772, 90-3 BCA ¶ 22,946, at 115,190 (1990) (stating that a site condition does not qualify as "unknown" if it would have been revealed upon inquiry or reasonable site investigation).

Bidders are generally held to a standard of imputed knowledge based upon the experienced, prudent contractor in the relevant geographic area. See Husman Bros., Inc., DOTCAB 71-15, 73-1 BCA ¶ 9889 at 46,237, 46,238 (involving wet subsurface conditions in the mountains of Wyoming that were not unusual for the elevation). This assumed knowledge of a geographical area is separate and distinct from information gained from a site investigation.

. **Unusual Condition**

An unusual condition is difficult to define because of the numerous unanticipated conditions and events that occur at construction sites. To establish an unusual condition and satisfy the Type II requirements the condition must be one that might not reasonably be anticipated based on the type of work and the site location. See, e.g., Charles T. Parker Constr. Co., 433 F.2d at 778-79 (finding that hard, abrasive rock was generally recognized and usual in the geographical area, so no recovery for additional excavation costs was allowed). Because of various unexpected conditions, the analysis and acceptance of "unusual" conditions for Type II claims are conducted on a case-by-case basis and are very fact-specific.

. **DEFECTIVE SPECIFICATIONS**

. **Design v. Performance Specifications**

There are two categories of

specifications: design specifications (also known as prescriptive specifications) and performance specifications. Distinguishing between the two categories is not always an easy task, as evidenced by the large body of federal law which has evolved around efforts to make the distinction. However, the distinction is crucial because it is a deciding factor in whether the Spearin Doctrine applies. (The Spearin Doctrine, discussed below, holds the owner liable for defects in design specifications, but not for problems with performance specifications.)

The most oft-cited definitions of design and performance specifications in the context of construction contracts are found in the Court of Claims decision in J.L. Simmons Co. v. United States, 412 F.2d 1360 (Ct. Cl. 1969). The Simmons Court notes:

DESIGN SPECIFICATIONS "set forth in precise detail the materials to be employed and the manner in which the work [is] to be performed, and [the contractor is] not privileged to deviate therefrom, but [is] required to follow them as one would a road map." Id. at 1362.

PERFORMANCE SPECIFICATIONS "set forth an objective or standard to be achieved, and the successful bidder is expected to exercise his ingenuity in achieving that objective or standard of performance, selecting the means and assuming a corresponding responsibility for that selection." Id.

Many federal courts and various of the boards of contract appeals have adopted the "ingenuity" concept from the J.L. Simmons definition of performance specifications and made that the focal point of the inquiry. See, e.g., Penguin Industries, Inc. v. United States, 530 F.2d 934 (Ct. Cl. 1976); Aleutian Constructors v. United States, No. 22-89C, 37 CCF ¶ 76,203 (Ct. Cl. 1991). Others have framed the issue based upon whether "any deviation" from the specifications would require written approval, making them design specifications if approval was required. See Pittsburgh-Des Moines Corp., ENG BCA No. 314-3-84, 89-2 BCA ¶ 21,739 (1989).

"Mixed" Design and Performance Specifications

The entire set of specifications on any given project rarely

fall neatly into one category or the other. Therefore the federal courts and boards have generally looked to the specific section in dispute to determine whether that section is a design or performance specification. Flinchbaugh Products Corp., ASBCA No. 19851, 78-2 BCA ¶ 13,375 (1978) (often cited as the source of this proposition). But see Utility Contractors, Inc. v. U.S., 8 Cl. Ct. 42, 51 (1985) (where the court acknowledged that the specifications included both design and performance elements, but refused to examine the particular sections in question, instead noting that the specifications as a whole permitted the contractor to "use its own judgment and experience in deciding how, when, where, under what conditions, and which proportions would be best" and were thus performance specifications).

. **Spearin Doctrine - Implied Warranty as to the Adequacy of the Specifications**

The implied warranty as to the adequacy of the specifications originated in the early twentieth century Supreme Court case of United States v. Spearin, 248 U.S. 132, 39 S. Ct. 59, 63 L. Ed. 166 (1918), and is thus commonly referred to as the Spearin Doctrine. The Spearin Doctrine reflects the simple proposition that the party that supplies the specifications is responsible for their accuracy, adequacy and feasibility. So in most cases, the owner warrants that if the contractor follows the design specifications of the construction contract, the desired result will be achieved. The contractor is not required to verify the accuracy of the design specifications provided in the contract documents.

Virginia courts have applied the reasoning of the Spearin Doctrine on numerous occasions. See Southgate v. Sanford & Brooks Co., 147 Va. 554, 137 S.E. 485 (1927); Greater Richmond Civic Recreation, Inc. v. A.H. Ewing's Sons, Inc., 200 Va. 593, 106 S.E.2d 595 (1959); Worley Bros. Co. v. Marcus Marble & Tile Co., 209 Va. 136, 161 S.E.2d 796 (1968); Chantilly Constr. Corp. v. Dept. of Highways and Transportation, 6 Va. App. 282, 369 S.E.2d 438 (Va. App. 1988).

. **Factors Considered in the Application of the Spearin Doctrine**

The following questions must be addressed in assessing Spearin Doctrine applicability:

. **Are the Specifications Design or Performance-type**

Specifications?

The implied warranty will not apply if the contract specifications are performance-type specifications, as opposed to design specifications. As noted above, the distinction between the two types of specifications is not always easily drawn.

- **Did the Contractor Perform the Work in Accordance with the Specifications?**

The implied warranty may be void if the contractor deviated from the specifications. This principle is based on the understandable reluctance of the courts to make the determination that the construction problems would have been encountered even if the contractor strictly adhered to the specifications (i.e., it is

much easier fo

Owner-authorized

changes are the exception to this rule. If the owner approves a deviation from the specifications, then the warranty still applies as long as the contractor advised the owner of the probable consequences of the change to the best of his knowledge. Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950) (owner still warrants the design specifications, even though the changes were suggested by the contractor).

Is the Implied Warranty Negated by an Express Contract Provision?

The owner's responsibility for the design specifications can be eliminated via an express contract provision. Chantilly, 369 S.E.2d at 444. However, the provision must be clear and specific. Virginia courts have rejected attempts to claim that the implied warranty was voided by standard contract provisions requiring the contractors to visit the site, get approval for changes to the specifications and/or inform the owner of defects in the specifications. Southgate, 137 S.E. 485 (1927); Chantilly, 369 S.E.2d 438 (1988). In Southgate, the contract for the construction of a bulkhead contained the following clauses:

Contractor

must visit premises and take his own soundings and assume all responsibility for conditions as they are.

Premises.--

Each contractor must visit the premises and satisfy himself as to local conditions and assume all responsibility for the same in connection with the prosecution of the work.

Southgate, 137 S.E. at 487. After construction, the bulkhead collapsed. The court determined that this was the result of an inadequate design. The owner claimed that since the contractor was responsible for the site conditions, he should have known that the design "was not sufficiently heavy" for that area. Id. The court flatly rejected the owner's contention, noting that the contractor cannot be held responsible because "it is his duty to follow the plans

and specifications furnished as his guide by the architect as the agent of the owner." Id.

OWNER CHANGES

Changes to the work on a construction project are almost inevitable. Therefore, it is essential that the construction contract establish clear procedures for handling these changes.

A well drafted "Changes" clause will accomplish two goals: 1) it will allow the owner to order necessary changes to the original scope of the work; and 2) it will provide the contractor with the promise of compensation and time extension as appropriate, for the changes to the scope of work. A typical "Changes" clause provides:

The Owner, without invalidating the Contract and without notice to the surety, may order a Change in the Work consisting of additions, deletions, modifications or other revisions to the general scope of the Contract, or changes in the sequence of the performance of the Work. The Contract Price and the Contract Time shall be adjusted accordingly. All such Changes in the Work shall be authorized by written Change Order, and all Work involved in a Change shall be performed in accordance with the terms and conditions of this Contract. If the Contractor should proceed with a Change in the Work upon an oral order, by whomever given, it shall constitute a waiver by the Contractor of any claim for an increase in the Contract Price and/or Contract Time, on account thereof.

There are numerous issues to consider in relation to the "Changes" clause:

Limits of the Owner's Authority to Order Changes

The language of most "Changes" clauses give the owner broad power to make whatever changes to the work that he sees fit. The contractor cannot refuse to perform change order work that is properly ordered. However the owner's authority is not without limits:

Competitive Bidding Requirement

The Virginia Public Procurement Act provides that:

No fixed-price contract may be increased by more than twenty-five percent of the amount of the contract or \$10,000, whichever is greater, without the advanced written approval of the Governor or his designee, in the case of state agencies, or the governing body, in the case of political subdivisions. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an error in its bid or offer.

VA. CODE ANN. § 11-55 (1993).

This provision, designed to ensure the integrity of the competitive procurement process, will likely apply to the larger construction contracts, where changes often exceed \$10,000. The contractor should be made aware of this provision and any impact it may have on the time required to process change orders.

Cardinal Changes

Irrespective of the limits of the Virginia Public Procurement Act, no owner, of any type, has the authority to issue a change to the contract work that is so far beyond the reasonable scope of the original contract that it may be considered a "cardinal change." For example, a contractor engaged to resurface a school parking lot cannot, through a series of drastic change orders, be required to build an addition to the school for a new cafeteria. The cafeteria is not merely a change to the original scope of work, but an entirely new scope of work.

In determining what constitutes a cardinal change, Virginia courts will ask whether it "can be shown that the building was so materially changed that it could not be reasonably recognized as the same building as work embraced in the contract." Warren v. Goodrich, 112 S.E. 687 (Va. 1922). The number or character of changes in determining whether a change is a cardinal change is fact-specific and determined on a case-by-case

basis. See, e.g., General Dynamics Corp. v. United States, 585 F.2d 457 (Ct. Cl. 1978) (where changes increased performance costs by 165% and extended the completion date three years, the court still found no cardinal change because the contractor should have anticipated such alteration in a contract to build nuclear submarines).

A finding of a cardinal change provides the contractor with the right to reject or abrogate the contract. Though the cardinal change exception is not often applied, it is an important exception to the owner's authority to issue changes to the work.

"Written Change Order"

Most "Changes" clauses require that a change order be issued in writing and many, like the one above, specifically state that work performed pursuant to an oral change order is not compensable. Though this formal written procedure can slow the construction progress (consuming time while a written change is being created, reviewed and approved), the time lost must be balanced against the advantage of eliminating otherwise likely conflicts regarding the scope of and authorization for the change.

However, most state courts have not allowed the owner to abuse the requirement for a written change order by finding that if there was in fact an oral order to perform the work, then the owner must have intended to waive the requirement for a written change order. State Highway Dep't v. Wright Contracting Co., 131 S.E.2d 808 (Ga. Ct. App. 1963); Owens v. Bartlett, 528 P.2d 1235 (Kan. 1974); but see Main v. Dep't of Highways, 206 Va. 143, 142 S.E.2d 524 (1965) (demonstrating strict enforcement of contract requirements). On the other hand, select states have denied recovery for oral change orders, but the rationale was believed to be founded, not in the contract provision, but upon a statute or an ordinance prohibiting oral change orders. See, e.g., Clark County Constr. Co. v. State Highway Comm'n, 58 S.W.2d 388 (Ky. 1933).

Authority to Issue Changes

Since the power to issue change orders is the power of the purse, the owner is not likely to defer to the A/E on change order issues as he does with other construction issues. And unless the owner expressly grants authority to the

A/E, the contractor cannot assume that the architect has that authority. See Kirk Reid Co. v. Fine, 205 Va. 778, 783, 139 S.E.2d 829, 832-33 (1965) (stating that an architect or engineer cannot order a change order and bind an owner without express authority).

As a practical matter, a construction site is a tremendous breeding ground for unauthorized changes leading inevitably to potential disputes. As problems are encountered in the field, well-meaning participants in the process, such as contractor site managers or supervisors, as well as A/E representatives and owner inspectors, often make decisions and engage in conduct that effectively changes the scope of work without the benefit of the procedures and safeguards established in the Changes clause. Sound contract administration and strict adherence to requirements for written notice of such matters are essential to dispute avoidance.

Constructive Changes

A constructive change is a legal fiction covering situations where the contractor believes instructions, acts, omissions, etc. for which the owner is responsible have effectively changed the scope of work without benefit of a formal change order. For instance, a contractor's claim for additional costs resulting from defective specifications is essentially an assertion that the scope of work has been constructively changed.

A key element in a construction contract is a provision requiring prompt, written notice by the contractor of any instructions, acts, omissions, etc., which may constitute a constructive change. (See Section II.D.13 regarding notice requirements.) Such a provision should provide that any claims by the contractor for additional costs occasioned thereby will be waived absent such written notice, preferably within a specified time (e.g., within ten (10) days) after the contractor knew or should have known of the circumstances giving rise to the constructive change.

The purpose of such strict notice provisions is to give the owner the opportunity to deal with the situation by rescinding the instructions or formally changing the contract in a less costly manner.

HANDLING CONSTRUCTION CLAIMS -- AN OWNER'S PERSPECTIVE

MAKING CLAIMS AGAINST THE CONTRACTOR

Owner claims against the contractor require the following considerations:

Basis for the Claim

Claims against the contractor will generally involve delay, non-performance or defective work. However, if the contractor has assumed design responsibility, defective design claims become another potential theory of liability on which to base a claim against the contractor.

Delay Claims

The potential sources for delay on a construction project are innumerable. Some common contractor-caused delay scenarios include:

- () failure to timely mobilize for project start-up;
- () delays in obtaining subcontractors to perform the work;
- () failure to adequately staff the project with management or field labor;
- () delays in shop drawing submission;
- () delays resulting from the correction of defective work;
- () improper scheduling and coordination.

As a practical matter, the owner's prosecution of a delay claim against the contractor generally takes the form of defending the assessment of liquidated damages. The owner must be prepared to show: (1) there was a delay; (2) the delay violated the contract; and (3) the contractor caused the delay.

Establishing an actual delay involves demonstrating that the contract-specified completion date or an interim milestone date was not met or could not have been met.

Any actual delay to the work will violate the contract unless that delay is

"excusable." Excusable delays, usually specifically defined in the contract's "Time Extension" provision (see Section II.D.6), generally include delays due to unforeseeable causes or causes beyond the control of the contractor, such as fires, floods, other natural disasters, labor disputes (strikes), or unusually severe weather. Such excusable delays will extend the contract milestone or project completion dates and therefore defeat or reduce a delay claim or liquidated damage assessment.

Finally, the owner must demonstrate the delays were caused by the contractor and not the result of any actions by the owner or its representatives.

Non-Performance

If the contractor's delays or poor workmanship rise to the level where there is a clear failure to prosecute the work, then the contractor can be deemed to have abandoned the work. At this point the owner is permitted to complete the work and recover damages from the contractor.

Since there is no "bright line" standard to define abandonment, most construction contracts will set out the parameters for such in the default termination provision of the construction contract. (See Section II.D.7 for a discussion of the Termination for Default clause.)

Defective Work

Defective work claims are generally pursued either under a breach of contract theory or a breach of warranty theory.

A negligence theory, while theoretically available, is rarely successful in the construction contract context under Virginia law. See VMI V. King, 217 Va. 751, 232 S.E.2d 895 (1977) (negligent performance of a construction contract was a breach of contract). See also Blake Constr. Co. v. Alley, 233 Va. 31, 353 S.E.2d 724 (1987) (negligence actions in Virginia can only be

pursued in cases of property damage and personal injury).

Breach of warranty claims can be based upon the express warranties of the contract or the contractor's implied warranty of workmanship and materials imposed by Virginia law. Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950).

Defective Design

Generally design liability will only attach to a contractor if the contractor was responsible for the design and an express warranty of the design's sufficiency appears in the contract. However, under a specific set of circumstances, an implied warranty will apply.

An implied warranty that the design is fit for a particular purpose arises only if:

(1) the contractor holds himself out as particularly competent to undertake the contract;

(2) the owner has no expertise in the work of the contract;

(3) the owner does not furnish plans, design specifications, or details; AND

(4) the owner indicates, tacitly or expressly, his reliance on the contractor's skill, after making known to the contractor the particular purpose intended for the structure.

- **Notice Requirements**

It is essential to confirm that the contractually required notice, if any, has been given to the contractor prior to filing the claim. From the owner's standpoint, prompt notice to the contractor of potential problems is almost always the best course of action, regardless of what the contract requires. As such, battles over whether the proper notice was given are more likely to occur when the contractor is making a claim against the owner. (See Section II.D.13 for a discussion of notice provisions generally.)

- **Damage Types**

- **Actual Damages**

Like any other type of contract damages, actual damages on a construction contract are recoverable if the loss was foreseeable and the extent of the loss can be established with a reasonable degree of certainty. Wyckoff Pipe & Creosoting Co. v. Saunders, 175 Va. 512, 518-19, 9 S.E.2d 318, 321 (1940) (stating that damages can be awarded where there is a reasonable, intelligent and/or probable estimate of damages.) Of course, the damages cannot be based on mere speculation, but neither must they be proven with mathematical certainty.

The following cases provide examples of the recovery of actual damages on a construction contract under Virginia law:

- () Roanoke Hosp. Ass'n v. Doyle & Russell, Inc., 215 Va. 796, 802, 214 S.E.2d 155, 160 (1975) (finding that in a claim for contractor delay, the owner's "added interest costs during the [extended] construction period arising from the longer term of borrowing" were direct and recoverable damages because such damages are an ordinary result of the extension of the construction financing; lower court awarded damages for utilities, storage costs and insurance premiums which were not challenged on appeal).
- () Kirk Reid Co. v. Fine, 205 Va. 778, 139 S.E.2d 829 (1965) (stating that in cases of defective or unfinished

work, the owner can recover either the cost of correcting/completing the work or the difference in value between what was actually built and what was required by contract).

() See also Lehigh Portland Cement Co. v. Virginia Steamship Co., 132 Va. 257, 11 S.E.2d 104 (1922); McDevitt & Street Co. V. Marriott Corp., 713 F. Supp. 906 (E.D. Va. 1989) (discussing various types of owner and contractor damages).

. **Consequential v. Direct Damages**

Direct damages are those which arise as a matter of fact from the breach of a contract, while "consequential damages are those which arise from the intervention of 'special circumstances' not ordinarily predictable." Roanoke Hospital, 215 Va. at 801, 214 S.E.2d at 160.

The standard for the recovery of consequential damages is set forth in Fairfax County Redevelopment and Housing Auth. v. Hurst & Assocs. Consulting Engineers, Inc., 231 Va. 164, 343 S.E.2d 294 (1986), where the Court stated:

Consequential damages are compensable if they were within the contemplation of the parties at the time they entered into their contract. Whether a particular item constitutes consequential damage is a question of law for the court, but whether the damage was within the contemplation of the parties generally is a question of fact for the jury.

Hurst & Assocs., 231 Va. at 167, 343 S.E.2d at 296. See also Roanoke Hospital, 215 Va. at 801, 214 S.E.2d at 160.

. **Liquidated Damages**

Though the standard for recovering actual damages in a construction contract does not differ from basic contract law, the realities of construction work make actual delay damages difficult to

ascertain. As such, many construction contracts contain a liquidated damages provision, which provides that the contractor will be assessed a certain amount of money per day for every day past the contract completion date that the work remains substantially incomplete. The liquidated damages provision has long been recognized by Virginia courts as a valid attempt to account for the potentially severe impacts upon the owner of delays to a construction project. Welch v. McDonald, 85 Va. 500, 8 S.E. 711 (1888); Piland Corp. v. League Constr. Co., 238 Va. 187, 380 S.E.2d 652 (1989).

As a preliminary showing for entitlement to the contract-specified liquidated damages, the owner must establish that:

- () the contract work was not substantially completed by the contract completion date (plus any time extensions granted);
- () the liquidated damages ("LD's") are due under the contract; and
- () the period measured for assessing the LD's was appropriate. (The appropriate period is measured from the completion date specified in the contract to the date of substantial completion -- generally defined as the date when the work is sufficiently complete to fulfill its intended purpose -- not final completion.)

The contractor then has the burden to show: (1) the delay was not the responsibility of the contractor; (2) the delay was excusable; or (3) the LD provision is unenforceable.

- (1) If the contractor can show that the delay to the overall project completion was the responsibility of some other party (i.e., the owner, A/E or another contractor) then LD's will not be assessed.
- (2) As discussed above, the delay will be considered "excusable" if it was the result of unusually severe weather or other unforeseeable causes. (See Section II.D.6 explaining "excusable" delay.)

- (3) LD provisions are not enforceable if they are found to constitute a penalty. To avoid such a finding, it must be established that: (i) "the actual damages contemplated at the time of the agreement would be uncertain and difficult to determine with exactness" and (ii) "the amount fixed is not out of all proportion to the probable loss." **Taylor v. Sanders, 233 Va. 73, 75, 353 S.E.2d 745, 746-47 (1987).**

If the LD provision is determined to be invalid, the owner can still recover actual damages. On the other hand, if LD's are assessed, the owner forfeits its right to collect actual damages even if those actual damages exceed the LD's imposed. Welch v. McDonald, 85 Va. 500, 8 S.E. 711 (1888); Rex Trailer Co. v. United States, 350 U.S. 148 (1956).

DEFENDING CLAIMS BY THE CONTRACTOR

In General

The primary defense to the most common construction claims is the proof that an essential element of the claim is missing. As such, the theories for defending differing site condition, defective specification, and other substantive claims can be found in the previous sections of this Chapter where the elements of those claims are discussed. (See also Section II.D.13, discussing lack of notice as a possible defense to a contractor's claim.)

Delay Claims

Many of the claims submitted by the contractors will include some delay component because delays to the project can be very costly to the contractors. The contractor bids the job based on a certain completion date. Every day past that date, the contractor incurs additional cost for supervision, equipment, field and home office overhead, as well as possible escalation of labor and material.

Recouping Costs for Unmeritorious Delay Claims by the Contractor - VA. CODE ANN. § 11-56.2

As noted in Section II.D.11, the Virginia Public Procurement Act provides a

mechanism whereby the contractor is required to pay a portion of the public owner's costs in defending delay claims brought by the contractor. The actual portion to be paid, if any, is determined by the portion of the contractor's delay claim which is found to be without merit. (See Section II.D.11 and VA. CODE ANN. § 11-56.2.)

. **Critiquing Schedule Analysis**

The contractor's delay claim must include proof that delay was actually suffered and that the delay actually affected project completion. This proof must come in the form of an analysis of the project schedule.

() Challenging the Method

As mentioned in Section II.D.2.b above, the Critical Path Method ("CPM") of scheduling is clearly preferred by the courts. However, use of a CPM schedule analysis does not exempt the contractor from a critique of its methodology.

The schedules on a construction project will include an "as-planned" schedule, numerous updated schedules, and an "as-built" schedule showing how the work was actually accomplished. Accordingly, there are various approaches to CPM schedule analysis which rely more heavily on certain schedules. For instance, the contractor's analysis may include any of the following approaches: an as-planned vs. as-built comparison; a collapsed as-built analysis; an impacted as-planned schedule; a time impact analysis; or a fragment analysis. Each of these approaches has its merits and shortcomings depending on the factual situation and the complexity of the analysis required.

() Challenging the Underlying Schedules

A schedule analysis can be no better than the schedules upon which it is based. Thus, specific attention should be paid to the propriety of the underlying schedules used in the contractor's analysis. For example, if the contractor's initial as-planned schedule includes an improper duration for an activity or incorrect logic regarding the necessary sequencing of activities, then the entire critical path may be flawed.

() Concurrent Delay

In a complex construction project with numerous activities underway at the same time, it becomes difficult to identify the cause and duration of delays. In analyzing a contractor's claim based on owner-caused delay, it must be determined whether

the contractor either contributed to the delay of the activity in question, or was responsible for delay to any other activity which would have delayed completion regardless of the owner-caused delay. Such a situation, referred to as a "concurrent delay," can be the basis for reducing delay claims. Such a defense usually requires detailed CPM analysis and expert testimony.

- . **Attacking Damages**

- . **General Standard For Proving Damages**

In a breach of contract action, the contractor can recover "all damages which are the direct result of the breach and which can be proved with reasonable certainty, though not with exactness." Richmond v. A.H. Ewing's Sons Inc., 201 Va. 862, 870, 114 S.E.2d 608, 614 (1960). However, damages that are "speculative" and "conjectural" cannot be recovered. Id.; see also, ADC Fairways Corp. v. Johnmark Constr., Inc., 231 Va. 312, 343 S.E.2d 90 (1986) (noting that lost profits cannot be recovered if they are purely speculative (i.e., if there is no evidence that they would have been realized absent the breach)).

- . **Contractor Recovery**

The construction contractor's damages, recoverable as compensable damages for breach of contract, fall into the following general categories.

- (i) Direct costs associated with claims for defective specifications, constructive changes and differing site conditions, including labor, material, equipment, subcontractor costs and, if appropriate, delay damages described below.
- (ii) Labor inefficiency and/or acceleration claims resulting from multiple changes or other owner-caused disruptions include additional labor costs due to reduced productivity and non-scheduled demobilization/remobilization.
- (iii) Delay claims typically include the following cost

elements:

- i Jobsite costs such as extended supervision and equipment rental.
- i Jobsite overhead such as office/trailer rental, utilities, office staff, etc.
- i Labor and material escalation.
- i Extended warranties.
 - i Home office overhead costs, typically calculated with the Eichleay formula discussed below.

See McDevitt & Street Co. v. Marriott Corp., 713 F.Supp. 906 (E.D. Va. 1989) (discussing various types of contractor and owner damages).

Eichleay Damages

Most delay claims include a component for recovery of the contractor's unabsorbed home office overhead. These are the indirect costs incurred by the contractor in running its business, including everything from salaries of executives and office personnel to photocopying costs to utilities. These costs are regularly incurred with the passage of time, regardless of the particular projects that the contractor is performing.

When the contractor submits a delay claim, it will almost invariably attempt to recover these costs either in the form of a percentage of the total value of the contractor's claim, or via a calculation referred to as the Eichleay formula (established in Eichleay Corp., ASBCA 5183, 60-2 BCA ¶ 2688 (1960)). The formula attempts to estimate the percentage of the contractor's overhead allocable to a particular project by determining what portion of the total work of the contractor that job represents. The overhead allocable to the project is converted to a daily rate that is multiplied by the duration of the alleged owner-caused delay to determine the amount of damages. The formula is controversial, in part, because the damages calculated under the formula are subject to variables unrelated to the project in question.

Total Cost Claims

Contractor claims for disruption or reduced productivity due to owner-caused delays and/or changes are frequently calculated under the "total cost" method. A "total cost" claim refers to instances where the contractor claims the difference between its actual cost of performance and its estimated costs at the time of bid. The "total cost" method is considered acceptable in Virginia. Pebble Bldg. Co. v. G.J. Hopkins, Inc., 223 Va. 188, 288 S.E.2d 437 (Va. 1982). However, "total cost" claims are not favored by the courts because they over-simplify the damage calculations and do not address specific causation.

Acceptance of total cost claims generally hinges upon a showing that: (1) the nature of the plaintiff's losses made it difficult to specifically determine them with any reasonable degree of accuracy; (2) the plaintiff's bid or estimate was accurate; (3) the actual costs incurred were reasonable; and (4) plaintiff was not responsible for the additional costs. See WRB Corp. v. United States, 183 Ct. Cl. 409, 426 (1968) (denying "total cost" approach because the difficulty of establishing actual damages was the result of the plaintiff's poor record-keeping procedures and because of plaintiff's inability to refute evidence that some of the damages were its fault).

Contractors often anticipate the criticisms of a pure total cost claim by utilizing a "modified total cost" calculation in which reductions are made for bid errors and/or self-inflicted inefficiencies. However, many of the criticisms of "total cost" claims still apply.

"PASS-THROUGH" CLAIMS

A "pass-through" claim refers to instances where the contractor sponsors a claim against the owner for a subcontractor who has suffered damages. This process is required because the subcontractor lacks privity to pursue the claim in its own right directly against the owner.

Many jurisdictions have grappled with whether subcontractors should be allowed to circumvent the privity requirements using "pass-through" claims. Virginia has yet to settle the issue.

. **1990 - APAC-Virginia, Inc. v. Dep't of Highways and Transportation, 9 Va. App. 450, 388 S.E.2d 841 (1990)**

In APAC, the court was faced with a claim against VDOT brought by a contractor on behalf of the subcontractor. The court disallowed the "pass-through" claim on VDOT's motion for summary judgment, reasoning that:

the common law requirement of privity of contract is well established. In Virginia, it is settled that no cause of action exists for a claim solely for economic loss, absent privity of contract. . . . Legislative abrogation of the privity of contract cannot be by implication and must be expressed.

An action on a contract must be brought in the name of the party in whom the legal interest is vested. Ordinarily, such an interest is vested only in the promisee or promisor, and only this person or his privy may sue on the contract.

APAC, 9 Va. App. at 452, 388 S.E.2d at 842 (citations omitted). The deference to the concept of privity of contract shown by the APAC decision sent what appeared to be a clear message that Virginia would not allow "pass-through" claims.

. **1991 - Legislative Input**

In an apparent response to the APAC decision, the General Assembly revised Virginia Code Section 33.1-386 to specifically allow a contractor to bring a claim against VDOT "under the contract for himself or for his subcontractors or for persons furnishing materials for the contract" for damages caused by VDOT actions. VA. CODE ANN. § 33.1- 386 (1995).

. **1993 - Tyger Constr. Co. v. Dep't of Highways and Transportation, 17 Va. App. 166, 435 S.E.2d 659 (1993)**

The Tyger case stems from facts similar to those of APAC: a contractor pursued a claim against the owner on behalf of the subcontractor. The trial court, using APAC as its precedent, granted summary judgment in favor of VDOT on the "pass-through" claim. However, in granting Tyger Construction Co.'s

appeal of that decision, the court distinguished APAC, noting that Tyger's claim also included damages specific to Tyger and not exclusively subcontractor damages. To distinguish APAC, the Tyger court engaged in a detailed reading of Tyger's complaint, reciting numerous paragraphs in the decision. Ultimately, the court seemed to be persuaded by the language of the complaint, noting that Tyger, as well as its subcontractor, had suffered damages and the fact that the APAC "suit was styled `APAC-Virginia, Inc., ex. rel., etc.'" while Tyger brought the action in its own name. Tyger, 17 Va. App. at 169-71, 135 S.E.2d at 661-62.

What is Next

Though the General Assembly settled this issue as it pertains to VDOT contracts, questions still remain as to all other government contracts. Given the opposing holdings of the Tyger and APAC courts on what appeared to be similar fact patterns, ammunition is available for arguments on either side of this issue.

DESIGN-BUILD AND CONSTRUCTION MANAGEMENT CONTRACTS

INTRODUCTION

Design-Build Contracts Defined

A "design-build" or "turnkey" construction contract refers to a project in which the owner's responsibility is limited to "turning the key" in the lock to open the completed project. The contractor agrees to both design and construct the project to the point of readiness for operation or occupancy. Hawaiian Indep. Refinery, Inc. v. United States, 697 F.2d 1063, 1065 n.5 (Fed. Cir. 1983), cert. denied, 464 U.S. 816, 104 S. Ct. 73, 78 L. Ed. 2d 86 (1983). The owner has no responsibilities and the contractor assumes all risks incident to the creation and completion of the project including the risk for all losses and damages until the work is accepted by the owner.

Construction Management Contracts Defined

While the term "construction management" has several interpretations, it generally refers to an owner's use of a single entity that bridges the gap between pure design and pure construction activities. A construction manager ("CM") will typically become involved during the design stage to assist the owner with design review, cost projections and preliminary scheduling.

Then, during the bid stage, the CM will assist in the selection of the specialty contractors who will perform the construction. (These specialty contractors would typically be subcontractors to the single general contractor in the conventional construction contract arrangement.) These specialty "trade" contractors enter into separate contracts with the owner or with the CM as agent for the owner.

During the construction phase, the CM is responsible for overall scheduling, coordination and management of the construction work.

DESIGN-BUILD AND CONSTRUCTION MANAGEMENT CONTRACTS FOR VIRGINIA LOCAL GOVERNMENTS

Unlike many states that totally prohibit design-build contracts in

public contracting, Virginia allows their use with certain restrictions and special procedures. These restrictions are justified by public policy concerns. The procurement procedures for public contracts are designed to ensure fair

competition among the bidding contractors and guarantee the best value for the public body. These goals are difficult to accomplish with a design-build contract because there is no common project on which a comparison of bids can be based. As such, design-build contracts have been used sparingly in public contracting.

In Virginia, public bodies wishing to enter into a design-build contract were previously required to get the approval of the General Assembly. See VA. CODE ANN. § 11-41.2:1 (1993) (repealed effective January 1, 1997) (listing the specific projects on which public bodies have requested, and received, approval to enter into design-build or construction management contracts). However, recent modifications to the Virginia Public Procurement Act changed the procedures for obtaining authority to enter into these types of contracts.

Effective July 1, 1996, the Virginia Public Procurement Act was amended to grant authority to "any public body, other than the Commonwealth" to "enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis" if the public body complies with the requirements of § 11-41.2:2 and obtains the approval of the newly created Design-Build/Construction Management Review Board. VA. CODE ANN. § 11-41.2:2A (1996). However, the first line of the new legislation notes that "the competitive sealed bid process remains the preferred method of construction procurement for public bodies in the Commonwealth." VA. CODE ANN. § 11-41.2:2A (1996). This preference is made obvious by the extensive procedures required to obtain approval from the Review Board. Though not intended as a substitute for the detailed review of the revised Act, a summary of the procedures is provided here:

Any public body considering the use of a design-build or construction management contract for a particular project must:

- (1) Engage a licensed architect or engineer to advise the public body in the use of design-build or construction management contracts and assist in the preparation of the Request for Proposal (RFP);
- (2) Adopt general procedures to select, evaluate and award design-build or construction management contracts, consistent with the provisions of the Act, which include requirements for:

i specificity of the RFP,

The benefits of relying on one contractor are balanced by the fact that the owner cannot spread out liability to ensure a larger pool for recovery of any damage claims arising from defects or delays in performance. This reliance on one party also destroys many of the checks and balances present in traditional construction contracting.

The contractor on the other hand must initially prepare a bid based on specifications only listing the needs of the owner without any detailed designs. The contractor is then bound by that bid in its performance of the contract (absent a separate agreement, subsequent negotiations, or changes to the work), thus assuming nearly all of the risks associated with construction. But see, e.g., Glassman Constr. Co. v. Maryland City Plaza, Inc., 371 F. Supp. 1154, 1157-58 (D. Md. 1974) (stating that the risks assumed by the contractor under a "design-build" project are not so broad as to deny the contractor recovery for additional work not contemplated in the original contract). The prime contractor also assumes any responsibility and liability for any defective design specifications it produced or received from an architect or engineer.

CONSTRUCTION MANAGEMENT CONTRACTS IN PRACTICE

Advantages of Construction Management Contracts

By virtue of the CM becoming involved at an earlier stage of the project than is typical with a conventional general contractor arrangement, it is possible for some construction activities by the separate trade contractors to commence earlier than would otherwise be possible. As a result, CM arrangements are frequently associated with "fast track" contracting where preliminary construction activities can get underway while the design is still incomplete for later stages of construction.

As noted in earlier sections, the A/E is frequently engaged by the owner in conventional construction contracting to perform additional duties during construction such as inspection, change order administration, review of contractor submittals, etc. Proponents of CM arrangements assert that a CM is better qualified to perform such contract management functions for the owner than the A/E. Contractors making defective specification claims feel that an A/E with original design responsibility cannot provide the owner with objective advice on the merits of such

claims and that a CM will view such claims with an open mind.

The CM also becomes responsible for scheduling and coordinating the work of the trade contractors. While this appears to be a mere substitution of the CM for the general contractor, it is believed that the CM may be better positioned to serve the best interests of the owner in this regard.

Disadvantages of Construction Management Contracts

There are additional costs associated with adding a CM to the cast of characters in the construction process. CMs respond, of course, that their contribution will result in cost savings elsewhere to compensate for the additional cost.

It is also important to note that an owner using a CM with multiple trade contracts on the same project has lost the single-contact advantage of using a general contractor in the conventional method. While the CM is responsible for managing the multiple trade contractors, the potential for confusion and resulting disputes is increased.

This factor is particularly important with regard to scheduling and coordination. The CM is likely to find himself in an adversary position with the trade contractors with respect to coordinating their activities. The trade contractors may be better positioned to base claims on scheduling failures of a CM than would subcontractors linked through privity to a single general contractor. Because the CM is an agent for the owner, the costs resulting from such failures are more likely to become a liability of the owner.

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