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Contractors Need to Flag Unanticipated Costs As Soon As Project Delayed

by **Sands Anderson Marks & Miller Construction Law Team**

In *Commonwealth v. AMEC Civil, LLC*[1], the Virginia Court of Appeals applied a strict interpretation to the statutory notice requirements for claims arising during the construction of state highways. The effect is to narrow the ability of plaintiffs to recoup unanticipated costs when the nature of the work changes, even unavoidably, and the claim for additional payments is not properly noticed at the time of delay. As a result, the Court set aside most of the $21.2 million judgment previously awarded to AMEC for cost overruns during construction of the Route 58 Clarksville Bypass in Mecklenburg, Virginia.

The original $72.5 million contract required AMEC to widen 5.3 miles of Route 58 and construct 11 bridges in 41 months. Due to difficulties installing the supports for the John W. Tisdale Memorial Bridge and unusually high water levels, AMEC spent 19 additional months over two winter periods completing the project. Alleging that these delays were out of the company's control, AMEC sought to recover cost overruns from the Virginia Department of Transportation.

Section 33.1-386(A) of the Code of Virginia, which governs the submission of claims arising during the construction of state highways, requires that "*written notice* of the contractor's intention to file such a claim [be] given to the Department [of Transportation] at the *time of the occurrence* or *beginning of the work* upon which the claim and subsequent action is to be filed."[2] This statutory notice requirement imposes a two-pronged burden on contractors seeking adjusted compensation: (i) they must submit their intention in writing; and (ii) they must submit their intention promptly.

Written Notice

Although AMEC never gave the Department of Transportation (VDOT) written notice of the majority of its claims, a lower court decided that formal written notice was not required if VDOT had actual knowledge of the claims.[3] The lower court noted that the two parties "discussed the claim and followed the contractual procedures for resolving claims while work was in progress." According to the lower court, these discussions and proceedings "alerted VDOT of AMEC's claims, thus giving the Department the opportunity to take appropriate remedial measures." As such, the lower court concluded that, under section 33.1-386(A), AMEC was not required to formally alert VDOT of "exactly what it already knew."

The Court of Appeals disagreed. Citing extensive caselaw advocating the strict interpretation of similar statutory notice requirements, the Court concluded that "a legislature says in a statute what it means and means in a statute what is says." Therefore, the written notice requirement of section 33.1-386(A) necessitates communication—*in writing*—"[s]ignaling discontent with the agreed contract pricing" and declaring an "intent to assert an administrative claim for damages." The Court emphasized that this intention must be expressly communicated. Although the Court stopped short of requiring a formal legal pleading, it dispelled the notion that meeting minutes and progress memoranda could be sufficient to satisfy this notice requirement.[4]

Timely Notice

Relying heavily on *Dr. William E. S. Flory Small Business Development Center v. Commonwealth*[5], the Court of Appeals reinforced the requirement that claims under section 33.1-386(A) be timely. In *Flory*, the Small Business Development Center submitted invoices seeking reimbursement for six months of uncontracted services. Although the *Flory* Court acknowledged that these invoices constituted written notice, it held that the invoices did not satisfy the timeliness requirement because they arrived six months after work had begun. Following suit, the Court of Appeals dismissed AMEC's adjustment claims in those instances where AMEC gave written notice long after it had begun rendering the claimed services.

Although *Commonwealth v. AMEC Civil, LLC* deals exclusively with the construction of state highways, the Court of Appeals' decision may have broader implications for the construction industry. Many public contracts are

subject to similar (if not identical) statutory notice requirements. As a result, contractors in the public sector should expect similarly literal interpretations of their obligations. It is yet unclear whether these obligations will extend to contracts in the private sector as well.

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The construction team at Sands Anderson is committed to informing the construction professionals we know about court decisions, legal opinions and legislation that will impact the construction industry.

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We would like to note the excellent contributions of our legal research intern, Eric Howlett, whose skill and analytical abilities significantly improved this legal article.

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[1] *See* Commonwealth of Virginia v. AMEC Civil, LLC at *18 (Va. Ct. App. June, 16 2009) ("[W]e hold the [circuit] court erred as a matter of law in concluding AMEC gave timely 'written notice' of its 'intention to file' a claim 'at the time of the occurrence or beginning of the work upon which the claim and subsequent action is based.").

[2] Va. Code Ann. § 33.1-386(A) (2009) (emphasis added).

[3] *See* AMEC Civil, LLC v. Commonwealth of Virginia, 74 Va. Cir. 492, 501 (2008) ("Because form does not prevail over substance, AMEC's actual notice was a valid substitute for written notice since if effectively accomplished the purpose of the written notice requirement.").

[4] *Compare* Commonwealth of Virginia v. AMEC Civil, LLC at *11 ("Code § 33.1-386(A)'s written notice proviso does not require the sophistication of a legal pleading."), *with id.* at *18 (finding no precedent to support the contention that meeting minutes and memoranda satisfy the statutory notice requirement).

[5] *See* 261 Va. 230, 238–39, 541 S.E.2d 915, 919–20 (2001) (holding that invoices filed six months after work had begun did not satisfy the requirement that a claim be filed "at the time of the occurrence of the beginning of the work upon which the claim is based").