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CONSTRUCTION LAW

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26-1 INTRODUCTION

26-1.01 The Scope of This Chapter

This chapter addresses the basic principles of construction law generally applicable to public works projects in Virginia. The authors 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 opinions from the federal courts and the various Boards of Contract Appeals) is cited in support of propositions not yet addressed by the Virginia courts. *See, e.g., Brinderson Corp. v. Hampton Rds. Sanitation Dist.*, 825 F.2d 41 (4th Cir. 1987) (noting that, when interpreting a contract provision that takes language from a federally mandated contract provision, Virginia courts “would recognize the principle that use of the same words in contracts derives life and meaning from earlier consistent judicial and administrative construction of them”).

26-1.02 The Parties and Delivery Systems

An owner has several options for structuring the web of contracts, legal relationships, and attendant roles and responsibilities required for any significant construction project. The organization of these relationships is often referred to as the “delivery system” for the construction project. Selecting the appropriate delivery system and clearly delegating responsibilities among the participants is the critical first step in planning a construction project.

The most common project delivery system is referred to as the “design-bid-build” or “traditional” delivery system. In a design-bid-build project, the owner executes two separate contracts. The first contract is between the owner and a design professional, either an architect or engineer (referred to generally here as “A/E”). As part of that contract, the owner pays the A/E to develop detailed plans and specifications for construction. When the plans and specifications are complete, those documents form the basis of a bid package upon which various construction contractors bid. The owner then awards a separate construction contract, obligating the successful bidder to construct what is shown in the plans and specifications. Depending on the nature and complexity of the project, as well as its in-house resources, the owner may delegate to the A/E certain responsibilities during

¹ The authors want to recognize the extensive contributions of Randall C. Allen to the creation of this chapter. Mr. Allen was an original co-author with Mr. Cook and much of the existing chapter can be attributed to his efforts.

construction that would otherwise be performed by the owner, such as inspection, pay application approval, administration of change orders, etc.

Though the design-bid-build system described above is the most prevalent, it is certainly not the only option for structuring the relationships of the parties. For instance, the owner may contract with a number of prime contractors for different aspects of a construction project (referred to as a “multi-prime” delivery system). The primary advantage of a multi-prime arrangement is the speed with which work can be completed (i.e., different “bid packages” can be awarded for portions of the work, allowing design for other areas concurrent with the construction efforts in the initial bid packages). Potential disadvantages of this delivery system include extra administration and oversight costs for the owner, design and construction integration problems, and the significant potential for claims against the owner related to one prime contractor interfering with another. In most instances, the disadvantages of this approach outweigh its benefits. Thus, the multi-prime delivery system is not often employed by local governments.

Another delivery system involves contracting a construction management (CM) firm for the project. A CM firm is especially useful in multi-prime situations but is also often retained for design-bid-build arrangements if the owner believes that additional oversight of the project is required. The addition of a traditional CM firm generally does not impact the rights and remedies between the owner and contractor. However, there is a recent trend in the private sector toward “CM At-Risk” delivery systems, whereby the CM firm assumes some responsibility for the completion of the work within certain time, budgetary, or performance parameters.

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 26-5 for a discussion of the procedures for contracting with design-build and construction management firms under the Virginia Public Procurement Act. Under the design-build approach, the local government defines its needs and the general parameters of the work but leaves the detailed design to the contractor. The design-build delivery system is being employed increasingly by local governments across the country because of its two distinct advantages. First, the local government has a single point of responsibility if something goes awry on a design-build project, meaning that the local government is not left to decide who is at fault between the architect and the construction contractor, as they are the same party. Second, the design-build approach can save time because it allows for overlapping the end of the design effort with the beginning of the construction effort. In this way, the contractor can be working on the design for the mechanical and electrical systems while the foundations of the building are being constructed. The major disadvantages of the design-build approach lie in the increased overall price for the work (generally higher than a design-bid-build scenario) and the inability to accurately compare one bidder’s price to another when the final design is unclear at the bidding stage. Moreover, the owner must be willing to relinquish a certain amount of control over the project to effectively use the design-build process. The inability to relinquish such control can be a major hurdle to the use of a design-build delivery system.² This chapter is focused primarily on the relationship between the owner and prime contractor in the conventional arrangement where a single contractor is responsible for construction in accordance with plans and specifications prepared by the owner or an A/E.

26-1.03 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

² Another approach to public projects in Virginia is a Public Private Partnership (PPP). Localities typically look to this approach for public developments that have the potential for revenue generation, such as parking structures and highway toll lanes. Discussion of PPPs is beyond the scope of this chapter. See Chapter 11 Economic Development, section 11-5.09.

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 hodgepodge of ambiguous and conflicting terms likely to cause confusion and disputes. In fact, Va. Code § 15.2-1237 specifically requires that county attorneys or "other qualified attorney[s]" "approve as to form" all contracts entered into by a county. Further, Va. Code § 15.2-1239 provides, in part, that contracts that violate Article 2 of Title 15.2 are void, and the "head of such department or agency shall be personally liable for the costs." This review must also assure that the owner does not inadvertently delegate to a third party contract administration duties that may be best retained by the owner. For instance, the ubiquitous American Institute of Architects (AIA) construction contract gives the architect considerable authority that local governments may wish to retain, including, for instance, the final decision-making responsibility on all matters involving aesthetic effect. See AIA, Form A201 (2017), 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 supplementation 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, potential disputes, and unexpected costs.

26-1.04 Other Sources of Information

26-1.04(a) Standard Form Contracts/Standard Clauses

The AIA [publishes](#) an extensive set of contract documents for construction projects of all types. 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 includes 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 project's design.

26-1.04(b) Virginia Public Procurement Act

[Chapter 25, Public Procurement Law](#), provides a detailed discussion of the Virginia Public Procurement Act, Va. Code § 2.2-4300 et seq., which governs the entire field of public contracting in Virginia. Though references to that Act are included below, this chapter is generally intended to address issues unique to construction contracts. Thus, review of the overall requirements of the Virginia Public Procurement Act is essential.

26-2 OWNER AND CONTRACTOR

26-2.01 Introduction

Generally, the most complex of the construction site relationships is 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.

26-2.02 Owner's Implied Duties and Warranties

26-2.02(a) 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 [26-3.02\(c\)](#) for a detailed discussion of this implied warranty (a.k.a. the *Spearin* Doctrine).

26-2.02(b) 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 *Cent. Lunatic Asylum v. Flanagan*, 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, 121 S.E.2d 359 (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 the duty to coordinate by inserting disclaimer provisions in their contracts with 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.

26-2.03 Contractor's Duties and Warranties

26-2.03(a) Duty of Cooperation and Non-Interference

The duty of cooperation and non-interference applies to the contractor as well as the owner. See section [26-2.02\(b\)](#). In the contractor's case, the duty to cooperate extends to the subcontractors too. See, e.g., *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717 (4th Cir. 2000) (failure to inform subcontractors of restrictions in funding of change orders prevented application of "pay when paid" clause); *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).

26-2.03(b) Implied Warranty of Workmanship and Materials

The contractor warrants that the work undertaken will be completed in a workmanlike manner, using adequate materials. See *Mann v. Clowser*, 190 Va. 887, 59 S.E.2d 78 (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).

26-2.03(c) 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.

26-2.03(d) 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. The *Pebble* court also found the contractor failed in its duty to coordinate the work.

26-2.03(e) Liability for Satisfactory Performance of Subcontractor's Duties

Construction contracts executed on or after January 1, 2023, in which there are at least one general contractor and one subcontractor, must include a provision that any general contractor is liable to any subcontractor for satisfactory performance of the subcontractor's duties under the contract. Va. Code § 11-4.6(B)(2) (formerly § 11-4.6(C)). The general contractor must pay the subcontractor within sixty days of receipt of an invoice following satisfactory completion of the invoiced work or within seven days after receipt of payment from the owner to the general contractor for the invoiced work, whichever is earlier. *Id.* If the contractor withholds all or part of the amount invoiced by any subcontractor because of an alleged breach of contract, the contractor must notify the subcontractor within fifty days of receipt of such invoice, in writing, specifically identifying the contractual non-compliance and the amount being withheld. *Id.* A contractor's failure to make timely payment shall result in interest penalties consistent with Va. Code § 2.2-4355, which provides for interest penalties on amounts owed by a state agency to a vendor. *Id.* Every subcontract between a subcontractor and a lower-tier subcontractor or supplier, of any tier, shall contain the identical payment, notice, and interest requirements as those provided in Va. Code § 11-4.6(B)(2), unless the contract is for the construction of a single-family home or the value of the contract is \$500,000 or less. *Id.*

26-2.03(f) Liability for Proper Wages

For contracts entered into on or after July 1, 2020, employees of a subcontractor are deemed to be employees of the general contractor. Va. Code § 11-4.6(C)(2) (formerly § 11-4.6(E)). Thus, general contractors are jointly and severally liable with their subcontractors at any tier for wages due the subcontractors' employees, if the general contractor knew or should have known that the subcontractor was not paying his employees all wages due. Va. Code § 11-4.6(C)(1), (4) (formerly § 11-4.6(D), (G)). Unless otherwise provided by contract, the subcontractor shall indemnify the general contractor for wages, damages, penalties, etc., owed as a result of the subcontractor's failure to pay wages. Va. Code § 11-4.6(C)(3) (formerly § 11-4.6(F)). This law does not apply to construction of a single-family home or construction contracts of \$500,000 or less, Va. Code § 11-4.6(C)(4) (formerly § 11-4.6(G)), or to persons solely furnishing materials. Va. Code § 11-4.6(A). If the contractor (or other employer) is found to have knowingly and willfully failed to pay wages, the employee may be awarded triple the amount of wages due, plus reasonable attorney's fees and costs. Va. Code § 40.1-29(J). As evidence in such a suit, a contractor may offer a written certification from the subcontractor that the subcontractor and each of his sub-subcontractors paid their employees proper wages. Va. Code § 11-4.6(C)(4) (formerly § 11-4.6(G)).

26-2.04 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, a few standard provisions that appear (in some form) in most construction contracts 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 turns on the wording of the clause in question and the particular factual circumstances.

26-2.04(a) 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 its technical appearance. The scope of work provides the boundary within 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 strong and, more importantly, 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. For example, the scope of work would include the dimensions and reinforcement requirements for a poured-in-place concrete wall. The way in which the wall is to be built (e.g., the type of formwork necessary to construct the wall) is within the contractor's purview as a "method and manner" of construction.

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 particular specification sections is an effective method of assigning work because it allows the owner to easily keep track of what work has and has not been contracted.

An undefined scope of work inevitably results in challenges as to what is "beyond the scope" of a contractor's work. See *James River Iron, Inc. v. Turner Construction Co.*, 13 Cir LR17633 (City of Richmond Cir. Ct. Sept. 30, 2004) (although definition section of contract clearly defined a term, the frequent use of the term elsewhere in the contract in a manner inconsistent with the definition created an ambiguity such that the court looked to the parties' actions to determine the proper meaning of the term).

A shared understanding of the contractor's responsibilities under the contract eases the burden of the change order process. See section [26-3.03](#) for a discussion of changes to the work.

26-2.04(b) Scheduling Provisions

Depending on the relative complexity of the project, a provision imposing scheduling requirements upon the contractor should be included. It is important to address scheduling issues thoroughly and clearly in the construction contract. A contract should specify a schedule methodology and should clearly establish the contractor's requirements for submitting the schedule. Because (as discussed above) 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.

26-2.04(b)(1) Bar Charts

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

26-2.04(b)(2) Critical Path Method

The Critical Path Method (CPM) scheduling technique is preferred in more complex and costly construction projects. 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) and 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, if not completed within the allotted time period, will result in delay to the entire project. Activities not on the critical path are said to have "float." If an activity has fifteen days of float, it can be completed up to fifteen days beyond the early completion date for that activity without affecting the project's final completion date. See *Joseph E. Bennett Co.*, GSBCA 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 with other techniques, it allows for detailed and precise oversight of construction progress at all stages.

26-2.04(b)(3) 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 and compare the performance progress with the completion schedules to prevent the contractor(s) from missing deadlines. See, e.g., *Nelson v. Virginia*, 235 Va. 228, 368 S.E.2d 239 (1988) (involving an architect's contractual duty to monitor performance progress). If an interim milestone or final completion date is in danger of slipping, efforts are required to overcome the delay by adjusting activity durations, resequencing activities, and/or increasing resources such as manpower or equipment.

26-2.04(c) 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 in section 26-3.01.

26-2.04(d) Payment Provisions

All construction contracts should include specific procedures governing how and when payments to the contractor are to 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. Such a provision ensures that the owner is promptly made aware of any schedule problems.

The contractor is generally paid on a percent-complete basis; monthly payment requisitions are made for the work actually completed during the prior month. The owner's engineer or other authorized representative is typically responsible for verifying the percent complete and certifying the payment amount requested. Further, a specified percentage of each authorized payment is held by the owner as retainage until project completion. Under the Virginia Public Procurement Act, public owners are not permitted to hold any more than five percent retainage, and the contractor is subject to this limitation in contracting with its subcontractors. Va. Code § 2.2-4333. The Western District of Virginia has held that this provision cannot be waived and is incorporated by law into any relevant contract or subcontract for construction under the Virginia Public Procurement Act. *S. End Constr. Inc. v. Tom Brunton Masonry Inc.*, No. 7:12cv390 (W.D. Va. Feb. 25, 2013).

26-2.04(e) Suspension of Work Clause

The owner/contractor contract must contemplate the delays and interruptions that are virtually inevitable in complex construction projects. A typical Suspension of Work clause 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 allows 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 recommended clause above insulates the local government from liability for any contractor costs incurred during a suspension of reasonable duration. The inclusion of the caveat on "unreasonable" periods should make such a provision consistent with the Virginia Public Procurement Act prohibition regarding "no-damage-for-delay" provisions, which are discussed in section [26-2.04\(k\)](#). The determination of whether a particular duration constitutes a "reasonable" amount of time for a suspension of work depends on several circumstances, including the overall project performance period and the status of work at the time of suspension.

26-2.04(f) Time Extension Clause

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

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, 244 S.E.2d 774 (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, because the strike was not excused as being beyond the contractor's control and without its fault or negligence, the contractor was liable for damages caused by the delay in performance. *Id.*

26-2.04(g) Termination for Default Clause

The Virginia local government construction contract should include two options for terminating contractors: Termination for Default and Termination for Convenience. These two options have vastly different implications for both the local government and the contractor. The Termination for Default provision is addressed in this section; the Termination for Convenience provision, of equal importance, is addressed in section [26-2.04\(h\)](#).

A Termination for Default clause should be specific in defining the circumstances under which such termination is appropriate, the process for termination, and the remedies available to the local government upon termination of the contractor. A typical clause provides as follows:

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:
 - a. The filing by the Contractor of a voluntary petition in bankruptcy or insolvency, or a petition for reorganization;
 - b. 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;
 - c. The appointment of a receiver for all or any substantial portion of the property of the Contractor; and
 - d. 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.

Certain elements of this sample provision merit discussion, and are addressed below.

26-2.04(g)(1) Drastic Measure

As the most drastic remedy available to the owner, terminating the contractor for default is generally done 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 requires a new and likely time-consuming procurement action. Contractors are very likely to challenge any termination for default because (1) the "responsibility" determinations on public works projects generally require contractors to disclose any prior instances of default terminations and (2) a default termination may affect a contractor's ability to obtain future performance bonds. These two factors provide the contractor ample incentive to initiate litigation in response to a default termination.

26-2.04(g)(2) Notice to the Contractor

Due to the drastic nature of a termination for default, the owner is generally required to give notice to the contractor of its intentions to terminate the contract. In the sample clause provided above, the owner is required to give written notice to the contractor ten days before exercising the termination right. This "cure period" gives the contractor an opportunity to avoid the termination by either (1) demonstrating that it 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. Including a cure provision in the local government construction contract is highly recommended.

26-2.04(g)(3) 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 Cnty.*, 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); *Siegfried Constr., Inc. v. Gulf Ins. Co.*, No. 98-2808 (4th Cir. Feb. 2, 2000) (unpubl.) (unless expressly stated in the contract or bond, termination is not a requirement for a finding of default).³ 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 quick completion of the job. If reprocurement is required, all reasonable costs of the reprocurement are paid by the defaulting contractor. Care must be taken to preserve the owner's rights under the performance bond. First, the bond itself must be examined to identify all conditions necessary to obtain relief. For instance, the bond is likely to include express requirements for notice of default by the contractor ("principal" under the bond) and perhaps requirements that meetings including the surety be scheduled in advance of the default. Second, the Virginia Public Procurement Act requires that suit on the performance bond be initiated within five years after completion of the contract, which

³ In *XL Specialty Insurance Co. v. Commonwealth*, 269 Va. 362, 611 S.E.2d 356 (2005), the Supreme Court held that while performance bonds and construction contracts must be read together to determine their scope, the mere performance by the surety of its duties under the bond does not, even under principles of equitable subrogation, establish a direct contractual relationship between the surety and the owner. Similarly, in *Environmental Staffing Acquisition Corp. v. B & R Construction Management*, 283 Va. 787, 725 S.E.2d 550 (2012), the Court held that while subcontractors are third-party beneficiaries to the payment bond mandated by Va. Code § 2.2-4337, that statute does not operate to automatically make them third-party beneficiaries to the underlying contract.

occurs upon final payment to the contractor. Va. Code § 2.2-4340. If a final certificate of occupancy or written final acceptance of the project is issued prior to final payment, the five-year period begins no later than twelve months after issuance of the certificate of occupancy or written final acceptance. *Id.* Any failure to comply strictly with the bond's terms and conditions will be exploited by the surety to avoid liability. Note also that in *Johnson Controls Inc. v. Norair Engineering Corp.*, 86 Va. Cir. 138 (Fairfax Cnty. 2013), a circuit court held that the principal under the bond must be specifically named as a necessary party in the count that addressed enforcement of the bond.

26-2.04(g)(4) Response by the Contractor

The contractor can contest the owner's notice of intention to terminate for default 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 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.

26-2.04(h) 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 Transp.*, 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, 114 S.E.2d 608 (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).

26-2.04(i) 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 requires the contractor to conduct regular inspections and control the quality of performance. Construction contracts 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 subcontractors at any tier. 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.

26-2.04(i)(1) Voluntary vs. 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 Insurance Co. v. City of 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 performance bond surety. Therefore, the court held that the surety was released from its obligations under a performance bond.

26-2.04(i)(2) Specific Inspection Provisions

The general inspection requirements set forth above can be supplemented with specific requirements tailored to the particular project. This supplementation is appropriate in cases where certain aspects of the construction merit special attention. For instance, a county having a water treatment plant constructed may wish to conduct an inspection of the pumps or other specialized equipment to be incorporated into a plant and can specify such an inspection in the contract documents. Such provisions can dictate everything from the extent, locale, and timing of the inspections to the specific administrative form to be completed during the inspections.

26-2.04(i)(3) Over-Inspection

Despite the broad authority for owner inspections, the owner is limited by its implied duty of cooperation and non-interference. Overzealous inspections may be considered interference with the contractor's work and lead to contractor claims for delay or loss of labor productivity. See *Roberts v. United States*, 357 F.2d 938, 174 Ct. Cl. 940 (1966).

26-2.04(j) Changes Clause

Due to the almost inevitable necessity to make changes to the scope of work after the contract award, every construction contract must have a mechanism for incorporating such changes. The Changes clause is discussed at length in section [26-3.03](#).

26-2.04(k) “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. Thus, the contractor is forced to absorb all of the costs associated with the owner’s delay, such as extended project and home office overhead, labor or material escalation, and extended equipment rental costs. 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 § 2.2-4335. 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 § 2.2-4335. The Virginia Supreme Court rejected local government attempts to limit the scope of the prohibition in *Blake Construction Co. v. Upper Occoquan Sewage Authority*, 266 Va. 564, 587 S.E.2d 711 (2003). The Court held that the parties could not contractually limit the definition of “unreasonable delay” to acts of bad faith, maliciousness, gross negligence, or abandonment of the contract. Only the limitations expressed in the statute—that the delay was within the owner’s control and was unreasonable—could be considered. Unreasonableness is to be determined by a court based on the facts and circumstances of each case. The Court also noted that notice restrictions, because they are expressly allowed by Va. Code § 2.2-4335(B)(2), may act as a condition precedent.

A similar attempt to limit a contractor’s delay damages was rejected by the Virginia Supreme Court in *Martin Brothers Contractors, Inc. v. Virginia Military Institute*, 277 Va. 586, 675 S.E.2d 183 (2009). The contract included a damage limitation clause excluding certain field office costs and home office overhead from delay claims. VMI argued that the exclusions were permissible “liquidated damages” under the Public Procurement Act. The Supreme Court reaffirmed *Blake* and held the contract provisions operated as an absolute bar to most of the contractor’s delay expenses. As such, the provisions were void and unenforceable as against public policy by virtue of Va. Code § 2.2-4335.

The same section of the Public Procurement 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 § 2.2-4335(C). See *Upper Occoquan Sewage Auth. v. Blake Constr. Co.*, 266 Va. 582, 587 S.E.2d 721 (2003) (public body cost claim disallowed because there was no judicial determination that delay claim had no basis in law or fact). Conversely, a public body is similarly obligated to pay a percentage of the contractor’s costs if the contractor contests a denial of a delay claim and the public body’s denial is determined through litigation or arbitration to have been made in bad faith. These provisions are obviously intended to serve as major deterrents to the filing of excessive and unjustified delay claims by contractors, or the unjustified denial of delay claims by public

bodies. As such, specific reference to these provisions in the construction contract might be advisable.

26-2.04(l) Hold Harmless Provisions in Design Contracts

Any provision in a contract between an architect, engineer, or other design professional and a public body relating to the planning or design of a building or other construction project that purports to indemnify or hold harmless the public body against liability is void and unenforceable, except to the extent that it indemnifies the public body against liability for damage arising out of negligent, reckless, or intentionally wrongful conduct of the architect or engineer. Va. Code § 11-4.4. Likewise, such contracts cannot impose on one party a duty to defend the other party. *Id.*

26-2.04(m) Wages

Contractors and subcontractors under any public contract with a state agency, or with a locality that has adopted an ordinance requiring the payment of prevailing wages, are required to pay wages at the prevailing wage rate as determined by the Commissioner of Labor and Industry. Va. Code §§ 40.1-6(6); 2.2-4321.3. This applies to all wages, salaries, benefits, and other remuneration, and to any mechanic, laborer, or worker employed, retained, or otherwise hired to perform services in connection with the public contract. Va. Code § 2.2-4321.3. It does not apply to public works contracts of \$250,000 or less. Va. Code § 2.2-4321.3(J). Employers must keep records of hours worked and wages paid for six years. Va. Code § 2.2-4321.3(H). Any contractor or subcontractor who willfully employs any mechanic, laborer, or worker under the public contract at a rate less than the prevailing wage rate is guilty of a Class 1 misdemeanor and shall be liable to the worker for all wages due plus eight percent interest. Va. Code § 2.2-4321.3(D). Further, the contractor or subcontractor will be barred from bidding on public contracts until full restitution has been made. *Id.* Any interested party may bring a suit alleging violation of the prevailing wage statute and, if successful, is entitled to reasonable attorney's fees and costs. Va. Code § 2.2-4321.3(E).

26-2.04(n) Disputes Provisions

The possibility of disputes should be anticipated in the contract documents. Unresolved disputes can cause missed performance schedules and prolonged delays, which explain the requirement of the Virginia Public Procurement Act that all public contracts include procedures for handling contract claims. Va. Code § 2.2-4363. The procedures, which must include a time limit for a decision, may be specified in the contract or incorporated by reference. If the public body has established administrative proceedings pursuant to Va. Code § 2.2-4365, such procedures must be in the contract or incorporated by reference. Va. Code § 2.2-4363(B). If the public body has not adopted procedures for consideration of claims, Va. Code § 2.2-4363(C) provides default procedures. See section [25-8.08](#) of Chapter 25, Public Procurement Law, for a more thorough discussion. Any contract provision mandating that any action on a contract for construction within the Commonwealth be brought outside the Commonwealth is unenforceable. Va. Code § 8.01-262.1.

Several dispute resolution methods are available. Negotiated settlements, arbitration, mediation, administrative review, and litigation are common techniques utilized 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.

26-2.04(n)(1) Authority to Use Alternative Dispute Resolution Methods

Local government attorneys are well aware of the Dillon Rule, limiting 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. Sch. Bd. of Fairfax Cnty.*, 980 F.2d 253 (4th Cir. 1992) and *Spotsylvania Cnty. Sch. Bd. v. Sherman Constr. Corp.*, 14 Va. Cir. 333 (Spotsylvania Cnty. 1989) (both cases voiding arbitration clauses in construction contracts because Va. Code § 22.1-71, which empowers school boards to sue and be sued on contracts, does not expressly provide for arbitration).

In 2002, the General Assembly enacted the Administrative Dispute Resolution Act, Va. Code §§ 2.2-4115 to 2.2-4119. If the parties agree, local governments may use dispute resolution procedures (except arbitration) to “narrow or resolve any issue in controversy.” Va. Code § 2.2-4116(A). A decision by a public body to participate in a specific dispute resolution proceeding shall be within the discretion of the public body and is not subject to judicial review. Va. Code § 2.2-4116(B). An agreement arising out of any dispute resolution proceeding shall not be binding upon a public body unless the agreement is affirmed by the public body. Va. Code § 2.2-4116(C). Most communications and records relating to alternative dispute resolution are exempt from FOIA. Va. Code §§ 2.2-4119 and 2.2-3705.1(11).

Additionally, Va. Code § 15.2-1404 empowers localities to enter into agreements for the arbitration of disputes. 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 § 2.2-4366. 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 § 2.2-514, as applicable. Alternative dispute resolution procedures entered into by school boards shall be nonbinding.” Va. Code § 2.2-4366.

26-2.04(n)(2) 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 necessarily that it is binding arbitration. If arbitration is selected for dispute resolution in a construction contract, the clause should specify that the arbitration award is binding to avoid the risk of subsequent litigation costs. Local governments electing binding arbitration for construction dispute resolution should consider incorporating into the clause the Construction Industry Rules of the American Arbitration Association.

The interpretation of the arbitration provision in a construction contract, including determinations as to its scope, is the province of the courts. Under *Doyle & Russell, Inc. v. Roanoke Hospital Association*, 213 Va. 489, 193 S.E.2d 662 (1973), the parties are entitled to pre-submission judicial determination of arbitrability of the issues before mandatory arbitration begins. *Id.* (stating that additional language in the contract limited the broad mandatory arbitration clause, so that only findings of fact were subject to arbitration). See *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849 (4th Cir. 2010), for a discussion of the limited scope of judicial review of arbitration awards.

26-2.04(n)(3) Mediation

In recent years, the high cost of litigation has caused a tremendous increase in the use of mediation for dispute resolution. This trend 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 experienced in construction dispute resolution; (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 binding decision. Instead, the mediator assists the parties in achieving a mutual agreement on their own. As a result, the public body and contractor each must enter mediation with a strong commitment to resolving their differences through collaborative problem solving.

26-2.04(n)(4) Administrative Review

Where litigation is selected as the ultimate dispute resolution method, public bodies generally use an internal mechanism to review contractor claims and, if possible, resolve them before litigation commences. This administrative review is often a condition precedent to the initiation of litigation by the contractor. See Chapter 25, Public Procurement Law, section [25-13.03](#) for a discussion of the administrative review process.

26-2.04(n)(5) Notice Requirement

Most dispute provisions 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 [26-2.04\(o\)](#), which specifically discusses notice requirements.

26-2.04(n)(6) Claims Must Be Submitted in Writing

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

26-2.04(n)(7) Requiring Continued Prosecution of the Work

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

26-2.04(n)(8) 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 Virginia 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 § 2.2-4363(B). A contract provision that the public entity had thirty days to decide on a claim before the contractor could file suit did not mean that a default denial occurred if the public entity failed to render a decision within thirty days, and thus the statute of limitations had not run. *Type, Inc. v. George Mason Univ.*, 59 Va. Cir. 282 (Fairfax Cnty. 2002).

26-2.04(o) 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 or anything that might become a claim, etc., and get authorization before beginning extra work for which the contractor requests compensation.

26-2.04(o)(1) 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 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 apprise him of certain information as soon as it becomes known.

Beyond having the information, the notice and authorization requirements provide the owner with the opportunity to examine the problem, take steps to eliminate or mitigate

costs, investigate funding, collect information, keep records, suggest alternatives, and otherwise provide input to the situation.

26-2.04(o)(2) Statutory Notice Requirements

Section 2.2-4363 of the Virginia Public Procurement Act requires that “[c]ontractual claims, whether for money or other relief, shall be submitted in writing no later than 60 days after receipt of final payment; however, written notice of the contractor’s intention to file a claim shall be given at the time of the occurrence or at the beginning of the work upon which the claim is based.” In addition, a suit or invocation of administrative procedures appealing the public body’s final decision on a claim must be filed within six months of the date of the final decision on the claim. Va. Code § 2.2-4363(E); *Galaxy Constr., Inc. v. City of Chesapeake*, 107 Va. Cir. 277 (Chesapeake Cnty. 2021) (granting locality’s plea in bar to all counts of breach of contract, breach of good faith and fair dealing, and unjust enrichment because contractor did not file suit within six months of termination of the contract).

In *Commonwealth v. AMEC Civil, LLC*, 280 Va. 396, 699 S.E.2d 499 (2010) (VDOT case), the Court emphasized the importance of the statutory notice requirement. Timely submission of the claim in accordance with the statute is a condition precedent to bringing an action and thus a mandatory prerequisite to filing suit. It is not merely a procedural requirement, but a part of the newly created substantive cause of action and accordingly an element of the contractor’s prima facie case. Actual notice cannot substitute for written notice or make later written notice timely. The Court held that a written record of the minutes of meetings cannot constitute notice; a written document must clearly give notice of the contractor’s intent to file its claim for damages and must be given to the governmental entity by letter or equivalent communication directed to the entity at the appropriate time.

The trigger for the “time of occurrence” or “beginning of work” depends on the specific circumstances that arise during construction. In *AMEC*, the Court found that the time of the denial of a request for additional compensation was the “time of occurrence.” The Court also found that the when the parties developed a “legitimate dispute” over delay costs constituted the “time of occurrence.”

Even if the claims provision of the contract does not include its own notice requirement, the contractor is still bound to give notice under the Act.⁴ See *MCI Constructors v. Spotsylvania Cnty.*, 62 Va. Cir. 375 (Spotsylvania Cnty. 2003) (Procurement Act notice provision prevails over general notice provisions of § 15.2-1246; the triggering “occurrence” took place when proposed change orders were denied, disallowed, or disapproved, in whole or in part); cf. *F.T. Evans, Inc. v. Sci. Museum of Va.*, 61 Va. Cir. 317 (City of Richmond 2003) (when dispute over payment does not arise until the work is completed, notice is the claim itself); *D.R. Hall Constr. Inc. v. Spotsylvania Cnty. Bd. of Sup’rs*, 40 Va. Cir. 260 (Spotsylvania Cnty. 1996) (specific Procurement Act notice provisions prevail over those of § 15.2-1246 regarding notice for general claims against the county; a locality is exempt from § 2.2-4363 notice requirements if it adopts its own procurement policies and procedures regarding contractual claims; the notice provisions of the locality’s ordinance supersede conflicting notice provisions in the contract).

If a contract is subject to both § 15.2-1246 (no suit may be filed against a county unless a notice of appeal and bond are filed with the county clerk within thirty days of disallowance or notice of disallowance of the claim) and § 2.2-4363(E) of the Virginia Public Procurement Act (suit required within six months of disallowance), the Virginia Supreme

⁴ Because of a procedural failure by the contractor, the Supreme Court would not consider the merits of an argument that the triggering occurrence in a contract notice provision (which closely followed the wording of Va. Code § 2.2-4363) was the subsequent contract price change order, not the initial work order reducing the scope of the project. *Blake Constr. Co. v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 587 S.E.2d 711 (2003).

Court has held that the provisions are complementary. *Viking Enter., Inc. v. Cnty. of Chesterfield*, 277 Va. 104, 670 S.E.2d 741 (2009) (contractor's suit properly dismissed for failure to comply with notice and bond requirements of Va. Code § 15.2-1246); *see also Cnty. of Albemarle v. Camirand*, 285 Va. 420, 738 S.E.2d 904 (2013) (service of a single document entitled "Appeal Bond" did not comply with the statutory written notice requirement).

26-2.04(o)(3) Judicial Enforcement of the Requirements

In general, Virginia courts protect and enforce the written agreement of the parties. *See, e.g., Smith v. Smith*, 3 Va. App. 510, 351 S.E.2d 593 (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, as illustrated by the following cases:

1. *Commonwealth v. AMEC Civil, LLC*, 280 Va. 396, 699 S.E.2d 499 (2010), discussed in section 26-2.04(o)(2).
2. *Carnell Constr. Corp. v. Danville Redev. & Hous. Auth.*, 745 F.3d 703 (4th Cir. 2014), in which the Fourth Circuit, interpreting state law and citing *AMEC*, held that the notice requirements of the contract were mandatory procedural requirements barring all claims for additional compensation for which notice was not properly given.
3. *SNC-Lavalin America, Inc. v. Alliant Techsystems Inc.*, No. 7:10cv00540 (W.D. Va. Oct. 13, 2011) (granting defendant summary judgment on a change claim for which plaintiff had not provided timely, contractually required written notice).
4. *TC MidAtlantic Dev. v. Commonwealth*, 280 Va. 204, 695 S.E.2d 543 (2010) (affirming the trial court's dismissal of a complaint because contractor did not sufficiently plead that it had satisfied the contractual notice provisions required as conditions precedent to the filing of a legal action). *But see Metra Indus. Inc. v. Rivanna Water & Sewer Auth.*, No. 3:12cv00049 (W.D. Va. Feb. 15, 2013) (in a diversity action, federal pleading rules apply and a party is not required to allege specific factual matters with respect to the satisfaction of conditions precedent).
5. *Flory Small Business Dev. Ctr. v. Commonwealth*, 261 Va. 230, 541 S.E.2d 915 (2001) (holding that submission of invoices more than six months after the occurrence upon which the claim was based did not comply with the requirement of former Va. Code § 11-69(A) [now § 2.2-4363] that written notice of intent to file a claim must be submitted at the time of the occurrence or beginning of the work upon which the claim is based).
6. *Welding, Inc. v. Bland Cnty. Serv. Auth.*, 261 Va. 218, 541 S.E.2d 909 (2001) (finding an allegation that notice was provided as evidenced through minutes of progress meetings was sufficient to meet pleading requirements regarding contractual provision of notice as condition precedent as required by former Va. Code § 11-69(A) [now § 2.2-4363]).
7. *Atl. & Danville Ry. v. Del. Const. Co.*, 98 Va. 503, 37 S.E. 13 (1900), in which a contractor's claim for additional costs was denied because of its failure to get the contractually required authorization before proceeding with extra work. The Court noted 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."

8. *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp. 906 (E.D. Va. 1989) (barring contractor's claims for failure to comply with a seven-day notice provision and an authorization provision).
9. *Gen. Excavation, Inc. v. Fairfax Cnty. Bd. of Sup'rs*, 33 Va. Cir. 120 (Fairfax Cnty. 1993) (denying contractor's claims for failure to provide the contractually and statutorily required notice of the events giving rise to the claims).
10. *R.J. Crowley Inc. v. Cnty. Sch. Bd. of Fairfax Cnty.*, 41 Va. Cir. 55 (Fairfax Cnty. 1996) (holding that written updates of the status of a project were not sufficient notice of intent to file claim).
11. *United States v. Centex Constr. Co.*, 638 F. Supp. 411 (W.D. Va. 1985); *Serv. Steel Erectors Co. v. SCE, Inc.*, 573 F. Supp. 177 (W.D. Va. 1983).

26-2.04(o)(4) 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. Department of Highways*, 206 Va. 143, 142 S.E.2d 524 (1965), waiver and estoppel clearly do not apply "to the rights of a State when acting in its sovereign or governmental capacity."

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 Erectors Co. v. SCE, Inc.*, 573 F. Supp. 177 (W.D. Va. 1983). A waiver can be implied only 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, 137 S.E.2d 860 (1964); *Radiance Capital Receivables Fourteen, LLC v. Foster*, 298 Va. 14, 833 S.E.2d 867 (2019). An express waiver also must reflect both elements: knowledge of the right's existence and the intent to relinquish it. *Hensel Phelps Constr. v. Thompson Masonry, Inc.*, 292 Va. 695, 791 S.E.2d 734 (2016). In *Hensel Phelps*, the prime contractor settled with the Commonwealth over defective work discovered more than five years after contract performance. (By operation of a statute then in effect, the Commonwealth was not subject to the statute of limitations in claims regarding construction contracts.)⁵ The prime contractor filed a breach of contract claim against the subcontractors who performed the defective work. The Court found that the while the subcontracts incorporated the prime contract by reference, a general incorporation provision is insufficient to expressly waive a limitations period, as it does not expressly acknowledge the right to a limitations period or intent to waive that right.⁶

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

⁵ In response to *Hensel Phelps*, the 2020 General Assembly imposed a statute of limitations of fifteen years for a claim brought by the state regarding a construction contract. Va. Code § 2.2-4340.1.

⁶ Subsequently, the Code was amended to permit waivers of the statute of limitations for claims by a public body arising from a construction subcontract. Va. Code § 8.01-232.

abandon its rights under the contract. *Service Steel Erectors Co. v. SCE, Inc.*, 573 F. Supp. 177 (W.D. Va. 1983).

While the standard is not easy to meet, the court in *Ross Engineering 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.”

26-3 POTENTIAL PERFORMANCE PROBLEMS

26-3.01 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.

26-3.01(a) 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 are assumed by the prime contractor. See *United States v. Spearin*, 248 U.S. 132, 39 S. Ct. 59 (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 between undertaking expensive site investigations before submitting the bid or reducing their risk by simply including contingency amounts in their bid price. Contractors often choose the latter. Thus, many owners have responded by including some type of risk-shifting provision in construction contracts, in an effort to avoid inflated bids.

26-3.01(b) Risk-Shifting Clauses: Owner Assumes Liability

A Differing Site 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. The Supreme Court of Virginia has stated that the purpose of the differing site conditions clause is to shift the risk of adverse subsurface or latent physical conditions from the contractor, who normally bears such risk under a fixed-price contract, to the government, in order to ensure low, competent bids. *Commonwealth v. AMEC Civil, LLC*, 280 Va. 396, 699 S.E.2d 499 (2010); see also *Foster Constr. C.A. & Williams Bros. Co. v. United States*, 435 F.2d 873, 193 Ct. Cl. 587 (1970). As such, these clauses have become normal practice in the construction industry. A typical Differing Site Conditions clause provides as follows:

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 items (a) and (b), respectively, in the above sample clause.

26-3.01(c) Type I Differing Site Conditions

A Type I differing site condition exists when subsurface or latent physical conditions at the construction site *differ materially* from those *indicated* in the contract documents or implied from the language or methods described in the contract. To determine whether a Type I differing site condition exists, the court must first interpret the contract, which is a legal inquiry reviewed de novo on appeal, and then engage in a factual inquiry. *P.J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913 (Fed. Cir. 1984). The contract documents must therefore indicate the conditions that the contractor should have encountered. The contract "indications" are generally contained, if at all, in geotechnical data, such as the results of soil borings taken during the design phase and included with the contract documents. See *S.T.G. Constr. Co. v. United States*, 157 Ct. Cl. 409 (1962); see also *Mojave Enters. v. United States*, 3 Cl. Ct. 353 (1983) (where the claimant was denied compensation because the defendant had made no express representation of the amount of rock to be excavated). In *Haymes Brothers v. RTI International Metals, Inc.*, No. 4:10CV00005 (W.D. Va. June 17, 2011), the contract provided that the owner would grant an equitable adjustment "only in the event that soils and rock of a type(s) different than those known to contractor are encountered." The court found that "type" could refer either to the composition of the subsurface materials or to the layout and quantity of the subsurface materials, or to both, and was therefore an ambiguous term and the contractor was entitled to an adjustment when a large substratum of rock was encountered that was not indicated by the borings.

To establish a Type I differing site condition claim, the contractor must show:

- a subsurface or latent physical condition
- materially different
- from representations in the contract documents
- upon which the contractor reasonably relied

See *Foster Constr. C.A. & Williams Bros. Co. v. United States*, 435 F.2d 873, 193 Ct. Cl. 587 (1970); *Brechan Enters., Inc. v. United States*, 12 Cl. Ct. 545 (1987); *Simpson Constr. Co.*, VABCA No. 3176, 91-1 BCA ¶ 23,630 at 118,390 (1990); *Fruin-Colnon Corp. v. Niagara Frontier Transp. Auth.*, 180 A.D.2d 222, 585 N.Y.S.2d 248 (1992).

26-3.01(c)(1) Subsurface or Latent Requirement

Type I conditions must be either subsurface or latent. A common example is subsurface rock conditions that affect excavation or drilling activities. See *Commonwealth v. AMEC Civil*,

LLC, 280 Va. 396, 699 S.E.2d 499 (2010) (water levels affecting bridge construction were not a latent or subsurface physical condition at the time of contract execution).

26-3.01(c)(2) Materially Different

The difference between the contract representation and the actual condition must be significant. However, this requirement is rarely an issue because if the difference were so slight as to cause little cost increase, then the claim generally would not be pursued anyway. The Virginia Supreme Court has held that the "materially different" provision of a differing site condition clause applies to quantities of material as well as nature of material. *Asphalt Roads & Materials Co. v. VDOT*, 257 Va. 452, 512 S.E.2d 804 (1999) (more unsuitable excess material than anticipated in contract).

26-3.01(c)(3) Representations in the Contract Documents

The key element of the Type I differing site condition is the representation in the contract documents. Contract representation is what distinguishes Type I from Type II conditions. If the contract does not represent the expected conditions, then a Type I differing site condition cannot exist. However, the representation need not be express, according to the court in *Foster Construction C.A. & Williams Brothers Co. v. United States*, 435 F.2d 873, 193 Ct. Cl. 587 (1970). Other courts have concurred, finding implied representations to be the basis of a Type I differing site condition. See, e.g., *Stock & Grove, Inc. v. United States*, 493 F.2d 629, 204 Ct. Cl. 103 (1974) (where contract documents showed an embankment with various sizes and shapes of stone and directed the contractor to a particular quarry for the stone, there was an 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 and characteristics of the soil to be excavated).

26-3.01(c)(4) 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 the contractor 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 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 Enters. v. United States*, 3 Cl. Ct. 353 (1983). This inquiry is essentially the same as determining whether reliance on the information was reasonable.

26-3.01(c)(5) 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 *Asphalt Rds. & Materials Co. v. VDOT*, 257 Va. 452, 512 S.E.2d 804 (1999) (general contract provisions that submission of the bid was conclusive evidence that contractor was satisfied as to the conditions to be encountered in performing the work, and disclaimers of any warranty of subsurface conditions, did not negate the application of a more specific differing site clause); *Foster Constr. C.A. & Williams Bros. Co. v. United States*, 435 F.2d 873, 193 Ct. Cl. 587 (1970) (holding that the following disclaimer on the geological data did not bar plaintiff's recovery for a Type I differing site condition: "Note: Drill Hole Data shown for information only. The Bureau of Public Roads does not assume responsibility for the accuracy of the data"); see also *Coatesville Contractors & Eng'rs, Inc. v. Borough of Ridley Park*, 506 A.2d 862 (Pa. 1986).

26-3.01(d) 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. Analysis of whether a Type II differing site condition exists is a factual determination and does not require contract interpretation. *Commonwealth v. AMEC Civil, LLC*, 280 Va. 396, 699 S.E.2d 499 (2010); see also, e.g., *Charles T. Parker Constr. Co. v. United States*, 433 F.2d 771, 193 Ct. Cl. 320 (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).

Type II claims are less common because of a stiff burden in establishing what constitutes an unusual condition. *Charles T. Parker Constr. Co. v. United States*, 433 F.2d 771, 193 Ct. Cl. 320 (1970); see *Century Concrete Servs. Inc. v. Bd. of Sup'rs of Fairfax Cnty.*, No. 134852 (Fairfax Cnty. Cir. Ct. Jan. 19, 1996) (because contract was silent as to amount of rock, presence of more rock than anticipated by contractor did not constitute a material difference between the contract documents and subsurface conditions), *rev'd on other grounds*, 254 Va. 423, 492 S.E.2d 648 (1997); section 26-4.02(c)(4).

To qualify as a Type II differing site condition, the contractor has the burden to show that the unknown physical condition was one that could not be reasonably anticipated by the contractor from study of the contract documents, inspection of the site, or the contractor's general experience, if any, as a contractor in the area, and that the condition varied from the norm in similar contracting work. *Commonwealth v. AMEC Civil, LLC*, 280 Va. 396, 699 S.E.2d 499 (2010) (finding unusually elevated water levels during bridge construction constituted Type II differing site conditions).

26-3.01(d)(1) 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.

26-3.01(d)(2) 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. v. United States*, 433 F.2d 771, 193 Ct. Cl. 320 (1970) (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.

26-3.02 Defective Specifications

26-3.02(a) 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 easy, as evidenced by the large body of federal law that has evolved around efforts to make the distinction. However, the distinction is a crucial 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 costs and delays resulting from 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, 188 Ct. Cl. 684 (1969). The *Simmons* Court noted the following:

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.”

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.”

Many federal courts and several 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 Indus., Inc. v. United States*, 530 F.2d 934, 209 Ct. Cl. 121 (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 were required. See *Pittsburgh-Des Moines Corp.*, ENG BCA No. 314-3-84, 89-2 BCA ¶ 21,739 (1989); see also *Wm. H. Gordon Assocs. v. Heritage Fellowship*, 291 Va. 122, 784 S.E.2d 265 (2016) (because contractor adhered in all material aspects to design specifications, contractor was entitled to be paid for remediation work necessitated by collapse of parking pad).

26-3.02(b) “Mixed” Design and Performance Specifications

The entire set of specifications on any given project rarely falls 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. United States*, 8 Cl. Ct. 42 (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 proportion would be best” and were thus performance specifications).

26-3.02(c) *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 (1918), and is thus commonly referred to as the *Spearin* Doctrine. The *Spearin* Doctrine provides that the party who supplies the specifications is responsible for their accuracy, adequacy and feasibility. Therefore, 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 design specifications provided in the contract documents.

Courts applying Virginia law have followed 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. Marus Marble & Tile Co.*, 209 Va. 136, 161 S.E.2d 796 (1968); *Chantilly Constr. Corp. v. Dep't of Highways and Transp.*, 6 Va. App. 282, 369 S.E.2d 438 (1988); *Costello Constr. Co. v. City of Charlottesville*, 97 F. Supp. 3d 819 (W.D. Va. 2015).

26-3.02(d) Factors Considered in the Application of the *Spearin* Doctrine

Questions that must be addressed in assessing the applicability of the *Spearin* Doctrine are discussed below.

26-3.02(d)(1) Are the Specifications Design- or Performance-type Specifications?

The implied warranty does 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.

26-3.02(d)(2) 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., the courts can more easily find the specifications defective if the contractor tried to implement them and the specifications failed).

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 its 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).

26-3.02(d)(3) 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 Constr. Corp. v. Dep't of Highways and Transp.*, 6 Va. App. 282, 369 S.E.2d 438 (1988); see also *Modern Cont'l S. v. Fairfax Cnty. Water Auth.*, 70 Va. Cir. 172 (Fairfax Cnty. 2006). 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. See *Southgate v. Sanford & Brooks Co.*, 147 Va. 554, 137 S.E. 485 (1927) (requirement that contractor assume responsibility for local conditions in prosecution of work held not to be a warranty that structure erected according to plans would not collapse); *Chantilly, supra* (holding that by supplying contractor with specifications, agency impliedly warranted that specifications, if complied with, would produce concrete that would meet strength requirements); *Costello Constr. Co. v. City of Charlottesville*, 97 F. Supp. 3d 819 (W.D. Va. 2015) (noting "These standard contract provisions, however, do not amount to an express warranty by which Costello affirmatively accepted the burden of any defects in the City's construction documents.") In *Southgate, supra*, 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.

After construction, the bulkhead collapsed. The court determined that this collapse 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.*

However, in *Modern Continental South v. Fairfax County Water Authority*, 72 Va. Cir. 268 (Fairfax Cnty. 2006) (prior decision reported at 70 Va. Cir. 172), the court allowed contract language to void the *Spearin* implied warranty and thereby denied the contractor's recovery of the extra costs it incurred. In *Modern*, the circuit court shifted the responsibility for the accuracy of the owner's drawings to the contractor based on (1) the contract requirement that the contractor review the drawings to ensure that they were free from certain infirmities, and (2) the fact that both parties recognized a particular potential problem area in the drawings provided by the owner that might lead to extra costs for the contractor. The *Modern* Court distinguished *Spearin* and other prevailing Virginia and federal authority based upon the unique combination of both parties' prior knowledge of a potential defect and the express requirement that this potential problem be examined by the contractor.

26-3.03 Owner Changes

Changes to the work on a construction project are almost inevitable. Therefore, a construction contract must establish a local government's right to issue changes, as well as clear procedures for administering changes.

A well drafted "Changes" clause accomplishes two goals: (1) it allows the owner to order necessary changes to the original scope of the work; and (2) it provides 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 following:

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.

As discussed below, there are numerous issues to consider in relation to the "Changes" clause.

26-3.03(a) Limits of the Owner's Authority to Order Changes

The language of most "Changes" clauses gives 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.

26-3.03(a)(1) Competitive Bidding Requirement

The Virginia Public Procurement Act provides as follows:

No fixed-price contract may be increased by more than twenty-five percent of the amount of the contract or \$50,000, whichever is greater, without the advance 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 § 2.2-4309.

In *Carnell Construction Corp. v. Danville Redevelopment & Housing Authority*, 745 F.3d 703 (4th Cir. 2014), the Fourth Circuit affirmed that this statute can be applied to reduce the amount of a jury verdict for damages related to a change order dispute. *Carnell* featured a construction project with an original price of \$793,541. During the course of construction, disputes arose between the contractor and the government over entitlement to and value of change orders. The disputes were submitted for a jury trial, and the jury awarded the contractor \$515,000 for the work. The trial court applied Va. Code § 2.2-4309 and reduced the verdict to \$142,557.57, equal to 25 percent of the original contract value.

The Fourth Circuit upheld the trial court's application of Va. Code § 2.2-4309. In reaching its decision, the Fourth Circuit deflected several attempts to avoid the repercussions of the statute. First, it rejected an argument that the cap only applies to situations in which a contractor has increased the contract price excessively without providing additional work. It then rejected an argument that some conditional language allowing modifications to the final contract price transformed a fixed-price contract into a unit-price contract. And third, it held that the statute did not effect an unconstitutional taking of property, finding no fundamental property right in the constitutional sense to a particular remedy in contract.

In reaction to *Carnell*, the General Assembly amended Va. Code § 2.2-4309 in 2015 to provide that the statute:

[does] not limit the amount a party to a public contract may claim or recover against a public body pursuant to § 2.2-4363 [contractual disputes] or any other applicable statute or regulation. Modifications made by a political subdivision that fail to comply with [Va. Code § 2.2-4309] are voidable at the discretion of the governing body, and the unauthorized approval of a modification cannot be the basis of a [§ 2.2-4363] contractual claim.

26-3.03(a)(2) Cardinal Changes

Irrespective of the limits of the Virginia Public Procurement Act, no owner 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 ask whether it can be shown that "the building was so materially changed that it could not be reasonably recognized as the same building or work embraced in the written contract." *Warren v. Goodrich*, 133 Va. 366, 112 S.E. 687 (1922). The number or character of changes in determining what constitutes a cardinal change is fact-specific and determined on a case-by-case basis. See, e.g., *Gen. Dynamics Corp. v. United States*, 585 F.2d 457, 218 Ct. Cl. 40 (1978) (where changes increased performance costs by 165 percent 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 federal

district court held that a cardinal change must be so “materially different” from that specified in the contract that it amounts to an actual breach of the contract. *Colonna’s Shipyard Inc. v. U.S. Dep’t of the Navy*, No. 2:14cv331 (E.D. Va. Dec. 14, 2015) (number of bilateral contract modifications indicated that modifications were redressable under the contract). A demand outside the contract cannot be a cardinal change if it does not require the performance of additional work or development of new information. *Hancock Elecs. v. Wash. Metro Area Transit Auth.*, 81 F.3d 451 (4th Cir. 1996).

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 limitation on the owner’s authority to issue changes to the work.

26-3.03(b) “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. See *Main v. Dep’t of Highways*, 206 Va. 143, 142 S.E.2d 524 (1965) (demonstrating strict enforcement of contract change order requirements).

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. See, e.g., *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*, *supra* (demonstrating strict enforcement of contract change order 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 ordinance prohibiting oral change orders. See, e.g., *Clark Cnty. Constr. Co. v. State Highway Comm’n*, 58 S.W.2d 388 (Ky. 1933). See also *Crawford Constr. & Gen. Contractors Inc. v. Kemp*, No. CL 11-153 (City of Salem Cir. Ct. Sept. 14, 2011) (when both parties mutually ignore the change order provisions of the contract, the court will imply a contract).

In *Carnell Construction Corp. v. Danville Redevelopment & Housing Authority*, No. 4:10CV00007 (W.D. Va. Jan. 23, 2012), *aff’d in part on other grounds*, 745 F.3d 703 (4th Cir. 2014), the federal district court held that as the Authority had agreed in writing to mediate all claims for extra work, it was a jury question as to whether it had waived the written change order requirements of the contract. Note, however, that the notice requirements of the Virginia Public Procurement Act still applied as this was a government contract.

26-3.03(c) Authority to Issue Changes

Since the power to issue change orders is the power of the purse, local government construction contracts generally require approval by the governing body or a properly delegated representative. Authority to issue changes is rarely delegated to the A/E. Absent an express grant of authority from the owner to the A/E, the contractor cannot assume that the architect or engineer has that authority. See *Kirk Reid Co. v. Fine*, 205 Va. 778, 139 S.E.2d 829 (1965) (stating that an architect or engineer cannot issue 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 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.

26-3.03(d) 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 the 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. See *Cardinal Dev. Co. v. Stanley Constr. Co.*, 255 Va. 300, 497 S.E.2d 847 (1998) (involving changes in the scope of work without change orders).

A key element in a construction contract is a provision requiring prompt, written notice by the contractor of any instruction, act, omission, etc., that may constitute a constructive change. See section 26-2.04(o) 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 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.

26-4 CONSTRUCTION CLAIMS

Because of the relative complexity of most construction contracts, disputes regarding contract interpretation are not uncommon. The fundamental rules of contract interpretation apply to such disputes and will be resolved by the courts as questions of law subject to de novo review. *VEPCO v. Norfolk S. Ry. Co.*, 278 Va. 444, 683 S.E.2d 517 (2009); *PMA Cap. Ins. Co. v. US Airways, Inc.*, 271 Va. 352, 626 S.E.2d 369 (2006). The task for the court is to determine the parties' intentions, which should be ascertained, whenever possible, from the language that the parties employed in the contract. *Flippo v. CSC Assocs. III, L.L.C.*, 262 Va. 48, 547 S.E.2d 216 (2001).

An ambiguity exists when the contract's language is of doubtful import, is susceptible of being understood in more than one way or of having more than one meaning, or refers to two or more things at the same time. *VEPCO v. Norfolk S. Ry. Co.*, 278 Va. 444, 683 S.E.2d 517 (2009); *Tuomala v. Regent Univ.*, 252 Va. 368, 477 S.E.2d 501 (1996); *Galloway Corp. v. S.B. Ballard Constr.*, 250 Va. 493, 464 S.E.2d 349 (1995).

26-4.01 Claims Against Contractor

26-4.01(a) Basis for the Claim

Claims against the contractor 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. Promissory estoppel, however, is not a cognizable cause of action in Virginia. *W.J. Schafer Assocs. v. Cordant, Inc.*, 254 Va. 514, 493 S.E.2d 512 (1997); *Va. Sch. of Arts v. Eichelbaum*, 254 Va. 373, 493 S.E.2d 510 (1997); *Ward's Equip. v. New Holland N. Am.*, 254 Va. 379, 493 S.E.2d 516 (1997). Nor can there be an action for fraud when the source of the breach of duty derives solely from the contract. *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344 (1998).

26-4.01(a)(1) Indemnification

A claim for implied or equitable indemnity must grow out of a contractual relationship. *Pulte Home Corp. v. Parex, Inc.*, 265 Va. 518, 579 S.E.2d 188 (2003) (homeowner has no indemnity claim against manufacturer of defective product(s) used in construction of his home); *Int'l Fid. Ins. Co. v. W.Va. Water Auth.*, No. 7:11cv00441 (W.D. Va. Oct. 30, 2012) (a special relationship or unique factors are required before indemnification can be implied); see also *Stone Ridge Condo. Unit Owners' Ass'n v. J.M. Turner & Co.*, 62 Va. Cir. 280 (Nelson Cnty. 2003) (whether the indemnity claim is express or implied, it must arise out of a contractual relationship).

Under Virginia law, a provision in any construction contract by which the contractor purports to indemnify another party to the contract against liability for personal or property damage caused by that party's own negligence is against public policy and unenforceable. Va. Code § 11-4.1; *Uniwest Constr. v. Amtech Elevator Servs.*, 280 Va. 428, 699 S.E.2d 223 (2010) (holding that this statute voids indemnification provisions that reach damage caused by the negligence of the indemnitee, even if the damage does not result solely from the negligence of the indemnitee). The Virginia Supreme Court cited *Uniwest* in *Hensel Phelps Construction v. Thompson Masonry*, 292 Va. 695, 791 S.E.2d 734 (2016), noting that the indemnification clauses in the subcontracts at issue were unenforceable because they would require the subcontractor to indemnify the general contractor for its own negligence.

Virginia Code § 11-4.1, which applies specifically to construction contracts, provides an exception to the general Virginia rule allowing contractual clauses in which a party indemnifies itself against losses incurred by its own future negligence. See, e.g., *RSC Equip. Rental, Inc. v. Cincinnati Ins. Co.*, 54 F. Supp. 3d 480 (W.D. Va. 2014); *Estes Express Lines, Inc. v. Chopper Express Inc.*, 273 Va. 358, 641 S.E.2d 476 (2007).

26-4.01(a)(2) Statute of Limitations

The state's immunity from the statute of limitations on contract actions (Va. Code § 8.01-231) applies to counties but does not apply to cities and towns, as they are not arms of the state. *Richmond Metro. Auth. v. McDevitt St. Bovis Inc.*, 42 Va. Cir. 243 (City of Richmond 1997), *aff'd on other grounds*, 256 Va. 553, 507 S.E.2d 344 (1998) (immunity issue not appealed). Thus, for cities and towns, the standard limitations period for an action arising from a written contract is five years from the date of accrual. Va. Code § 8.01-246; *Hensel Phelps Constr. v. Thompson Masonry*, 292 Va. 695, 791 S.E.2d 734 (2016) (warranties arising out of a written contract pertaining to performance are subject to the same five-year statute of limitations provisions as any other breach of contract action). However, in the context of construction projects, Va. Code § 2.2-4340.1 provides a fifteen-year statute of limitations for action by a state public body on any construction contract.

Virginia Code § 8.01-230 (which provides that a cause of action accrues when breach occurs, not when damage is discovered) does not abrogate the common law rule that if a breach occurs when a contract remains executory, the claimant has the option of pursuing the remedy when the breach occurs, or awaiting final performance. The statute of limitations runs from the date fixed for final payment. *Suffolk City Sch. Bd. v. Conrad Bros.*, 255 Va. 171, 495 S.E.2d 470 (1998); see also *Kloster v. Chandler*, No. CL-2008-9336 (Fairfax Cnty. Cir. Ct. June 22, 2009) (contract dictates when performance considered final). In *Gerald T. Dixon, Jr., L.L.C. v. Hassell & Folkes, P.C.*, 283 Va. 456, 723 S.E.2d 383 (2012), the Supreme Court held that the failure of the party alleging a breach to sign the contract did not preclude the formation of a binding contract, but it did preclude the contract itself from becoming a written contract. Thus, the appropriate statute of limitations was Va. Code § 8.01-246(4), the statute applicable to unsigned or unwritten contracts. The Court emphasized that the writing setting forth the terms of the agreement stated that an "executed copy will serve as our agreement," implying that absent this specific requirement the writing might have constituted a written contract, even if unsigned. *Id.*

26-4.01(a)(3) Delay Claims

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

1. failure to timely mobilize for project start-up;
2. delays in obtaining subcontractors to perform the work;
3. failure to adequately staff the project with management or field labor;
4. delays in shop drawing submission;
5. delays resulting from the correction of defective work; and
6. 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 that (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 [26-2.04\(f\)](#), 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.

26-4.01(a)(4) Non-Performance

If the contractor's delays or poor workmanship rise to the level of 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.

Because there is no "bright line" standard to define abandonment, most construction contracts set out the parameters for abandonment in the default termination provision. See section [26-2.04\(g\)](#) for a discussion of the Termination for Default clause.

26-4.01(a)(5) 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 *Wm. H. Gordon Assocs. v. Heritage Fellowship*, 291 Va. 122, 784 S.E.2d 265 (2016) (an action for the negligence of a design professional is for breach of contract); *Va. Military Inst. 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).

26-4.01(a)(6) Defective Design

Generally, design liability attaches to a contractor only 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 applies.

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.

See *McConnell v. Servinsky Eng'g*, 22 F. Supp. 3d 610 (W.D. Va. 2014) (holding that a claim for breach of implied warranty is not distinct from a claim for breach of contract, because any implied warranties arise out of the contract; holding further that privity is required in such claims).

A cause of action for negligent design accrues when the allegedly negligent plans are "finally approved." *Va. Military Inst. v. King*, 217 Va. 751, 232 S.E.2d 895 (1977). When a contract requires county approval of plans, then the date of that approval marks the beginning of the statute of limitations period. *Wm. H. Gordon Assocs. v. Heritage Fellowship*, 291 Va. 122, 784 S.E.2d 265 (2016).

26-4.01(b) 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 [26-2.04\(o\)](#) for a discussion of notice provisions generally.

26-4.01(c) Damage Types**26-4.01(c)(1) 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, 9 S.E.2d 318 (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:

1. *Commonwealth v. AMEC Civil, LLC*, 280 Va. 396, 699 S.E.2d 499 (2010) (work performed because of differing site conditions was not "extra work" or "force account" work, but was compensable under the terms of the contract; to recover overhead during periods of reduced activity or delay, the contractor must prove that it could not otherwise reasonably recoup its pro rata home office expenses incurred while its workforce was idled; the Blue Book rental costs represent an industry standard for determining the actual cost of operating owned equipment).

2. *Roanoke Hosp. Ass'n v. Doyle & Russell, Inc.*, 215 Va. 796, 214 S.E.2d 155 (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; the lower court awarded damages for utilities, storage costs and insurance premiums, which were not challenged on appeal).
3. *Wm. H. Gordon Assocs. v. Heritage Fellowship*, 291 Va. 122, 784 S.E.2d 265 (2016) (distinguishing *Roanoke Hosp.* and holding that, as delay did not change the length or terms of the construction financing, interest paid on the loan during the delay were not proper damages).
4. *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).
5. *Commonwealth v. Asphalt Roads & Materials*, No. 1665-97-1 (Va. Ct. App. 1998) (unpubl.) (evidence of the rental value of similar equipment as proof of delay damages was not sufficient; intelligent and probable estimate of actual damages required), *rev'd on other grounds, Asphalt Rds. & Materials Co. v. VDOT*, 257 Va. 452, 512 S.E.2d 804 (1999).
6. *See also Lehigh Portland Cement Co. v. Virginia Steamship Co.*, 132 Va. 257, 111 S.E. 104 (1922); *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp. 906 (E.D. Va. 1989) (discussing various types of owner and contractor damages), *aff'd in part and rev'd in part*, 911 F.2d 723 (4th Cir. 1990) (remanding for reconsideration of interest calculation but affirming in all other regards).

26-4.01(c)(2) 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 Hosp. Ass'n v. Doyle & Russell, Inc.*, 215 Va. 796, 214 S.E.2d 155; *see also Wm. H. Gordon Assocs. v. Heritage Fellowship*, 291 Va. 122, 784 S.E.2d 265 (2016).

The standard for the recovery of consequential damages is set forth in *Fairfax County Redevelopment & Housing Authority v. Hurst & Associates 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.

See also Pulte Home Corp. v. Parex, Inc., 265 Va. 518, 579 S.E.2d 188 (2003) (consequential damages do not flow directly and immediately from the act of a party, but only from the consequences or results of such act); *Roanoke Hosp.*, *supra*. In *Carnell Construction Corp. v. Danville Redevelopment & Housing Authority*, 745 F.3d 703 (4th Cir. 2014), the court of appeals held that business destruction, loss of good will, third party claims, and attorney's fees were consequential damages. The court also held that in federal court those damages must be specially pled.

Due to the uncertainty of whether damages will be designated consequential, parties to construction contracts in recent years have increasingly included mutual waivers of consequential damages. In doing so, the local government retains its rights to recover liquidated damages for delay (discussed below), as well as all its remedies for defective work and breach of warranty. Moreover, the local government is less likely to be exposed to liability for the contractor's damages such as reduced bonding capacity, lost profits, financing charges and other costs likely to be considered consequential.

26-4.01(c)(3) 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 is 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 contract-specified liquidated damages, the owner must establish that:

1. the contract work was not substantially completed by the contract completion date (plus any time extensions granted);
2. liquidated damages ("LDs") are due under the contract; and
3. the period measured for assessing LDs was appropriate. (The appropriate period is measured from the completion date specified in the contract to the actual 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 that (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 (e.g., the owner, A/E, or another contractor) then LDs 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 [26-2.04\(f\)](#), 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 are 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, 353 S.E.2d 745 (1987).

If the LD provision is determined to be invalid, the owner can still recover actual damages. On the other hand, if LDs are assessed, the owner forfeits its right to collect actual damages even if those actual damages exceed the LDs imposed. *Welch v. McDonald*, 85 Va.

500, 8 S.E. 711 (1888); *Rex Trailer Co. v. United States*, 350 U.S. 148, 76 S. Ct. 219 (1956).

Liquidated damages provisions may constitute a penalty and, therefore, be unenforceable when the amount agreed to is “out of all proportion to the probable loss.” *Brooks v. Bankson*, 248 Va. 197, 445 S.E.2d 473 (1994); *Taylor v. Sanders*, 233 Va. 73, 353 S.E.2d 745 (1987). Such a provision also may constitute an unenforceable penalty if the agreed amount is “grossly in excess of actual damages.” *O’Brian v. Langley Sch.*, 256 Va. 547, 507 S.E.2d 363 (1998). A party may contractually waive its right to object to a liquidated damages clause. *Gordonsville Energy, L.P. v. Virginia Elec. & Power Co.*, 257 Va. 344, 512 S.E.2d 811 (1999).

26-4.02 Defending Claims by the Contractor

26-4.02(a) In General

The primary defense to the most common construction claims is proof that an essential element of the claim is missing. 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 section [26-2.04\(o\)](#), discussing lack of notice as a possible defense to a contractor’s claim. Counties are immune from claims based on quantum meruit. *MCI Constructors v. Spotsylvania Cnty.*, 60 Va. Cir. 290 (Spotsylvania Cnty. 2002), following *Flory Small Business Ctr. v. Commonwealth*, 261 Va. 230, 541 S.E.2d 915 (2001). It had been assumed that the same immunity from quantum meruit claims applied to cities in Virginia, but those arguing to the contrary may cite *Davis Brothers Construction Co. v. City of Richmond*, 70 Va. Cir. 409 (City of Richmond 2006). In *Davis Brothers*, the court found that the contractor might have had a quantum meruit claim against the city but for the fact that the contractor’s workmanship was so poor that no value was given to the city. It is unclear whether the apparent willingness to allow a quantum meruit claim against the city in better factual circumstances represents a change in position or merely a failure to address that issue. It seems more likely to be the latter.

26-4.02(b) Delay Claims

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

26-4.02(b)(1) Recouping Costs for Unmeritorious Delay Claims by the Contractor – Va. Code § 2.2-4335

As noted in section [26-2.04\(k\)](#), 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 that is found to be without merit. See Va. Code § 2.2-4335.

26-4.02(b)(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.

26-4.02(b)(2)(i) Challenging the Method

As mentioned in section [26-2.04\(b\)\(2\)](#), 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 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 that 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 "fragnet"⁷ analysis. Each of these approaches has its merits and shortcomings, depending on the factual situation and the complexity of the analysis required.

26-4.02(b)(2)(ii) 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.

26-4.02(b)(2)(iii) 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.

26-4.02(c) Attacking Damages

26-4.02(c)(1) 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, 114 S.E.2d 608 (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).

26-4.02(c)(2) Contractor Recovery

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

1. Direct costs associated with claims for defective specifications, constructive changes, and differing site conditions include labor, material, equipment, subcontractor costs and, if appropriate, delay damages described below.
2. 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.
3. Delay claims typically include the following cost elements:
 - Jobsite costs, such as extended supervision and equipment rental.

⁷ A "fragnet" is a fragment of a CPM network. Once it is completed, it is then added into the as-built schedule.

- Jobsite overhead, such as office/trailer rental, utilities, office staff, etc.
- Labor and material escalation.
- Extended warranties.
- Home office overhead costs, typically calculated with the *Eichleay* formula discussed in section 26-4.02(c)(4).

See *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp. 906 (E.D. Va. 1989) (discussing various types of contractor and owner damages), *aff'd in part and rev'd in part*, 911 F.2d 723 (4th Cir. 1990) (remanding for reconsideration of interest calculation but affirming in all other regards).

26-4.02(c)(3) Interest

The Virginia Supreme Court held in *County of Fairfax v. Century Concrete Services*, 254 Va. 423, 492 S.E.2d 648 (1997), that Va. Code § 15.2-1244 bars the payment of any interest on warrants, which is the method used by counties to pay valid claims against them. See Va. Code § 15.2-1243. The Court held that Va. Code § 8.01-382 did not apply because § 15.2-1244 was more specific. See also *MCI Constructors v. Spotsylvania Cnty.*, 60 Va. Cir. 290 (Spotsylvania Cnty. 2002) (no interest allowed on claim). The issue was raised but found moot in *Presidential Service Co. Tier II, Inc. v. King George County Service Authority*, Rec. No. 030593 (Va. Aug. 7, 2003) (unpubl.).

Although the construction contract at issue in *Century Concrete* did not have any provisions regarding the payment of interest, the Court's language indicated that no contract with a county could provide for interest. Nor was the opinion limited to contractual claims.

This principle was reaffirmed in *Commonwealth v. AMEC Civil, LLC*, 280 Va. 396, 699 S.E.2d 499 (2010), in which the Court held that in the absence of a statutory or contractual waiver, the Commonwealth and its agencies have sovereign immunity from liability for pre-judgment interest on contract claims.

26-4.02(c)(4) Eichleay Damages

Most delay claims include a component for recovery of the contractor's unabsorbed home office overhead. These indirect costs are 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 almost invariably attempts 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.

The Virginia Supreme Court allowed use of the *Eichleay* formula for calculating unabsorbed home office expenses against a public body in *Fairfax County Redevelopment & Housing Authority v. Worcester Brothers Co.*, 257 Va. 382, 514 S.E.2d 147 (1999). The Court also held that the contractor need not prove that overhead actually increased as a result of the delay prior to being entitled to *Eichleay*-calculated damages; the contractor must prove the existence of unabsorbed overhead as evidenced by the inability to accept

other contracts or the placement of workers on standby. *Cf. Lockheed Info. Mgmt. Sys. v. Maximus, Inc.*, 259 Va. 92, 524 S.E.2d 420 (2000) (no overhead damages because contractor failed to show inability to recoup costs with another contract); *Commonwealth v. AMEC Civil LLC*, No. 2134-11-2 (Va. Ct. App. May 22, 2012) (unpubl.) (where proof of actual costs is expressly required by the parties' contract and the record established that the party seeking recovery maintained those figures, delay damages cannot be calculated from averaged data absent expert testimony establishing that the averaging method is an accurate method for calculating actual costs).

26-4.02(c)(5) 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 (1982). However, "total cost" claims are not favored by the courts because they oversimplify 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 contractor's losses made it difficult to specifically determine them with any reasonable degree of accuracy; (2) the contractor's bid or estimate was accurate; (3) the actual costs incurred were reasonable; and (4) the contractor was not responsible for the additional costs. See *WRB Corp. v. United States*, 183 Ct. Cl. 409 (1968) (denying "total cost" approach because the difficulty of establishing actual damages was the result of the contractor's poor record-keeping procedures and because of contractor'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 using 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.

26-4.02(d) Contractor Claims Against Design Professionals

In claims involving allegations of defective specifications, contractors may seek to join the owner's architect or engineer as a co-defendant. Virginia's adoption of the "economic loss doctrine," however, prevents recovery of typical construction contract claim damages absent privity of contract. The Virginia Supreme Court held that in the absence of privity, a person cannot be held liable for economic loss damages caused by his negligent performance of the contract. *Gerald M. Moore & Son, Inc. v. Drewry*, 251 Va. 277, 467 S.E.2d 811 (1996). In *Moore*, the owner had contracted with a professional corporation for engineering services and filed suit against both the corporation and the engineer who performed the work, but who was not a party to the contract. See also *Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc.*, 152 F.3d 313 (4th Cir. 1998) (Va. Code §§ 8.2-318 and 8.01-233 do not abrogate the need for contractual privity to recover consequential economic loss damages); *McConnell v. Servinsky Eng'g*, 22 F. Supp. 3d 610 (W.D. Va. 2014) (engineer performing a professional service pursuant to a contract does not also assume an independent tort duty). The economic loss doctrine does not, however, insulate the local government from liability to the contractor for defective specifications prepared by its design professional. See discussion of the *Spearin* Doctrine at section [26-3.02\(c\)](#).

In *William H. Gordon Associates, Inc. v. Heritage Fellowship*, 291 Va. 122, 784 S.E.2d 265 (2016), the Virginia Supreme Court held that the evidence was sufficient to find that a professional engineer breached the professional standard of care with regard to his design specifications, that this breach resulted in flaws in the design, that the flaws in the design caused the construction failure, and that the remediation costs should be borne by the engineer.

26-4.03 “Pass-Through” Claims

A “pass-through” claim occurs 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.

26-4.03(a) 1990: *APAC-Virginia, Inc. v. Dep’t of Highways and Transportation*

In *APAC-Virginia, Inc. v. Virginia Dep’t of Highways & Transp.*, 9 Va. App. 450, 388 S.E.2d 841 (1990), the Virginia Court of Appeals 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

[t]he 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.

Id. (citations omitted). 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. See also *XL Specialty Ins. Co. v. Commonwealth*, 269 Va. 362, 611 S.E.2d 356 (2005) (holding that the doctrine of equitable subrogation does not qualify a surety as a “contractor” under Va. Code § 33.1-387 [recodified as § 33.2-1103]).

26-4.03(b) 1991: Legislative Input

In an apparent response to the *APAC* decision, the General Assembly revised Va. Code § 33.1-386 [recodified as § 33.2-1101] 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 § 33.2-1101.

26-4.03(c) 1993: *Tyger Constr. Co. v. Dep’t of Highways and Transp.*

In *Tyger Construction Co. v. Department of Highways and Transportation*, 17 Va. App. 166, 435 S.E.2d 659 (1993), the Virginia Court of Appeals considered 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* (without reference to the 1991 amendment), noting that *Tyger*’s claim also included damages specific to the contractor 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 the contractor, as well as its subcontractor, had suffered damages and that the *APAC* suit was styled *APAC-Virginia, Inc., ex. rel., etc.* while *Tyger* brought the action in its own name.

26-4.03(d) What Is Next

Although 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. See section [26-4.02\(d\)](#) regarding the requirement of privity for the recovery of economic loss damages from negligent performance of a contract.

26-5 DESIGN-BUILD/CONSTRUCTION MANAGEMENT

26-5.01 Introduction

26-5.01(a) 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. See, e.g., *Hawaiian Indep. Refinery, Inc. v. United States*, 697 F.2d 1063 (Fed. Cir. 1983); see also Va. Code § 2.2-4379. 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.

26-5.01(b) Construction Management Contracts Defined

The term “construction management” generally refers to an owner’s use of a single entity that bridges the gap between pure design and pure construction activities. See Va. Code § 2.2-4379.

A construction manager (CM) typically becomes involved during the schematic phase of design to assist the owner with design review, cost projections and preliminary scheduling. Then, during the bid stage, the CM selects which of the specialty contractors will perform the construction. Ninety percent of this subcontracted work as measured by cost is required to be performed by subcontractors, “which the construction manager shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable.” Va. Code §§ 2.2-4380(B)(6), 2.2-4381(C)(6), and 2.2-4382(D)(5).

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

26-5.02 Design-Build Contracts for Virginia Local Governments

Virginia, like many states, has permitted the use of design-build and construction management delivery methods for public construction projects. In 2017, the General Assembly passed a major amendment to the Virginia Public Procurement Act providing guidance and standards for the use of these delivery methods for public projects, subject to certain restrictions and special procedures. The new, more permissive amended Virginia Public Procurement Act grants authority to “any local public body [to] enter into a contract for construction on a fixed price or not-to-exceed price . . . design-build basis” if the public body has:

1. implemented procedures that are consistent with the procedures adopted by the Secretary of Administration for using design-build contracts and that contain a two-step competitive negotiation process consistent with the standards established by the Division of Engineering and Buildings (DEB) of the Department of General Services for state public bodies;
2. engaged a licensed architect or engineer to advise the public body in the use of design-build contracts and assist in the preparation and evaluation of the Request for Proposal (RFP); and
3. made a written determination that competitive sealed bidding is not practicable or fiscally advantageous, documenting the basis for that determination.

Va. Code § 2.2-4382(A)-(C), (E).

Construction management contracts may be used for projects whose cost is expected to be less than the project cost threshold established in the procedures adopted by the Secretary of Administration governing such contracts, if the project is complex as defined in Va. Code § 2.2-4379 and the local governing body approves in writing of the use of construction management. Va. Code § 2.2-4382(D).

Construction management contracts must comply with the above requirements for design-build contracts (except the two-step negotiation process is not expressly required to be consistent with DEB standards), and additionally:

1. public notice of the Request for Qualifications must be posted on the Department of General Services procurement website ([eVA](#)) at least thirty days before qualifications are due and the contract must be entered into no later than the completion of the schematic design phase (unless prohibited by authorization of funding restrictions);
2. no more than 10 percent of the construction work, as measured against total cost, can be performed by the construction manager's own forces. The remaining work must be performed by the construction manager's subcontractors who were procured through competitive sealed bidding to the maximum extent possible;⁸ and
3. experience with prior construction management or design-build may be considered in awarding the contract but is not required. Price is a critical basis for the award of the contract.

Va. Code § 2.2-4382(D).

For both design-build and construction management projects, the public body must report to the Department of General Services annually by November 1 all completed capital projects in excess of two million dollars, specifying the procurement method used, the projected and actual budget, the projected and actual timeline, and any post-project issues. Va. Code § 2.2-4383.

26-5.03 Design-Build Contracts in Practice

26-5.03(a) Advantages of Design-Build Contracts

The owner can benefit from using a design-build contract, in that the owner need only deal with one party during the entire construction project. Liability is also simplified by this arrangement; the owner then can hold the prime contractor solely responsible for any defects or delays in the design and construction of the project.

Despite the contractor's duty to design the project, the owner can also participate in the design by approving, disapproving or modifying the design specifications provided by the prime contractor. However, this active participation can reduce the efficiency and purpose of choosing a design-build contract and may cause the owner to assume prior allocated risks of the contractor by approving a deficient or defective design.

The public policy goals of fairness are served by the requirement, applicable also to CM contracts, that "[a] written determination shall be made" to show that "sealed bidding is not practicable or fiscally advantageous." Va. Code § 2.2-4382(C). Obtaining the best price is also achieved by the provision of a two-step competitive negotiation process requirement. Va. Code § 2.2-4382(E).

⁸ These provisions do not apply to construction management contracts involving infrastructure projects. Va. Code § 2.2-4382(D)(5).

26-5.03(b) Disadvantages of Design-Build Contracts

The benefits of relying on one contractor are balanced by an owner's inability to 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 listing only 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 the construction. See, e.g., *Glassman Constr. Co. v. Maryland City Plaza, Inc.*, 371 F. Supp. 1154 (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.

26-5.04 Construction Management Contracts in Practice**26-5.04(a) 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, some construction activities by the separate trade contractors may commence earlier than would otherwise be possible. Owners can take advantage of this procedure in situations in which competitive sealed bidding is not practicable or fiscally advantageous, with the regime put in place by the Commonwealth essentially farming out the process of seeking qualified bidders to the construction manager. The 10 percent-by-cost cap on performance of construction services by the construction manager ensures that public monies are still well spent, and that the principle of fair participation by smaller entities is safeguarded. As a result of the applied expertise in streamlining of the manager, CM arrangements are frequently associated with "fast track" contracting where preliminary construction activities can get underway while the design for later stages of construction is still incomplete.

The governing statutes on CM contracts now require the public body to retain an A/E to assist with the decision on delivery method and prepare for the RFP. This inclusion combines the advantages and expertise of the traditional A/E with the more open-minded approach and different review method often employed by CMs, which were touted as advantages of the latter type of contract.

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

26-5.04(b) 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 in scheduling and coordination. The CM is likely to find himself in an adversarial 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.