



APRIL 2015

## MIND THE GAP! – A POTENTIAL CARVE-OUT IN THE STRICT NOTICE REQUIREMENTS UNDER THE VIRGINIA PUBLIC PROCUREMENT ACT

By Jessica Haire

Despite the Virginia Public Procurement Act's (VPPA) strict and rigorous notice requirements for contract claims against a public entity, the highly factual inquiry necessary to assess compliance can get contractors past a motion to dismiss. Last month, the U.S. District Court for the Western District of Virginia (WDVA) confirmed that whether or a not notice complies with the VPPA's requirements is a question of fact to be determined at trial, not on a motion to dismiss. Specifically, WDVA denied the City of Charlottesville's motion to dismiss Costello Construction of Maryland, Inc.'s cumulative impact claims against the City on the basis of untimely notice under the VPPA. At issue in the City's motion was the following language of the VPPA, requiring notice of contractual claims to the public entity:

"Contractual claims, whether for money or other relief, shall be submitted in writing no later than 60 days after final payment. However, written notice of the contractor's intention to file a claim shall be given at the time of the occurrence or the beginning of the work upon which the claim is based."

The WDVA's ruling is unique in that it addressed notice for cumulative impact claims for the first time, leaving open the question of whether the burdensome, strict VPPA notice requirements can be complied with

more flexibly in cases of cumulative impacts. The Supreme Court of Virginia has previously recognized that not all claims arise under the same circumstances and that the phrase "at the time of occurrence" requires a factual inquiry into the circumstances of each claim. However, thus far, litigation in Virginia over notice under the VPPA has been primarily limited to claims that are identifiable (if not quantifiable) prior to the start of the work upon which the claim is based, such as direct damages or acceleration.

But cumulative impacts, by their nature, cannot be identified or quantified until after work on a project has progressed or maybe even completed. In that sense, the "occurrence" of the claim may not be before the first change order, or even the 10th change order. While not previously litigated in Virginia, the WDVA's ruling seems to suggest that there is an opening for contractors who discover they have been damaged by a litany of changes and delays by the owner to seek compensation for those claims after the work has been performed despite the strict notice requirements in the VPPA.

On the Fontaine Fire Station Project, Costello is seeking just that - damages, in part, from the City of Charlottesville for the cumulative impacts related to the construction of the project. Attached to the complaint were two "notices of claims/claims" that were filed with

the City after substantial completion. The City argued these notices were untimely as a matter of law because they were not filed prior to the beginning of the work upon which the claims were based. Costello argued that the VPPA contemplates notice “at the time of the occurrence” of the claim, which in the case of cumulative impacts may be after most of the work has been completed.

The Court disagreed with the City and is allowing the claims to move forward. Whether the notices will ultimately be found to comply with the VPPA remains to be seen.

For more information regarding this alert, please contact Jessica Haire at 202.461.3109 or [jhaire@foxrothschild.com](mailto:jhaire@foxrothschild.com) or any member of the Construction Practice.



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