Good Law, Smart Business, and Sound Public Policy:

Strict Compliance with Notice Provisions in Virginia Public Construction Contracts

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Virginia courts strictly enforce notice provisions in construction contracts when the notice is a prerequisite to a contractor's right to sue or relates to an event that increases the time or cost of construction.[1] Under the "strict compliance rule," a contractor's claim generally will be dismissed, regardless of the merits, where it fails to meet the time and form requirements of a notice provision, including when the contractor relies on oral notice but the provision requires written notice.[2]

The strict compliance rule is sometimes criticized by contractors (and their lawyers) given the potentially harsh consequences of the rule and the prevalence of notice provisions in construction contracts.[3] In light of the criticisms of this beneficial rule, it is worthwhile to examine some of the law, business, and public policy behind the rule in Virginia and the shortcomings of the alternative preferred by critics, the "no-prejudice rule."[4]

The Good Law Behind the Strict Compliance Rule

Whether a contractor is required by statute or contract to provide notice to the owner, Virginia courts will strictly enforce the requirement if it is unambiguous, and the notice operates as a mandatory prerequisite to suit. When those elements exist, compliance is part of a contractor's prima facie case,

and Virginia courts will not rewrite or ignore the notice requirement to excuse a failure to comply.

A contractor's statutory duty to submit a "notice of intent to file a claim" (NOI) is strictly enforced by Virginia courts.[5] On most Virginia state road and bridge projects, compliance with the NOI requirement is a "condition precedent."[6] Therefore, providing an NOI in the time and manner prescribed is "a mandatory prerequisite to filing suit against the Commonwealth," an "element [of the contractor's] prima facie case," and "part of the [contractor's] substantive cause of action."[7] On projects governed by the Virginia Public Procurement Act (VPPA), the giving of an NOI is a "mandatory, procedural requirement which must be met in order for a court to reach the merits of a [contractor's] case."[8]

The requirement to submit a timely, written NOI is "clear and unambiguous" under the Virginia Code.[9] Therefore, to permit a substitute for this requirement, such as actual notice, is to "create an exemption that has no basis in the text of the statute," which is improper because "courts must apply [a statute's] plain meaning, and . . . are not free to add to language, nor to ignore language, contained in statutes."[10]

The legal analysis of a statutory notice requirement in Virginia compares to the analysis of a contractual notice requirement. Virginia courts apply traditional rules of contract interpretation and enforce the requirements as written.[11] Therefore, when a contract states that failure to provide a notice will result in a waiver of claim, or where the notice is found to operate as a "condition precedent" to the right to sue, the courts are unlikely to excuse a failure to strictly comply.[12]

The Business and Public Policy Behind Notice Provisions and the Strict Compliance Rule for Public Owners

There are generally two types of notice in Virginia's construction contracts: a "notice of change," which alerts public owners to circumstances outside of the original contractual undertaking, such as extra work, delays, or differing site conditions; and an NOI, which alerts public owners of potential disputes.[13]

Courts have explained that the "salutary purposes" behind such notices in public works contracts "merit strict enforcement."[14] The primary purpose is to keep a public owner informed and in control of its project. As one court explained, a notice provision "allows [public owners] to efficiently manage the construction project by forcing prompt identification of potential disputes."[15] In particular, an NOI informs the public owner "when a . . . dispute has started down [the] path [toward litigation]," which enables it "to make difficult judgments about continued management of the contract."[16]

The public owner cannot make judgments on matters it is unaware of.[17] The contractor is the first to know if a problem or dispute exists and whether it intends to recover any resulting cost from the owner. When the contractor notifies the owner of a problem or dispute, the owner has the opportunity to take appropriate action, including:

- mitigating or eliminating the underlying issue or future damages;[18]
- investigating claims while evidence and memories are still fresh;[19]
- documenting the actual costs of any extra or disputed work;[20]
- weighing alternatives and avoiding unnecessary costs;[21]
- budgeting for project completion and calculating the effect of a claim on an agency's procurement budgets;[22] and
- determining whether the contract should be adjusted prior to suit.[23]

Although waiver of a contractor's claim if it fails to comply with a notice requirement is a harsh result, this prospect incentivizes the contractor's compliance because waiver makes the cost of failing to comply outweigh the cost of compliance.[24] Without prompt notice of a problem or dispute, "the Government is at a significant disadvantage . . . . This deprives the Government of control of the work and of the amount of financial resources needed to complete it."[25] Lack of timely notice can result in the "runaway project," where the owner has no opportunity to evaluate claims before related work is performed and costs are incurred, or where the time to resolve issues is prolonged.[26] The owner is also unable to scrutinize a contractor's claims or curb its "opportunistic" behaviors without timely notice.[27]

Strict Compliance With Notice Provisions Is Smart Business Practice for Virginia Government Contractors

The strict compliance rule is criticized as a one-sided rule that owners can use in combination with "arduous notice provisions

to receive work for free."[28] This argument, however, is hollow as it relates to Virginia's construction contracts.[29]

First, Virginia contractors employ the strict compliance rule to force public owners to comply with their own notice obligations.[30]

Second, notice provisions in Virginia's construction contracts empower contractors to preserve their rights.[31] In dismissing a claim for extra work where the contractor did not obtain a written change order before performing the work, the Supreme Court of Virginia explained, the contractor "could have fully protected [itself]," *i.e.*, preserved its entitlement and right to sue, if it had followed the contractual "method by which [it] could insure the recovery of the cost of such extra work."[32] This method includes submitting an NOI when a demand for extra work is not made by written change order.[33]

Third, Virginia's construction contracts include notice requirements that are relatively straightforward and "typical" for public works contracts.[34] An NOI must be submitted "at the time of the occurrence or beginning of the work upon which the claim is based."[35] On most Virginia road and bridge projects, a contractor must provide notice that extra work is necessary to fulfill the contract's intended scope "before performing any such work."[36]

Requiring notice before performing work "is the least burdensome of the numerous 'extra work notice' provisions found in construction contracts."[37] Furthermore, the timing and form of an NOI depends on "the circumstances of each case."[38]

Finally, strictly complying with notice requirements prevents the communications failure that often results in a waiver of a contractor's claim: the contractor performs work without first notifying the owner of its "subjective hope that a change order might someday be issued by the owner," but the owner is unaware of this hope.[39] A contractor's intentions may be misunderstood from statements made at a project meeting or actions on the job site, but a contractor clearly communicates its intentions and preserves its rights when it provides the prescribed notice.[40]

The Mutual Benefits of Strictly Enforcing Notice Requirements

Most notice provisions in Virginia's construction contracts require the contractor to provide written notice to the owner.[41] This is mutually beneficial because disputes are common on construction projects and many end in litigation.[42] Strictly enforcing written notice requirements eliminates the issue of "what is notice," which is a costly fact-based question given the various forms and theories of notice, such as actual, constructive, implied, and oral notice.[43] Furthermore, written notice "avoid[s] the credibility contests that arise in cases of alleged oral modification and waiver of written contract provisions."[44]

In refusing to excuse a party's failure to provide notice in the time and manner prescribed by statute or contract, courts recognize that the prescribed notice grabs the attention of the responsible government employee in a way that other forms of notice may not.[45] This is especially true on complex government construction projects as "most . . . generate an avalanche of . . . documentation."[46]

When a clause governing an unanticipated event includes a prompt, written notice requirement, the public owner often assumes the risk of the unanticipated event if the contractor submits the notice and meets other requirements.[47] This benefits the owner because the contractor will not include a contingency in its bid price for taking on the risk of the unanticipated event.[48] By receiving prompt notice if the unanticipated event occurs, the owner also benefits because it has the opportunity to take immediate action to limit its risk. Furthermore, the contractor benefits by knowing it has a reliable way to shift the risk of the unanticipated event to the owner.

When a contractor strictly complies with notice provisions, it triggers the contractual procedures for resolving claims or requested changes.[49] This promotes early resolution of issues and provides opportunity for the parties to assess their interests in a timely manner.[50]

Finally, if the courts can be expected to strictly enforce notice provisions, contractors and owners are more likely to comply with them.[51]

Is the "No-Prejudice Rule" a Better Option?

Under the no-prejudice rule, "the requirement for giving formal written notice is disregarded if the party against whom a claim is made cannot prove practical prejudice to its interest due to lack of timely notice."[52] From a public owner's perspective, this rule is more detrimental than beneficial.

The rule creates an exception to a notice requirement where none exists. When a court does this to a statutory notice requirement it practices "judicial legislation," which is forbidden in Virginia.[53] Similarly, when the no-prejudice rule is applied to a contractual notice requirement, courts basically rewrite the requirement, but Virginia courts are "not at liberty to rewrite a contract simply because the contract may appear to reach an unfair result."[54]

The no-prejudice rule does not recognize that a contractor's failure to strictly comply with a notice requirement in many cases poses an inherit prejudice to a public owner.[55] The General Assembly essentially took this position when, after balancing the interests of the parties in adopting the VPPA, it made the duty to submit a timely, written NOI a prerequisite to a contractor's right to bring suit under the statute but did not include a no-prejudice exception to this duty.[56]

The no-prejudice rule is an exception that swallows the notice requirement. As one court explained, "[t]he thirty-day notice provision [in the federal changes clause] . . . rapidly developed an exception [the no-prejudice rule] so broad that very little was left of the rule."[57] This confirms the concerns of courts that have refused to embrace anything less than strict compliance with notice provisions.[58]

Finally, in contrast to the strict compliance rule, the no-prejudice rule makes the parties battle over prejudice, which "is fact-specific and can be a lengthy and distracting issue."[59] Under this rule, the owner must show that it was prejudiced by the contractor's failure to comply with its notice requirements.[60] Therefore, while the no-prejudice rule creates opportunity for contractors, it puts public owners at a costly disadvantage.

Conclusion

Notice requirements in Virginia's construction contracts require strict enforcement in light of the underlying law, business, and public policies. Strict compliance with notice requirements allows public owners to make important project management decisions, contractors to preserve their rights, and both parties to identify and resolve problems quickly and apart from litigation. Although the no-prejudice rule helps a contractor avoid the consequences of failing to comply with a notice requirement, it is incompatible with Virginia law and poses public policy issues and practical concerns for public owners.

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Endnotes:

1 *See, e.g., Commonwealth v. AMEC Civil, LLC*, 54 Va. App. 240, 252, 677 S.E.2d 633, 639 (2009), *rev'd in part on other grounds*, 280 Va. 396, 699 S.E.2d 499 (2010) ("*AMEC I*") ("It is thus fair to say, as most commentators do, that 'strict compliance with notice of claim requirements has become the clearly established rule [in Virginia]'") (citing Robert K. Richardson, *Notice of Claim Requirements Under the Virginia Public Procurement Act: Owner's Friend – Contractor's Nightmare*, 48 Va. Lawyer 34, 36 (Oct. 1999)); 1 Richard F. Smith et al., Virginia Construction Law Deskbook §§ 7.1901, 7.1902, 7.2003, 10.501 & 11.501, and cases cited therein (3d ed. 2015); *W. v. U. S. Postal Serv.*, 907 F. Supp. 154, 158 (E.D. Va. 1995); *United States v. Centex Constr. Co.*, 638 F. Supp. 411, 412 (W.D. Va. 1985); *City of Richmond v. A. H. Ewing's Sons, Inc.*, 201 Va. 862, 869, 114 S.E.2d 608, 613 (1960).

2 5 Phillip L. Bruner & Patrick J. O'Conner, Bruner & O'Connor on Construction Law § 15:71 (2016); *see, e.g., Commonwealth v. AMEC Civil, LLC*, 280 Va. 396, 408, 699 S.E.2d 499, 506 (2010) ("*AMEC II*") (holding that owner's actual knowledge or project meeting minutes were insufficient to satisfy a contractor's duty to submit a "notice of intent to file a claim" ["NOI"]); *William E.S. Flory Small Bus. Dev. Ctr., Inc. v. Commonwealth*, 261 Va. 230, 237-38, 541 S.E.2d 915, 919 (2001) ("*Flory*"); *Main v. Dep't of Highways*, 206 Va. 143, 149-50, 142 S.E.2d 524, 529 (1965); *MCI Constructors v. Spotsylvania Cty.*, 62 Va. Cir. 375, 379-81 (2003); *D. R. Hall Constr., Inc. v. Spotsylvania Cty. Bd. of Supervisors*, 40 Va. Cir. 260, 269 (1996); *Gen. Excavation, Inc. v. Fairfax Cty. Bd. of Supervisors*, 33 Va. Cir. 120, 121-22 (1993).

3 *See, e.g.*, John P. Ahlers & Lindsay K. Taft, *Construction Contract Draconian Notice Provisions: Is Prejudice Still the Issue?* 66 No. 5 Washington State Bar News 11 (May 2012).

4 *See, e.g.*, 5 Bruner & O'Connor, *supra* note 2, §15:71; Ahlers & Taft, *supra* note 3, at 13-15.

5 The statutory requirement to submit a NOI on a Virginia state construction project derives from Va. Code § 2.2-4363 of the Virginia Public Procurement Act ("VPPA"), which governs most "vertical" construction projects (buildings and similar structures), and Va. Code §§ 33.2-1101 and 33.2-1103, which govern most "horizontal" construction projects (roads and bridges) administered by the Virginia Department of Transportation ("VDOT").

6 Va. Code § 33.2-1103; *see AMEC II,* 280 Va. at 406, 699 S.E.2d at 505.

7 *AMEC II,* 280 Va. at 406-07, 699 S.E.2d at 505.

8 *Flory*, 261 Va. at 238, 541 S.E.2d at 919.

9 *AMEC II,* 280 Va. at 408, 699 S.E.2d at 506.

10 *Id.* at 407-08, 699 S.E.2d at 506 (citation omitted).

11 *See, e.g., Faulconer Constr. Co. v. Branch & Assocs. Inc.*, 85 Va. Cir. 85, 86, 88 (2012) (barring subcontractor's claim for failure to comply with contractual notice provisions, and explaining it is not the court's duty to rewrite the contract but "to declare what the instrument itself says it says"); *SBC-Lavalin Am., Inc.*

v. Alliant Techsystems, Inc., No. 7:10CV00540, 2011 U.S. Dist. LEXIS 118312, at *14-21 (W.D. Va. Oct. 13, 2011); *Modern Cont'l South v. Fairfax Cty. Water Auth.*, 70 Va. Cir. 172, 189-90 (2006); *McDevitt & St. Co. v. Marriott Corp.*, 713 F. Supp. 906, 922 (E.D. Va. 1989), *aff'd on relevant grounds, rev'd in part*, 911 F.2d 723 (4th Cir. 1990); *Centex Constr. Co.,* 638 F. Supp. at 413-14; *Serv. Steel Erectors Co. v. SCE, Inc.*, 573 F. Supp. 177, 178-81 (W.D. Va. 1983).

12 *Id.*; *see also TC MidAtlantic Dev., Inc. v. Commonwealth*, 280 Va. 204, 209, 210, 212-13, 695 S.E.2d 543, 546, 547, 548 (2010).

13 *See, e.g.*, Virginia Department of General Services, General Conditions of the Construction Contract (2015) [hereinafter "DGS General Conditions"] §§ 7(b) [notice of differing site condition], 39 [notice of extra work], 43(a) and (b) [notice of excusable non-compensable delay and notice of compensable delay], and 47(a) [NOI] (the DGS General Conditions govern most Virginia state "vertical" construction). *See also* Virginia Department of Transportation, 2016 Road and Bridge Specifications (2016) [hereinafter "VDOT Specifications"] §§ 104.03 [notice of differing site condition], 109.05(a)(1) [notice of extra work], 108.04 [notice of excusable non-compensable delay], 109.05(e) [notice of compensable delay], and 105.19(a) [NOI] (the VDOT Specifications govern most Virginia state road and bridge construction).

14 *Huff Enters., Inc. v. Triborough Bridge & Tunnel Auth.*, 191 A.D.2d 314, 316, 595 N.Y.S.2d 178, 181 (1993) (citations omitted).

15 *Modern Cont'l South*, 70 Va. Cir. at 190.

16 *AMEC I*, 54 Va. App. at 255-56, 677 S.E.2d at 641.

17 *See* John Cibinic, Jr. & Ralph C. Nash, Jr., Administration of Government Contracts 471 (3d ed. 1995); Barry B. Bramble & Michael T. Callahan, Construction Delay Claims § 2.08 (5th ed. 2016).

18 VDOT Specifications, *supra* note 13, § 105.19(a); *Yates Constr. Co. v. Fairfax Cty. Water Auth.*, No. 96-1946, 1997 U.S. App. LEXIS 14862, at *5-6 (4th Cir. June 19, 1997).

19 1 Bruner & O'Connor, *supra* note 2, § 4:35; VDOT Specifications, *supra* note 13, §§ 104.03, 105.19, 108.04, 109.05(e); *MCI Constructors,* 62 Va. Cir. at 379, 380; *Johnson Constr. v. Rugby Mun. Airport Auth.*, 492 N.W.2d 61, 62-64 (N.D. 1992).

20 VDOT Specifications, *supra* note 13, §105.19; 1 Bruner & O'Connor, *supra* note 2, § 4:35; *Johnson Constr.,* 492 N.W.2d at 63-64.

21 *MCI Constructors,* 62 Va. Cir. at 380; *A.H.A. Gen. Constr. v. New York City Hous. Auth.*, 92 N.Y.2d 20, 34, 699 N.E.2d 368, 376 (1998).

22 *AMEC I,* 54 Va. App. at 256, 677 S.e.2d 633, 641; *A.H.A. Gen. Constr.*, 92 N.Y.2d at 34, 699 N.E.2d at 376.

23 *A.H.A. Gen. Constr.*, 92 N.Y.2d at 34, 699 N.E.2d at 376; *Johnson Constr.,* 492 N.W.2d at 63-64. Furthermore, the courts have noted that compliance with notice provisions puts a public owner in the position to take other steps, including: avoiding waste of public funds, re-examining the drawings and the contract with respect to the claim, selecting less costly alternatives of construction, hiring a different contractor to perform the extra work or eliminating contract work, budgeting to meet possible liability, and documenting communications in connection to a claim. *See id.*; *McDevitt,* 713 F. Supp. 906 at 919-20; 1 Bruner & O'Connor, *supra* note 2, § 4:35 & n. 5.

24 *See generally* Benjamin Klein, Transaction Cost Determinants of "Unfair" Contractual Arrangements, 70 American Economic Review Papers and Proceedings 356, 356-62 (1980), *reprinted in part in* Henry N. Butler and Christopher R. Drahozal, Economic Analysis For Lawyers, 247, 247-50 (2d ed. 2006) (explaining that to incentivize compliance with a contract provision the cost of non-compliance should outweigh the cost of compliance, and in order to achieve this result in some cases the provision must include an "unfair" sanction being imposed in the case of non-compliance). Similarly, in strictly enforcing a notice provision of the Virginia Tort Claims Act, the Supreme Court of Virginia recognized, "the town's [actual] knowledge had no effect on whether the claimant substantially complied with the statute. We explained that the arbitrary and peremptory provisions of the statute are necessary to accomplish the purposes of the enactment." *Halberstam v. Commonwealth*, 251 Va. 248, 252, 467 S.E.2d 783, 785 (1996) (citation omitted).

25 Cibinic & Nash, *supra* note 17, at 471; *see, e.g.*, *McDevitt,* 713 F. Supp. 906 at 919.

26 *See MCI Constructors*, 62 Va. Cir. at 379-80; *Modern Cont'l South*, 70 Va. Cir. at 190; 1 Bruner & O'Connor, *supra* note 2, § 4:35 & nn. 5, 5.50, & 6 and cases cited therein, including *Seneca Valley, Inc. v. Caldwell*, 808 N.E.2d 422, 428 (Ohio Ct. App. 2004).

27 *See, e.g.*, *A.H.A. Gen. Constr.,* 92 N.Y.2d at 33, 699 N.E.2d at 376*;* John D. Yates, Conflict and Disputes in the Hong Kong Construction Industry: a Transaction Cost Economics Perspective, (July 1998) (unpublished M.A. thesis, the University of Hong Kong) at 158, http://hub.hku.hk/handle/10722/33940 (last visited Sept. 30, 2016) (explaining that deliberately depriving an owner of information is a form of "opportunism," and an informed owner is well positioned to curb a contractor's opportunism). Furthermore, the courts have recognized the importance of scrutinizing a contractor's clams in light of their opportunistic behaviors. *See, e.g.*, *Jefferson Hotel Co. v. Brumbaugh*, 168 F. 867, 875 (4th Cir. 1909). One opportunistic behavior that contractors engage in "almost as a routine custom and practice, [is] a game of 'claim inflation.' This is when a contractor pads a claim for the purpose of giving . . . arbitrators room to 'split the baby' without undue impact upon the claimant's bottom-line recovery expectations." 1 Bruner & O'Connor, *supra* note 2, § 4:50.

28 Paige Spratt, *Strict Compliance with Construction Contract Notice Provisions: Detrimental to Contractors and Taxpayers*, 40 Pub. Con. L.J., 911, 922 (Summer 2011).

29 The idea that the strict compliance rule is a tool that owners use to obtain work for free is not only hollow as it relates to Virginia state construction contracts for the reasons discussed in this article, but it is probably not true in general as "[o]wners often fail to use notice provisions to their advantage or fail to protect their interests when considering claims." Bramble & Callahan, *supra* note 17, § 2.08. In addition, governments often impose formalities and demand strict compliance therewith not to cheat contractors but because they are useful in preventing malfeasance and protecting the integrity of the public procurement process. *See, e.g., MCI Constructors*, 62 Va. Cir. at 379; *A.H.A. Gen. Constr.,* 92 N.Y.2d at 33, 699 N.E.2d at 376*; Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947); 2 Bruner & O'Connor, *supra* note 2, §§ 4:23 n. 1 & 4:43.

30 *See, e.g., A. H. Ewing's Sons, Inc.*, 201 Va. at 869, 114 S.E.2d at 613. In addition, prime contractors in Virginia are entitled to strict compliance with the notice provisions or written change order requirements in their subcontracts. *See, e.g.*, *Faulconer Constr.*

Co., 85 Va. Cir. at 85-88; *Centex Constr. Co.*, 638 F. Supp. at 413; *Service Steel Erectors Co.*, 573 F. Supp. at 178-81; *John W. Johnson, Inc. v. J.A. Jones Constr. Co.*, 369 F. Supp. 484, 494 (E.D. Va. 1973).

31 *See, e.g.*, contract clauses cited *supra* note 13.

32 *Main,* 206 Va. at 149-50, 152, 142 S.E.2d at 529, 530-31; *see, e.g., Pa. Elec. Coil, Ltd. v. City of Danville*, No. 4:06CV00080, 2008 U.S. Dist. LEXIS 27630, at *15, *21-22 (W.D. Va. Apr. 4, 2008) (citing *Main*, 206 Va. 143, 142 S.E.2d 524; *Kirk Reid Co. v. Fine,* 205 Va. 778, 139 S.E.2d 829 (1965)).

33 *See Main,* 206 Va. at 149-50, 142 S.E.2d at 529; VDOT Specifications, *supra* note 13, § 105.19. This method incorporates what was once considered to be "basic in all Government contracts that [the contractor] cannot do work which it is not required to do by the contract, without registering a protest against being required to do it, or securing an order for extra work, and then later make a claim against the Government for additional compensation." *J. A. Ross & Co. v. United States*, 115 F. Supp. 187, 190 (Ct. Cl. 1953).

34 2 Bruner & O'Connor, *supra* note 2, § 7:140 n. 25. Before a contractor places his bid on a Virginia state construction project, the notice requirements and the consequence for failure to comply are made known as the specifications are available for inspection prior to the placement of bids. *See, e.g.*, DGS General Conditions, *supra* note 13, § 47.

35 Va. Code § 2.2-4363; *see also* Va. Code § 33.2-1101.

36 VDOT Specifications, *supra* note 13, § 109.05(a)(1).

37 2 Bruner & O'Connor, *supra* note 2, § 5:109 ¶ 4.3.5; *see also* Smith, *supra* note 1, § 10.501.

38 *MCI Constructors*, 62 Va. Cir. at 378 (citing *Flory*, 261 Va. at 238, 541 S.E.2d at 919). Although routine construction documents will not suffice to satisfy the NOI requirement, the form of an NOI "does not require the sophistication of a legal pleading. Any document can suffice if it clearly and timely states the contractor's intention to later file an administrative claim." *AMEC I*, 54 Va. App. at 255, 256, 677 S.E.2d at 641.

39 In *Atlantic & D. R. Co. v. Delaware Constr. Co.*, the Supreme Court of Virginia made a similar point when it explained that provisions requiring the contractor and owner to agree to a change order before performing extra work are meant "to avoid subsequent disagreement, and prevent just such a controversy as has arisen in this case." 98 Va. 503, 512, 37 S.E. 13, 16 (1900); s*ee also Perry Eng'g Co. v. AT&T Commc'ns, Inc.*, No. 90-0153-H, 1992 U.S. Dist. LEXIS 12332, at *11 (W.D. Va. July 31, 1992); 1 Bruner & O'Connor, *supra* note 2, § 4:37. Furthermore, in strictly enforcing notice provisions, courts have recognized that an owner's actual knowledge of work or facts underlying a claim are not "tantamount to knowledge" that the contractor intends to file a claim or the contractor's opinion that the work in question is extra or a directed change. *W. Sur. Co. v. Dep't of Transp.*, 326 Ga. App. 671, 679, 757 S.E.2d 272, 278-79 (2014). *See, e.g.*, *McDevitt,* 713 F. Supp. at 919-20; *Pa. Elec. Coil, Ltd.*, No. 4:06CV00080, 2008 U.S. Dist. LEXIS 27630 at *16-17 (W.D. Va. Apr. 4, 2008); *R.J. Crowley, Inc. v. Fairfax Cty. Sch. Bd.*, 41 Va. Cir. 55, 56-57 (1996).

40 *See, e.g., AMEC II,* 280 Va. at 408, 699 S.E.2d at 506 (holding that meeting minutes do not satisfy a written NOI requirement because such statements are "merely a recorded summary of what was said at meetings"); *AMEC I,* 54 Va. App. at 257, 677 S.E.2d at 641 (noting a written NOI specifically informs the owner of the contractor's intent, and explaining "[i]t [is] not enough that the contracting agency could have intuited the contractor's intent to file a claim based upon the nature of the dispute") (citation omitted).

41 *See, e.g.,* contract clauses cited *supra* note 13.

42 *See, e.g., Brinderson Corp. v. Hampton Rds. Sanitation Dist.*, 825 F.2d 41, 42 (4th Cir. 1987).

43 2 Bruner & O'Connor, *supra* note 2, § 5:109 ¶ 4.3.5.

44 *Promo-Pro Ltd. v. Lehrer McGovern Bovis, Inc.*, 306 A.D.2d 221, 222, 761 N.Y.S.2d 655, 656 (2003); s*ee also Huff Enters., Inc.*, 191 A.D.2d at 315, 595 N.Y.S.2d at 180. In addition, a contemporaneous written notice can help deal with a persistent factor in construction disputes, "witnesses who slant the facts heavily in favor of their own side." Smith, *supra* note 1, § 1.704.

45 *See, e.g.*, *Halberstam,* 251 Va. at 252, 467 S.E.2d at 785.

46 *AMEC I*, 54 Va. App. at 255-56, 677 S.E.2d at 640-41.

47 *See, e.g.*, the contract clauses cited *supra* note 13; 1 Bruner & O'Connor, *supra* note 2, § 4:2. Having the risk of an unanticipated event shift from the contractor to the owner upon receipt of notice makes practical sense given that the contractor is, initially, in the best position to deal with a risk of an unanticipated event as it is the first to know when the event occurs and it has exclusive control of the task of providing notice. *See, e.g.*, 1 Bruner & O'Connor, *supra* note 2, § 4:36.50.

48 *See Asphalt Rds. & Materials Co. v. Commonwealth*, 257 Va. 452, 458, 512 S.E.2d 804, 807 (1999). Furthermore, in general, a contractor is unlikely to include a contingency in its bid, or will include one that is as small as possible to secure the work, when a contract's risk allocation incorporates two principles: 1) a risk is allocated to the party that is best able to manage or control it if it occurs, and 2) exposure to a risk is split between the owner and contractor by clearly defining a point at which the risk is transferred from one party to another. *See* David B. Ashley et al., Guide to Risk Assessment and Allocation for Highway Construction Management 31-35 (2006). Both of those elements exist when an owner agrees to assume the risk of a change but conditions it on the contractor providing notice. The risk of a change is on the contractor initially because he is first to discover the issue and he is, thus, in the best position to handle the risk. The provision of notice of the change is the point at which the risk is transferred from the contractor to the owner.

49 Michael Harris, The Importance and Value of "Notice" Provisions in Construction Contracts 1, 2 (2016), http://www.long-intl.com/articles.php (last visited Sept. 30, 2016).

50 *Id.* For example, strict compliance with the notice provisions in VDOT's contracts may explain why "[for] [fiscal year] 2015, of the 76 potential claims on construction/maintenance contracts, only 7 were filed as actual claims . . . ." Letter from Charles A. Kilpatrick, Commissioner, VDOT, to Hal E. Greer, Director, Joint Legislative Audit and Review Commission (June 3, 2016), in Joint Legislative Audit and Review Commission, Development and Management of State Contracts in Virginia, at Appendix G, 125, 126 (2016).

51 *See, e.g., Modern Cont'l South*, 70 Va. Cir. at 192.

52 5 Bruner & O'Connor, *supra* note 2, § 15:71.

53 *Halberstam,* 251 Va. at 252, 467 S.E.2d at 785; *see AMEC II,* 280 Va. at 407-08, 699 S.E.2d at 506; *Jackson v. Fid. & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005); *AMEC I*, 54 Va. App. at 253-55, 677 S.E.2d at 640.

54 *Dominick v. Vassar*, 367 S.E.2d 487, 489 (1988); s*ee Modern Cont'l South,* 70 Va. Cir. at 181, 189-90.

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Compliance *continued from page 37*

55 *See* 2 Bruner & O'Connor, *supra* note 2, § 5:109. ¶ 4.3.5.
56 *Modern Cont'l South*, 70 Va. Cir. at 194-95 (citation omitted).
57 *Appeal of Powers Regulator Co.*, GSBCA No. 4668, 80-2 B.C.A. (CCH) ¶ 14,463, (Apr. 30, 1980), *available at* 1980 WL 2546 (citation omitted). Furthermore, notice requirements in federal changes clauses "are enforced sporadically . . . [or] when fairness demands. This has created the anomalous situation in which the notice requirements currently being imposed on contactors are those found in the decisional law rather than those found in the contract language." Cibinic & Nash, *supra* note 17, at 476.
58 *See Huff Enters., Inc.*, 191 A.D.2d at 317, 595 N.Y.S.2d at 181; *Modern Cont'l South*, 70 Va. Cir. at 192; *see also Halberstam*, 251 Va. at 250, 467 S.E.2d at 784.
59 1 Bruner & O'Connor, *supra* note 2, § 4:35.
60 *Id.*

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7 www.justice.gov/opa/pr/us-investigations-services-agrees-forego-least-30-million-settle-false-claims-act-allegations (Aug. 19, 2015) (last visited Sept. 11, 2016).
8 www.justice.gov/opa/pr/jacintoport-international-llc-and-seaboard-marine-ltd-agree-settle-false-claims-allegations (Aug. 1, 2016) (last visited Sept. 11, 2016).
9 U.S. Attorneys' Manual, *supra* note 7, §9-28-010; *see also id.* §4-3.100 ("Government attorneys handling corporate investigations should maintain a focus on potentially liable individuals and maximize the accountability of individuals responsible for wrongdoing….").
10 Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference (May 10, 2016) ("I have to tell you how disconcerting it is to hear something described as the 'Yates Memo.' I call it the Individual Accountability Policy, but I may have long since lost that battle.").
11 Memorandum from Deputy Attorney General Sally Q. Yates, US Department of Justice, to Assistant Attorney General and US Attorneys (Sept. 9, 2015) (hereinafter the "Yates Memorandum").
12 Yates Memorandum, *supra* note 13.
13 *See, e.g.,* Joseph W. Yockey, *Beyond Yates: From Engagement to Accountability in Corporate Crime*, 12 N.Y.U. J.L. & Bus. 407 (2015-2016).
14 *Qui tam* actions are FCA cases filed by an individual (called "relators") on behalf of the government in which the DOJ may choose to intervene. Relators are often former employees and other "whistleblowers," though it can be any individual with knowledge of a violation of the act. Relators are awarded a portion of any settlement or judgment against the defendant. *See* 31 U.S.C. § 3730 (2000).
15 Acting Associate Attorney General Bill Baer, Remarks on Individual Accountability at American Bar Association's 11th National Institute on Civil False Claims Act and Qui Tam Enforcement (Washington, D.C.) (June 9, 2016). This number does not include matters that agencies referred to the DOJ.
16 *Id.*
17 http://www.bna.com/doj-increasingly-demanding-n57982072932/ (last visited Sept. 9, 2016).
18 Baer, *supra* note 17.
19 U.S. Attorneys' Manual, *supra* note 7, § 9.28-200.
20 *See* Federal Sentencing Guidelines Manual § 8C2.
21 Letter Agreement between USDOJ and Parametric Technology (Shanghai) Software Co. Ltd and Parametric Technology (Hong Kong) Limited (Feb. 16, 2016).
22 https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million (Feb. 18, 2016) (last visited Sept. 11, 2016).
23 Letter Agreement between USDOJ and BK Medical ApS (June 21, 2016).
24 *United States of America v. Latam Airlines Group*, S.A., No. 0:16-cr-60195-DTKH (S.D.Fla. July 25, 2016) (Document No. 2, Deferred Prosecution Agreement).
25 *See, e.g.*, *id.*
26 *See* U.S. Attorneys' Manual, *supra* note 7, §§ 9-28.700 – 9-28.1000.
27 *Id.* § 9-28.700.
28 https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association (May 10, 2016) (last visited Sept. 11, 2016).
29 *Id.*