Pursuant to Rules 5:26 and 5:27, Appellant TC MidAtlantic Development, Inc. ("TCM"), by counsel, respectfully submits this Opening Brief, stating as follows:

BRIEF STATEMENT OF THE CASE

This appeal challenges the decision of the Circuit Court sustaining a demurrer and dismissing with prejudice all of TCM's claims, which total over $12 million. In violation of this Court's well-established instructions, the Circuit Court short-circuited the litigation process by judging the merits of TCM's claims on demurrer, thereby depriving TCM of its day in court. TCM's claims arise from its work on three office buildings located on Capital Square in Richmond: The renovation of the Washington and Finance (n/k/a Oliver Hill) Buildings (Phases I-A and I-B), and the design and development of a new office building on Broad Street between 8th and 9th Streets (Phase II). The Commonwealth terminated TCM for cause on both Phases I and II. The Circuit Court sustained the Government's demurrer even though TCM's pleadings were more than sufficient to state legally cognizable claims. Importantly, the facts of this case are virtually identical to those decided by this Court in Welding, Inc. v. Bland County Serv. Auth., 261 Va. 218, 541 S.E.2d 909 (2001), and, therefore, binding precedent guides this Court's review.

The Circuit Court also substantively misapplied and misinterpreted the dispute resolution provisions of the parties' contract – specifically, Section 47 of the General Conditions of the parties' Design-Build Contract ("Section 47") – and ignored the fact that Section 47 was inapplicable to TCM's Phase II claims. Section 47 is modeled almost verbatim on Virginia Code § 2.2-4363, the contract dispute provision of Virginia's Public Procurement Act, Va. Code § 2.2-4300, et seq. (the "PPA"). It is one of the most widely used dispute resolution provisions in government contracting. See G.S. Form E&B CO-7DB. The General Conditions are included in virtually every public construction contract the Commonwealth issues and administers under the PPA. The contract at issue in this case was the first contract for a state-owned facility entered into under the Public-Private Education Facilities and Infrastructure Act of 2002 (the "PPEA"), Va. Code § 56-575.1, et seq., and also uses Section 47 of the General Conditions as the mechanism for resolving disputes.

Nature of the Case

TCM's claims were dismissed with prejudice on demurrer because the Court concluded that TCM failed to present sufficient "evidence of compliance" with the dispute resolution procedure set forth in Section 47. In its Orders dated December 17, 2007, January 7, 2008 and July 10, 2008

(the "Orders"), the Circuit Court ignored TCM's well-pleaded allegations that (1) it submitted its claims by making "written demands upon DGS for the payment of all sums properly due and payable;" and (2) TCM, in fact, complied with Section 47 by timely submitting its formal claims and filing the action which is the subject of this appeal. The Circuit Court also misinterpreted Section 47 as it related to TCM's claims in Counts I-IV relating to Phase I and misapplied it to TCM's claims in Count V relating to Phase II. As discussed in Section II infra, the Circuit Court dismissed this claim under Section 47 even though Section 47 does not apply to the Phase II project. Finally, the Circuit Court abused its discretion by denying TCM leave to amend its Complaint to correct any alleged pleading deficiencies.

Course of Proceedings

In May 2004, TCM and Appellees, the Commonwealth of Virginia, Department of General Services, and the Comptroller of the Commonwealth (collectively, "DGS"), executed a contract pursuant to the PPEA, Va. Code § 56-575.1, et seq., for the renovation of the Washington and Finance (n/k/a the Oliver Hill) Buildings owned by the Commonwealth within Capitol Square in Richmond (the "Project"). The PPEA was enacted in 2002 by the Virginia General Assembly to bring private sector expertise

to bear on public projects, saving the Commonwealth time and money. See App 105, (Amended Complaint ("AC"), ¶ 6). The work was divided into two phases: (1) Phase I-A and I-B; and (2) Phase II.

Several disputes arose between TCM and DGS in connection with the construction of the Project. The main dispute arose during the demolition of the tenant improvements in the Washington Building in December of 2005 when TCM discovered a rare structural flooring system known as the "Metropolitan Floor System." App 110 (AC, ¶ 31). Over the course of the next year, the parties spent a significant amount of time discussing their respective claims:

- On December 18, 2005 and February 2, 2006, TCM notified DGS in writing of the hidden condition stemming from the discovery of the Metropolitan Floor System in the Washington Building. App 47-48; App 111-12 (AC, ¶¶ 34 and 37).

- On April 14, 2006, DGS executed Change Order Number 1, which directed TCM to cease all work on the Washington Building and to investigate the Metropolitan Floor System. App 49-51 (Exhibit 13 to AC).

- On December 18, 2006, the parties submitted their claims on the Finance Building, the Washington Building and Phase II to mediation. That mediation failed. App 108 (AC, ¶ 20).

- On December 22, 2006, DGS attempted to terminate TCM for cause with respect to the Finance Building, Washington Building and Phase II projects. App 108 (AC, ¶ 21).

- DGS voluntarily suspended the terminations for cause several times as the parties tried to resolve their disputes.

- On February 16, 2007, as required by Section 47, TCM served DGS with its Notices of Intent to File Claims with respect to the Finance Building, Washington Building and Phase II projects. App 52-62 (Exhibits 2-5 to AC).

- On the same day, DGS served TCM with a letter finally terminating TCM for cause with respect to the Finance Building, Washington Building and Phase II projects. DGS's letter also invited TCM to "file any formal claims on [the] projects pursuant to the provisions of Section 47[.]" App 64-65 (Exhibit 6 to AC).

- On March 23, 2007, pursuant to Section 47, TCM submitted to DGS its final claims for payment of the work TCM had performed on the Finance and Washington Buildings. App 68-75 (Exhibits M-N to TCM Memorandum in Support of Motion for Reconsideration).

Because DGS did not respond to these claims, TCM filed a complaint against DGS in the Circuit Court for the City of Richmond in April 2007, alleging breaches of contract and wrongful termination. TCM amended its complaint in September 2007. TCM's claims in the Amended Complaint totaled approximately $12 million in damages. DGS filed counterclaims against TCM and a third-party complaint against TCM's surety. DGS later amended its Counterclaims, which sought $11 million in damages.

In October 2007, DGS filed a demurrer to TCM's Amended Complaint contending, among other allegations, that each of TCM's claims was barred for failure to comply with Section 47. See App 178. By order dated December 17, 2007, the Circuit Court sustained DGS's demurrer and

dismissed TCM's Amended Complaint with prejudice (without leave to amend) on the ***sole*** ground that TCM had not offered sufficient "evidence" that its claims were timely submitted as required by Section 47:

> Plaintiff failed to submit a timely claim to Defendant for a final decision.
>
> ***
>
> Plaintiff ... does not submit any documentation or make reference to a formal claim submitted within the sixty day time period.
>
> The Court finds the evidence of compliance with Section 47 of the General [] Conditions to be insufficient.
>
> It is, therefore, ORDERED that Defendant's Demurrer to Plaintiff's Amended Complaint is sustained. Plaintiff's Amended Complaint is dismissed without leave to amend.

See App 427 and 429 (Order, at 5 and 7).

Section 47 states, in pertinent part, as follows:

> ***Contractual claims*** ... shall be submitted, in writing, no later than sixty (60) days after final payment; however, ***written notice of the Contractor's intention to file such claim*** must be given at the time of the occurrence or beginning of the Work upon which the claim is based. The filing of a timely notice is a prerequisite to recovery under this Section.
>
> ***

> The Contractor may not institute ***legal action*** prior to receipt of the Owner's ***final written decision on the claim*** unless the Owner fails to render such a decision within ninety (90) days of submission of the claim or within ninety (90) days of final payment, whichever is later.
>
> The decision of the agency head or other signatory on the Contract shall be final and conclusive unless the Contractor within six (6) months of the date of the ***final decision on a claim***, ***initiates legal action*** as provided in § 2.2-4364 of the Code of Virginia. ... The sole result of the Owner's failure to render a decision within 90 days shall be the Contractor's right to immediately institute ***legal action***.

App 1 (emphasis added).

Accordingly, Section 47 establishes a three-step process for resolving contract disputes: The contractor (1) provides written ***notice*** of its intent to file a claim with the owner; (2) submits its ***claim*** with the owner; and, if the dispute remains unresolved, (3) files a formal ***complaint*** in court. Id. In its ruling, the trial court overlooked TCM's allegations which specifically pleaded compliance with Section 47:

> 17. Throughout the course of the Project, **TCM provided written notice to DGS of its intention to file contractual claims**....
>
> 18. **TCM has made written demands upon DGS** for the payment of all sums properly due and payable to TCM....

> 19. **TCM has made written demands upon DGS** for the performance of DGS's obligations under the terms of the Contract Documents for the Project and pursuant to applicable law....

See App 107-08 (AC, ¶¶ 17-19) (emphasis added). DGS also had actual notice of TCM's claims because the parties, as required under their contract, mediated their respective claims. App 208 (AC, ¶ 20) ("TCM and DGS mutually agreed to submit their collective Project claims to mediation, and participated in a mediation of their collective claims").

The Circuit Court also misinterpreted the requirements of Section 47. Specifically, with respect to TCM's Phase I claims, it conflated TCM's submission of a *claim* with DGS (step 2) with TCM's filing of a formal *complaint* in the Circuit Court (step 3). With respect to TCM's Phase II claims (pleaded in Count V), it improperly applied Section 47, even though Section 47 was inapplicable because the parties never executed a Design-Build Contract for the Phase II work. Pursuant to Section 25 of the parties' Comprehensive Agreement, the only prerequisite to filing suit against DGS with respect to TCM's Phase II claims was attendance at a mediation. App 3. Specifically, Section 25(b)(i) provides that, "The parties shall attempt in good faith to settle the dispute by mediation before resorting to litigation as provided below." Id. Finally, the Circuit Court abused its discretion by refusing to permit TCM leave to amend when it sustained DGS's demurrer.

In view of the Circuit Court's obvious error in sustaining DGS's demurrer without leave to amend, TCM filed a motion for reconsideration on January 4, 2008, which was denied on January 7, 2008, *before it was even opposed*. On January 10, 2008, TCM filed a Notice of Appeal, which was dismissed without prejudice by this Court on April 30, 2008 as premature. On May 29, 2008, TCM filed a Motion to Amend Order dated December 17, 2007 (collectively with the January 4, 2008 motion for reconsideration, the "Reconsideration Motions"), which was denied on July 10, 2008. On March 26, 2009, DGS non-suited its Counterclaims. On April 23, 2009, TCM timely filed its Notice of Appeal.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in its Orders in sustaining DGS's demurrer and denying the Reconsideration Motions to Counts I-IV because (a) it failed to properly evaluate TCM's pleadings and, instead, improperly resolved the merits, and (b) it misinterpreted Section 47 and erroneously found that TCM failed to submit a timely claim and complaint.

2. The Circuit Court erred in its Orders in sustaining DGS's demurrer and denying the Reconsideration Motions to Count V because it applied Section 47 to the Phase II claims, even though Section 47 was not part of the parties' Phase II contract.

3. The Circuit Court abused its discretion by refusing to allow TCM to amend its Amended Complaint.

QUESTIONS PRESENTED

1. Whether the Circuit Court in its Orders erroneously sustained DGS's demurrer and denied the Reconsideration Motions to Counts I-IV because: (a) it failed to properly evaluate TCM's pleadings and, instead, improperly resolved the merits (Error No. 1(a)); and (b) it misinterpreted Section 47 and erroneously found that TCM failed to submit a timely claim and complaint (Error No. 1(b))?

2. Whether the Circuit Court in its Orders erroneously sustained DGS's demurrer and denied the Reconsideration Motions to Count V because it applied Section 47 to the Phase II claims, even though Section 47 was not part of the parties' Phase II contract (Error No. 2)?

3. Whether the Circuit Court abused its discretion by refusing to allow TCM to amend its Amended Complaint (Error No. 3)?

STATEMENT OF FACTS

On May 14, 2004, TCM and DGS executed a Comprehensive Agreement for the Project. The Project involved several components of work, broken down into two general phases. Phase I involved the design and redevelopment of the Finance Building (n/k/a the Oliver Hill Building)

(Phase I-A) and the Washington Building (Phase I-B) on Capitol Square. See App 106 (AC, ¶ 12). Phase II involved the design and construction of a new office building, parking garage, and related facilities at the corner of 8th and Broad Streets in Richmond. See App 107 (AC, ¶ 13). TCM and DGS executed Design-Build Contracts for the Phase I(A) and I(B) work, but *did not* execute a Design-Build Contract for the Phase II work. Accordingly, Section 47 applied to Phase I, but not to Phase II. See App 3 (Section 25 to the Comprehensive Agreement).

The primary dispute between the parties arose during demolition of existing tenant improvements in the Washington Building, when, in December of 2005, TCM discovered a rare structural flooring system known as the "Metropolitan Floor System." See App 110 (AC, ¶ 31). This System consists of an archaic structural design that had not been used in office building construction for decades. The contract drawings depicted a reinforced concrete floor covered by gypsum fireproofing and terra cotta tiles, not the Metropolitan Floor System. TCM had no reason to suspect that the contract drawings were wrong and could not have visually inspected the flooring system before commencing the Work, since it was concealed. TCM could only have discovered the flooring system through invasive or destructive testing, but the contract documents did not authorize

TCM to conduct such testing – in part because the Washington Building was fully occupied and contained asbestos and lead paint at the time TCM and DGS executed the Design-Build Contract. App 476.

On December 18, 2005, and again on February 2, 2006, TCM issued a written notice to DGS of the hidden condition, as required under Section 7 of the General Conditions. See App 111-12 (AC, ¶¶ 34 and 37). Because the Metropolitan Floor System constituted a hidden condition, TCM was entitled to a change order compensating it for the millions of dollars in additional (and unanticipated) costs associated with the extra work necessary to permit TCM to perform the contract. See App 110-11, 113 (AC, ¶¶ 31 and 45). DGS, however, refused to acknowledge that the Metropolitan Floor System was a hidden condition and would not, therefore, issue a change order. DGS argued that TCM's failure to proceed with the hidden conditions work without additional payment was a material breach of TCM's contract. App 411 (Amended Counterclaim, ¶¶ 37-39).

The Commonwealth has continuously owned and occupied the Washington Building since 1923. During those 82 years of uninterrupted ownership and occupancy, DGS and its associated divisions have overseen all maintenance of, and repairs and renovations to, the Washington Building. Additionally, over the years, DGS has authorized

numerous penetrations through the floors as well as the renovation and removal of entire floor bays – all of which exposed the existence of the Metropolitan Floor System to DGS. App 109 (AC, ¶ 27). However, DGS failed to disclose any of this information to TCM – either before or after entering into the Comprehensive Agreement. To make matters worse, at the time it entered into the Comprehensive Agreement, DGS had in its possession a detailed report written by one of its division's employees that identified and described the Metropolitan Floor System in the Washington Building. App 111 (AC, ¶ 33). DGS never provided TCM with a copy of the report prior to entering into the Comprehensive Agreement or before TCM began the Work. App 477.

On December 18, 2006, TCM and DGS jointly submitted their claims concerning the Phase I and Phase II work to non-binding mediation. See App 108 (AC, ¶ 20). On December 22, 2006, after the parties failed to settle their claims at mediation, DGS sent TCM three letters: one purporting to terminate TCM for cause on Phase I-A, one purporting to terminate TCM for cause on Phase I-B, and the third purporting to terminate TCM for cause on Phase II. App 108 (AC, ¶ 21). Thereafter, DGS voluntarily suspended the terminations for cause several times. On February 16, 2007, TCM sent DGS letters relating separately to the Finance and

Washington Buildings as well as Phase II contesting DGS's attempt to terminate the Comprehensive Agreement – and stating its intention to pursue claims against DGS (the "Notice Letters"). App 107-08 (AC, ¶¶ 17 and 22); App 52-62 (Exhibits 2-5 to AC). On the same day, DGS sent TCM a letter finally issuing the effective termination letter, terminating TCM for cause – and expressly inviting TCM to "file any formal claims on [the] projects pursuant to Section 47" (the "Termination Letter"). App 108-09 (AC, ¶ 23); App 64-65 (Exhibit 6 to AC).

On March 23, 2007, pursuant to Section 47, TCM submitted to DGS its final claims for payment for the work it performed on the Washington and Finance Buildings (the "Claim Letters"). See App 107-08 (AC, ¶¶ 17-19); App 68-75 (Exhibits M-N to TCM Memorandum in Support of Motion for Reconsideration). DGS was well aware of TCM's claims by then, since the parties had already participated in a mediation over them. App 108 (AC, ¶ 20).

Because DGS maintained that terminating TCM for cause absolved it of any duty to pay TCM for any of its claims, TCM did not wait for a "final written decision" from DGS to file suit. See App 284. On April 24, 2007, TCM filed a complaint against DGS in the Circuit Court for the City of Richmond asserting approximately $12 million in claims for breach of

contract, wrongful termination and cardinal change relating to the Finance and Washington Buildings as well as Phase II. On September 5, 2007, TCM amended its complaint. See App 158.

On October 3, 2007, DGS filed Counterclaims against TCM. On December 5, 2007, DGS filed Amended Counterclaims totaling $11 million, alleging breach of contract against TCM (for the Finance and Washington Buildings) and TCM's surety (for the Finance Building). App 405.

On October 3, 2007, DGS filed its demurrer to TCM's Amended Complaint. On December 17, 2007, the Circuit Court sustained the demurrer and dismissed all of TCM's claims without leave to amend:

> ... [TCM] failed to submit a timely claim to Defendant for a final decision. [TCM] did not file suit in this Court until April 24, 2007, more than sixty days after [DGS's] February 16, 2007 termination letter. [TCM] failed to file any other form of final complaint with [DGS].
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> ***
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> ... [TCM] ... does not submit any documentation or make reference to a formal claim submitted within the sixty day time period.
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> The Court finds the evidence of compliance with Section 47 of the General [] Conditions to be insufficient.

See App 427 and 429.

On January 4, 2008, TCM filed a motion for reconsideration, which the Circuit Court denied on January 7, 2008, *before it was even opposed*. App 445 and 465. On January 10, 2008, TCM timely filed a Notice of Appeal. App 467. On April 30, 2008, this Court dismissed the appeal without prejudice as premature. App 470. The parties proceeded to litigate DGS's counterclaims. On March 26, 2009, one month before the start of the jury trial (scheduled for April 27-May 8, 2009), DGS nonsuited its counterclaims. App 496 and 498. On April 23, 2009, TCM timely filed its Notice of Appeal. App 500.

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

I. THE CIRCUIT COURT ERRED IN ITS ORDERS IN SUSTAINING DGS'S DEMURRER ON COUNTS I-IV (ERRORS 1(a) and 1(b)).

The purpose of a demurrer "is to determine whether a motion for judgment states a cause of action" upon which relief can be granted. Tronfeld v. Nationwide Mut. Ins. Co., 272 Va. 709, 712, 636 S.E.2d 447, 449 (2006). A demurrer tests "the legal sufficiency of facts alleged in pleadings," and "not the strength of proof" of those facts. Augusta Mut. Ins. Co. v. Mason, 274 Va. 199, 204, 645 S.E.2d 290, 293 (2007) (citation omitted); see also Welding, Inc. v. Bland County Serv. Auth., 261 Va. 218, 227, 541 S.E.2d 909, 914 (2001) ("A demurrer does not test matters of

proof and, unlike a motion for summary judgment, does not involve evaluating and deciding the merits of a claim").

Thus, when reviewing a demurrer, a trial court must accept as true all properly pleaded material facts and construe the pleadings in the light most favorable to the plaintiff. Tronfeld, 272 Va. at 713, 636 S.E.2d at 449; Ogunde v. Prison Health Servs., Inc., 274 Va. 55, 65, 645 S.E.2d 520, 526 (2007). "Under this rule, the facts admitted are those ***expressly alleged***, those which fairly can be viewed as ***impliedly alleged***, and those ***which may be fairly and justly inferred*** from the facts alleged." Catercorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993) (emphasis added); Tronfeld, 272 Va. at 713, 636 S.E.2d at 449 (quoting Ward's Equip., Inc. v. New Holland N. Am., Inc., 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997)) (trial court must consider "[a]ll reasonable factual inferences fairly and justly drawn from the facts alleged" in plaintiff's favor).

Virginia's demurrer standard reflects this Court's fundamental aversion to "short-circuit[ing] litigation pretrial[.]" Catercorp, 246 Va. at 24, 431 S.E.2d, at 279. In Renner v. Stafford, 245 Va. 351, 429 S.E.2d 218 (1993), this Court lamented the "increasing frequency [with which] we are confronted with appeals of cases in which a trial court has incorrectly short-

circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits." Id. at 352, 429 S.E.2d at 219.

Because the circuit court's determination of a demurrer is "confined to the legal sufficiency of a pleading, and does not involve a consideration of disputed facts," the circuit court is not permitted to assess the legal sufficiency of the evidence on a demurrer. See Hop-in Food Stores, Inc. v. Serv-N-Save, Inc., 237 Va. 206, 209, 375 S.E.2d 753, 755 (1989) (citing Bellamy v. Gates and Gill, 214 Va. 314, 315-16, 200 S.E.2d 533, 534 (1973)). In evaluating a circuit court's decision, this Court reviews the circuit court's ruling *de novo* to determine "whether a plaintiff's factual allegations are sufficient to state a cause of action." Schmidt v. Household Fin. Corp., II, 276 Va. 108, 114, 661 S.E.2d 834, 837 (2008) (citation omitted).

A. The Circuit Court Failed To Properly Evaluate TCM's Pleadings And, Instead, Improperly Resolved The Merits. (Error No. 1(a)).

Virginia is a notice pleading jurisdiction. Rule 1:4(d) provides:

> Every pleading shall state the facts on which the party relies in numbered paragraphs, and ***it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense.***

(Emphasis added). When a complaint contains sufficient allegations of

material facts to "inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer." See Catercorp, 246 Va. at 24, 431 S.E.2d at 279. "[E]ven though a [complaint] may be imperfect, when it is drafted so that [the] defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer[.]" Id.

The sole basis for the Circuit Court's decision sustaining DGS's demurrer is that "the ***evidence*** of compliance with Section 47 of the General [] Conditions [is] insufficient." See App 429 (emphasis added). However, TCM is not required to provide ***evidence*** of its compliance at the demurrer stage, but only to have ***pleaded*** compliance. TCM did, in fact, plead compliance with Section 47 by alleging that (1) it provided "written notice to DGS of its intention to file contractual claims" (see App 107 (AC, ¶ 17)), and (2) it "made written demands upon DGS for the payment of all sums properly due and payable to TCM" and "for the performance of DGS's obligations under the terms of the Contract Documents for the Project and pursuant to applicable law" (App 108 (AC, ¶¶ 18-19)). Accepting these factual allegations as true – as well as any facts impliedly alleged and which may be fairly and justly inferred – TCM adequately pleaded compliance with Section 47. See Catercorp, 246 Va. at 24, 431 S.E.2d at

279. Rather than limit its review to the sufficiency of TCM's ***allegations***, however, the Circuit Court improperly considered whether TCM had ***proven*** compliance with Section 47. See App 429. In doing so, the Circuit Court erred.

The facts and posture of this case -- and the Circuit Court's errors -- are virtually identical to those in a case previously decided by this Court, Welding, Inc. v. Bland County Serv. Auth., 261 Va. 218, 541 S.E.2d 909. In that case, a contractor sued a county service authority for failing to make two payments due to the contractor under the parties' contract. The circuit court sustained the authority's demurrer on the grounds that the contractor had not complied with the dispute procedures set forth in Virginia Code § 11-69(A) (recodified as Va. Code § 2.2-4363, the statute from which Section 47 was adopted) because (1) the pleadings did not "indicate" that the contractor had filed a notice of intent to file a claim for $100,000 for additional work, and (2) a second claim for $166,000 in liquidated damages was untimely under the statute. The circuit court also refused to allow the contractor to amend its pleadings because it found that an amended pleading could not cure the deficiencies. Id., at 226-28, 541 S.E.2d at 913-15.

With respect to the allegations relating to the notice of intent to file the $100,000 claim, the contractor merely alleged that final payment was made, that by letter the contractor "made [a] claim for $100,000" for the additional work, and that the authority "previously had written notice of [the contractor's] intention to file [the claim for $100,000] at the time of the occurrence or beginning of the work upon which the claim was based." Id., at 227, 541 S.E.2d at 914. The authority argued that those allegations were insufficient because the notice was based on written meeting minutes of a progress meeting. Id. This Court found that the contractor's allegation "that the Authority had previous written notice of [the contractor's] intention to file a claim" was sufficient to withstand demurrer and that "***whether such writing complies with the requirements of Code § 11-69(A) is a determination to be made at trial***." Id. (emphasis added).

With respect to the allegations relating to the timeliness of the contractor's claim for $166,000 in liquidated damages, the contractor merely alleged that it "objected to [the Authority's] decision to withhold liquidated damages for delay" and "made a written claim for the balance due." Id., at 228, 541 S.E.2d at 914. The authority alleged that the attachments to the motion for judgment showed disputes regarding responsibility for the delay and that the contractor was aware of the

disputes and its intentions to file claims prior to the withholding of the liquidated damages. Id. This Court held as follows:

> Once again, however, the issues raised by the Authority require construing provisions of the Procurement Act and applying them to the facts of this case. ***Issues such as whether filing notice eighteen days after an alleged "occurrence" or filing a notice of intent and a claim in a single document comply with the Procurement Act are not matters of pleading a cause of action, but of resolving the merits of the case.***

Id., at 228, 541 S.E.2d at 914 (emphasis added). This Court further found that the contractor's allegations and "all inferences reasonably taken therefrom 'cure the deficiencies' found by the trial court[.]'" Id. Accordingly, this Court reversed the circuit court's decision and remanded the case.

TCM's allegations that it "provided written notice to DGS of its intention to file contractual claims" and "made written demands upon DGS for the payment of all sums properly due and payable" were comparable to – if not more explicit than – the allegations this Court held sufficient to withstand demurrer in Welding. App 107-08 (AC, ¶¶ 17-19). Accordingly, TCM's allegations, together with all reasonable inferences, sufficiently pleaded compliance with the dispute procedures set forth in Section 47.

Consequently, the Circuit Court committed reversible error in sustaining DGS's demurrer in its December 17th Order and denying TCM's

Reconsideration Motions in its January 7th and July 10th Orders. The Circuit Court failed to accept TCM's allegations (pleaded expressly or impliedly and which may have been fairly inferred) as true and to construe them in the light most favorable to TCM. Therefore, the Circuit Court short-circuited TCM's constitutional right to have its claims against DGS decided on their merits by a jury. Renner, 245 Va. at 353-54, 429 Va. at 220.

B. The Circuit Court Misinterpreted Section 47 (Error No. 1(b)).

The Circuit Court's Orders reflect a fundamental misunderstanding of Section 47. When a dispute arises between a contractor and an owner (in this case, DGS), the contractor must first submit a written ***notice*** of its intent to file a claim with the owner at the time of the occurrence or the beginning of the work that forms the basis for the claim (step 1). The contractor is then required to submit its ***claim*** to the owner for final written decision no later than 60 days after final payment (step 2). The contractor then has six months from the date the owner issues its written decision on the claim to file a ***complaint*** in court (step 3). If, however, the owner fails to render a formal decision on the contractor's claim within 90 days of its submission, the contractor may immediately file suit. See App 1.

In its Orders, the Circuit Court did not address the first-step in the process – whether TCM satisfied the notice of intent requirement of Section

47; therefore, that question is not before this Court. See App 423-30; App 465-66; App 495. The sole basis for the Circuit Court's decision to dismiss TCM's Amended Complaint was its finding that TCM "failed to submit a timely claim to [DGS] for a final decision" and "did not file suit in this Court until April 24, 2007, more than sixty days after [DGS's] February 16, 2007 termination letter." App 427. The Circuit Court's interpretation of Section 47 was erroneous for several reasons.

First, TCM did, in fact, make a timely formal submission of its claims (step 2). TCM was terminated by DGS on February 16, 2007. See App 108-09 (AC, ¶ 23). In the Termination Letter, DGS stated that TCM was "entitled as of the date of [the Termination Letter] to file any formal claims on these projects pursuant to the provisions of Section 47[.]" Id. TCM did just that when, on March 23, 2007, it timely submitted to DGS its final claims on both the Washington and Finance Buildings. See App 108 (AC, ¶ 18); App 68-75 (Exhibits M-N to TCM Memorandum in Support of Motion for Reconsideration).[1] Accordingly, even though it was not required to

[1] To prove compliance with step 2 of Section 47 (even though it was not required to do so at this stage of the case), TCM attached its Claim Letters to its Motion for Reconsideration filed on January 4, 2008. The Circuit Court should have considered these letters in ruling on TCM's Motion. See Torloni v. Commonwealth, 274 Va. 261, 265-66, 645 S.E.2d 487, 490 (2007) (issues and arguments raised in motion for reconsideration are adequately preserved for review on appeal).

under the rules of notice pleading, TCM presented to the trial court evidence that TCM had timely complied with Section 47.

In addition to submitting its claims on March 23, 2007, TCM also submitted written claims to DGS in the course of the parties' formal mediation proceedings in December of 2006. As TCM pleaded in its Amended Complaint:

> 20. TCM and DGS mutually agreed to **submit their collective Project claims** to mediation, and participated in a mediation of **their collective claims** as required in the Contract Documents on December 18, 2006.

See App 108 (AC, ¶ 20). Therefore, TCM's formal written submission of its claims during the December 2006 mediation process is additional evidence that TCM complied with Section 47 and that the trial court's dismissal of TCM's claims with prejudice was in error.

Second, the Circuit Court clearly confused the filing of a claim with DGS (step 2) with the filing of a complaint in the Circuit Court (step 3). DGS's Termination Letter did not trigger the running of the six-month time period for TCM to file a complaint – at most, it triggered the running of the 60-day time period for TCM to submit its final claims to DGS. In fact, the Termination Letter expressly invited TCM to file a "formal claim[]" on the Project "pursuant to the provisions of Section 47." See App 64-65 (Exhibit

C to AC).[2] TCM's submission of its final claims on March 23, 2007 then triggered the period for DGS to issue a final decision on them. See App 1 (Section 47). Under Section 47, if DGS failed to issue its final decision on TCM's claims within 90 days, then TCM had the option to file suit immediately. The 90-day period expired on June 24, 2007 (90 days after TCM's March 23, 2007 claim submission). Because DGS terminated TCM for cause on February 16, 2007, it was obvious that DGS would never approve TCM's claims for payment under any circumstances. Indeed, DGS has argued below that, because TCM was terminated for cause, final payment would never have been due. See App 284 and Footnote 2, supra. Accordingly, TCM did not wait the full 90-day period before filing its complaint on April 24, 2007.

Under Virginia law, a party is not required to perform a futile act. See Waller v. Welch, 154 Va. 652, 662, 153 S.E. 722, 725 (1930) (party to contract need not perform where performance would be futile given other party's repudiation of contract). To wait the full 90 days before filing suit would have been a useless exercise in futility, which the law does not

[2] Under Section 47, the 60-day time period begins to run from the date of final payment. No such final payment, however, was ever made to TCM. DGS has argued that the 60-day time period in this case began to run on February 16, 2007 – the date it terminated TCM for cause – since final payment would never had been made. Even if this position were correct,

require. In any event, TCM's complaint was not late, and the Circuit Court erred in finding that it was. See App 427. In fact, *at worst*, the Circuit Court might have dismissed the action as ***premature*** – on the technicality that TCM failed to wait the full 90-day period before filing suit. Such a dismissal, however, would had to have been without prejudice to the refiling of a timely complaint after expiration of the 90-day period on June 24, 2007.[3]

Third, while a trial court may examine exhibits to a complaint to determine whether a party has stated a cause of action (see Catercorp, 246 Va. at 22, 431 S.E.2d at 279), it may not consider the absence of exhibits as evidence that the party has not. The Circuit Court's determination that certain of the exhibits to the Amended Complaint did not constitute a "claim" under Section 47 (see App 429) was improper. The Circuit Court defined a claim as a "demand of a right or supposed right, or a calling on another for something due or supposed to be due." See App 428

TCM's filing of its final claims on March 23, 2007 was timely.

[3] To protect itself, TCM filed a second action against DGS on August 16, 2007. TCM filed the second action before the expiration of the six-month limitations period set forth in Section 47 in order to preserve its litigation position in the event the Circuit Court concluded that the April complaint was premature. The six-month period would have ended, at the earliest, on August 23, 2007 – six months after TCM submitted its final claims on March 23, 2007. The second action has been stayed pending final resolution (including all appeals) in this action.

(quoting Wilby v. Gostel, 265 Va. 437, 449, 578 S.E.2d 796, 803 (2003)). TCM properly pleaded that it submitted timely payment demands to DGS. Whether these demands constituted claims under the parties' contract was a fact question for the jury; it was not a proper subject of inquiry and determination on demurrer. See Welding, 261 Va. 218, 541 S.E.2d 909.

II. THE CIRCUIT COURT ERRED IN ITS ORDERS WHEN IT APPLIED SECTION 47 TO COUNT V (ERROR NO. 2).

The parties expressly agreed in Section 25(a) of the Comprehensive Agreement that disputes involving matters covered by the Design-Build Contracts "shall be governed by Section 47[.]" See App 3. The parties further agreed that ***all other disputes*** arising under the Comprehensive Agreement (i.e., claims involving matters *not* covered by a Design-Build Contract) ***would not be subject to Section 47***, but instead would be subject to a good faith attempt to settle through mediation before resorting to litigation. Specifically, Section 25 states:

> (i) The parties shall attempt in good faith to settle the dispute by mediation before resorting to litigation as provided below....
>
> (ii) ... Mediation shall be a condition precedent to the institution of a lawsuit pursuant to this Agreement, or the Design Build Contract.

See App 3 (Section 25(b)(i)).

Count V of TCM's Amended Complaint concerns Phase II of the Project. As discussed above, TCM and DGS executed Design-Build Contracts for Phases I(A) and I(B), but not for Phase II. Accordingly, Section 47 only applies to disputes involving TCM's work on Phase I, *not* Phase II. Thus, even if the Circuit Court were correct that TCM failed to comply with Section 47, that finding would be inapplicable to Count V.

III. THE CIRCUIT COURT ERRED IN DISMISSING TCM'S AMENDED COMPLAINT WITHOUT LEAVE TO AMEND (ERROR NO. 3).

Even assuming arguendo the Amended Complaint was deficient and, therefore, the Circuit Court correctly sustained DGS's demurrer, it abused its discretion in denying TCM an opportunity to amend its pleading.

This Court has often held that a trial court abuses its discretion if it denies the plaintiff an opportunity to correct its complaint after sustaining a demurrer to it. See, e.g., Fox v. Deese, 234 Va. 412, 429, 362 S.E.2d 699, 709 (1987) (finding that the trial court abused its discretion by sustaining demurrers "without leave to amend;" reversing and remanding with instructions that the trial court should allow the plaintiff to file a motion to amend and should grant the motion); Strader v. Metro. Life Ins. Co., 128 Va. 238, 246, 105 S.E. 74, 76 (1920) (finding no error in sustaining demurrer, but leave to amend should have been given). Indeed, a plaintiff is typically granted leave to amend after a demurrer has been sustained.

See Va. Code § 8.01-273 ("Wherever a demurrer to any pleading has been sustained, *and as a result thereof the demurree has amended his pleading*...) (emphasis added); c.f. Sup. Ct. Rule 1:8 ("Leave to amend shall be liberally granted in furtherance of the ends of justice"); Ford Motor Co. v. Benitez, 273 Va. 242, 252, 639 S.E.2d 203, 208 (2007) ("[A] trial court's decision refusing leave to amend after a showing of good cause is, in ordinary circumstances, an abuse of discretion"); Bibber v. McCreary, 194 Va. 394, 396, 73 S.E.2d 382, 384 (1952) (stating that "leave to amend should be liberally granted" after a demurrer is sustained and reversing trial court's denial of motion for leave to amend).

In contravention of this Court's precedents, the Circuit Court sustained DGS's demurrer "without leave to amend," thus denying TCM an opportunity to correct the alleged deficiencies. While the Circuit Court may have believed that amendment would be futile, it was not in a position to make that judgment since a demurrer merely tests the allegations of the complaint, not the facts underlying it. See Augusta, 274 Va. at 204, 645 S.E.2d at 293; Welding, 261 Va. at 227, 541 S.E.2d at 914. As detailed above, TCM served DGS with its formal claims in the Claim Letters. App 107-08 (AC, ¶¶ 17-19); App 68-75 (Exhibits M-N to TCM Memorandum in Support of Motion for Reconsideration). Leave to amend would have

permitted TCM to specifically reference and attach those letters to cure any alleged pleading deficiencies. However, the Circuit Court sustained DGS's demurrer without leave to amend and, therefore, deprived TCM of the opportunity to tender an amended complaint.

TCM's "right to a fair trial must not be made subordinate to the judiciary's efforts to control its docket." Peterson v. Castano, 260 Va. 299, 304, 534 S.E.2d 736, 739 (2000). The Circuit Court in this case did just that. At the hearing on TCM's request to amend its original Complaint, the Circuit Court – without any rational justification – sternly informed TCM's counsel that it was unhappy with his original efforts to amend TCM's Complaint. The Circuit Court stated as follows: "Look, you had 19 pages to begin with. Now, how many pages have you got in the other one? If you've got a whole lot more pages, I'm not going to let you do it.... I can't imagine why 30 pages are necessary to assert anything, any kind of complaint." See App 136-37 (September 5, 2007 Hearing Transcript, at 4-5). It is common practice for Virginia courts to allow repeated amendments, at least so long as there is no substantial prejudice to the defendant. See, e.g., Kay v. Prof'l Realty Corp., 222 Va. 348, 351-52, 281 S.E.2d 820, 822 (1981) (second amendment allowed after demurrer to first amendment was sustained); Winchester Homes, Inc. v. Hoover Universal,

Inc., 27 Va. Cir. 62, 68 (Fairfax Co. Cir. Ct. 1992) (granting leave to file third amendment to complaint, "[a]s a court shall, upon sustaining a demurrer, liberally grant a plaintiff leave to amend").

CONCLUSION AND RELIEF SOUGHT

The Circuit Court ignored longstanding principles of Virginia law, reaching substantive conclusions at the demurrer stage and refusing without justification to grant leave to amend. In so doing, it made several of the same reversible errors as did the circuit court in Welding. Moreover, the Circuit Court misinterpreted the dispute procedures of Section 47 with respect to TCM's Phase I claims and improperly applied them to TCM's Phase II claims. Reversal is necessary to ensure that TCM receives its day in court, and the litigation process is not short-circuited.

Dated: December __, 2009 TC MIDATLANTIC DEVELOPMENT, INC.

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CERTIFICATE OF SERVICE

Pursuant to Rules 5:26(d) and Rule 5:27 of the Rules of the Supreme Court of Virginia, I hereby certify that on this __ day of December, 2009, 15 copies and one electronic copy of the foregoing Opening Brief of Appellant and the Appendix thereto were filed by hand delivery with the Clerk of the Court; and that three copies of the Opening Brief of Appellant and the Appendix were served by hand delivery on the following:

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