IN THE
SUPREME COURT OF VIRGINIA

Record No. 091271

TC MIDATLANTIC DEVELOPMENT, INC.,
Appellant

v.

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF GENERAL SERVICES, *et al.*
Appellees

BRIEF OF APPELLEES

William C. Mims, Attorney General of Virginia
Maureen R. Matsen, Deputy Attorney General
Richard Tyler McGrath (Va. State Bar I.D. No. 25448)
Randall H. Wintory (Va. State Bar I.D. No. 43312)
OFFICE OF THE ATTORNEY GENERAL
900 E. Main Street, 2nd Floor
Richmond, VA 23219
Telephone (804) 786-1100
Facsimile (804) 371-2086
rmcgrath@oag.state.va.us
Counsel for Appellees Commonwealth of Virginia, Department of General Services and the Comptroller of the Commonwealth of Virginia

SUBJECT INDEX

Page

TABLE OF CITATIONS v

NATURE OF THE CASE AND MATERIAL PROCEEDINGS 1

RESTATEMENT OF QUESTIONS PRESENTED BY TCM'S OPENING BRIEF 5

1. Whether the trial court correctly sustained DGS's demurrer and denied the Reconsideration Motions to Counts I-IV because: 5

   (a) The trial court properly evaluated TCM's Amended Complaint and correctly ruled that TCM failed to allege it submitted the required written claim to DGS for a final decision, which was a mandatory condition precedent to bringing a legal action against DGS? [TCM's Error No. 1(a)] 5

   (b) The trial court correctly construed Section 47 in ruling that TCM failed to submit the required written claim based upon TCM's allegations in the Amended Complaint and the exhibits attached thereto? [TCM's Error No. 1(b)] 5

2. Whether the trial court correctly sustained DGS's Demurrer and denied the Reconsideration Motions to Count V because it applied Section 47 to the Phase II claims, where TCM failed to argue that Section 47 did not apply and, even if Section 47 did not apply, TCM was still required to submit a written claim as a condition precedent to filing its action against DGS? [TCM's Error No. 2] 5

3. Whether the trial court correctly dismissed the Amended Complaint without leave to amend where (a) TCM previously asked for and received leave to amend to address the same deficiencies in its allegations; and (b)

TCM made no further motion to amend and did not tender an amended pleading? [TCM's Error No. 3] 6

FACTS 6

ARGUMENT 13

I. SUMMARY OF ARGUMENT 13

II. STANDARD OF REVIEW 16

A. ON DEMURRER 16

B. ON MOTIONS FOR LEAVE TO AMEND 17

C. ON MOTIONS FOR RECONSIDERATION 18

III. THE TRIAL COURT CORRECTLY SUSTAINED THE DEMURRER DISMISSING TCM'S ACTION 18

A. TCM FAILED TO ALLEGE SUBMITTAL OF THE REQUIRED CLAIM, WHICH BARRED TCM'S ACTION AGAINST DGS [TCM's Assignments of Error 1(a) and (b)] 19

B. THE TRIAL COURT PROPERLY EVALUATED THE AMENDED COMPLAINT AND CONCLUDED THAT TCM FAILED TO ALLEGE SUBMITTAL OF THE REQUIRED WRITTEN CLAIM [TCM's Assignment of Error 1(a)] 30

C. TCM MISCONSTRUES THE TRIAL COURT'S INTERPRETATION OF SECTION 47 33

D. THE TRIAL COURT PROPERLY CONSIDERED TCM'S FAILURE TO ATTACH AN EXHIBIT TO THE AMENDED COMPLAINT THAT CONSTITUTED THE REQUIRED CLAIM [Assignment of Error 1(b)] 34

E. TCM'S POSITIONS ARE DIFFERENT AND INCONSISTENT FROM THOSE TCM TOOK WHEN OPPOSING THE DEMURRER – TCM

INVITED THE ERROR AND NOW SEEKS TO TAKE ADVANTAGE OF THAT ERROR [TCM's Assignment of Error 1(a) and (b)] 35

1. TCM invited the assigned error and is seeking to take advantage of that error..... 36

2. TCM may not rely on facts not alleged in the Amended Complaint. 37

3. The Reconsideration Motions were improper and, therefore, the trial court properly denied them. 38

IV. TCM WAS REQUIRED TO SUBMIT A WRITTEN CLAIM FOR ITS PHASE II CLAIMS [TCM's Assignment of Error No. 2]..... 39

A. TCM INVITED THE ERROR AND, THEREFORE, IS BARRED FROM TAKING ADVANTAGE OF THE ERROR [TCM's Assignment of Error No. 2] 39

B. TCM WAS REQUIRED TO SUBMIT A WRITTEN CLAIM FOR PHASE II AS A MANDATORY CONDITION PRECEDENT TO FILING A LEGAL ACTION AGAINST DGS [TCM's Assignment of Error No. 2]..... 40

C. TCM WAIVED ASSIGNMENT OF ERROR NO. 2, THAT THE TRIAL COURT ERRED IN DENYING THE RECONSIDERATION MOTIONS, BY FAILING TO PRESENT ARGUMENT IN SUPPORT [TCM's Assignment of Error No. 2] 41

VI. THE TRIAL COURT PROPERLY DISMISSED THE AMENDED COMPLAINT WITHOUT LEAVE TO AMEND WHERE IT GRANTED TCM's PREVIOUS MOTION TO AMEND AND WHERE TCM DID NOT MAKE ANOTHER MOTION TO AMEND OR TENDER ANOTHER AMENDED PLEADING [TCM's Assignment of Error No. 3] 42

CONCLUSION AND RELIEF SOUGHT 47

CERTIFICATE 48

TABLE OF CITATIONS

Cases

Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99 (E.D. Va., 1983) 38

Angstadt v. Atlantic Mutual Ins. Co., 254 Va. 286, 492 S.E.2d 118 (1997) 37

Bibber v. McCreary, 194 Va. 394, 73 S.E.2d 382 (1952) 46

Blake Constr. Co./Poole & Kent v. Upper Occoquan Sewage Auth., 266 Va. 564, 587 S.E.2d 711 (2003) 16

Cangiano v. LSH Building Co., LLC, 271 Va. 171, 623 S.E.2d 889 (2006) 27, 36, 37, 39

Commonwealth v. AMEC Civil, LLC, 54 Va.App. 240, 255-56, 677 S.E.2d 633, 640-41 (Va.Ct.App. 2009) 22

Dade v. Anderson, 247 Va. 3, 439 S.E.2d 353 (1994) 43

Dr. William E.S. Flory Small Business Development Center, Inc. v. Commonwealth, 261 Va. 230, 541 S.E.2d 915 (2001) 16, 19, 21, 40

Flippo v. F&L Land Co., 241 Va. 15, 400 S.E.2d 156 (1991) 19

Ford Motor Co. v. Benitez, 273 Va. 242, 639 S.E.2d 203 (2007) 45

Fox v. Deese, 234 Va. 412, 362 S.E.2d 699 (1987) 45

Harrison & Bates, Inc. v. Featherstone Assocs., L.P., 253 Va. 364, 484 S.E.2d 883 (1997) 41

Hechler Chevrolet, Inc. v. General Motors Corp., 230 Va. 396, 337 S.E.2d 744 (1985) 18, 38, 43

Hetland v. Worcester Mut. Ins. Co., 231 Va. 44, 340 S.E.2d 574 (1986) 17

Jones v. Ford Motor Co., 263 Va. 237, 559 S.E.2d 592 (2002) 43

Kitchen v. Newport News, 275 Va. 378, 657 S.E.2d 132 (2008) 17

Legg v. County School Bd. of Wise County, 157 Va. 295, 160 S.E. 60 (1931) 43

Lerner v. Gudelsky Co., 230 Va. 124, 334 S.E.2d 579 (1985) 19

Main v. Department of Highways, 206 Va. 143, 142 S.E.2d 524 (1965) 15, 19, 23, 30, 31

Neff v. Garrard, 216 Va. 496, 219 S.E.2d 878 (1975) 42

P.L. Farmer, Inc. v. Cimino, 185 Va. 965, 41 S.E.2d 1 (1947) 44

Philip Morris USA, Inc. v. Chesapeake Bay Found., Inc., 273 Va. 564, 643 S.E.2d 219 (2007) 17, 27, 38

Prieto v. Commonwealth, 278 Va. 366, 381, 682 S.E.2d 910, 917 (2009) 42

Pulte Home Corp. v. Parex, Inc., 265 Va. 518, 579 S.E.2d 188 (2003) 23, 35

Stamie E. Lyttle Co. v. County of Hanover, 231 Va. 21, 341 S.E.2d 174 (1986) 21

Strader v. Metro Life Ins. Co., 128 Va. 238, 105 S.E. 74 (1920) 45

Viking Enterprise, Inc. v. Chesterfield, 277 Va. 104, 670 S.E.2d 741 (2009) 40

Walsh v. Bennett, 260 Va. 171, 175, 530 S.E.2d 904, 907 (2000) 18

Ward's Equipment, Inc. v. New Holland North America, Inc., 254 Va. 379, 493 S.E. 2d 516 (1997) 17, 18, 43

Welding, Inc. v. Bland County Service Auth., 261 Va. 218, 541 S.E.2d 909 (2001) 15, 27, 28, 32

Winchester Homes, Inc. v. Hoover Universal, Inc., 27 Va. Cir. 62 (Fairfax Cir. Ct., 1992) 46

Winston v. Commonwealth, 268 Va. 564, 604 S.E.2d 21 (2004) 18

Statutes

Va. Code § 2.2-1132 8

Va. Code § 2.2-4363 7

Va. Code § 2.2-814 ..... 9, 20, 29, 32, 35, 40

Va. Code § 2.2-815 40

Va. Code § 8.01-192 ..... 9, 20, 29, 32, 35, 40

Va. Code § 8.01-273 46

Va. Code § 8.01-386 8

Va. Code §§ 2.1-223.1 through 2.1-223.4 40

Va. Code §§ 56-575.1, et seq. 6

Regulations

1 Va. Admin. Code 30 8

Rules

Rule 1:1 39

Rule 1:8 46

Rule 5:17(c) 27, 37

Rule 5:17(c)(4) 42

Rule 5:25 ..... 27, 37

Rule 5:27 42

Other Authorities

CPSM Section 326.0 ..... 8, 20, 29, 32, 35, 40

Treatises

3 Steven G.M. Stein, Construction Law ¶ 8.01(4)(b)-(d) (2007) 22

VIRGINIA:

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COMMONWEALTH OF VIRGINIA, DEPARTMENT OF GENERAL SERVICES, *ET AL.,*

Appellees.

BRIEF OF APPELLEES

The appellees, the Commonwealth of Virginia, Department of General Services and the Comptroller of the Commonwealth of Virginia, (referred to collectively as "DGS"), by counsel, submit this brief respectfully requesting this Honorable3 Court to affirm three orders entered by The Honorable Theodore J. Markow and The Honorable Margaret P. Spencer, Judges of the Circuit Court of the City of Richmond in favor of DGS and against the appellant TC MidAtlantic Development, Inc. ("TCM").

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

TCM appeals from the trial court's entry of three orders. One order sustained DGS's demurrer to TCM's Amended Complaint and dismissed TCM's action without leave to amend. The other two orders denied TCM's

motions for reconsideration seeking to reverse the dismissal of its case.

The underlying case involves contractual disputes between DGS and TCM that arose during a public construction project. DGS and TCM entered into a Comprehensive Agreement and two Design-Build Contracts in May of 2004, wherein TCM contracted to be solely responsible for the design, construction and renovation of certain office buildings within the Capitol Square Complex in Richmond, Virginia (the "Project"). App. 105-106 (Am. Compl. ¶¶ 5-11). Before the Project was completed, the disputes arose and, after TCM refused to complete the Project without a multi-million dollar increase in compensation, DGS terminated TCM for cause on February 16, 2007. App. 63-65 ("Termination Letter").

On April 24, 2007, TCM filed its original Complaint seeking damages in excess of $12,000,000.00. App. 76-95. In response, DGS filed a Plea in Bar/Motion to Dismiss. App. 96-99. Rather than having the trial court hear and decide the Plea in Bar/Motion to dismiss, TCM filed a Motion for Leave to File an Amended Complaint ("Motion for Leave") (App. 100-132), which the trial court heard (App. 135:21-145:22) and granted. App. 158-59.

In response to the Amended Complaint, DGS filed the Demurrer, Plea in Bar and Motion to Dismiss Amended Complaint and supporting

memoranda (the "Demurrer"). App. 231-251; App. 278-322; App. 52-63.[1] A hearing on the Demurrer was held on November 29, 2007 (the "Hearing"). App. 323-404 (Hearing Transcript). TCM did not ask the trial court for leave to amend the Amended Complaint or tender an amended pleading before, during or after the Hearing. The trial court took the Demurrer under advisement and, on December 17, 2007, the trial court entered an order (the "December 17th Order") that sustained the Demurrer and dismissed the Amended Complaint without leave to amend. App. 423-430.

On January 3, 2008, TCM filed a Request for Suspension or Vacation ("Request for Suspension/Vacation") asking the trial court to suspend or vacate the December 17th Order to allow TCM time to file, and the trial court to consider, a motion for reconsideration. App. 431-444. TCM did not ask the trial court for time to file another motion to amend the Amended Complaint or to tender an amended pleading.

On January 4, 2008, TCM filed a Motion for Reconsideration ("Motion for Reconsideration"), seeking reversal of the December 17th Order. App. 445-464. Again, TCM did not ask the trial court for leave to amend the Amended Complaint and did not tender an amended pleading. The trial court denied the Motion for Reconsideration by an order entered January 7,

[1] App. 52-63, Exhibits 2 through 6 to the Amended Complaint, are also Exhibits 2 through 6 to DGS's Reply (App. 278-322).

2008 (the "January 7th Order"). App. 465-466. A counterclaim made by DGS against TCM remained pending. App. 405-422.

TCM appealed the December 17th Order to this Court. (Record No. 080534) ("First Petition"). That appeal was dismissed, without prejudice, on April 30, 2008. App. 470.

On May 29, 2008, TCM filed a Motion to Amend Order Dated December 17, 2007 in the trial court ("Motion to Amend Order" and, together with the Motion for Reconsideration, referred to as the "Reconsideration Motions"). App. 471-494. Once again, TCM did not ask the trial court for leave to amend the Amended Complaint or tender an amended pleading. The trial court denied that Motion by order dated July 10, 2008 (the July 10th Order"). App. 495. On March 26, 2009, DGS non-suited its counterclaims. App. 496-499. TCM noted its appeal. App. 500-502.

TCM's "Course of Proceedings" is objectionable in that it presents numerous "facts" and relies on documents that are not alleged in or part of the Amended Complaint. Thus, these "facts," and any inferences from such "facts" or documents, are not deemed true and must be disregarded. The primary instance is TCM's reference to purported letters dated March 23, 2007 ("March 23rd Letters"). There is no allegation in the Amended

Complaint regarding the March 23rd Letters or that TCM submitted them as claims under Section 47, and the March 23rd Letters are not Exhibits to the Amended Complaint.

Another instance of TCM's objectionable "facts" pertains to the floor system in the Washington Building. These "facts" are not germane to this appeal and should be disregarded. Similarly, TCM's "facts" about a purported "report" regarding the Metropolitan Floor System allegedly written by a DGS employee are not germane and must be disregarded.

RESTATEMENT OF QUESTIONS PRESENTED BY TCM'S OPENING BRIEF

1. Whether the trial court correctly sustained DGS's demurrer and denied the Reconsideration Motions to Counts I-IV because:

   (a) The trial court properly evaluated TCM's Amended Complaint and correctly ruled that TCM failed to allege it submitted the required written claim to DGS for a final decision, which was a mandatory condition precedent to bringing a legal action against DGS? [TCM's Error No. 1(a)]

   (b) The trial court correctly construed Section 47 in ruling that TCM failed to submit the required written claim based upon TCM's allegations in the Amended Complaint and the exhibits attached thereto? [TCM's Error No. 1(b)]

2. Whether the trial court correctly sustained DGS's Demurrer and denied the Reconsideration Motions to Count V because it applied Section 47 to the Phase II claims, where TCM failed to argue that Section 47 did <u>not</u> apply and, even if Section 47 did not apply, TCM was still required to submit a written claim as a condition precedent to filing its action against DGS? [TCM's Error No. 2]

3. Whether the trial court correctly dismissed the Amended Complaint without leave to amend where (a) TCM previously asked for and received leave to amend to address the same deficiencies in its allegations; and (b) TCM made no further motion to amend and did not tender an amended pleading? [TCM's Error No. 3]

FACTS

The Project from which this case arises consisted of selected state-owned buildings within or immediately adjacent to the Capitol Square Complex in Richmond, Virginia. The Project was undertaken pursuant to the Commonwealth of Virginia's Public Private Education Facilities and Infrastructure Act of 2002, Va. Code §§ 56-575.1, et seq. ("PPEA"). The primary contract DGS and TCM entered into was denominated as the "Comprehensive Agreement." App. 4-46 (the Comprehensive Agreement without the voluminous exhibits and documents incorporated therein). The entire Comprehensive Agreement was incorporated by reference into the Amended Complaint, App. 106 (Am. Compl. at ¶ 11).

The Comprehensive Agreement governed projects divided into two phases, Phase I and Phase II. App. 9-10 at R-4; App. 106-107 (Am. Compl. ¶¶12-13). Phase I-A was the Finance Building (renamed the Oliver W. Hill, Sr. Building). Id. Phase I-B was the Washington Building. Id. Phase II consisted of three potential projects for the demolition, development,

design and construction of a new 8th Street Complex and renovation of the 9th Street Office Building. Id.

DGS and TCM executed two Design-Build Contracts as required by the Comprehensive Agreement for Phase I, the Finance and Washington Buildings. Id. The Design-Build Contracts incorporated terms and conditions entitled "General Conditions of the Design-Build Contract Between the Commonwealth of Virginia and TC MidAtlantic Development, Inc. ("General Conditions"). Section 47 of the General Conditions prescribed claims and disputes procedures taken directly from Va. Code § 2.2-4363. App. 307-308. Among other conditions, Section 47 required TCM to:

1. Give written notice of an intent to file a claim (also referred to as notice of intent or notice of claim) at the time of occurrence or before beginning the work on which the claim is based.

2. Submit a written claim along with all practically available supporting evidence and documentation for a final decision by the agency within 60 days after final payment.

3. Obtain a final decision denying the claim or allow the time for a final decision to expire resulting in a deemed denial.

4. Initiate a legal action within six months of the final decision to avoid the decision from becoming final and conclusive.

Id. When DGS terminated TCM, DGS expressly notified TCM that it was "entitled as of the date of this letter to file any formal claims on these

projects pursuant to the provisions of Section 47 ...." App. 108-109 (Am. Compl. ¶ 23); App. 64-65 (Termination Letter at 2-3).

The Comprehensive Agreement also incorporated mandatory disputes and claims procedures, nearly identical to Section 47 and also taken from the predecessor to Va. Code § 2-2-4363, found in Chapter 3 of the Construction and Professional Services Manual ("CPSM").[2] App. 12 at ¶ 2(d) (referencing Exhibit H); App. 44 (Section 41 referencing Exhibit H, which incorporated by reference CPSM Chapter 3).[3] In Chapter 3, CPSM Section 326.0 required submittal of a written claim along with all practically available supporting evidence and documentation. Submittal of a written

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[2] The CPSM is an official publication of DGS published under authority of Va. Code § 2.2-1132. See also, 1 Va. Admin. Code 30, Agency Summary, Division of Engineering and Buildings. As an official document or publication containing the law, statutory and otherwise, of an agency of the Commonwealth, this Court may take judicial notice of the CPSM. Va. Code § 8.01-386. The applicable CPSM is available at the Bureau of Capital Outlay Management, 1100 Bank Street, Richmond, VA, and at the Library of Virginia. The current version of the CPSM, which contains the same claims procedures as the 1996 edition, is available at: http://www.dgs.virginia.gov/DivisionofEngineeringandBuildings/BCOM/CPSM/tabid/402/Default.aspx.

[3] While Exhibit H to the Comprehensive Agreement is not in the Appendix, it is in the Record. R. 00303. In any event, TCM acknowledged that CPSM Chapter 3 was incorporated into the Comprehensive Agreement and applicable to TCM. App. 201:17-24 (regarding applicability of CPSM Chapter 3 and ownership of design documents); and cf. App. 209:19-210:12 and 211:6-14 (DGS's argument regarding applicability of CPSM Chapter 3 and ownership of documents).

claim was also required by the mandatory claims procedures under Va. Code §§ 2.2-814 and 8.01-192.

DGS's Plea in Bar/Motion to Dismiss asserted that TCM's Complaint was barred by, among other deficiencies, TCM's failure to (a) comply with the requirement in Section 47 to submit a written claim; and (b) comply with the statutory preconditions to a remedy against the Commonwealth under Va. Code § 8.01-192. App. 96-97.

Rather than having the trial court hear and decide the Plea in Bar/Motion to dismiss, TCM filed a Motion for Leave to Amend and an Amended Complaint to address the pleading deficiencies in the Complaint. App. 101 at ¶ 7; App. 141:5-142:19. The Amended Complaint filed with leave of court was 30 pages in length and consisted of 127 paragraphs and 57 exhibits ("Exhibits"), which filled two five-inch thick binders.

Once again, the Amended Complaint failed to allege that TCM submitted a timely written claim for a final decision under Section 47 and none of the 57 Exhibits were the required written claim. App. 236-238 (Mem. in Support of DGS's Demurrer at 6-8); App. 278-285 (DGS's Reply to TCM's Opp. to DGS's Demurrers at 1-8). Accordingly, DGS filed the Demurrer and supporting memoranda. App. 231-251; App. 278-322.

TCM opposed the Demurrer by arguing on brief that, for the Finance Building claim,

> [T]he Amended Complaint documents that TCM prepared and submitted to DGS, for immediate payment, invoices documenting the expenses incurred for the additional work (collectively, the "Finance Building Invoices"). [Am. Compl.] at ¶¶ 81, 86.
>
> The Finance Building Invoices, and the associated directive letters and/or support that TCM attached thereto, constitute both notice of TCM's intention to submit a claim to DGS and a claim itself.[4]

App. 254-55 (TCM's Mem. in Opp. to DGS's Demurrer at 3-4). TCM further argued that:

> TCM submitted to DGS, in writing, its claims related to the Finance Building and Washington Building prior to the 60-day deadline in Section 47.[5] Additionally, pursuant to the provisions of Section 5 of the Agreement, TCM submitted, in writing, its claims as to Phase II of the Project. Am. Compl. ¶ 118.[6]

App. 259 (TCM's Mem. in Opp. to DGS's Demurrer at 8).

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[4] Paragraphs 81 and 86, or any other paragraphs, do <u>not</u> allege that the Finance Building Invoices were TCM's notices of claim and the claim.

[5] No citation to any allegations in the Amended Complaint.

[6] The Amended Complaint at ¶ 118 alleges as follows:

> TCM previously submitted its invoices and demand for payment of all sums payable for Phase II of the Project, pursuant to the provisions of Section 5 of the Comprehensive Agreement (the "Phase II Invoice"). Copies of the Phase II Invoice and associated materials are attached hereto as Exhibit 57.

App. 129; App. 310-22 (Exhibit 57, the referenced invoice).

TCM then argued that the Termination Letter, dated February 16, 2007 (App. 63-67) was DGS's final decision on TCM's claims pursuant to Section 47. App. 258-60 (TCM's Mem. in Opp. to DGS's Demurrer at Subsection C); App. 108-109 (Am. Compl. ¶ 23 alleging the Termination Letter constituted DGS's final decision on TCM's claims). Thus, TCM argued, it had complied with all prerequisites to filing suit as of February 16, 2007. Id. However, none of TMC's allegations or exhibits actually supported its arguments.

At the Hearing on the Demurrer, TCM maintained that (a) it sufficiently alleged submittal of a written claim in accordance with Section 47, that its invoices were its claims; (b) the Termination Letter was DGS's final decision on TCM's claims; and (c) TCM had, therefore, complied with all prerequisites to filing suit as of February 16, 2007. App. 352:4-8; App. 355:10-15; App. 361:18-363:4. TCM also argued that

> [W]e didn't attach all of the papers and notices to this complaint. We attached a lot of them, but, for example, on March 16th, after we got [the Termination Letter], we sent [Mr. Owens] another letter saying we disagreed with what you're going to do, we intend to file a claim, here's our claim, and, oh, by the way, here's a summary of our claim with respect to Phase One, the Finance Building, and here's a summary of our claim with respect to Phase Two of the Washington Building.

App. 344:23-345:6. To support this argument, TCM cited no allegations in the Amended Complaint, cited no Exhibits, and proffered no documents to the Court.

The trial court had previously granted TCM's Motion for Leave, which allowed TCM to file the Amended Complaint to correct the deficiencies in its Complaint. TCM never made another motion for leave to amend or tendered another amended pleading before, during or after the Hearing. The trial court sustained the Demurrer and dismissed the Amended Complaint without leave to amend. App. 423-430 (December 17th Order).

In its Request for Suspension/Vacation, TCM asked the trial court to suspend or vacate the December 17th Order to allow the trial court time to consider the Motion for Reconsideration. App. 431-444. TCM did not ask the trial court for time to file another motion for leave to amend or to tender another amended pleading. The Motion for Reconsideration did not include a motion for leave to amend or tender an amended pleading.

TCM's Request for Suspension/Vacation and Motion for Reconsideration raised different and inconsistent positions than those brought to the trial court's attention previously. While TCM still argued that its invoices were its claims and the Termination Letter was a final decision on those claims, TCM now asserted that (a) a different set of paragraphs

contained the requisite allegations that TCM had submitted the required claim; (b) Section 47 did not apply to Phase II, so no written claim need be submitted; and (c) the March 23rd Letters, which were not alleged in the Amended Complaint and were not Exhibits thereto, were the written claims that TCM was required to submit for final decision. App. 449-454. By entry of the January 7th Order, the trial court denied the Motion for Reconsideration.

Long after the December 17th Order became final under Rule 1:1, TCM filed the Motion to Amend Order, re-arguing its Motion for Reconsideration. App. 471-494. The trial court deemed that Motion to be another motion for reconsideration and, in the July 10th Order, denied it. App. 495.

ARGUMENT

I. SUMMARY OF ARGUMENT

The parties' contract and applicable law imposed mandatory procedural requirements that were conditions precedent or prerequisites to TCM's right to bring a legal action against the Commonwealth. TCM was required to exhaust these mandatory administrative procedures or else any right to bring a legal action would be barred. Under such circumstances it was necessary for TCM to allege performance of the mandatory procedural

requirements to state a valid claim sufficient to survive a demurrer. Concerned that its original Complaint lacked such allegations, TCM preemptively moved for leave to amend, which the trial court granted, thereby allowing TCM to file its Amended Complaint to correct the deficiencies in its pleading.

The Amended Complaint, however, still failed to allege submittal of a written claim for final decision and, therefore, its action was barred by law. In opposing the Demurrer, TCM maintained that its Amended Complaint alleged submittal of the required written claims. TCM, however, argued facts not alleged in the Amended Complaint, pointed to no allegations or Exhibits that showed TCM submitted the required claim, and presented no credible argument that TCM had, in fact, submitted the required claim.

TCM had a full and fair hearing on whether it sufficiently alleged a valid claim. The trial court carefully considered TCM's allegations in the Amended Complaint as amplified by the Exhibits attached thereto, and in light of TCM's arguments on brief and at the Hearing. The trial court had previously given TCM an opportunity to amend to allege performance of the mandatory claims procedures. The trial court found TCM's allegations lacking, correctly sustained the Demurrer and, under the circumstances, properly dismissed the case without leave to amend. TCM never made

another motion to amend the Amended Complaint and never tendered another amended pleading to the trial court, despite having the opportunity to do so.

If the trial court erred, although it did not, then such error was caused by TCM, and TCM cannot rely on the error it created as grounds for this appeal. TCM's appeal relies on the March 23rd Letters, which are not alleged in the Amended Complaint and are not attached to the Amended Complaint. In opposing the Demurrer, TCM did not argue that the March 23rd Letter were the required claims or that Section 47 was inapplicable to its Phase II claims. TCM never asked the trial court for leave to amend and never tendered an amended pleading to the trial court, though it had the opportunity to do so. As such, the trial court could not consider these arguments. Consequently, TCM created the assigned errors and TCM cannot now argue that the trial court erred in sustaining the Demurrer.

As a result, Welding, Inc. v. Bland County Service Auth., 261 Va. 218, 541 S.E.2d 909 (2001) does not compel reversal of the Orders as TCM insists. Instead, this case is governed by Main v. Department of Highways, 206 Va. 143, 149-50, 142 S.E.2d 524, 529 (1965) (affirming decision sustaining demurrer where the plaintiffs took none of the mandatory steps prescribed in the contract to ensure payment for extra work, including

giving notice of intent) and William E.S. Flory Small Business Development Center, Inc. v. Commonwealth, 261 Va. 230, 541 S.E.2d 915 (2001) (affirming dismissal where contractor failed to perform mandatory claims procedure by not submitting timely notice of claim).

If anything, Welding, Main and Flory compel this Court to affirm the decisions of the trial court and dismiss this case. TCM was required to allege that it submitted the required written claim for a final decision. The Amended Complaint contained no such allegation and none of its Exhibits are TCM's claims. Thus, the trial court's dismissal without leave to amend and denial of the Reconsideration Motions should be affirmed.

II. STANDARD OF REVIEW

A. ON DEMURRER

A demurrer admits the truth of the facts alleged in the complaint, as well as any facts that may be reasonably and fairly implied and inferred from those allegations, and the sufficiency of the trial court's legal conclusions made as to those facts is reviewed by this Court de novo. Blake Constr. Co./Poole & Kent v. Upper Occoquan Sewage Auth., 266 Va. 564, 570-71, 587 S.E.2d 711, 714-15 (2003). To survive a demurrer, "a pleading must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment. In other words, despite

the liberality of presentation which the court will indulge, the [complaint] must state a cause of action." Kitchen v. Newport News, 275 Va. 378, 385, 657 S.E.2d 132, 136 (2008).

A demurrer does not admit the correctness of conclusions of law. Ward's Equipment, Inc. v. New Holland North America, Inc., 254 Va. 379, 382-83, 493 S.E. 2d 516, 518 (1997). The Court may examine the plaintiff's allegations in light of the exhibits attached to the complaint and "ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings." Id.

On appeal, this Court is confined solely to the facts alleged in the complaint to which the demurrer was sustained. Philip Morris USA, Inc. v. Chesapeake Bay Found., Inc., 273 Va. 564, 572, 643 S.E.2d 219, 223 (2007). No consideration can be given to any additional facts or documents presented on brief or during oral argument. Powers v. Cherin, 249 Va. 33, 35, 452 S.E.2d 666, 667 (1995).

B. ON MOTIONS FOR LEAVE TO AMEND

This Court's review of the trial court's decision to grant or deny a motion to amend "is limited to the question whether the trial judge abused his discretion." Hetland v. Worcester Mut. Ins. Co., 231 Va. 44, 46, 340 S.E.2d 574, 575 (1986). After sustaining a demurrer, a trial court may

properly deny a motion for leave to amend, if such a motion were made, and dismiss the case when it is apparent that such an amendment would accomplish nothing more than provide opportunity for re-argument of questions already decided. Ward's Equipment, 254 Va. at 387, 493 S.E. 2d at 521; Hechler Chevrolet, Inc. v. General Motors Corp., 230 Va. 396, 403, 337 S.E.2d 744, 749 (1985).

C. ON MOTIONS FOR RECONSIDERATION

A denial of a motion for reconsideration is reviewed applying an abuse of discretion standard. Winston v. Commonwealth, 268 Va. 564, 620, 604 S.E.2d 21, 53 (2004). Whether the trial court abused its discretion is fact-specific and this Court must review the record and reverse the trial court only upon finding a clear abuse of discretion. Walsh v. Bennett, 260 Va. 171, 175, 530 S.E.2d 904, 907 (2000). Motions for reconsideration are not favored because:

> The trial courts labor under increasing burdens, and judicial economy requires that litigants have one, but only one, full and fair opportunity to argue a question of law. The time required to hear a litigant reargue a question a second time must be taken from other litigants who are waiting to be heard.

Hechler, 230 Va. at 403, 337 S.E.2d at 749 (emphasis added).

III. THE TRIAL COURT CORRECTLY SUSTAINED THE DEMURRER AND DISMISSED TCM'S ACTION [TCM's Assignments of Error 1(a) and (b)]

A. TCM FAILED TO ALLEGE SUBMITTAL OF THE REQUIRED CLAIM, WHICH BARRED TCM'S ACTION AGAINST DGS

[TCM's Assignments of Error 1(a) and (b)]

To have a right to bring an action against DGS, TCM was required to perform all of the required procedures to exhaust the administrative claims process, including submitting a written claim for a final decision. App. 307 (Section 47 provision that contractor may not institute legal action prior to receipt of final decision or deemed denial). These procedures were conditions precedent to bringing a legal action against DGS - the "mandatory, procedural requirements in order for a court to reach the merits of a case." See Flory, 261 Va. at 238, 541 S.E.2d at 919 (VPPA claims procedures).

"A party seeking to recover on a contract right must allege... performance of any express conditions precedent upon which his right of recovery depends." Lerner v. Gudelsky Co., 230 Va. 124, 132-33, 334 S.E.2d 579, 584 (1985) (emphasis added); Flippo v. F&L Land Co., 241 Va. 15, 22, 400 S.E.2d 156, 160 (1991) (affirming decision sustaining demurrer); see also Main, 206 Va. at 149-50, 142 S.E.2d at 529 (affirming decision sustaining demurrer where the plaintiffs took none of the steps prescribed in the contract to ensure payment for extra work, including giving written notice of his intent of claim).

The four steps TCM was required to perform, and therefore allege, to exhaust the mandatory administrative claims procedure were:

1. Give written notice of its intent to file a claim at the time of occurrence or before beginning the work on which the claim is based.

2. Submit a written claim along with all practically available supporting evidence and documentation for a final decision by the agency within 60 days after final payment.

3. Obtain a final decision denying the claim or deemed denial.

4. Initiate a legal action within six months of decision.

App. 307-308 (Section 47); see also, CPSM Section 326.0 (imposing nearly identical claims procedure as Section 47 for certain claims arising under the Comprehensive Agreement); Va. Code §§ 2.2-814(A) and 8.01-192 (requiring submittal of a written claim for claims against the Commonwealth).

In this case, the sufficiency of TCM's Amended Complaint turns on whether there are any allegations showing that TCM exhausted the mandatory conditions precedent by submitting a written claim for a final decision along with all practically available supporting evidence and documentation for a final decision. A "claim" in other contexts has been defined as "an authoritative or challenging request, a demand of a right or

supposed right, or a calling on another for something due or supposed to be due." App. 428 (Dec. 17th Order at 6).

A routine invoice or request for payment submitted during the course of a construction project is not a claim because it is not an authoritative or challenging request. See, e.g., MCI Constructors v. Spottsylvania Cnty., 62 Va. Cir. 375, 378 (Spottsylvania Cir. Ct., Aug. 4, 2003) (finding that routine invoices and demands for payment were not notices of claims, but were the "routine and anticipated components of construction projects [that] generally do not provoke irresolvable disputes").

A mere demand for payment is not a claim, though if refused, it may be the occurrence that gives rise to a claim, whereupon a written claim must be submitted. See Flory, 261 Va. at 238, 541 S.E.2d at 919; and App. 307 (Section 47).

A simple letter also cannot be a claim given Section 47's requirement that a claim be submitted along with all practically available supporting evidence and documentation. See Stamie E. Lyttle Co. v. County of Hanover, 231 Va. 21, 25-26, 341 S.E.2d 174, 177-78 (1986) (contractor's letter regarding extent, nature and amount of claims was settlement proposal, not a claim submitted pursuant to county's claims procedures).

A claim distinguishes itself from routine project documents by (a) declaring that the contractor is asserting a claim that, if denied, could result in the filing of a legal action, and (b) by requiring the agency to render a final written decision on such claim. App. 307-308 (Section 47); cf. Flory, 261 Va. at 238-39, 541 S.E.2d at 919-20 (invoices were insufficient to comply with notice of claim requirement in VPPA); Commonwealth v. AMEC Civil, LLC, 54 Va.App. 240, 255-56, 677 S.E.2d 633, 640-41 (Va.Ct.App. 2009) (discussing notice of intent to file a claim); and see 3 Steven G.M. Stein, Construction Law ¶ 8.01(4)(b)-(d) (2007) (methods for presenting a written construction contract claim).

On brief to the trial court, TCM argued that (a) it had alleged submittal of the required claim; (b) its invoices were its claim; (c) the Termination Letter dated February 16, 2007 was DGS's denial of those claims; and (d) TCM had, therefore, complied with all prerequisites to filing suit. App. 259 (TCM's Opp. at 8); App. 352:4-8; App. 355:10-15; App. 361:18-363:4. In making these arguments, in most instances TCM cited to no allegations in the Amended Complaint or Exhibits. Where TCM cited to paragraphs or Exhibits, they did not support TCM's arguments.

TCM's oral argument at the Hearing was similarly unenlightening. TCM made a confusing, ambiguous reference to a purported letter TCM

sent after receiving the Termination Letter. App. 344:23-345:6. However, given TCM's express allegations and arguments that the Termination Letter dated February 16, 2007 was DGS's denial of TCM's claims, then this referenced letter had to be one of TCM's letters dated February 16, 2007, which TCM argued were its notice of claim and claim. App. 52-62; App. 360:16-361:5. In any event, TCM's argument is not supported by any allegations in the Amended Complaint or by the Exhibits to the Amended Complaint.

In other words, TCM failed to direct the trial court to any specific allegations in the Amended Complaint or Exhibits thereto that showed TCM submitted the required timely written claim and supporting documentation. Thus, the trial court was left with TCM's bare argument, but no allegations or exhibits, that showed TCM submitted the required timely written claim with supporting documentation. Under such circumstances, sustaining the demurrer was proper. Main, 206 Va. at 149-50, 142 S.E.2d at 528-29; and see, Pulte Home Corp. v. Parex, Inc., 265 Va. 518, 523, 579 S.E.2d 188, 190 (2003) (affirming trial court's decision sustaining a demurrer where court was left with the naked allegation of an alleged express warranty).

After the trial court sustained the Demurrer, TCM changed its position as to where and how it alleged submittal of the required written claim.

TCM's new position was different from and inconsistent with the position TCM had argued to the trial court in opposition to the Demurrer. After dismissal of its case, TCM relied upon the following allegations:

> 17. Throughout the course of the Project, TCM provided *written notice to DGS of its intention to file contractual claims* at the time of the occurrence or beginning of the work upon which such claims are based.
>
> 18. TCM has made *written demands* upon DGS for the payment of all sums properly due and payable to TCM, and DGS has failed or refused to timely or fully pay all such sums 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. However, DGS has failed or refused to timely or fully perform its contractual and legal obligations under the Contract Documents for the Project and pursuant to applicable law.

App. 459 (emphasis added). TCM relies on these same Paragraphs on appeal. Opening Br. 19.

TCM, however, fails to provide any credible explanation as to how these Paragraphs allege compliance with the mandatory requirements to submit a written claim along with all practically available evidence and documentation for a final decision. Op. Brief at 19, 22.

Paragraph 17 pertains to giving notice of claim, the first mandatory step under Section 47, which is not at issue in this appeal. App. 307. Paragraph 17 is important, though, in one respect. The word "claim" is a

term of art in public construction contracts. TCM's use of the word claim in Paragraph 17 with respect to its notices of claims, but not in Paragraphs 18 and 19, shows that TCM clearly understood the distinction between a "claim" and a routine "demand for payment." By omitting the word "claim" from its allegations in Paragraphs 18 and 19, TCM understood that it was not alleging submittal of the required written claim.

To support its position, TCM argues that TCM's and DGS's alleged agreement to submit their collective Project claims to mediation as required in the contract documents is additional evidence that TCM complied with Section 47. App. 108 (citing Am. Compl. Paragraph 20). TCM's argument is unavailing. First, TCM relies on facts not alleged in the Amended Complaint. TCM argues that it made a "formal written submission of its claims during the December 2006 mediation process ..." Opening Br. at 25. However, there is no such allegation in the Amended Complaint. Moreover, no written claims or documents were exchanged by the parties in the mediation. App. 397:6-22.

Second, the alleged mediation required under the Comprehensive Agreement did not apply to Phase I claims. App. 34 (Section 25(b)). Phase I claims were governed by Section 47 exclusively, which did not require mediation. Id. Also, proposals to settle a dispute through mediation do not

constitute submittal of the required claim. See Stamie E. Lyttle, 231 Va. 21, 25-26, 341 S.E.2d 174, 177-78 (letter regarding claims was settlement proposal, not a required claim). No matter, Paragraph 20 does not allege that the contractual requirement to submit Phase II disputes to mediation satisfied the written claim submittal requirement.

Thus, the Paragraphs on which TCM relies for this appeal do not allege the submittal of the required written claim along with all practically available documentation. If they did, then rather than alleging that "TCM has made written demands upon DGS," Paragraphs 18 and 19 would have alleged "TCM submitted timely written claims to DGS."

The fact that Paragraphs 18 and 19 fail to reference the March 23rd Letters shows that TCM did not consider the March 23rd Letters to be the required claim. TCM, itself, refers to the March 23rd Letters as notices of claim. See Appellant's Designation of the Record for Appendix, Item No. 6, wherein TCM identifies the March 23rd Letters not as claims, but as "Letters from TCM to DGS providing DGS with *Notice of TCM's Claims*." (emphasis added.)

Furthermore, TCM's assertion that the March 23rd Letters were the required claim is contradicted by TCM's express allegation that the

Termination Letter, dated February 16, 2007, was DGS's denial of all of TCM's claims. App. 108-109 (Am. Comp. ¶ 23).

In any event, the March 23, 2007 Letters were not alleged in the Amended Complaint, were not Exhibits to the Amended Complaint and TCM never asked for leave to amend the Amended Complaint or tendered an amended pleading. TCM did not argue that the March 23rd Letters were its claims on brief or at the Hearing, so TCM did not give the trial court the opportunity to consider this argument when deciding the Demurrer. Accordingly, these Letters and any "facts" associated with them must be disregarded by this Court. Philip Morris, 273 Va. at 572, 643 S.E.2d at 223; Powers, 249 Va. at 35, 452 S.E.2d at 667; Rules 5:17(c)(3); 5:25. If anything, TCM invited the assigned error and seeks to take advantage of that error, which it cannot do. Cangiano v. LSH Building Co., LLC, 271 Va. 171, 181, 623 S.E.2d 889, 895 (2006).

For all of the foregoing reasons, Welding, Inc. v. Bland County Service Auth., 261 Va. 218, 227, 541 S.E.2d 909, 914 (2001) does not support reversal of the December 17th Order. In Welding, the contractor failed to allege submittal of the required written notice of claim (which is not the step at issue in this appeal). This Court held that the contractor cured that defect by moving to amend and tendering an amended complaint

alleging the Authority "had previous written notice of Welding's intent to file a claim." Welding, 261 Va. at 226, 541 S.E.2d at 913, 914-915.

Like Welding, TCM's Amended Complaint failed to allege it satisfied a mandatory prerequisite to filing its legal action by submitting the required claim. Unlike Welding, however, TCM never cured that deficiency by moving to amend and by tendering an amended pleading to the trial court. If TCM truly believed that the March 23rd Letters were its claim, then according to Welding, TCM should have moved for leave to amend as it did previously and tendered an amended pleading. TCM chose not to take any of these actions, which prevents TCM from arguing that the March 23rd Letters were its claims.

At bottom, TCM invites this Court to rule that vague allegations regarding submittal of routine project documents, such as invoices or demands for payment, are sufficient to allege submittal of the required timely written claim along with all supporting practically available evidence documentation, which is necessary to exhaust the mandatory administrative claims procedure. Such a ruling would mean that contractors could dispense with filing a claim and simply allege that every routine invoice or demand for payment in every government contract was a "claim." If such a rule were the law, then on a typical government construction

project there would be hundreds of claims, whether intended or not. For the government to comply with Section 47, it would be forced to treat every invoice or payment demand as requiring a written decision by the agency head, and every invoice or payment demand as giving rise to a legal action. This would unnecessarily burden the government and cost significant tax dollars upon receipt of every invoice or payment demand.

The submittal of a timely written claim along with all practically available supporting evidence and documentation for a final decision was a condition precedent or prerequisite to TCM's right to file an action against DGS under Section 47. See, also, CPSM Section 326.0 and Va. Code §§ 2.2-814 and 8.01-192.

Thus, TCM had to allege it timely submitted written claim along with all practically available supporting evidence and documentation for a final decision. TCM's failure to allege such submittal was fatal to TCM's action against DGS. The trial court previously gave TCM an opportunity to allege it exhausted the mandatory administrative claims procedure. As a result, the trial court correctly sustained the Demurrer without leave to amend and properly denied the Reconsideration Motions.

B. THE TRIAL COURT PROPERLY EVALUATED THE AMENDED COMPLAINT AND CONCLUDED THAT TCM FAILED TO ALLEGE SUBMITTAL OF THE REQUIRED WRITTEN CLAIM [TCM's Assignments of Error 1(a)]

TCM asserts the trial court erred by failing to properly evaluate TCM's Amended Complaint and, instead, resolved the merits of the case. TCM does so by seizing upon the trial court's use of the word "evidence" in deciding that TCM's allegations and Exhibits failed to allege submittal of the required written claim. Opening Br. at 19, citing App. 429. TCM's argument is unfounded.

The trial court's decision in the December 17th Order is consistent with this Court's decision in Main. In Main, the trial court sustained a demurrer with leave to amend based on its conclusion that the plaintiffs' pleading failed to allege compliance with certain procedures in the specifications. Main, 206 Va. at 147, 142 S.E.2d at 527-28. The plaintiffs filed their amended pleading, to which the defendants demurred on substantially the same grounds. The trial court sustained the demurrer to the amended pleading and, the plaintiffs having declined leave to amend, dismissed the case. Id. The trial court concluded that the amended pleading failed to allege, among other things, that the plaintiffs had given notice of their intention to make a claim for extra compensation as required by the specifications. Main, 206 Va. at 149, 142 S.E.2d at 528.

On appeal, this Court found that the specifications specifically required that the contractor must give notice of his intent to claim and, unless he did so, the claim was waived. Main, 206 Va. at 149-50, 142 S.E.2d at 529. This Court concluded that the plaintiffs "took none of the required steps to insure payment." Id. As to the plaintiffs' argument the parties orally modified the contract, this Court concluded that the contract clearly provided the method by which the plaintiffs could recover costs for extra work, and not having followed the prescribed method, they were not entitled to any recovery. Main, 206 Va. at 147, 142 S.E.2d at 530-31. This Court affirmed the trial court's dismissal on demurrer. Id.

Although this Court did not use the word "evidence" in its opinion in Main, its discussion of the alleged facts is the same as though the facts were established by evidence by, for example, concluding "plaintiffs took none of the required steps to insure payment." Main, 206 Va. at 149-50, 142 S.E.2d at 529. Likewise, the decision in Main resulted in a decision on the merits of the case on demurrer based solely on the alleged facts.

In this case, after reciting the appropriate standard for deciding the Demurrer the trial court recited the fact alleged in the Amended Complaint as if they were true - as "evidence" of the facts in the case - in analyzing whether TCM sufficiently alleged submittal of the required written claim.

App. 425-427. Applying the applicable standard and in light of the "evidence," i.e. allegations, the trial court correctly concluded that TCM did not "submit any documentation or make reference to a formal claim submitted within the sixty-day time period" and found "the evidence of compliance with Section 47 ... to be insufficient." App. 429.

TCM's reliance on Welding is misplaced. In Welding, the contractor cured the deficiency in its pleading by tendering an amended pleading that the alleged the public body had previous written notice of its intention to file a claim. Welding, 261 Va. at 227, 541 S.E.2d at 914. Unlike the contractor in Welding, TCM did not cure its deficient pleading by moving to amend or tendering another amended pleading.

Also unlike the contractor in Welding, TCM does not and cannot cite any allegations in the Amended Complaint that allege it submitted the required written claim. TCM's allegations are that it made written demands for payment or performance of contractual obligations. App. 107-108 (Am. Compl. ¶¶ 18-19). However, Section 47 requires a written claim – not written demands for payment or performance of contractual obligations. See, also, CPSM Section 326.0 and Va. Code §§ 2.2-814 and 8.01-192. TCM's vague allegations about alleged written demands are not sufficient to survive demurrer. As a result, TCM's argument must be rejected.

C. TCM MISCONSTRUES THE TRIAL COURT'S INTERPRETATION OF SECTION 47 [TCM's Assignment of Error 1(b)]

TCM erroneously argues that the trial court misinterpreted Section 47 and confused the filing of a "claim with DGS" with the filing of a "complaint in the trial court." Opening Brief at 23-28. TCM's argument is based upon the following three sentences in the December 17th Order:

> [TCM] failed to submit a timely claim to [DGS] 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 formal complaint with [DGS].

Opening Br. at 24 (citing App. 427) (emphasis added).

TCM misconstrues the Order. The first sentence of the quoted passage appears after the trial court's recapitulation of TCM's allegations, Exhibits and arguments pertinent to whether TCM alleged submittal of the written claim. Based upon that, in the first sentence the trial court correctly concluded that TCM failed to submit a timely claim. The second sentence then excluded the possibility that TCM's Complaint satisfied the claim submittal requirement because it was not filed within the prescribed 60 days. In the third sentence, the trial court simply used the words "filing a formal complaint with [DGS]" interchangeably with "filing a claim with DGS." Thus, there is no merit to TCM's argument.

There is also no merit to TCM's argument that in the quoted passage

above the trial court confused the filing of a claim with the filing of the Complaint. Opening Br. at 25-27. Plainly, the trial court was considering the 60-day period for submitting the written claim, not the 6-month period for filing the Complaint, which was to commence when a final decision on the claims was rendered. According to TCM's allegations (which contradict TCM's arguments), the Termination Letter on February 16, 2007 was DGS's final decision on all of TCM's claims. App. 258-60; App. 108-109 (Am. Compl. ¶ 23). Assuming on demurrer that those allegations are true, then TCM was free to file its Complaint on April 24, 2007. As a result, TCM's arguments that its Complaint was filed prematurely, or that it was not required to perform a futile act by waiting until its claims were denied or deemed denied, are baseless and contradict its express allegations.

D. THE TRIAL COURT PROPERLY CONSIDERED TCM'S FAILURE TO ATTACH AN EXHIBIT TO THE AMENDED COMPLAINT THAT CONSTITUTED THE REQUIRED CLAIM

[Assignment of Error 1(b)]

TCM argues that a trial court may not consider the absence of exhibits in determining that a plaintiff has not pled a cause of action. Opening Brief at 27. TCM is wrong. Under certain circumstances a court may consider the absence of documents or exhibits when properly sustaining a demurrer. See Pulte, 265 Va. at 523, 579 S.E.2d at 190

(affirming decision sustaining a demurrer where plaintiff failed to produce alleged express warranty after court granted motion craving oyer).

The Demurrer tested the sufficiency of TCM's pleading. To state a good cause of action, TCM was required to plead it fully performed the mandatory conditions precedent in Section 47. See, also, CPSM Section 326.0 and Va. Code §§ 2.2-814 and 8.01-192.

The trial court specifically gave TCM leave to file the Amended Complaint so TCM could allege that it fully exhausted the mandatory claims procedures, and so TCM could attach numerous documents to support those allegations. In opposing the Demurrer before the trial court, TCM argued that its Exhibits to the Amended Complaint were the required claim. Under these circumstances, in sustaining the Demurrer the trial court properly considered the absence of an exhibit constituting TCM's claim.

E. TCM'S POSITIONS ARE DIFFERENT AND INCONSISTENT FROM THOSE TCM TOOK WHEN OPPOSING THE DEMURRER – TCM INVITED THE ERROR AND NOW SEEKS TO TAKE ADVANTAGE OF THAT ERROR [TCM's Assignment of Error 1(a) and (b)]

In the Reconsideration Motions, TCM changed its positions and argued for the first time that (a) Paragraphs 17-19 contain the allegations that TCM submitted the required written claim (App. 433-34, 453, 489); (b) Section 47 does not apply to Phase II (App. 433, 449-50, 484); and (c) the

March 23rd Letters were its claims (App. 433-34, 454, 486). TCM's changed positions do not provide valid grounds for this appeal for three reasons.

1. TCM invited the assigned error and is seeking to take advantage of that error.

A litigant may not "approbate and reprobate" by taking successive positions that are inconsistent with each other – "to invite error and then attempt to take advantage of the situation created by his own wrong." Cangiano, 271 Va. at 181, 623 S.E.2d at 895.

At the trial court, TCM opposed the Demurrer on brief and at the Hearing on the Demurrer by taking the position that it had alleged the submittal of the required written claims to DGS for both Phase I and Phase II of the Project. App. 259 (TCM's Opp. at 8). In support of that position, TCM cited no paragraphs containing such allegations for Phase I, cited Paragraph 118 as containing its allegations for Phase II (although it does not), and generally relied on routine invoices as its claims. Id.

After dismissal of its case, TCM took inconsistent positions that: (a) Paragraphs 17-19 allege timely submission of a written claim with supporting documentation (b) that the March 23, 2007 letters were its

claims, and (c) Section 47 does not apply to Phase II. Compare App. 259 with App. 432-434 and App. 449-454.

TCM invited the purported error by (a) not making these arguments on brief or during the Hearing; (b) not moving to amend the Amended Complaint or tendering an amended pleading; and (c) waiting until after dismissal of its case to raise these arguments for the first time. As a result, TCM is barred from relying to its advantage on the error it created. Cangiano, 271 Va. at 181, 623 S.E.2d at 895.

Furthermore, in the First Petition TCM did not assign error to the January 7th Order denying the Motion for Reconsideration or to the dismissal without leave to amend. First Petition 5-6. This Court should not consider those arguments now. See Angstadt v. Atlantic Mutual Ins. Co., 254 Va. 286, 291, 492 S.E.2d 118, 121 (1997) (refusing to consider issue because defendant had not assigned error to the issue in its first appeal); and see Rule 5:17(c).

2. TCM may not rely on facts not alleged in the Amended Complaint.

In reviewing the trial court's decision to sustain the Demurrer, this Court is confined solely to the facts alleged in the Amended Complaint.

Philip Morris, 273 Va. at 572, 643 S.E.2d at 223; Powers, 249 Va. at 35, 452 S.E.2d at 667.

The March 23rd Letters were not alleged in the Amended Complaint and were not Exhibits thereto. Therefore, the Letters cannot be considered here in deciding whether the Demurrer was properly sustained.

3. The Reconsideration Motions were improper and, therefore, the trial court properly denied them.

TCM's Reconsideration Motions were improper in that they sought to reargue the issues already argued and decided. Motions for reconsideration are disfavored because:

> The trial courts labor under increasing burdens, and judicial economy requires that litigants have one, but only one, full and fair opportunity to argue a question of law. The time required to hear a litigant reargue a question a second time must be taken from other litigants who are waiting to be heard.

Hechler Chevrolet, 230 Va. at 403, 337 S.E.2d at 749.

Motions for reconsideration are appropriate only where the court patently misunderstood a party, made a decision outside the issues presented or made an error not of reasoning but of apprehension. Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va., 1983). It is improper to reargue the previous argument and ask the court to rethink what it already thought through. Id.

Here, the trial court clearly understood and apprehended TCM's allegations and arguments presented in opposition to the Demurrer and made its decision on the issues presented. As a result, TCM's Reconsideration Motions were improper. Therefore, the trial court's denial of the Reconsideration Motions was a proper exercise of its discretion.

Also, under Rule 1:1, the December 17th Order became final 21 days after entry. Accordingly, the trial court correctly denied the Motion to Amend Order, which TCM did not make until more than five months later.

IV. TCM WAS REQUIRED TO SUBMIT A WRITTEN CLAIM FOR ITS PHASE II CLAIMS [TCM's Assignment of Error No. 2]

A. TCM INVITED THE ERROR AND, THEREFORE, IS BARRED FROM TAKING ADVANTAGE OF THE ERROR [TCM's Assignment of Error No. 2]

On brief and at the Hearing TCM argued that it had alleged compliance with Section 47 for its Phase II claims. App. 259. It was not until after the trial court dismissed its case that TCM first Section 47 did not apply to its Phase II claims. App. 449-452. TCM invited the assigned error and is now seeking to take advantage of that error. As a result, TCM's Assignment of Error No. 2 should not be considered on appeal. Cangiano, 271 Va. at 181, 623 S.E.2d at 895.

B. TCM WAS REQUIRED TO SUBMIT A WRITTEN CLAIM FOR PHASE II AS A MANDATORY CONDITION PRECEDENT TO FILING A LEGAL ACTION AGAINST DGS [TCM's Assignments of Error No. 2]

Even if Section 47 does not apply to TCM's Phase II claims, TCM was still required to submit a written claim for a decision and exhaust the mandatory administrative procedures before it was entitled to file a legal action against DGS for Phase II claims. CPSM Section 326.0 imposed the same mandatory administrative procedure found in Section 47, specifically, submittal of a written claim along with all practically available supporting evidence and documentation. CPSM Section 326.0.

TCM was also required to submit a written claim and exhaust the administrative claims procedure by Va. Code §§ 2.2-814 and 2.2-815[7], and 8.01-192. See Flory, 261 Va. at 236, 541 S.E.2d at 918 (discussion regarding pecuniary claims procedures against the Commonwealth); and see Viking Enterprise, Inc. v. Chesterfield, 277 Va. 104, 113, 670 S.E.2d 741, 746 (2009) (affirming dismissal of contractor's action against county, where contractor failed to comply with mandatory claims procedures in Va. Code § 15.1-1246, although it complied with mandatory claims procedures in Va. Code §§ 2.2-4363 and 4362).

[7] Formerly codified as Va. Code §§ 2.1-223.1 through 2.1-223.4.

TCM did not and cannot allege that it complied with these mandatory procedures in connection with its Phase II claims. Invoices or demands for payment are not claims for the reasons explained above. Even if this Court were to consider the March 23rd Letters (which it should not because they were not alleged in, nor attached to the Amended Complaint), it is apparent from the face of the documents that they do not pertain to Phase II. App. 68-75.

TCM's failure to submit the required timely written claim is a complete bar to TCM's Phase II claims. TCM failed to allege submittal of a written claim and, therefore, the trial court's dismissal without leave to amend was correct. Where a trial court reaches the correct result for the wrong reason, this Court does not hesitate to assign the correct reason and affirm the trial court's judgment. Harrison & Bates, Inc. v. Featherstone Assocs., L.P., 253 Va. 364, 369, 484 S.E.2d 883, 886 (1997).

C. TCM WAIVED ASSIGNMENT OF ERROR NO. 2, THAT THE TRIAL COURT ERRED IN DENYING THE RECONSIDERATION MOTIONS, BY FAILING TO PRESENT ARGUMENT IN SUPPORT [TCM's Assignment of Error No. 2]

As part of its Assignment of Error No. 2, TCM asserts that the trial court erred in denying the Reconsideration Motions to Count V because it applied Section 47 to the Phase II claims. TCM presents no argument in its Opening Brief in support of its assertion that the trial court abused its

discretion in denying the Reconsideration Motion as to the Phase II claims. As a result, TCM has waived this Assignment of Error. Prieto v. Commonwealth, 278 Va. 366, 381, 682 S.E.2d 910, 917 (2009); Rule 5:17(c)(4); Rule 5:27

VI. THE TRIAL COURT PROPERLY DISMISSED THE AMENDED COMPLAINT WITHOUT LEAVE TO AMEND WHERE IT GRANTED TCM's PREVIOUS MOTION TO AMEND AND WHERE TCM DID NOT MAKE ANOTHER MOTION TO AMEND OR TENDER ANOTHER AMENDED PLEADING [TCM's Assignment of Error No. 3]

TCM asked for and was granted leave to amend its Complaint because it failed to allege performance of all the mandatory steps necessary to exhaust the administrative claims procedure, including submittal of the required written claim. DGS demurred to the Amended Complaint on the same grounds. Throughout the proceedings below and now on appeal TCM has taken the position that the Amended Complaint alleges submittal of the required timely written claim and supporting documentation. TCM has never sought further leave to amend and never tendered another amended pleading for the trial court's or this Court's consideration. TCM had ample opportunities to make another motion to amend, but simply chose not to do so.

Leave to amend under Rule 1:8 is not a matter of right. Neff v. Garrard, 216 Va. 496, 497, 219 S.E.2d 878, 879 (1975). Where a demurrer

has been sustained and the plaintiff does not ask for leave to amend, the dismissal of the case should be affirmed. See, e.g., Legg v. County School Bd. of Wise County, 157 Va. 295, 301, 160 S.E. 60, 61 (1931); cf. Main, 206 Va. at 147, 142 S.E.2d at 528 (amended pleading dismissed with prejudice where plaintiffs declined leave to further amend); Jones v. Ford Motor Co., 263 Va. 237, 261559 S.E.2d 592, 604 (2002) (plaintiff failed to plead breach of duty and failed to request to amend pleadings, so no error in court's refusal to give instruction on duty).

Provided that a motion to amend is made after the trial court sustains a demurrer, the trial court may properly deny such motion and dismiss the case when it is apparent that such an amendment would accomplish nothing more than provide opportunity for re-argument of questions already decided. Ward's Equipment, 254 Va. at 387, 493 S.E. 2d at 521; Hechler, 230 Va. at 403, 337 S.E.2d at 749.

Where the plaintiff fails to tender an amended pleading to show what amendments a plaintiff would make, this Court cannot determine whether the trial court abused its discretion in refusing to grant leave to amend and, therefore, should affirm the dismissal. Dade v. Anderson, 247 Va. 3, 8, 439 S.E.2d 353, 356 (1994).

Failure to invoke these amendment procedures in the trial court deprives a plaintiff of the right to invoke them on appeal or assign error to the trial court's dismissal without leave to amend. Such error, if it were error cannot be taken advantage of on appeal. See, e.g., P.L. Farmer, Inc. v. Cimino, 185 Va. 965, 969-70, 41 S.E.2d 1, 3 (1947) (defendant's failure to invoke procedure for amendment where there is a variance between allegations and proof deprived it of the right to invoke them on appeal).

TCM preemptively moved to amend its Complaint when DGS challenged the sufficiency of the allegations. The trial court gave TCM leave to amend allowing TCM to file the Amended Complaint to cure the defects in the Complaint. The Amended Complaint failed to cure the defects in TCM's allegations. Under these circumstances, TCM's failure to make another motion for leave to amend despite having the opportunity to do so was tantamount to declining leave to amend.

Further, TCM's failure to invoke these procedures in the trial court deprives it of the right to invoke them on appeal or assign error to the trial court's dismissal without leave to amend. Consequently, TCM cannot ask this Court to determine whether the trial court abused its discretion in dismissing the Amended Complaint without leave to amend.

TCM's failure to tender an amended pleading to show what amendments a plaintiff would make, means that this Court cannot determine whether the trial court abused its discretion in refusing to grant leave to amend. Even if TCM had made a motion for leave to amend, it is apparent that such an amendment would have done nothing more than provide TCM with an opportunity to reargue questions already decided. Plus, the time to submit the required written claim had expired.

Here, after entry of the December 17th Order TCM filed the Request for Suspension/Vacation and the Reconsideration Motions without ever asking for time to file another motion to amend, making another motion to amend or tendering another amended pleading. Clearly, TCM chose not to move to amend or tender an amended pleading despite having the opportunity to do so.

For these reasons all of TCM's authorities are distinguishable and inapposite: Fox v. Deese, 234 Va. 412, 362 S.E.2d 699 (1987) (unlike this case, plaintiff never afforded opportunity to amend), Strader v. Metro Life Ins. Co., 128 Va. 238, 105 S.E. 74 (1920) (unlike this case, no indication that plaintiff had previously amended), Ford Motor Co. v. Benitez, 273 Va. 242, 639 S.E.2d 203 (2007) (unlike this case, after a showing of good cause defendants should be given leave to amend affirmative defenses,

rather than asserting unfounded affirmative defense), Bibber v. McCreary, 194 Va. 394, 73 S.E.2d 382 (1952) (unlike this case, order sustaining demurrer did not dismiss case and, therefore, was not final, so that trial court erred in holding that it was without jurisdiction to entertain plaintiff's motion to amend); Winchester Homes, Inc. v. Hoover Universal, Inc., 27 Va. Cir. 62, 68 (Fairfax Cir. Ct., 1992) (unlike this case, plaintiff moved to amend its amended pleading); Va. Code § 8.01-273 (demurrer statute, which does not require giving leave to amend sua sponte); and Rule 1:8 (Rule on amendments, which does not require giving leave to amend sua sponte).

Also, there is no basis for TCM's argument that its "right to a fair trial must not be made subordinate to the judiciary's efforts to control its docket." Opening Br. at 31. In support of this argument, TCM quotes a statement made by the trial court, which TCM describes as the trial court's unhappiness with TCM's efforts to amend the Complaint. Id. The trial court's statement lends no support at all to TCM's assignment of error. Moreover, TCM created the assigned error by not making another motion for leave to amend. For all of the reasons above, the trial court properly exercised its discretion in dismissing the Amended Complaint without leave to amend.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated, TCM failed to allege submittal of the required written claim, failed to make another motion for leave to amend, failed to tender an amended pleading to cure the deficiencies in its pleading, and caused or invited the assigned errors. DGS respectfully requests that this Honorable Court affirm the decisions of the Circuit Court of the City of Richmond sustaining the Demurrer and dismissing this case without leave to amend and denying the Reconsideration Motions.

Commonwealth of Virginia,
Department of General Services, and
The Comptroller of the
Commonwealth of Virginia

By: _____/s/_____
Counsel

William C. Mims, Attorney General of Virginia
Maureen R. Matsen, Deputy Attorney General
Richard T. McGrath (Va. State Bar I.D. No. 25448)
Randall H. Wintory (Va. State Bar I.D. No. 43312)
OFFICE OF THE ATTORNEY GENERAL
900 E. Main Street, 2nd Floor
Richmond, VA 23219
Telephone (804) 786-1100
Facsimile (804) 371-2086
rmcgrath@oag.state.va.us

CERTIFICATE

Pursuant to Rule 5:28(g) of the *Rules of the Supreme Court of Virginia*, I hereby certify that on the __4th__ day of January, 2010, in compliance with Rule 5:26(d), fifteen (15) copies of the *Brief of Appellees* were filed in the Office of the Clerk of the Supreme Court of Virginia, an electronic copy of the *Brief of Appellees* was also filed with the Clerk, and three (3) copies were served by first class U.S. mail upon the following:

Everette G. Allen, Jr., Esquire
Andrew K. Clark, Esquire
Robert Wm. Best, Esquire
LeClair Ryan, P.C.
Post Office Box 2499
Richmond, Virginia 23218-2499
Tel: (804) 545-1500
Fax: (804) 545-1501
everette.allen@leclairryan.com
andrew.clark@leclairryan.com

S. Scott Morrison (*pro hac vice*)
Nicole Lynn Kobrine (*pro hac vice*)
David C. Rohrbach (*pro hac vice*)
Katten Muchin Rosenmann, LLP
1025 Thomas Jefferson St. N.W.
East Lobby, Suite 700
Washington, D.C. 20007
Tel: (202) 625-3500
Fax: (202) 298-7570
scott.morrison@kattenlaw.com

Counsel for Appellant TC MidAtlantic Development, Inc.

/s/
Randall H. Wintory
Assistant Attorney General
Construction Litigation Section
Counsel for Appellees