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**IN THE  
SUPREME COURT OF VIRGINIA**

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Record No. 091662

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**AMEC CIVIL, L.L.C.,**  
*Appellant*

v.  
**COMMONWEALTH OF VIRGINIA, et al.**  
*Appellees*

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***BRIEF OF APPELLEES***

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**KENNETH T. CUCCINELLI, II**  
Attorney General of Virginia  
**WESLEY G. RUSSELL, JR.**  
Deputy Attorney General  
**RICHARD TYLER MCGRATH** (VSB No. 25448)  
Senior Assistant Attorney General  
Chief, Construction Litigation Section  
**RANDALL H. WINTORY** (VSB No. 43312)  
OFFICE OF THE ATTORNEY GENERAL  
900 E. Main Street, 2<sup>nd</sup> Floor  
Richmond, VA 23219  
Telephone: (804) 786-1100  
Fax: (804) 371-2086  
E-mail: rmcgrath@oag.state.va.us

**WILLIAM R. MAUCK, JR.** (VSB No. 25439)  
**STEPHEN G. TEST** (VSB No. 18870)  
**MATTHEW S. SHELDON** (VSB No. 73734)  
WILLIAMS MULLEN  
A Professional Corporation  
1021 E. Cary Street, 17<sup>th</sup> Floor  
P.O. Box 1320 (23218-1320)  
Richmond, VA 23219  
Tel: (804) 643-1991  
Fax: (804) 783-6507  
E-mail: bmauck@williamsmullen.com

*Counsel for the Commonwealth of Virginia and the Commonwealth of  
Virginia, Department of Transportation*

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**VIRGINIA:**

**IN THE SUPREME COURT**

AMEC CIVIL, LLC,  <i>Appellant,</i>  v.  COMMONWEALTH OF VIRGINIA, <i>ET AL.</i> ,  <i>Appellees.</i>	Record No. 091662  <i>BRIEF OF APPELLEES</i>
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Appellees, the Commonwealth of Virginia and the Commonwealth of Virginia, Department of Transportation (collectively, "VDOT"), respectfully submit this Brief in support of their opposition to the appeal filed by Appellant, AMEC Civil, LLC ("AMEC") and also present their assignments of cross-error arising from an opinion and judgment entered June 16, 2009, by the Court of Appeals (Record Nos. 1961-08-2 & 2061-08-2).

**RESTATEMENT OF AMEC'S QUESTIONS PRESENTED**

- I. Whether the Court of Appeals applied the proper standard of review? (AMEC A/E Nos. 1, 2, 5, 18, 20)
- II. Whether the Court of Appeals correctly ruled that the lake levels were not a "differing site condition?" (AMEC A/E Nos. 2, 3, 4)
- III. Whether the Court of Appeals applied Code § 33.1-386 as it is written? (AMEC A/E No. 13)
- IV. Whether the Court of Appeals correctly ruled that AMEC failed to give the required timely written notice of various claims? (AMEC A/E Nos. 5-17)

V. Whether the Court of Appeals correctly ruled that AMEC failed to offer any evidence that it could not reasonably recoup its home office overhead costs? (AMEC A/E Nos. 18, 19)

VI. Whether the Court of Appeals correctly ruled that the force account provisions of the Contract did not apply? (AMEC A/E Nos. 20, 21)

VII. Whether the Court of Appeals correctly ruled that VDOT was not liable for interest. (AMEC A/E No. 22)

### **VDOT'S ASSIGNMENTS OF CROSS-ERROR**

Only to insure that certain issues are not waived, VDOT assigns cross-error to the Court of Appeals' failure to rule on the following:

1. The Court of Appeals erred by failing to rule that the trial court erred by failing to enforce the written Contract, which barred AMEC's claims, because AMEC failed to provide notices of intent in the manner prescribed by Specification § 105.16.

2. The Court of Appeals erred by failing to reverse the trial courts award of damages to AMEC for Drilled Shafts and Work Order Nos. 6 and 7 because AMEC and VDOT previously entered into an accord and satisfaction on these claims.

3. The Court of Appeals erred by failing to rule that the trial court erred in admitting evidence relating to a different construction project based on AMEC's claim that VDOT had "superior knowledge," a doctrine not adopted by Virginia, where VDOT had no duty to disclose information pertaining to a different project and where such evidence was collateral, irrelevant, and prejudicial.

4. The Court of Appeals erred by failing to rule that the trial court abused its discretion by refusing to admit testimony relating to Butcher's Creek which refuted AMEC's contention that VDOT had "superior knowledge."

5. The Court of Appeals erred by failing to rule that the trial courts award of damages to AMEC for a defective concrete specification should be

reversed because the specification was a performance specification and because AMEC offered no evidence that the concrete specification was defective.

6. The Court of Appeals erred by failing to rule that the trial court's award of damages for Pier 17 Foundation Cap should be reversed because AMEC admitted it was solely responsible for construction, demolition, and replacement of the Pier 17 Foundation Cap.

7. The Court of Appeals erred by failing to rule that the trial courts award of damages to AMEC for extended home office overhead should be reversed because AMEC offered no evidence that it was on standby for any portion of the delay and because the evidence conclusively proved that AMEC was able to recoup such costs.

### **QUESTIONS PRESENTED BY ASSIGNMENTS OF CROSS-ERROR**

I. Whether the Court of Appeals erred by failing to rule that the trial court erred by failing to enforce the written Contract, which barred AMEC's claims, because AMEC failed to provide notices of intent in the manner prescribed by Specification § 105.16? [Relating to Assignment of Cross-Error No. 1]

II. Whether the Court of Appeals erred by failing to reverse the trial courts award of damages to AMEC for Drilled Shafts and Work Order Nos. 6 and 7 because AMEC and VDOT previously entered into an accord and satisfaction on these claims? [Relating to Assignment of Cross-Error No. 2]

III. Whether the Court of Appeals erred by failing to rule that the trial court erred by admitting evidence relating to a different construction project based on AMEC's claim that VDOT had "superior knowledge," a doctrine not adopted by Virginia, where VDOT had no duty to disclose information pertaining to a different project and where such evidence was collateral, irrelevant, and prejudicial? [Relating to Assignment of Cross-Error No. 3]

IV. If the trial court did not commit error in admitting evidence of an unrelated project, whether the Court of Appeals erred by failing to rule that the trial court abused its discretion by refusing to admit testimony relating to Butcher's Creek which refuted AMEC's contention that VDOT had "superior knowledge"? [Relating to Assignment of Cross-Error No. 4]

V. Whether the Court of Appeals erred by failing to rule that the trial courts award of damages to AMEC for a defective concrete specification should be reversed because the specification was a performance specification and because AMEC offered no evidence that the concrete specification was defective? [Relating to Assignment of Cross-Error No. 5]

VI. Whether the Court of Appeals erred by failing to rule that the trial court's award of damages for Pier 17 Foundation Cap should be reversed because AMEC admitted it was solely responsible for construction, demolition, and replacement of the Pier 17 Foundation Cap? [Relating to Assignment of Cross-Error No. 6]

VII. Whether the Court of Appeals erred by failing to rule that the trial courts award of damages to AMEC for extended home office overhead should be reversed because AMEC offered no evidence that it was on standby for any portion of the delay and because the evidence conclusively proved that AMEC was able to recoup such costs? [Relating to Assignment of Cross-Error No. 7]

### **STATEMENT OF THE CASE**

After 13 days of trial, in a terse 1½-page opinion, the trial court rendered a general verdict awarding AMEC the full amount of its Claim, except for pre-judgment interest and attorneys' fees. Armed with citations to the record from both sides, the Court of Appeals thoroughly and carefully combed the vast record in this case and rendered a thorough, carefully considered 36-page opinion reversing certain aspects of the trial court verdict. A review of AMEC's past and current citations to the record reveals that the Court of Appeals was correct: the trial court was plainly wrong and/or there is no evidence to support the general verdict on the issues

where the Court of Appeals reversed the verdict. AMEC now invites this Court to commit the same errors as the trial court by ignoring the governing contractual and statutory provisions and settled Virginia law. This Court should decline AMEC's invitation.

After completing the Project<sup>1</sup>, AMEC bundled 13 discrete claims together and submitted them as a final administrative claim ("Claim") to VDOT seeking \$24,792,823.43. J.A. 3494-3545. Following VDOT's partial denial of the Claim, AMEC filed suit against VDOT. J.A. 1-29.

Before trial, VDOT filed a motion for leave to file several Pleas in Bar asserting that AMEC failed to satisfy the mandatory requirements for timely written notice of intent to file claims mandated by Code § 33.1-386 and Specification § 105.16. J.A. 56-61. The trial court denied VDOT's motion for leave to file the Pleas in Bar. J.A. 129-50, 550-51, 591-93. Then, in a lengthy letter opinion issued February 12, 2008 ("February 12 Opinion"), the trial court denied VDOT's unfiled Pleas in Bar. J.A. 552-65, 568-82.

After 13 days of trial, submittal of post-trial briefs, suggested findings of fact and conclusions of law, the trial court issued its very brief opinion

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<sup>1</sup> "Contract" refers to the written contract VDOT awarded to AMEC for construction of the Route 58 Clarksville Bypass (the "Project") in the sum of \$72,479,999.49. Pertinent parts of the Contract are VDOT's Metric Road and Bridge Specifications (1997) ("Specifications"), Division I, General Provisions, (J.A. 3340-3482), and "Special Provisions" (J.A. 3297-3332).

(“Final Opinion”) and a Final Order rendering a general verdict in favor of AMEC in the entire amount of its claim, \$21,181,941.00, denying only pre-judgment interest and attorney’s fees. J.A. 4371-73. The Court of Appeals held that the trial court erred as follows:

Statutory Written Notice. The Court of Appeals reversed the trial court’s rulings that (a) actual notice was suffice to comply with the statutory requirement that written notice be given to VDOT by the contractor at the time of occurrence or beginning of work on which the claim is based, and (b) AMEC gave timely written notice. As to the first ruling, the trial court misconstrued the law. There was no evidence to support the latter ruling. As a result, 6 of AMEC’s 13 claims were barred. J.A. 4422 and n. 34.

Compensability of AMEC’s Claims and Damages. The Court of Appeals reversed the awards based upon elevated lake water levels and overhead power lines claims. The Court of Appeals remanded several claims with instructions to make certain findings on entitlement and quantum of damages. J.A. 4423. The Court of Appeals reversed the trial court’s award of home office overhead and profit. Id. The Court of Appeals affirmed the trial court’s denial of prejudgment interest. Id.

## **FACTS**

### **A. NOTICE OF INTENT TO FILE A CLAIM**

## 1. Drilled Shafts<sup>2</sup>

AMEC gave written notice of its intent to file a claim for the work on the drilled shafts long after the time of the occurrence or beginning of work on which this claim was based. The Contract required AMEC to construct two test “technique shafts” before actually constructing the drilled shafts. J.A. 975. AMEC experienced difficulties constructing the first technique shaft and determined it needed to seat the casing deeper into the bedrock than it originally planned. J.A. 976-78. For this change, VDOT and AMEC agreed to increase AMEC’s unit price for drilled shafts to a higher “rock socket” unit price, which VDOT paid for all 100 drilled shafts. J.A. 1042-43, 3150-53.

In April of 2001, when drilled shaft construction first began, AMEC was aware of the difficulties that led to the claim. J.A. 1379-80. AMEC first

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<sup>2</sup> The basic substructure of a bridge consists of:

- A “drilled shaft” is a large steel cylinder (“casing”) driven vertically into the lake bed until it is seated in the underlying bedrock, down which a hole (“rock socket”) is drilled deeper into the bedrock. The drilled shaft is filled with steel rebar and concrete (“drilled shaft concrete”). J.A. 944-45, 3295.
- A “foundation cap” is a large horizontal steel-reinforced concrete structure built across the top of 2 or 3 drilled shafts using a steel form AMEC purchased that resembles a large box with no top and holes cut out of the bottom that fit over the drilled shafts. This form extended below water level and had to be water-tight to pour the concrete. J.A. 954-55; 960-64.
- “Columns” are two steel-reinforced concrete columns built on top of each completed foundation cap.
- A “pier cap” is a steel-reinforced concrete structure similar to the foundation cap built on top of the columns.

gave VDOT the required written notice of intent to make a claim for drilled shaft work in June, 2003, over two years after beginning the work and after completing nearly 85% of the drilled shafts.<sup>3</sup> J.A. 3240. The other documents AMEC cites were sent even later and are also untimely: JA 3246 (December 9, 2003 AMEC letter, also no indication of intent to file a claim) (not cited to Court of Appeals); J.A. 3254 (January 28, 2004 AMEC letter); J.A. 3905-06 (May 21, 2004 AMEC letter); J.A. 203-06 (July 6, 2004 AMEC letter regarding settlement); J.A. 207-14 (July 21, 2004 Meeting Minutes regarding settlement discussions).

2. Drilled Shaft concrete mix design

AMEC never gave VDOT the required written notice of intent to file a claim based on the drilled shaft concrete specification. At the beginning of its drilled shaft work AMEC encountered difficulties placing the concrete. J.A. 998-99. These difficulties were caused by AMEC's mix design, equipment, and placement procedures, not the specification. J.A. 1117, 1126-30, 1138-39, 2877-82, 3157-58, 3174-78, 3183-88. AMEC's cites two documents as its notice, JA 3193-98 (meeting minutes) and JA 3204 (request to change water reducer) (which were not cited to the Court of

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<sup>3</sup> AMEC demonstrated that it knew about the notice requirements and the proper way to comply. AMEC sent VDOT three written claim notices and two written notices of differing site conditions for different issues. J.A. 3156, 3159, 3161, 3181, 4085-4089.

Appeals). These documents do not indicate any intention to file a claim or that VDOT's specification was defective.

### 3. Winter Periods/ Acceleration Claims

Originally, AMEC was scheduled to work during three Winter Periods in years 2000-2001, 2001-2002 and 2002-2003. The Specifications allowed non-compensable time extensions for delays due to unforeseen causes that extended the contract time limit into the period between November 30 and April 1 ("Winter Period"), when working conditions were unsuitable for the completion of the work. J.A. 3451.

AMEC first became aware on May 16, 2001 that the extension of time in Work Order 6 extended the fixed end completion date into the 2003-2004 Winter Period (the "First Winter Period"). J.A. 4078. AMEC gave no written notice of its intent to make a claim for overhead for the entire First Winter Period until its letter to VDOT in March, 2003, nearly two years later. J.A. 3225. AMEC also sought compensation for the entire Winter Period of 2004-2005 (the "Second Winter Period"). AMEC based its notice on time extensions in Work Orders 4 and 6, which adjusted the fixed completion date into the First Winter Period. Id. These time extensions were non-compensable. AMEC's written notice was not timely.

AMEC knew in January 2002 it would not meet the fixed end date.

J.A. 1586. AMEC decided to “accelerate” its work by adding additional manpower, equipment and materials and working more hours. J.A. 4072, 4075-77. AMEC never gave VDOT the required written notice of intent to make a claim for this alleged acceleration. AMEC cites J.A. 3210-11 (Dec. 12, 2002 AMEC letter) (not cited to the Court of Appeals), and J.A. 268-70 (April, 2004 AMEC letters), which pertain to AMEC expediting construction activities and scheduling. Nothing in these indicates any intent to file a claim or that VDOT accelerated the work.

4. Formwork, Foundation Caps, etc.

AMEC never gave the required written notice of intent to file a claim for these issues. AMEC does not cite any documents giving notice as to these issues. The Court of Appeals noted that AMEC did not brief these issues. J.A. 4401 and n.13. To the extent AMEC asserts these issues were “derivative,” the claims from which there were purportedly derived are invalid, i.e., water levels and drilled shafts, so these claims are also invalid.

5. Pier 17 Foundation Cap Repair

While AMEC was pouring concrete for the Pier 17 foundation cap, inflatable seals in the bottom of the form failed, allowing lake water to leak in (J.A. 1532-33, 2454-55, 3212, 3218), which caused defects in the concrete. J.A. 2424-28. At the time, the lake level was 18 inches below the

top of the form. J.A. 3212-17. The seals failed because sawdust used to seal leaks was displaced by shifting weight in the formwork as concrete was being placed and by the use of vibrators to consolidate the concrete. J.A. 2312. After AMEC's repair efforts failed, AMEC demolished and replaced the foundation cap. J.A. 1533. AMEC never gave written notice of its intent to file a claim. For notice, AMEC cites J.A. 3210-11 (Dec. 12, 2002 AMEC letter) (not cited to the Court of Appeals), and J.A. 268-70 (April, 2004 AMEC letters), which pertain to AMEC expediting construction and scheduling. Nothing indicates any intent to file a claim or that VDOT caused the defective concrete.

6. Work Orders 4, 6, 7 & 12

During the Project, Work Orders<sup>4</sup> were issued to resolve claims for which AMEC had submitted written notices of intent. J.A. 3135-40. Work Orders 4, 6, 7 and 12 collectively extended the Contract's completion date to December 31, 2003. J.A. 3135-40, 3163-69. When negotiating these Work Orders, AMEC made no request for overhead or profit. J.A. 1012-13. AMEC never gave the required written notice of intent. As written notice, AMEC cites J.A. 203-06 (July 6, 2004 AMEC letter) and 207-14 (July 25, 2004 meeting minutes), which pertain to settlement discussions well after

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<sup>4</sup> "Work Orders" specified changes in the work and the agreed cost and additional time for such changes, if appropriate. J.A. 3374, 3387.

the time of occurrence or beginning of the work.

## **B. CONTRACTUAL CHALLENGES TO AMEC'S CLAIMS**

### **1. Elevated Lake Levels**

The Project's primary feature was Bridge B616, which spans the John H. Kerr Reservoir ("Kerr Lake" or the "lake"). The Contract informed AMEC that the lake was under the exclusive control of the U.S. Army Corps of Engineers ("USACE") (J.A. 826, 828, 3302), lake levels were beyond VDOT's control and routinely fluctuate by several feet, which can take place within a few days. J.A. 3302. The Contract required AMEC to avail itself of USACE's records of past, current and predicted lake levels to determine the impacts fluctuations may have on AMEC's planned construction methods and operation. J.A. 826-27, 3302. Mr. Ralston, one of AMEC's witnesses, testified that there were sustained periods of high water (above 301 feet) in the USACE's records. J.A. 819:14-829:5, 849:21-852:12. USACE's records were not Contract documents. J.A. 3384.

From March through July, 2003, in parts of August and September 2003, and in the spring of 2004, AMEC claimed that elevated water levels interfered with AMEC's work. J.A. 1508, 2984-87, 3224, 1417-18, 3265. Sustained periods of high water in Kerr Lake were shown in USACE's records. J.A. 823:22-824:2, 827:17-828:8, 931:4-933:6, 3238. AMEC

planned on pouring foundation caps if the lake elevation was below 301 feet (J.A. 844-45), despite the fact that average spring-time lake elevations fluctuated above 304 feet for sustained periods. J.A. 267, 3238. Past lake levels had fluctuated as high as 316 feet or higher for sustained periods. Id. The lake could rise to over 320 feet. J.A. 3229. During periods of high water, AMEC recouped or absorbed its home office overhead costs by deploying its workforce to unaffected revenue-producing parts of the Project. J.A. 1403-06, 1511-12. VDOT granted time extensions in Work Orders 39 and 51, but not compensation, because lake levels were beyond the control of and not caused by VDOT, and were not a differing site condition. J.A. 2531-32, 3268-69, 3270-71.

## 2. Drilled Shaft Design and “Superior Knowledge”

AMEC claimed entitlement to additional compensation for the drilled shafts because VDOT possessed “superior knowledge” about drilled shaft construction allegedly gleaned from an earlier project (the “Butcher’s Creek Project”) (J.A. 608-17) on another section of Route 58 near Kerr Lake (J.A. 1167) which was designed by a different engineering firm (J.A. 2011), using different design criteria, built by a different contractor (J.A. 2011), who used different equipment and methods than AMEC. J.A. 897-902, 2375-77.

AMEC asserted that VDOT knew the other contractor had the same

difficulties on the Butcher's Creek Project as AMEC had on the Project (J.A. 1177); and that VDOT had a duty to, but did not tell AMEC of these prior difficulties. AMEC did not contend that rock at the Project was different than as indicated in the Contract. J.A. 4050-56. VDOT resolved this issue prior to construction of the first drilled shafts by increasing the unit price for drilled shafts to the rock socket unit price. J.A. 1043, 3150-53.

3. Drilled Shaft Concrete Mix Design and "Superior Knowledge"

AMEC contended that VDOT's drilled shaft concrete specification was defective. J.A. 2555-56, 3297-3332. AMEC also claimed VDOT had "superior knowledge" that the drilled shaft concrete mix specification was defective. J.A. 1186-89. Over VDOT's objections, the trial court admitted AMEC's evidence about the Butcher's Creek Project's drilled shaft concrete as its only proof that this Project's concrete specification was defective. J.A. 1168-69. The Butcher's Creek Project was designed by a different engineering firm (J.A. 2011), using different design criteria, and was built by a different contractor (id.), who used different means and methods. J.A. 897-902, 2375-77. The trial court refused to allow the VDOT's rebuttal witness to testify about the Butcher's Creek Project. J.A. 2969-76.

4. Pier 17 Foundation Cap

As explained above (§ A(5)), inflatable seals in AMEC's concrete

form failed, lake water leaked in that irreparably damaged the Pier 17 foundation cap, which AMEC demolished and replaced. AMEC admitted it was responsible for the failure of its form and that AMEC assumed the risk of pouring the concrete. J.A. 1618.

5. B640 - Boulders, Bedrock and Concrete Mix

AMEC encountered boulders at Bridge B640 that interfered with the work. J.A. 989. AMEC claimed the boulders delayed work by 40 days. J.A. 1372. AMEC provided no documentation of the time and cost incurred. J.A. 1053-54. AMEC's expert testified he never analyzed whether boulders delayed work for 40 days. App. 1736-38. It took AMEC only 8 days to remove the boulders and continue with the work. J.A. 2719-22. VDOT disagreed that a differing site condition existed, but it granted AMEC an 8-day non-compensable time extension. J.A. 3268-69.

6. Power Lines

AMEC claimed that overhead electric power lines interfered with its work. J.A. 3230-31, 3239. The Contract, however, required AMEC to verify the location and planned relocation of utilities before it began work, and also made AMEC responsible for all such costs. J.A. 3400-01.

**C. Time Extensions to the Fixed End Date**

Work Order 39 granted AMEC non-compensable time extensions for

the first high water period (144 days), the First Winter Period (99 days), and the boulders (8 days), extending the completion date to September 3, 2004. J.A. 2980-85, 2989, 3268-69. Work Order 51 gave AMEC a 41-day non-compensable time extension for high water in August and September 2003 (37 days), and for weather in December 2003 (4 days), extending the completion date to October 14, 2004. J.A. 2991-92; 3270-71. Both Work Orders state that they do not entitle AMEC to additional compensation.

**D. AMEC’S DAMAGES – MARK-UPS AND INTEREST**

VDOT did not order AMEC to perform force-account work, AMEC did not seek force account mark-ups on force account work, and was not entitled to force account mark-ups for overhead and profit. J.A. 3387-90, 3461-64. Similarly, neither the Contract, nor Code § 801-382 entitled AMEC to recover pre-judgment interest from VDOT.

**ARGUMENT**

**I. THE COURT OF APPEALS CORRECTLY APPLIED THE PROPER STANDARD OF REVIEW IN CONCLUDING THAT THE TRIAL COURT’S VERDICT WAS PLAINLY WRONG AND/OR WITHOUT EVIDENCE TO SUPPORT IT [Question No. 1 and AMEC’s A/E Nos. 1, 2, 5, 18, 20)**

A trial court's factual findings will not be set aside “unless it appears from the evidence that the judgment is plainly wrong or without evidence to support it.” Transcon. Ins. Co. v. RBMW, Inc., 262 Va. 502, 510, 551

S.E.2d 313, 317 (2001). The weight accorded to a trial court's factual findings is not applicable where all probative evidence on an issue consists of an interpretation of documents. Vahabzadeh v. Mooney, 241 Va. 47, 51 n.4, 399 S.E.2d 803, 805 n.4 (1991). Interpretation of contracts and statutes is a question of law reviewed de novo. Transcon, 262 Va. at 510, 551 S.E.2d at 317; Washington v. Commonwealth, 272 Va. 449, 455, 634 S.E.2d 310, 313 (2006).

Applying the appropriate standard of review, the Court of Appeals carefully considered the case issue-by-issue and thoroughly examined the Record to determine whether there was any evidence to support the trial court's verdict on the issues presented in the Appeal. J.A. 4400-05, 4416-18 (COA Op. 13-18, 29-31); and see Sections II through VI, below.

**II. THE COURT OF APPEALS CORRECTLY APPLIED CODE § 33.1-386 IN HOLDING THAT ACTUAL NOTICE IS NOT SUFFICIENT TO SATISFY THE WRITTEN NOTICE REQUIREMENT [Question No. III and AMEC's A/E No. 5, 8, 9, 10, 11 & 13]**

**A. THE STATUTORY WRITTEN NOTICE REQUIREMENT IS STRICTLY CONSTRUED**

Whether AMEC gave timely written notice required by § 33.1-386 and Specification § 105.16 is a mixed question of law and fact. The Court of Appeals applied the proper standard in reviewing the trial court's general verdict. Section II, above; J.A. 4394-4405. The trial court's conclusion that

AMEC gave the required written notice is not supported by the evidence, and the trial court did not find that there was *timely* written notice. The Court of Appeals correctly construed the statute, the Contract and the Record in reversing the trial court.

The written notice requirement in Code § 33.1-386 must be strictly construed and strictly complied with, thus actual notice will not suffice. “The sovereign can be sued only by its own consent, and a state granting the right to its citizens to bring suit against it can be sued only in the mode prescribed.” Viking Enter. v. Chesterfield, 277 Va. 104, 111, 670 S.E.2d 741, 744 (2009) (Virginia Public Procurement Act (“VPPA”)). Statutory notice requirements “must be met in order for a court to reach the merits of a case.” Dr. William E.S. Flory Small Bus. Dev. Ctr., Inc. v. Commonwealth, 261 Va. 230, 238, 541 S.E.2d 915, 919 (2001) (VPPA).

Code §§ 33.1-386 and 33.1-387 prescribe the mandatory procedures to sue VDOT. Commonwealth v. Yeatts, Inc., 233 Va. 17, 24, 353 S.E.2d 717, 721 (1987). An action under Code § 33.1-387 depends on compliance with § 33.1-386. XL Specialty Ins. Co. v. VDOT, 269 Va. 362, 367, 611 S.E.2d 356, 359 (2005).<sup>5</sup> Code § 33.1-387 “must be strictly construed.” Id., 269 Va. at 371, 611 S.E.2d at 361. Therefore, Code § 33.1-386 must also

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<sup>5</sup> In XL Specialty, the surety asserted a contract action against VDOT. XL Specialty, 269 Va. at 366, 611 S.E.2d at 358.

be strictly construed.

In response to VDOT's strict construction argument, AMEC failed to argue in either the trial court or the Court of Appeals that Code § 33.1-386 should not be strictly construed, or that Code § 8.01-192 precludes strict construction of Code § 33.1-386. AMEC's argument should not be considered now. Gibson v. Commonwealth, 276 Va. 176, 182, 662 S.E.2d 54, 57 (2008); Rule 5:25.

In any event, AMEC's argument that Code § 8.01-192 precludes strict construction of Code § 33.1-386 is unavailing. Code §§ 33.1-386 and 33.1-387 are specific statutes pertaining to VDOT's contracts that prevail over § 8.01-192, a general statute relating to pecuniary claims against the Commonwealth. See Flory, 261 Va. at 239, 541 S.E.2d at 920 (VPPA).

Virginia courts adhere to the plain meaning rule of statutory construction. Va. Polytechnic Inst. & State Univ. v. Interactive Return Serv., 271 Va. 304, 308-309, 626 S.E.2d 436, 438 (2006). Thus, the written notice requirement in Code § 33.1-386 means what it says:

We presume that the legislature chose, with care, the words it used when it enacted the ... statute. ... Courts cannot "add language to the statute the General Assembly has not seen fit to include. ... [N]or are they permitted to accomplish the same result by judicial interpretation. ... Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning."

Jackson v. Fidelity and Deposit Co. of Maryland, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005).

**B. ACTUAL NOTICE IS NOT SUFFICIENT TO SATISFY THE STATUTORY WRITTEN NOTICE REQUIREMENT**

Actual notice is not sufficient to satisfy the written notice requirement in Code § 33.1-386. See Main v. Dep't of Highways, 206 Va. 143, 149-50, 142 S.E.2d 524, 529 (1965); J.A. 3407-08 (Specification § 105.16, oral notice not sufficient). To permit actual notice to suffice, whether based on lack of prejudice or any other excuse, when the statute expressly requires written notice, would create an exception not in the statute." Jackson, 269 Va. at 313, 608 S.E.2d at 906; Town of Crewe v. Marler, 228 Va. 109, 114, 319 S.E.2d 748, 750 (1984) (plaintiff did not substantially comply with statutory written notice requirement even though the town had actual notice). Allowing a court to create exceptions in statute that contains none would defeat the purpose of the statute and permit judicial legislation. Id.

AMEC's argument that the "underlying policy" of the notice requirement is satisfied by actual notice cannot be and has never been used to judicially re-write a statute. Plus, the underlying policy supports the Court of Appeals' decision. The purpose of written notice requirements is to alert public bodies to possible claims so they can budget for the completion of the project. J.A. 4398; MCI Constructors v. Spotsylvania Cnty., 62 Va.

Cir. 375, 380 (Spotsylvania Cir.Ct., 2003); J.A. 3407 (§ 105.16, explaining purpose of early notice). Notice of intent to file a claim must be given at the earliest possible time to “permit early investigation of a specific assertion so as to enable the government entity to control costs and weigh alternatives.”

Id. Written notice of claim is necessary because it

[S]erves as an official indication of opposing contract interpretations at the earliest possible time. To allow otherwise could potentially undermine the General Assembly’s clear intent in enacting the notice of claim requirements, thereby enabling contractors to unnecessarily lengthen both the time and costs associated with resolving disputes.

Modern Cont’l S. v. Fairfax Cnty. Water Auth., 70 Va. Cir. 172, 190 (Fairfax Cir.Ct. 2006).

As the Court of Appeals recognized, VDOT is prejudiced when a contractor fails to give timely written notice. J.A. 4398. AMEC’s assertion that VDOT took no action upon receipt of a written notice is wrong. J.A. 2990-91. VDOT is entitled to receive timely written notice so it can take action as necessary. J.A. 3407 (§ 105.16).

AMEC’s reliance upon TQY Investments v. Rogers Co., Inc., 26 Va. Cir. 40 (Fairfax Cir.Ct., 1991), is misplaced. TQY addressed the sufficiency of a subcontractor’s notice of the filing of a mechanic’s lien. The owner had actual knowledge of the lien, but received written notice well after the lien was filed. The TQY court noted that actual knowledge was no substitute for

the required written notice and that failure to give written notice would have been fatal to the lien. Id., at 41. The subcontractor's written notice was sufficient because Code § 43-7 does not specify when notice must be given.<sup>6</sup> In contrast, Code § 33.1-386 specifies when written notice must be given. AMEC's failure to strictly comply with § 33.1-386 by giving the timely written notice to which VDOT was entitled, barred AMEC's claims.

**III. AMEC DID NOT GIVE TIMELY WRITTEN NOTICE OF AMEC'S CLAIMS** [Question No. IV and AMEC's A/E Nos. 5 – 17]

**A. AMEC FAILED TO GIVE WRITTEN NOTICE AT THE "TIME OF THE OCCURRENCE OR BEGINNING OF THE WORK"**  
[AMEC A/E No. 6 & 7]

The Court of Appeals held there was no evidence AMEC gave the required timely written notice of intent to file a claim for the following claims:

Drilled Shaft Work –Written notice given two years after AMEC knew about the potential problem and began the work was "untimely because it came long after "the time of the occurrence or beginning of the work upon which the claim and subsequent action is based.'" J.A. 4400-01 (COA Op. 13-14).

Drilled Shaft Concrete Design – There was no evidence that AMEC gave written notice during the performance of the contract of an intention to later file a claim. J.A. 4401 (COA Op. 14).

Concrete Formwork for Foundation Caps, Piers & Columns – VDOT never received written notice of AMEC's intention to file independent claims for these alleged additional costs and AMEC did not brief this issue to the Court of Appeals. J.A. 4401 (COA Op. 14 and n.13); AMEC's Brief of

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<sup>6</sup> Until the owner receives the written notice to which he is entitled, he does not incur any legal obligation to the subcontractor. Mills v. Moore's Super Stores, Inc., 217 Va. 276, 280, 227 S.E.2d 719, 723 (1976).

Appellee, COA Record No. 2061-08-2, at 11-18.

Pier 17 Foundation Cap Repair – No written notice that can be reasonably interpreted as stating any intention by AMEC to file a claim based upon the repair work to Pier 17's Foundation Cap. J.A. 4402 (COA Op. 15).

Work Orders 4, 6, 7 & 16 – No written notice of intention to later file a claim seeking damages related to these work orders. AMEC claimed it provided written notice in July 2004, but that notice came after commencement of the work authorized by Work Orders 4, 6, 7, and 16. J.A. 4402-03 (COA Op. 15-16).

Acceleration Damages – AMEC claimed its accelerated effort began in January 2002, but its first written notice of any intention to assert a claim came in April 2004 (J.A. 268-70), which was untimely as to acceleration prior to April 2004. J.A. 4403 (COA Op. 16).

AMEC's argument that the Court of Appeals never considered the "time of occurrence" trigger for giving notice is simply false. The Court of Appeals considered and applied both triggers for the notice requirement. If the above-cited findings and conclusions were not clear enough, the Court of Appeals plainly held:

[T]he court erred as a matter of law in concluding AMEC gave timely "written notice" of its "intention to file" a claim "at the time of the occurrence or beginning of the work upon which the claim and subsequent action is based." ... The circuit court's contrary conclusion first dispensed with the statutory requirement of written notice and then held, in the alternative, that written notice had been given from "minutes" of meetings and "memoranda" exchanged between the parties. No legal precedent supports the court's first ruling, and no evidence supports its alternative ruling.

J.A. 4405 (COA Op. 18) (emphasis added).

Also, the two triggers are not necessarily different. The "time of

occurrence” is the beginning of work when a contractor knows, like AMEC, that it has a potential claim at the beginning of the work. Flory, 261 Va. 230, 233-34, 238-39, 541 S.E.2d 915, 916-17, 919-20. In Flory, the plaintiff’s invoices were insufficient to comply with the VPPA’s notice requirements. The defendant demanded that the plaintiff sign an agreement as a condition precedent to payment for the plaintiff’s services, which the plaintiff refused to sign. The plaintiff began work, but did not file a notice of intent to file a claim in the absence of the agreement. Id. This Court ruled that invoices submitted more than six months after the plaintiff was told that it would not be paid absent a signed agreement were insufficient to comply with the statutory requirement. Id. This implies that the defendant’s refusal to pay the invoices did not create a new “occurrence” that cured the plaintiff’s failure to give notice before beginning work.

AMEC argues its drilled shaft notice was not untimely because AMEC was incapable of determining at an early stage whether drilled shaft problems would “wreak havoc on budget and anticipated costs.” This argument was flatly rejected in MCI, which is not binding, but is strongly persuasive. A contractor must give notice when a claim first arises even if the contractor is unable to determine the full monetary impact of the claim at that time. MCI, 62 Va. Cir. at 379. In MCI, the Court barred a contractor’s

claims that arose out of the change order process because the contractor failed to provide notice of those claims when the change orders were issued. Id. Here, AMEC knew of the difficulty in building the drilled shafts from the very beginning of drilled shaft construction in April 2001. J.A. 1379-80. AMEC waited over two years until the work was nearly complete to give notice. Unsuccessful negotiations or discussions prior to giving written notice did not constitute an “occurrence,” did not relieve AMEC of its obligation to give timely notice, but do prove that AMEC knew about the claim long before it gave the required notice. Likewise, the Contract’s “partnering” provisions did not relieve AMEC of its obligation to give timely notice.

FT Evans, Inc. v. Science Museum of Virginia, 61 Va. Cir. 317 (City of Richmond Cir.Ct., 2002) and RGA/SSA Architects v. VCU, 61 Va.Cir. 730 (City of Richmond Cir.Ct., 2002) were wrongly decided and, in any event, are inapposite because, unlike AMEC, until the work was completed neither of the plaintiffs knew there would be a dispute about payment. FT Evans, 61 Va.Cir. at 319-20; RGA/SSA, 61 Va.Cir. at 732.

AMEC’s interpretation of § 33.1-386 would allow a contractor to delay giving the written notice until the work is completed. Final completion would be the only “occurrence” that absolutely triggers the written notice

requirement. AMEC's view is inconsistent with the statutory and contractual notice requirements, and with Flory.

If AMEC's argument prevails, then the requirement that notice be given before beginning work would be superfluous, the very purpose for giving advance notice would be eviscerated, and VDOT and all other state agencies would be deprived of the ability to investigate and effectively resolve claims prior to litigation; or, in the alternative, would be deprived of the ability to terminate a contract for convenience upon learning that the cost of the project might be double the approved budget because of the existence of the circumstances giving rise to the potential claim.

AMEC's argument that there was credible evidence to support the trial court's conclusion is not supported by the Record. None of the documents that AMEC now says satisfied the statutory and contractual notice requirements come anywhere close to being the timely written notice of intent required by § 33.1-386 and Specification § 105.16. Op. Br. 12-13.<sup>7</sup> Indeed, of the 16 documents cited, 9 do not contain the word "claim" or the words "intent to file or make" a claim or indicate any such intention. JA 203-06, 3159, 3174-78, 3193-98, 3204, 3210-11, 3220-24, 3246, 3254. The few

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<sup>7</sup> AMEC did not cite most of these documents to the Court of Appeals. Thus, AMEC invited the error assigned to the Court of Appeals' decision. Cangiano v. LSH Bldg. Co., 271 Va. 171, 181, 623 S.E.2d 889, 895 (2006).

documents that possibly indicate AMEC's intent to file a claim (J.A. 203-06, 207-14, 3240, 3254, 3905-06) were either (a) untimely as they pertain to difficulties performing work that began over two years earlier (id.), or (b) they pertain to claims where notice is not a contested issue. J.A. 3236, 3265.

The remainder of AMEC's purported notices are simply routine correspondence typical for any construction project, not notices of intent. J.A. 3204. AMEC's letter relating to the boulders plainly states that it is a notice of a differing site condition, but nothing about an intent to file a claim. J.A. 3159. Likewise, meeting minutes that AMEC cites pertain to AMEC's ongoing work, but no intent to file a claim. J.A. 3174-78; 3220-24.

AMEC's actual timely written notices of intent on some claims not being contested in this appeal prove two things. First, when AMEC believed that some act of omission or commission by VDOT gave rise to a potential claim, AMEC knew that Code § 33.1-386 and Specification § 105.16 required written notice at the time of occurrence or beginning of the work; and, second, other documents that AMEC cites are not and were not intended to be notices of intent.

**B. THE COURT OF APPEALS DID NOT CREATE ADDITIONAL NOTICE REQUIREMENTS FOR THE BENEFIT OF VDOT [AMEC A/E No. 12]**

The Court of Appeals did not create additional notice requirements as AMEC contends. The Court of Appeals simply explained its reasoning in distinguishing between routine construction project documents and true notices of intent. J.A. 4398-4400 (COA Op. 11-13). The Court of Appeals' explanation was necessary given that contractors, like AMEC, often argue that routine construction project documents, which say nothing about an intent to file a claim, satisfy the written notice requirement. MCI, 62 Va. Cir. at 379-80 (engineer's rejection letters and contractor's transmittal letters were not timely notices of intent).

**C. SPECIFICATION § 104.03 REQUIRED AMEC TO GIVE VDOT NOTICE OF A DIFFERING SITE CONDITION [AMEC A/E No. 14]**

The Contract obligated AMEC to give written notice regarding alleged differing site conditions at the Project. J.A. 3390 (§ 104.03). AMEC was not relieved of that obligation based on VDOT's purported 'superior knowledge' of site conditions at a different project. No additional time or compensation was due AMEC "unless [AMEC] has provided the required written notice." Id. The party who "encountered" or "discovered" the condition at the site must notify the other party. Id. Here, AMEC is the party who "encountered" or "discovered" the alleged condition at the Project. J.A. 1363:22-1364:20.

**D. AMEC'S OBLIGATION TO STRICTLY COMPLY WITH THE NOTICE REQUIREMENTS WAS NOT OBIATED BY**

**IMPLIED COVENANTS OF GOOD FAITH AND FAIR DEALING OR BY A DUTY TO DISCLOSE “SUPERIOR KNOWLEDGE” [AMEC A/E Nos. 15 & 16]**

AMEC did not brief its argument regarding an implied covenant of good faith and fair dealing, so it is waived. This duty applies to UCC contracts. Code § 8.1A-304. The UCC does not apply to construction contracts. Bruce Farms, Inc. v. Coupe, 219 Va. 287, 289 n.1, 247 S.E.2d 400, 402 n.2 (1978). Such duty “cannot be the vehicle for rewriting a contract in order to create duties that do not otherwise exist.” Ward’s Equip. v. New Holland N. Am., 254 Va. 379, 385, 493 S.E.2d 516, 520 (1997).

AMEC’s argument that the Court of Appeals erred when it failed to consider a purported implied duty to disclose “superior knowledge” is also unfounded. No such duty applies where, as here, parties are engaged in an arm’s length transaction. Costello v. Larsen, 182 Va. 567, 29 S.E.2d 856, 857 (1944); see Norris v. Mitchell, 255 Va. 235, 241, 495 S.E. 2d 809, 813 (1998). Even if there were such a duty, it would not obviate AMEC’s contractual duty to give written notice of a differing site condition. J.A. 3390. In any circumstance, the Commonwealth is immune from implied rights or causes of action. See Flory, 261 Va. at 236-37, 541 S.E.2d at 918.

**E. AMEC WAS REQUIRED TO GIVE SEPARATE WRITTEN NOTICE OF INTENT FOR EACH ACT OR OMISSION THAT CAUSED DAMAGE TO AMEC [AMEC A/E No. 17]**

AMEC did not address Assignment of Error No. 17 in its Petition (23-28), so it is waived. Rule 5:25; VDOT v. Fairbrook Bus. Park. Assocs., 244 Va. 99, 105, 418 S.E.2d 874, 878 (1992). AMEC was required to give written notice for each discrete claim. Code § 33.1-386; J.A. 3407-08 (§ 105.16). AMEC's Claim and its Amended Complaint both contained 13 discrete and separate claims. J.A. 7-25, 3494-3810. The Court of Appeals addressed each of AMEC's discrete claims for which notice was an issue. J.A. 4400-4405 (COA Op. 13-18). Also, AMEC cannot avoid its failure to give notice by arguing that certain claims were derivative of the lake levels, drilled shafts or acceleration claims, which were invalid. The discrete claims arose from separate and distinct "occurrences" and/or work starting at different times, requiring separate and distinct notices of intent.

**F. AMEC'S CLAIM WAS NOT AND COULD NOT BE ITS WRITTEN NOTICE OF INTENT**

AMEC argues that its Claim, taken with VDOT's alleged "actual notice," satisfies the statutory written notice requirement. Being raised for the first time on this appeal, this argument has been waived. Rule 5:25. In any event, in each instance AMEC knew of a potential claim before beginning the work. Notice given after the work was completed and final payment was pending is not timely. Sections II and III(A), above.

**IV. THE COURT OF APPEALS CORRECTLY RULED THAT ELEVATED LAKE LEVELS WERE NOT A DIFFERING SITE CONDITION UNDER THE CONTRACT AS A MATTER OF LAW**  
[Question No. II, AMEC's Assignments of Error Nos. 2, 3 & 4]

**A. THE ELEVATED LAKE LEVELS DID NOT CONSTITUTE A DIFFERING SITE CONDITION [AMEC's A/E No. 2]**

AMEC argues that the sustained high water levels in Kerr Lake were a differing site condition. Neither the Contract nor any evidence support AMEC's argument or the trial court's general verdict.

The Court of Appeals applied the proper standard in holding that lake levels were not a differing site condition. Contract interpretation is a question of law. Transcon, 262 Va. at 510, 551 S.E.2d 317; P.J. Maffei Bldg. Wrecking Corp. v. United States, 732 F.2d 913, 916-917 (Fed. Cir. 1984) (whether the contract made representations that differed materially from those encountered is a matter of contract interpretation); Foster Constr. C.A. & Williams Bros. Co. v. United States, 193 Ct. Cl. 587, 601 (Ct. Cl. 1970) (cited in Asphalt Roads & Materials Co. v. Commonwealth, 257 Va. 452, 457, 512 S.E.2d 804, 807 (1999)).<sup>8</sup> Whether the claimed conditions differ materially from the contract or were unusual is a question of fact. Asphalt Roads, 257 Va. at 458, 512 S.E.2d at 807; Turnkey Enterprises, Inc. v. United States, 220 Ct. Cl. 179, 193-96, 597 F.2d 750,

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<sup>8</sup> Although the Court in Asphalt Roads looked to federal law, it did not apply the settled rule that Type I differing site conditions involve a question of law.

758-59 (Ct. Cl. 1979). No evidence supports the trial court's general verdict and its implicit interpretation of the Contract was plainly wrong.

As the Court of Appeals recognized, there are two types of differing site conditions in Specification § 104.03. J.A. 3390. Type I differing site conditions involve subsurface or latent physical conditions that differ materially from those indicated in the contract. Id.; J.A. 4407; Asphalt Roads, 257 Va. at 458, 512 S.E.2d at 807. Type II differing site conditions involve unknown physical conditions of an unusual nature that differ materially from those ordinarily encountered and generally recognized as inherent in the work. J.A. 3390, 4407.

The Court of Appeals correctly concluded that the elevated lake levels did not constitute either a Type I or Type II differing site condition. Specification § 104.03 must be construed in light of the Site Information provision, which told AMEC that: (1) lake levels were beyond VDOT's control and routinely fluctuate by several feet, which can take place within a few days; and (2) AMEC was responsible for obtaining past, current and predicted lake levels from the USACE to "determine the impacts possible fluctuations may have on planned construction methods and operation." J.A. 3302.

The sustained lake levels were not a Type I differing site condition

because they did not differ materially from any indication in the Contract. The Contract “established neither a baseline nor even a range of fluctuations” and “steered clear of making any binding representations on the subject.” J.A. 4408, 3302. There were no indications in the Contract as to how long the water might remain above any given elevation. J.A. 3302 The USACE’s records were not part of the Contract. J.A. 3384.

Sustained water levels are not a Type I differing site condition in other jurisdictions that have considered the issue. See Meyers Co., Inc. v. United States, 41 Fed.Cl. 303, 309 (Fed.Cl. 1998) (sustained period of low water). The reason, in part, is that a differing site condition must exist when the contract is executed. Olympus Corp. v. United States, 98 F.3d 1314, 1317-18 (Fed. Cir. 1996). Conditions resulting from natural events that occur after the contract began cannot be differing site conditions. Turnkey, 220 Ct. Cl. at 193-96, 597 F.2d at 758-59 (unusual period of drought); Utility Contractors, Inc. v. United States, 8 Cl.Ct. 42, 51 (Cl.Ct. 1985) (heavy rain caused stream to overflow cofferdam); Amino Bros. Co. v. United States, 372 F.2d 485, 490-91 (Ct. Cl. 1967) (flood water). That is because they are caused by acts of God, which do not entitle a contractor to additional compensation. Walser v. United States, 23 Cl.Ct. 591, 595 (Cl.Ct. 1991) (high rise in river level); Tombigbee Constructors v. United States, 420 F.2d

1037, 1043-44 (Ct. Cl. 1970) (flood); Roen Salvage Co., 79-2 B.C.A. (CCH) P13,882, 1979 Eng. BCA LEXIS 32 (Eng'r B.C.A. 1979) (high lake levels).

Sustained water levels are not a Type II differing site condition because it was a known, predictable condition. AMEC knew there were sustained periods of high water (above 301 feet). J.A. 819:14-829:5. Under the Contract, routine and non-routine fluctuations were known conditions, so outside the scope of a Type II condition. J.A. 4408. Also, unprecedented water levels caused by climactic conditions are an act of God, not a Type II condition. Turnkey, 220 Ct.Cl. at 193-96, 597 F.2d at 758-59.

Randa/Madison Joint Venture III v. Dahlberg, 239 F.3d 1264 (Fed. Cir. 2001), cited by AMEC, actually supports the Court of Appeals' ruling. There, subsurface groundwater was not a Type II differing site condition because it was not an unknown condition, that is, a condition that could not be reasonably anticipated from the contract documents, site inspection and the contractor's general experience. Id., at 1276. Information available predicted the actual conditions encountered. Id., at 1277.

AMEC defines "sustained elevated lake levels" as any period of time when lake levels were higher than 301 feet. J.A. 844-45. Yet average lake elevations routinely fluctuated above 301 feet for sustained periods. J.A. 267, 3238. In the past, lake levels fluctuated as high as 316 feet or higher

for sustained periods. Id. The lake could rise to over 320 feet. J.A. 3229.

The sustained lake levels were (a) caused by an act of God and weather, (b) were not different from what was indicated in the Contract, and (c) were known, predictable conditions. The Court of Appeals correctly held that the sustained elevated lake levels were not a differing site condition.

**B. THE CONTRACT PRECLUDED AMEC'S DIFFERING SITE CONDITION CLAIM [AMEC's A/E No. 3]**

Contrary to AMEC's contention, the Site Information provision is not an invalid "disclaimer" or "caveatory and exculpatory provision" like those analyzed in Asphalt Roads. Compare J.A. 3302 (Site Information) with Asphalt Roads, 257 Va. at 459, 512 S.E.2d at 808. In Asphalt Roads, the contract contained express indications of the quantity of unsuitable soil to be excavated. Asphalt Roads, 257 Va. at 459, 512 S.E.2d at 808. These quantity indications could not be disclaimed by the site inspection provision or the warranty disclaimer thereby making the contractor responsible for quantities exceeding the amount indicated. To do so would render the differing site condition provision meaningless. Id.

Unlike Asphalt Roads, the Contract made no representations about the lake levels that the Site Information provision disclaimed. The latter informed AMEC that lake levels were beyond VDOT's control and routinely fluctuate by several feet, which can take place within a few days. This

implied non-routine fluctuations could take place over a longer period. There was no baseline lake level indicated or a maximum period the lake would fluctuate above or below a particular level. It was up to AMEC to obtain past, current and predicted lake levels from USACE and plan its work around fluctuations in the lake level. J.A. 3302, 4408-09 (COA Op. 21-22). The USACE's records were not Contract documents. There were no indications of lake levels for the Site Information provision to disclaim, so that provision did not nullify Specification § 104.03.

**C. THE COURT OF APPEALS CORRECTLY CONSTRUED THE UNAMBIGUOUS TERMS OF THE CONTRACT [AMEC's A/E No. 4]**

AMEC argues that, in construing the Site Information and differing site conditions provisions, the Court of Appeals erred by construing “conflicting Contract provisions in favor of VDOT, as opposed to construing such ambiguities against VDOT ....” Raised for the first time on appeal, and not addressed in its Petition (p. 15-18) this argument is waived. Rule 5:25; Fairbrook, 244 Va. at 105, 418 S.E.2d at 878. Also, conflicts in a contract are not construed against the drafter, but are harmonized to give effect to the parties' intent as expressed in the contract as a whole. Plunkett v. Plunkett, 271 Va. 162, 168, 624 S.E.2d 39, 42 (2006). However, the Site Information provision contains no indications of lake levels or disclaimer, so

there is no conflict with the differing site conditions provision.

**D. AMEC WAS NOT ENTITLED TO COMPENSATION FOR DELAY CAUSED BY ELEVATED LAKE LEVELS**

AMEC makes the untenable argument that, by granting time extensions in Work Order 39 and 51, VDOT conceded that the lake levels were a differing site condition, thereby entitling AMEC to additional compensation. With good reason, the Court of Appeals flatly rejected this argument. J.A. 4409. Non-compensable time extensions, such as these, are for delays due to causes beyond either party's control. J.A. 3449-50. Such extensions protect a contractor from liquidated damages and termination for default. Id.; J.A. 3452-3 (§§ 108.11-108.13). VDOT may grant a non-compensable time extension when, e.g., a delay occurs due to causes beyond the contractor's control. J.A. 3450 (§ 108.09(b)). These provisions do not entitle a contractor to additional compensation. Id. The purported "concession" is also contrary to the terms of the Work Orders, which expressly state that the time extensions shall not be construed to mean that VDOT would pay any overhead costs. J.A. 3269, 3271.

**V. AMEC WAS REQUIRED, BUT FAILED, TO PROVE IT COULD NOT RECOUP ITS HOME OFFICE OVERHEAD EXPENSES, AND THE CIRCUIT COURT ERRED IN AWARDING SUCH EXPENSES**  
[Question No. V and AMEC's A/E Nos. 18 & 19]

The Court of Appeals applied the proper standard (Section I, above) in holding that AMEC did not prove a prima facie case for home office

overhead, which is a mixed question of law and fact. The trial court made no findings of fact or conclusions of law on AMEC's entitlement to home office overhead. The trial court's general verdict was contrary to the evidence and the Contract.

To recover home office overhead, a contractor must prove, inter alia, that "it could not otherwise reasonably recoup its pro rata home office expenses incurred while its workforce was idled by the delay." Fairfax Cnty. Redev. Hous. Auth. v. Worcester Bros. Co., 257 Va. 382, 388, 514 S.E.2d 147, 151 (1999); Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc., 259 Va. 92, 115-16, 524 S.E.2d 420, 433 (2000).

Like Lockheed, AMEC failed to offer any evidence that it could not reasonably recoup its home office overhead from other revenue-producing work during the periods of delay. In fact, the evidence proved that during periods of delay AMEC continued working, thus earning revenue to recoup its overhead. J.A. 1403:19-1406:6, 3220-24. AMEC suffered no unabsorbed overhead and, therefore, was not entitled to overhead.

**VI. AMEC PERFORMED NO FORCE ACCOUNT WORK, SO IT WAS NOT ENTITLED TO RECOVER FORCE ACCOUNT MARK-UPS**  
[Question No. VI and AMEC's A/E Nos. 20 & 21]

The Court of Appeals applied the proper standard (Section I, above) in construing Specification § 109.05 and concluding that it had no

relevance to AMEC's claims, which is a mixed question of law and fact. J.A. 4419 (COA Op. at 32). The trial court made no findings of fact on AMEC's right to force account mark-ups in Specification § 109.05. AMEC failed to prove entitlement to home office overhead, which included force account mark-ups for overhead. Id.; Section V, above.

Specification § 109.05 (J.A. 3461-64) provides that, if extra work must be performed VDOT may require the contractor to perform the work on force account basis in lieu of payment on a unit price or lump sum basis. Id. VDOT, however, never required AMEC to perform work on force account and AMEC did not seek recovery based on work VDOT ordered AMEC to perform on a force account basis. As a result, AMEC was not entitled to recover force account mark-ups under § 109.05. Id.; J.A. 3461.

**VII. VDOT IS NOT LIABLE FOR PRE-JUDGMENT INTEREST [Question No. VII and AMEC's A/E No. 22]**

The Commonwealth has never been liable for interest absent express statutory authority or a contract provision explicitly imposing such liability. State Hwy. & Transp. Comm'r v. Tr. of Parsonage of Broadford Methodist Episcopal Church S., 220 Va. 402, 404, 258 S.E.2d 503, 504 (1979); Ry. Express Agency, Inc. v. Commonwealth, 196 Va. 1059, 1066, 87 S.E.2d 183, 187 (1955); Commonwealth v. Safe Deposit and Trust Co. of Baltimore, Md., 155 Va. 458, 460, 155 S.E. 897, 898 (1930); Lynchburg v.

Amherst Cnty., 115 Va. 600, 608, 80 S.E. 117, 120 (1913)<sup>9</sup>; 1985-1986 Op. Att’y Gen. Va. 146, 147 (June 14, 1986). Neither Code § 8.01-382, nor the Contract make VDOT liable for pre-judgment interest.

The Commonwealth does not waive its immunity simply by entering into a contract. This Court rejected that argument in Lynchburg, as Virginia has established a different doctrine between the Commonwealth and “natural persons and private corporations.” Lynchburg, 115 Va. at 608, 80 S.E. at 120. This Court has also rejected arguments that justice requires the Commonwealth to pay interest or that the Commonwealth should pay interest the same as an individual. Safe Deposit, 155 Va. at 460, 155 S.E. at 898.

The Commonwealth’s immunity from pre-judgment interest under § 8.01-382 was upheld in George Hyman Construction Co. v. WMATA, 816 F.2d 753, 759 (D.C.Cir. 1987). AMEC’s attempt to distinguish Hyman is unavailing. Hyman remains good law after Wiecking v. Allied Medical Supply Corp., 239 Va. 548, 391 S.E.2d 258 (1990). Wiecking did not consider whether the Commonwealth is liable for pre-judgment interest.

Furthermore, the General Assembly has affirmed the decisions in George Hyman, Lynchburg, Safe Deposit and the Opinion of the Attorney

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<sup>9</sup> The statutory predecessors to Code § 8.01-382, were in effect at the time of each of these decisions.

General by amending Code § 8.01-382 at least three times without taking any action to abrogate them. 1997 Va. Acts Ch. 551; 2004 Va. Acts Ch. 646; 2008 Va. Acts Ch. 219. The General Assembly is presumed to have full knowledge of these decisions. Waterman v. Halverson, 261 Va. 203, 207, 540 S.E.2d 867, 869 (2001); Cape Henry Towers, Inc. v. National Gypsum Co., 229 Va. 596, 602, 331 S.E.2d 476, 480 (1985); Beck v. Shelton, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004). Where the General Assembly could have “overruled” these statutory interpretations when it amended the statute, the failure to do so reinforces such interpretations and creates a presumption that the General Assembly intended to affirm them. Burns v. Bd. of Supervisors of Stafford Cnty., 227 Va. 354, 360, 315 S.E.2d 856, 860 (1984); Beck, 267 Va. at 492, 593 S.E.2d at 200 (Att’y Gen. Opinions).

AMEC relies on cases from foreign jurisdictions whose law is directly contrary to settled Virginia law: Architectural Woods, Inc. v. State, 92 Wash.2d 521, 598 P.2d 1372 (Wash. 1979); Univ. of Louisville v. RAM Eng. & Constr., Inc., 199 S.W.3d 746 (Ky. 2006). As such, these cases are inapposite, unpersuasive and must be disregarded.

#### **VIII. VDOT’S ASSIGNMENTS OF CROSS-ERROR**

**A. AMEC FAILED TO COMPLY WITH THE CONTRACT'S MANDATORY NOTICE REQUIREMENTS [Assignment of Cross-Error No. 1; Question Presented No. 1]**

For all of the reasons stated above, by failing to comply with the written notice requirements in Code § 33.1-386, AMEC also failed to comply with the written notice requirements in Specification § 105.16, which in pertinent part requires:

[a] written statement describing the act of omission or commission by the Department or its agents that allegedly caused damage to the Contractor and the nature of the claimed damage shall be submitted to the Engineer at the time of occurrence or beginning of the work upon which the claim and subsequent action are based... Submission of a notice of claim as specified shall be mandatory. Failure to submit such notice shall be a conclusive waiver to such claim for damages by the Contractor. An oral notice or statement will not be sufficient nor will a notice or statement after the event.

J.A. 3407-08 (§ 105.16). A contract “becomes the law governing the case.” Palmer & Palmer Co., LLC v. Waterfront Marine Constr., Inc., 276 Va. 285, 289, 662 S.E.2d 77, 80 (2008).

The meeting minutes, letters and other routine project documents, which AMEC asserts are its written notices of intent, fail to comply with § 105.16's explicit requirement to describe VDOT's act of omission or commission and the nature of the claimed damage. J.A. 3407. Documents indicating AMEC's difficulties in performing the work, nothing more, are not sufficient. Also, oral notice (i.e., actual notice) and notice after the event

(i.e., the Claim) are not sufficient.

**B. AMEC'S CLAIMS FOR DRILLED SHAFTS AND WORK ORDER NOS. 6 AND 7 WERE BARRED BY ACCORD AND SATISFACTION** [Assignment of Cross-Error No. 2; Question Presented No. 2]

AMEC's drilled shaft and Work Order claims were barred under accord and satisfaction principles, which the Court of Appeals failed to decide. J.A. 4401 n. 11, 4403 n. 16. Where a contractor "agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered." Southgate v. Sanford and Brooks Co., 147 Va. 554, 563, 137 S.E. 485, 487 (1927) (citations and quotation marks omitted).

Where parties agree to a bilateral contract modification, such as a work order, without reservation, the agreement "operates as a bar to all claims not specifically reserved." Fraass Surgical Mfg. Co., Inc. v. United States, 505 F.2d 707, 712 (Ct.Cl. 1974). An express release is not necessary for a work order to constitute an accord and satisfaction. McLain Plumbing & Elec. Serv., Inc. v. United States, 30 Fed.Cl. 70, 79 (Fed.Cl. 1993). When the contractor accepts a work order "without reservation or protest [which] increase[es] his compensation [it] may not later claim further compensation for alleged breach of contract." Fraass, 505 F.2d at 712.

The trial court's general verdict awarded AMEC damages for the time

granted in Work Orders 6 and 7. By the terms of the Contract, the Work Orders necessarily contained the additional time and compensation for that time. J.A. 3374. In both Work Orders, AMEC requested compensation and time for specific items of work, to which VDOT agreed. J.A. 3163-69; 150A. The Work Orders were bilateral and the terms were undisputed, which AMEC accepted without reservation or any indication that AMEC would claim additional time or money in the future.<sup>10</sup> Id.; J.A. 1056.

The general verdict also awarded damages for the drilled shaft claim. Drilled shaft work was paid at a unit price, which is a comprehensive sum stated in AMEC's bid, inclusive of overhead, profit and all materials, labor, tools, equipment and incidentals. J.A. 3387 (§ 104.02), 3461 (§§109.04 & 109.05); 3297-3332 (Special Provisions, Drilled Shafts, § X). Before AMEC started the drilled shafts, VDOT and AMEC mutually agreed to increase the unit price for drilled shafts to the higher rock socket unit price. J.A. 1040-43, 1448-49, J1893, 3033. The agreed increase in the unit price, which AMEC accepted without reservation, was an accord and satisfaction.

**C. THE COURT OF APPEALS ERRED IN FAILING TO RULE THAT THE TRIAL COURT ERRED IN ADMITTING AMEC'S COLLATERAL EVIDENCE [Assignment of Cross-Error No. 3; Question Presented No. 3]**

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<sup>10</sup> AMEC knew how to reserve future claims in work orders, but chose not to do so for the Work Orders. 3135-36 (Work Order 4).

The trial court erred by admitting evidence about the Butcher's Creek Project, based on the doctrine of "superior knowledge," which is not the law in Virginia. See Section III(D), above. AMEC's evidence was collateral, irrelevant, and prejudicial. As such, this evidence was inadmissible. Evidence of collateral facts is inadmissible because it tends to draw the mind away from the point in issue, to excite prejudice, mislead, and is prejudicial. PTS Corp. v. Buckman, 263 Va. 613, 620-21, 561 S.E.2d 718, 722-23 (2002). AMEC's collateral evidence from the Butcher's Creek Project was inadmissible because of the numerous differences between the two Projects and in the means and methods used. App. 897-902, 1974-78, 2011, 2375-77, 2971-77.

Further, assuming, arguendo, the "superior knowledge" doctrine, a creature of federal common law, applies in Virginia, AMEC's claim of "superior knowledge" was legally and factually deficient. A duty to disclose superior knowledge does not require the government to disclose problems experienced by other contractors on a prior contract where the projects in question are sufficiently dissimilar. Granite Constr. Co. v. United States, 24 Cl.Ct. 735, 751-53 (Cl.Ct. 1991).

Here, AMEC did not prove the requisite close correlation between Butcher's Creek Project and this Project necessary to invoke the doctrine.

Instead, the evidence demonstrated that the two projects were dissimilar in the drilled shafts design, the equipment and methodologies chosen by the contractors, and the employment of a specialized drilling subcontractor on Butcher's Creek Project. J.A. 897-902, 985, 1974-78, 2011, 2375-77, 2971.

AMEC merely showed that there was a change in a concrete specification on the Butcher's Creek Project to prove, ipso facto, that the specification for this Project was defective. This is exactly the type of loose causal assumption that PTS and Granite prohibit.

**D. VDOT'S BUTCHER'S CREEK EVIDENCE SHOULD HAVE BEEN ADMITTED** [Assignment of Cross-Error No. 4; Question Presented No. 4]

A litigant is entitled to introduce all competent, material, and relevant evidence tending to prove or disprove any material issue raised, unless the evidence violates a specific rule of admissibility. Tarmac Mid-Atlantic v. Smiley Block Co., 250 Va. 161, 166, 458 S.E.2d 464, 465 (1995). The trial court abused its discretion by refusing to allow VDOT's rebuttal witness to testify. J.A. 2969, 2973-77. That proffered testimony would have proven significant differences sufficient to establish a complete defense to AMEC's superior knowledge arguments. Granite, 24 Cl. Ct. at 751-53.

**E. THE EVIDENCE PROVED AMEC WAS NOT ENTITLED TO DEFECTIVE CONCRETE SPECIFICATION DAMAGES** [Assignment of Cross-Error No. 5; Question Presented No. 5]

A defective specification claim must be based on a design specification, not a performance specification. Conner Bros. Constr. Co. v. United States, 65 Fed.Cl. 657, 685 (Fed.Cl. 2005). Design specifications tell the contractor exactly how the contract is to be performed and permit no deviations. Id. Performance specifications set forth an objective or standard of performance, which the contractor is expected to achieve using his ingenuity. Id. To differentiate, courts look to the level of discretion inherent within the specification. Fru-Con Constr. Corp. v. United States, 42 Fed.Cl. 94, 96 (Fed.Cl. 1998).

AMEC's evidence showed that the drilled shaft concrete specification was a "performance" specification. J.A. 1115-20, 1126-30, 3157-58, 3297, 3877, 3917. The specification placed the burden on AMEC to develop its own "mix design" that would achieve performance criteria and submit it to VDOT, in effect representing to VDOT "this is the mix design we want to use and we believe as a contractor it will meet the criteria of your specification." J.A. 1117. When AMEC encountered problems with its drilled shaft concrete mix (J.A. 1126-28, 3157-58), AMEC reported to VDOT that its problems were related to AMEC's equipment and placement procedures, not a defective specification. J.A. 1129-30, 3877. AMEC offered no expert opinion on the issue, and otherwise failed to prove the

specification was defective or caused AMEC's alleged injury. Damages for this claim must be excluded from any award made to AMEC.

**F. THE EVIDENCE CONCLUSIVELY PROVED AMEC WAS NOT ENTITLED TO PIER 17 FOUNDATION CAP DAMAGES**  
[Assignment of Cross-Error No. 6; Question Presented No. 6]

The defects in the Pier 17 Foundation Cap concrete were caused when the inflatable seals in AMEC's foundation cap form failed, allowing water to leak into the form and irreparably damaged the concrete. J.A. 2452-56, 1533, 3212, 3218. AMEC was solely responsible for the foundation cap form and for the timing of the concrete pour. J.A. 1073-99. AMEC was responsible, not VDOT's, if the foundation cap formwork failed. J.A. 1099. AMEC knew that (a) elevated lake levels affected when foundation caps could be constructed (J.A. 959); (b) the lake level was slightly elevated when the Pier 17 foundation cap was poured (J.A. 1532-33); and (c) AMEC was responsible for obtaining current and predicted lake levels to determine what impacts the lake levels may have on AMEC's planned operations. J.A. 3302 (Site Information). AMEC's decision to pour this foundation cap was "was a risk [AMEC] understood." J.A. 1618:14-18. The Court of Appeals should have to exclude such damages.

**G. THE EVIDENCE CONCLUSIVELY PROVED THAT AMEC WAS NOT ENTITLED TO HOME OFFICE OVERHEAD**  
[Assignment of Cross-Error No. 7; Question Presented No. 7]

AMEC put on no evidence that it was on “standby” during any of the alleged delays. Section V, above; J.A. 1883-88. To recover home office overhead, the contractor must prove that it was required to remain on “standby” during the delay. Worcester Bros. 257 Va. at 388-89, 514 S.E.2d at 151. A contractor is on standby if a government-caused delay of indefinite period requires the contractor to remain ready to resume work immediately, which effectively suspends much, if not all of the work. P.J. Dick, Inc. v. Principi, 324 F.3d 1364, 1370-71 (Fed. Cir. 2003). A contractor is not on standby if the delay does not suspend all or almost all of the work. Id., at 1371-72. “As long as the contractor is able to continue performing the contract, although not in the same way or as efficiently or effectively as it had anticipated it could do so, it can allocate a portion of its indirect costs to that contract.” Williams, 326 F.3d at 1380-81.

When high lake levels affected AMEC’s work, AMEC shifted its work forces to other work not affected by the high water. J.A. 1403-06, 3221. AMEC “reallocated the labor to the best of [its] ability to other non-critical work to try to keep things moving along.” J.A. 1511-12. Thus, AMEC failed to prove a prima facie case for overhead costs.

## CONCLUSION AND RELIEF SOUGHT

For the reasons stated, the Commonwealth asks this Honorable Court to affirm the decision of the Court of Appeals, except as to the Commonwealth's Assignments of Cross-Error. The Commonwealth respectfully requests this Court to find the Assignments of Cross-Error to be well-founded and remand this case to the Court of Appeals with proper instructions.

Respectfully submitted,

THE COMMONWEALTH OF VIRGINIA AND  
THE COMMONWEALTH OF VIRGINIA,  
DEPARTMENT OF TRANSPORTATION

By: Richard Tyler McGrath/s/  
Counsel

Kenneth T. Cuccinelli II, Attorney General  
Wesley G. Russell, Jr., Deputy Attorney General  
Richard Tyler McGrath, (VSB No. 25448)  
Senior Assistant Attorney General, Chief  
Randall H. Wintory, (VSB No. 43312)  
Assistant Attorney General  
OFFICE OF THE ATTORNEY GENERAL  
CONSTRUCTION LITIGATION SECTION  
900 E. Main Street, 2nd Floor  
Richmond, VA 23219  
Tel: (804) 786-1100  
Fax: (804)371-2086  
rmcgrath@oag.state.va.us  
rwintory@oag.state.va.us

William R. Mauck, Jr. (VSB No. 25439)  
Stephen G. Test (VSB No. 18870)  
Matthew S. Sheldon (VSB No. 73734)  
WILLIAMS MULLEN, P.C.  
1021 E. Cary Street, 17<sup>th</sup> Floor  
P.O. Box 1320 (23218-1320)  
Richmond, VA 23219  
Tel: (804) 643-1991  
Fax: (804) 783-6507  
bmauck@williamsmullen.com  
stest@williamsmullen.com

### **CERTIFICATE REQUIRED BY RULE 5:28**

Pursuant to Rules 5:28(g) of the Rules of the Supreme Court of Virginia, I hereby certify that on the 5th day of April, 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 in email in PDF format, and three (3) copies were served by first class U.S. mail upon the following:

Marie Whittemore (V.S.B. No. 09221)  
Robert L. Hodges (V.S.B. No. 31396)  
J. Tracy Walker, IV (V.S.B. No. 31355)  
McGUIRE WOODS, LLP  
One James Center  
901 E. Cary Street  
Richmond, Virginia 23219  
Tel: (804) 775-1111  
Fax: (804) 775-1061  
twalker@mcguirewoods.com

Gregory S. Martin (pro hac vice)  
Gregory S. Martin & Assocs., PA  
555 Winderley Pl. Suite 415  
Maitland, FL 32751  
Tel: (407) 660-4488  
Fax: (407) 660-4540  
gsm@gsmartinlaw.com

Richard Tyler McGrath/s/  
Richard Tyler McGrath,  
Chief, Construction Litigation Section  
Senior Assistant Attorney General