

BRIGLIA McLAUGHLIN

FILE

VIRGINIA LEGISLATIVE UPDATE

ASAMW General Membership Meeting

Lauren P. McLaughlin

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PRE-PERFORMANCE LIEN WAIVERS VOID IN VIRGINIA



PRE-PERFORMANCE LIEN WAIVERS NEARLY EXTINCT IN VIRGINIA

- Virginia Governor McAuliffe proposed amendments on March 27, 2015 - Senate Bill 891S2. April 15, 2015 Senate concurred and House adopted Governor's recommendation.
- Voids waivers of payment bond claims and contract claims executed prior to providing any labor, services, or materials.
- Voids lien waivers executed prior to providing any labor, services or materials.

VPPA STATUTORY CAP ON CHANGE ORDERS

Carnell Const. Corp. v. Danville Redevelopment & Hous.
Auth., 745 F.3d 703, 710-11 (4th Cir. 2014)



HB 1628 Contract Modification Limits



- In response to *Carnell Case*, VPPA was amended to remove the 25% statutory cap on change order work performed.
- Effective July 1, 2015.

Cumulative Impact Claims

*Costello Construction Company of Maryland, Inc. v.
City of Charlottesville, Virginia, No. 3:2014cv034
(March 19, 2015)*



Cumulative Impact Claims

NOTICE UNDER THE VIRGINIA'S PUBLIC
PROCUREMENT ACT (VPPA)
VA. CODE § 2.2-4300, ET SEQ.

- Requires written notice of a contractor's intention to file a claim at the time of the occurrence or the beginning of the work upon which the claim is based. Va. Code § 2.2-4363(A).
- When does a cumulative impact claim occur?

Cumulative Impact Claims

IMPLIED WARRANTY OF DESIGN ADEQUACY (*SPEARIN* DOCTRINE)

To what extent does contract language like this shift the risk of design inadequacies to the contractor?

“[The construction documents are] complete and sufficient for bidding negotiating, costing, pricing, and construction of the project” [and the contractor has a] “continuing duty to review and evaluate the Construction Documents”

Cumulative Impact Claims

IMPLIED WARRANTY OF DESIGN ADEQUACY (*SPEARIN* DOCTRINE)

What about this language?

“Contractor agrees to verify all ... details shown on the drawings ... received from the Engineer” and to “notify him of all errors, omissions, conflicts and discrepancies.”

Cumulative Impact Claims

IMPLIED WARRANTY OF DESIGN ADEQUACY (*SPEARIN* DOCTRINE)

What about this language?

“The submission of a bid will be considered conclusive evidence that the bidder is satisfied with regard to subsurface conditions to be encountered in the work.”

Teaming Agreements

Dwight Snead Landscaping & Paving Co. v. Nutri-Blend, Inc.,
2014 WL 5492713 (Va.Cir.Ct. Sept. 16, 2014)



Teaming Agreements

Agreement to agree or enforceable contract?

Defendant's arguments against enforceability:

- No duration for the prospective subcontract was set in the teaming agreement.
- The plaintiff subcontractor was not a Local Small Business or Local Small Business Enterprises as called for in the teaming agreement.
- The teaming agreement included a provision that provided:
"Nothing herein shall be deemed to create a presumption that the parties have agreed to exclusively respond with the other."

SB 987 Bid Match Preference for Virginia Businesses



Matches out-of-state preferences to the lowest responsive and responsible bidder who is a resident of Virginia and is within 5 percent of the lowest bid price.

HB 1835 Methods of procurement; job order contracting and cooperative procurement

- Increases the limits for job order contracting to \$500,000 for single-job and \$5 million total in one year and provides that:
 - (i) order splitting to avoid maximum dollar amounts is prohibited,
 - (ii) no public body shall issue or use a job order solely for the purpose of procuring professional architectural or engineering services, and
 - (iii) job order contracting shall not be used for construction, maintenance, or asset management services for a highway, bridge, tunnel, or overpass.

BRIGLIA McLAUGHLIN

PLC

lmclaughlin@brigliaw.com

www.brigliaw.com