

WHEN NOTICE ISN'T REALLY NOTICE

By A. Wayne Lalle, Jr.



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Contracting with the government, whether federal, state or local, requires strict adherence to numerous statutory requirements not specifically set forth in your construction contract. For example, most states require that a contractor comply with its state statutory notice provisions to pursue a claim. These provisions are in addition to contractual notice provisions relating to specific claims such as changes, delays and differing site conditions. Unlike contractor notice provisions, however, there are few exceptions and a contractor's failure to strictly comply with statutory notice provisions can be fatal to an otherwise valid claim for recovery.

As an example, *Commonwealth of Virginia v. AMEC Civil, LLC*, 280 Va. 396, 699 S.E.2d 499 (2010) provides a stark reminder of the need to comply with statutory notice of claim provisions. In *AMEC*, the contractor ("AMEC") substantially prevailed at the trial court as reflected in a general verdict of \$21,181,941. On the issue of statutory notice, the trial court found that strict compliance with the notice requirements of Virginia Code § 33.1-386 was not necessary. The trial court reasoned that the public policy purpose of the statutory notice requirement was met since the Virginia Department of Transportation ("VDOT") had "actual notice" and had "suffered no prejudice" from AMEC's failure to comply with the statute's provisions. *AMEC*, 699 S.E.2d at 504.

This reasoning is consistent with the "actual notice" exception to strict compliance with notice provisions which may apply when the contractor fails to meet contractual notice requirements. In addition, courts are reluctant to require strict adherence to contractual notice requirements when the government has suffered "no prejudice" as a result of the contractor's failure to strictly comply with a contractual notice provision. The Court of Appeals, however, rejected this "actual notice" concept as it related to the statutory notice requirements and the Virginia Supreme Court agreed.

Virginia Code § 33.1-386(A) requires that the contractor "set forth the facts upon which the claim is based, *provided that written notice of the contractor's intention to file such claim shall have been given to the Department at the time of the occurrence or beginning of the work upon which the claim and subsequent action is based.*" (Emphasis added.) The Virginia Supreme Court held that this provision must be "strictly construed." *AMEC*, 699 S.E.2d at 506. Thus, project meeting minutes which reflected AMEC's intent to file a claim did not fulfill the statutory notice requirements. *Id.* Likewise, letters and meeting minutes exchanged between AMEC and VDOT, which showed the parties were aware of the underlying problems, did not suffice. *Id.* At a minimum, to comply with the statute, a written

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document "must clearly give notice of AMEC's intent to file its claim and must be 'given to [VDOT]' by letter or equivalent communication directed to VDOT at the appropriate time." *AMEC*, 699 S.E.2d at 506. Under the statute, the "appropriate time" is either "at the time of occurrence" of the claim or commencement of the "work upon which a claim is based." *Id.* Virginia Code § 33.1-386(A).

Similar to statutory notice provisions, many states also require that a contractor formally "present" its claim within a certain period to a local government before proceeding to litigation. Failure to meet the requirements of these presentment statutes within the prescribed time can likewise be fatal to the contractor's claim when the failure is discovered, after the time for presentment has lapsed. For instance, if this issue is not raised until litigation is filed, it may be too late for the contractor to comply with the presentment requirement.



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