

## Beware A Never Ending Warranty Period: Drafting Virginia Public Project Contracts After *Hensel Phelps v. Thompson Masonry*

Contractors on Virginia public projects likely are aware that their responsibility to correct defective construction can be unending. By Virginia statute ([Code §8.01-231](#)), there is no statute of limitations that applies against the Commonwealth. While private parties are barred from bringing lawsuits after a certain period of time, no such bar applies to the Commonwealth.

Last month the Supreme Court of Virginia made clear in [Hensel Phelps Construction v. Thompson Masonry Contractor](#) that incorporating the prime contract on a state project into lower tier subcontracts is not enough to also expose the lower-tier subcontractors to endless liability. The endless period isn't created by the prime contract, but by the statute.

Fourteen years after finishing a job at Virginia Tech, the Commonwealth sued Hensel Phelps for defective work. Hensel Phelps settled and then sought to recover from its subs. Hensel Phelps asserted defective work claims, for which the time period to sue began when the breach (*i.e.* defective work) occurred. The trial court dismissed the lawsuit, finding that as between Hensel Phelps and the subs, the statute of limitations for breach of contracts had expired and barred the recovery claims. The Supreme Court agreed.

Hensel Phelps may have succeeded in pursuing claims against the subs had the indemnity provisions of its subcontracts been enforceable. Claims for indemnity do not begin to run until the indemnitee pays the obligation for which it is owed indemnity. Under that theory, the indemnity claim didn't arise until Hensel Phelps paid the settlement.

Unfortunately for Hensel Phelps, the indemnity clauses in its subcontracts were too broad. The clauses attempted to indemnify Hensel Phelps even for its own negligence: running afoul of Virginia law holding indemnification void as against public policy where it indemnifies a party against liability for his own negligence.

This case gives rise to several important lessons learned:

- Be aware that public projects can carry endless liability.
- Make sure your indemnity clauses are drafted so as to be enforceable under all law.
- When working on public projects, carefully review whether your contract lines up with the recovery rights you seek to preserve. For instance, general contractors could require subcontractors to expressly waive any rights under the statute of limitations.
- Consider including language explaining the rights among the parties in the event of future recovery actions by a public owner, such as delayed accrual for indemnity claims or affirmative rights to assert breaches long after a statute of limitations has expired.

If you have specific concerns about how your contracts might be impacted, feel free to contact me.