

Construction and Public Contracts Law

by Jennifer A. Mahar

The Construction Law and Public Contracts Section is pleased to present three articles highlighting recent developments concerning legal issues that can be a challenge for contractors dealing with the Federal Government or the Commonwealth of Virginia — compliance with contract notice provisions and individual accountability for corporate wrongdoing. Arnie B. Mason, the chair of our publications committee, led the effort to recruit authors from our section to share their professional insights on these critical issues. We hope that you find takeaways in these articles useful in your practice.

In *Individual Accountability and Corporate Cooperation — A Year in Review*, Dawn L. Merkle provides a useful overview of the US Department of Justice’s focus on individual accountability for corporate wrongdoing in its enforcement of federal statutes such as the False Claims Act (FCA) and the Foreign Corrupt Practices Act (FCPA). She highlights the September 2015 *Individual Accountability for Wrongdoing* memorandum issued by US Deputy Attorney General Sally Yates, in what has become known as the “Yates Memorandum.” She also discusses the effects to date of this policy memorandum on DOJ’s enforcement activities, including DOJ’s recent application of the cooperation credit in its decision-making process.

In *Good Law, Smart Business and Sound Public Policy: Strict Compliance with Notice Provisions in Virginia’s Public Construction Contracts*, Rodolfo R. “Rudy” Remigio addresses the law, business, and public policy behind Virginia courts’ strict enforcement of notice provisions in construction contracts. Because compliance with notice provisions can make or break a contractor’s contract claim against a Virginia public owner, notice issues are frequently at the center of these disputes. He also explores the risks and benefits to both the commonwealth and contractors resulting from this judicial approach.

In *Changes to Differing Site Conditions Clause in VDOT Construction Contracts Specifications*, James R. “Jimmy” Germano reviews the Virginia Department of Transportation’s 2016 amendment to the

Differing Site Conditions clause contained in the VDOT Specifications. VDOT has added language to include an enforcement mechanism for instances where a contractor fails to provide written notice of an encountered differing site condition. He examines how the Supreme Court of Virginia’s decision in *Commonwealth v. AMEC Civil, LLC* may be indicative of the Court’s interpretation of VDOT’s amendment in future cases.

Our Section is in its 37th year of offering exceptional networking and educational opportunities in the areas of construction and government contract law to our members. Our annual program lineup includes our popular two-day CLE program in early November, where section members at all experience levels from across the commonwealth meet to discuss the latest developments in our practice areas and to network. We produce a semi-annual newsletter to keep our members informed of recent judicial decisions and new legislation. Our members have access to the Construction Law Handbook, a comprehensive resource that indexes and digests construction law cases decided in Virginia’s state and federal courts. We also sponsor CLEs, webinars, and several networking events throughout the year, the details of which are announced on our section’s webpage (<http://www.vsb.org/site/sections/construction>).

I invite you to join our vibrant section. Please feel free to contact me for more information on what our section has to offer.



Jennifer A. Mahar is a member of Smith Pachter McWhorter PLC, focusing her practice on commercial disputes in the government contracting and construction industries. She represents contractors and sureties in all phases of project development and construction. A former assistant commonwealth’s attorney, she has an active trial practice in federal and state courts and before boards of contract appeals. She is the chair of the board of governors of the Construction Law and Public Contracts Section of the Virginia State Bar.