

Construction Law in the Twenty-first Century: A Unique Challenge

by Jack Rephan

Construction lawyers in Virginia and elsewhere have a unique challenge in the twenty-first century. Just as the construction industry is forever changing, so is construction law. The construction law practitioner is challenged to keep abreast of new laws and new judicial decisions. The construction industry is growing, and lawyers who are knowledgeable about construction and its unique legal problems are in demand. The 20-year-old Construction Law and Public Contract Law Section of the State Bar is one of its larger sections, with over 600 members.

The use of alternate delivery systems, such as design build, partnering and construction management—in both the private and public construction at the federal, state and local levels—have generated new forms of contract documents and a new set of legal principles. In 1997, the American Institute of Architects, working with the American Bar Association and other organizations, promulgated new contract documents. Provisions included a termination for convenience clause and a waiver of consequential damages. The General Assembly enacted statutes that will influence the construction industry and create a need for legal services for contractors, subcontractors and other businesses. For instance, in 1995 the Public/Private Transportation Act was signed, and the Public/Private Educational Facilities and Infrastructure Act of 2002, and the Virginia Fraud Against Taxpayers Act became laws last year.

Alternative dispute resolution procedures—rather than litigation—are increasingly being used. Mediation and arbitration are mandatory under the 1997 edition of the American Institute of Architect contract forms. On large projects, dispute review boards and mini trials resolved construction contract disputes out of court.

There is a myriad of new laws within construction law. Lawyers who have clients engaged in construction need to be aware of these developments in the law.

In this issue of the *Virginia Lawyer*, Thomas Folk and Patricia Wittie examine the current climate of increased government spending and the potential consequences to a government contractor who violates ethical rules under federal statutes. Daniel Toomey and Tamara McNulty survey the Sarbanes-Oxley Act of 2002 and its effects on the construction industry and surety underwriters. Randall Wintory addresses Virginia Code § 43-11, as amended in 2002, and the procedural steps necessary to impose liability on an owner to a subcontractor. Finally, I look at whether the doctrine of implied indemnity is recognized in Virginia and whether it is applicable to claims for indemnity where only economic damages are involved.



I hope that this issue of the *Virginia Lawyer* will be of interest to lawyers in Virginia and elsewhere with clients in the construction industry.

Jack Rephan is a past chair of the Construction Law and Public Contract Section