



Construction and Public Contracts Law

by Christopher S. Boynton

The Construction Law and Public Contracts Section is pleased to have this opportunity to present three articles highlighting recent legal developments that impact construction industry participants, whether it involves construction contracting with the federal government, the Commonwealth of Virginia, or private parties. The three articles address the important and ever-evolving topics of preserving delay claims against the commonwealth, a surety's ability to rely upon its principal's pay-if-paid defense to subcontractor payment bond claims, and the new 2017 AIA construction contracting forms. Arnie B. Mason, the chair of our publications committee, again led the effort to recruit authors from our section to share their professional insights on these critical issues. We hope in your review of these articles that you find information useful to your practice.

In “Defending Payment Bond Claims — What Is To Be Done?” Scott W. Kowalski and Mark A. Burgin address the challenges facing sureties who attempt to rely upon their principal’s pay-if-paid clause in defending against subcontractor claims on payment bonds. Clearly, case law is in flux in this area, with federal courts — particularly in Miller Act claims — generally finding that a surety cannot rely upon its principal’s pay-if-paid clause to deny bond claims, while state trial courts appear to be more strictly interpreting contracts to allow sureties to benefit from their principals’ inclusion of pay-if-paid clauses in contracts with their subcontractors. Scott and Mark also discuss the federal court distinction between contract provisions impacting the *timing or right* of recovery versus the *measure* of recovery, and the federal courts’ general view that clauses falling into the former category are unenforceable by a surety in the Miller Act context.

In “A Decade in the Making: the 2017 Revamp of the AIA’s Construction Contract Documents,” Stephen K. Pudner reviews the newest incarnation of the American Institute of Architects’ design-bid-build construction contract forms. Stephen notes that the AIA has made substantial changes to the insurance requirements of the A201 family of forms, and that the 2017 AIA forms also include major revisions to how damages are calculated and enforced, including making automatic the assessment of liquidated damages rather than requiring the assertion of a claim prior to assessment. Other changes continue the decades-old trend of lessening the architect’s responsibility and liability under the A201 family of forms, and create a process for making and agreeing upon an advance calculation of the contractor’s fee when an owner later terminates the contract for its convenience.

In “Time is Money: Preserving Delay Claims in Virginia State Contracts,” Jacob P. “Jay” Stroman provides a detailed overview of the procedural hurdles involved in submitting and documenting a delay claim against the Commonwealth of Virginia and its agencies. Jay highlights the various notice requirements embedded in state statutory law, specifications, and contract forms. He also discusses the importance of providing a timely and complete Schedule Impact Analysis as part of the claims documentation process. Because strict compliance with notice and documentation provisions can often make or break a

contractor’s contract claim against a Virginia public owner, such issues are frequently at the center of these disputes.

Our section is in its 38th year of offering exceptional networking and educational opportunities in the areas of construction and government contracts law to our members. Our annual program lineup includes our highly popular two-day CLE program in early November at the Boar’s Head Inn in Charlottesville, 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 also co-sponsor a CLE session each June at the Virginia State Bar’s Annual Meeting in Virginia Beach. This year, we are partnering with the Litigation Section to present “Successful Appellate Practice from the Trial Court to the Appellate Court” with an outstanding panel of speakers, including sitting trial and appellate judges and noted appellate practitioners.

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 website (<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 all that our section has to offer.



Christopher S. Boynton is a deputy city attorney for the City of Virginia Beach, and focuses his practice on civil and commercial litigation, including disputes in the construction and government contracting arenas. Boynton has an active trial practice in federal and state courts. He is the chair of the board of governors of the Construction Law and Public Contracts Section of the Virginia State Bar.