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Val S. McWhorter

Mr. McWhorter has focused his practice in the area of Construction law for 40 years. His practice has included representing contractors in large, complex claims arising under federal, state, and local government contracts, as well as contracts between private parties.

Mr. McWhorter has engaged in substantial litigation before various Federal Boards of Contract Appeals, Federal Courts and State Courts. He has also served as an advocate in the mediation of construction contract disputes before numerous mediators involving a wide variety of projects.

Mr. McWhorter's success in resolving construction contract disputes earned him nomination as Construction Man of the Year with Engineering News Record in 1991. He is a featured speaker on construction related issues at the National Construction Superconference, Industry and Bar Association meetings. Mr. McWhorter is a member of the Moles and the Beavers and the American College of Construction Lawyers where he served on the Board of Governors.

Practice Areas

- Construction
- Construction Litigation
- Mediation

Education

Washington & Lee University (J.D., 1969; B.A., 1966)

Bar Admissions

Commonwealth of Virginia, 1969
 District of Columbia and U.S. Court of Federal Claims, 1970

Professional Experience

Smith Pachter McWhorter PLC; Member, 1986-present
 Wickwire Gavin & Gibbs, PC, Partner, 1986
 King and King, Chartered, Associate, 1980-1986
 Department of Navy, Assistant to the General Counsel, 1979-1980
 Defense Acquisition Regulatory Council, Navy Legal Member, 1979-1980
 Renegotiation Board, General Counsel, 1977-1979
 King and King, Chartered, Associate, 1972-1977

Professional Memberships and Honors

American College of Construction Lawyers, Board Governors, 2011-2012, 2004-present
Chambers USA: America's Leading Lawyers for Business, Construction – Virginia, 2004-2019
 Virginia Super Lawyers in area of Construction, 2006-2020
 Washington DC Super Lawyers in area of Construction, 2006-2020
 Who's Who Legal - Construction, 2006-2020
Construction Man of the Year, Nominee, Engineering News Record, 1991
 The Moles, Executive Committee, 2007-2011, Member, 1991-present
 The Beavers, 2009-present
 American Arbitration Association, Panel of Arbitrators
 American Bar Association Public Contract Law Section, Former Committee Officer and Council Representative
 American Bar Association, Dispute Resolution Section
 American Bar Association, Forum on the Construction Industry
 American Society of Civil Engineers, Associate

Charitable, Community and Civic Activities

Appointed by Governor McAuliff to serve as a Commissioner on the Virginia Port Authority, 2014; reappointed in 2017
Appointed to the Washington & Lee Law School Law Council, 2014-present
George Mason University, Arts at Mason, Board Member 2004-present
Virginia Commission on Higher Education Board Appointments, Member, 2006-2010
Commission on Higher Education in Virginia, Appointed Member, 1995-1996
Virginia State Council of Higher Education, past Chairman, Member, 1990-1997
George Mason University, Board of Visitors, Vice Rector, Member, 1982-1990

Publications and Speaking Engagements

Co-Author: Richard F. Smith, Val S. McWhorter & W. Stephen Dale, Differing Site Conditions, ABA Forum on Construction Industry: Construction Law (American Bar Assoc.) (Allensworth, et al. ed., 2009)

Presenter: "Alternative Dispute Resolution Options," The Moles Presentation, 2007

Co-Author: Prelitigation Discovery, Construction Litigation Deskbook (American Bar Assoc.) (Macpherson, et al. ed., 2006)

Speaker: "Mediation Advocacy," ABA Dispute Resolution Section Presentation, 2004

Co-Author: *Construction Disputes: Representing the Contractor, Third Edition* (Aspen Publishers, Inc., 2001)

Speaker: "Construction Disputes, Information Technology and the Web," E-Business in the Construction Industry, 2000

Co-Author: *Mediation Strategies, Proving and Pricing Construction Claims, Third Edition* (Aspen Publishers, Inc., 2000)

Speaker: "Advanced Project Delivery Systems," ABA Forum on the Construction Industry, 2000

Speaker: Public Works Contracting Issues: "What Owners and Contractors Really Think About Each Other's Claims," Associated General Contractors, 2000

Speaker: "Purposes and Pathways, Project Delivery Systems and Risk," ABA Forum on Construction Industry, 1998

Speaker: "Prospects, Performance, Profitability," Virginia Construction Symposium, 1997

Author: *Virtual Final Decision on Government Claims* (26 Public Contract Law Journal 157, 1997)

Author: *Disputing the Meaning of a Claim: The Fallout from Dawco Construction* (23 Public Contract Law Journal 451, 1994)

Chapter Co-Author: *Proving and Pricing Claims* (Wiley Law, 1993)

Speaker: The Construction SuperConference presentations:

- *Effective Use of Dispute Review Boards: Strategies and Stories from DRB Members and Legal Counsel*, 2005
- *The "Seven Danger Signals" of a Sick Project*, 2003
- *Working with Consultants and Outside Counsel in Complex Construction Disputes*, 2002
- *Remedy Granting Provisions and Efficient ADR Techniques in Public Works Contracts*, 2001
- *How Internet Based Construction Industry Portals Will Change the Work You Market and Procure Professional Services*, 2000
- *Construction Claims in the 21st Century*, 1998
- *Managing Construction Risk: The Reduction of Unforeseen Construction Costs*

- Through Cradle-To-Grave Project Management, 1997*
- *Reducing a Thirty Day Trial to a One Week Mediation*

Representative Matters

Construction Claims and Litigation: Represented prime contractors before federal and state courts, in mediations, and in private negotiations recovering over \$500 million for clients on a wide range of claims involving large, complex construction projects. These claims have focused on delays, changes in scope, differing site conditions and impacts to the work. Defended prime contractors against claims and litigation by subcontractors. This experience has involved consulting with, and preparing for testimony, experts in highly technical engineering issues, damages calculations and schedule-related claims.

Alternate Dispute Resolution: Successfully mediated contractor disputes with public agencies and private owners including:

- U.S. Army Corps of Engineers
- Bureau of Reclamation
- Washington Metropolitan Area Transit Authority
- State of Rhode Island
- Metropolitan Water District of Southern California
- Private Utilities

Tren Urbano, Puerto Rico

Represented track designer and interface coordinator in its negotiations with the prime contractor and in negotiations with the owner regarding delays and impacts to the work.

(Owner: Puerto Rico Highway & Transportation Authority)

Marmet Locks and Dam, Charleston, West Virginia

Marmet Lock Replacement involved excavation for and construction of a new, larger navigational lock adjacent to an existing lock on the Kanawha River in West Virginia. Smith Pachter McWhorter worked with the project to prepare requests for equitable adjustment and address changes in federal regulations. Of note, the project encountered differing site conditions (unidentified coal layers) that allowed excessive water to enter the excavation. In addition, Smith Pachter McWhorter assisted in preparing requests for equitable adjust to address problems with the project specifications.

(Owner: Corps of Engineers, Huntington District)

Arch Street Station, Long Island Railroad

This project involved the design and construction of a more than \$200 million yard and shop facility for the Long Island Railroad. Disputes arose between the owner and the contractor regarding track construction and the nature of standard specifications. Represented the contractor in its negotiations with the owner and in a dispute review board that ultimately resolved the claim in favor of the contractor.

(Owner: MTA/LIRR)

Washington Metro, New York Ave. Station (Red Line), Washington, DC

In its second Design-Build effort, Washington Metro's New York Avenue Station was an in-fill station built on the existing WMATA Red Line. Assisted the prime contractor in resolving issues with the owner related to delay and disruption as well as successfully defended the prime contractor in state and federal court against subcontractor suits.

(Owner: Washington Metropolitan Area Transit Authority)

Largo Metro Station, Prince George's County, Maryland

The Washington Metro Blue Line Extension represented the first extension to the original

Metrorail system and WMATA's first experience with Design-Build project delivery. The failure of the owner to acquire the project right-of-way and to relocate utilities in a timely fashion, along with defects in WMATA's design documents and unusually severe weather, combined to generate substantial delays in the work. Represented the prime contractor in litigation before the Armed Services Board of Contract Appeals.

(Owner: Washington Metropolitan Area Transit Authority)

Southern New Jersey Light Rail System

Represented the contractor in a dispute with New Jersey Transit over more than \$100 million in claims. The contract for the 34-mile light rail "River Line" system between Trenton and Camden faltered due to delays and disruptions from unscheduled freight traffic, delayed property access, utility relocations and permits, and disputes over recognized change orders and other contract obligations. The design, build, operate and maintain project (\$441 million in the design/build phase) involved design and construction through rural and urban areas; rehabilitation, replacement and continuous operation of existing freight rails; construction of new track, new stations, yard facilities and signaling, and the supply of light rail vehicles. Throughout construction, worked with the contractor, a joint venture of one of the country's top engineering and construction firms and an international manufacturer of rail cars, in analyzing and preparing the claims to promote early resolution. The dispute could not be resolved without litigation. Five months into an expected 12-month trial, New Jersey Transit and the contractor settled the dispute.

(Owner: New Jersey Transit)

Diamond Valley Lake Reservoir (West Dam), Southern California

This massive civil works project involved excavating, hauling and placing over 65 million cubic yards of material to create two dams, the largest being 1.7 miles long. Differing site conditions were encountered in the foundation for the dam and in the borrow areas. Claims were prepared, presented and resolved through mediation.

(Owner: Metropolitan Water District of Southern California)

Anniston Chemical Demilitarization Facility, Anniston, Alabama

This project was part of the program for demilitarizing chemical weapons. The contract involved was for construction of the facility. During the course of construction, design deficiencies became apparent, differing site conditions were encountered, and costs increased. Requests for Equitable Adjustment were prepared, presented and resolved through negotiation.

(Owner: U.S. Government, Corps of Engineers, Huntsville District)

Olmsted Lock, Illinois/Kentucky

A project which involved construction of a new lock on the Ohio River. During construction, the site was flooded by direction of owner with resulting increased costs and delay. The designs of reinforcing steel and concrete were defective and resulted in delays and claims for recovery of increased costs. Claims were resolved through negotiation.

(Owner: Corps of Engineers, Louisville District)

James R. Olin Flood Control Project, Buena Vista, Virginia

Excavation and placement of materials from a government-furnished borrow area to construct levels along the Maury River. There were differing site conditions with borrow areas, and varying quantities on stone protection of the levels. Claims were prepared and presented. The matter was litigated before the ENGBCA, and the issues were resolved through mediation.

(Owner: Corp of Engineers, Norfolk District)

Coolidge Dam, Arizona

This repair project was flooded during construction and issues arose regarding whether this was an Act of God or resulted from the owner's failure to manage the reservoir. In addition, there were labor productivity problems and differing site conditions. Claims were prepared and resolved through mediation.

(Owner: United States Department of the Interior, Bureau of Reclamation)

Gallipolis Lock Replacement, West Virginia

This project required construction on the Ohio River. The Project encountered differing site conditions in foundation and structural excavation (expansive clays), defective concrete specifications, defective gates, constructive changes, and schedule delays. Claims were prepared and resolved through mediation.

(Owner: Corps of Engineers, Huntington District)

McKinley Test Chamber, Eglin Air Force Base, Florida

A design (A?E) contract, suffered numerous changes throughout the design process. This sophisticated atmospheric chamber is used to subject weapons, aircraft and other military hardware to extreme climatic conditions. The evolving design parameters from the owner significantly increased the design effort from its fixed price origin. Claims were prepared and resolved through mediation.

(Owner: Corps of Engineers, Mobile District, for the United States Air Force)

Western Freeway, Portsmouth, Virginia

Bridge structure and fill constructed from owner provided borrow areas. The materials proved defective (expansive clays) and claims for differing site conditions were prepared, presented and resolved through negotiation.

(Owner: Virginia Department of Transportation)

The Washington Suburban Sanitary Commission (WSSC), Maryland

This project encountered numerous difficulties during construction. Changes in exterior granite, differing site conditions in the foundation (unsuitable materials), life safety systems issues, design problems with the curtainwall (wind loads), owner directed changes to interior finishes, and schedule delays were encountered. Claims were prepared and litigation commenced. All issues were resolved through mediation.

(Owner: Washington Suburban Sanitary Commission)

Richmond Flood Control, Virginia

This U.S. Army Corps of Engineers project involved construction of flood walls along the James River. In the course of construction, differing site conditions were encountered in the pile driving operation and slurry wall construction. Contaminated soils and design changes were also encountered, delaying the project and increasing costs. Issues regarding variations in quantity were addressed. Acceleration efforts, with attendant productivity issues, were undertaken. Claims were prepared and resolved through negotiation.

(Owner: Norfolk District, U.S. Army Corps of Engineers)

Little River Glen, Fairfax County, Virginia

A public elderly residence. During the course of construction, design errors became apparent and changes occurred, resulting in schedule delays. The issues were resolved through litigation in state court and negotiation.

(Owner: Fairfax County, Virginia)

Operations and Maintenance (O&M) Contract, at Fort Belvoir, Virginia

During performance, disputes arose as to the proper scope of work, differing site conditions and directed changes. Claims were prepared and resolved through negotiation.

(Owner: Corps of Engineers, Baltimore District)

Beaver Dam, Arkansas

A dam restoration project. During attempted excavation for bentonite slurry wall through the dam, the contractor encountered differing site conditions (rock stresses) and defective specifications (failure of specified excavation equipment), making progress commercially impossible. The contractor was terminated for default. An appeal was taken to the Corps of Engineers Board of Contract Appeals, where the Board found Type II differing site conditions existed. The Board converted the termination to one for the convenience of the Government.

(Owner: Corps of Engineers, Little Rock District)

Navajo Dam, New Mexico

Restoration involved mechanical rock excavation and slurry wall construction. In excavating, differing site conditions in the rock were encountered (excessively hard rock), greatly increasing the cost of and time for excavation. Claims were prepared and resolved through negotiation.

(Owner: Department of the Interior, Bureau of Reclamation)

Space Launch Complex (SLC3 East), Vandenberg Air Force Base, California

Completed under an Engineer/Procure/Construct (EPC) contract. During the design phase, changes occurred that caused inefficiencies and additional work and increased the cost of the design effort. Contractual analyses were performed and presented, with all matters being resolved.

(Owner: United States Air Force)

Launch Complex 40, Florida

Built under an Engineer/Procure/Construct (EPC) contract. Design evolution and changes by the owner caused the design effort to take far longer and affected productivity and the procurement process. This complex structure had an inflexible construction completion date, resulting in an accelerated effort in the face of continuing changes. Claims were prepared and resolved through negotiation.

(Owner: Private space contractor for the United States Air Force)

Jamestown-Verrazano Bridge, Rhode Island

Jamestown-Verrazano Bridge was constructed over Narragansett Bay in Rhode Island. It consisted of three main segments: a cast-in-place concrete trestle structure, heavy-lift precast approach spans, and a cast-in-place cantilever main span. The project encountered differing site conditions in pile placement, defective concrete specifications, and defective design issues resulting in schedule delays and cost overruns. Claims were prepared and resolved through mediation.

(Owner: Rhode Island Department of Transportation)

Brantley Dam, New Mexico

This project involved construction of an earthen dam that encountered unanticipated

difficulties in almost every phase: rapidly deteriorating foundation, excessive cleanup, faulty borrow areas, differing site conditions (underground caverns), and delays and associated labor productivity problems. Claims were prepared, and litigation commenced before the Interior Board of Contract Appeals. The parties agreed to mediation, and the matters were resolved. This settlement remains the largest mediated settlement of a federal contract construction claim.

(Owner: United States Department of the Interior, Bureau of Reclamation)

St. Stephen Power Plant, South Carolina

Part of the Cooper River Rediversion program and included canal excavation, earthen dam and hydroelectric power plant construction. The concrete specifications were defective resulting in owner-imposed changes. Disputes also arose as to the proper pay classification of excavated materials. Just prior to completion, leaks developed in the earthen dam and catastrophic failure was barely averted. Forensic work with geotechnical and engineering consultants was performed to help establish the cause of the leakage. Claims were prepared and tried successfully before the Corps of Engineer Board of Contract Appeals.

(Owner: Corps of Engineers, Charleston and Savannah Districts)

Lexington Park at Patuxent NAS, Maryland

This project involved the clearing of existing dilapidated Navy housing and construction of new site services and roads. Design changes and differing site conditions occurred which increased the cost and delayed construction. Claims were prepared and were resolved through the Navy Chief's Board procedure.

(Owner: United States Navy)

De Queen Dam, Arkansas

An earthen structure was constructed for flood control and recreation. During excavation of the reservoir, unanticipated rock was encountered, increasing costs and delaying the project. Claims were prepared and resolved through negotiation.

(Owner: Corps of Engineers, Tulsa District)

Lakeview Lake, Texas

A major excavation for what became the Joe Pool Reservoir. During the mass excavation, differing site conditions (soil characteristics) were encountered resulting in significant increased costs and delays. Claims were prepared and resolved through negotiation.

(Owner: United States Army, Corps of Engineers, Fort Worth District).

Pacheco Tunnel, Gilroy, California

Excavation of the 5.3 mile tunnel performed in rock by the drill and blast method. During the course of construction, extreme ground pressures resulted in deformation of the steel support system and, at various reaches, failures occurred. Contract claims were prepared alleging differing site conditions (squeezing rock) and defective design. The matter was litigated before the United States Court of Claims, and was resolved through settlement.

(Owner: United States Department of the Interior, Bureau of Reclamation)

Washington Metro, Station & Tunnels (Section B-10), Washington, D.C.

Constructed using the New Austrian Tunneling Method. In the course of construction, differing site conditions were encountered resulting in excessive rock overbreak increasing the quantity of concrete necessary for the tunnel lining. In addition, large

quantities of water entered the excavation through the ventilation shaft. The events led to delays and increased costs. Claims were prepared and litigated successfully before the Corps of Engineers Board of Contract Appeals.

(Owner: WMATA)

Washington Metro, Section B-GC (Red Line), Washington, D.C.

Involved a cut and cover tunnel operation and track installation delays on the Washington Metro (WMATA) system. The claim issues included site access and availability, as well as design issues and differing site conditions surrounding the tunnel construction. Claims were prepared and were resolved through negotiation. (Owner: WMATA)

Grand Coulee Third Power Plant, Coulee Dam, Washington

At its completion in 1976, the world's largest source of hydroelectric power. Involved from initial excavation for the forebay dam and power plant through dedication and included a myriad of issues: differing site conditions (rock overbreak), labor inefficiency, and defective concrete design and schedule delays. The dam and power plant prime contractor, the penstock supplier and the turbine manufacturer were separately represented. Claims were prepared and issues resolved through negotiations.

(Owner: U.S. Department of the Interior, Bureau of Reclamation)

Indian Island Wharf, Oregon

Part of the Navy's Trident program on the West Coast. Issues arose concerning differing site conditions encountered in driving concrete piles by jetting. Claims regarding these conditions and defective specifications were prepared and the matter was resolved through the Navy Chief's Board procedure.

(Owner: United States Navy)

George C. Wallace Tunnel, Mobile, Alabama

A sunken tube/concrete encased tunnel, through which I-10 passes under Mobile Bay. During construction, unanticipated lowering of the water table outside the cutoff pile approaches resulted in area settlement. In addition, the salinity of the water at the point of tube lowering was different than represented, causing the tubes to resist sinking. Differing site conditions causing pile diversion were encountered in construction of the sheet pile cofferdam. Claims were prepared on differing site conditions, and defective specification issues, and were resolved through negotiation with the FHWA and the Alabama Highway Department.

(Owner: State of Alabama Highway Department)