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Construction Law Advisory

The Newsletter of the Construction Practice

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Drones in the Field: Fairer Skies Ahead?

By Justine M. Kasznica

Editor's note: Given the emerging field of drone use and the expected issuance of new federal regulations, our newsletter will run a series of articles this year exploring drone use in the construction industry.

The use of drones on construction projects is increasing rapidly, as the construction industry realizes their many beneficial uses, including: collecting and analyzing aerial imagery; surveying; digitizing geographic terrain; inspecting or monitoring structures and project sites continuously and in real time; and assisting in the management of the project design, construction, and maintenance process.

Companies seeking to use drones for such purposes, however, must follow lengthy, costly and burdensome FAA regulations. But this may soon change.

On February 11, 2016, an amendment was proposed in the House of Representatives (and accepted at the committee level) that, if passed, will help facilitate widespread adoption of commercial drone use by the construction industry.

The amendment proposes to create a "micro" classification for drones weighing under 4.4 pounds (including payload). An operator of a micro drone would not be required to pass any aeronautical knowledge test or meet any age or experience requirement and would not need to obtain a Certificate of Waiver or Authorization, which currently is required for flights under 200 feet above ground level. In addition, the micro drone, and its components and equipment, would not need to meet any airworthiness certification standards.

The operator would have to register the micro drone through the FAA's online registration system and operate the drone in accordance with the following rules:

- Operation must be below 400 feet above ground level;
- Airspeed must not exceed 40 knots;
- Drone must be within the operator's vision line of sight;
- Operation must be during daylight; and
- Operation must be at least 5 miles away from the geographic center of a tower-controlled airport or an airport denoted on an FAA-published chart (unless the operator obtains prior approval).

If passed, this amendment will significantly alter the commercial drone regulatory landscape and encourage innovation within drone technologies. The construction industry in particular would benefit from the passage of this amendment, given the many purposes for drone use on construction projects.

If you have any questions about this article or the FAA's regulation of drones, please contact the author, Justine M. Kasznica, who is a member of the firm's Business and Finance Practice, at 412.209.2537 or jkasznica@saul.com.

Recent Case Challenges State's Ability to Enter into P3 Agreement

By Scott A. McQuilkin

Increasingly, public entities are looking to Public-Private Partnerships (or "P3s") as an efficient construction project delivery method, and many in the construction industry see P3s as an effective way to rebuild America's crumbling infrastructure. P3s provide a mechanism for public entities, which may lack sufficient funds, to partner with private contractors on public construction projects.

A December 2015 lawsuit in West Virginia, however, highlights the tension between a public entity's obligation to competitively bid "traditional" public projects and the need for public entities to find ways to lower costs or transfer risks on certain projects. In the lawsuit, *Accelerated Construction Services, LLC v. West Virginia University, et al.*, the plaintiff, a general contractor, alleges that West Virginia University violated West Virginia's public bidding statute by failing to competitively bid a project for the construction of dormitories called "University Place" and, instead, improperly entering into a P3 agreement. The plaintiff contends that West Virginia's public bidding statute required a competitive bid and a contract award to the lowest qualified responsible bidder.

The plaintiff argues that the university is attempting to take advantage of its status as a "public" entity by avoiding zoning requirements, property taxes, and permit and inspection requirements, and, at the same time, use the P3 process to avoid complying with the competitive bidding and prevailing wage statutes. The plaintiff seeks as damages the lost profits that it contends it would have earned as the low bidder, as well as an injunction prohibiting construction until the competitive bidding process is followed.

This case raises interesting issues concerning a public entity's ability to avoid the competitive bid process and enter into P3 agreements. Saul Ewing will keep an eye on the case and provide any relevant updates.

If you have any questions about legal issues involving P3s, please contact the author, Scott A. McQuilkin, who is a member of the firm's Construction Practice, at 617.912.0970 or smcquilkin@saul.com.

Carefully Draft Arbitration Provisions to Avoid Inconsistent Awards

By Alicia Shelton

The Second Circuit Court of Appeals, which covers appeals for all New York, Connecticut and Vermont federal courts, recently OK'd an arbitrator's decision that issued inconsistent awards. *See United Bhd. of Carpenters & Joiners of Am. v. Tappan Zee Constructors, LLC*, 804 F.3d 270 (2d Cir. 2015). This case serves as a warning for construction companies and owners to closely review and potentially revise their arbitration provisions in construction contracts.

How did we get here? The case arose out of a dispute between the general contractor and two trade union subcontractors concerning the scope of work to be performed by the respective trade unions on the Tappan Zee Bridge replacement project in New York. The arbitration provision required the arbitrator to issue a short-form decision within five days of the hearing, followed by a more thorough written decision within 30 days of the hearing. Although the arbitration clause set forth the criteria for the arbitrator's determination, it failed to define the short-form decision and the written decision, and it did not require the two decisions to be consistent.

Following a hearing, the arbitrator issued a short-form decision award, in favor of the trade unions, based on what the arbitrator determined to be industry practices. Nine days later, the arbitrator issued an opinion and award that reversed his earlier determination on the basis that no established industry practices governed and, therefore, cost efficiency favored resolving the dispute in favor of the contractor.

Both the U.S. District Court and the Second Circuit Court of Appeals declined to overturn the award. Concluding that the arbitrator acted within his authority under the arbitration provision, the Second Circuit warned, "[t]he remedy for unduly broad arbitral powers is not judicial intervention: it is for the parties to draft their agreement to reflect the scope of power they would like their arbitrator to exercise."

If you have questions about this article or arbitration provisions in construction contracts, please contact the author, Alicia Shelton, who is a member of the firm's Construction Practice, at 410.332.8783 or ashelton@saul.com.

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