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# Construction Law Advisory

The Newsletter of the Construction Practice

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## Doreen M. Zankowski moderates P3 panel at 2015 Construction SuperConference

Doreen M. Zankowski, a partner at Saul Ewing LLP and vice chair of the firm's Construction Practice, is moderating a panel about trends in P3 projects during the 2015 Construction SuperConference in San Diego, California. The 75-minute session – Lessons Learned and Takeaways From Real and Current P3 Projects. Is the P3 Market Here to Stay ... and Should it Flourish? – begins at 9:30 a.m. on Tuesday, December 8, 2015.

Using real-world "lessons learned" from P3 programs, such as the Pennsylvania Rapid Bridge Replacement Program, the Governor George Deukmejian Courthouse in Long Beach, California, and the Sandler Neurosciences Center at the University of California/San Francisco, the panel will overlay the latest project management techniques and the need to use project management and "partnering concept" from the point of identification of the P3 project, right through substantial completion and the implementation of the operating and maintenance phase.

Joining Doreen for the panel are: Frank J. Baltz, senior vice president & chief legal officer for Clark Construction Group, LLC; Peter W. Tunnicliffe, P.E., BCEE, DBIA, CIRM, executive vice president & president for CDM Smith; and Clifford W. Ham, principal architect, Judicial Council of California's Administrative Courts. Saul Ewing is also a proud Silver Sponsor of the Construction SuperConference and encourages industry professionals to visit our attorneys at booth #209 in the Knowledge Exchange exhibit.

## Use of Drones Increasing in Construction Industry

By Justine M. Kasznica

Affordable and easy-to-fly, small unmanned aircraft systems (sUAS), commonly referred to as "drones," now are widely available for consumer purchase and use. Companies and organizations around the globe and across a diverse array of industries are using drones, or seek to use drones, for commercial or humanitarian endeavors.

Within the construction industry, drones can improve performance on projects in a variety of ways, including by improving safety and helping ensure that projects come in on-time and within budget. For example, drones allow companies to obtain and analyze important real-time data relating to infrastructure and site inspections;

aerial surveying and mapping; 3D modeling; and identifying potential hazards, delays and progress issues.

Drone use in the construction industry is expected to grow in the years to come. The Association for Unmanned Vehicle Systems International (AUVSI) reported recently that the construction industry has been granted the fourth most exemptions for commercial drone use by the Federal Aviation Administration (FAA) behind only real estate, aerial surveying, and agriculture.

The current regulatory landscape, however, is ill-equipped to adequately address the increasing use of drones. FAA regulations make it very difficult for companies to use drones for legitimate commercial purposes. Under the current system, companies must petition the FAA for special exemptions from the many Federal Aviation Regulations applicable to manned aircraft operations by filing "Section 333 Petitions," a process that can be costly, time consuming and burdensome, potentially offsetting some of the cost-saving benefits of drone use.

The exemptions that the FAA has granted to date set forth particular conditions and limitations for commercial drone operations which may add to the cost and burden of obtaining proper approvals. The conditions and limitations include the following requirements:

- the drone operator possesses at minimum a recreational or sport pilot's license;
- the drone operates within the visual line of sight of the pilot and a second visual observer at all times;
- the drone flies in daytime at a speed of no more than 87 knots and at an altitude of no more than 400 feet above ground level; and
- the drone weighs no more than 55 pounds including payload.

The FAA has made an effort to streamline the process through interim rules and policies, and the FAA is expected to issue the much-anticipated final rules and regulations for operating commercial drones sometime in 2016. By establishing rules concerning commercial drone use, the regulations will likely provide contractors and owners with some much-needed cost certainty to determine whether drones would be beneficial on specific projects.

If you have any questions about this article or the FAA's regulation of unmanned aircraft systems, please contact the author, Justine M. Kasznica, at 412.209.2537 or [jkasznica@saul.com](mailto:jkasznica@saul.com).

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## Skilled Labor Shortage Presents Safety Concerns and Renewed OSHA Scrutiny

By Donald A. Rea

You cannot open a trade publication without reading about the shortage of skilled labor. Carpenters, welders, steel workers, electricians, project managers and estimators are in short supply. An Associated General Contractors of America survey found that 74 percent of the respondents believe there is a crunch in skilled trades and 53 percent report an inability to hire needed professionals; other surveys indicate the shortage is expected to worsen in coming years.

The tight labor market has left many contractors, engineering and architectural firms scrambling to recruit and retain personnel in an increasingly competitive labor market with rising pay rates. In fact, many contractors are forced to turn down work because of a lack of capacity. Others are taking on temporary workers from various sources including temp agencies. *Construction Business Owners* reports that "[s]taffing firms are

rapidly growing because many construction firms are averse to hiring new staff and consider staffing firms to be a safer, more cost-effective method."

Contractors should be mindful of the impacts of an increased use of temporary and/or less trained workers. For example, the recent rise in use of temporary workers has given rise to increased scrutiny, regulations and enforcement by OSHA. In addition, OSHA has put employers on notice that they must treat temporary workers like permanent employees with respect to training, safety and health protections. In order to avoid potential enforcement actions, contractors need to be proactive with temporary workers. This includes ensuring that they receive all safety procedures and policies and are thoroughly drug tested before commencing on-site work and provided with all available safety training.

The use of temporary and less trained workers also has led to an increase in workers' compensation claims. The Hartford recently reported in an article by its vice president of construction insurance, Tom Boudreau, that "workers' compensation claims for construction workers with less than one year of experience on a job were nearly 3.5 times more frequent than those involving workers with at least one year of experience." Now is a good time for contractors to review

their workers' compensation coverage to ensure it is not only compliant but sufficient in light of the changing marketplace for skilled help.

If you have any questions about this article or OSHA regulations and enforcement, please contact the author, Donald A. Rea, at 410.332.8680 or drea@saul.com.

## New ANSI/ASHRAE Standard Issued to Guard Against Outbreaks of Legionnaires' Disease

By Garry R. Boehlert

Consistent with statistics issued by the Centers for Disease Control and Prevention ("CDC"), outbreaks of Legionnaires' disease continued to sweep the nation in 2015. During the summer, 12 people died and more than 100 became ill during an outbreak traced to a cooling tower on a recently renovated hotel in New York City. This fall, another dozen died at a Quincy, Illinois veterans' home. The CDC estimates that the disease annually causes between 18,000 and 30,000 illnesses – approximately 10 percent of which are fatal.

Because Legionnaires' disease is contracted from bacteria commonly present in man-made water systems and is transmitted by inhalation or aspiration of contaminated water droplets, when outbreaks occur, building owners and those in the construction and design industry frequently find themselves defending costly litigation claims.

On June 26, 2015, the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) issued ANSI/ASHRAE Standard 188-2015 "Legionellosis: Risk Management for Building Water Systems." This standard sets out a risk management approach for preventing Legionellosis in building water systems and is intended for use by building owners and managers, as well as those involved in the design, construction and maintenance of such systems.

Under the standard, owners must conduct an annual survey to assess the building's water features and systems and determine if the building possesses one or more of the following risk characteristics associated with Legionnaires' disease:

- Multiple housing units with one or more centralized potable water systems

- Over 10 stories high (including below grade)
- Health care facility where stays exceed 24 hours
- Occupants are at-risk (elderly and smokers)

If the building indicates at least one risk factor, the owner must develop a water management program, which includes assembling a program team, analyzing the water systems to determine where hazardous conditions may occur, and determining locations where control measures can be applied. Corrective actions, if bacteria are encountered, also must be included in the program, along with other measures.

The standard is being embraced by the industry. New York City and New York state have used the standard's risk management approach and have imposed additional requirements, such as the registration and treatment of all cooling towers and mandatory testing for bacteria in certain facilities.

Where, as in New York, Standard 188 is adopted into laws and building codes it has the force of law. However, even if not formally made part of a code, when outbreaks occur, plaintiffs will likely argue that the standard sets best practices for their industry. As a result, knowledge of and adherence to the risk management precepts in ASHRAE Standard 188 are the best tactics to prevent Legionnaires' disease claims.

If you have any questions about defense of Legionellosis claims and lawsuits, please contact the author, Garry R. Boehlert, at 202.295.6617 or gboehlert@saul.com.

## General Contractors Cannot Shift Sub-Bid Costs to General Bid

By Scott A. McQuilkin

The Massachusetts Attorney General's Office ("AGO") has upheld a bid protest of a contract awarded by the Massachusetts Water Resources Authority ("MWRA"). The AGO determined, in a November 17, 2015 decision, that the low bidder violated Massachusetts public bidding laws by failing to include all of its filed sub-bid costs in its filed sub-bids. By shifting the filed sub-bid costs to its general contract price, the low bidder, which planned on self-performing the sub-bid work, secured an unfair advantage over the other bidders.

The decision, *In re: Massachusetts Water Resources Authority; Alewife Brook Pump Station*, serves as a warning to general contractors who self-perform filed sub-bid work that they cannot avoid the requirements of the sub-bid law by shifting sub-bid costs to the general bid.

The Massachusetts sub-bid law requires sub-bidders to certify in their bids that they will furnish "all labor and materials" required for completing their scope of work. Similarly, the statutory general bid form requires general bidders to segregate the costs of the general contractor's work and the costs of filed sub-bidders.

A general bidder may self-restrict a sub-bid, meaning that the general bidder will self-perform the sub-bid work. A self-restricted sub-bid, however, must be on a par with the other sub-bidders.

The low-bidder submitted self-restricted filed sub-bids for five sub-trades, but did not include all of the costs associated with the sub-trades or any overhead and profit for the sub-trades. Instead, it carried these costs and profit in its general bid.

By excluding certain costs and profit from the sub-bids, the low bidder guaranteed that it would be the lowest filed sub-bidder for the sub-trades. In fact, the low bidder's sub-bids were \$1 million lower than the lowest unrestricted sub-bids.

The AGO found that by shifting costs and profit from the sub-bids to the general bid, the low bidder failed to include all "labor" for the sub-trades in the sub-bids, and failed to segregate accurately the general bid costs and the sub-bid costs. The low-bid also violated the equal footing principle, as filed sub-bidders could not bid "in the same way" if one of them shifted costs and profit to the general bid.

While Massachusetts' sub-bid law gives general contractors leeway to self-restrict sub-bids, general contractors must make sure to include all sub-bid costs within the respective sub-bids.

If you have any questions about legal issues involving bidding for construction projects, please contact the author, Scott A. McQuilkin, at 617.912.0970 or [smcquilkin@saul.com](mailto:smcquilkin@saul.com).

This publication has been prepared by the Construction Practice for information purposes only.

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