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Construction Law Advisory

The Newsletter of the Construction Practice

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Saul Ewing LLP is sponsoring AGC Build New England Awards Gala

Saul Ewing LLP is a proud sponsor and corporate partner of the 2015 Build New England Awards Gala on October 8, 2015 in Boston, Massachusetts. Firm attorneys who support the construction industry will join with members of the Associated General Contractors of Massachusetts and other professionals in the industry to celebrate teamwork in building.

Winning teams are recognized for their collaborative approach to planning, designing and building facilities that meet the vision and goals of owners and enhance the community where projects are built.

The gala is from 6:00 p.m. to 9:30 p.m. at the Intercontinental Hotel, located at 510 Atlantic Avenue. Please visit http://tinyurl.com/ACG-NEA for more information.

Pennsylvania's Contractor and Subcontractor Payment Act Does Not Apply to Public Projects

By George E. Rahn, Jr. and Gregory J. Wartman

Pennsylvania's Contractor and Subcontractor Payment Act ("CASPA") is a powerful tool for contractors and subcontractors to ensure that they receive prompt payment for their work and may entitle them to expansive remedies, such as attorneys' fees and penalties. The Pennsylvania Supreme Court recently ruled that this Act does not apply to construction projects where the owner is a governmental entity.

In *Clipper Pipe & Service, Inc. v. Ohio Casualty Insurance Co.*, the U.S. Department of Navy commissioned the construction of an addition and renovations to the Navy/Marine Corps Reserve Training Center in the Lehigh Valley. The Navy entered into a contract with Contracting Systems, Inc. II ("CSI") to serve as general contractor. CSI entered into a subcontract with Clipper Pipe & Service to perform the mechanical and HVAC work.

When CSI failed to pay monies under the subcontract, Clipper sued CSI and its surety, asserting claims for breach of contract and violation of CASPA – likely because the CASPA claim would allow it to recover its attorneys' fees and possibly a statutory penalty. The defendants moved for summary judgment on the grounds that CASPA does not apply because the Navy, a governmental entity, does not come within the Act's definition

of an owner. CASPA only allows a subcontractor to pursue a claim against a contractor that has entered into a contract with an owner as defined by the Act. If the Navy was not an "owner" under the Act, CSI could not be a contractor subject to liability.

The Pennsylvania Supreme Court agreed with CSI. CASPA defines an "owner" as "[a] person who has an interest in the real property that is improved and who ordered the improvement to be made." The Act defines "person" as "[a] corporation, partnership, business trust, other association, estate, trust foundation or a natural individual." The Court found that none of these terms encompass governments or governmental entities. The Court ruled that because the Navy was not a person as defined under CASPA, it could not be an owner. As a result, Clipper could not be liable for violating the Act. The Court noted that "although we do not discount that the policy of CASPA would seem to be served by applying it to the present circumstances, such application is too disharmonious with the statutory mechanics to support the extension."

On public projects, instead of relying on CASPA, contractors and subcontractors working in Pennsylvania must rely on the Prompt Pay Act ("PPA"), which governs the payment obligations and rights of contractors and subcontractors on public projects. That statute, however, differs from CASPA in several ways. It contains different timing provisions for payment, a different rate of interest, and a different burden of proof associated with penalty and attorneys' fees provisions. Most notably, it is more difficult for a party to recover attorneys' fees and penalties under the PPA than it is under CASPA. For example:

- Under CASPA, a "substantially prevailing" party is entitled to recover attorneys' fees and expenses. The PPA, on the other hand, gives courts the discretion to award attorneys' fees only where a party has withheld payments in bad faith.
- Under CASPA, courts must impose a 1 percent monthly penalty against an owner (or contractor) that has wrongfully withheld payments from a contractor (or subcontractor). While the PPA also contains a penalty provision, that statute gives courts discretion to impose a 1 percent penalty if a nonpaying owner or contractor acted arbitrarily or vexatiously.

Public Bid Rejected Based on Access to Inside Information

By Doreen Zankowski

The Massachusetts Office of the Attorney General ("AGO") this month denied a bid protest by a low bidder because it had access to "insider knowledge" about the University of Massachusetts building project through its subsidiary, which performed pre-bid services and developed the project estimate, which was not made available to the bidders.

Even though there was no suggestion that the low bidder took advantage of its access to the inside information, the very fact that the low bidder had access to the information, as well as the low bidder's failure to disclose its relationship to its subsidiary, unleveled the playing field among the bidders. The AGO's August 3, 2015 bid protest decision, titled *In Re: University of Massachusetts Building Authority*, underscores the strength and reach of the equal footing principle on public projects in Massachusetts.

The awarding authority rejected the low bid on the grounds that the appearance of a conflict of interest due to the relationship between the low bidder and its subsidiary violated the state conflict of interest laws and that the access to the project estimate (and other information) violated the "equal footing" principle. The second low bidder argued that Massachusetts law imputed the knowledge of the subsidiary to the low bidder – destroying equal footing.

The low bidder asserted that there was no basis to pierce the corporate veil, that the conflict of interest statute was inapplicable, and that the low bidder did not have any access to materials not available to the other bidders.

While the AGO did not believe it had jurisdiction to decide the conflict issue, it found sufficient grounds under the equal

footing principle to deny the protest. First, while noting the purpose of the competitive bidding statutes to ensure "an open and honest procedure for public contracts," the AGO held that the low bidder should have disclosed the relationship with its subsidiary pre-bid. Next, the AGO agreed that under Massachusetts law the subsidiary's knowledge of the project estimate was imputed to the low bidder. Equal footing required all bidders to have the opportunity to bid in the same way, on the same information, and with the same risk of rejection. It was unfair for one bidder to have access to superior information – even though there was no suggestion that the low bidder took advantage of its relationship with the subsidiary.

The AGO also noted that the low bidder's subsidiary would play an ongoing role in the project. This only added to the potential conflict of interest, as, if the low bidder was awarded the contract, the subsidiary would be questioning its parent's estimates, giving the low bidder an inherent unfair advantage throughout the project.

While *In re: University of Massachusetts Building Authority* presents unique facts, it also is a useful reminder of the importance and reach of the equal footing principle in public bidding. Simply having superior access to information is enough to disrupt equal footing.

Pennsylvania and Maryland Active with P3 Transportation Projects

By Nicholas V. Fox

The Pennsylvania Department of Transportation ("PennDOT") expects to award bids to develop compressed natural gas ("CNG") refueling stations throughout the state by the end of 2015 as the agency and its counterpart in Maryland increasingly employ Public-Private Partnership ("P3") laws to align with private partners to facilitate new transportation projects.

On September 29, 2014, Pennsylvania's P3 Board authorized PennDOT to seek a private partner to design, build, finance, operate and maintain up to 37 CNG filling stations. On January 16, 2015, PennDOT named four teams to its shortlist of candidate partners. The following teams are vying for selection:

- *Clean Energy* - Newport Beach, CA
- *GP Strategies* - Escondido, CA[1]
- *Spire* - St. Louis, MO[2]
- *Trillium CNG* - Salt Lake City, UT[3]

1. Team additionally comprised of L.R. Kimball (Ebensburg, PA), McCrossin (Bellefonte, PA), and Gladstein Neandross & Assoc. (Santa Monica, CA).
2. Team additionally comprised of Institute of Gas & Technology (Des Plaines, IL), Raymundo Engineering Co. (Walnut Creek, CA), Parsons Brinckerhoff (Pittsburgh, Lancaster, Camp Hill, Philadelphia), and Dual Fuel Services, Inc. (Batavia, IL).
3. Teamed with Larson Design Group (Williamsport, PA).

The CNG project is just the latest of a number of P3 projects approved by the Board since Pennsylvania's P3 law – The Public and Private Partnerships for Transportation Act – came into effect in 2012. The seven-member Board examines and approves new P3 projects.

Other recent notable P3 initiatives in Pennsylvania include the Wireless Telecommunications Partnership Program and the Rapid Bridge Replacement Project. The Rapid Bridge Replacement Project calls for the replacement of 558 bridges, making it among the nation's largest P3 projects. More information on this project and other Pennsylvania P3s can be found at http://www.p3forpa.pa.gov/.

Not to be outdone by its northern neighbor, Maryland is in the final stages of green-lighting a new P3 project that is expected to exceed $2 billion in costs. The P3 project is a new 16-mile light rail to be called the "Purple Line." Maryland is down to four final private bidders, with selection expected later this year.

Saul Ewing is counsel to one of the final four bidders for the Purple Line and has vast experience working on P3 projects. Saul Ewing's P3 work is led by Doreen Zankowski, who formerly worked in-house for a large international engineering firm on several P3 projects.

AAA Issues Revised Rules for Arbitration in Construction Industry Disputes

By Nicholas V. Fox

The American Arbitration Association recently updated its Construction Industry Arbitration Rules and Mediation Procedures, effective July 1, 2015. There are six new rules, some of which are borrowed from litigation procedures. Highlights of the revisions include:

- **Mandatory mediation.** Under revised Rule R-10, mediation is now mandatory for claims exceeding $100,000 if the underlying contract requires mediation. Where the underlying contract does not include mandatory mediation, a party may unilaterally opt out. Mediation will occur concurrent with the arbitration.

- **Dispositive motions.** New Rule R-34, titled *Dispositive Motions*, permits the arbitrator to dispose of all or part of a claim upon motion of a party. A party must seek the arbitrator's consent before submitting a dispositive motion.

- **Emergency relief**. New Rule R-39, titled *Emergency Measure of Protection*, introduces the concept of preliminary injunctive relief to the arbitration process. Rule R-39 works as follows: a party seeking emergency relief submits a written request via email or facsimile to the AAA. Within one (1) business day, the AAA appoints an "emergency arbitrator." Within two (2) business days of the appointment, the emergency arbitrator establishes a schedule for the emergency application for relief. The parties' positions are thereafter heard via telephone or videoconference, or upon written submissions. An interim award granting the requested relief may subsequently be entered, with or without tender of security, and the emergency arbitrator's authority expires upon appointment of the permanent arbitral panel.

- **New consolidation and joinder procedures.** Revised Rule R-7 establishes deadlines for when requests to consolidate arbitrations must be submitted and establishes a framework for handling party joinder. All requests for consolidation or party joinder must be submitted before the appointment of an arbitrator or within 90 days of when the AAA determined that all administrative filing requirements were satisfied, whichever is later. For parties contesting consolidation or joinder, oppositions must be submitted to the AAA within 10 days (consolidation) or 14 days (joinder) after the AAA issues notice of such request.

- **Enforcement and sanction power of the arbitrator.** New Rule R-25, titled *Enforcement Powers of the Arbitrator*, defines the authority of the arbitrator in handling pre-hearing activities. Under the new Rule, the arbitrator may allocate the costs of document production among the parties. The arbitrator is now also expressly authorized to draw an adverse inference, exclude a party's submissions or evidence, or make an interim award of costs when that party does not comply with an arbitrator's pre-hearing directive.

  New Rule R-60, titled *Sanctions*, grants arbitrators broad powers to sanction any party that fails to comply with its obligations under the Rules or with an arbitrator's order. The arbitrator may not issue sanctions *sua sponte*, and must provide the party against whom sanctions are requested with the opportunity to respond.

- **Information exchange measures.** Rule R-24, formerly titled *Exchange of Information*, has been renamed, *Pre-Hearing Exchange and Production of Information*. Under the revised Rule, a framework is set forth to handle electronically stored data. The new rule authorizes the arbitrator to establish the search parameters for e-discovery "to balance the need for production of electronically stored documents . . . against the cost of locating and producing them." The AAA has characterized the intent of the new language as an effort "to give arbitrators a greater degree of control to limit the exchange of information, including electronic documents."

- **New preliminary hearing rules.** A checklist of topics to be addressed at the preliminary hearing is a key feature of these new rules.

The AAA has been active in revising its Construction Industry Arbitration Rules and Mediation Procedures in recent years. This latest step in AAA's course of adapting its rules in response to industry feedback contains several significant

changes that are sure to alter how construction arbitrations are conducted. Whether implementation of these new arbitration functionalities results in further realization of the AAA's stated purpose of facilitating efficient and economical resolution of disputes will be determined by how participants conduct themselves in this newly expanded arbitration forum.

Zankowski to moderate P3 panel at Construction SuperConference in December

Doreen M. Zankowski, a partner at Saul Ewing LLP and vice chair of the firm's Construction Practice, will moderate a panel called **"Lessons Learned and Takeaways From Real and Current P3 Projects. Is the P3 Market Here to Stay ... and Should it Flourish?",** at the Construction SuperConference in San Diego on December 8, 2015. During the session, 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. For more information about the Construction SuperConference, http://www.constructionsuperconference.com/home.

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