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Aviation and Construction

The Use of Drones in the Construction Industry: Are You Prepared?

Action Item: Anyone in the construction industry who is using drones in their business (or allowing contractors to use drones on their property) must be aware of the applicable laws and regulations, and should also check on insurance coverage for such operations and implement risk management “best practices.”

Introduction

The use of unmanned aerial systems (“UAS”), more commonly known as drones, in the construction industry is becoming more and more prevalent. Construction companies are using drones to monitor work progress; to measure stockpiles; to perform jobsite and work safety inspections; for environmental air and ground sampling; and to provide real-time aerial surveying, mapping, or 3D modeling of construction that cannot be seen from the ground or are in spaces where humans could be at risk, with resulting cost savings for a construction project. This is a topic that warrants attention—whether you are in construction and are using drones to conduct your business operations, or are allowing contractors to use drones on your property. You need to have “best practices” in place and know the law.

Laws/Regulations—Who Has Authority?

The use of drones in our national airspace is largely primarily regulated by the federal government, through the Federal Aviation Administration (“FAA”). However, the FAA has been slow to issue regulations for drones. Because of that, state and local authorities have also passed a myriad of regulations that you must be aware of (and comply with) for your geographic location. States’ individual attempts to regulate UAS are setting the stage for a major clash between state and federal lawmakers. As laws and regulations develop at the federal level, there will inevitably be conflicts with state laws that will have to be sorted out in the courts, where there will be a strong argument in favor of federal preemption of state and local efforts to regulate UAS.

At the federal level, the FAA has stated its position that drones are “aircraft,” and as such, within the FAA’s jurisdiction to regulate. If you are using a drone in your construction operations (or even allowing a third party to use a drone on your property for construction work)—whether or not you charge for that use—then you are not using that drone for “recreational” or hobby purposes. Rather, if a drone is

being used for a business, it is considered commercial usage, which requires FAA approval. The current method to obtain FAA approval is through a Section 333 exemption process. Companies wishing to obtain the necessary FAA approval must submit a so-called Section 333 application and, if approved, a civil Certificate of Authorization (“COA”) will also be issued. Section 333 exemptions may be granted if there is a determination that the UAS can operate safely within the national airspace, within certain operational conditions and limitations associated with the exemption. The commercial entity seeking such an exemption must demonstrate that the UAS will not adversely affect safety, or that it will prove at least an equal level of safety to that of current rules. The Section 333 exemption process can take four months or more. A pilot/operator must be properly licensed and also meet certain qualifications to operate the drone, and the drone owner must be registered with the FAA.

The regulatory scheme for small (weighing less than 55 pounds) drones will change over the next few months, because the FAA is expected to finalize regulations that will hopefully “streamline” the approval process for commercial drone usage, if the drone obeys certain restrictions—including being operated at an altitude of less than 500 feet, flying only in daylight, being within the operator’s visual line of sight at all times, traveling at a speed not to exceed 100 mph, and not being operated within five miles of an airport.

Risk Management

Use of drones can expose your company and employees to a variety of risk and liability issues. Liability issues should be addressed, whether you are using drones in your construction operations or contractors are using drones on your property. There is the potential for personal injury or property damage. Use of drones could result in claims for trespass, invasion of privacy, or other torts. The use of high-resolution cameras or video, as well as data-gathering capabilities, may give rise to privacy concerns and “hacking” of data. Insurance coverage for drone usage should be evaluated. A standard commercial general liability (“CGL”) policy may have an exclusion for bodily injury or property damage caused by an insured’s use of an

“aircraft”—but is a drone defined as an “aircraft” under your policy, versus the FAA’s definition of a drone as an “aircraft”? Insurance for invasion of privacy-type torts, or data breaches, may also be prudent. Several insurers are specifically writing insurance policies for commercial drones, or issuing specific drone exclusions. Another consideration is to put policies and procedures in place to govern drone usage, or even ban the use of drones in general, or absent specific permission or other restrictions

Another topic that should be considered is contractual indemnification clauses. Contractors should clarify who is indemnifying whom for any drone “mishaps”. Third parties may wish to protect themselves by having contractors certify that their drone operations are lawful, insured, and that they will indemnify the property owner for any mishaps.

Conclusion

The use of drones in the construction industry can have huge benefits. Because this is a complex and rapidly-changing area of the law, you should consult with your insurance professional and legal advisors to ensure you are properly addressing this topic. Blank Rome LLP has extensive experience in several relevant industry sectors, including Construction, Aviation, Insurance Coverage, Litigation, Government Contracts, and Cybersecurity, and can work with clients to evaluate regulatory, technical, legal, and business considerations to mitigate risk while assisting with business solutions. — © 2016, BLANK ROME LLP

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