Getting Served: Legalities and Risks of Airport Contractual Agreements

Tuesday, March 12, 2019
2:00-3:30 PM ET
Purpose

Discuss research from the Airport Cooperative Research Program (ACRP) Legal Research Digest 30: Contract Risk Management for Airport Agreements and Legal Research Digest 31: Preemption of Worker Retention and Labor Peace Agreements at Airports.

Learning Objectives

At the end of this webinar, you will be able to:

• Identify primary risks associated with common contracts used by airports of all sizes
• Identify key issues to consider when drafting or reviewing contractual provisions related to such risks
• Discuss the issues related to labor-harmony or labor-peace agreements
• Describe labor laws and preemption relevant to airports and how to identify and minimize risks
Elizabeth Smithers  
City of Charlotte/Charlotte Douglas International Airport

- Assistant City Attorney, Aviation Department
- 8 years of practice at CLT including 2 years as a legal intern
- Serves as a member of ACRP’s legal panel
- Oversees various contract agreements including goods and services, technology, concession agreements and leases.
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2. Volunteer for a project panel
3. Prepare a research proposal
4. Answer an ACRP survey
5. Apply the research results

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Deadline!

To be considered for 2020 research funding, submit your problem statement to ACRP IdeaHub no later than March 20, 2019

Register at https://ideahub.trb.org/

You can also vote and comment on your favorite ideas!
Today’s Speakers

Lacey D. Corona, Nelson Mullins Broad and Cassel
Presenting
ACRP Legal Research Digest 30
Contract Risk Management for Airport Agreements

and

Eric T. Smith, Kaplan Kirsch Rockwell
Presenting
ACRP Legal Research Digest 31
Preemption of Worker Retention and Labor Peace Agreements at Airports
CONTRACT RISK MANAGEMENT FOR AIRPORT AGREEMENTS

Lacey D. Corona, Esq.
Nelson Mullins Broad and Cassel
Lacey D. Corona

Transportation & Infrastructure Specialist

✈ Special Counsel to Orlando International Airport’s (OIA) on its $3.6 billion Capital Improvement Project (including new South Terminal)

✈ General Construction Counsel to OIA, including day-to-day handling of construction, professional service, and maintenance and operational contracts

✈ Peer Review Consultant for major U.S. airport related to $5 billion public-private partnership project

✈ Airport Procurement Disputes and Litigation
8 TYPES OF CONTRACTS USED BY AIRPORTS OF ALL SIZES

- Professional Services
- Construction
- Repair/Maintenance
- Tenant and User
- Software/Information Technology
- Airline Signatory
- Ground Transportation
- Vendor/Purchasing

RISKY BUSINESS
PROFESSIONAL SERVICE AGREEMENTS
Risk: Indemnity

Methods to Mitigate Risk:

- Broad indemnity and duty-to-defend language
- Avoid mutual indemnity
Sample Provision:

A. Consultant hereby agrees to defend, indemnify, and hold harmless City . . . **against all liabilities, claims, judgments, suits, or demands for damages to persons or property arising out of, resulting from, or relating to the work performed under this Agreement (“Claims”) . . . This indemnity shall be interpreted in the broadest possible manner to indemnify the City for any acts or omissions of Consultant or its subcontractors.**

D. **Insurance coverage** requirements specified in this Agreement **shall in no way lessen or limit the liability of the Consultant** under the terms of this **indemnification obligation.**
Risk: Termination

Methods to Mitigate Risk:

- Owner right to terminate for cause and for convenience
- Distinguish between all or part of the project

X Do not allow lost or anticipated profits on terminated work
Sample Provision:

The Owner may terminate this Contract in whole or in part at any time for its convenience.

... [T]he Contractor shall be compensated by the Owner for the Contractor's reasonable costs actually expended and profit earned on Work that has been fully completed and accepted by the Owner. There is no entitlement to anticipatory profits.
CONSTRUCTION AGREEMENTS
Risk: Schedule Impacts

Methods to Mitigate Risk:

- Liquidated damages for each day of delay
- Limit contractor’s remedies

Allow Relief from Schedule Impacts

But Limit Indirect Impacts
Sample Provision:

An extension of the Contract Time shall be the Contractor’s sole and exclusive remedy for any delay of any kind or nature, except to the extent the delays were solely caused by (1) material acts or material omissions by the Owner . . . constituting active interference or (2) concealed or unknown conditions . . . For these delays, the Contractor is only entitled to the reasonable actual costs that are caused directly and solely by the delay . . .
REPAIR / MAINTENANCE AGREEMENTS
Risk: Dispute Resolution

Methods to Mitigate Risk:

- Consider mandatory arbitration with expert for highly technical services
- Require ongoing performance while dispute is pending
Sample Provision:

Unless otherwise agreed in writing, the Contractor shall carry on the Work and maintain its progress during any court proceedings or arbitration, and the Authority shall continue to make undisputed payments to the Contractor in accordance with the Contract Documents.
Risk: Remedies for Default

Methods to Mitigate Risk:

- Include clear “non-wavier” language
- Airport’s exercise of remedy should not be exclusive of other remedies
Sample Provision:

Any efforts by City to mitigate damages caused by Tenant’s breach of this Lease shall not constitute a waiver of City’s right to recover damages hereunder and shall not affect the right of City to indemnification . . .
SOFTWARE / INFORMATION TECHNOLOGY AGREEMENTS
Risk: System Downtime

Methods to Mitigate Risk:

- Include up-time guarantees and downtime penalties
- Negotiate source code escrows
Sample Provision:

Consultant hereby grants to City a license to use all source code for the entire Software Program ("Source Code") for the purposes described in this Agreement. This Source Code will be placed in an agreed to escrow account with the City identified as beneficiary and be accessible to the City on the terms and conditions set forth in the Escrow Agreement. . . . The Source Code shall be kept current with the latest release of the Software Program in use by the City . . .
AIRLINE SIGNATORY AGREEMENTS
Risk: Airline Bankruptcy

Methods to Mitigate Risk:

- Ensure any benefits to airline do not apply while in default
- Require deposit of at least 3 months rent
Sample Provision:

AIRLINE shall provide Authority on the Effective Date of this Agreement with a contract bond, irrevocable letter of credit or other similar security acceptable to Authority ("Performance Security") in an amount equal to the estimate of three (3) months’ rentals, fees and charges payable by AIRLINE . . . to guarantee the faithful performance by AIRLINE of its obligations under this Agreement and the payment of all rentals, fees and charges due hereunder.
GROUND TRANSPORTATION AGREEMENTS
Risks: Property Damage and Personal Injury

Methods to Mitigate Risks:

- Require appropriate insurance coverage
- Name the airport as an additional insured
Sample Provision:

Company, **at its own cost and expense**, shall obtain and maintain . . . the following types of insurance **naming the Authority, the City and the members** (including, but without limitation, all members of the governing board of the Authority, the Orlando City Council and the advisory committees of each), officers, agents and employees of each as additional insured's.
VENDOR / PURCHASING AGREEMENTS
Risk: Performance

Methods to Mitigate Risk:

- Require performance bond or letter of credit
- Consider requiring a bid bond
Sample Provision:

Contractor shall furnish to Authority a **Performance Bond** . . . **completed on the Authority’s forms** . . . in a penal sum equal to Seven Hundred Fifty Thousand Dollars ($750,000.00).
QUESTIONS?
Preemption of Worker-Retention and Labor Peace Agreements At Airports

A Brief Summary Of Select Issues and Practical Approaches

Eric T. Smith, Esq.
Partner, Kaplan Kirsch & Rockwell, LLP
Washington, D.C.
Eric T. Smith, Esq.
Principal Investigator

- Partner, Kaplan Kirsch & Rockwell, LLP
- Practice 100% focused on airport law – narrow but very broad
- 30+ Years in aviation
- 14 years labor attorney
- Advises airports on contracts ranging from concessions to airline use & lease agreements
THOMAS W. ANDERSON, Metropolitan Airports Commission, Minneapolis, Minnesota;

DAVID BANNARD, Foley & Lardner LLP, Boston, Massachusetts;

JAY HINKEL, City of Wichita, Kansas;

MARCO B. KUNZ, Salt Lake City Department of Airports, Salt Lake City, Utah

ELAINE ROBERTS, Columbus Regional Airport Authority, Columbus, Ohio; and

E. LEE THOMSON, Clark County, Las Vegas, Nevada.
11-01 Coverage

- Introduction/Overview
- Federal Labor Protection Laws, Preemption and Proprietary Rights Exception
- Labor Harmony Agreements and Worker Retention Programs
- Applicability to Airports.
- The Airport Sponsor – Sources of Risk and Potential Claims
- Appendix A, B and C

Cover all today??
Increase in initiatives to have airports require “labor peace” or “labor harmony” as part of contracts with on-airport businesses

Concessions operations largest focus

National initiatives by SEIU and UNITE Here

Things may not always be what they appear.

The need for a well-informed senior staff, board, council, etc.

Legal foundation

Real-world examples

Practical implications

Understanding The Context Is The Key

Going to move quickly
Why This Topic Is Relevant &
To Whom This May Be Of Importance

**Why Is This An Issue?**

- Push by multiple labor organizations to penetrate airports
- Certain tools used to expedite organization efforts
- Tools implemented *via contractual provisions* in agreements between businesses and airport
- Advocacy/Pressure applied to elected officials and/or senior airport personnel
- Fraught with legal and business risk

**Who Should Be Concerned?**

- Elected officials often do not fully appreciate legal and practical risks
- Airport executives face similar challenges but are also tasked with running airport, maintaining business relationships with on-airport businesses and airlines.
Obligatory Legal Baseline Coverage

- Railway Labor Act (RLA)
- National Labor Relations Act (NLRA)
Union Organizing – The (Very) Basics

- Focus upon NLRA
- Appropriate Unit
- Showing of Interest
- Petition for Election
- Elections
- Individual Employee Rights
Union Organizing – The (Very) Basics (continued)

- Card Check
- Neutrality
- Relationship to Labor Harmony
- Showing of Interest
- Petition for Election
- Elections
How Airports Become A Focal Point

- Concessions Models
- Challenges Faced
- Airport ownership/operation
- Use of Contractual Provisions
The Core Legal Issue – Preemption

- Labor Harmony
- Implementation – Practical Reality
- Employee Rights
  - Conflict?
- Does requirement have adverse impact upon federally-protected rights?
- Proprietor Rights & Its Limits

This “reading between the lines” is often a source of confusion between elected officials and airport management personnel. The fact that in most, if not all, cases where labor-harmony agreements are implemented, several common items are included in the final agreements between the private employers and the unions demonstrates how the requirements work and, ultimately, come under fire from both employers and employees.

Two of the most important terms that unions seek in order to establish conditions advantageous to unionization are known as “neutrality” and “card-check” provisions.
Handling Issues

- Proactive Education
- Responding to Inquiries
- Contractor Concerns
- Negotiating Parameters
- Implementation
  - Tricky, complex and an art
Legal Research Digest 31

PREVENTION OF WORKER RETENTION AND LABOUR PEACE

This Digest was prepared under ACRP Project 3-G-1, 'Legal Aspects of Airport Operations', by
Knappen, E. C. O. Co., the digest was prepared by J. D. Clark. Empire Building, 1010
1201 Washington Ave. N.W., Washington, D.C.,

Background

There are many factors that affect the retention of workers in the aviation sector. These factors include the working conditions, compensation, and benefits offered by employers. Workers in the aviation sector, especially in the airport environment, often work long hours and under stressful conditions. This can lead to high turnover rates, which can be costly for employers and disruptive for operations.

In recent years, there has been a growing concern about the retention of workers in the aviation sector. This concern has led to a number of initiatives aimed at improving working conditions and increasing compensation for workers. These initiatives have included the introduction of new regulations and the implementation of new policies by employers.

Forward

Airports in many countries are now subject to new regulations that aim to improve the working conditions of workers. These regulations include provisions for paid leave, sick leave, and holidays. In addition, there are provisions for the provision of social benefits, such as pension schemes and health care.

While these regulations may be intended to improve the working conditions of workers, they may also have the unintended effect of increasing the cost of operations for airports. This is because the cost of providing these benefits can be substantial, and may require airports to increase their prices in order to cover the costs.

However, it is important to note that the introduction of new regulations may also have positive effects. For example, they may help to reduce turnover rates and increase the productivity of workers. This is because workers may be more likely to remain with an employer if they feel that they are being treated fairly and that their working conditions are acceptable.

In conclusion, the retention of workers in the aviation sector is an important issue that must be addressed by employers and policymakers. By introducing new regulations and implementing new policies, it is possible to improve the working conditions of workers and increase their productivity. However, it is also important to consider the costs associated with these initiatives and to ensure that they are sustainable in the long term.
<table>
<thead>
<tr>
<th>Airport Involvement in Labor-Harmony Issues</th>
<th>Required</th>
<th>Permitted</th>
<th>Prohibited</th>
</tr>
</thead>
<tbody>
<tr>
<td>Require businesses not contracting with the airport to unionize or enter into labor-harmony agreements</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Require as a licensing or regulatory matter that its contractors or their subcontractors unionize or enter into labor-harmony agreements</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Require as a market participant (e.g., investor, owner, purchaser, or financier) that businesses with which it deals negotiate in good faith with unions in order to avoid labor-related disruptions</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Require as a market participant (e.g., investor, owner, purchaser, or financier) that businesses with which it deals require their subcontractors to negotiate in good faith with unions in order to avoid labor-related disruptions</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Require that certain provisions, such as card check or neutrality, be included in any agreement between a contractor or subcontractor and a union</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Require its contractors or their subcontractors to forego their right to determine the unionization of their employees through a secret-ballot election pursuant to NLRB or NMB procedures</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Restrict an employer's freedom of speech with respect to its views regarding unionization</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Forego airport-based actions that would diminish federal labor rights of both employers and employees</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Impose supplemental sanctions or penalties for violations of federal labor law</td>
<td></td>
<td>X</td>
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Implementation of a Labor Harmony Provision – Appendix B

Appendix B - Flowchart of Labor Harmony Implementation

- Union and subtenant negotiate labor harmony agreement
- Agreement reached?
  - Yes: Tenant informs airport owner and requests approval of sublease
  - No: Subtenant informs Tenant and Provides List of Areas of Disagreement
- Tenant informs airport owner, provides a list of areas of development, and requests or identifies which demands of parties are within airport owner's discretion to reject
- Are there labor issues that implicate federal law?
  - Yes: Does a request diminish or eliminate a right granted under federal law?
    - Yes: Airport owner cannot force a party to agree to such a provision. Airport owner informs tenant of this fact and stipulates that the labor harmony prerequisite will be waived and the sublease will be approved unless an agreement is reached
    - No: Airport owner reviews areas of disagreement, decides reasonable areas, and informs tenant of its position
  - No: Airport owner reviews sublease and approves
- Subtenant and Tenant Execute Sublease

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### APPENDIX C—SUMMARY CHART OF POTENTIAL CAUSES OF ACTION AGAINST AIRPORT SPONSORS IN LABOR PREEMPTION ARENA

<table>
<thead>
<tr>
<th>Cause of Action</th>
<th>Party Bringing Action</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>On-airport businesses</td>
</tr>
<tr>
<td>Declaratory judgment asserting preemption</td>
<td>X</td>
</tr>
<tr>
<td>Governmental interference with employer/employee rights under 42 U.S.C. 1983</td>
<td>X</td>
</tr>
<tr>
<td>Generally applicable aviation statutes (e.g., ADA, FAA)</td>
<td>X</td>
</tr>
</tbody>
</table>
PREAMPTION OF WORKER-RETENTION AND LABOR-PEACE AGREEMENTS AT AIRPORTS

This digest was prepared under ACRP Project 11-01, “Legal Aspects of Airport Programs,” for which the Transportation Research Board (TRB) is the agency coordinating the research. Under Topic 07-DD, this digest was prepared by Eric T. Smith, Kaplan Kirsch & Rockwell, LLP, Washington, DC.

Background

There are over 4,000 airports in the country and most of these airports are owned by governments. A 2003 survey conducted by Airports Council International-North America concluded that city ownership accounts for 38 percent, followed by regional airports at 25 percent, single-country at 17 percent, and multi-jurisdictional at 9 percent. Primary legal services to these airports are, in most cases, provided by municipal, county, and state attorneys.

Research reports and summaries produced by the Airport Continuing Legal Studies Project and published as ACRP Legal Research Digs are developed to assist these attorneys seeking to deal with the myriad of legal problems encountered during airport development and operations. Such substantive areas as eminent domain, environmental concerns, liasing, contracting, security, insurance, civil rights, and tort liability present cutting-edge legal issues when research is useful and indeed needed. Airport legal research, when conducted through the TRB’s legal-studies process, either collects primary data that usually are not available elsewhere or performs analysis of existing literature.

Foreword

Airports are centers of economic activity and places where a great number of jobs exist. Viewed as engines of economic development, airports often become the focus of groups seeking to have an impact on the local economy and the persons who work at the airport. These groups include elected officials, the media, social activists, and labor unions. Airports are increasingly being asked, for a variety of reasons, to become involved in matters that historically were reserved for private employers to address with their own employees. Among the matters airports are becoming involved in are, potentially, setting minimum wage rates, establishing safety/training baselines, and requiring “labor-harmony” or “labor-peace” agreements at the subject airports.

These agreements generally require that, as a condition of operating on-airport property, an organization must become signatory to some form of an agreement with a labor organization. These matters are usually injected into the contract of an airport business by the sponsor, including certain contractual language in the agreements between the sponsor and the business. The implications of involving the airport in such matters may be dramatic, far-reaching, and fraught with legal entanglements. This is especially true with respect to labor-harmony or labor-peace agreements.

This digest is intended to serve as an overview of issues related to labor harmony or labor-peace agreements for airport management personnel and other interested personnel, including airport authority board members or elected officials.
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- Conducts research to find solutions.
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Report 47: Guidebook for Developing and Leasing Airport Property

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Report 87: Procuring and Managing Professional Services for Airports

Synthesis 30: Airport Insurance Coverage and Risk Management Practices

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March 20
Energetic Value — The Design and Economics of Microgrids at Airports

April 18
Taking Preparedness Seriously — Emergency Exercises for Any Airport

May 8
Priming the Pump — Cleaner Approaches to Airport Ground Transportation
Today’s Participants

• Elizabeth Smithers, City of Charlotte - Charlotte Douglas International Airport, aesmithers@cltairport.com

• Lacey Corona, Nelson Mullins Broad and Cassel, lacey.corona@nelsonmullins.com

• Eric Smith, Kaplan Kirsch & Rockwell LLP, esmith@kaplankirsch.com
Panelists Presentations


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