



Via E-mail only

May 31, 2019

Forrest Hester, Tutus Solutions
fhester@gotutus.com

Kevin Jones, Tutus Solutions
kjones@gotutus.com

John W. McClelland, ARA
John.McClelland@ararental.org

Mike McCann, Spencer Fain
mmcann@spencerfane.com

Jeff Stachowiak, Sunbelt Rentals
jstachowiak@sunbeltrentals.com

David Merrifield, Merrifield Safety Consulting,
LLC
dmerrifi@stjoelive.com

Jon Gilchrist, Payne & Jones
jwg@paynejones.com

DeAnna Martin, SAIA
deanna@saiaonline.org

Barris Evulich, Evulich and Associates

Re: Decision of the ANSI Board of Standards Review (BSR) Appeals Panel resolving two separately filed appeals: 1) Tutus Solutions (Tutus) of the approval of A92.20 and A92.22 as American National Standards (ANS); and 2) American Rental Association (ARA) of A92.20, A92.22 and A92.24 (A92 suite of standards) as ANS.

Dated Notice

Dear Appeals Participants:

On May 7, 2019, the ANSI Board of Standards Review ("BSR") heard the above appeals. The decision of the ANSI BSR follows.

Please be advised that **this transmission via E-mail constitutes your official notification of the decision of the BSR.**

Should a party to this appeal wish to file an appeal of this BSR decision with the ANSI Appeals Board, written notice of appeal and all appeals statements and supporting documentation must be filed with the Secretary of the ANSI Appeals Board (the office of the undersigned) by **June 21, 2019**. The appeal shall be accompanied by a filing fee in the amount of \$1200.00. If you require an extension of the deadline date for the filing of an appeal, you must contact the Secretary of the ANSI Appeals Board on or before **June 21, 2019** or you will forfeit your right to further appeal. The appeal must be filed in accordance with the *ANSI Appeals Board Operating Procedures*, a copy of which is attached to the E-mail that transmitted this decision.

Thank you for your attention to this matter. If you have any questions, or if I may be of assistance to you, please contact me at (212) 642-4914 or send an E-mail to acaldas@ansi.org.

Sincerely,
Anne

Anne Caldas
Secretary
ANSI Board of Standards Review

cc: P. Griffin, ANSI Senior VP & General Counsel
F. Schrotter, ANSI Senior VP & COO
J. Smith, ANSI Outside Counsel
ANSI Board of Standards Review

ANSI BOARD OF STANDARDS REVIEW SUMMARY DECISION

Two separate appeals were filed by Tutus Solutions (Tutus) and the American Rental Association (ARA) challenging the ANSI BSR's decision to approve A92.20, A92.22 and A92.24 (the A92 suite of standards) as American National Standards (ANS). These ANSs are sponsored by ASC A92 *Aerial Platforms* for which the Scaffold & Access Industry Association (SAIA) serves as Secretariat (ASC A92). For the reasons set forth below, the BSR grants in part each of the two appeals and directs SAIA to take the timely actions described below if the A92 suite of standards are to retain their status as ANS.

Appellant 1 – Tutus Solutions (Tutus):

Represented by: Forrest Hester, Tutus Solutions
Kevin Jones, Tutus Solutions

Respondent – ASC A92 and SAIA (ASC A92):

Represented by: David Merrifield, A92 Chairman
Jon W. Gilchrist, Payne & Jones, SAIA Legal Counsel
DeAnna Martin, A92 Liaison

Appellant 2 – American Rental Association (ARA):

Represented by: John W. McClelland, Ph.D., ARA
Mike McCann, Spencer Fain, ARA Legal Counsel
Jeff Stachowiak, Sunbelt Rentals

Respondent 2 – ASC A92 and SAIA (ASC A92):

Represented by: Barris Evulich, Evulich and Associates, Chair A92.5
DeAnna Martin, A92 Liaison
David Merrifield, A92 Chairman

Observer:

Josh Van Zuiden, ARA

Hearing Date: May 7, 2019

Hearing Location: ANSI, New York

ANSI Board of Standards Review (BSR) Panel

Teresa Ambrosius
Paul Bralower
Gabriella Davis, Chair
Cristine Fargo
Monica Leslie

Patricia McGillicuddy
Tanisha Meyers-Lisle
Patricia Sena
Michael Wixted
David Zimmerman

ANSI Staff and Counsel

Anne Caldas, Secretary, ANSI BSR
Elizabeth Gonzalez, Recording Secretary, ANSI BSR
Patricia Griffin, ANSI Senior VP & General Counsel
Jeffrey Smith, ANSI Outside Counsel

I. Introduction

Each of the A92 suite of standards¹ was approved by the ANSI Board of Standards Review (BSR) as an American National Standard (ANS) on November 20, 2018. Tutus Solutions (Tutus) appeals the approval of A92.20 and A92.22 and the American Rental Association (ARA) appeals the approval of A92.20, A92.22 and A92.24. The essence of both appeals is that the standards (for different reasons) violate section 3.2 *Commercial terms and conditions* of the *ANSI Essential Requirements* (www.ansi.org/essentialrequirements) (hereinafter, the "Commercial Terms Policy"). Each appeal raises certain additional, and in some respects related, arguments as well. A hearing was held before a BSR Panel² on May 7, 2019. For the reasons set forth below, we find that the Commercial Terms Policy has been violated and direct that the A92 suite of standards be withdrawn as ANS, unless SAIA, on behalf of ASC A92, within 30 days of the receipt of this decision, submits a plan for the BSR's approval, demonstrating how the A92 suite of standards will be revised within 6 months of the date of this decision (or as soon thereafter as is possible) to bring them into compliance with the Commercial Terms Policy.

II. Arguments and Analysis

As noted, the thrust of both appeals is that the A92 suite of standards violates the Commercial Terms Policy, which currently provides:

3.2 Commercial terms and conditions

Provisions involving business relations between buyer and seller such as guarantees, warranties, and other commercial terms and conditions shall not be included in an American National Standard. The appearance that a standard endorses any particular products, services or companies must be avoided. Therefore, it generally is not acceptable to include manufacturer lists, service provider lists, or similar material in the text of a standard or in an annex (or the equivalent). Where a sole source exists for essential equipment, materials or services necessary to comply with or to determine compliance with the standard, it is permissible to supply the name and address of the source in a footnote or informative annex as long as the words "or the equivalent" are added to the reference. In connection with standards that relate to the determination of whether products or services conform to one or more standards, the process or criteria for determining conformity can be standardized as long as the description of the process or

¹ The A92 suite of standards under appeal are comprised of the following three standards: (i.) *A92.20 Design, Calculations, Safety Requirements and Test Methods for Mobile Elevating Work Platforms (MEWPs)*; (ii.) *A92.22 Safe Use of Mobile Elevating Work Platforms (MEWPs)*; and (iii.) *A92.24 Training Requirements for the Use, Operation, Inspection, Testing and Maintenance of Mobile Elevating Work Platforms (MEWPs)*.

² At the discretion of the BSR, the BSR or a panel consisting of at least five (5) BSR members, subject to applicable conflict of interest provisions, may conduct the appeals hearing.

criteria is limited to technical and engineering concerns and does not include what would otherwise be a commercial term.³

We address the Appellants' arguments, in turn, below.

A. American Rental Association (ARA) Appeal

ARA claims that the A92 suite of standards is not in compliance with the Commercial Terms Policy because these standards specifically require that a "Manual of Responsibilities (MOR)," a document produced, copyrighted and sold only through SAIA, be attached to every Mobile Elevated Work Platform (MEWP) manufactured under the standards.⁴ Specifically, for example, section 6.1 *General* of standard A92.20 requires "[t]he manufacturer shall provide, at the time of delivery, operation manuals to include at a minimum an operator's manual, and a manual of responsibilities located on the MEWP in a weather-resistant storage location." The term "manual of responsibilities" is defined as "[a] document containing definitions and requirements mandated in applicable A92 Standards for the following entities: Manufacturers, Dealers, Owners, Users, Supervisors, Operators, Occupants, Lessors, Lessees, and Brokers." In the related A92.22 standard, section 2.2 *Other Referenced Documents*, the MOR is referred to as "The SAIA Manual of Responsibilities for Dealers, Owners, Users, Supervisors, Operators, Occupants, Lessors, Lessees and Brokers for the Safe Use of Mobile Elevating Work Platforms."

ARA argues that this requirement that the MOR be physically attached to the MEWP violates the Commercial Terms Policy because it effectively endorses a product available only through SAIA, a single source, and does not permit any kind of substitution. This requirement, ARA maintains, violates at least two provisions of the Commercial Terms Policy: (i) the requirement that "[t]he appearance that a standard endorses any particular products, services or companies must be avoided;" and (ii) the direction that "[w]here a sole source exists for essential equipment, materials or services necessary to comply with or to determine compliance with the standard, it is permissible to supply the name and address of the source in a footnote or informative annex as long as the words 'or the equivalent' are added to the reference."⁵

For its part, SAIA maintains that the MOR is necessary for safety reasons and, because it contains verbatim excerpts from the A92 standards, there simply is no "equivalent." SAIA also states that the

³ The BSR takes no position at this time on whether and to what extent other parts of the A92 suite of standards, not raised in these appeals, would conform to the current Commercial Terms Policy or to a revised version of the Commercial Terms Policy that is currently under consideration by the ANSI Executive Standards Council (ExSC).

⁴ The MOR itself is essentially a condensed version of the standards – an extensive table that contains verbatim excerpts from the standards and designates, with check marks, those parts of the standards that need to be followed by various entities using the MEWPs, such as manufacturers, dealers, owners, users, supervisors, operators, occupants, lessors, lessees, and brokers.

⁵ ARA also raises other related concerns, including that SAIA has a conflict of interest because it benefits financially from the requirement that the SAIA MOR be physically attached to the MEWP, that the MOR is prohibitively expensive because hundreds-of-thousands of MEWPs are subject to the MOR requirement, that the MOR is unnecessary in light of the manufacturer's own operators manual which is more specific and easier to understand and that the requirement that the MOR be physically attached to the MEWP violates antitrust laws. The BSR need not decide these issues in light of its resolution of the argument under the Commercial Terms Policy.

requirements associated with the MOR have been part of the A92 standards since 1999, are well known in the industry and that ARA itself approved prior versions of the standards that relied on the MOR in 2014. Finally, SAIA suggests that ANSI's Executive Standards Council (ExSC) gave tacit support to SAIA's position that its standards did not violate the Commercial Terms Policy.

The BSR agrees with ARA that the MOR violates ANSI's Commercial Terms Policy. The requirement in one or more of the A92 suite of standards that a copyrighted document, which we consider a "product," be attached to another after-market product (the MEWP) amounts to an "endorsement" of the MOR, in violation of the Commercial Terms Policy. Since the MOR is a verbatim restatement of excerpts from the standards – in a slightly different format – no other source could supply this product without violating SAIA's copyright. Accordingly, the only manner in which SAIA can come into compliance with the Commercial Terms Policy is to remove the requirement that the SAIA MOR be attached to the MEWP for the A92 suite of standards. The BSR also agrees with ARA that there has been no showing that the only way to maximize safety is by requiring use of the MOR as opposed to through the use of equivalent materials that do not, for example, directly quote the standards but convey the key points in a different way, as ARA urged. Finally, the advisory opinion issued to SAIA by the ExSC⁶ (without the benefit of a full record) was expressly made subject to the possibility that further study would lead to a different conclusion, given that the matter was one of first impression.

B. Tutus Solutions, Inc. (Tutus) Appeal

Tutus appeals the approval of A92.20 and A92.22 as ANS also based on alleged non-compliance with the Commercial Terms Policy. In Tutus' case, the alleged violation flows from text in the standards that requires all modifications to the MEWP be approved by the manufacturer, for example, section 4.5 *Modifications* of A92.22, states in part:

Modifications or additions to a MEWP shall be made only with prior written permission of the manufacturer. In case the manufacturer no longer exists, modifications to a MEWP shall be made under the direction of an engineer with expertise in MEWPs.⁷

Tutus maintains that this requirement forecloses other engineers with requisite expertise who are "equivalents" under the Commercial Terms Policy from competing with manufacturers for business relating to modifications of MEWPs. Tutus argues that the delegation of authority over modifications to the manufacturer (or remanufacturer) exclusively is exacerbated by the fact that a recent revision to the A92 suite of standards expands the definition of "modification" to include any alteration of equipment under the standard. Tutus also pointed out during the hearing that equivalent international standards do not contain the requirement that modifications be handled exclusively by the manufacturer.

The BSR agrees with Tutus that the requirement that modifications or additions to a MEWP be made only with the permission of the manufacturer violates the Commercial Terms Policy. As the standard

⁶ See Annex A of this decision for the ExSC's February 21, 2017 communication to SAIA and ARA.

⁷ See also section 6.2.2 *Modifications* of A92.20, which states: "The manual shall state that modifications or additions to a MEWP shall be made only with prior written permission of the manufacturer/remanufacturer. In case the manufacturer/remanufacturer no longer exists, modifications to a MEWP shall be made under the direction of an engineer with expertise in MEWPs. The owner shall retain permission and pass it on to any subsequent owner, as applicable."

itself concedes, the manufacturer is not a "sole source" since, in the case where the manufacturer no longer exists, modifications can be carried out "under the direction of an engineer with expertise in MEWPs." Thus, the standard could be adjusted to allow for experienced alternatives to perform modifications to the MEWP even if the manufacturer is still in existence.

Finally, Tutus raises a number of other alleged process flaws, which taken together, Tutus claims renders the A92 suite of standards unsuitable for national use and ones that should not retain their status as ANS. The BSR does not agree with Tutus' arguments on the other points raised, and finds that: 1) the argument concerning the alleged imbalance of the subcommittees is without merit as the ANSI Executive Standards Council (ExSC) has confirmed in a published interpretation that subcommittees are not bound by the same due process-based requirements as are consensus bodies, unless a developer's procedures explicitly state to the contrary; 2) ANSI's requirements for procedural appeals at the standards developer level do not require some of the characteristics the Appellant desires, for example, in-person hearings or recordings; 3) the A92 standards are not in conflict with one another, as ANSI defines the term, and ANSI's definition of conflict and assessment of the same, does not reach OSHA rulings or requirements – as is also the case for coordination requirements; 4) comments received with a negative vote submitted in response to a recirculation opportunity are not required to be resolved in the current (final) phase of the voting process, rather, the ExSC has stated that such comments may be held for the next revision cycle as only one recirculation opportunity is required – of course, the decision to hold such comments for the next revision cycle is subject to a procedural appeal at the developer level, as was the case here.

III. Conclusion

For the reasons stated above, the BSR grants in part each of the two appeals. Specifically, the BSR grants the portions of both appeals that go to the merits of the arguments related to the Commercial Terms Policy. A requirement that the MOR be purchased solely from SAIA and used with every piece of equipment constitutes an "endorsement" of SAIA's MOR under ANSI's Commercial Terms Policy, and as such is not permissible in an ANS. In addition, the standards' text providing that "[m]odifications or additions to a MEWP shall be made only with prior written permission of the manufacturer" is, in the BSR's view, a commercial term and as such, is not permissible in an ANS. The other procedural arguments raised by Tutus are without merit.

Accordingly, the BSR directs that the A92 suite of standards be withdrawn as ANS, unless ASC A92 within 30 days of the receipt of this decision submits a plan for the BSR's approval, demonstrating how the A92 suite of standards will be revised within 6 months of the date of this decision (or as soon thereafter as is possible) to bring them into compliance with the Commercial Terms Policy.⁸

⁸ This decision is limited to the application of ANSI's Commercial Terms Policy to the particular facts of these appeals and the A92 suite of standards. It does not address or relate to issues of safety or other requirements established by manufacturers in connection with the manufacture or use of equipment or parts or the use of OEM-manuals, decals or the like.

Annex A

From: Anne Caldas

Sent: Tuesday, February 21, 2017 7:34 AM

To: DeAnna Martin <deanna@saiaonline.org>; Tony Conant <Tony.Conant@ararental.org>

Cc: Anne Caldas <acaldas@ansi.org>; James Thompson <Jthompso@ansi.org>

Subject: Request re: ANSI Commercial Terms and Conditions - SAIA

Dear Ms. Martin and Mr. Conant –

At their February 8, 2017 meeting the ANSI Executive Standards Council (ExSC) considered information provided to them by the Scaffold & Access Industry Association (SAIA) as secretary to ASC A92 *Aerial Platforms* or on which ANSI was copied, including correspondence between SAIA and the American Rental Association (ARA). The subject of these documents is ARA's objections to a requirement that a "Manual of Responsibilities (MOR)" produced and made available solely by SAIA would continue to be required for each piece of equipment covered by multiple A92 standards. (See April 3, 2015 ARA letter to SAIA and December 12, 2016 ARA letter to SAIA).

The ANSI ExSC discussed the issue and, noting that it was a matter of first impression under section 3.2 *Commercial terms and conditions* of the *ANSI Essential Requirements: Due process requirements for American National Standards* (www.ansi.org/essentialrequirements), determined that the MOR requirement is not out of compliance based on a plain reading of Section 3.2. Relevant to the ExSC's decision was that the MOR is an embedded document (not unlike normatively referenced documents), modestly priced and reasonably available through SAIA. However, given that section 3.2 doesn't directly address embedded documents like the MOR, the ExSC has formed a Task Group to further consider the meaning and application of section 3.2 in this and related contexts and whether revisions to it are warranted.

The ExSC will let both parties know if changes are made to Section 3.2 such that the opinion and findings presented here changes in the future.

Sincerely,
Anne

Anne Caldas
Secretary, ANSI Executive Standards Council (ExSC)
acaldas@ansi.org
212-642-4914