

TAMPA

Construction Contracts: Forms and Substance

*The Array of Essential Contract Documents Beyond
Design and Construction Agreements*

ABA FORUM
ON THE CONSTRUCTION
INDUSTRY



Fall Meeting
2004

*October 21–22
Tampa Marriott Waterside
Tampa, Florida*



Lawyers Serving the Construction Industry
through Education and Leadership

Dear Colleagues,

The Forum is hosting an important and unique Program in Tampa, Florida, on October 21 & 22, 2004

at the [Tampa Marriott Waterside Hotel](#).

The 2-day Program examines a wide selection of essential contract documents. Unlike the typical contract document seminars that explore owner-contractor, owner-architect, and trade contracts with general conditions, this Program collects in one place the array of other construction-related contracts that most construction lawyers don't have in their form files.

We have sought out the best in their fields to produce the most current forms of each document and included them in the Program materials. The Program materials will also include scholarly materials that explain the importance of the various contracts and the consequences of failing to use up-to-date forms of agreement.

Attendees will gain an understanding of each of these forms and their interrelationships, and walk away with up-to-date forms for the following categories of documents: pre-bid agreements; teaming, consulting, and mentoring agreements; letters of intent and notices to proceed;

financial performance agreements, with a checklist of financial information to be requested from each contracting party; performance guarantees and letters of credit; environmental, consultancy and preconstruction services agreements; construction site related agreements, including third-party access, airspace, temporary easements and offsite storage agreements; payment related agreements, including change orders and lien waivers and releases; equipment procurement and operation agreements; dispute resolution board agreements and procedures; and joint prosecution and defense agreements. And while the materials alone are worth the price of admission, the Program's venue is an added value.

The Marriott Waterside is Tampa's newest and most luxurious downtown destination. It is located on the water, overlooking Tampa Bay. It is directly across the street from Tampa's new Streetcar that connects directly to Ybor City (Tampa's Latin Quarter) and the Channelside shopping district. Come for the fun, and stay for the Program!

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Atlanta, GA

Tampa Bay is a vibrant waterfront area on Florida's beautiful West Coast and offers a unique blend of urban excitement set in a natural surrounding. Roar down roller coasters in the morning;

row down the nature rich Hillsborough River in the afternoon. Catch a ball game from the bleachers; catch some rays on the nearby beaches.

While originally the name of a body of water on the west coast of Florida, Tampa Bay has now come to represent the region made up of the many distinct communities connected by the Bay waters. Visitors have plenty of genuine, exciting attractions and communities to explore.

Fall Program Leadership

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Program Schedule

Wednesday

October 20

3–6 PM

**Advanced
Registration/Information**

Thursday

October 21

7:30 AM–5 PM

**Registration/Exhibition
Open**

7:30–8:30 AM

Continental Breakfast
(available to paid registrants)

8:00–8:10 AM

Welcome from the Chair

James Duffy O'Connor

Chair, Forum on the Construction Industry

Maslon Law Firm

Minneapolis, MN

8:10–8:15 AM

**Opening Remarks and
Announcements**

Carina Ohara

Program Co-Chair

Bechtel

San Francisco, CA

John Spangler

Program Co-Chair

Alston & Bird, LLP

Atlanta, GA

8:15–8:30 AM

Introduction to the Program

Peter Hughes

CH2M Hill

8:30–9:30 AM

Pre Bid Agreements

Roy C. Fazio

MWH Global, Inc.

Broomfield, CO

James Killian

Maslon Edelman Borman & Brand LLP

Minneapolis, MN

Our first session focuses on pre-bid agreements including Teaming, Consulting and Mentoring Agreements. What provisions should be in these agreements and what can happen if these terms are missing? The session will also look at Letters of Intent and Notices to Proceed. Are they enforceable contracts? Does the issuance of a Notice to Proceed create a contract? If so, what are its terms? This panel will also discuss the other documents that come into play before a formal contract is signed.

9:30–10:30 AM

**Financial Performance
Agreements**

Lynn R. Axelroth

Ballard Spahr Andrews & Ingersoll, LLP

Philadelphia, PA

Rudolf H. Beese

Sonnenschien Nath & Rosenthal LLP

Kansas City, MO

This session focuses on documents and instruments that may be utilized to gain comfort with the other parties' financial health and capacity to perform. How can a project owner be assured that the contractor has the financial capacity to complete the project? How can a contractor obtain comfort that the owner has the ability to pay for the Project? The panelists will run through a checklist of financial information to be requested from each party, and they will discuss performance guarantees and letters of credit.

10:30–10:45 AM

Break

10:45–11:45 AM

**Environmental, Consultancy
and Pre-Construction
Services Agreements**

Margaret A. Hackbarth

Holland & Knight, LLP

Washington, D.C.

Kenneth F. Strong

Gordon & Rees, LLP

San Francisco, CA

This panel will discuss nuances and pitfalls to be aware of when drafting Environmental, Consultancy and Pre-Construction Services Agreements. Who can rely upon the results of environmental investigations and what limitations can or should be imposed by contract? How should risks be addressed in consultancy agreements and what does the law say if these risks are not addressed in the contract?

12:00 NOON–1:30 PM

Luncheon

Rud Mueller

Hillsborough County Aviation Authority

Tampa, FL

1:30–1:45 PM

Break

1:45–2:45 PM

**Construction Site Related
Agreements**

Christopher M. Caputo

Robinson & Cole, LLP

Boston, MA

Patrick Greene, Jr.

Peckar & Abramson

River Edge, NJ

This session will address the types of site documents that need to be included in any project's "toolbox," and why these documents are so important. Documents to be discussed will include: third-party access, airspace, temporary easement and offsite storage. The panel will also discuss how the common law will apply if these types of documents are needed but not obtained.

2:45–3:45 PM
Payment Related Agreements

[Gregory L. Cashion](#)
[Smith & Cashion, PLC](#)
Nashville, TN

[Eric A. Berg](#)
[Piper Rudnick](#)
Chicago, IL

What is a Change Order really supposed to look like and when does a "Release and Lien Waiver" really work as a release and lien waiver? What about retainage, and how does the statutory or common law constructive trust doctrine apply? This panel will discuss forms and procedures to minimize issues arising out of the payment process.

3:45–4:00 PM
Break

4:00–5:00 PM
Equipment Procurement and Operation Agreements

[William F. Bresee](#)
Glendora, CA

[John V. Snyder](#)
[Bechtel Power Corporation](#)
Frederick, MD

What are the main concerns that need to be taken into account when drafting a purchase order to procure a single piece of

equipment that makes up the bulk of the contract price? How do you draft an agreement to operate or maintain the project once construction is completed? Our two speakers who both have substantial experience in drafting and litigating these issues as lawyers, and as business people that have procured and provided these services, will present practical advice based on their own experiences.

5:30–7:30 PM
Welcome Reception at The Marriott Waterside

Friday

October 22

7:30 AM–12:45 PM
Registration/Exhibition Open

8:30–9:30 AM
Dispute Resolution Board Agreements and Procedures

[Robert A. Rubin](#)
[Postner & Rubin](#)
New York, NY

[Daniel D. McMillan](#)
[Jones Day](#)
Los Angeles, CA

Our two speakers, both leading authorities on dispute resolution boards, will discuss the operation of DRBs and provide insider opinions on the pros and cons of DRBs. Both will also share their extensive experience with DRBs and provide their recommended forms for the creation and administration of DRBs.

9:30–10:30 AM
Dispute Related Agreements

[John P. Carpenter](#)
[Peter Kiewit Sons', Inc.](#)
Omaha, NE

[Joel D. Heusinger](#)
[Woods & Aitken, LLP](#)
Lincoln, NE

Disputes concerning construction projects frequently involve multiple parties with similar or related interests. The topic of this discussion is formalizing joint prosecution and defense agreements, and agreements to allow one party to prosecute claims on behalf of others that are passed through the chain of contracts.

10:30–10:45 AM
Break

10:45–12:00 NOON
Ethics: Avoiding Conflicts When Representing Multiple Clients

[Bruce C. King](#)
[Carlton Fields](#)
Tampa, FL

[Carol J. Patterson](#)
[Zetlin & De Chiara, LLP](#)
New York, NY

How should a lawyer deal with conflict issues that may arise when multiple clients request representation to jointly prosecute or defend their claims? What are the ethical issues that every lawyer should be concerned about when bringing clients together to partner on a project? This discussion will focus on the ethics of multiparty representation and will provide an opportunity to fulfill your ethics CLE requirement.

NOON
Adjourn

Conference Information



Advance Registration

Please complete and return the attached registration form with your payment by September 29, 2004. If you wish to have your name appear on the pre-registration list distributed at the Program, we must receive your registration no later than this date.

Conference registrations will only be accepted when accompanied by a check, Visa, American Express, or MasterCard information. You may register online at www.abanet.org/forums/construction or you may fax credit card registrations to Cherie Dikelsky at (312) 988-5677. *Registrations cannot be held without payment.*

On Site Registration

On site registration is available for those persons who missed the registration deadline. If you plan to register at the door, you must call (312) 988-5579 at least 72 hours before the conference to confirm that space is still available. Failure to call in advance may result in not being admitted to a sold out Program. On site registration will only be accepted when accompanied by a check, money order, American Express, Visa or MasterCard information. *Registrations will not be accepted without payment.*

Registration Confirmation

If you do not receive a written or email confirmation by September 29, 2004, please call Cherie Dikelsky directly at (312) 988-5580 to verify that your registration form and check were received. Failure to call in advance of the Program may result in not being admitted.

Tuition

Tuition includes admission to the Program, coffee breaks, continental breakfast, lunch, one ticket to Welcome Reception at the Tampa Marriott Waterside, and one set of Program course materials. Lunch is limited to registrants, faculty and members of the press.

Cancellation Policy

No refunds will be granted for cancellations received after September 29, 2004. To receive a refund (less a \$50 administrative fee), cancellations must be made in writing and received on or before September 29, 2004. Registrants who are unable to attend may send a substitute or receive course materials in lieu of a refund. The ABA reserves the right to cancel any Programs, and assumes no responsibility for personal expenses.

Hotel

The conference will be held at The Tampa Marriott Waterside, 700 S Florida Avenue, Tampa, FL 33602. Reservations can be made by calling the Marriott at (813) 221-4900. To ensure availability please make your reservation by September 28, 2004. The Hotel Reservation Office will assign rooms on a space available basis. Hotel check-in time is 4:00 p.m. and the check-out time is 12:00 p.m. Conference Rates: \$179 single/double.

Air Transportation

You can fly to ABA meetings with *unbeatable fares* on the following carriers by purchasing your ticket under the ABA Discount Code and using one of two options: Percentage Discounts or Zone Fares. Once your airfare has been determined, the percentage discount can then be applied to produce additional savings to you. By asking the agent to *compare* the percentage-discounted fare with the carrier's Zone Fares, even

greater savings may be achieved. Zone Fares are more flexible and user-friendly than non-refundable, restricted airfares. While Zone Fare rules and restrictions vary with each airline, most only require a 7-day advance purchase; do not require a Saturday night stay; are changeable and refundable and require only a 2-day minimum stay.

The ABA Discounted Meeting Airfares are available on the following airlines through your travel agent, directly from the airlines or from the ABA travel agency, Tower Travel at (800) 921-9190.

American Airlines (800) 433-1790	Discount Code #16666
Delta Air Lines (800) 241-6760	Discount Code #189419 A
US Airways (877) 874-7687	Discount Code # 36632473

CLE Credit

Accreditation has been requested for the conference from every state with mandatory continuing legal education (MCLE) requirements for its lawyers. Please be aware that each state has its own rules and regulations, including its definition of "CLE". Check your state agency for confirmation of this Program's approval. Lawyers seeking to obtain MCLE credit in Louisiana and Pennsylvania are required to pay state accreditation fees directly to that state. Certificates of attendance will be available at the conclusion of this conference. For questions pertaining to the number of credit hours granted by each state, call (312) 988-6217 two or three weeks after the conference.

Membership

As an added bonus to new members, the membership tuition rate will be available to registrants who join the Forum on or before the first day of the Program. For your convenience, a Forum membership form is included in the brochure. Membership dues are not deductible as charitable contributions for federal income tax purposes. However, such dues may be deductible as a business expense.

Tax Deduction for Educational Expenses

In the United States, an income tax deduction may be allowed for educational expenses undertaken to maintain or improve professional skills. This includes registration fees, travel, meals, and lodging expenses. (see Treas. Reg. 1.162-5) (Coughlin vs. Commissioner 203 F 2d 307).

Course Materials

If you are not planning to attend the Program and wish to order the course materials, check the appropriate box on the registration form and send it with the appropriate fees. Allow approximately 3-4 weeks after the Program for delivery.

Services for Persons with Disabilities

If special arrangements are required for an individual with a disability to attend this Program, please submit your request in writing to Alanna Sullivan, Forum on the Construction Industry, American Bar Association, 321 N. Clark Street, Chicago, IL 60610, or fax to (312) 988-5677, no later than September 29, 2004.

Forum on the Construction Industry Website

Cell Phone Policy

As a courtesy to speakers and attendees, we request that all cell phones and pagers be turned off in the meeting rooms.