December 2005

The newsletter of the ABA Forum on the Construction Industry

UNDER CONSTRUCTION

AAA Commercial Rules Provide Emergency Relief for Construction Projects

By Harvey W. Berman

A general contractor on a project with tight deadlines has a dispute with a key subcontractor seeking a substantial change order for work claimed to be outside the scope of its contract. The subcontractor threatens to stop work if the change order is not approved, which will wreck havoc on the project schedule, expose the general contractor to liability, and minimize the likelihood of future work from the Owner.

The Architect finds a defect, and the Owner requires the general contractor remove and correct it in accordance with the original specifications and plans, which will be cost-prohibitive. A repair remedy exists that is cost-effective but not precisely according to the contract documents.

Disputes like these are common. Issues such as delays, interference, and defects require quick action to avoid substantial damage to others on the project which may or may not ever be recompensed. A *Dispute Resolution Board* (DRB) provides an excellent means of resolving disputes on large or complex projects, however, it is often difficult to get the parties to agree in advance to a procedure that may never be used and which is often expensive for the parties to arrange. A less expensive alternative to a DRB is a procedure that is available through the use of the Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association (Commercial Rules). This procedure is not available under the Construction Arbitration Rules of the American Arbitration Association (Construction Rules), however, it can be made applicable to construction disputes.

Emergency Rules

Rules O-I to O-8 of the Commercial Rules -- "Optional Rules for Emergency Measures of Protection" (Emergency Rules), provide that the parties may adopt these rules to deal with situations where they need emergency relief prior to the constitution of the arbitration panel. Here's how it works.

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Appointment of Nominating Committee

The following people have been appointed to serve on the Nominating Committee, and to select and submit to the membership for election at The Forum's Annual Meeting on April 7, 2005 the nominees for the positions of Chair-Elect and four Governing Committee Members at Large:

CHAIR

Ty D. Laurie
203 North LaSalle Street, Suite 1900
Chicago, IL 60601-1293
email: ty.laurie@dlapiper.com

MEMBERS

Bob Beaumont, Art Brannan, Mark Heley, John Hinchey, Marc Mercante, Leslie O'Neal-Coble

Please forward your nominations or expressions of interest, along with a curriculum vitae including details of the nominee's activities in the Forum, the ABA and its Sections and Divisions, and in the legal profession generally, to Ty Laurie by January 20, 2006.

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Vol. 8 No. 1 - December 2005

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Under Construction is published by the American Bar Association Forum on the Construction Industry, 321 N. Clark Street, Chicago, IL 60610. Requests for permission to reprint and manuscripts submitted for consideration should be sent to the attention of the Editor, Patrick J. O'Connor, Jr. Address corrections should be sent to the ABA Service Center at the address above.

Defending Liberty Pursuing Justice

MESSAGE FROM THE CHAIR ELECT

Ty Laurie,
Chair Elect

ABA ATTORNEYS PITCH IN AFTER KATRINA

"You cannot live a perfect day without doing something for someone who will never be able to repay you."

John R. Wooden, UCLA Coach Emeritus (1948-1975)

Coach John Wooden, enshrined in the Basketball Hall of Fame as both player and coach, led UCLA to ten NCAA basketball championships and four perfect 30-0 seasons. One of his principles for success was giving to others, which is exactly what ABA attorneys have been doing post-Katrina. Literally picking up the pieces of Katrina's rubble, many of our attorneys are giving their time and talent to help victims re-construct their lives or, in some cases, to assist those who must craft new ones.

Among those suffering are some of our own Forum attorneys living and practicing in the path that Katrina traveled. The most harrowing story belongs to Bruce Shreves, who was plucked from the roof of his home by a helicopter five days after Hurricane Katrina tore through New Orleans. The displaced and temporarily relocated include Harvey Koch, Charles Seeman, and Rich Tyler, all from New Orleans, and Mark Mercante and Danny Shaw of Mandeville, Louisiana. Rich Tyler, co-chair of the 2005 Fall program, still managed to perform his co-chair duties and arrive at our meeting in time despite the tragedy he and his family were experiencing. Danny Shaw and Mark Mercante also had roles in the meeting and didn't let Katrina prevent them from contributing. We are sure there are more Forum members impacted by this disaster. Our thoughts and prayers are with all of you.

Even as reports of the misfortunes of our own become known, the sections and forums of the American Bar Association are giving to others by providing both legal assistance and other resources. A task group is exploring ADR options to assist Katrina victims in resolving their insurance claims, another is proposing town hall meetings to give voice to the hurricane survivors. Reuniting pets with their families, affordable housing, debt deferment, tax relief, and consumer protection to avoid further victimization are the focus of other attorney groups within the ABA. Materials are being developed to help lawyers assist storm victims, as is a video program on local preparedness and disaster recovery. Environmental clean-up issues are being addressed, as are issues for small businesses. Impacted law students from Tulane and Loyola have found help from the ABA in terms of placement at other schools, a job placement bank is being developed, and a database of temporary housing was organized.

In addition to giving our expertise, we also are giving our money, both individually, through our firms, and by membership in various ABA sections and forums. While no numbers are available, it is safe to say that ABA attorneys have been generous with all of their resources.

Thus, without being asked or urged, ABA attorneys, like Coach Wooden, have embraced the principle of giving.

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ABA Attorneys Pitch in After Katrina

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Observers, however, endow Coach Wooden with another trait as well: perseverance. Beginning his career by shooting rags at a tomato basket nailed to his father's barn, the 5'10" farm boy persevered to become a basketball hero at Purdue University. Not an instant success as a coach, he again persevered at UCLA for fifteen years before winning his first national title. With perseverance, he created a record that many believe will remain unprecedented.

As the weeks and months pass, the ABA plans to persevere in helping those impacted by Katrina. In that regard, the ABA has formed the Hurricane Katrina Task Force to determine what more we can do. Mark Heley kindly has agreed to serve on the task force as the Forum's liaison. Preliminary suggestions for the task force include donating more funds and other resources, providing legal assistance, and organizing Forum members to repair or re-build homes.

Please picture a farm boy pitching rags into a tomato basket. Now believe that by perseverance, each of us can make a significant -- if not unprecedented -- difference in the life of someone harmed by Hurricane Katrina. We ask that you brainstorm and send your ideas and suggestions to Mark Heley so that he can share them with the Hurricane Katrina Task Force.

To Bruce, Harvey, Charles, Rich, Mark, and Danny, and all other members whose lives have been disrupted by Katrina, a Forum-full of good thoughts and positive energy is being sent your way. ♦

The Enforceability of "Additional Insured" Provisions Under Statutory Anti-Indemnification Schemes

By Trinh Huynh

Introduction

The enforceability of "additional insured" endorsement provision in construction contracts has routinely been the subject of much litigation. Two recent appellate decisions demonstrate the dichotomous positions courts across the country had taken regarding the enforceability and scope of "additional insured" endorsements.

Oregon

In *Walsh Construction Co. v. Mutual of Enumclaw*, 338 Or. 1, 104 P.3d 1146 (2005), the Oregon Supreme Court held that "additional insured" endorsements violate the state's anti-indemnification statute and therefore are unenforceable.

Facts

In *Walsh*, the general contractor on a remodeling project required a subcontractor to obtain liability insurance coverage that listed the general contractor and its agent as "additional insureds." Subsequently, one of the subcontractor's employees was injured on the work site. That subcontractor's employee filed a claim against the general contractor, who in turn, tendered defense of the claim to the subcontractor pursuant to the terms of the "additional insured" endorsement under the subcontractor's liability insurance policy.

When the insurance company refused to honor its obligation under the "additional insured" provision, the general contractor settled the claim with the subcontractor's employee and initiated a breach of contract action against the insurance company. The insurance company argued that the additional insured provision violated Oregon's anti-indemnification statutes and as such, was void. The general contractor argued that the state's anti-indemnification statute did not apply to "additional insured" endorsement. Relying on a previous Oregon appellate decision, *Montgomery Elevator Co. v. Tuality Community Hosp.*, 101 Or.App. 299, 790 P.2d 1148 (1990), the general contractor contended that "a promise to obtain insurance is not the same as a promise to indemnify." The contractor noted that there was a "fundamental, and ultimately dispositive, difference between an agreement to indemnify another party for the consequences of its own negligence and an agreement to procure insurance coverage by which the other party will be indemnified for its own liability."

Holding

The Oregon Supreme Court, however, found the general contractor's argument unpersuasive. Affirming the Iowa court, the Court noted that Oregon's anti-indemnification statute, ORS 30.140(1), prohibits "any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damages…caused in whole or in part by the negligence of the indemnitee." The Court determined that the state's "indemnitee's sole negligence" indemnification prohibition extended to "additional insured" endorsement contracts. Tracing its legislative history, the court found that the statute remained constant in "prohibiting agreements by which a party's insurer would be required to indemnify another party for damages arising from the latter party's negligence." As the court reasoned, later amendments to the statute

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The Enforceability of "Additional Insured" Provisions Under Statutory Anti-Indemnification Schemes

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were "designed to prevent parties with greater leverage in construction agreements (generally, owners and contractors) from shifting exposure for their own negligence—or the cost of insuring against that exposure—to other parties (generally, subcontractors) on a "take-it-or-leave-it" basis." The court found that requiring a party to indemnify or requiring the procurement of additional insurance coverage for the latter's own negligence achieves the same statutorily forbidden end. In its opinion, the Oregon Supreme Court concluded that the statute "prohibits not only 'direct' indemnification arrangements between parties to construction agreements but also 'additional insurance' arrangements by which one party is obligated to procure insurance for losses arising in whole or in part from the other's fault."

California

The California appellate court in *American Casualty Company of Reading, Pa. v. General Star Indemnity Co.*, 125 Ca. App.4th 1510, 24 Cal.Rptr.3d 34 (2005), when confronted with a similar situation, however, came to a different conclusion.

Facts

In *American Casualty*, a lessor and lessee entered into a license agreement whereby the lessor granted to the lessee the right to use the lessor's studio in North Carolina to produce a movie. The agreement included an indemnity and "additional insured" endorsement clauses in which the lessor was to be added as "additional insured" under the lessee's insurance policies.

An employee of the lessee was injured while operating a lift while on the lessor's premises. The employee pursued a claim against the lessee, its employer, and the lessor. Due to the state's workers' compensation exclusivity rules, an action against the lessee was dismissed. Instead, judgment was entered against the lessor and was discharged by both the lessor's and lessee's primary insurance companies. The lessee's primary insurance company then sought contribution and/or indemnification from the lessor's excess insurance carrier.

In support of its claim, the lessee's insurance company argued that it had no liability under the indemnity agreement nor the "additional insured" endorsement. The lessee's insurance company contended that injuries sustained by its employee were a result of the lessor's "sole negligence." As such, the lessee's insurance company concluded that its liability under the "additional insured" endorsements was unenforceable because California's statute prohibits indemnification based on the indemnitee's sole negligence. Thus, since section 2782 of the California Civil Code exempted its insured from indemnification liability, the insurance company's liability under the "additional insured" endorsements was also null and void.

Holding

Applying California law, the California appellate court rejected the lessee's insurance company's appeal. The court concluded that an "additional insured" insurance contract is entirely separate from indemnification clauses and its enforcement is not expressly limited by section 2782 of the relevant California statute. Section 2782 of California's Civil Code limits the scope of indemnification in construction contracts and specifically prohibits indemnification based on the sole negligence of the indemnitee.

However, as the court noted, the statute explicitly states that its "sole negligence" limitation found in its anti-indemnification statute "shall not affect the validity of any insurance contract." As interpreted by the appeals court, "a provision in a liability policy providing coverage to an additional insured will not be deemed contrary to public policy or unenforceable merely because that additional insured party may have incurred claim liability due to its "sole negligence." The court concluded that absent express language in the parties' contract, insurance policy or endorsement, coverage for claims arising from an additional insured's negligence is permissible even within the scope of section 2782 and indemnification limitations under the terms of the contract. Building on prior California decisions, the appeals court found that "sole negligence of additional insured will not, in the absence of contrary policy terms/language, preclude party from enforcing coverage commitment."

Conclusion

These two cases illustrate the complexity of "additional insured" liability coverage. Although the respective courts' interpretations appear diametrically opposed and could create more confusion, there remains a lesson to be learned: The enforceability of "additional insured" liability may be affected by the scope and limitations of each state's anti-indemnification statutes and the courts in which the statutes are interpreted.

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Public Owner Direct Purchases: An Additional Exposure for the Contractor

By Darren Duzyk

Introduction

In all delivery systems, most contractual liability transferred from the owner to the General Contractor and Subcontractors (collectively "Contractor") focuses on performance issues relating to matters within the control of the Contractor. A silent liability monster has reared its ugly head for the Contractor in the form of the owner direct purchase ("ODP") procedure employed on many public projects. The ODP is the worst form of exposure for a Contractor because it puts all of the liability for the actions of the material supplier on the Contractor but gives that Contractor no contractual control over the supplier. This is because the ODP is a contractual agreement between the owner and the material supplier that is executed to save the owner, a public entity, the sales tax dollars by purchasing the material directly. This ODP structure is employed in spite of the fact that the Contractor is installing the materials provided by the supplier.

The Problem

In a nutshell, the situation involves a Contractor performing installation of materials on a public project which are actually purchased directly by the owner through the ODP process. Although the Contractor includes the material suppliers pricing in its bid, the bid item for the materials is backed out of the contractual agreement that is ultimately executed between the owner and the Contractor thus permitting the owner to contract directly with the supplier through the ODP process and save sales tax dollars on the projects' material costs. In most circumstances, the Contractor retains the same role with the material supplier as it would if the material supplier were directly subcontracted to the Contractor, i.e., participation in the shop drawing and pay application processes. Additionally, in most circumstances, the suppliers' materials are included in the scope of the bond provided by the Contractor.

Controversy usually arises in this scenario when the material supplier fails to perform or provides non-conforming goods to the project. Frequently on public projects, no one, including the Contractor, wants to step up and take responsibility for dealing with the problem created by the material supplier. The Contractor's basis for not taking responsibility is the obvious lack of contractual authority over the material supplier because the purchase order was executed directly between the material supplier and the owner.

The root of the exposure for the Contractor lies in the often overlooked provisions dealing with taxation of the public owner. Within the supplementary conditions, there are provisions dealing with sales tax for owner direct purchases. For example, Paragraph 3.6 "Taxes" under Section 00302 of AIA's Supplementary Conditions to A201/CMa 1992 version provides, in relevant part:

3.6.2 – The Owner, a government entity as defined by [the appropriate state agency], is exempt from payment of sales tax on the purchase of all building materials and equipment sold to the Owner with an approved Purchase Order. The Owner shall exercise the option of purchasing all or any portion of the materials and equipment included in the Contractors Bid directly from the manufacturer or supplier in accordance with the conditions set forth:…

3.6.2.2 – the Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents for all materials and equipment purchased by the Owner through the Purchase Order procedure;…

3.6.2.3 – the Contractor shall retain all Contract obligations for materials and equipment purchased by the Owner through the purchase order process;

Needless to say, this language is vague as it attempts to impose some contractual responsibility on the Contractor despite the Contractor's lack of authority over the material supplier. However, one thing is clear regardless of the choice of words… these provisions attempt to assert liability on the Contractor for the performance of the material supplier regardless of the relationship, or lack thereof, between the parties. Contractually, the Contractor cannot demand performance of the material supplier, withhold payment or terminate the material supplier because of the lack of contractual privity. In the real world, if the situation is not remedied and the owner does elect to terminate the purchase order with the material supplier, the owner is likely to rely upon the above referenced contractual provisions to force the Contractor to absorb any cost overrun associated with a replacement supplier or to recoup monies already paid by the owner to the breaching material supplier.

A Related Problem

Aside from the potential breach or non performance by the material supplier, an additional potential problem can arise for the Contractor because of the ODP system. This is due to the material suppliers' practice of using purchase orders as opposed to contractual agreements.

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Public Owner Direct Purchases: an Additional Exposure for the Contractor

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Many material suppliers rely on standard purchase orders with their own terms agreeing to provide materials to a contractor. If the same material provider executes the ODP Purchase Order with the owner there are two separate contracts executed by the material supplier with two different entities on the same project for the same specified material. In the event of non-performance by the material supplier, the parties' rights are confused even more. Accordingly, Contractors in this scenario are well advised to not sign or agree to purchase orders issued by the material supplier since the material supplier is contracting directly with the owner.

The Law

Unfortunately, it does not appear that the above referenced language has ever been addressed or interpreted in a published opinion. From experience, I can tell you that there are arbitrators interpreting the language differently. Some hold that the Contractor bears the responsibility for the material supplier's breach. Others hold that if the owner is going to take advantage of its tax exempt status, it will live with the consequences of its contractual agreement.

One persuasive authority on the issue was found in some commentary on taxes. In short, the cases cited in the commentary seem to indicate that state regulatory authorities will assess sales tax to public owners who purchase materials directly in instances where the owner is merely benefiting from the non-taxable status without actually exercising contractual authority over the material supplier. In other words, although the Contractor's responsibility for the material supplier's breach was not addressed, the opinions conclude that if the state revenue cabinet believes that it appeared to be a sham transaction where the owners were not paying sales tax but were diverting all of the contractual liability to the Contractors, the cabinets came back and taxed these owners on the materials.

Proposed Real World Solutions

Beyond revising the contractual language cited above to clearly inform Contractors of their liability exposure, there are some protective measures that can be taken by Contractors, if, of course, they are willing to initiate them. Some of the basic practices suggested to Contractors, but usually frowned upon by them, also apply to this situation. They include requiring material suppliers to be bonded, not using material suppliers they are not familiar with and only using bids from suppliers they know are reputable, i.e. – basing the decision on more than just the lowest price.

The most logical solution comes through in the form of legislation. Some states have statutes which exempt sales tax for materials purchased on public projects. This structure enables the Contractor to contract directly with material suppliers and still enables the owner to enjoy its tax free status as a public entity. Local chapters of the various contractor trade associations should support legislation of this nature in states where these statutes do not exist.

There is nothing wrong with a Contractor attempting to negotiate out of above referenced language once it is determined to be the low bidder. However, if the Contractor and Owner do not reach an agreement and the Contractor refuses to perform under those contractual provisions, it is likely that the Contractor will forfeit its bid bond.

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AAA Commercial Rules Provide Emergency Relief for Construction Projects

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Notice

A party seeking emergency relief must notify in writing AAA and all other parties of the relief sought, why the relief is required on an emergency basis, and why the party is entitled to the relief sought. (ER O-I).

Appointment of Arbitrator

Within one day of receipt of the notice, AAA must appoint a single emergency arbitrator from a special AAA panel of emergency arbitrators. The emergency arbitrator must immediately disclose to the parties any circumstances that are likely, on the basis of the facts disclosed in the application, to affect the arbitrator's impartiality or independence. Any challenge to the emergency arbitrator must be made within one business day of the communication by AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed. (ER O-2).

Scheduling of Hearing

Rule O-3 provides that the emergency arbitrator shall as soon as possible, but within two business days, establish a schedule to consider the application. The schedule may allow proceeding by telephone conference or on written submissions.

Interim Award & Security

If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim award granting the relief and stating the reasons for it. (ER O-4).

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AAA Commercial Rules Provide Emergency Relief for Construction Projects

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An interim award may be conditioned on the provision of appropriate security. (Rule O-6).

Extent of Panel Authority

Modifications of an interim award of emergency relief may be obtained only if the emergency arbitrator finds changed circumstances. Once the regular arbitration panel is constituted, however, the emergency arbitrator has no authority to act and all change requests must be made to the regular panel. The only exception is if the parties agree that the emergency arbitrator is named as a member of the regular panel. (ER O-5).

Special Master

If the parties agree to use the Emergency Rules, can they still seek interim measures from a court? Yes. The Rules provide that a request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate. In addition, if AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, AAA is required to proceed as provided in Section O-I of the Emergency Rules and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.
(ER O-7)

Costs and Filing Fees

Costs associated with applications for emergency relief shall be apportioned by the emergency arbitrator or special master, subject to the power of the regular panel to determine finally the apportionment of such costs. (Rule O-8). But what are the filing fees? AAA applies a minimum administrative fee of $1,500.00 for limited claims, and there is no set formula for emergency matters. The parties are encouraged to place a value on the claim so that appropriate fees can be assessed. In the absence of a specified value, AAA determines the appropriate fee.

Application to Construction Projects

Although the Emergency Rules appear in the Commercial Rules and not in the Construction Rules, AAA has indicated that it will permit the use of the Emergency Rules for construction disputes if the Emergency Rules are properly referenced in the arbitration agreement.

Stand-Alone Request for Emergency Relief

Can emergency relief via the Emergency Rules be requested without a separate claim for damages? AAA will allow a stand-alone claim for emergency relief if the emergency procedure is properly referenced in the arbitration agreement. However, it has been AAA's experience that claims for damages are usually filed with a claim for emergency relief. AAA has had limited experience with claims being filed for only injunctive emergency relief and not involving a claim for damages.

Is the Request for Relief a Real Emergency?

What happens if the emergency request for relief is not a "real" emergency? The emergency arbitrator can dismiss a claim because it is premature, is not a real emergency, or is a claim more appropriately handled as a claim for monetary relief. This is consistent with the arbitrator's general power to make decisions relating to matters submitted to him or her. As always, the arbitrator's powers may be limited by arbitration agreement.

Sample Contract Language

On its website, AAA provides sample language that is readily modified to apply to construction projects.

The parties may specify the emergency arbitrator's powers or limitations on powers, whether the emergency arbitrator is required to be on the regular panel, the location of any hearings, whether discovery is permitted, or matters that are excluded from the emergency arbitrator's jurisdiction. To get closer to the concept of a DRB, the parties may specify the name of the emergency arbitrator. Prior to doing so, the parties should obtain that person's advance agreement to fulfill this role.

Use Emergency Rules Cautiously

While the Emergency Rules provide a quick method for having an urgent matter resolved, resort to the Emergency Rules still requires filing a claim, and it is possible that some limited discovery could be permitted by the emergency arbitrator. Parties involved in a construction project should consider carefully whether the situation at issue truly requires emergency relief, what the impact of the filing of the claim will be on the claimant's relationship with the opposing party or other members of the construction team, whether there is sufficient information at the time of the filing of the emergency claim for an arbitrator to make an appropriate decision, the likelihood that the emergency relief will be upheld by the regular arbitration panel, as well as the cost and time involved in filing an emergency claim.

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Join Us For Our 2006 Winter Meeting!

Join us in New York

WHEN: January 26, 2006

WHERE: The Waldorf=Astoria Hotel

TITLE: Expecting the Unexpected: Anticipating and Managing Key Risks to Successful Projects

TELL ME MORE: This in-depth one-day program will bring together nationally recognized counsel and industry professionals to help experienced and new construction attorneys consider how best to approach various risks their clients face. Speakers will examine strategies to address key issues such as finalizing lower tier agreements, and managing potential risks including force majeure delays, changes in law, and pre-existing site conditions. Contractors and suppliers will explain how they identify and approach pricing for bid contingencies. Finally, we will hear expert panelists to get their insights on anticipating the impact of price escalation and international contingencies, and from a senior risk manager's update on hot topics in the surety industry.

Register by January 5, 2006 for advance registration rates. To register for the program online or to download a registration form, please visit the Forum's website, at www.abanet.org/forums/construction. Not sure if you're registered? Contact T-rex at 877-309-1565 or 630-262-1599.

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December 2005

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