

American Bar Association
Forum On The Construction Industry, MS 11.2
321 North Clark Street
Chicago, IL 60610

2007 MidWinter Meeting • January 25, 2007



[PRESORTED]
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2007 MidWinter Meeting

Withstanding the Tremors:

The Golden Rules
for a Rock-Solid
Design/Build Project

07

January 25, 2007

WESTIN ST. FRANCIS HOTEL
SAN FRANCISCO, CA

PROGRAMS • PUBLICATIONS • PEOPLE

Dear Colleagues:

The Joint Midwinter 2007 Meeting of the Forum and FSLC returns to beautiful San Francisco and the historic Westin St Francis Hotel, built in 1904 and located in the heart of the City, facing Union Square. This program is designed as an advanced primer on the implementation of design-build. Whether you represent providers or procurers of design-build services, or just want to learn more about this project delivery system, this program will provide you with unique perspectives and insights into the use and misuse of design-build.

All of the sessions of this one day program are plenary sessions. The first session focuses on structuring the design-build teaming agreement to maximize the potential for success. Does the teaming agreement accurately reflect the promises made to the owner? What should the team do if the owner micromanages the design process, or exerts control over design decisions? How do design issues, and control over design decisions, effect buy-out of the subcontractors and downstream delegation of design responsibility? The panelists will address these and many other risk allocation issues.

No discussion of design-build would be complete without considering relevant insurance and bonding issues, and our second session focuses on these topics. As to insurance, the presenters will address the allocation and insurability of the risks faced by the design-build team, the interplay between professional liability versus CGL insurance, the types of coverages commercially available, and much more. Not to be overlooked, the speakers will also focus on several bonding issues such as the use of alternative forms of security in lieu of bonds, how to structure the underlying indemnity agreements, and how the dollar value of performance is measured and quantified for bonding purposes.

The third session focuses on Owner-provided bridging documents, and their impact on the design and performance obligations of the design-build team. Is the Owner liable for design errors and omissions arising out of the bridging documents? What are the practical implications of implementing a "bridged" project? What options are available to deal with the impact of the "bridging" documents on the team's performance obligations and warranties? The answers await you in San Francisco.

The fourth session is a practical "lessons learned" presentation, focusing on actual reported instances where design-build has gone awry. Case studies will be used to illustrate instances where design-build has gone failed. Instead of learning what to do, this session will instruct on what not to do.

The fifth and final session focuses on the use of the design-build delivery system for heavy construction projects. This session will focus on the advantages and disadvantages of using design-build for heavy construction projects, long term performance warranties, completion issues unique to heavy projects, and flow down provisions important for federally funded projects.

As if these topics, preeminent speakers and first class materials alone weren't worth the price of admission, beautiful San Francisco has an allure all itself. San Francisco is one of the great urban centers of America, with tourist attractions, cultural amenities and some of the country's best restaurants, museums and historic sites. Napa Valley is also a very short drive away. Please join us on January 25, 2007 at the fabulous Westin St. Francis Hotel.

See you in the City by the Bay!

Timothy R. Thornton
Program Chair
Greensfelder, Hemker & Gale
St. Louis, MO

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Governing Committee Liaison
Alston & Bird, LLP
Atlanta, GA

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Leadership

07

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New York, NY

Program Schedule

Wednesday, January 24

10:00am – 6:00pm

REGISTRATION OPEN

3:00 – 6:00pm

EXHIBITION OPEN

Thursday, January 25

7:30am – 5:00pm

REGISTRATION OPEN

7:30am – 5:00pm

EXHIBITION OPEN

7:30 – 8:30 am

CONTINENTAL BREAKFAST

8:15 – 8:30 am

WELCOME & OPENING REMARKS

Ty D. Laurie

Chair, Forum on the Construction Industry
DLA Piper US LLP, Chicago, IL

Michael Keeley

Chair, TIPS Fidelity & Surety Law Committee
Strasburger & Price, LLP, Dallas, TX

**INTRODUCTION TO
THE PROGRAM**

Timothy R. Thornton

Greensfelder Hemker & Gale, St. Louis, MO

8:30 – 9:45am

**STRUCTURING THE
CONTRACTUAL RELATIONSHIPS
AMONG THE
DESIGN-BUILD TEAM MEMBERS**

Bennett D. Greenberg

Seyfarth Shaw, LLP, Washington, DC

Robyn Miller

DMJM H&N, Inc., Los Angeles, CA

This session focuses on structuring the design-build relationship for success. Points of emphasis will include avoiding a potential disconnect between the parties' teaming agreement versus their proposal to the owner; clarifying that control of the design process is vested in the design-build team, not the owner; and controlling design decisions as a means of affecting both buy-out of the subcontractors as well as delegation of design responsibility to specialty trade subcontractors. Additional topics include: design and construction scope definitions;

delineation of performance responsibilities; warranties and disclaimers; indemnification obligations; changes to the scope and contract time; liability for professional errors and omissions; project integration obligations; and identifying and allocating the major risks in the downstream relationships.

9:45 – 10:35am

**INSURING AND BONDING THE
DESIGN-BUILD TEAM**

Jeff Appelbaum

Thompson Hine, LLP, Cleveland, OH

F. Malcolm Cunningham

Cunningham Law Firm, W. Palm Beach, FL

This session explores the major insurable risks to be addressed by the design-build team and the major issues surrounding performance bonding of the design-builder, its team members and downstream participants.

Insurance issues will include

- the interplay between professional liability and CGL insurance;
- what types of insurance and coverages are commercially available;
- how insurance carriers value and price the underlying risks;
- how warranties impact insurance coverage; and
- the need to analyze how OCIP interrelate with other insurance

Bonding issues will include:

- the need for performance bonding by the design-build team;
- documenting performance bonding responsibilities among team members;
- the use of alternative forms of security;
- structuring of indemnity agreements; and
- quantifying the dollar value of performance for bonding purposes.

10:35 – 10:50am

BREAK



10:50 – 11:35am

COPING WITH THE OWNER

G. William Quatman

Shughart Thomson & Kilroy, Kansas City, MO

L. Tyrone Holt

The Holt Group, LLC, Denver, CO

This session will focus on the issues raised when the owner provides bridged design documents as part of the owner's program definition including:

- The impact of the owner's bridging documents on the design and performance obligations of the design-build team;
- the interplay between bridged documents and the Spearin Doctrine;
- the owner's liability for errors/omissions arising out of the bridging documents;
- how an owner might secure the risks associated with bridged documents;
- the obligations and liability of the owner's bridging consultants; and
- the practical implications of implementing a "bridged" project.

11:35am – 12:20pm

BREAK

12:20 – 1:45pm

LUNCH

Featured Speaker: Derek Cunz

Director of Project Development,
M.A. Mortenson Company, Minneapolis, MN

1:45 – 2:15pm

BREAK

For a brochure on the

2007 ABA Tort Trial & Insurance
Practice Section, Fidelity & Surety
Law Committee Midwinter Meeting

Friday, January 26, 2007
call (312) 988-5672
or visit www.abanet.org/tips.

2:15 – 3:25pm

**LEARNING FROM THE MISTAKES
OF OTHERS: WHEN DESIGN-BUILD
HAS GONE AWRY**

Kerry L. Kester

Woods & Aitken, LLP, Lincoln, NE

Deborah J. MacKay

Faegre & Benson LLP, Minneapolis, MN

Thomas L. Rosenberg,

Roetzel & Andress, Columbus, OH

This session will address a variety of issues in the context of case studies featuring illustrations of design-build gone wrong. Examples include disputes over the allocation of work among team members; disputes that arise because agreement as to scope was not completely achieved; problems associated with delegating design responsibility down the subcontracting chain; and implications of long-term warranties. Rather than instructing what to do, this session will instruct what not to do.

3:25 – 3:40pm

BREAK

3:40 – 4:40pm

**DELIVERING HEAVY
CONSTRUCTION PROJECTS
THROUGH DESIGN-BUILD**

John Carpenter

Kiewit Corporation, Omaha, NE

D. Peter Hughes

CH2M Hill, Denver, CO

Michael C. Loulakis

Akerman Senterfitt, Vienna, VA

This session will focus on selecting design-build for delivery of heavy construction projects. Issues to be covered include:

- Advantages/Disadvantages of Using Design-Build for Heavy Construction Projects;
- Long Term Performance Warranties;
- Completion of the Heavy Project;
- Issues Beyond the Physical Construction; and
- Flow down provisions important for federally funded project.

4:40 – 5:00pm

CLOSING REMARKS

Conference Information

ADVANCE REGISTRATION

Please complete and return the attached registration form with your payment by JANUARY 11, 2007. 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 JANUARY 11, 2007.

Conference registrations will only be accepted when accompanied by a check, money order, Visa, American Express or MasterCard information. Credit card registrations may be FAXED to T-Rex directly at (630) 262-1520. Registrations cannot be held without payment. A registration form is included in this brochure as well as online at www.abanet.org/forums/construction.

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

In order to be listed in the pre-registration list distributed at the program, registrations must be received by JANUARY 11, 2007. If you do not receive an email confirmation by JANUARY 11, 2007, please call T-Rex directly at (630) 262-1599 to verify that your registration form and payment 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, lunch, 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 JANUARY 11, 2007. To receive a fund (less a \$50 administrative fee), cancellations must be made IN WRITING and RECEIVED on or before JANUARY 11, 2007. 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 program, and assumes no responsibility for personal expenses.

HOTEL

The conference will be held at The Westin St. Francis Hotel, 335 Powell Street, San Francisco, CA 94102. Reservations can be made by calling the Hotel Reservation Office at (415) 397-7000. To insure availability please make your reservation by December 18, 2006, and refer to the ABA Midwinter Meeting. The Hotel Reservation Office will assign rooms on a space available basis. Hotel check-in time is 3:00 p.m. and the check-out time is 12:00 p.m. Reservations must be cancelled 48 hours prior to the scheduled day of arrival to avoid a one night's cancellation charge. Conference Rates: \$249 s/d.

AIR TRANSPORTATION

Discounted airfares are available for travel to ABA Master Calendar meetings. ABA and Travelocity negotiated airfare discounts and web only fares are available to members at ABA Online Travel. Visit www.abanet.org; and select ABA Online Travel under ABA Calendar. Airfare discounts are available to all meeting attendees by calling the ABA's travel agency, Travelocity Business, toll-free at 866-321-8403.

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. Attorneys 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) 988-5678 2 to 3 weeks before the conference.

MEMBERSHIP

As an added bonus to new members, the member's tuition rate will be available to registrants who become members of the Forum or TIPS 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, American Bar Association, 321 N. Clark St., Chicago, IL 60610, or Fax to (312) 988-5677, no later than JANUARY 9, 2007.

FORUM ON THE CONSTRUCTION INDUSTRY WEBSITE

www.abanet.org/forums/construction/home.html

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.

Registration Form (Please print or type)

Housing Deadline: December 18, 2006
Registration Deadline: January 11, 2007

1. REGISTRANT INFORMATION:

Last Name	First Name	M.I.
(Name as you wish it to appear on attendee list & name badge)		ABA Member ID#
Firm/Company/Agency		
Address		
City	State	Zip
(Area Code) Business Phone Number	(Area Code) Business Fax Number	
E-mail Address		
Spouse or Guest (Print as you wish names to appear on badge)		
<input type="checkbox"/> I am a New Member		

2. REGISTRATION FEES:

You may use this form to register for the Forum on the Construction Industry/TIPS FSLC Joint Meeting as well as the ABA TIPS FSLC Midwinter Meeting.
Thursday, January 25, 2007

**A. The Forum on the Construction Industry
2007 Midwinter Meeting** (Sponsored jointly by TIPS FSLC)

	1/11/07 <i>ON OR BEFORE</i>	1/11/07 <i>AFTER</i>
<input type="checkbox"/> General Attendees	\$450	\$475
<input type="checkbox"/> Forum Members	\$395	\$420
<input type="checkbox"/> TIPS Members	\$395	\$420
<input type="checkbox"/> Government/Academic/YLD	\$260	\$285
<input type="checkbox"/> Law Students	\$160	\$160

Insurance Company Employees:

<input type="checkbox"/> Non-TIPS members	\$260	\$285
<input type="checkbox"/> TIPS members	no charge	\$285

Subtotal \$ _____ \$ _____

Friday, January 26, 2007

**B. ABA TIPS Fidelity & Surety Law Committee
2007 Midwinter Meeting**

	1/5/06 <i>ON OR BEFORE</i>	1/5/06 <i>AFTER</i>
<input type="checkbox"/> General Attendees	\$450	\$475
<input type="checkbox"/> Forum Members	\$395	\$420
<input type="checkbox"/> TIPS Members	\$395	\$420
<input type="checkbox"/> Government Employees	\$150	\$175
<input type="checkbox"/> Law Students	\$150	\$150

Insurance Company Employees:

<input type="checkbox"/> Non-TIPS members	\$225	\$250
<input type="checkbox"/> TIPS members	no charge	\$200

Subtotal \$ _____ \$ _____

3. SOCIAL EVENT TICKETS:

Event	Fee	Qty	Total
1/25/07			
Thursday Luncheon	Incl.	_____	\$ _____
Spouse/Guest Ticket	\$80	_____	\$ _____

****YOU MUST SIGN UP FOR LUNCH TO ATTEND****

1/26/07

TIPS FSLC Welcome Reception (Included in Friday's registration)

Spouse/Guest Ticket	\$60 (\$65*)	_____	\$ _____
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(*at the door)

1/26/07

TIPS FSLC Luncheon	Incl.	_____	\$ _____
Spouse/Guest Ticket	\$80	_____	\$ _____

****YOU MUST SIGN UP FOR LUNCH TO ATTEND****

Subtotal \$ _____

4. MATERIALS ONLY:

I will not be attending the seminars and wish to order program materials for:

<input type="checkbox"/> The Forum on the Construction Industry/ TIPS FSLC Joint 2007 Meeting	\$150
Subtotal	\$ _____

5. TOTAL PAYMENT:

Total (Add subtotals 2a, 2b, & 3 or 4): \$ _____

6. PAYMENT INFORMATION:

- Check (made payable to ABA)
 Season Pass Voucher Money Order
 MasterCard American Express VISA

Credit Card Number _____ Expiration Date _____

Signature _____

7. MEMBERSHIP APPLICATIONS:

- Please enroll me as a member of the Forum on the Construction Industry. Membership fee (\$40 Regular/\$5 Law Student). I understand I must be a member of the ABA and at least one Section. I belong to the following Section(s):

- I am a member of the ABA and wish to join the Tort Trial & Insurance Practice Section. I have enclosed a separate check for \$50 made payable to the American Bar Association.

8. THREE WAYS TO REGISTER:

ONLINE:
www.abanet.org/forums/construction/home.html

MAIL:
Technical Registration Experts (T-Rex)
FORUM ON THE CONSTRUCTION INDUSTRY
13 South 2nd Street, Suite 2
Geneva, IL 60134

FAX:
(630) 262-1520
T-Rex phone is (877) 309-1565 or (630) 262-1599