# FEUCI COURSE

# APPLYING BEST CONTRACTING PRACTICES TO CONSTRUCTION CONTRACTS

June 15-16, 2017 Shearman & Sterling LLP Offices | 401 9th Street, N.W. Washington D.C.



June 15-16, 2017 | Washington D.C.

# **OVERVIEW**

The objective of this course is to assist professionals in avoiding unnecessary contractual mistakes. In some sense, contractual mistakes are just another name for experience. Experience is always good. In this course, experience is used as the basis to suggest how to implement contractual strategies. Lack of focus and clarity in a contract can lead to great disappointment for all parties involved in a project.

Risk is sometimes defined as "decision-making under uncertainty." The challenge of the parties to a contract is not to try to eliminate risk but rather to put into place a narrative structure that enables the parties to predict what contractual result would be obtained if a risk materializes. If a contract does not allow the parties to determine the consequences of an unanticipated situation, they will have to look to an expert, mediator, tribunal or court to impart guidance or pass judgment.

Form contracts will be handed out.

# LEARNING OUTCOMES

- Discern the anatomy of a construction contract
- Identify types of unforeseen circumstances, adjustments and change orders
- Define limitations on overall liability and contract expiration
- Parse owners and contractors responsibilities
- Differentiate contractors warranties
- Evaluate legal regimes and how to choose a legal entity
- Implement philosophy of project into the construction contract

# WHO SHOULD ATTEND

A practical and comprehensive course for understanding virtually every aspect of construction contracts supplemented with real-life examples and court decisions.

This course offers tactical advice for anyone who must negotiate or understand construction contracts in connection with the implementation, financing or operation of construction projects. Emphasizing current market practices and strategic options for risk sharing, the course is a narrative explanation of the underpinning of essentially all of the issues involved in construction contracting and examines a sample construction contract on a provision-by-provision basis. It is a guide of great value for project managers, engineers, lawyers, accountants, bankers, real estate owners, government officials, reporters, consultants, and concerned citizens.



"The course provided insight to central issues. Speaker was expert in the area and entertaining."

Owner, Tracey Mihelic Law

# **COURSE TIMING**

THURSDAY, JUNE 15, 2017

8:00 – 8:30 am Registration and Continental Breakfast

8:30 am – 5:00 pm Course Timing

12:00 – 1:00 pm Group Luncheon

# **AGENDA**

### **Contractual Principles**

- Legal Regimes Civil Codes vs. Case Law
- Choosing a Legal Entity
  - o General and Limited Partnerships
  - o LLPs and PCs
  - o Corporations
  - o Limited Liability Companies
  - o Forming a Project Entity
  - o SPVs
- Communication with the Contractor and the Attorney/Client Privilege
  - o Ouasi-Contract
  - o Parold (Oral) Evidence
  - o Additional Terms
- Philosophy of the Contract
  - o Prudent Practices
  - o "Best" Efforts and "Commercially Reasonable" Efforts
  - o "Good Faith" and "Good Intentions"
- Third-Party Beneficiaries
- Unforeseen Circumstances, Adjustments and Change Orders
  - o Force Majeure
  - o Risk of Loss
  - o Builder's All Risk Insurance to Cover Risk of Loss
  - o Equitable Adjustments
  - o Change Orders
  - o Constructive Changes
  - o Cardinal Changes and Contractual Abandonment
  - o Cumulative Impact Changes
- The Contractor's Failure to Preform
  - o The Concept of Default
  - o Remedies at Law vs. Remedies in Equity
  - o Adequate Assurance
  - o Exclusivity of Remedies
  - o U.S. Bankruptcy Code
    - Rejection of Contracts
- The Owner's Failure to Discharge Its Responsibilities
  - o "No Damages for Delay" Provisions
  - o Active Interference and Loss of Efficiency

# **AGENDA**

### THURSDAY, JUNE 15, 2017 (CONTINUED)

- Liquidated Damages for Delay and Impaired Performance
  - o Output
  - o Efficiency
  - o Availability
  - o Emissions
  - o "Double Counting", "Caps" and "Sub Caps"
- Contractors Warranties
  - o Hidden or Latent Defects
  - o Subcontractor Warranties
  - o Superior Vendor Warranties
  - o "Pre-ordered" Equipment
  - o "Serial" Defects
  - o Locating Defects and Deficiencies
  - o Remedies for Breach of General Warranty
  - o Scheduling of Warranty Work
  - o Warranty Exclusions
  - o Limitation of Warranties
  - o Warranty Bonds
- Security for the Contractor's Performance
  - o Performance Bonds
  - o Parent Guarantors
    - Other Security
    - Collection vs. Payment
    - Forum
  - o Letters of Credit
    - "Direct Pay"
    - Eligible Banks
    - Standby Letters of Credit
    - Expiration
  - o Bank Guaranties
- Limitations on Overall Liability and Contract Expiration
  - o Negligence and Gross Negligence
  - o Types of Damages
  - o Waiver of Damages
  - Who Owes the Damages and to Whom Are They Owed?
  - o No Excuse of Performance
  - o Incoterms
  - o Subrogation
- Title and Other Legal Matters
  - o Licenses
  - o Representations and Warranties
  - o Legal Opinions
- Indemnification and Insurance
  - o Builder's Insurance
  - o Operating Period Insurance
- Dispute Resolution and Governing Law
  - o Litigation
  - o Arbitration

# **COURSE TIMING**

FRIDAY, JUNE 16, 2017

8:00 – 8:30 am Continental Breakfast

8:30 am – 12:00 pm Course Timing

# **AGENDA**

### **Anatomy of a Construction Contract**

- Definitions
- Intent
- Commencement of the Work
- Relationship of the Sponsor, the Contractor and Subcontractors
- Contractor's Responsibilities
- Review, Inspections, and Auditing
- Sponsor's Responsibilities and Rights
- Testing and Completion
- Guarantees and Liquidated Damages
- Contract Price, Payment, and Credit Support
- Force Majeure, Hazardous Materials and Site Conditions
- Representations and Warranties
- Contractor's Warranties
- Title and Risk of Loss
- Insurance
- Indemnification
- Default, Termination and Suspension
- Damages and Liabilities
- Adjustments
- Dispute Resolution and Governing Law
- Assignment
- Financing

# COURSE INSTRUCTOR



## Howard M. Steinberg

Howard M. Steinberg is a retired partner and now "Of Counsel" to the project development and finance group of the international law firm of Shearman & Sterling LLP. He concentrates on transactions involving the energy sector and focuses on the power industry in particular. He has represented sponsors, offtakers, miners, fuel suppliers, contractors, operators, underwriters and lenders in the development, acquisition, restructuring and privatization of infrastructure projects around the world. His two-volume tome on engineering, procurement and construction contracts is being published this year by Routledge, Taylor & Francis Group.

# REQUIREMENTS FOR SUCCESSFUL COMPLETION OF PROGRAM

Participants must sign in/out each day and be in attendance for the entirety of the course to be eligible for continuing education credit.

# INSTRUCTIONAL METHODS

This program will use PowerPoint Presentations, group discussions, as well as active participation.

# **IACET CREDITS**



AUTHORIZED EUCI has been accredited as an Authorized Provider by the International Association for Continuing Education ■ and Training (IACET). In obtaining this accreditation, EUCI has demonstrated that it complies with the ANSI/IACET Standard which is recognized internationally as a standard of good practice. As a result of their Authorized Provider status, EUCI is authorized to offer IACET CEUs for its programs that qualify under the ANSI/IACET Standard.

EUCI is authorized by IACET to offer 1.0 CEUs for the course.

# **EVENT LOCATION**

**Shearman & Sterling LLP** 401 9th Street, N.W.

Washington, D.C. 20004

# **NEARBY HOTELS**

**Courtyard Washington Convention Center** 

900 F St NW. Washington, DC, 20004 **United States** (202) 638-4600 0.1 miles from office

**Kimpton Hotel Monaco Washington DC** 

700 F St NW. Washington, DC, 20004 (202) 628-7177 0.1 miles from office

**Hotel Harrington** 

436 11th Street NW, Washington, DC, 20004 (202) 628-8140 0.1 miles from office

**Grand Hyatt** Washington

1000 H Street NW, Washington, DC, 20005 (202) 582-1234 0.4 miles from office

**Washington Marriott** at Metro Center

775 12th Street NW. Washington, DC, 20005 (202) 737-2200 0.4 miles from office



Please make checks payable to: "PMA"

# **EVENT LOCATION**

Shearman & Sterling LLP 401 9th Street, N.W.

Washington, D.C. 20004

See nearby hotels on page 6

# PLEASE REGISTER

| <b>APPLYING BEST CONTRACTING PRACTICES TO</b> |
|---|
| CONSTRUCTION CONTRACTS COURSE:                |
| June 15-16, 2017   Washington, DC-LIS \$1305  |

June 15-16, 2017 | Washington, DC: US \$1395, Early bird on or before May 26, 2017: US \$1195

| How did you hear ab          | oout this event? (direct e-mail, collea | ague, speaker(s), etc.) |   |
|------------------------------|---|-------------------------|---|
| Print Name                   |   | Job Title               |   |
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| <b>OR</b> Enclosed is a che  | ck for \$                               | to coverregistrations   |   |
|                              |   |                         |   |

### **Substitutions & Cancellations**

Your registration may be transferred to a member of your organization up to 24 hours in advance of the event. Cancellations must be received on or before May 12, 2017 in order to be refunded and will be subject to a US \$195.00 processing fee per registrant. No refunds will be made after this date. Cancellations received after this date will create a credit of the tuition (less processing fee) good toward any other EUCI event. This credit will be good for six months from the cancellation date. In the event of non-attendance, all registration fees will be forfeited. In case of course cancellation, EUCI's liability is limited to refund of the event registration fee only. For more information regarding administrative policies, such as complaints and refunds, Contact our offices at (201) 871-0474.