

Dead is the Handshake

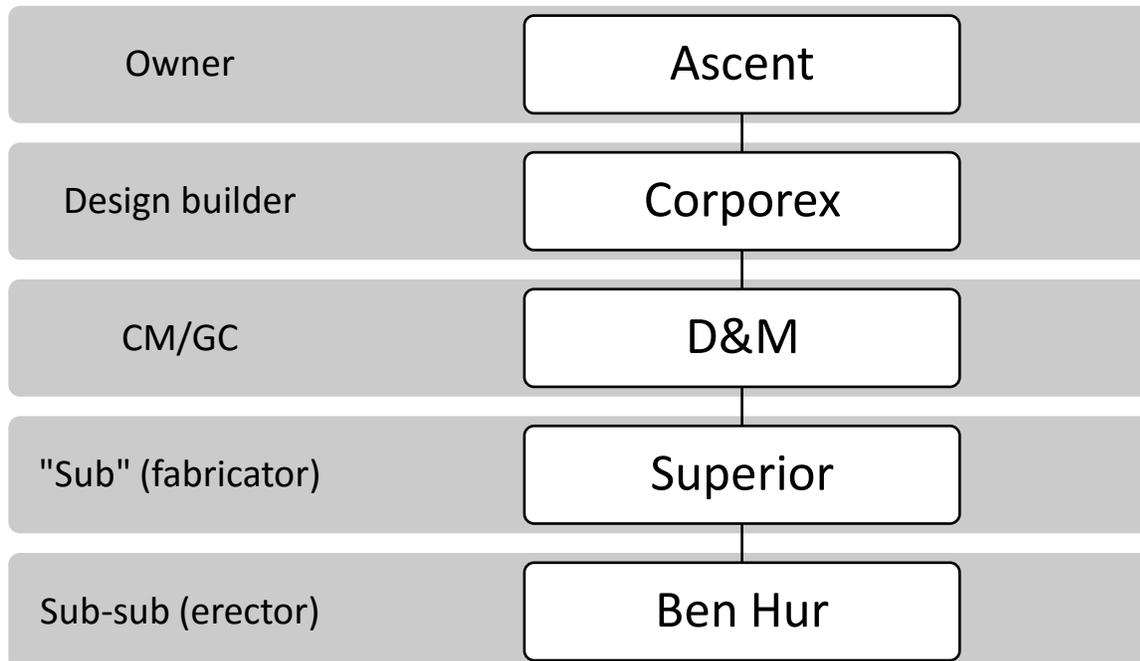
Executive Summary: The "Steel Team" composed of fabricator and erector joined together to sue the owner and general contractor for failure to pay on changes. The "right" parties appeared to win, but they paid dearly.

The Project and Players. The project was the Ascent at Roebling's Bridge – a 21-floor, luxury condominium in Covington, Kentucky.

The players in this lawsuit include:

- Owner - The Ascent at Roebling's Bridge, LLC ("Ascent")
- Design builder - Corporex Development and Construction Management LLC ("Corporex")
- Construction Manager/ General Contractor (CM/GC) - Dugan and Meyers Construction Company ("D&M")
- Steel fabricator - Superior Steel, Inc. ("Superior")
- Steel erector - Ben Hur Construction Company, Inc. ("Ben Hur")
- The "Steel Team" – Superior and Ben Hur (they grouped together and gave themselves this name)

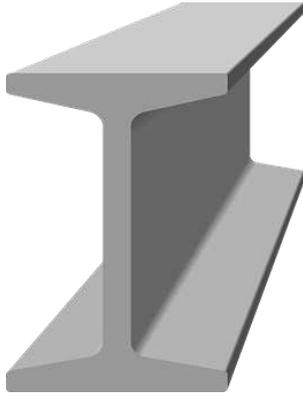
Here is the contractual hierarchy:



The play-by-play. The project went out for bid during the design phase. Bids on the steel package were received by D&M and then D&M asked for a reprice from Superior. Concurrent

with the request for reprice, there was a design change, but D&M wanted to keep all the pricing apples to apples, so they asked Superior to price the originally issued drawings.

D&M awarded the steel fabrication and erection to Superior Steel, Inc. for \$1,814,000; the erection would be done by Superior's sub, Ben Hur, for \$444,000.



Change notification. After award of the work, there were acknowledged changes by the design builder which were passed down to the Steel Team. The Steel Team expressed concern over the changes as they would cost additional money. To receive personal assurance of payment, Ben Hur met with D&M's president who drafted a letter the next day acknowledging that the extra work was necessitated. However, this letter was directed not to be sent to the subcontractor by D&M's client, Corporex.

The Steel Team did get paid for some changes, but eventually were denied their claim(s) and the owner held back not only on changes, but on the \$195,143.40 of retention too.

Trial Court. Superior and Ben Hur got together and sued all the parties upstream of them. The jury took less than an hour to give the Steel Team almost everything they asked for

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| • Superior's extras | \$124,017.26 |
| • Ben Hur's extras | \$284,295.53 |
| • Superior's attorneys' fees | \$349,241.70 |
| • Ben Hur's attorneys' fees | - |

Appeal. All parties appealed and the Kentucky Court of Appeals sent it back down for a retrial. The parties didn't want a retrial, so they were granted a discretionary review by the Supreme Court of Kentucky.

Supreme Court's Decision. The extras and the retention were granted to the Steel Team, but no attorneys' fees were paid.

Lessons learned. This scenario plays out daily in the industry. Here's the recap on what to learn from this case:

- Attorneys always win – Superior was chasing \$124k in extras and spent \$349k on attorneys. With your spouse the expression is "do you want to be right, or you want to be happy?" In dispute resolution the saying should be "do you want to be right, or you want to be solvent"? The attorneys (for plaintiff and defendant) went home with the cash, as usual.
- Don't do work on a handshake – the days of your Dad's construction company doing business on a handshake are gone. In this case, the Steel Team actually started without a contract. Then they proceeded on work based on a promise they wouldn't be cheated. They were cheated and were leveraged by the owner, design builder, and CM/GC.
- Be careful as a sub-sub – Ben Hur had only an implied contract with D&M – they had a direct contract with Superior. Although there's likely language that could have been

