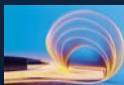




Outside Construction
Counsel's Role
Page 1



Contract Clauses
To Protect the
OwnerPage 2

JOHN E. OSBORN, P.C.
ATTORNEYS & COUNSELORS AT LAW

Construction *Law*

Summer/Fall 2008

JOHN E. OSBORN P.C. TESTIFIES ON NEW YORK CITY COUNCIL'S PROPOSED REFORM TO THE ENVIRONMENTAL CONTROL BOARD

On Thursday, June 19, 2008, Alex Truitt from the law firm, John E. Osborn P.C., testified before the Small Business and Governmental Operations Committees of the New York City Council on Intro. No. 777.

Intro. No. 777 proposes many modifications to the New York City Environmental Control Board. John E. Osborn PC represents major real estate owners and developers, and has day-to-day involvement with the Environmental Control Board.

The key points raised by the law firm include: (a) Detailed recommendations relating to the development and implementation of technology to upgrade recordkeeping through electronic case management, (b) Recommendation that the City of New York allocate sufficient financial resources to implement the important reforms included in the legislation; (c) Failure of the ECB to adequately assure that the respondent receives the notice of violation and the resulting effect of defaults on the respondents; (d) Improving the selection process and training of administrative law judges; and (e) Shortening the adjudication process as it currently is unreasonably lengthy and appeals sometimes take years to be decided.

John E. Osborn, P.C. believes that the amendments proposed to the NYC ECB by Intro. 777 will promote better efficiency, professionalism and quality of the ECB's adjudication process, but unless these legislative changes are accompanied with specific reforms, the changes will not be effective.

Outside Construction Counsel's Role in Representing the Owner: Legal and Practical Strategies for Success

Construction counsel's traditional role is in handling construction contract litigation or arbitration after project completion; after the damage has already been done.

Making construction counsel part of the planning process has been effective and has demonstrated value. In instances where the owner retains outside construction counsel early, a few things have been clear: there are fewer claims and virtually never an impasse due to contract interpretation issues.

Early involvement of construction counsel adds expertise and the ability to add a sense of urgency. Analyzing complex facts and turning out an action plan on a short deadline is something at which attorneys excel. In the capital planning process, the owner relies on many participants with varying degrees of expertise, loyalty, focus and experience. The involvement of experienced construction counsel from project inception creates an advantage: the construction counsel will invariably see early signs of a problem on the project in time to head off disaster. Perhaps the most distinct advantage is that counsel, to a greater degree than other construction project participants, is used to demonstrating undivided loyalty to the client.

Over time, it has become clear that the large project benefits from the dispute resolution experience of construction counsel that can be folded into the owner's project strategy. In examining an extensive array of litigation and project problem solving assignments our law firm has undertaken, the problems have been recurring and the ability to reach solutions has been consistent.



Over and again, the same lessons have been learned from cost overruns, delays, construction defects and design errors and omissions. In each instance, significant legal expense is required to address the issues, when they arise. It is far better to prevent the problems at the outset by engaging construction counsel from the project's inception. Almost invariably, if construction counsel is involved from the beginning, litigation can be headed off.

Specifically, construction counsel will offer advice and assistance in the following areas:

Selection of the Architect and Construction Manager: There are many questions which can uniquely be posed by construction counsel: for example: what are the architect's or construction manager's track record on meeting project completion deadlines, living within project budgets, understanding environmental issues, solving project problems?

Assemble the Bid Package: Assist the owner in setting the strategy for and assembling the bid

package used in selecting contractors; deciding on whether to provide for bid alternates or to provide for a process to negotiate with the low bidder, pre award.

Choose the Project Delivery Method: Construction management, traditional design-bid-

Construction Law

PAGE 2

build, or design build. A broad range of practical experience with the various methods of project delivery is important.

Prepare the Design and Construction Contracts: Prepare each of the contracts for the project with the contractor, construction manager and the architect, each with consistent terms and with consistent methods of dispute resolution.

Facilitate the Setting of the Environmental Strategy: Construction counsel, with an environmental background can save the owner from expensive and embarrassing environmental impasses which stop the project midstream at devastating additional cost to the owner.

Establish Responsibility for Project Cost: Assisting the owner in understanding that there must be "bottom line" responsibility for the project cost. A prevalent owner, architect, construction manager stalemate is the issue of who is responsible for accurately assessing what it will cost to build the project. Standard industry contract forms most often leave this up in the air, thereby leaving the owner with more project than is in the budget.

Assure Compliance with Government Requirements: Dealing effectively with government regulations, laws and industry standards and guidelines is essential to a successful project.

Facilitate the Development of a Realistic Project Schedule: The construction attorney is in an excellent position to effectively urge focus and accuracy on this issue. There is a clear motive for falling short in the creating of a true schedule: financial projections are better served by a short schedule. The owner who can report that the project will be delivered for its intended use in 2 years (instead of 2 ½ years) will be better able to develop better projections to attract investors and lenders and with a short schedule, the owner can project lower general conditions expenses.

Project Team Realignment: Creating strategic realignments of project participants and sometimes even changing contractors or design professionals during the project is almost impossible without a well thought out legal strategy.

Establish Responsibility for Project Close Out: Project close out is too often neglected by the design and construction team and the owner is left with a project which does not effectively

function. Developing a legal strategy for close out, at the very outset of the project, assures focus and establishes the individuals within the design, construction and owner team who will be monitoring compliance with close out, warranty and training obligations. Construction counsel's technical knowledge, tenacity, sense of urgency and attention to detail can be instrumental in getting the job done.

What are the most important considerations in entering the owner-architect contract?

- The architect's role in making decisions and resolving disputes with contractors during the project must be spelled out clearly.
- Timing of architect action during the project must be clearly delineated; time limits must be set for the architect's review of shop drawings, revisions and RFI responses.

When it comes to running a long term capital program, the contract terms can make all of the difference!

- Spelling out the architect's role in reaching an estimate of the construction cost is important to avoid suffering overruns from the outset.
- The architect's errors and omissions insurance requirements must be spelled out and compliance verified.
- Clear delineation of responsibilities for each phase of the project must be made; spelling out the architect's role for planning, design and construction administration is essential.
- If a construction manager is being utilized, spell out the distinction in roles between architect and construction manager.

What are the essential clauses which must be included in the contractor's agreement to protect the owner?

- ✓ Spell out the schedule and the method and criterion for adjusting the schedule.
- ✓ Include a clause which precludes the contractor for recovering delay damages.

- ✓ Provide that the owner has the right to take away work from the contractor in the event of contractor default.
- ✓ Provide that the owner can terminate the contractor for convenience.
- ✓ Spell out a mold prevention and management plan to satisfy practical concerns and insurance requirements.
- ✓ Set a method for resolving changed conditions (i.e. conditions not anticipated by the parties when the contract was signed).
- ✓ Allow for the owner to terminate, suspend or accelerate without paying a significant price to do so.
- ✓ Clearly set out insurance requirements to eliminate gaps and overlaps.

ATTORNEY SPOTLIGHT .

Christopher J. Platt, Esq. drafts and negotiates contracts on significant construction projects for school districts, hotels, universities and commercial and residential real estate owners. Mr. Platt has been instrumental in resolving real estate development and construction disputes on a broad variety of projects. In an effort to achieve successful close-outs and avoid litigation and he has also been highly successful in trouble-shooting during projects. He has a well established track record in representing owners on large construction projects experiencing design errors and omissions and construction failures and .

Mr. Platt has presented "Lesson from Troubled School Construction Projects," in October 2004 and "School Construction Projects, A Formula for Success," in October 2005 at the New York State School Boards Association. He co-authored the articles "Limitations of Liability in Construction Site Safety and Construction Contract Claims," The Metropolitan Corporate Counsel, April 2000 and "Use of Non-Binding ADR in Environmental and Construction Disputes Through Teamwork with Outside Counsel," The Metropolitan Corporate Counsel, August 1999.

Mr. Platt received his JD from Widener University School of Law in 1998 and is admitted to the New York State Bar.