

# Osborn Legal Update

## Construction Contracts, Dispute Resolution, and the Ethics of Settlement: The Top 10 Strategic Tips for the Institutional Owner

Our firm represents institutional owners, including universities, school districts, healthcare centers, and others. On large construction projects, the following are our own top 10 strategic tips, which, if followed, go a long way toward producing high-quality construction that is built on time and within budget.

1. **Prepare Contracts in Advance.** The owner must have the construction manager agreement and the architect agreement prepared and coordinated in advance to maximize its control over the construction process.
2. **Uniform Dispute Resolution.** There must be a uniform dispute resolution method for the entire project – the last thing the owner needs is to be waging wars in multiple forums.
3. **Include Owner-Protective Clauses.** The essential clauses which protect the owner from time-related risks are the no damage for delay, acceleration, suspend work, and take away work clauses. These clauses give the owner greater control over the schedule.
4. **Be Realistic on the Value of Surety Bonds.** Surety bonds are a necessary evil, but we would advise you to proceed with caution when considering terminating a contractor or calling in a bond. Threatening termination and threatening to call in the bond are often the best leverage for getting the contractor back on track.
5. **Insist on Strict Notice of Claim Language.** It is important for the owner to insist on strict notice of claim language. While these clauses may appear adversarial, time and time again, we have seen that the effect of these clauses is to limit disputes and prevent litigation.
6. **Work with In House Counsel.** For mediation and litigation, thorough preparation of the client's claims and defenses is key. When possible, outside counsel must work with in-house counsel to develop strategies and marshal the witnesses and documents.
7. **Question Arbitration.** Arbitration may not be advisable anymore.
8. **Consider DRBs.** DRBs are the future of dispute resolution in the construction industry. Before considering a DRB, the institutional owner must carefully consider the DRB panelists, procedures and whether they want the DRB rulings be binding.
9. **Evaluative Mediation Works Best.** Evaluative mediation remains the preferred method. Empirical data support the proposition that cases are more likely to settle when mediators offer their views as to the merits of the case.
10. **Confirm in Writing that Mediation is Confidential.** There are no statutes in New York which provide that mediation is generally confidential. Therefore, it is essential that the parties to a mediation enter into a mediation agreement which protects the confidentiality of statements, writings and conduct in the mediation session.

### Recent Presentation

On March 1, 2016, John E. Osborn P.C. presented *Construction Contracts, Dispute Resolution and the Ethics of Settlement: A Strategic Primer for the Institutional Owner* in New York City. In the program, [John E. Osborn, Esq.](#) and [Daniel H. Crow, Esq.](#) provided strategic advice to owners in creating contracts and resolving disputes.

### Our Practice

John E. Osborn P.C. is a 10 lawyer firm founded in 1992. The Firm's practice concentrates in complex construction, environmental, real estate and commercial litigation and focuses on representing large property owners, construction managers, contractors and design professionals. The Firm's owner-clients include school districts, charter schools, colleges and universities, hotels, office buildings, apartment complexes, restaurants, nightclubs, healthcare facilities, nursing homes, arenas, museums, industrial properties, airports, auto dealers and commercial and residential developers. A thorough, long-term knowledge of the real estate, construction and environmental industries and design profession – together with comprehensive experience dealing with government entities – is critical to the Firm's success.

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