

Pro Bono – Law Firms

The Construction Lawyer's Pro Bono Commitment

John E. Osborn

JOHN E. OSBORN P.C.

Remember Gary Hobson, the Chicago tavern owner in the TV show *Early Edition*, who wakes up each morning, opens his apartment door and picks up the newspaper which shows him tomorrow's news. He then proceeds to go out and take steps to alter the catastrophic events shown in the paper. Often the change in conduct was indirect and staving off catastrophe was accomplished by "doing good" on the broader scale of things – it meant following basic principles.

In the case of Gary Hobson, he selflessly disrupted his daily life to help deserving people. In construction law we have chosen to offer our pro bono commitment to help deserving projects. We know the symptoms which will predictably lead to a project which suffers from failure in budget, quality and schedule. At project inception, we CAN predict when the headlines will read: "Project Put On Hold: As Cost Overruns Mount," "Façade Collapse Injures 14: Investigation Delays Project," "Architect Fired: Design Errors Lead to Expensive Redesign."

Since its inception, John E. Osborn P.C. has been the "owner's attorney." Our clients are school districts, hotels, universities, health care facilities, religious institutions, not for profits, restaurants, night clubs and mixed use facilities, as well as residential and commercial developers.

Over the years, we have chosen a number of specific projects to which to make a pro bono contribution which have included not for profit organizations renovating premises for a soup kitchen and undertaking the restoration of a soccer field.

We laud New York State Bar Association President Mark H. Alcott's plan to make the Empire State Counsel program the first and foremost initiative of his administration. In line with this initiative, John E. Osborn P.C. will set an agenda each year to use the firm's core practice skills – in construction and environmental law – to achieve goals which serve the greater good.

Contributing time, effort and funding is an important law firm commitment. Law firm involvement with creating affordable housing, combating or developing a cure for specific diseases, and fighting for civil rights are essential roles which cannot be effective without pro bono support. As construction attorneys, we are uniquely positioned to "see into the future" to assure success when these cause-oriented organizations build to house their own operations by teach-

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ing them the principles to follow to assure success and the pitfalls to avoid in staving off failure of their capital project.

Thorough due diligence is a critical component of project success. The good news is that there are many publicly minded companies and individuals who would like to donate property or a building; the bad news is that the donated property or building may have contaminated soil, underground gasoline tanks, or be filled with friable asbestos. In the case of an old building, however elegant, it may simply be a nightmare to renovate, prone to water intrusion bringing about mold or exorbitantly expensive to heat. Clearly, the planning stage must be well thought out. It is clear that even organizations who can count on abundant support for their capital plan from charitable gifts or endowments, fail to reach their goals and have delays and cutbacks in project scope because there has not been basic common sense at the planning and due diligence stage.

Principles Leading To A Successful Project

Based on years of construction litigation and arbitration and project troubleshooting, the following is the top ten list of ways in which construction counsel can assist an owner in setting an agenda for project success:

Selection of the Architect and Construction Manager: Assist the owner in selecting the architect and construction manager; there are many questions which can uniquely be posed by construction counsel relating to track records on dispute resolution and whether previous projects experienced delays, overruns, design errors or construction defects.

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: Facilitate the selection of the best method of project delivery: construction management, traditional design-bid-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 trade contractors, each with consistent terms and with consistent methods of dispute resolution.

Facilitate the Setting of the Environmental Strategy: In building from the ground up, a strategy for addressing potential site contamination, underground tanks, wetlands, hydrology and storm water and erosion control issues are frequently overlooked. In renovating, asbestos, lead-based paint, PCBs and mold issues are not adequately addressed. 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. It is our experience that it is often the construction attorney who has effectively "held the architect's and construction manager's feet to the fire" to force them to take ownership on this issue to arrive at solid construction cost numbers prior to finalizing the design and prior to bid.

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: Developing a realistic and credible schedule is often neglected. The construction attorney is in an excellent position to effectively urge focus and accuracy on this issue.

Project Team Realignment: When a project is severely off track, construction counsel is often in the best position to realign the project team, either through a slight shift in the project personnel or even by disengaging the architect, construction manager or one of the trade contractors.

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. The duration and scope of the warranties on equipment and construction are often disputed by contractors and vendors and the construction and design team, by themselves, tend not to be successful in protecting the owner's rights.

How To Avoid The 10 Most Deadly Construction Sins

Before embarking upon any type of construction or renovation project, it is important to examine the typical mistakes made by owners – public, private or not for profit. Without fail, one or more of the "Ten Most Deadly Construction Sins" will cause problems on the project. Avoiding each of the 10

most deadly construction sins is essential in producing a successful project. The Ten Most Deadly Construction Sins are as follows:

Lack of Focus Up Front: It is essential that the owner develop a "vision" for the project, at the inception, which is captured in written documents.

Failure to Choose the Best Method of Project Delivery: Does it make most sense to use design-bid-build, design/build, or construction management to manage the project and to allocate risk?

Failure to Assemble the Project Team: When it comes down to it, it is all about the people.

Failure to Coordinate the Project: Poor coordination allows defective work to be installed, designs not to fit together and ultimately diminishes quality and causes cost overruns and failure to deliver a project on time.

Failure to Establish a Method of Changing Scope: Although it is hard to believe, the most frequent reason that construction projects fall apart is over failure to clearly define the scope of work.

Failure to Understand (Truly Understand) Local Conditions: Local building codes and union requirements can add cost and cause delay if they are not appropriately researched and taken into account.

Accurate or Too Elaborate a Schedule or Lack of Accurate Updates: Easy to follow and easily updatable schedules are essential but are frequently lacking, even on well funded, private sector projects.

No Periodic Meetings; Failure to Keep Job Meeting Minutes: Fixing a time for the weekly meeting, and recording its results, are both important requisites for every project from large to small.

No Vision on Dispute Resolution: Creating an appropriate dispute resolution at the outset is essential.

Failure to Recognize that Quality Wins the Day: At the end of the day, capital projects last a long time and if quality is compromised, the end user will suffer for generations.

Conclusion

The criteria for being chosen for our pro bono program is that the entity must serve the greater good and be planning to undertake or be in the process of carrying out a construction or renovation project. The role which we far prefer is to be involved with the planning of the construction or renovation from the outset. We will also consider troubleshooting to get a failed or troubled construction project back on track or in some instances to assist with litigation to recover costs attributable to errors and omissions by a design professional or construction defects on the part of a trade contractor. Like the protagonist in *Early Edition*, we would rather see ahead and stave off the harm (through advance planning) rather than picking up the pieces after the damage has been done (through troubleshooting or litigation).

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