

# OSBORN

## **What Corporate Counsel Needs To Know About Construction And Renovation; The Ten Most Deadly Construction Sins: How To Avoid Them**

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Our law firm serves as counsel to owners, contractors, design professionals and others in litigating and resolving complex construction and environmental disputes. Although we would prefer to be hired by a client before trouble arises, very often our first introduction to a client is after a suit has already been commenced relating to the building of a courthouse, hotel, hospital, school or university building, bridge, roadway, wastewater plant or other facility. By the time we meet the client, the problems have been defined and the lines have been drawn.

Always, there are engineering, architectural, surety, insurance, building code, environmental or technology issues which must be thoroughly analyzed and mastered. There are contracts, plans, specifications, shop drawings and years of correspondence and job meeting minutes to wade through. And there are the people who ran the project who need to be interviewed and evaluated.

Quite often it is unclear to the people who worked on the project from day to day what went wrong.

The detective work which ensues is always challenging, intriguing, and rewarding. Theories and suspects are presented and dismissed until the "truth" of what went wrong and the identification of culprits or "bad guys" becomes clear.

Reaching an objective view is both difficult and essential. Admitting to a basic "construction sin" is difficult for any project participant, but identifying and addressing the particular shortcoming on the part of your own client, early on, can greatly strengthen the case and allow for the development of a strategy to de-emphasize the sin. Of course, it would have been better to have avoided the problem in the first place, but "fessing up" to a shortcoming, early on, can allow the client to avoid having the whole case destroyed due to lack of credibility. The worst possible outcome is for the attorney to learn the client's "sin" after the case has already begun: at a deposition of the client or, worse yet, at trial.

We try to identify the theme of the matter at the first interview with the client. What really went wrong here? Who is objective and credible and who is not? What is the "chemistry" among the people who managed and built the project? What is the specific expertise of each of these people?

Without fail, one or more of the "Ten Most Deadly Construction Sins" caused the problem; it is just a matter of finding which ones early on in the dispute resolution process. Better yet, read this list before the next project and be assured that if each and every sin is avoided you will have a better project and will be able to resolve all disputes, incrementally, and without a lot of pain and expense, during the project.

## What Are the 10 Most Deadly Construction Sins?

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1. *Lack of Focus Up Front.*

Even before the Architect is chosen, it is essential that the needs, the budget and the "vision" for the project be captured in written documents. Too often, the owner charges ahead without a clear map. Operating without a map assures greater likelihood that a project will be cut back, delayed for an owner decision or abandoned mid-stream. An example is the school district which fails to recognize difficult rock excavation in a budget and has to cut back on the project to obtain funds to cover it. Earlier recognition would have allowed for an increase in the bond issue or at least some flexibility on where to cut. A detailed feasibility study with a written plan for implementation, including a well researched budget, are essential. Failing to *really* focus up front will leave a string of dead carcasses in its wake: when the project lacks adequate funding, the architect's fee may go unfunded or the whole project may be abandoned.

2. *Failure to Choose the Best Method of Project Delivery.*

Specific methods of project delivery have gained wide acclaim: construction management had its day in the sun and design build has been used extensively in recent years, sometimes on projects where other methods may have been more appropriate. Too often, too little focus goes into what method will be most economical, expeditious and effective and therefore, it is frequent that the most effective method of project delivery is not chosen. Cost effectiveness often clashes with aesthetics. An early and clear vision of core goals reflecting the input of the entire project team leads to choice of the right delivery method.

3. *Failure to Assemble the Right Project Team.*

Alignment of skills, levels of experience and personalities is essential. Partnering, at the earliest stages, has been used to make sure that the team fits together. A "retreat" attended by all participants before the project begins often assures the fit or gives the opportunity for a realignment. Litigation often reveals that distrust, rivalry or simple incompatibility among participants on a project destroys quality and progress, and has significant economic impact.

4. *Failure to Coordinate the Project Team.*

Neither inadequate nor excessive levels of communication are acceptable. In order to ensure that each decision does not become a misadventure, effective communication is essential. This may also be a time to rely on counsel. Poor coordination allows defective work to be installed, for coordination of drawings to be chaotic, and encourages the writing of self-serving letters which protest the contents of job meeting minutes – this is a self-generating process because once self-serving letters are written they require a response. At the end of the project, when faced with a lot of self-serving letters, it is hard to tell what really went occurred. It is critical for the owner to keep objective records showing what really happened on a daily basis. Don't put a spin on the facts and do not editorialize – if you do, the records you keep will not be usable later in court. If they are objectively kept (and remember the owner has the best resources to keep records) these records can be used to prove your case.

5. Failure to Provide a Method of Changing the Scope, Price or Schedule.

It would seem basic that both the owner and contractor need to confirm the scope of work and the price. It is hard to believe, but the basic ground rules are often neglected. As practical experience shows, the most hotly contested issues in construction contract litigation relate to determining scope and price.

6. Failure to Understand (Truly Understand) Local Conditions.

Unions, hours of work and availability of materials differ widely with each locality. With investment in real estate becoming national and international, failure to examine local conditions has become a common pitfall. An international hotel investor may purchase a hotel in New York City having paid a price and set a budget which does not take into account union requirements and the cost differential of renovating in New York, which factors can annually add millions of dollars to the budget.

7. No Accurate Schedule or Too Elaborate a Schedule or Lack of Accurate Updates.

Easy to follow and easily updatable schedules are essential. Elaborate schedules have drawbacks because they cannot be readily understood or updated. A simple bar chart, showing the work of each trade, is often all you need. Prompt and realistic adjustments in schedule allow for acceleration at an early stage. Waiting takes away flexibility and assures that the project will not be finished on time. Refusal to adjust a schedule often hardens the parties' positions and leads to litigation

8. No Periodic Meetings; Failure to Keep Job Meeting Minutes.

Fixing a time for the weekly meeting is an important requisite for every project from small to large. Meeting minutes are binding on the parties and can be used in court. Job meeting minutes are more credible than correspondence, as job meeting minutes reflect meetings when all of the most important participants are present and have an opportunity to speak up or to object to the minutes, in writing, if they contain inaccurate information.

9. No Vision on Dispute Resolution

Dispute resolution needs focus at the time all of the parties to the project first get together. So often it is not until a dispute breaks out at the end of the project that the parties even read the dispute resolution clause. The successful use of mediation to solve construction disputes has been impressive. Once the mediation is held, if the case is not settled, the parties would then have prompt resort to the courts.

10. Failure to Recognize that Quality Wins the Day.

With an emphasis on value engineering and, on price, the focus on quality can be lost. Quality of communication and of the project team members brings the project in on time and on budget - there is no easy alternative.

## CONCLUSION

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The owner's continuous focus leads to success in project delivery. This means that the owner must thoroughly know the project from inception, choose the right advisers, prepare the right contracts, set the right ground rules for dispute resolution, pick the right project team, and establish quality and good candid communications.