

**Legal Aspects in Project Delivery- Indemnification, Exculpatory Clauses,
Mediation & Dispute Resolution**

Presented at the NYIEC program, “Mitigating Construction Risks”

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2-3 PM

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We are entering an era where owners are increasingly aware of the need to control costs. Owners have tried many approaches to address this issue. There are several options available to attorneys to both mitigate risk at the outset and control costs when dealing with a dispute.

1. The owner can exculpate itself through the use of exculpatory clauses such as the no damage for delay clause traditionally incorporated into public sector construction contracts or by broad indemnification clauses of questionable fairness and insurability. This may be seen to limit claims against the owner.
2. The owner can recognize that incorporating broad indemnity and exculpatory clauses deter some quality bidders and encourages bidders to add a contingency to the bid price – to attract better quality bidders and to obtain better pricing – public sector entities may allow damages for delay and narrow the indemnity obligations on the contractors and design professionals.
3. Owners recognize that alternative methods of project delivery are worth exploring: Public Private Partnerships and Design Build are often seen as tremendously effective at saving owners time and money and allowing for more construction value.
4. Owners also recognize that the Scaffold Law inflates costs for every construction project in New York State.
5. An owner not relying on indemnity and exculpatory clauses knows that claims will be made. These claims will not be subject to legal defenses as in the past and may even involve claims against the design professional or owner’s representative. These claims are better resolved equitably in mediation or even through a dispute resolution board, set up before the project begins.
6. Opting for mediation and arbitration as an alternative to the court system is considered by many to be an effective means of mitigating, or even completely avoiding, the risks of litigation.
 - a. Use of a skilled mediator can often improve the prospects for settlement, and arbitration can provide for more streamlined and cost effective dispute resolution by industry professionals likely to understand the subject matter of the claims before them.

- b. Mediating and/or arbitrating disputes may, however, present certain unique challenges in the public sector, which can affect both the actual and perceived usefulness of ADR processes as a means of managing and reducing a public's owner's risk.
- c. Also, where an owner will "benefit" from strict application of contract terms, it might be exposed to greater risk in a dispute resolution forum that values equity over contract enforcement.

BIOS:

John E. ("Jack") Osborn is the managing partner of John E. Osborn P.C., a 12 lawyer firm concentrating in complex construction, environmental, real estate law and litigation and serves as the General Counsel to the GNYCUC. The firm's clients include hotels, college and universities, school districts, charter schools, healthcare institutions, construction managers as well as commercial and residential developers. He has over 30 years of experience in litigating complex commercial disputes relating to construction, real estate, corporate and environmental issues. Mr. Osborn has tried multimillion dollar construction cases and has represented owners on multi-hundred million dollar projects which are among the largest and "highest profile" in the metropolitan area. He is also one of New York State's premiere strategists and problem solvers in negotiating contracts and advising companies on business, government relations and commercial matters. He is an adjunct faculty member at NYU's Preston Robert Tisch Center for Hospitality, Tourism and Sports Management and serves as General Counsel to the Hotel Engineers Association of New York, Inc. ("HEANY").

Bettina Quintas is an Executive Agency Counsel with the New York City Transit Authority, handling construction and commercial litigation and Americans with Disabilities Act issues for the agency.

Prior to joining NYCTA, she was with Parsons Brinkerhoff's New York office where she helped establish a Capital Asset Survey and Management Division. She left PB to draft and negotiate the construction management and architect/engineer contracts for the construction of Terminal One at Kennedy Airport representing a consortium of four airlines. Prior to joining PB, she clerked for Postner & Rubin, a construction law firm in New York City.

Ms. Quintas is an Adjunct Professor in Columbia University's Law School, and School of Engineering and Applied Science, where she teaches an interdisciplinary course focusing on construction industry law. She has lectured for the American Society of Civil Engineers, Practising Law Institute and other societies and universities on construction contract documents, construction claims, surety law, professional liability, alternative dispute resolution, and government contract law.