

# *Atlantic Coastal Construction Journal*

Cover Focus:

**John Turner Consulting**

*Operating throughout  
New England  
and New York*



Published by: **Construction Management Institute**: A Leading Voice on Construction Management Consulting in: Infrastructure Construction, Cross Laminated Timber Design and Construction, Transportation Industry, the Renewable Energy, and Biomass Industry

### **Topics Covered in this Edition:**

Construction Risk Management: Owners and Funders Perspectives - Pavement Management Consulting - Construction Engineering Inspections - Special Inspections - Materials Testing and Laboratory Service - Civil Engineering Support Services

March/April Edition - 2023

# Atlantic Coastal Construction **JOURNAL**

## **PUBLISHER**

**Construction Management  
Institute of Maine, Inc.  
Mark House Court  
Belfast, Maine 04915  
TEL (207) 338-6307  
mainecmi@gmail.com**

## **CONTRIBUTING WRITERS**

**T. S. Laurent  
Terrance Manning  
A. T. House, EJD  
Paul Wills Plante  
Moran Cresa**

**Industry Affiliations -  
Associations and  
Alliances  
Page 21**



## **COVER FOCUS**

**John Turner Consulting**  
Operating Throughout New  
England and New York



## **FEATURE ARTICLES**

**Advisors and Alternative  
Dispute Resolution  
Consultants to Industry: Pg.2**

**Construction Risk  
Management: Pg. 3**  
*- Owners and Funders  
Perspectives*

**Owner's representatives  
reduce risk and increase the  
likely success: Pg. 10**

**Mitigating of Risks on a  
Construction Project Pg. 12**

**Advantages of Mediation in a  
Construction Dispute Pg. 16**

**Construction Mediation:  
Tips for Success Pg. 16**

## **Advisors and Alternative Dispute Resolution Consultants to Industry: Supporting Clients from Concept to Turn-Key**

By combining 40+ years of executive management expertise with a law degree, focused on business development, I offer a multi-disciplined, consulting service to associates and clients. I serve all with the utmost Skill, Integrity, & Responsibility. My associates and clients are owners/ developers, construction managers, general contractors, specialty contractors or subcontractors, and vendors. My focus is on project development and management, facilitation of strategic management and finance processes to mitigate controversies, and avoidance of disputes. In defense of potential claims, I have provided professional expert witness testimony and support to law firms in furtherance of their reaching equitable resolutions to project-related controversies or disputes. Our expertise encompasses multi-facets of projects from conceptual planning - to close out or turn-key. I provide clients with resolution advisory services through negotiation or mediation, to expert witness investigations, and reports to and including support and assistance to our client's law firm during arbitration and litigation. Our Advisory Services are available to Client/Associates 24/7 - Register with us FREE and you can contact us to ask or discuss any issue. Speak with us in strict confidence - FREE

## **Construction Management Institute of Maine, Inc.**



**Website: <https://www.arthurhouse.com/>**

**Email: [advisor@arthurhouse.com](mailto:advisor@arthurhouse.com)**

**Phone: 207-338-6307**

# Construction Risk Management: Owners and Funders Perspectives

*By; T. S. Laurent*

Construction projects are beset with fundamental risks. In the construction industry the doctrine of risk mitigation is primarily attendant to construction managers, general contractors, and the architectural/engineering fields – “Providers”. A refined analysis of a projects’ fiduciary risk management should also focus on the funding sources of construction opportunities, without which - no project moves forward without the “Funder”.

Private construction, projects come to fruition when owners - developers, investors, and other stakeholders acquire funding through private sources; absent funding there is no construction. The funding predominantly originates from private individuals, investors, lenders, and from institutional sources. It befits parties to construction services to be mindful of owners’ interests and concerns; after all, they provide the resources and call the ball. Five primary sectors within the construction industry include residential, commercial, heavy civil, industrial, and environmental construction.

Public construction largely consists of public building construction of (e.g., transportation, bridges, railroads, streets, and highways), construction for public services (e.g., power facilities, water supply, sewage, and waste disposal), and (e.g., as well as for education and health care). This paper observes projects, in the State of Maine, in the categories of transportation, (e.g., bridges, railroads, streets, highways, and airport construction, rejuvenation, or reconstruction).

With particular attention paid specifically to public construction, John Turner Consulting, “JTC” is an Engineering consultant domiciled in Dover, New Hampshire. While JTC is led by a professional engineering staff licensed and operating in all New England States, and the State of New York; Maine is the focus of this paper.



On January 18, 2022, Governor Janet Mills presented the Maine Department of Transportation (MaineDOT), the 2022 Edition of a Work Plan for the three calendar years 2022, 2023, and 2024, which included capital projects and programs, maintenance and operations activities, planning initiatives, and administrative functions. The plan contains 2,316 individual work items with a total value of \$3.17 billion. That Work Plan consisted principally of work to be delivered or coordinated through MaineDOT, but it also includes funding and work by other transportation partners, including airports and transit agencies.

In late 2021, the federal Bipartisan Infrastructure Law (BIL) became law. As pointed out in the Work Plan announcement letter, the most common question MaineDOT is asked now is “What are you going to do with all that money?” Considering approximately 70% of Maine voters approved of necessary funding, and additional transportation bonds; and taxpayers recognize, “the tangible, foundational value that transportation has to the safety, economic opportunity, and quality of life of all Maine people,” they also want to know that there is a mechanism in place that holds all parties answerable, for not only where that money is going, but more important they want to know that there is a fiduciary accountability as to how it is spent and whether there is a mechanism in place to detect and avoid any waste in that spending.

Arising from the Work Plan budget of \$3.17 billion for the (3-year) term, approximately 57% of those funds, or roughly \$1.8 billion, are allocated to “Highway and Bridge Capital” projects. Additionally, roughly another 17% or \$535 million is dedicated to “Highway and Bridge Operations.” Together the state-wide budget over the three years, for these two sectors, approximates 74% or about \$2.3 billion (a three-year average of \$767 million) of the overall budget.



## **Highway and Bridge Capital Projects**

The most heavily used component of Maine’s transportation system is its 8,800-mile, state-jurisdiction highway network. This three-year Work Plan directs nearly \$1.8 billion to highway and bridge capital projects, including the following:

- o 235 bridge projects – estimated cost: \$631 million.
- o 115 miles of highway construction and rehabilitation – estimated cost: \$155 million.
- o 353 highway safety and spot improvements – estimated cost: \$237 million.
- o 1,057 miles of preservation paving – estimated cost: \$462 million.
- o 2,162 miles of Light Capital Paving (LCP) – estimated cost: \$111 million.

*Source: Maine Department of Transportation (MaineDOT), Three-Year Work Plan, 2022 Edition, Published January 2022, Accessed at: <https://www.scribd.com/document/553673578/Maine-DOT-Work-Plan>*

## Highway and Bridge Operations

Highway and bridge maintenance and operations work accounts for \$535 million in this Work Plan, while three-year annual averages for major maintenance and operations work include:

- o \$10.3 million in bridge and structural maintenance.
- o \$5.2 million in bridge and other infrastructure inspections and inventory.
- o \$15.5 million in custodial maintenance.
- o \$22.4 million in drainage maintenance.
- o \$6.6 million in operational and safety maintenance.
- o \$9.9 million in surface and base maintenance.
- o \$46.4 million in winter maintenance.

*Source: Maine Department of Transportation (MaineDOT), Three-Year Work Plan, 2022 Edition, Published January 2022, Accessed at: <https://www.scribd.com/document/553673578/Maine-DOT-Work-Plan>*

Independent oversight safeguards Public Funds (e.g., MaineDOT, Municipalities, other Public Projects, and Taxpayers) by monitoring projects from award of contracts to closeout. From the government or state level, there is sufficient professional oversight that ensures: adequate competition that is fair and equitable to all contractors and vendors; funds have been acquired and reserved for the completion of projects; there is a mechanism in place to avoid greater spending than authorized; and all contractors, subcontractors, and vendors have the capacity to fulfill their contracts responsibly.

## **Pavement Management Consulting**

Considerable savings for taxpayers can be achieved with continuous project oversight, before and after the project is awarded and throughout the entire construction process. With a generalized focus placed on “Highway and Bridge Capital Projects” and “Highway and Bridge Operations,” John Turner Consulting, delivers comprehensive quality assurance and quality control services to engineers, state agencies, municipalities, and contractors. Their knowledge in pavement structural design, material gradation, existing pavement evaluation and recommendation, has led many private contractors, engineering firms, commercial development companies, cities, and towns across the Northeast to turn to John Turner Consulting for their pavement evaluation & management needs.

John Turner Consulting provides full-service pavement management and investigation services, including visual evaluation/condition assessments, supplemented with pavement forensics/investigations and AMRL-certified laboratory testing, to determine the most cost-effective design for reconstruction. They also manage the entire process, from preparing specifications and prescreening bidders, to assisting with bidding/award process and overseeing construction.

Their professional staff has extensive experience in projects providing Quality Assurance (QA) and Quality Control (QC) services to engineers, state agencies, municipalities, and contractors alike. JTC employs an expert staff of Inspectors, Technicians, and laboratory services for both field and plant needs. Staff is continually trained on latest technologies and industry movements through the NorthEast Transportation Training & Certification Program, The Asphalt Institute, Massachusetts Aggregate Asphalt Producers Association, Maine Asphalt Pavement Association, and continually seeking more.

Staff experience includes varying types of mix designs, using wide ranges of admixtures while controlling the product and implement changes as projects require, whether at the production facility or at the point of placement. A project profile includes Quality Assurance Testing and Inspection throughout New Hampshire, Maine, Rhode Island, Vermont, Massachusetts, and Connecticut. Additionally, John Turner Consulting provides the same services in all these regions for the Federal Aviation Administration (FAA) as well.

## **Construction Engineering and Inspections**

Turner Consulting's CE&I team is as familiar with the administrative specifications governing construction contracts as they are the technical specifications. Most important among these administrative functions is financial management. This scope includes working on the Owner's behalf to manage, track, and verify the bid items and quantities during construction.

Their significant strength is being able not only to perform the project management and permitting duties in a professional and comprehensive manner, but also supplement that with experienced engineers and project managers with practical onsite construction experience. A key component is their broad range of construction related services includes resident engineering and construction inspection.

Construction professionals work closely with owners, design professionals, and construction contractors to ensure quality projects given the challenges of schedule, budget, safety, and other constraints. Their resident engineering/construction inspection staff safeguards compliance with design documents, performs quality field inspections and maintains excellent daily, weekly, and monthly project records.

## **Special Inspections**

Special Inspections is the monitoring of the materials and workmanship that are critical to the integrity of a building structure. The International Building Code (IBC) established special inspection protocol and requires Structural Tests and Special Inspections for materials, installation, fabrication, erection and/or placement of components and connections.







## **Materials Testing and Laboratory Services**

Each member of the JTC field and laboratory staff has qualified for one or more programs, including:

- o American Concrete Institute (ACI)
- o International Code Council (ICC)
- o National Fire Protection Association (NFPA)
- o National Institute for Certification in Engineering Technologies (NICET)
- o Northeast Transportation Technician Certification Program (NETTCP)
- o Pre-cast/Prestressed Concrete Institute (PCI)
- o Post Tensioning Inspectors
- o Structural Steel: Ultrasonic, Mag Particle, Dye-Penetrant and Certified Welding Inspectors
- o Troxler Nuclear Density Gauge

## **Civil Engineering Support Services Group**

JTC provides design and drafting services to their clients in the civil engineering sector to aid in timely project delivery during times of increased workload. Their Civil Support Services team uses the latest Autodesk Civil 3D design software to produce three-dimensional site models and plan sets, adapting each project to client-specific CAD standards and expectations of presentation.

Their Civil Support Services team will contribute to your project success by aiding in the initial concept and feasibility design development or join the team in the final stages of project delivery to accelerate timelines. Our staff brings together diverse project experience and skills allowing us to offer a wide range of support services.

These special inspection processes require specific expertise to determine compliance with approved construction documents and referenced standards. Turner Consulting is a special inspections and testing firm recognized through national accreditation and validation regularly conducting tests and inspections throughout New England. Its role includes ensuring the Schedule of Special Inspections is strictly adhered to and that all required inspections are completed. They maintain a punchlist and ensure that re-inspections are performed prior to signing off on any area of work. Resident engineers provide interim reports as well as a final signoff at project completion.

Their staff and employees hold specific certifications that virtually no other firms have in New England. These certifications include International Code Council (ICC) for reinforced concrete special inspector, pre-stress concrete special inspector, spray-applied fireproofing, fire-stopping, and structural masonry.

John Turner Consulting has complete laboratory facilities for the testing and evaluation of concrete, asphalt, masonry, soils, fireproofing, and steel, as well as miscellaneous materials such as wood. Their laboratories meet the requirements of ASTM C1077 and E329 and have the following credentials:

- o Successfully inspected by the Cement and Concrete Reference Laboratory (CCRL)
- o Successfully inspected by Northeast Transportation Technician Certification Program (NETTCP)
- o Accredited by the American Association of State and Highway Transportation Officials (AASHTO)
- o Licensed as a Concrete Testing Laboratory by the Commonwealth of Massachusetts Board of Building Regulations and Standards
- o Validated by the U.S. Army Corps of Engineers
- o Accredited by the National Voluntary Laboratory Accreditation Program (NVLAP Lab Code 600246-0)
- o MassDOT approved laboratory for ASR [Alkali-Silica Reactivity Testing—AASHTO T 303 (modified)/ ASTM C1567] (JTC is part of the select list of laboratories approved in the Northeast)



## **Owner's representatives reduce risk and increase the likely success of public and private projects**

*By: Paul Wills Plante and Moran Cresa*

Public and Private projects require a great deal of attention to be successful. The many pitfalls can each be costly — or potentially derail the project. Hiring an owner's representative eliminates uncertainties by engaging experienced leadership to increase the predictability of the project's performance and ultimate outcome.

Owner's representatives manage projects from concept through completion. They understand what questions to ask, what information needs to be gathered, and how to keep projects on time and on budget.

We have the ability to develop dependably accurate cost models so Municipalities, State Agencies, and Investors or Lenders can make informed decisions before they set a project in motion; otherwise, they might plan for months only to find out a project is not feasible.

It starts with the strategic planning and project feasibility. An experienced owner's representative or project consultant- can help develop the right business model and collect outside data, such as a develop demand analysis, and perform demographic and market research to help create the financial architecture of the project and understand its purpose. The owner's representative also develops schedules and budgets that are both reasonable and attainable.

In the schedule, there are components beyond physical construction activities, such as regulatory requirements, entitlement time frames, move planning, and other milestones.

Owner's representatives also handle the team selection process, which is criteria based, to make sure you have the right designers and construction firms. Part of that process is working for tough, but fair, contract language that appropriately transfers the risk to those various entities, thus mitigating the owner's risk.

A strong owner's representative is vigilant in the budget and schedule management and oversight. Also, through the use of technology, he or she should offer real-time reporting and access to information at the click of a button to help owners understand the key indicators of the project. Additionally, through the process there's always a need to have the project owner's internal resources engaged in the projects. Experienced owner's representatives know when to engage these people and when not to in order to keep staff on their mission (and not engage them unnecessarily throughout the process). It's important to bring a strong end to the project, including financial and closeout activities, with diligent oversight.

Usually there is blended experience within a team. Someone may have more experience on the project design and planning side or on the physical construction and technical building side. That's typically supplemented with some financial experience and understanding of how to look at a business plan and make sure that the goals are obtainable and the assumptions made are correct. You have to have a little experience in a lot of things and understand when you need outside resources to support you for the occasional deeper dives required throughout the project's life cycle.

Typically one owner's representative serves as a project's lead, but he or she is supported by a multidisciplinary team of experts who are involved at the appropriate time.



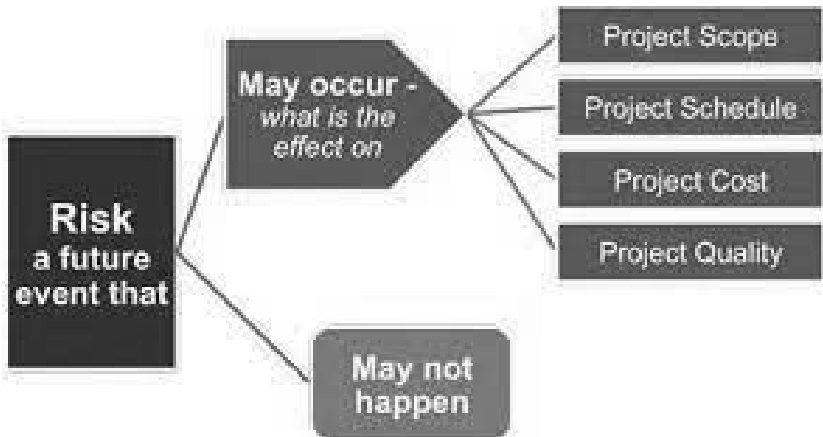
Organizations may not have the resources to handle all the tasks of a large construction project. There are numerous risks associated with any project, such as not meeting financial expectations, running late or over budget, or having mistakes made along the way that add costs. Permitting and regulatory requirements are also part of the day-to-day responsibilities of the project manager.

A lot of projects could fail because you had the right business plan and budget but the wrong team. Some people who have never been through the process might not know how to gather and analyze the appropriate data to select one. You could have good intentions at the outset but the wrong expertise. It's not always a cost-based selection — it's really criteria-based, which involves costs, experience, and the team that's put in place.

One client, for example, had started a major capital project on its own. About a third of the way through, it asked Plante Moran Cresa to look at where it was and perform an analysis. We found the project was behind schedule and significantly over budget. We developed a recommendation and recovery plan, and then implemented it. The project was completed in the originally defined time frame and for less than their original budget.

At the end of a project, without some oversight, there's a tendency for things to linger: a few open issues don't get addressed properly, paperwork and lien exposure is not adequately mitigated, financial closeout doesn't happen on the appropriate timeline. The longer these stay open, the greater the financial risk and the more obstacles exist to meeting the original expectations.

Also, when you're moving into a new facility it's a major undertaking with a lot of pieces and parts that need to be planned for, and events need to occur in a timely and orderly fashion to not disrupt business operation. **PPMC**



## Mitigating of Risks on a Construction Project

*By: Terrance Manning*

Construction projects require a great deal of careful planning. Despite this, there are many ways that a project can go wrong. Identifying, analyzing, and managing risks are essential for the feasibility of a project. There must be procedures in place that help you identify risk early on.

Some risks are apparent, while other risks might not be. In either case, having a risk mitigation strategy prepares the contractor in case of an unforeseen circumstance. As a contractor, your ability to manage risks is vital for the successful completion of a project.

The following describes a list of risks that you might face and how to mitigate them.



## 1. Inadequate budget

Budget is one of the most sensitive topics and also the most discussed topic on a construction project. Miscalculation of cost, budget shortfalls, and waste of material are some reasons that can lead to budget shortfalls.

Mitigation: Construction project management software plans your budget while keeping subcontractors in mind—helping you with finances as well. With such software, you can track project deadlines and generate invoices. It also assists in allocating resources to employees. You can avoid budget shortfalls by distributing the budget using management software.

## 2. Poor scheduling

One of the reasons for project delays is poor scheduling by the manager. Not accounting for the smallest of actions can cause long delays. It shows a lack of communication between subcontractors, employees, and the project manager. As a result, frustration arises as work gets delayed.

Mitigation: Use software tools for scheduling and making a project timeline. Share the project timeline with subcontractors and your employees. The latest construction management tools also have cloud accessibility. You can access the project timeline anywhere and on any device you want. Also, have a plan B in place in case of a schedule conflict.

### 3. Safety Hazards

A work environment with safety hazards can lead to injuries and—in extreme cases—mortalities. Safety hazards can lead to employee resentment, lack of quality, and delays. As a contractor, you must ensure a safe working environment for your employees.

Mitigation: To mitigate this risk, train the laborers and the employees on safety management. Moreover, all safety protocols should be strictly adhered to and shared with the employees.

### 4. Miscommunication

Miscommunication can cause disputes within the construction team and with the client as well. Disputes between subcontractors and stakeholders in a construction project are not uncommon. Not only does it lead to a bad work environment, but it can also lead to unwarranted delays and a lack of quality work.

Mitigation: To avoid miscommunication and disputes, make sure to document everything. Document the meetings that you have with subcontractors and the client. Moreover, keep all the employees on the same page through regular communication via email, calls, and text messages. Share the project timeline with subcontractors so that they know what tasks require attention.

### 5. Unforeseen Circumstances

Unforeseen circumstances can throw the project timeline out of the window. Accidents, bad weather, and other unexpected risks at a construction site add to the stress level of a contractor and construction manager.

Mitigation: While a construction manager cannot avoid all the risks, there are some ways to be prepared for it. By staying ahead (of the schedule), one can reduce the impact of a risk. Likewise, keep an extra budget for dealing with risks and unexpected circumstances. Check weather forecasts for the duration of the project.

## Conclusion

Risks can cause increased budgets, delays, and a toxic work environment. A risk management procedure in place that identifies, transfers, and mitigates the risk is essential for successful project completion. As a construction manager, deal with risks on the basis of their probability and impact. Deal with high probability risks first and then deal with low probability risk.

*TM*  
14

# **Alternative Dispute Resolution: Mediation can Resolve Construction Disputes**

*By: Arthur House, EJD*

## **Using Mediation to Resolve Construction Disputes:**

The life-cycle of any significant Construction project can take years to complete, encompass tiers of general contractors and subcontractors, and engage hundreds of construction professional and employees. Professional conflict resolution is essential in the construction industry because it helps maintain relationships between the parties who must continue to work together toward completion of a project that may have come to a stalemate as to the understanding and or enforceability of a contract or agreement.

Often, the parties are bound to terms within their contract that do not allow them to stop work when a conflict arises. Mediation can assure the work can and will continue, while maintaining a nonadversarial relationship on a project, where the parties wish to preserve their relationship for future projects.

## **Disputes Are Common on Construction Projects:**

Parties, in a conflict, can turn to mediation to minimize disputes and mitigate costs, in financial and scheduling terms, arising from conflicts that might result in costly and time-consuming litigation and arbitration. Mediation is appealing because a construction dispute can be mediated in lieu of and even while litigation or arbitration is either contemplated or ongoing while the project is still being constructed.

## **Mediation Basics**

Mediation is a private dispute resolution process in which the parties work with a mediator to negotiate a settlement to their dispute. The mediator is a neutral party who has no vested interest in the outcome and is trained to facilitate a settlement between the parties. In addition, for construction disputes the mediator usually has experience in the construction industry.

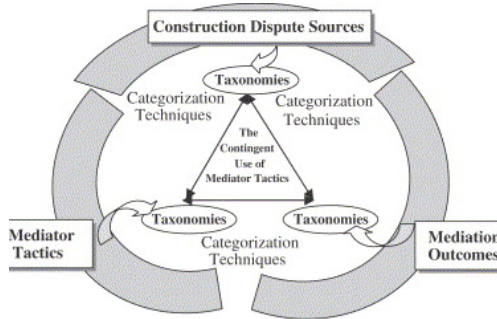
A mediator cannot bind the parties to any outcome. In mediation, the parties are the decision makers and only they can reach a mutually satisfactory agreement and find solutions that facilitate completion of a project still under construction or preserve relationships for future construction projects. This contrasts with litigation and arbitration, where control of the dispute is relinquished to a court or arbitrator that has no interest in facilitating timely completion of a project or preserving relationships.



## Advantages of Mediation in a Construction Dispute

Mediation is faster and less expensive than litigation or arbitration. Mediation sessions usually take no more than a day or two, compared to a court trial or arbitration hearing that can take weeks or months. Mediation can be scheduled as soon as the parties are ready, while arbitration hearings and court trials often take years to be scheduled. This time advantage is particularly important when the mediation takes place while a project is still under construction because resolution of disputes clears the way for more cooperation between the project participants.

**EJD**



## Construction Mediation: Tips for Success

***Construction projects often produce disputes. Mediation can help resolve such disputes, quickly, confidentially, and efficiently. This Article offers ten tips for success in mediation.***

*By: Arthur House, EJD*

### 1. Get What You Need:

Forms of mediation vary greatly, from facilitative (with the mediator encouraging parties to consider the benefits of settlement, and creative alternatives for dispute resolution), to evaluative (with the mediator providing a non-binding assessment of the strengths and weaknesses of positions, to help parties rationally evaluate the benefits of settlement), and a variety of other forms. Mediators, moreover, vary, from subject matter experts (including non-lawyer professionals) to experts in dispute resolution (including ex-judges and highly experienced counsel). Get a process, and a mediator, that is right for your dispute. Even if the process is not specified in a contract, or if mediation is directed by a court, you still have the ability to shape the process (on agreement with the adversary). Since you share an interest in ensuring that the process succeeds, early discussion with adversaries about the needs of the dispute should be a high priority.

## **2. Prepare For The Mediation:**

Successful mediation requires preparation. Make sure that the appropriate decision-makers are in the room; that essential information (necessary to evaluate the dispute) has been exchanged; and that the mediator is well-informed about the nature of the dispute, the history of prior attempts to resolve it, and any roadblocks or opportunities that may affect the conduct of the mediation.

## **3. Foster Cooperation:**

Nobody “wins” a mediation by steam-rolling an adverse party. They win by encouraging the adversary to see the wisdom of a fair resolution of the dispute. This is a special form of advocacy; it starts with cooperation. Discussions of the process, the schedule, the venue and the pre-conditions (information exchange, briefing of the mediator)—all can offer opportunities for parties to demonstrate that cooperation and rational discussion about common interests can produce beneficial results. All-or-nothing (“my way or the highway”) positioning may work in some situations, but not in mediation.

## **4. Prepare To Persuade The Adversary:**

Mediation offers a unique opportunity to speak directly to an adversary and its decision-makers. In the exchange of pre-mediation memoranda, and especially in the opening statements that commonly begin the mediation session, focus on what the adversary needs to know (and consider) to reach the conclusion that a fair settlement is appropriate in this dispute. The critical audience is the adversary, not the mediator. Focus on the strengths of your position, and problems in the adversary’s position. Remind the adversary of the risks and costs of discovery and trial. Avoid bluster and name-calling. Joe Friday had it right: “Just the facts, ma’am.”

## **5. Seek Agreement On The Framework For Discussions:**

Construction disputes often present an array of sub-issues, which may roll up into a “big picture” question (i.e., which side writes the other side a check). On occasion, parties may wish to focus the mediation on that overall question. But, more commonly, some discussion of individual issues occurs first. Talk to the adversary (and mediator) about the framework for the discussions. Will they proceed one-by-one through a list of issues? If so, which issues come first? Is the priority based on dollar value, or from easiest to hardest, or something else?

Are there some issues that cannot be resolved, now, due to incomplete information (e.g., a critical exchange of expert reports has not yet occurred, or a critical motion is pending before the court)? Think of the mediation as a project. Is there a logical sequence for discussions that most likely will lead to efficient resolution of the dispute? This is another opportunity to demonstrate cooperation with an adversary.

## **6. Formulate A Settlement Range:**

Just as with valuation of any asset, the value of claims in a dispute is not a matter of precise science. And, just as in any business deal, a party has both its wish list of “wants,” but also a more modest list of “needs.” Using those criteria, it should be possible to formulate a range of settlement values, from “best case” to “worst case,” and some sense of a “likely case.” The ultimate settlement (if it occurs) generally involves an overlap between each party’s individual settlement range. Working through your own settlement range, and “guesstimating” what the other party may think is the range is a very useful exercise in preparation for mediation. During the mediation, moreover, when settlement demands and offers are exchanged, efforts to explain the justification for your position on the range of settlement values (often, an assessment of the probability of success, multiplied by the amount of damage recoveries at stake, minus the costs of litigation) can help you to advocate (often, through the mediator) for the reasonableness of your position. And, where an adversary offers a number “out of the blue,” a useful response is often to inquire as to the basis for the calculation of their number.

## **7. Stay Positive:**

Mediation can be a tedious process, including lengthy periods when the mediator spends time in private caucus with the adversary, only to deliver some “nothing burger” of a response from the other side. Stay positive. Everybody postures. Everybody wants to maintain a broad latitude for negotiation. An experienced mediator will remind you that the process works, even in some very tough cases. Resist the temptation to walk out, on the conclusion that the other side is “not serious” about settlement (given their early positioning). Work with the mediator to formulate strategies that can produce useful progress.

## **8. Use Your Creativity:**

Most disputes, at bottom, are about money. But there often are valuable items that may cost little to offer, to “sweeten” a deal. A contractor claiming losses on a project might accept “structured” payments (over time), or additional work, in lieu of the full amount of money that could be claimed. An owner could accept correction of defective work, or an extended warranty, in lieu of direct monetary compensation. Both sides might benefit from agreement on a public statement regarding successful completion of the project. Further, even if the entirety of the dispute cannot be resolved, the parties may agree to resolve a portion of the conflict, and direct the remainder of the dispute to resolution by some efficient mechanism (such as the engagement of a neutral third-party engineer). Part of the magic of mediation is that, with the right mediator, and cooperation between the parties, creative solutions may emerge even where the parties are dead-set in their positions on the merits.

## **9. Complete The Settlement:**

Shaking hands on a deal at the mediation table is fine, but certainty as to the deal is better. Before leaving the mediation, the parties should have (at least) a binding term sheet, outlining the essential terms of agreement. To ease the burden of drafting a term sheet (often late in the evening, after parties have bargained hard all day), bring a draft form to the mediation. Better yet, prepare a form of term sheet (with blanks) and share it with your adversary, in advance of mediation, so that preparation of the form, for signature at the end of the process, is relatively easy.

## **10. Learn From The Process:**

No two mediations are exactly the same. But parties can learn a great deal about the process, and about the needs and capabilities of their own organization, from conducting a mediation. Do some form of debriefing, after the mediation, as to what went well, and what can be improved. Consider capturing that knowledge in a memorandum, or a lunch-and-learn program, to spread the benefits of the experience within your organization.

***Arthur House, EJD***

# Strategic Engineering Solutions that Exceed Expectations



**Our company's mission is to provide outstanding service, to contribute to our clients' success, and to exceed expectations. We are committed to quality, efficient service, and meeting customer requirements for all aspects of our engineering services and solutions.**

19 Dover St, Dover, NH 03820

Phone: (603) 749-1841

Website: <https://www.consultjtc.com/>

**John Turner**  
**President/Founder of John Turner Consulting**



Email: [john@consultjtc.com](mailto:john@consultjtc.com)

# CONSTRUCTION MANAGEMENT INSTITUTE

Established - 2001 Partial List

Industry Affiliations - Associations and Alliances

<https://www.arthurhouse.com/management-copy.shtml>



Western Maine  
Transportation Services



MaineDOT



Blane Casey  
Building Contractor, Inc.

Building A Better Maine.....Building By Building



ST. LAURENT  
& SON EXCAVATION, INC.

Since 1970



NUCOR



PIKE  
INDUSTRIES  
A CRH COMPANY



AECOM

PARSONS



AGC  
THE CONSTRUCTION  
ASSOCIATION



SGS

Stella Jones



TEC ASSOCIATES  
CONSULTING ENGINEERS



energy forever



SINOPEC



A BlueScope Steel Company



GATEWAY TERMINAL



MERCER



# **Atlantic Coastal Construction Journal: Construction Risk Management**

**Copyright © 2023 by Arthur House, EJD**

The author has 40-years of construction, forestry, and renewable energy industries experience. He completed BS and MBA degrees. Attended Business and Entrepreneurship program at Nova Southeastern University, working on a Doctorate. Later attended Purdue/Concord Law School, graduating with honors, earning an Executive Juris Doctorate (EJD). He teaches Contract and Construction Law as an Adjunct Professor, has taught undergraduate and graduate courses at universities including; Florida International University, Lynn University, Franklin Pierce, Notre Dame, Southern New Hampshire University, and Rochester University. Art lives with his wife of 48-years, on their farm in Maine.

All rights reserved. No part of this book may be reproduced in any form or by any electronic or mechanical means including storage and retrieval systems without permission in writing from Arthur House, EJD

Disclaimer: The author is not a practicing attorney and as such is not engaged in any unauthorized practice of law – but recommends the reader seek legal counsel on matters of concern in any dispute. Advisory content is not intended to give, and should not be relied upon for, legal advice in any particular circumstance or fact situation. No action should be taken in reliance upon the information contained in this site, without obtaining the advice of an attorney.

Powered By Bookemon. [www.bookemon.com](http://www.bookemon.com)



[art@arthurhouse.com](mailto:art@arthurhouse.com)

## Welcome to Yvonne's Construction Gift Baskets



Introduce your company to potential clients.  
Show appreciation for your client's business.  
Send a thank you basket to subcontractors and vendors who have been a part of your continued success. Send a Get Well basket to employees and to any person who will most need to be cheered up!



**Call: 207-930-5723**

### A CONSTRUCTION INDUSTRY CALENDAR - KEEPING THOSE COMMITMENTS

NEG	FRI	FRI	THU	WED	TUE	MON
8	7	6	5	4	3	2
16	15	14	13	12	11	9
23	22	21	20	19	18	17
31	30	29	28	27	26	24
38	37	36	35	34	33	32

1. Clients want projects done yesterday. With this calendar you can start the job on the 15th and get it done by the 11th.
2. All clients want their jobs done by Friday. So, we give you two Fridays each week.
3. There are seven extra days in each month for those end-of-the-month jobs.
4. Because no one ever pays their bill on the first of the month. There is no first of the month.
5. Clients don't want their bills on the 10th or the 25th of the month. So, we deleted those days.
6. As the business owner, you don't need weekends off. So, we deleted those inconvenient days. A benefit is that clients will never have to pay over-time or weekend pay.
7. There is a new Negotiation day each week. On this day, clients call in to change their prices, reduce the bills, and explain - you are wrong. The client is always right.