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GREEN BUILDING

Keeping Your Green Project Out of the Red

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By Melissa A. Orien and David W. Zimmerman

With the buzz of "going green" as the latest trend, public and private owners alike are seeking environmentally friendly construction projects. But the trend comes with an increased risk of liability for designers and contractors on green projects. Designers and contractors should adjust their practices to keep their green projects from dragging their bottom line into the red.

Three such best practices include (1) engaging in clear project-level communication to adequately adjust the parties' expectations, (2) understanding green products to be used on the project, including their limitations and availability; and (3) avoiding conduct that warrants or guarantees a final result.



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Adjusting Expectations

The failure of a project to meet the owner's expectations creates fertile ground for a dispute. Clear communication and clear contract language can ensure that all parties understand the risks of a green project, understand which party bears the risks, and understand the scope of work and payment obligations. The following actual claims reported by Frank Musica of Victor O. Schinnerer & Co., Inc. demonstrate problems that arise from maladjusted expectations:

- An owner of a project who intended to use the facility for sensitive government contract work sued the designer because extensive daylight systems created security risks.
- An owner repeatedly altered its sustainability objectives on a project and then failed to pay the designer's significantly increased BIM costs, claiming that the costs arose from the designer's inexperience with sustainable building.
- An owner demanded aesthetic change during construction after it became dissatisfied with the "look" of the building. When the requested alteration reduced the project's LEED rating, the owner claimed that the architect should have allowed for adjustments to the building's appearance when calculating target points.

If an owner is unfamiliar with the Leadership in Energy and Environmental Design (LEED) process, the project team should educate the owner during the pre-design phase about the certification process, its risks, and its requirements. Further, the owner needs to understand that LEED certification is determined by a third-party organization, the U.S. Green Building Council (USGBC), and the parties cannot predict how the USGBC will exercise its own discretion. LEED certification targets on projects need to be treated as target goals, not performance specifications or performance guarantees. Contract language should also reflect this reality.

The owner and design team need to spend time discussing the LEED credits targeted on the project. The design team should educate the owner as to how achieving a given credit will shape the look and function of a building.

Because target LEED points are identified during the design phase, changes during the construction phase can jeopardize the certification goal because it is difficult to identify and achieve an alternate LEED point after construction has commenced. The contract terms should provide for owner-requested changes during construction.

Because responsibilities for LEED points are allocated among the various parties on a project, each party should request clear contract language to limit its responsibility to its own respective credits. Further, the design team should be wary of any contract provision requiring that the designer exclusively bear the risk of redesigning the project if the bids exceed the owner's budget because of difficulties in estimating costs on a green project.

Understanding Green Systems and Materials

Actual claims have arisen from eco-friendly materials that have leaked, molded, or simply not performed adequately. Further, "fresh air" systems run the risk that unexpected pollutants will travel inside the structure without being mitigated by building ventilation systems. For example, a university sued the designer of a fresh air system in a library for damage caused by diseases introduced into the inside air after pigeons used the solar shading as shelter. Natural daylight and open-air buildings are brighter and draftier than their traditional counterparts. In addition, LEED-friendly materials may be in short supply and not readily available for all construction projects. Reported claims have centered around the unavailability of specified green materials that caused project delays.

The design team should research proposed products, their respective technical limitations, and their suitability for the project's climate prior to incorporating them into a project or its design. When sufficient time or information is not available to research an innovative material or system design, the contractor and designer should be cognizant of the risks associated with untested methods or potentially unavailable materials and, where possible, modify their contracts to account for such risks.

Avoid Guarantees or Warranties

Perhaps most dangerous, designers and contractors can unwittingly expose themselves to claims by owners that they guaranteed the project would achieve a certain level of efficiency or cost savings. Aggressive marketing materials or representations to an owner about a party's experience with the LEED certification process can give the owner basis to assert a claim for breach of guarantee, misrepresentation,

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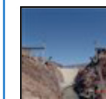
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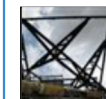
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fraud, or violation of consumer protection laws if the desired result is not achieved.

Parties should avoid language contracts, proposals, and marketing material that guarantees performance, such as statements that the completed structure will be "30-percent more energy efficient than similar structures" or that the completed structure will "increase employee productivity by 15 percent." Further, contract documents should not incorporate proposals that represent that a certain certification or efficiency level will be achieved. For example, an office building owner sued the designer for breach of guarantee after the structure failed to achieve the gold LEED certification goal.

An owner can seek to recover consequential damages such as the increased energy costs to operate the building over an extended period of years or the diminution in rental value from failure to achieve the desired certification level. This increased risk makes waivers of consequential damages or other caps on damages important contract provisions.

The best way to mitigate risk on a green project is through carefully crafting contract language to identify and allocate risk. Standard general conditions are simply not sufficient to deal with these issues. Further, no standard industry form contract addresses the risks that are unique to LEED projects. As a result, designers and contractors need to take an active role in educating the project owner about the realities and limitations of building a LEED project. With clear contract language and reasonable owner-expectations, designers and contractors can mitigate potential risk on a green project.

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