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WIDE RANGE OF LEGAL ISSUES

Impact California's Construction Industry

Legally Green: Avoiding The Legal Pitfalls of Green Building Construction

Increasingly Popular Approach Also Brings Potential Liabilities

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Increasing public awareness and government attention has jumpstarted market demand for environmentally-friendly or “green” building designs, construction practices and final products. Green building construction is the wave of the future and is inevitable for any company constructing in America. However, the possibility for liability is huge, which makes it vitally important to think-out projects from contracting, through construction, until the desired certification level has been achieved.

Contractors on green projects face myriad issues: environmentally-friendly material may be hard to find, leading to bids over budget or supply delays; projects could be delayed by contractually-required recycling conditions and a simultaneous decline in available materials; the architect could claim its work was industry standard at the time of design and pawn off the unknown risks of specified green materials onto the owner or contractor.

Of equal concern is the fact that consumer perception of what “green” means frequently differs from builders’ understandings. Careless marketing of green buildings – builders using vague, undefined phrases, or unintentionally warranting an outcome that does not come to fruition – creates unfulfilled expectations downstream. The inevitable result: hesitant players, naïve risk assumptions, increased uncertainty, and sticky lawsuits with all parties pointing the finger at someone else.

Unfortunately, green building construction is so new that there are very few published cases laying out who is responsible for what liability. So how can contractors situate them-

selves now to mitigate the inevitable litigation fall-out?

RISK MITIGATION PRE- AND POST-CONSTRUCTION

Fine-comb ‘Green’ Contracts

Verify that green contract terms are explicitly defined. For example, ascertain in writing what green products or equipment are required for the project. Specify what sustainability standards are being sought. Is it a certain light bulb wattage? Low-volatile organic compound (“VOC”) sealant or paint? Specificity is the key to avoiding unmet expectations down the road. For reference, “Green Format” specifications are available from the Construction Specification Institute and McGraw Hill Construction. There is also a Federal Guide for Green Construction Specifications available online.

Expected LEED certification levels and the process for achieving points on the way should be candidly discussed and written down. As background, in 1998 the U.S. Green Building Council (USGBC) developed the Leadership in Energy and Environmental Design (LEED) rating system, which evaluates the design, construction and operation of newly-constructed or renovated buildings, and is considered the definitive, nationally-accepted benchmark for design, construction, and operation of “green” buildings. The LEED system involves four certification categories: Certified, Silver, Gold and Platinum. Generally, LEED-certified projects are designed, constructed and managed in accordance with principles that promote maximum resource and energy efficiency, healthy indoor environments, and the use of natural, renewable resources. Since the year 2004, 3,426 buildings, including 1,304 homes, have achieved some level of LEED certification. Not surprisingly, there are currently 17,450 commercial buildings and 13,836 homes registered for LEED certification.

Be aware of LEED-related contract language requiring analysis of internal

company procedures for compatibility with the selected green standard. For example, the paperwork requirements for a specified LEED certification may require a contractor to adopt new internal document-control procedures. Further, know who on the project is responsible for achieving certain LEED points, and the penalties for the project failing to achieve LEED certification, or certain points on the way to LEED certification. In LEED certification, some points are awarded based on design and specifications, while others are based on construction and performance. Loss of points for construction and performance could mean loss of an incentive bonus. Lastly, negotiate contract language to shield against the imposition of liquidated damages during the “waiting for certification” stage. Anticipate consequences and designate who bears the risk if the project does not achieve the desired certification level.

Ask owners to insert a clause in all green construction contracts clearly stating that there are no third party beneficiaries to the contract. This prevents third parties, such as tenants, from suing the contractor to claim the benefits of its construction contract, e.g., reduced energy or reduced electrical payments.

Finally, carefully read indemnification clauses. These allocate risks amongst the parties to the project, detailing who will pay for what liability. These fine-print clauses can be full of surprises. For example, there may be a clause that says that the contractor has to indemnify the owner for failure to achieve ultimate green projections, and any associated liabilities.

Choose Projects Wisely

Pursue projects with green-savvy design professionals. For peace of mind, consider suggesting the use of a LEED-accredited professional or “LEED-AP” to perform peer review. These professionals have received USGBC training. Indeed, hiring a LEED-AP consultant charged with keeping track of documents required

for certification may be worthwhile for certain large-scale projects, because the loss of one or two credit points could mean the difference between platinum and gold certification, and possibly the loss of significant tax incentives. Having an on-site LEED professional during construction can also save time and money through quick resolution of green issues, without the need to call an outside consultant and delay the project while he or she grapples the learning curve.

Similarly, choose green-savvy subs and verify they have adequately investigated the availability of green construction material and replacement prices.

Scrutinize Warranty Language

Project owners may want guarantees that installed products are not only green, but warrantable. Check warranty language on specified products to verify the warranties will sync up with sustainability goals. For example, if the specified cork flooring develops mold, who is responsible for replacement costs and labor? Also check warranty language against product installation methods. Sometimes green

installation methods can void manufacturer warranties. If a contractor installs equipment that is supposed to run on regular electricity, but instead runs on solar power, it must ensure this tweak does not void the supplier's warranty or otherwise create new liability for the installer.


Procure Green-Tailored Insurance

A particularly thorny area of green building construction is insurance coverage. Adequate coverage for green construction is often costly due to unique, environmentally-friendly upgrades. Verify insurance coverage for these situations. ACE USA, Fireman's Fund, Liberty Mutual, XL, and Travelers offer green-building policies.

Also, check exclusions within insurance contracts. Many policies exclude breach of guarantee or warranty, which is critical because green construction is warranty driven. For example, if the contractor makes any warranties about attaining certain LEED points, he may be denied coverage if he does not ultimately achieve those points.

Foresee and Avoid Potential Third-Party Lawsuits

Product guarantees and warranties can lead to third-party lawsuits. Contractors should only represent workmanship, specific materials and compliance with building codes, not functionality or performance. For example, when installing a HVAC system professed to have fewer emissions damaging to asthma patients, contractors should not make any guarantees as to whether that system will, in fact, help asthma sufferers. Owners may take contractor representations and quote them in project marketing materials. When a dissatisfied tenant sues, the owner might point the finger at his contractor for misrepresentation.

While green building construction is a worthy cause, the absence of laws and regulations create necessarily wary contractors. With the playing field so broad, carefully covering all bases will serve a contractor well. 

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