

From Green to Seeing Red

There seem to be four stages of the green building movement in the U.S. First there was Green for Green's sake: the altruistic goal of environmental improvement. Then there was Green for Greenbacks: when it became stylish to be green and there was a market premium in selling green. After that there was Green for Red Tape: the legislative initiatives, often poorly thought out mandatory greenness. And most recently, Green seeing Red: when the liability costs associated with "failed" green efforts diminish or overwhelm the altruistic, economic or administrative reasons for going green. Not surprisingly all of these stages exist simultaneously, but recent legislative, administrative and judicial developments indicate that this last stage is growing and likely to play a more prominent role in the future. How are parties engaged in construction to best protect themselves as they advance into the green experience?

OWNER: Follow three rules to achieve your goal:

- Hire competent professionals with appropriate and local knowledge to design and build the project;
- Use contracts that fairly allocate risk to the owner, designer and builder; and
- Monitor the work and be ready to modify your goals depending on events.

Competent LEED Accredited Professionals or others of comparable education and experience are the starting point. They need experience in green design as well as in the implementation of local administrative and legislative systems. With the advent of more municipal green requirements, local knowledge is more than just building code experience—it is familiarity with the regulatory system and with local building practices.

Relations with local regulators are essential as many of these regulatory systems are poorly thought out and ambiguous. Further, using builders that have built green projects before not only provides an advantage when calculating LEED credits, but also assures smoother and less expensive implementation during construction and commissioning of the building systems.

Contracts that unfairly allocate risk have always generated unnecessary and costly disputes. The same is true of contracts that mandate unreasonable design or construction performance. For example, many owners seek to shift the entire burden of risk for green building certification to the design professional, general contractor or both. While superficially appealing to party shedding the risk, this approach is simplistic and the wise owner will recognize that it violates one of the cardinal tenets of risk management: risk should be borne by the parties best equipped to bear it and to control the outcome of the endeavor. Certification of a green building is not completely within the control of any single member of the project team and optimal risk allocation strategies will reflect this.

Current risk allocation surety products associated with the design and construction team are generally poorly designed to minimize the owner's exposure. For instance, the highly tradition-bound surety industry typically concentrates on the "Cs" of bonding: capital, capacity, character. "Green" does not start with a "C" and sureties are just now becoming more aware of the concomitant risks. If a surety needs to hire a replacement general contractor and complete a project, how likely is it the owner's green objectives will be fulfilled? Turning now to the design team, the professional liability policy affords

the designer—and by extension the owner—no protection if the designer fails to deliver on a promised LEED.

Owners have an ongoing responsibility to monitor the design and construction of their green building. While competent designers are essential, the owner has many decisions to make including site planning priorities, material choice and mechanical systems. Only the owner can decide on the trade-offs between fenestration design and mechanical requirements, and their green building implications. As construction proceeds, the owner has a continuing responsibility to oversee the builder's compliance with the contract documents and local regulations. Yet this responsibility cannot be myopic. If unanticipated conditions arise during construction affecting the green calculation, the owner must be willing to consider all alternative mitigation measures. Again, specialists can be of considerable help to the owner. On larger projects, owners have had success utilizing experienced claims analysts to analyze construction schedules and potential claims, with an eye toward prevention of blunders associated with long-lead "green" items, schedule issues for complex or unfamiliar systems, and a host of other pitfalls.

DESIGNER: Design firms have been in the forefront of the green movement since the 1970s and many have significant green-design capabilities. However, they too have a short checklist to assure they meet all their potentially conflicting requirements:

- Don't oversell your capabilities;
- Develop your contract documents completely; and
- Provide ongoing design services to assure the green goals are met.

Designers' failures to meet the Owner's expectations are the major cause of poor and litigious relations. Designers often oversell their capabilities or allow their scope of contracted work to fail to match the promise of the job interview. If the designer knows that the regulatory approval process for a green design sign-off takes 120 days, it is unethical to tell the Owner that it can be accomplished in 60 days.

Incomplete design documents are one of the largest causes of construction disputes. It seems likely that as the tide of disputes involving green issues moves forward, incompleteness of design is likely to still be a major cause. Already we can predict that the performance of mechanical systems and the commissioning of that equipment will be major causes of green disputes. Green design requires more design effort and greater diligence in assuring completeness and operational efficiency. Like the admonition to the Owner, the designer starts with the scope of work and contract for those design services. The Designer should not assume that old contracts will serve expanded responsibilities.

It is important to note the commoditization of design services and the corresponding downward pressure on design fees over the last thirty years. This trend has occurred, ironically, during a period where buildings have become increasingly complex, and the added responsibilities associated with green design exacerbate the challenge to the design professional. It is therefore more difficult than ever to produce a correct and complete set of design documents profitably. Incomplete design is almost always capable of being remedied by more design work.

During construction the Owner needs the Designer to monitor the green component of the design and keep abreast generally with the construction. Some owners seek to minimize or eliminate the designer's scope of construction administration services. We would advise design professionals to walk away from any contract that does not include an adequate provision for such services. The Designer may have to adjust its design to meet the actual conditions encountered in the field. This will require flexibility and ongoing evaluative capabilities.

BUILDER: Within the last year, the price uncertainty associated with building green has diminished as those attitudes and elements needed to perform green construction have become better understood. This decrease in possible risk to the builder still leaves substantial concerns that should be considered:

- Does the contract describe the additional level of work and diligence needed and does it properly allocate design issues to the designer?;
- Does it have the needed supervisory capability of overseeing the needed subcontractor and laborers to assure continued compliance with the contracts?; and
- Does the local community have the capability to supply and absorb the differentiated materials associated with the project?

Builder risk associated with green design has increased within the past year. Builders better understand the activity and quality control mandates associated with building green, and green materials are more commonly available, resulting in more stable and known costs. At the same time, the potential risk associated with project failure to meet green design objectives has increased. It is therefore imperative that the construction contract only allocate performance requirements to the contract which s/he can control or insure.

The Builder must also have in-house management capability to oversee the integration of the builder's green work into the entire project. That management capability must extend to the documentation of the green related activities and the ability to assure continued regulatory compliance. To the extent outside expertise is needed but not retained by the Owner as described above, it will have to be retained by the Builder.

Amazingly, some communities still seem to have no mandatory recycling procedures. In such a community, it would be difficult for a builder to properly dispose of its segregated materials that comprise the green points available for contractor activity. Therefore it is essential that either the local community has the absorptive capability or that there be nearby vendors or communities that can assist in the recycle process.

There will be claims associated with attempts to comply with green requirements and the failure to comply. Lawsuits have been few and far between so far but that will change. As the inventory of certified green buildings continues to swell, litigation will be a lagging indicator of this. The new and additional uncertainty of responsibility guarantees that those associated will need to consider the general outlines described above if they wish to minimize potential disputes in this area. We have hope that the green movement will proceed with minimal claims disruption, but are preparing for the worst. In that regard the observations provided in the paragraphs above have some common elements:

- Have reasonable and fair allocation of risk—contracts that place all elements of Green compliance risk on any one party are neither fair nor reasonable;
- Overselling capability or competence leads to a mismatch between technical scope and technical competence, leading to probable claims; and
- Remain flexible—the purpose of ongoing management is to assure proper performance and adapt to changed circumstances.

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