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CELEBRATING 55 YEARS

EBC Demo & Materials Summit

December 23, 2010 - Green Buildings

The 5th EBC Construction and Demolition Materials Regional Summit will be held on Friday, January 21, 2011 - 7:30 a.m. - 12:00 noon at the Sheraton Framingham, 1657 Worcester Rd.

The future success of construction and demolition materials recycling will be driven by national and international markets and generator stewardship. The industry recognizes that state environmental regulatory programs are no substitute for viable markets for recycled materials. At this year's EBC C & D Summit, national industry and Massachusetts processors will report on how they are deploying their large capital investments to profitably increase recycling and reuse of C & D materials. Plan now to attend and participate in this year's valuable and informative EBC C & D Summit.

This conference is a must attend event for those involved with the management of C & D debris, including: architects/engineers, building owners, construction contractors, demolition contractors, haulers, C&D processors, landfill owners/operators, transfer station owners/operators, municipalities, environmental groups, trade associations, law firms and consultants.

James Halter, vice president construction solutions for Waste Management, Inc., will be the keynote speaker.

Other speakers include: Dan Brodeur, P.J. Keating Company; Bob Cleaves, Biomass Power Association; Judy Cohen, Devens Recycling Center; Dan Costello, Costello Dismantling; Mike Camara, New Bedford Waste Services, Inc.; Brad Guy, The Catholic College of America; Ben Harvey, E. L. Harvey; Dr. Jenna Jambeck, University of Georgia; Christine LeBlanc, Harvard University; Maggie Mann, National Renewable Energy Laboratory (invited); Patrick Manning, Gypsum Recycling America; James McQuade, Mass DEP; Chip Millick, SAPPI (invited); Robert Petrucelli, Associated General Contractors of Mass.; Dale Raczynski, Epsilon Associates; Jim Taylor, Taylor Recycling (invited); Mike Taylor, National Demolition Association; William Turley, Construction Materials Recycling Association
and Ted Ziegler, DSM Environmental.

For more information visit http://www.ebcne.org/supra. at p. 6. Accordingly, where financing and/or incentives that aid in financing require meeting certain Green conditions, there is an added contingency to funding. Obviously, the more contingencies to funding that exist, the greater the risk that funding will not be achieved or that it will be interrupted. As a basic principle in Green building then, the contractor needs to be sure it understands the financing contingencies.

Section 2.2.1 of the A201 typically governs the contractor's right to obtain confirmation of owner financing. In the 1997 standard version, the owner is required to provide reasonable evidence of the financial arrangements it has in place to fulfill its obligations upon the contractor's written request, whether the request is made before or after work begins. In the 2007 A201, however, the contractor is entitled to obtain such information before beginning the work but can only obtain such information

after beginning work when: 1) the owner fails to make payments; 2) there is a material change in the contract sum; or 3) the contractor identifies in writing a reasonable concern regarding the owner's ability to make payment when due. Section 4.2 of the ConsensusDocs is akin to the 1997 A201, providing the contractor the right to obtain reasonable evidence of sufficient financial arrangements both before and after work commences. Further, pursuant to the ConsensusDocs, the owner is required to notify the contractor before any material changes in its funding conditions occur.

These 'financial assurances' provisions should be carefully reviewed and modified as necessary to provide the contractor a right to confirm that there is adequate financing in place throughout the life of the project. Where the risk of interrupted funding may perhaps be greater in Green building, the contractor has a correspondingly greater interest in nailing down its contractual right to obtain reasonable assurances of financing. The contractor should, therefore, insist in the contract on a broad right to review owner financing, both before and after work begins. Additionally, the contract should define as clearly as possible what constitutes adequate financial assurances so that there is no dispute during the course of the project as to whether adequate financing is in place.

B. Design Risk

Generally, the AIA 201 and ConsensusDocs Lump Sum contracts do not place design risk on the contractor. Pursuant to the 1997 and 2007 A201 documents, the contractor is required to carefully study and compare the contract documents, to take field measurements, and to observe site conditions affecting the work. The contractor is liable if it fails to perform these obligations and the failure results in damages to the owner but it is not required to ascertain whether the contract documents are in accordance with applicable law or to discover design flaws. Consistently, pursuant to the ConsensusDocs, there is no obligation to perform field measurements and the contractor is not responsible for design criteria specified in the contract documents.

Sometimes, however, the standard provisions are modified. The following are a couple such modifications to the A201 documents from real projects wherein the owner shifted design responsibility to the contractor, even though the contractor did not design the work and the owner hired the architect:

> Section 3.2.1: ... the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work... These obligations are for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, any errors, inconsistencies or omissions discovered... shall be reported promptly to the Architect...Having discovered such errors, inconsistencies or omissions, or if by reasonable study of the Contract Documents the Contractor should have discovered such, the Contractor shall bear all costs arising therefrom.

> Section 3.2.2: ...the Contractor is required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations....or if by reasonable study of the Contract Documents and other conditions, Contractor should have discovered such ...
>
> Section 3.5.2: The Contractor shall be solely responsible for determining that all materials furnished for the Work meet all requirements of the Contract Documents.

(emphasis added).

Obviously, the modifications above could make the contractor liable for various design issues. Because Green building is in such a state of development, making oneself potentially liable for design issues poses a particularly grave risk. This risk is especially serious where the standard commercial general liability policy does not provide coverage to the contractor for design errors and omissions. Further, the Spearin doctrine protection is lost when a contractor assumes design responsibility. See United States v. Spearin, 248 U.S. 132 (1918). Accordingly, assuming contractual responsibility for design issues, can remove this defense.

Additionally, if the contractor agrees to assume responsibility for selecting materials necessary to comply with design specifications, it could very well be creating potential product liability claims (implied warranty of merchantability and fitness for a particular purpose) in addition to express warranty obligations. Again, where the Green field, including what is needed to achieve its various standards, is still developing and at times seems to be a moving target, assuming responsibility for material selection is risky. At minimum, the contractor should discuss with its insurance agent whether it needs errors and omissions coverage when it assumes contractual responsibility for material selection. Consistently, where a contractor finds a certain product specified in the contract documents unavailable, it should avoid assuming responsibility for any alternative products selected unless it intends to assume design risk. That is, the contractor should be installing a comparable alternative only when the architect/engineer certifies that the substitute product is sufficient and confirms that it and not the contractor, is responsible for the sufficiency of that particular product.

Accordingly, contractors need to carefully study their contracts and confirm that they are not intentionally assuming design risk. When the design risk is intended, it is imperative that the contractor not only have the appropriate design expertise supporting its venture, but the necessary insurance to provide coverage for errors and omissions risks.

Further, the contractor will need to become an expert in whatever applicable zoning or other legal requirements apply through Green building if it is assuming this contractual risk. For instance, the Harvard Law School Environmental Law & Policy Clinic article points out that the City of Boston adopted Article 37 on Green buildings as part of its municipal zoning code. See The Green Building Revolution: Addressing and Managing Legal Risks and Liabilities, Kate Bowers, Leah Cohen,

Environmental Law & Policy Clinic. That ordinance requires "large projects" to be "LEED certifiable." Id. at p. 5. If a general contactor assumes responsibility for confirming that, "the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations" (as modified section 3.2.2 above provides), the contractor will need to become an expert in these types of issues.

Obviously, the contractor is planning for design risk on design-build projects. On more standard projects, however, where the contractor is not intending to assume design risk, it needs to be vigilant in avoiding that risk in the contract, especially in the Green field where additional standards and more risks exist.

C.
D. Delay Risk

Pursuant to the standard A101, A201, and ConsensusDocs contracts, a contractor is required to complete its work within a specified time frame. It is entitled to a change order extending the completion deadline (provided it complies with the claims process), when it is delayed in the commencement or progress of the work by the owner or architect, by changes in the work, or by reasonably unforeseeable conditions. Section 8.3.1 of the A201 provides that the contractor will receive additional time whenever delay is caused by "unavoidable casualties or other causes beyond the contractor's control."

Some examples of delay issues that potentially pose increased risk on Green projects are delay in obtaining materials, potential municipal inspection delays related to the inability to obtain permitting because of the new and developing nature of various designs, and delay in gathering paperwork for necessary Green certifications and the like. It is imperative, therefore, that the contractor confirm its exact responsibilities, that it review whether permitting will be a problem, and that it confirm the availability of specified products before committing to comply with any proposed schedule.

Further, the contractor should be vigilant about insuring that the contract provides it with a rather broad right to time extensions. To minimize the chance of future disagreements, the contractor should specify in the contract that issues such as delayed availability of materials or delay in obtaining required government approvals related to Green building design, are examples of issues that will allow the contractor to obtain time extension related change orders.

The contractor also will need to be vigilant about complying with the claims process concerning claims for additional time. Typically, as in the A201 and ConsensusDocs, the claims process for obtaining additional time is the same as that for seeking additional payment. In some jurisdictions such as Massachusetts, the failure to follow the contractually prescribed claims process can constitute a waiver of the claim. Accordingly, it is more important in Green building than ever to provide as broad a right as possible for contractor time extensions, and that the contractor comply with the claims process to obtain those extensions.

E. Damages

Potential damages on Green projects are monumental and as such, the parties will need to negotiate consequential and liquidated damages provisions in the contract. First, there is the increased potential for delay damages. There also are potential municipal penalties, the potential for lost sales, claims of missing the market, and claims for diminution in market value, among others. In the Shaw Development case, for instance, the developer counterclaimed against the contractor, alleging that the contractor was liable for a lost tax credit worth $635,000.00 due to the contractor's alleged failure to timely complete the project.

Indeed, although generally dangerous for the contractor, liquidated damages may be a preferable risk control mechanism in exchange for a waiver of some or all of the potential consequential damages, depending of course on the rate of liquidated damages. A liquidated damages provision for delay related damages will, in at least some jurisdictions, preclude recovery of related actual damages. Schrenko v. Regnante, 27 Mass. App. Ct. 282, 285 (1989).

The 1997 and 2007 A201 and the 2007 ConsensusDocs Lump Sum contracts contain a mutual waiver of consequential damages. Generally speaking, this waiver of consequential damages is a good protection for the contractor and should be maintained. To the extent there is any doubt as to the provision's breadth, it should be clarified to include, without limitation, damages such as loss in sales, diminution in property value, tax credit related damage claims, and the like.

Additionally, the contractor needs to make sue that the contract does not limit its right to recover for delay damages. That is, some contracts provide that there shall be no damages for delay to the contractor, other than an extension of time. Where there is the increased prospect for delay on these Green projects simply because related technology and designs are still new and developing, the prospect of delay related overhead costs is significant. The contractor, therefore, needs to be vigilant about striking 'no damages for delay' provisions whenever possible.

F. Disputes

Like any other contract, the process by which the parties agree to resolve potential disputes also is important.

The 1997 A201 contains a default provision requiring arbitration. The 2007 A201 contains a default provision requiring litigation. Arbitration must be selected as part of the contract negotiation process if it is going to be required. Both the 1997 and 2007 A201 documents require mediation before resort to arbitration or litigation, at least in most instances.

The ConsensusDocs process is very different from that of the AIA documents. Although as with the A201, the contractor must continue to work while the dispute is being resolved (Section 12.1), pursuant to Section 12.2, party representatives with the authority to resolve matters must work to resolve matters within 5 business days. Further, if not resolved within 15 days of first discussion, the matter proceeds to dispute resolution. Section 12.3 then requires "mitigation;" a non-binding review either with a dispute review board or a project neutral. If mitigation is unsuccessful, mediation must

follow.
If mediation is unsuccessful, the parties then will either arbitrate or litigate, depending on which choice they selected as part of negotiating the contract.

Simply put, review the merits of each process, including whether arbitration is an acceptable ultimate means of resolving the dispute, before contractually committing to it. Not only does the contractor need to be cognizant of the process and related timeframes, arbitration, without some controls in place, may not be preferable. Because many jurisdictions do not permit reversal of an arbitrator's decision even if the arbitrator made a mistake of law, weighing the benefits of a generally speedy process versus the danger of irreversible arbitrator error is a must. If possible, when the parties agree to arbitration as the dispute resolution method, attempt to negotiate a list of mutually acceptable arbitrators from which the parties will choose if arbitration becomes necessary. In this way, the parties can minimize the risk of arbitrator error by selecting a list of qualified arbitrators in advance.

Conclusion

Green building may be a wonderful development for everyone, creating new businesses, new markets and a potentially healthier environment. Like almost anything that is new and developing, however, it carries new and potentially increased risks. The parties need to be aware of those risks and strive to manage them through the contract.