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Managing green building risk so that building green doesn't leave you in the red Part 1 of 4

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Green building has become increasingly popular but there are related legal risks to everyone involved. These risks include, among other things, design delay and payment related issues. This article discusses Green building risks and how the AIA 101/201 and ConsensusDocs form contracts assign these risks.

The Shaw Development Case

In 2009, what is anecdotally referred to as the first Green building case, Shaw Development v. Southern Builders, provided a glimpse of some of the disputes to come. The dispute in Shaw arose from a \$7.5 million condominium project located in Crisfield, Maryland, called the Captain's Galley. The development included Green design features that were intended to support a LEED Silver Rating. Southern Builders, the general contractor on the job, filed a \$54,000 mechanic's lien against the project in 2006, which was subsequently reduced to \$12,000 by a Maryland Circuit Court. The owner counterclaimed for \$1.3 million, alleging damages that included \$635,000 in lost state tax credits under the state building program.

Specifically, the State of Maryland offered tax credits of up to 8% of a project's total cost for those that obtained the specified LEED certification. The contract required Southern Builders to deliver a certificate of occupancy within 336 calendar days from the date of the agreement and this certificate was apparently necessary in that time frame for the owner to apply for the tax credit. The owner also needed a United States Green Building Council certificate confirming the project's LEED certification, to apply for the tax credits.

The parties used the AIA 1997, A101 and 201 documents as their contract. The contract failed to specifically identify any tax credits, and did not provide for any formal certificate to be obtained from the U.S. Green Building Council. See Shaw Development v. Southern Builders: The Anatomy of America's First Green Building Litigation, Stephen Del Percio, (Aug. 2008), available at <http://www.greenbuildingsnyc.com/2008/08/20/the-anatomy-of-americas-first-green-bulding-litigation>.

Although the case settled, it provides a preview of future Green litigation issues, and highlights the need to identify Green-related responsibilities in the parties' contract. At minimum, it makes clear the need to understand Green risk and to contractually manage that risk.

The Harvard Law School Environmental Law & Policy Clinic Weighs In

In what was a cutting edge article, two authors from Harvard Law School's Environment Law & Policy Clinic outlined many of the risks in Green building. See The Green Building Revolution: Addressing and Managing Legal Risks and Liabilities, Kate Bowers, Leah Cohen, Environmental

Law & Policy Clinic, Harvard Law School, March 10, 2008. It is an instructive piece for lawyers and those performing Green construction alike.

For project owners, the risks the article cites include:

1. failure of a project to achieve certification;
 2. failure to qualify for tax credits;
 3. failure to meet loan or incentive program requirements;
 4. increased soft costs due to delays in construction or requirements for additional documentation;
- and
5. failure to meet or live up to claims in marketing or promotional materials for a development project.

Id. at 6. For contractors, those risks include:

1. failure to deliver features as promised by contract;
2. construction defects such as improper installation;
3. failure of a structure or system to perform as intended over the life-cycle of the building; and
4. insurance coverage exclusions, or more costly insurance policies.

Id. at 7.

Contract Risk Analysis

Most of the contract risk issues involved in construction can be generally broken down into the five "D's"; namely, design, delay, damages, disputes, and the dough---getting paid. The following discusses those risks on Green projects in terms of the 1997 and 2007 AIA A201, and 2007 ConsensusDocs Lump Sum contracts.

A. The Dough---Getting Paid

From the contractor's perspective, the contract always should provide the contractor the right to obtain reasonable assurances that the owner has sufficient financing in place to satisfy its payment obligations, both before and after work begins. This is true regardless of whether the project is Green. One of the risks that the Harvard Law School Environmental Law & Policy Clinic article identifies concerning owner financing, however, highlights the importance of this issue when it comes to Green building.

Specifically, The Green Building Revolution: Addressing and Managing Legal Risks and Liabilities article identifies the following financing risk for project owners:

failure to meet loan or incentive program requirements if construction is not as 'green' as originally planned, where loans or incentive programs are tied to achieving certification or sustainability outcomes.

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