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Managing green building risk so that building green doesn't leave you in the red - Part 2 of 4

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Part 1 appeared in the December Green Buildings

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.

1 Pursuant to the Spearin doctrine, the contractor is shielded from liability for otherwise defective construction where a defect exists but the contractor simply complied with the construction design documents it was provided. See United States v. Spearin, 248 U.S. 132 (1918).

Part 3 will appear in the February Green Buildings

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