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Managing green building risk so that building green doesn't leave you in the red

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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 contractor 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. 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 Mass., 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.

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