

Green Building Risks Contractors must monitor green contracts

Contractors need to manage the legal risks that green building presents

AGC members that want to thrive in today's sustainable marketplace must cultivate green-building opportunities and learn to manage their unique risks. A carefully crafted green risk-management strategy is critical, and all parties need to understand the allocation of responsibilities and risks.

A key feature of a contractor's green risk management, as for traditional risk management, is the contract language itself. The prime contract should anticipate and address risks associated with green building, and flow-down clauses should be included in subcontracts. The standard-form contract must be modified to address the unique legal risks of green building, which includes the following issues:

The contract should clearly define green terminology, such as "sustainability," "green certification" or "high-performance building." There is no universal definition for these terms, so the contract must clearly delineate which specific third-party rating system and which version of that system is the goal.

The contract should designate who is responsible for failure to achieve a third-party rating designation or who is responsible if the

project fails to obtain anticipated tax credits. If a contractor wants to assume increased risks and responsibilities, the contract language must reflect that responsibility and how the firm will be properly compensated for assuming additional risk. The contract also should address which party is responsible for preparing and collecting documents as part of the green-rating process.

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A contractor should understand and negotiate proper terms for project delivery. In a traditional design-bid-build scenario, the contractor warrants workmanship—that the project will be built according to the plans and specifications. Many green contracts, however, contain language that could make a contractor responsible for improper design.

In design-build, the contractor is responsible for the project performing according to specifications. A contractor must carefully assess the obligations and risks for design-build of a green project and ensure that the contract reflects the risk.

Generally, a contractor should include a disclaimer guaranteeing a particular outcome such as a green-building certification or specific energy efficiency. Failure to achieve a desired certification or a specific green performance is often deemed a consequential damage. As a result, ensure that consequential damages are waived.

The contract should address liability for how a green product or technology that fails will impact the contractor. Coordinating the interplay of building systems can be a problem, especially when experimental materials and technologies are specified. A green project that takes advantage of building information modeling is likely to present fewer such risks because the potential conflicts can be

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MUSTS FOR GREEN CONTRACTS

Key legal issues that green building contracts should address include the following:

- > Definitions of "green" terminology and desired green goals
- > Party responsible for failure to achieve a third-party rating designation or to obtain tax credits
- > Party responsible for document collection and submission to third-party rating entity
- > Specifics of project delivery method
- > Inadvertent warranties and guarantees
- > Waiver of consequential damages
- > Responsibility for failure of green products and technologies
- > Payment issues, especially concerning impact of delays for green designation

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identified and rectified during virtual construction, rather than in the field.

The contract should address payment provisions to avoid unintended delays in getting paid. For instance, a contractor does not want the achievement of green certification tied to

substantial completion. That could mean final payment and release of retainage would not be due for a long time, since green rating status is often not achieved until six to 18 months after completion.

Until recently, no standard-form construction contracts adequately addressed green risks. But AGC, as part of the 23 drafting and endorsing organizations involved with ConsensusDOCS, in November published the ConsensusDOCS 310 Green Building Addendum (GBA) to meet this need. It is the construction industry's first comprehensive standard contract that addresses the unique risks and responsibilities associated with green building.

General principles and key elements of ConsensusDOCS 310 include:

- > Uses contractual best practices to identify participants' roles and responsibilities;
- > Identifies the implementation and coordination critical to achieving a successful green building project, especially those seeking third-party green-rating recognition;
- > Works well with the ConsensusDOCS family of documents, as well as other standard contract documents;
- > Recommends that it be appended to each of the project-participant agreements;
- > Does not reallocate project risks from the various project contracts unless the parties specifically choose to do so;
- > Defines the green scope, allocates green-building-related responsibility and risk, apportions liability and notes changes to the design and/or construction to accommodate green-building objectives;
- > Creates a Green Building Facilitator (GBF), a person or entity charged with the responsibility to coordinate submittal documentation to achieve green-building goals.

The roles and responsibilities of the GBF are key components of the document. The GBF could be the architect/engineer, contractor, construction manager or even a third-party advisor/independent consultant, as long as the GBF is not an in-house employee or a staff member of the owner.

The new ConsensusDOCS 310 Green Building Addendum is the construction industry's first and only standard contract document specifically designed to address the unique characteristics of green building. With this document appended to the owner and GBF agreement, as well as appended to each of the other participant agreements, all parties should be aware of each other's roles and responsibilities on a green project.