

'Green' building requires legal pros

Building green without having a red bottom line

By Adam Richins

The building industry is going green. At present, green buildings represent almost 10 percent of the new construction market. The U.S. Green Building Council (the USGBC) estimates that the green building market will be worth \$12 to \$20 billion this year. More important, green building is growing exponentially. For example, in 2005, the number of green buildings more than doubled from the year before. Industry leaders agree that this remarkable trend will continue in the future. Indeed, some experts project that the market could grow to \$70 billion by 2012.

Most conversations on the topic of green building prompt three practical questions. First, what is green building? Generally speaking, a green building is a structure that is designed, built and operated to maximize energy efficiency, minimize resource use and reduce toxic materials in building components. However, most people believe that a building is not truly "green" unless it is certified. The Leadership in Energy and Environmental Design (LEED) rating system (devised by the USGBC) is the most widely accepted set of standards for green certification in the United States. LEED evaluates buildings in five areas: sustainable site development, water savings, energy efficiency, materials selection and indoor environmental quality. The system is credit-based, allowing projects to earn points within each of the five areas. LEED provides four progressive levels of certification: certified, silver, gold and platinum.

Second, why are developers and owners going green? The answer is in the numbers. Commercial buildings are responsible for almost 40 percent of America's energy consumption and 39 percent of all green-house gas emissions. In addition, green buildings use an average of 40 percent less water and 39 percent less energy than traditional buildings. These statistics drive the green market, both economically and socially. Economically, green buildings make sense because they significantly reduce the costs associated with operating commercial buildings. In fact, one recent study found that the cost of building a green building, which is usually 2 to 7 percent higher than building a traditional building, will be recouped in just two years. Socially, green buildings are favored because they markedly reduce the environmental impact of traditional buildings.

Third, what is the status of green building in Idaho? This year, the Idaho Legislature passed the Idaho Energy Efficient

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State Building Act, which requires all new state-funded buildings to be at least ten percent more efficient than buildings built under the existing building code. This Act, while a step forward, still requires less conservation than its counterpart bills across the nation.

Like any new building process, green building has encountered its problems. LEED certification can be time-consuming and complicated, particularly when developers and owners do not hire experienced consultants to guide them through the process. At times, developers and owners that set out to construct a green building do not receive certification, and the damages can be costly. Those persons may lose funding, tax credits, major tenants (if a condition to lease commencement was certification), energy savings and the marketing benefits of building green. Not surprisingly, lawyers are beginning to see an influx of disputes involving the issue of who is responsible, the designer or the contractor, when a project fails to meet certification goals. In light of this recent trend, owners should take the following steps to protect their green investment.

First, negotiate and draft contracts that clearly delineate each party's role and responsibility in earning green certification. Green projects involve numerous parties, including architects, engineers, contractors, subcontractors, vendors and building operators. At times, the legal duties applicable to each party in obtaining certification can become blurred. Therefore, project developers and owners should ensure that their contracts carefully outline three important areas: (1) the deliverables required for certification; (2) the parties responsible for collecting, assembling, and submitting the supporting documentation for each deliverable; and (3) the applicable due dates.

Second, make sure that your owner-architect and owner-contractor contracts require an integrated design process early in the project. The first step to an integrated design process is a "design charrette." A design charrette is a meeting during which all the project players (including the owner, building staff, design team, contractor and even the owner's attorney and financier) establish the project goals before any

design documents are prepared. During the design charrette, the duties and responsibilities of each party should be clearly allocated according to the contract. The contract should require additional meetings throughout the design and construction process to ensure that all tasks are performed on time and within budget.

Third, negotiate contracts that require designers and contractors to develop a procurement schedule for all green materials. Construction schedules are common in the building industry. However, developers and owners often overlook the need for procurement schedules. In green projects, such schedules are crucial because the products and materials used in green construction often come from smaller manufacturers that lack the capacity for mass production. In recent months, a few green projects across the nation have experienced construction delays due to the unavailability of green products chosen by the designer. A procurement schedule will help parties manage and anticipate potential delays.

Finally, include specific standards of conduct in your contracts to govern the actions of the architect and contractor.

The owner-architect contract should include a provision stating that the project designers will exercise reasonable care in achieving the owner's LEED certification goal. Likewise, the owner-contractor should include a clause indicating that the contractor will construct the facility in strict compliance with the drawings and specifications.

Green building is not simply a fad for the socially responsible. Our capitalist market has spoken, and green is the new gold. Project developers and owners should embrace green technologies, for both social and economic reasons. However, in doing so, project participants need to use contracts that anticipate the new legal issues presented.

Adam Richins is a commercial litigator and transactional attorney with the business law firm of Stoel Rives LLP, and a board member of the USGBC Idaho Chapter. Contact Adam Richins at (208) 389-9000.

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