



Green Projects

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The more I read and research this topic, the more concerned I become with the potential for uninsured claims that can arise out of these projects. In fact, a “green project” is not just another project!

I think the very first place that you should begin to review the exposures that arise from green projects would be your client contracts. It is absolutely essential that all contractors review their contracts prior to signing them in order to understand their rights and responsibilities in order to mitigate misunderstandings. This is the reason I am going to concentrate on the contract review process in this article as I believe this will assist you in meeting your due diligence needs on green projects.

First, here is some background information on green projects, according to a recent issue of *Southeast Construction* magazine:

- In 2010, it is estimated that there will be \$60 billion in construction values related to green projects.

- Fifty firms have reported more than \$3.5 billion in green revenues.
- Florida recently updated the Energy Conservation and Sustainability Building Act of 2008 with the requirement for lifecycle cost analysis programs.
- Twenty-eight states have passed new (and conflicting) laws requiring sustainability of design and construction certification levels.
- Many professional societies such as the NSPE, AIA, ASCE and ASLA Societies have modified their Professional Society statements requiring ethical obligations on the part of design professional when working on green projects.
- In addition, the American Arbitration Association is presently developing a green panel of LEED-accredited arbitrators that will be skilled in the details of the environmental and green construction for national, state and local standard requirements.

- Attorneys are also becoming LEED accredited. Can this bode well for designers and contractors?

It is obvious that the green building process is an idea whose time has come, but it is imperative that contractors and design professionals carefully review and analyze any such projects. Some of the important issues that must be considered when dealing with these projects are:

- Lack of standard contracts, which can create many problem areas.
- Potentially broad and all encompassing scope of services.
- Higher (and more onerous) standard of care requirements and
- Warranties, guarantees and performance standards, which can create uninsured exposures during construction and post construction phases.
- Use of cutting-edge and possibly misunderstood and misused new

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technology may cause serious incompatible and interoperability issues.

- How will new and improved and untested materials, supplies and products function as required for the entire life of project?
 - Use of new and often conflicting local, state, national and other organizational green building codes, regulations, standards and laws. But please note this is complicated by the fact that there is “no one size fits all” that can be used universally to mitigate the certification issues.
 - How will the upcoming International Code Council Standards be integrated?
 - Conflicting third-party certification issues.
 - Poor communication and coordination issues.
 - Were there any governmental on-site type building permitting or other related variances allowed.
 - Consider the project aesthetics, along with the energy and water concentration issues and don’t forget the indoor air quality issues.
 - Did the lender offer any interest rate reductions for a specified certification level?
 - Who will be responsible for overseeing the process of maintaining the overall LEED certification process on the project?
 - Will your green projects have an independent commissioning agent available at all times, as this will definitely improve the QA/QC process?
- Will there be an adequate contingency fund?
 - An absolute waiver of consequential damages!
 - Will the LEED-certified building meet the sometimes unrealistic expectations of owners, future occupants and users?
 - What are the special requirements of the construction and building maintenance people, especially when dealing with the life cycle maintenance issues?
 - Have you considered the ramifications of the LEED Version 3 and the performance standard issues related to energy and water usage which can result in disqualification of the certification for up to five years post completion?

Obviously, in the event of a claim, many of these areas will not result in an allegation, which will fall into the limited definition of “bodily Injury and Property Damage” which is a part of all commercial general and umbrella-type policies.

LEED Certification Issues

The U.S. Green Building Council has indicated that there are 77,000 LEED-accredited professionals in the U.S. since the program began in 2000. A question that must be considered is, “What can the LEED accreditation imply?”

- You are a green expert, as that’s the reason your client(s) hired you.
- The client’s contract can easily mandate that you are an expert with unrealistic obligations.

- Recent codes, regulations and statutes can also mandate specific unattainable and conflicting obligations.
- Does your sales and promotional information along with your website indicate you are an “expert” on green projects?
- Plaintiff attorneys (and juries) may find that you promised more than you can deliver.

In my opinion, green building projects present many new exposures as did the design/build delivery system many years ago, but with even more blurring of the bright lines between design and construction services.

Now, please allow me to comment on the insurance issues that are relevant to green projects.

Please remember, all commercial general and umbrella policies are designed to respond to claims arising out of the “insured’s negligence” in the performance of their construction services, which result in a “bodily injury and property damage” type claims. Unfortunately, this insuring agreement is subject to the following specific exclusions and, as such, these coverages do not apply to the following type claims:

- Damage to property in the insured’s care, custody and control.
- Damage to the insured’s and subcontractor’s work.
- Damage to the insured’s and subcontractor’s product.
- Impaired property.
- Pollution including mold and mildew issues.
- Professional type liability losses.

As a result, the potential from many uninsured claims can arise and if you want to mitigate these exclusions. I recommend that “Contractor’s Professional Liability” coverage become an integral part of your overall insurance program or else you are in harm’s way. ■ ■ ■

NOTE: This article is intended for general discussion of the subject and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.