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THE EVOLVING GREEN REVOLUTION

By Robert R. Tyson

In some ways, the “green revolution” has necessitated a “green evolution” for lawyers and their clients.

In the past, when a construction client — whether a developer, building owner or general contractor — sought legal services in connection with a proposed project, the contract documents often focused on the design specifications of the project. For example, what would the square footage be? What were the materials of construction? Where would the roads and utilities be located? These specifications were components of the contract between the parties, and in many instances, whether the specifications were achieved could be known at the completion of construction.

Green construction means that projects are no longer constructed to meet only design specifications. Instead, the consumer, whether the owner of a residential home or a commercial building, has an expectation that the building will meet a performance specification. Green performance specifications can take many forms.

An owner may desire a percentage reduction in energy use, or may insist that the landscaping be wholly maintained through the use of storm water, or that the building inhab-

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CNY Business Exchange magazine asked two local attorneys with expertise in construction law what businesses need to consider when looking to build green.



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itants will have a workplace free from toxic materials. The performance specification is an expectation that the building must behave a certain way and not merely possess certain physical and operational characteristics.

Green technologies and construction techniques are constantly evolving, and they present potential legal risks, which should be addressed in the parties' contract documents.

- One obvious risk is the “green” pedigree of the architect or contractor (general contractor or subcontractor(s)). Do they have experience on similar green construction projects? Relevant experience, demonstrated through a careful check of references, is a primary tool to reduce risk. Experience should also be the basis of representations and warranties in the contract documents.

- Another potential risk is the inherent ambiguity in calling something “green” in the first instance. Some people may interpret “green” to mean that a building will last longer, require less maintenance or result in a healthier environment for its occupants than a “non-green” building. Simply stated, however, there is no single definition of “green,” and green construction is not subject to a universally recognized standard of care. Where the project has been designed and will be constructed to achieve the Leadership in Energy and Environmental Design certification, applicable LEED requirements should be specified in the contract. However, for a variety of reasons, many owners want their building to be environmentally friendly and energy-efficient, but they do not seek to achieve LEED certification. In this case, in the absence of a uniform standard of care, it is important for the parties to agree on their precise expectations and to incorporate them into

the contract using objective language.

- It is important to understand that the parties' interests in a contract negotiation may be very different. The consumer (i.e., owner) will want the architect and owner to provide extensive, performance-based representations and warranties. For example, the owner may have an expectation that the building will result in a 40 percent reduction in electrical use and will want the contract to reflect that reduction. The architect and contractor, on the other hand, will be averse to a numerical performance specification, as failure to achieve the specification can give rise to a legal claim.

- Another risk to consider is whether the green technology performance specification is likely to be effective in the geographic location where it is proposed to be used. For example, the performance of a solar heating system that performs well in the southwestern United States may not work well in Central New York.

- In the (perhaps unlikely) event the parties agree on some form of objective performance specification, they should consider the time period in which the specification must be achieved. For example, if the contract requires a 15 percent reduction in electrical use, how will success (or failure) be determined? Must the building achieve that reduction at the end of the first year? Every year for the next 20 years? If the specification is not achieved in year 10, who should be responsible and how should the damages be allocated? Representations and warranties and indemnification provisions will frequently extend well into the future.

The advent of green construction projects has placed a renewed emphasis on risk mitigation and risk allocation by lawyers on behalf of clients. All parties involved in the green construction

project, including the owner, architect, contractors and subcontractors, and even downstream suppliers, should attempt to work collaboratively and cooperatively to achieve a mutually desirable result. The contract should, to the extent practicable, define the parties' green expectations, anticipate potential risks and fairly allocate responsibility for those risks if realized. Parties' insurance professionals should also be consulted during the negotiation process, as insurance may offer solutions.

The “Green Revolution” and also the “Green Evolution” are under way and are unstoppable. While legal risks remain, the contract documents, rather than the courtroom, offer a better opportunity to mitigate these risks. ■

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