

'Green building' is now a business practice, so handle it with care

Going green is becoming increasingly popular in the construction industry. Almost 1 billion square feet of new green construction was registered in 2007 alone, and 10 to 12 percent of non-residential construction starts in 2008 were green projects.



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The federal stimulus package included significant funding to green federal buildings and President Obama frequently mentions building green when discussing new energy-efficiency initiatives.

Additionally, the City of Baltimore recently enacted legislation, now in effect, which incorporates certain performance standards for "green building" into the building code for certain projects.

Reality, however, intrudes when the issues of cost, risk and performance must be addressed. Given that building green, by some estimates, can increase typical construction costs by 6 percent, altruistic desires will be trumped by basic business considerations of how to make such projects feasible in an increasingly demanding and challenging industry.

State government and many area county governments are answering this concern by extending an array of tax incentive programs aimed at offsetting the tax impact on "green" projects which achieve and conform to certain performance criteria.

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By reducing the tax burden by as much as 70 percent to 80 percent, these credits can make the difference for owners deciding whether green projects are worth their increased costs.

Given increasing mandates for "green building," such tax credit programs likely will become increasingly necessary aspects of financial projections for construction projects.

As "green building" progresses from projections of efficiency, the actual performance of certified green buildings is the great unanswered question. This concern is heightened as the new version of green building standards makes demonstrated performance part of a mandatory biannual recertification.

This process would conceivably subject tax credits, which had been an essential part of financing, to biannual re-examination. There is real concern that failing buildings could have their financing significantly altered by a failure to reproduce performance results obtained when construction was completed.

This is the traditional juncture at which construction projects intersect with litigation, when a loss is sustained on a property due to an alleged defect, whether in the design or building construction. Recent cases illustrate that form documents, widely accepted in the construction industry, inadequately ad-

dress this significant concern.

Many industry observers consider the following, which occurred with a project here in Maryland, the tip of the coming iceberg:

A developer-built condominium project encountered project delays. After complaining about a lack of payment, the contractor instituted a mechanics lien suit. The delays allegedly caused the loss of the tax credits for the project, which were issued on an annual "use it or lose it" basis.

The loss of tax credits resulted in a significant alteration of the project's financing and a counterclaim by the owner for substantial losses due to the loss of the tax credits.

Unlike standard construction, building green is fairly new not only to the actual players in the construction realm, but also to the insurance industry. Though some new insurance products are available as riders specifically addressing "Adverse Green Claims," such coverage is not uniform or widely available and may be subject to significant limits on coverage, including litigation costs.

This is understandable. Given the lack of significant data on industry-wide performance standards, insurers are unable to reliably predict green losses and create applicable insurance products against those losses.

The above scenario highlights the

substantial pitfalls which can occur when contract negotiations and documents fail to incorporate intervening changes in business practices. It is important to view "green building" as the new business practice that it is.

Owner and builder representatives should address this during drafting, rather than relying upon certain form documents ill-suited for this new and changed world. This advance due diligence can ensure that going green will benefit the environment, as well as the bottom line.

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