



Steps to limit exposure to potential costs and risks associated with going green

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The green building movement is gaining momentum across the United States as federal, state and local governments are making compliance with green building and construction codes less optional and more mandatory. Here in New York, Governor Patterson last fall signed into law the New York State Green Building Construction Act, which requires that the construction and substantial renovation of State buildings comply with "green" building standards established by the Office of General Services. Bills which, to different extents, would apply green standards to nearly all public and private construction and substantial renovations are being considered by the Legislature. Many localities, including the City of New York, also have passed or are considering passing, their own green building codes.

Although green construction comes with the promise of tax credits and decreased energy costs, the fact is that the unconventional means and methods of construction exposes owners to the additional costs of meeting regulatory requirements, and the additional risk that "going green" may not result in long-term actual savings. Among the potential new risks for owners include: (i) the failure to meet green building requirements resulting in the loss of associated tax credits or other incentives; (ii) higher construction costs which may not be recovered through energy cost savings; (iii) delays in construction schedules due to design professionals' and contractors' lack of understanding of green building requirements; (iv) higher maintenance and operations costs; and (v) the costs of legal action arising out of buildings that fail to achieve cost savings or other promised benefits.

While owners of traditional construction projects can adequately protect themselves against the costs and risks associated with such projects through the use of standard industry trade and design professional contracts and insurance requirements, industry standard contracts and insurance coverage may not fully protect owners in the event that their buildings fail to obtain green certification or meet certain green standards. For example, an owner may suffer damages, including the loss of tax credits, resulting from the failure of the building to obtain a certain type of green certification, or because the building fails to meet certain promised performance standards (i.e. energy efficiency or water usage). An owner also may lose a tax credit if the certification process is not completed in a timely manner even if the building ultimately complies with the applicable green building requirements.

Unfortunately, owners may not be able to recover the loss of tax credits and building efficiency savings if they rely on standard contracts and insurance requirements because such losses are not considered direct property damage. Rather, they are categorized as "consequential damages," which are damages not contemplated by the parties at the outset of the contractual relationship. For

numerous reasons. most construction contracts contain mutual waivers of claims for consequential damages, and almost all commercial general liability insurance policies exclude consequential damage claims. Furthermore, an owner of a major project may not be able to protect itself against a contractor's default by requiring the contractor to procure a performance bond because most surety companies are hesitant to bond a contractor when a contract requires specific energy efficiencies or any type of third-party certification, as is required for green certification.

Therefore, before undertaking a project, an owner should take certain steps to limit its exposure to the potential risks associated with green construction. Initially, the owner should make sure that its architect, engineer and contractor have all demonstrated their previous experience with successful green design and construction projects. In addition, an owner should insist that all contracts: (i) include a scope of work that spells out the specific requirements for all green certifications, performance-based energy standards and time deadlines; (ii) unequivocally assigns responsibility for each certification standard, process or goal to a specific party (i.e. the architect, the contractor or an independent consultant); and (iii) unequivocally states that the failure to achieve a specified certification, standard or goal, including timely completion of the work, constitutes a material breach of the contract for which the owner is entitled to seek damages. Finally, an owner should ensure that insurance products procured by its design professionals and contractors provide the maximum protection currently available for green construction projects.

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