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Sustainable Building: Managing the Environmental and Project Risks

The design and construction of sustainable buildings that are environmentally responsible and healthy places in which to work, as well as profitable facilities, are matters of increased interest these days. The U.S. Green Building Council (USGBC) is a voluntary, national nonprofit organization that promotes "Green Design," defined as design and construction practices that significantly reduce or eliminate the negative impact of buildings on the environment and occupants in five broad areas:

- Sustainable site planning
- Safeguarding water and water efficiency
- Energy efficiency and renewable energy
- Conservation of materials and resources
- Indoor environmental quality

To achieve their goal, the USGBC developed the LEED (Leadership in Energy and Environmental Design) Green Building Rating System®, which has gained significant popularity recently and is perhaps the most widely accepted method for measuring sustainability of building projects in the Unites States.

The number of LEED registered projects for educational, commercial, multi-use and other types of facilities has increased exponentially over the past several years in both the public and private sectors. The core goals of the USGBC and its LEED rating system are well-defined and, despite its economic critics, there are ample statistics detailing substantial environmental, economic, health-safety and community benefits to building green.

The potential pitfalls and risks associated with Green Building contracts are less clear. One

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Bob Rubin Honored as Top Construction Attorney in U.S. by *Chambers USA*

Following the success of the annual *Chambers* Global Awards in London, the first *Chambers* Awards for Excellence ceremony in New York was held on June 1, 2006, to "honor outstanding lawyers of the USA on the basis of the latest round of research carried out for *Chambers* USA 2006."

In the category of construction law, Bob Rubin was recognized as the leading construction attorney in the U.S. in 2006. Other Seyfarth Shaw attorneys honored in *Chambers'* 2006 listing include Kim Preston and Bennett Greenberg.

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obvious reason for this uncertainty is that Green Building requires the use of innovative systems and equipment having no significant track record for production or installation. Therefore, owners, contractors, designers and vendors alike are far less familiar with these processes and products and their comparatively novel applications. Not surprisingly, this lack of familiarity often leads to an increased risk of problems arising on the project, which may undermine the heart of the planned result.

Because of the growing popularity of building green and the increased adoption of the USGBC's LEED rating system, contractors are under pressure to become better acquainted with these concepts. Compliance with the LEED standards will be mandatory when they are made part of the construction contract. Failure to comply with a LEED system in that instance will likely result in a claim by the owner for breach of the very essence of the agreement.

As with traditional construction projects, an effective risk management plan for a Green Building project should begin with a thorough review and understanding of the contract documents, which generally include the contract for construction (including any requirements or documents incorporated by reference), specifications, general and supplemental conditions, addenda and modifications.

Leah Rochwarg

Will the Construction Industry Catch Avian Flu?

Avian Flu is emerging as a potential threat to the health of businesses and their workforces. During flu season, one sick worker absent from the jobsite may go unnoticed, and two or three may only be an inconvenience. In an Avian Flu pandemic, however, half of a workforce could fall ill and cause a construction project to come to a screeching halt.

Avian Flu is a viral infection highly contagious among the bird population as infected birds spread the virus through their saliva, nasal secretions and feces. Although Avian Flu is found almost exclusively among birds, cases of human infection have also been reported.

Most cases of human infection result in flu-like symptoms such as coughing, fever, extreme fatigue, sore throat, and muscle and joint aches. Some cases, however, include life-threatening symptoms such as pneumonia and severe respiratory illness. As of June 6, 2006, the World Health Organization (WHO) has confirmed 128 human deaths from Avian Flu.

Although the Centers for Disease Control and Prevention reports that all human cases of Avian Flu infection resulted from direct contact with poultry, scientists fear that Avian Flu may mutate and become contagious among humans. According to WHO, the danger for humans lies in mutation as well as coinfection. Should Avian Flu become contagious, a pandemic would result. Because most people have no immunity to Avian Flu, infection rates would be much higher than during seasonal epidemics of normal flu. Furthermore, the virus would inevitably spread through the workplace, resulting in high worker absenteeism.

Temporary and replacement workers may prove difficult to find in the event of an Avian Flu pandemic. Worker absenteeism would most likely be widespread in many industries, resulting in a need to find workers for multiple employers, simultaneously. Collective bargaining agreements may also limit an employer's ability to employ temporary and replacement workers during an Avian Flu pandemic. In addition, while an employer seeks a substitute workforce, laws may mandate new work policies and absentee worker assistance.

Under the Occupational Safety and Health Act (OSHA), an employer has an obligation to provide a workplace free from "recognized hazards." Should OSHA determine that workers are likely to be exposed to Avian Flu while at work (such as a construction site located on a poultry farm), then OSHA will require the employer to develop procedures based upon a "hazard assessment" of potential exposure at the worksite that protect its employees. These protections notwithstanding, an employer must be prepared for any employee who contracts Avian Flu.

An employee who contracts Avian Flu while at work would be entitled to receive temporary disability benefits in place of wages, reasonable and necessary medical treatment, and a reward for any resulting permanent disability, such as reduced respiratory capacity. Accordingly, employers should evaluate the adequacy of their worker compensation insurance coverage.

For employers with more than 50 employees in which an employee contracts Avian Flu away from work, the illness would most likely be classified as a "serious health condition" and the Family and Medical Leave Act (FMLA) would apply. If an employee's spouse, parent, or child contracts Avian Flu, then the FMLA would also apply to that employee. In either case, the employee would be entitled to 12 weeks of unpaid leave.

If the employee develops a disability because of Avian Flu, then the Americans with Disabilities Act may apply. As a result, the employer would need to engage in an "interactive process" with the employee to determine the employee's ability to work, any work restrictions and any available accommodations.

Although an Avian Flu pandemic would affect all businesses, the construction industry could be especially vulnerable since construction projects are deadline-driven activities. Avian Flu could place a contractor in the difficult position of having an inadequate workforce as schedule milestones approach.

Owners and contractors alike should review their contracts to ensure that they contain a force majeure clause, which protects a party from fault should it miss a deadline due to circumstances outside of its control, in many instances called an "Act of God." In general, these circumstances make it physically impossible to complete the work, not merely more expensive. Whether Avian Flu would fall under a force majeure clause is questionable and has not been adjudicated.

Regardless, any future force majeure clause should specifically include mass illness language. In this manner, owners and contractors should be protected.

Mark A. Lies, II

What the Breakup of Unified Organized Labor Means for the Construction Industry

Organized labor has generally faced declining membership for decades. That decline has been evident in the construction industry as well. In 1970, an estimated 40% of construction workers belonged to a union. By 2005, that figure had fallen to 13.1%. The disagreement among organized labor leaders about how to curb the overall decline in union membership recently led several unions to withdraw from the AFL-CIO and form their own labor federation.

From 1957 to 2005, organized labor was largely unified under a single federation, the AFL-CIO. In July 2005, however, several large unions, some representing construction workers, left the AFL-CIO to form their own labor union federation, known as the Change to Win Federation (CTW). As of June 2006, CTW had approximately six million members who belonged to seven member unions, including the International Brotherhood of Teamsters (Teamsters), Laborers' International Union of North America (Laborers) and the United Brotherhood of Carpenters and Joiners of America (Carpenters). Despite the schism, AFL-CIO remains the largest labor union federation in the U.S., representing over nine million workers.

This historic split in the organized labor movement can be expected to have repercussions in the construction industry. CTW has identified the construction industry as one of eight industries it will target in its organization efforts. Labor experts predict that, at a minimum, non-union employers will see increased efforts to organize new members by both CTW and AFL-CIO member unions, while unionized construction contractors are expected to encounter more difficult bargaining with unions and may see an increase in jurisdictional disputes among unions.

Specifically, non-union employers should be prepared for aggressive organizing campaigns. In addition to typical union organizing efforts, unions are expected to use anti-corporate campaigns, i.e., aggressive public campaigns waged against employers designed to coerce employers into agreeing to union demands. The campaign is typically waged in the courts and regulatory agencies and through the media. The union feeds negative information, usually unrelated to labor disputes and sometimes untrue, in an effort to tarnish the employer's public reputation.

Employers who are already unionized are also likely to experience more aggressive union activity. In addition to the emphasis on organizing new members, both AFL-CIO and CTW member unions are expected to pursue more aggressive bargaining stances in an effort to demonstrate that their federation is more successful in protecting workers' rights. Because of this aggressive bargaining, employers should be prepared for an increased possibility of strikes due to failed collective bargaining.

This possibility has already been realized by at least one group of contractors. In June 2006, the Laborers struck a Chicago-based building association after its contract expired and bargaining efforts failed. In addition to revealing the hard bargaining stance unions are expected to take in contract negotiations, this strike demonstrated the cohesiveness of the building trades unions. Despite the CTW/AFL-CIO split at the national level, local union members remained loyal to one another as other building trades unions refused to cross the Laborers' picket lines, effectively shutting down work on major construction sites in Chicago.

While AFL-CIO and CTW member unions have pledged to continue to work together at the local level, many labor experts doubt local cooperation will continue. If this is the case, unionized employers can expect jurisdictional disputes over which unions' members have a right to perform certain work. In the past, such disputes have typically been resolved through the AFL-CIO's Building and Construction Trades Department (BCTD) or by the National Labor Relations Board (NLRB). CTW member unions representing construction workers and the International Union of Operating Engineers have withdrawn from the BCTD and formed their own body, the National Construction Alliance (NCA). While the NCA is optimistic that the breakup will result in fewer jurisdictional disputes, the existence of dual bodies responsible for assigning work in the construction trade will likely create disputes. With no established method for resolving disputes and no additional allocation of NLRB funds toward dispute resolution, union in-fighting may increase and job sites may be disrupted if strikes are used to protest work assignments to unions without traditional jurisdiction over that work.

While these consequences of the AFL-CIO's breakup should be expected, employers can take steps to minimize the effect on their business. Non-union employers who would like to keep their non-union status should review their policies and procedures to ensure that they are maintaining a positive work environment. Moreover, non-union employers should address any vulnerabilities that may be exploited by an anti-corporate campaign. Union employers must also take steps to minimize the disruption aggressive union tactics might have on their operations. Union employers should be prepared for aggressive bargaining by unions and explore methods to increase their bargaining power before contracts expire. Additionally, union employers should create plans to deal with strikes and jurisdictional disputes in ways that will minimize work stoppages and disruptions on the job site.

Roger L. Price

Construction Can Earn Tax Benefits

In response to challenges associated with the nation's energy supply, Congress passed the Energy Policy Act of 2005 (EPAct). EPAct is a comprehensive, long-range national energy strategy aimed at reducing dependence upon foreign oil through conservation.

In part, EPAct provides tax incentives to encourage the construction and use of energy-efficient buildings and products. Certified energy-efficient residential buildings and products qualify for tax credits, while certified commercial buildings qualify for tax deductions. Tax credits are generally more valuable than deductions. Credits are applied directly to reduce the overall tax liability, while deductions simply reduce the amount of pretax income. Both incentives result in less taxes paid.

In 2006, the IRS issued Notice 2006-27, which highlights credit available under EPAct for residential construction. According to 2006-27, an eligible contractor who builds a qualifying dwelling unit in the United States, substantially constructed after August 8, 2005, may be eligible for a tax credit of up to $2,000. To receive the credit the resident must:

- Be acquired for use as a residence after December 31, 2005 and prior to January 1, 2008; and
- Obtain certification from the IRS for having met certain requirements for energy efficiency.

The requirements for certification are set out in the Internal Revenue Code, § 45L(c)(1). To be certified:

- The residence must annually use no more than 50% of the amount of energy used by a comparable unit that meets the 2004 International Energy Conservation Code Supplement standard; and

- The residence must install heating and cooling improvements to the building envelope that will reduce energy consumption to a level that is at least 10% below that of a comparable envelope.

Credit is also available to manufactured homes (factory built or prefabricated homes, including mobile homes) that are built in compliance with the Federal Manufactured Home Construction and Safety Standards. The credit is only available to manufactured homes built after December 31, 2005, and prior to January 1, 2008. The amount of tax credit awarded ranges from $1,000 to $2,000, subject to the level of energy efficiency attained.

In addition, credit for 10% of the cost of installing energy-efficient building equipment is available for qualifying components installed within the primary residence between December 31, 2005, and January 1, 2008. These credits may be combined with other tax incentives, such as systems, products, or building credits, to result in a larger award. Energy-efficient windows, doors, roofs, heating and cooling equipment are the qualified improvements eligible for a credit of up to $500 if these items are new and expected to remain in use for at least five years. The $500 credit limit is a lifetime credit. Only $200 of that credit may be used toward the installation of windows.

A 100% tax credit is available for the installation of "qualified energy property" such as fans (up to $50), oil or natural gas boilers (up to $150), and central heating or air-conditioning systems (up to $300). Also, taxpayers may receive a 30% credit toward the installation of solar hot water heaters (up to $2,000) and 30% credit toward the installation of photovoltaic (solar-electric) systems (up to $2,000).

Taxpayers who implement energy-efficient improvements to commercial buildings are eligible to receive EPAct's tax incentives in the form of tax deductions. Improvements must be made pursuant to a plan certified by the IRS before the tax deduction is taken. Eligible buildings that decrease their annual use of energy by 50% relative to the American Society of Heating, Refrigerating, and Air Conditioning Engineers' 2001 Standard are eligible for a tax deduction equivalent to the cost of the installation of energy-efficient property, up to $1.80/square foot In addition, building sub-systems may be eligible for a partial deduction of up to $.60/square foot. These incentives apply to buildings constructed after December 31, 2005, and prior to January 1, 2008, although this date may be extended through 2009 or 2010. If the plan for energy-savings improvements is not fully implemented, the deduction is subject to recapture.

CAUTION: In the case of privately owned buildings, the incentives are generally awarded only to the original owner or renovator. In the case of publicly owned buildings, the incentives are normally available only to the entity responsible for the renovation.

Mark L. Johnson

Any tax information or written tax advice contained herein is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice).

Construction Practice News

Bennett Greenberg co-chaired the Design-Build Instititute of America's Federal Facilities Conference in Washington D.C. (June 2006).

The February 20, 2006 issue of *Constructioneer Magazine* published the second of a two-part article ("Dispute Review Boards") written by **Bob Rubin and Sarah Biser.** The article highlights pitfalls that parties seeking resolution through a Dispute Review Board ought to avoid in order to ensure a successful result.

The lead article in the June 2006 issue of *Occupational Health and Safety Magazine* contains **Marks Lies'** article, "Employee Access to Workplace Medical and Exposure Records: OSHA's 29 CFR 1910.1020 is a trap for the unwary."

Seyfarth Shaw co-sponsored a Disaster Preparedness Symposium in Boston, MA (June 2006). For more information, please visit our website at: www.seyfarth.com.

David Blake has become a LEED Accredited Professional.

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