INSURANCE JOURNAL
THE NATIONAL PROPERTY CASUALTY MAGAZINE
WWW.INSURANCEJOURNAL.COM

Green Building: New Benefits for Society and New Challenges for Risk Management

By Kenneth C. Gibbs

Gibbs

As society becomes more environmentally conscious, as energy prices continue to soar, and as government laws and regulations mandate it, green building promises to become the rule, rather than the exception, in the construction and renovation of buildings and facilities. But while green construction has the "feel good" aspect of reducing the impact of a building on the environment and gives the owners and builders the personal satisfaction of being "part of the solution rather than part of the problem," the advent of green building brings with it new challenges, particularly with regard to risk management.

What is Green Building?

Building "green" in the construction industry focuses primarily on energy conservation and sustainable design. The goal is to build new projects or renovate old ones to minimize the use of resources and expend less energy, while reducing the costs to maintain. Beyond the environmental benefits, advantages of green building include reduced operating costs, enhanced asset value, health and safety benefits, possible grants or tax benefits and public recognition of ecological and environmental leadership.

The United States Green Building Council has developed a standard rating system to measure environmental efforts called LEED (Leadership in Energy and Environmental Design). The LEED rating system is divided into categories including sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality and innovation and design.

When a project is submitted for LEED certification the U.S. Green Building Council reviews the application based on these categories, analyzes the efforts implemented on the project and determines the specific level achieved: Certified, Silver, Gold or Platinum. While owners can build "green" without going through the LEED certification process, the economic and marketing advantage of having a LEED certified building is obvious.

The advent of green building brings with it new challenges, particularly with regard to risk management.

New Challenges

While "green is good" and the marketing advantages of an environmentally friendly and efficient building are attractive, as usual a new approach brings with it new challenges. One question that all owners will have is price and a cost/benefit analysis. Are there additional "upfront" costs in constructing green, and if so, are they offset by cost savings that will be achieved over time and/or by a higher sales price for the project? This needs to be studied on a case by case basis by owners and the design professionals they are working with. But there are additional challenges which directly impact risk management and the insurance community, particularly those who work with design professionals.

For example, one could easily envision a scenario in which an architect agrees to design an office building to qualify for a Gold or Platinum certification under the LEEDS standards. The owner/developer advertises the planned building as such to attract high-rent tenants. When the architect fails to achieve his "guaranty," the developer sues for professional negligence, breach of contract and breach of warranty.

While the architect might defend arguing that the owner's budget constraints prevented the achievement of the certification goal, are we in a situation where the applicable "standard of care" has been potentially violated triggering obligations under the professional liability policy?

One would think so.

'Green' Risk Management Issues

Theodore L. Senet, a noted Los Angeles construction and insurance attorney, recently listed nine risk management issues dealing with green construction:

1. Compliance with developing green building codes and local requirements;
2. Compliance with contract requirements related to certification levels;
3. Compliance with contract requirements related to energy savings and operational performance;
4. Obtaining tax incentives or meeting tax credit requirements;
5. Meeting investment criteria and financing requirements;
6. Additional time and costs related to the design, approval and fabrication of new building products and systems;
7. The ability of new green products and systems to perform to traditional performance standards;
8. The sequencing, constructability and commissioning of new systems, products and processes.
9. Compliance with project schedules and the impact on fast track projects.

From a risk management point of view, the risks identified above need to be addressed at the outset of the project. Establishing a clear program and budget is crucial at an early stage — otherwise the age old argument about design being constrained by underfunding will surely arise. Clearly defining and allocating the responsibilities to accomplish the project's goals is a must and unreasonable risk allocations (and conversely unreasonable limitations on liability) may well be counter-productive.

It may be sometime before insurance and related products are developed that cover the risks of green building.

While bonding the project will guard against contractor default and failure to comply with the plans and specifications it will not deal with the design issues involved.

The contractor's commercial general liability policy will only provide coverage for property damage and/or personal injury and not for pure economic loss which will occur if the green goals are not accomplished.

Professional liability insurance is typically the only type of insurance which will cover economic loss such as a failure to obtain certification levels, delays or increased maintenance and operational costs due to improper design. But professional liability insurance is expensive, often has relatively low limits, and is issued on a restricted claims made basis.

The question of what if any insurance will cover damages resulting from incorrect use of "green" materials or premature failure of "green" systems is something that insurance professionals, the construction/design industry and developers will have to carefully consider. Developers, contractors and architects should consult with an insurance professional before embarking on a green project to make sure that those risks that can be insured are, in fact, adequately insured.

Alternative Dispute Resolution

One final risk management tool that should be considered is alternative dispute resolution. Obviously arbitration clauses are often found in construction contracts and many construction disputes are resolved using mediation.

A variation of mediation that is gaining increasing use and popularity is the project neutral. The project neutral is a trained construction dispute resolution specialist whose only client is the project itself. Specified in the contract documents the project neutral becomes part of the construction team from the beginning of the project to the end.

I have had the privilege of being a project neutral on a number of large projects such as hotels, and often we can diffuse a potentially contentious issue by working with the parties up front, before an issue spirals out of control. With the new challenges of green construction and the new risks for all concerned, it is a concept which should seriously be considered by the parties, their lawyers and their insurance professionals before embarking on construction.

Green construction is here to stay. Make sure clients are prepared for the risk management challenges they will face in commencing and completing a green project. IJ

Gibbs is a full-time mediator, arbitrator and project neutral with JAMS based in Santa Monica, Calif. He is an Advisory Board Member of JAMS Global Engineering and Construction Group. E-mail: kgibbs@jamsadr.com.