

GREEN BUILDING PROJECTS POSE SPECIAL RISKS FOR CONTRACTORS

By Robert A. Foster

Building “green” has expanded dramatically. In 2004, there were about 2,000 registered green construction projects in the United States, and that number grew to more than 16,000 in 2008. Because green construction is a relatively recent phenomenon, the standard form contracts widely used in the construction industry have not been updated to reflect a proper allocation of risk between owners, architects, contractors, subcontractors, and suppliers. This article will discuss a few of the risks a contractor faces when it agrees to construct a green project, and offer ways to minimize or eliminate those risks.

WHAT IS A GREEN BUILDING?

“Green” buildings are generally understood to be energy efficient, environmentally friendly, and sustainable—whatever that means. There is no single definition of a green building, but by far the most widely used benchmark is the LEED® rating system. For purposes of this article, green buildings are buildings that are LEED certified. “LEED” refers to the Leadership in Energy and Environmental Design Green Building™ rating system, developed by the U.S. Green Building Council (USGBC). LEED provides by far the most widespread standard for green construction. To receive LEED certification, a project must meet a variety of prerequisites (for example, receptacles for recycling must be available, and no smoking is permitted indoors). Projects earn points for achieving various specific goals or standards, under six main categories: site selection, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, and innovation in design. Depending on the total number of points awarded, the USGBC will designate a qualifying project as Certified, Silver, Gold, or Platinum.

SPECIAL RISKS OF BUILDING GREEN

The requirements of green construction provide many opportunities for delays and cost overruns. In the worst-case scenario, if a project fails to meet the intended levels of green certification, the owner could lose valuable tax incentives or even be prevented from occupying an otherwise safe and sound building. When things do not go as planned, the owner will probably seek to have the contractor fix the problem for free, or will try to recover monetary damages from the contractor. It’s important for the contractor to be aware of these potential



liabilities and to take precautions against them by including appropriate protections in the contract.

PRODUCTS OR MATERIALS IN SHORT SUPPLY

A contractor who enters into a standard form agreement to build a green building may be taking on unanticipated liability with respect to the availability of products and materials. For example, to meet LEED’s indoor air quality standards, the architect will probably specify that only certain paints, coatings, and carpets may be used. If these particular products are in short supply, the construction schedule could be delayed even though non-compliant products are readily available and would be substituted in the normal course of business in an old-fashioned, non-green project. Before agreeing to construct a green building, a contractor should (i) verify that the exact products and materials specified by the design team are available, and (ii) make sure the contract provides that the contractor is not liable for delays caused by shortages.

COMMISSIONING (PERFORMANCE TESTING)

Green building standards require energy-using systems to be tested to verify performance. This process is called “commissioning,” which is a word borrowed from ship building—a ship is “commissioned” when it’s tested and found to be seaworthy.

ABOUT the AUTHOR

Robert A. Foster is a vice president of Shapiro, Iffschitz & Schram, P.C. (www.slslaw.com). A LEED® Accredited Professional and a Martindale-Hubbell AV-rated attorney, Mr. Foster concentrates in commercial real estate and lending. He can be reached at foster@slslaw.com or 202.689.1900, ext. 3029. This article is only provided as general background information. The article is not intended to be used as a basis for any particular course of action or as a substitute for legal advice.

For a green building, it's not enough for a contractor to install the exact equipment shown on the plans—the equipment also has to be tested. For most green projects, “fundamental commissioning” is a prerequisite under the “energy and atmosphere” category. If the energy-using systems do not perform up to the requirements, someone will have to pay to correct the situation, and the owner will certainly not volunteer to do so. It is fair for the construction contract to require the contractor to install the equipment properly, but the contractor should take care to see that it is not liable if either (i) the equipment does not perform to the manufacturer's specifications, or (ii) the equipment performs as advertised but does not meet the design goal (for instance, a heat pump may produce the rated number of BTUs, but the desired temperature inside the building might not be maintained).

“SUBSTANTIAL COMPLETION”

Under many construction contracts, the contractor becomes entitled to payment when an aspect of the work achieves “substantial completion,” which generally means the work is sufficiently complete so the owner can use it for its intended purpose. It is quite possible that a building (or a system in a building) could be substantially complete in the traditional sense, but not be completed for purposes of qualifying for anticipated points under the LEED rating system. The failure to qualify might have nothing to do with the contractor's performance—for instance, the architect might have specified the wrong light fixture. Before beginning a green project, a contractor should make sure that the contract documents do not define substantial completion as including the achievement of the anticipated LEED rating.

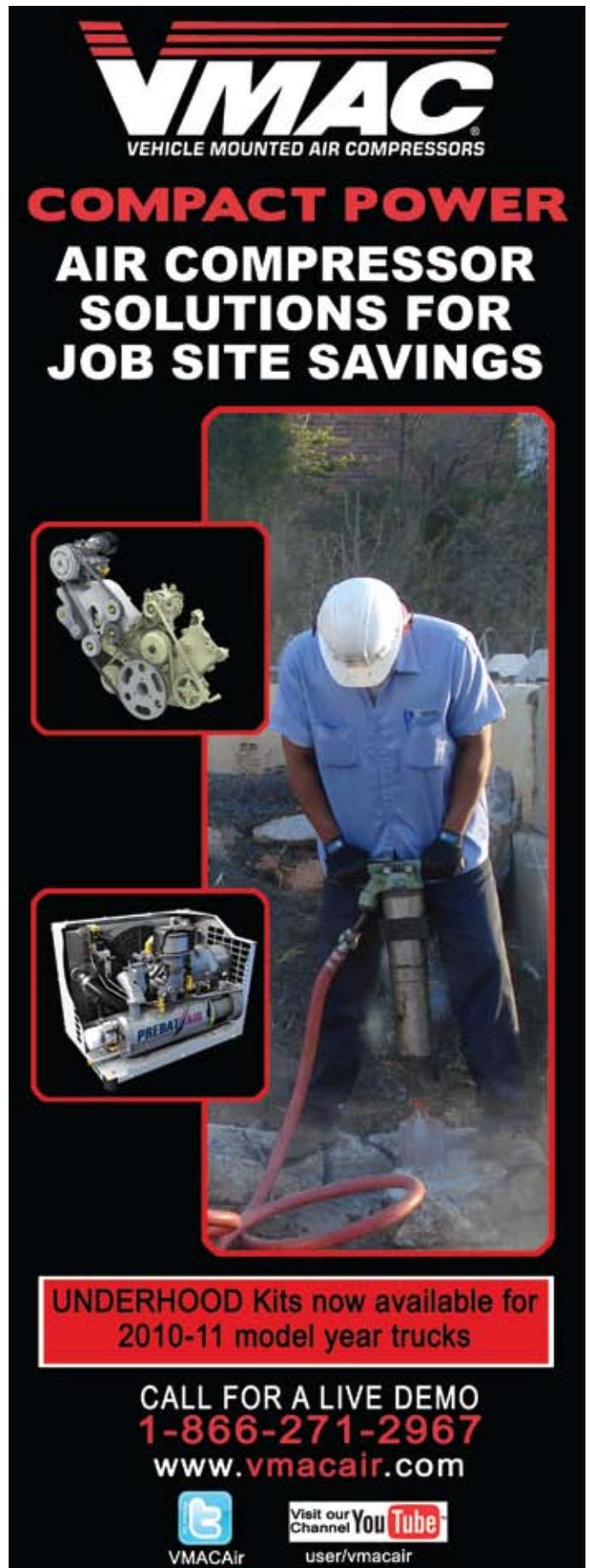
CONSTRUCTION METHODS

Obtaining green certification usually requires certain construction methods intended to (among other things) reduce construction debris and minimize indoor airborne particles. For example, depending on the type of project involved, a green point might be sought in the “materials and resources” category for recycling or salvaging 50 percent or more of construction, demolition, and packaging debris. When pricing a green project, a contractor should take account of all of the extra costs that will be incurred in designing and implementing the recycling and salvage program, and for documenting that the goals were achieved.

For interior construction work, green points may be available for reducing dust and airborne pollutants, under the “indoor environmental quality” category. The LEED rating system specifies certain types of filters that must be used in the HVAC system during the performance of construction, which must be replaced with a different type of filter prior to occupancy. To earn the green points, the owner must demonstrate that the clean-air procedures were followed, and therefore the contractor may be required to submit photographs taken in several places at various stages of the work. Again, a contractor should consider the cost of complying with these requirements when pricing a green project.

THE FUTURE IS NOW

States and cities across the country have begun to require new and substantially renovated commercial buildings to meet green building standards. Over time, it seems inevitable that sustainability standards will spread to other types of construction, such as residential and industrial buildings, and even highway construction. If they want to avoid costly disputes over green construction, contractors must learn about and address the special risks they face when building green. ■



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