

Sustainability Also Applies to Business Viability

(By Frank Musica, Victor O. Schinnerer & Company, Inc.)

Designing for sustainability involves considering environmentally responsible design alternatives, materials and construction techniques appropriate to the project that are consistent with the project client's program, schedule and budget. Clearly many in the design and construction industry are advocates of the process and objectives of building "green."

Home builders and others constructing habitable structures understand the need to increase the efficient use of materials and resources by reducing construction waste, using materials without "high-embodied" energy, and minimizing long term energy use. And without being reminded by laws and regulations—or by media hysteria—home builders are sensitive to the environmental impact of construction and need for projects to provide for healthful living.

But enthusiasm for green design may lead to ignoring well-developed risk management procedures. And firms that respond to a new societal imperative to reduce long-term operating and environmental impacts, often find that they endanger their own long-term viability.

As the leading insurer of design professionals, the Schinnerer program with CNA has experienced increasing claims against architects, mechanical engineers and other design professionals related to green design requirements. Many of the claims are the result of unrealistic expectations by clients that often are fueled by unreasonable promises by the design firm or excessive proclamation by certification programs, product manufacturers or even government agencies.

Although designing and building green projects do not create new and unmanageable exposures, recent professional liability claims against design firms—and contractual and warranty claims against constructors—indicate that firms often are the victims of their own zeal to meet market demands or the misguided application of inappropriate regulations.

Tempering Enthusiasm with Reality

In some cases regulations or corporate or government policies force components of green design into projects. Others are the result of "green demand" where customers see sustainability as essential to their health and that of society. But most who want a green project seem to be motivated by the implied, or expressed, assurance that any capital cost premium will be more than offset by reduced operating costs as well as other, perhaps equally tangible, benefits.

The interest in green design may stimulate the additional investment inherent in both the design services and construction costs in anticipated future measurable

environmental and financial paybacks. Or the interest may be forced from outside influences including imprudent government regulations.

The expectation that there will be a payback in decreased energy consumption or other costs to offset their investment often is fostered in part by the “sales pitch” associated with green design recognition programs. Programs such as LEED or Green Globes create a prize for a “green” project result. And now, as political bodies react to increasing public pressure, many of these certification programs that add time and cost to a project are being incorporated into government edicts.

Green design, however, is more than adding up points to attain a rating. Sustainability in design and construction requires more than having a ticket punched or displaying a rating like a trophy.

And consumer enthusiasm for green design, inappropriate government regulation and certification programs that force features to be added—or deleted—without recognition of real needs and sustainability options often result in dissatisfaction and claims.

Managing and Documenting Client Expectations

Sustainability in design and construction should not be pursued without a comprehensive understanding of the consequences. A thoughtful and knowledgeable consideration of the long-term operating and environmental impacts of a project is essential.

It is vital to have open and thorough communication concerning reasonable expectations of sustainability. Any client should understand that success in achieving the environmental objectives necessitates an integrated design and construction approach and active involvement by the client in the operations and maintenance of the building. Contractors and sub trades must both understand the goals and be involved in the many activities that allow the goals to be reached so that sound construction techniques and sensitivity to environmental matters such as the recycling of waste and the use of environmentally friendly techniques and processes are built into the process.

And clients who demand green design must understand that their expectations need to take into account that green design projects are not the same as what they have experienced in the past. Green projects have different performance characteristics and different operational requirements.

But not all who profess an interest in green design take their role seriously. For instance, an unengaged client such as a home buyer who wants a green “seal of approval” but does not understand the what costs and other consideration go into a green design may be surprised—and disappointed—at the consequences. Too often achieving a cumbersome sustainable design certification or meeting

government standards is the goal without an understanding that certification is not a commodity and government requirements that a project conforms to one specific evaluation system, often do not provide real value for the project user.

To attain the benefits of green design, everyone, including the project owner, has to make a genuine commitment to invest in the process including the design, construction, operation and maintenance measures required to achieve a minimal environmental impact while meeting the clearly indicate needs of the owner.

Establishing and Meeting the Standard of Care

Design firms are especially at risk because they are held to meeting a professional standard of care and it is difficult to determine if the standard of care for design services currently meets the level of expectations fostered by the media attention to energy and environmental concerns. And design firms and contractors that market themselves as having a high level of specialization raise their exposure to claims from dissatisfied clients.

With the superficial attention to green design in the media comes a higher probability of misunderstanding as to what are realistic expectations. And the overselling of the attributes—and the lack of emphasis on user requirements—can lead to dispute, claims and litigation.

Avoiding Guarantees, Fraud and Misrepresentation

Advertising, sustainability descriptions and even contracts can lead to exposures that are difficult to defend. Organizations promoting sustainable design through certification programs create a “brand” with their certification of a project often being seen both as a commodity and a trophy. A firm that includes in its marketing or its contracts a commitment to deliver a certified project may be subject to an express warranty of performance that extends beyond its ability to manage the risk.

And a client’s insufficient knowledge of and commitment to its own role and investment for the long-term coupled with the client’s uneducated enthusiasm may lead to claims of deliberate misrepresentation—or fraud in the inducement to contract—exposing the everyone in the design and construction process to claims that are difficult to defend.

Balancing Obligations with Manageable Risks

If there is an unclear definition of “green,” clients will be making significant financial commitments based on a concept that they may appreciate intellectually but understand only superficially. When a design firm or contractor contractually commits to producing a result such as obtaining third-party certification, achieving stated energy savings, reducing construction materials and waste, or creating a

healthful interior environment, the expectations are real even if often unrealistic. Unless the risk of misunderstanding and idealistic expectations about comfort, performance and maintenance are minimized, green projects may produce red ink and challenge the business viability of the design and construction entities.

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