

# Green Guarantees Vex Firms With Added Risk

Many contractors and designers are passing on work that includes long-term performance warranties for sustainable building systems. **BY PAULA MOORE**

**M**ore owners of green projects, especially governments, are demanding long-term performance guarantees, and contractors and designers are trying to figure out how to defray the risks of such commitments. Among the biggest problems posed by guarantees for contractors is being held accountable for work they didn't do and the operation of delivered buildings they no longer control.

Most insurance companies don't cover guarantees, and attorneys often advise against making them out of concern for potential liability that could cost millions of dollars. Contractors don't like to pass on a job because of guarantee demands, especially in the current economy, but some think it could be costlier in the long run not to.

"You try not to guarantee anything you can't actually control," says Michael Deane, vice president and chief sustainability officer at Turner Construction Co. in New York City.

"It's a real can of worms," says Bill Green, president of The RMH Group Inc., an engineering firm in Lakewood, Colo., about the trend. Required guarantees can range from getting a specified LEED certification to promising a building will deliver a specific amount of energy savings after occupancy. Some owners have sued contractors because a green building was supposed to decrease absenteeism among employees and increase productivity but didn't.

Owners' insistence that architects, engineers, construction companies and other contractors guarantee their work on sustainable projects coincides with the rise in demand for LEED-certified and other sustainable buildings. Owners pay a premium for green buildings, and they want to make sure they get their money's worth, according to contractors.

"There's been a lot of green evolution," says Roy Bash, attorney and chairman of the Construction/Energy/Real Estate Litigation practice group at the Kan-



sas City, Mo.-based Polsinelli Shughart PC law firm. "It's easy to say I want a green building, but it's harder to make the decision to pay for it."

Requiring new buildings to be sustainable has even become part of some city and state building codes, so contractors must deliver those buildings by law. The Washington, D.C.-based International Green Council's International Green Construction Code (IgCC), for example, was completed in 2012 and is the first model code to include sustainability measures for an entire construction project. States such as Florida, North Carolina and Oregon have adopted the code, as well as cities such as Scottsdale, Ariz.

## Legal Requirements

The RMH Group has seen contracts with performance guarantees from government agencies, including the U.S. Dept. of Veterans Affairs and the U.S. Army on Colorado projects, as well as a few from private-sector owners. One of the firm's main concerns is being held liable for long-term energy performance of a project for which RMH designed only the mechanical and electrical systems. The firm also worries about being held responsible for a building after it's finished.

The engineering firm cites a recent case study of two

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almost-identical, sustainable schools it worked on in Colorado as an example of potential liability. At one school, the maintenance staff learned how to operate the sustainable HVAC systems and monitored them vigilantly, according to RMH's Green. At the other school, operators didn't know how to use the systems, which weren't running optimally, so the second school used twice as much energy as the first one.

"This is a huge deal. ... We have walked away from business because we would not sign a guarantee," says Green. "What we try to do with developer-led design-build is have the team indemnify us for the guarantee."

"You get building operators with all levels of skill sets," says Ian McDowell, vice president and manager of preconstruction services for the southwest district of Sundt Construction Inc., Tempe, Ariz., which does a lot of sustainable work. "You may put a highly sophisticated system in a building whose maintenance staff is used to less sophisticated systems. ... Making someone contractually responsible for something they can't control is taking things too far."

If a contractor agrees to a performance guarantee, it does so at its own peril, say insurance experts. There's no insurance yet that covers guarantees, though some insurers are looking at what they might provide.

"The insurance industry hasn't caught up with this trend yet. ... Insurance companies are not interested in that additional risk," says Rod Taylor, managing director of Aon Risk Solutions' Environmental Services Group for the northeastern United States. Some large contractors are willing to guarantee a building will get a certain LEED rating, Taylor says, but they limit liability to a set dollar amount. "They're able to do something but not leave liability completely unlimited."

Insurers such as Aon suggest contractors get all parties participating in any guarantee involved in the process as early as possible and perhaps bring in a third-party facilitator as well. That strategy ensures that parties understand and agree to the same objectives. Many attorneys also prefer to help all parties reach a compromise. An architect, for example, may agree to "endeavor to achieve" or use its "best efforts" to reach a certain LEED certification on a project, says Ryan Manies, an attorney and architect with Polsinelli Shughart. "But parties should be careful about what they promise if they're not 100% sure they can deliver."

Sometimes a compromise isn't reached, and an attorney feels compelled to advise his client not to make a guarantee. "We tell them it's better to walk away than to make uninsurable warranties," Manies says. ■

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