



Environment

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Expert: Green projects risky for contractors

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Ujjval Vyas, an expert on risk management, said green building is fundamentally changing the construction industry in ways that bring new risks and liabilities to contractors.

Vyas is a principal at the Alberti Group, a national consulting firm that helps clients define sustainability goals, manage risk and improve the performance of their buildings. He is also an attorney and a professor.

Vyas was in Seattle recently to address the Associated General Contractors' Future Leadership Forum and give a public talk about what he called the myths and realities of green building.

More construction is going green, with some cities requiring green certification and owners hiring teams specifically to create LEED buildings. But green building means using new systems and technology, and is changing the traditional relationship between team members.

Vyas said contractors need to better understand how these changes affect them.

"People are afraid to have the hard conversations because they're afraid to be against something that everybody's for," he said. "You don't have to be against it at all. You can love sustainability. Just do what you always do (and remain skeptical)."

Vyas said it's important to know who's responsible if things don't perform as promised. Contractors, he said, need to be careful because owners often consider them the financially responsible party.

The best way to proceed, he said, is to ask questions. "If you don't remain skeptical, you significantly increase the risk and liability on the product."

Legal risks

Local green firms say they can handle the risks

Mike Clifford, project manager at Mortenson Construction, said some of Ujjval Vyas' points are concerns for his company. For example, Mortenson does not guarantee LEED certification in contracts and is clear to define its role and responsibilities.

But he said the process can go smoothly if team members get involved in a project early on, agree to work together collaboratively and define what they are responsible for. "If the communication is good on a project and the plan's good and there's investments from all parties early on, you eliminate a lot of your risk."

Giving team members incentives to reach goals is more effective, Clifford said, because it gets everyone working together.

Clifford agreed that design/build projects allow a team to collaborate more fully, though he said any delivery process that encourages integration at an early stage will create a better building.

A lawsuit that surfaced a year ago got people talking about these problems, Clifford said, and ended what he called the green building "honeymoon."

"Ultimately, this isn't something we see as anything we have to get too overly concerned about. It would never restrict us from getting involved in a project," he said. Rae Anne Rushing of Rushing/Blackbird, a Seattle mechanical and electrical engineering and sustainability consulting firm, said she's not worried about Vyas' concerns and doesn't think many general contractors would be either.

Vyas said he has been involved in lawsuits when a team's aspirations didn't match a building's performance. He said he sees lots of legal risk connected to green buildings.

For example, if a tenant requires LEED space and moves into a new building that later fails to get certified, it's going to be costly for the owner to lose that tenant, and it could end up in court.

If a building fails to perform as promised, Vyas said, the owner will sue the contractor, not the architect. "(The architect) isn't worth going after. You are, and your insurance carriers are worth going after."

Vyas said there are other legal questions about green projects. With a typical building, contractual requirements end at substantial completion. But with LEED, a building is not complete until it has received certification, which can take an extra year. Vyas said this can compromise warranties associated with substantial completion. To avoid problems, teams should write into contracts when their responsibility ends.

An attorney can lead a team astray if he or she is not experienced in sustainability issues and construction, he said. Teams should also never guarantee a level of LEED certification or imply that a project will reach a high level of performance until it does, he said, and they should also be careful about claims they make in press materials.

Vyas said contractors need to be much more actively involved from the beginning to avoid suits. Owners often speak most with architects, so the image they get of a finished product is what the architect envisions. Vyas said contractors need to communicate often with the owner about what is and isn't realistic.

"Architects believe that owners should pay for their dreams. Their zeal can become your performance requirement," he said. "Unless you say differently, the owner will think you agree with what the architect says."

Contractors should see all the contracts, he said, because another firm's contract could require something they did not agree to. They also need to be up to speed on green building and contractual risk, and limit their role by clarifying the scope of their work in contracts. Vyas said contractors should make it clear to owners that they are happy to install new systems or technology, though they are unclear about how they will perform.

"I'm suggesting you be the first person that says, 'this is our scope and our role.' The architects

"He's not really realizing (in) our region, and especially Seattle and Portland, we're really ahead of the game," she said. "This protect yourself, liability stuff, well maybe five or 10 years ago I would have been more concerned about it, but in today's world, I'm not at all."

Rushing said product risk and delivery risk will always exist, whether a project is green or not. Due diligence on any product or system in any building is crucial.

"It's humorous to me to categorize either (product or delivery liability) as stronger with green building," she said. "That's sort of the opposite of greenwashing... you're trying to scare people about something that isn't real."

Rushing also disagreed that design/build contracts provide the best path to sustainability. She said the Northwest is particularly gutsy in trying new processes and delivery methods such as design/bid delivery, design assist delivery and integrated design. "(Design/build is) not the only solution."

Jim Goldman, project executive at Turner Construction Co., said the issues Vyas raised are not really concerns for Turner because the best practices of green building have already become ingrained in the company.

"We haven't experienced contractual issues with green building or LEED certification," he said. "It's a core element of the project, which is always part of the building program. The goals are identified upfront and are very clear and the owner in particular has a key leadership role in being able to direct the building team."

Goldman said creating a high performing building takes planning and good collaboration. The earlier the contractor comes in the better, he said. Design/build is only one option. "It's a very good option but there's lots of ways to deliver. It doesn't preclude you from any of the methodologies that we use today."

Goldman said it is tough for a contractor who has never worked on a LEED project to learn how the process works. He said it is a big learning curve, but a relatively short one. "There is a learning curve. You need to approach it with a certain level of sophistication."

often just have no idea what they're talking about," Vyas said.

If a contractor is installing a confusing piece of equipment, "issue (the architect) a blizzard of RFIs."

Too often, he said, these discussions don't happen.

Some solutions

One of the great myths of green buildings, Vyas said, is that they perform better than others. He said there just is not enough good data: "The information stream is seriously polluted."

A building that is sustainable can also be high quality, depending on the motivation of the team. "Sustainability is a great location for you to really establish that you are a quality enterprise, not that you are a sustainable enterprise. That's a big, big difference."

If you're doing it for the marketing benefits, then you need go no further than LEED, Vyas said. But a team that wants to reach the highest level of quality needs to go beyond LEED and start thinking about how it can provide the highest quality building.

To create a truly high performance building, Vyas suggests entering into a design/build contract and a performance contract, and requiring commissioning at the beginning of a project. These actions, he said, get everyone at the table early and help ensure that a building meets their goals. "I see no better way than to engage in a design/build contract and a performance contract."

Failing that, teams need to do more research on the performance of products and tools. Focus on quality rather than just green, he said. Owners will recognize the level of quality brought to the table and will "hopefully discriminate in the marketplace and choose you."

To get team members working together, Vyas suggests contractors buy local architecture firms. A medium-sized construction company, he said, could easily buy the hottest architecture firm in town, creating a design/build firm that offers owners a single source for both services.

This would combine client pools and push competitors out of the market, while allowing team members to plug holes that occur when developing sustainable projects in a traditional way, he said.

"I would argue right now, every contractor should be going out there and just buying," he said. "This is the time to just purchase them."

Jeff Robinson, general superintendent at John Korsmo Construction, said the talk resonated with him, especially the idea of having architecture and construction firms combine forces. Vertical integration, he said, is key.

"That is clearly the direction that a lot of firms are heading and the GC/CM procurement method is one of the positive ways that we're working with our clients to be involved in design upfront... and helping them wash out the problems," he said. "I think it's a good idea."

Vyas said owners need to be more clear about what they expect from projects. Owners should send clear signals to the architect and contractors that they are looking for real solutions and a truly high performance building. Contracts should specify that any product or design solution used will be considered fully vetted.

"If you have to have 17 subconsultants, that's the case. It's your duty," he said. "Just because they saw it in a magazine, they don't get to spec it."

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