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PENGUINS GO FOR THE GOLD

Anyone thinking that the title of this article refers to Sidney Crosby, Brooks Orpik, Evgeni Malkin, and Sergei Gonchar playing for their home countries in the 2010 Vancouver Winter Games would be excused in so thinking if this were, in fact, the sports page. However, this is the *Construction Legal Edge*. The title refers to Pittsburgh's National Hockey League franchise seeking to become the first NHL team to achieve a LEED-Gold Certified arena.

On Earth Day 2009, the Penguins and the City of Pittsburgh – Allegheny County Sports and Exhibition Authority announced that they would seek a LEED Gold Certification for the new CONSOL Energy Center. While many of the NHL's teams have built new buildings in the past 10 years, neither they, nor any other major sports team in the United States, has achieved LEED Gold. Neither Yankee Stadium nor Citi Field, the two New York baseball stadiums, achieved any LEED certification. To date, the only arena facilities to have achieved LEED certification are the Phillips Center in Atlanta, home to the Atlanta Thrashers of NHL and NBA's Atlanta Hawks, and the American Airlines Arena in Miami, Florida, home of the NBA's Miami Heat. In addition, the Portland Trailblazers' Rose Garden earned a Gold Certification for environmentally friendly renovations to the 15 year old Rose Garden.

Nationals Park in Washington, D.C. which opened for the 2009 season was the first major league baseball stadium to earn LEED certification. Nationals Park earned green points with high efficiency lighting and air conditioning.

Newly opened Target Field in Minneapolis, home of the Minnesota Twins, was awarded LEED Silver Certification by the U.S. Green Building Council ("USGBC"). Target Field's LEED score of 36 points is the highest ever for an outdoor baseball facility. Nationals Park in Washington earned a 34 score from the USGBC. Target Field sports high efficiency lighting, a rain water filtration system and recycled construction materials has green building features.

Ken Sawyer, the Penguins CEO, stated that the Penguins from the outset wanted LEED Gold Certification and decided to seek the gold designation early on. The CONSOL Energy Center is both on time and on budget and Mr. Sawyer stated that the LEED Certification did not increase the project's budget. Some of the green design features of the CONSOL Energy Center include the use of natural lighting, green space around the building, recycling, use of local materials, green power sources, and efficient HVAC and use of environmentally-friendly paints.

In an April 2009 article, the *New York Times* stated that Pittsburgh claimed more LEED certified square footage than anywhere else in the United States as of 2005. Although other cities have since caught up, Pittsburgh was ranked 7th nationally in the number of buildings with LEED certification. Other LEED certified buildings in Pittsburgh include the David L. Lawrence Convention Center, Children's Hospital of Pittsburgh, PNC First Side, 3 PNC Plaza and various PNC branches, PNC can claim more LEED certified buildings than any other organization in the world.

Other current projects seeking LEED certification include the Westinghouse Electric Company Center in Cranberry Woods, the renovation of the Union Trust Building in Downtown and the Bakery Square Project. Local architects, contractors, and suppliers have partnered to help cement Pittsburgh growing reputation as a green city. The Pittsburgh Penguins will not know if this new arena has earned LEED Gold status from the USGBC until the building is substantially completed and inspected. As noted in previous issues of the *Construction Legal Edge*, designers and builders should take care in their contractual documents to avoid making guarantees as to LEED certification, as the process is in the control of the USGBC and outside the control of the designers or builders. The following article by Michael Magee shows how builders can use contract documents to minimize "green risk".

Just as Sidney Crosby iced the gold for Canada in the Olympics, the Penguins are skating hard to achieve LEED Gold when the first puck is dropped for the 2010 – 2011 Season.

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CODIFICATION OF "GREEN"

As the "green" wave continues to wash over us, two recent developments will further clarify efforts to integrate sustainability into new building construction or renovation projects by both contractors and design professionals.

Green Building Addendum

The Associated General Contractors of America (the "AGC") has issued, what it calls, the first comprehensive contract document to address the complexities of green building projects. Known as the ConsensusDOCSTM 310 Green Building Addendum, it is intended to help advise the owner, set proper expectations, and avoid delays in the construction of buildings seeking green certification or other sustainability goals.

The goal of the Green Building Addendum is to define, not the concept of "green", but rather the roles and responsibilities of contractors, designers, owners, and others involved in the construction of a "green" project. The Addendum utilizes the concept of a Green Building Facilitator, who can be either a project participant or an outside green consultant, to define the roles and methodology to be used to plan and implement a project's sustainability goals.

In theory, unless the contractor undertakes the role of the Green Building Facilitator on a project, the Addendum should shield the contractor from liability on the myriad of problems that arise in connection with a "green" project. Thereby leaving the contractor to do what it does best – build. Liability for selection of the "green" products and equipment, as well as overall design, will fall on the Green Building Facilitator. As a practical matter, while it should mitigate contractor risk, it is unlikely that incorporation of the Addendum into the construction contract documents will prevent the contractor from being named in the lawsuit when the owner does not achieve certification or does not otherwise achieve its sustainability goals.

International Green Construction Code

The decisions of the Green Building Facilitator will be guided, in large part, by applicable building codes. To this end, the International Code Counsel, along with the American Institute of Architects and ASTM International, released The International Green Construction Code, Public Version 1.0 in March of 2010. The IGCC is intended to facilitate and accelerate the construction of green buildings by addressing the need for a mandatory baseline of codes for green commercial construction of traditional and high-performance commercial buildings. Unlike voluntary green building standards used to date, the IGCC is written in mandatory, legally enforceable language.

The IGCC is designed specifically to integrate and coordinate with the other International Codes already being enforced by governmental code officials at all levels. The drafting bodies are urging quick governmental adoption of the new codes, even though a final version of the IGCC will not be in place until 2012.

According to the AIA, the key issues addressed by the IGCC are site and regional climate customization; post-occupancy building commissioning; prescriptive versus performance-based metrics; and the role of existing buildings in the IGCC.

The IGCC provides elective criteria that allows governing bodies to tailor the code to regional climate patterns. It begins with uniformly mandatory energy efficiency criteria that require commercial buildings to be 30 percent more energy-efficient than buildings created under the 2006 International Energy Conservation Code. From here, local municipalities have the option of selecting from requirements that will increase performance and sustainability standards. Included among the alternative compliance paths is ANSI/ASHRAE/USGBC/IES Standard 189.1, Standard for the Design of High Performance, Green Buildings Except Low-Rise Residential Buildings, as an alternative compliance path. Standard 189.1 is a set of technically rigorous requirements, which, like the IGCC, covers criteria such as water use efficiency, indoor environmental quality, energy efficiency, materials and resource use, and a building's effect on its site and community.

The IGCC requires that a commissioning plan be submitted to building officials along with the project's construction documents. Upon issuance of the certificate of occupancy, building owners will be required to submit a commissioning report to the local code official within 18 to 24 months. This report will detail, among other things, how the building has performed with respect to energy efficiency and performance. If a building does not meet its performance goals, the commissioning report will document why and how it can be improved.

While performance-based metrics are applied to larger projects, buildings smaller than 25,000 square feet are allowed to use prescriptive sustainability measures, including one that tracks energy usage beyond the site to source energy.

With respect to existing buildings, all large-scale, re-designed additions and renovations must be completed in accordance with the IGCC. Smaller-scale upgrades must spend five percent of their total budget on measures that will work toward meeting the IGCC's mandates.

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E-VERIFY: WHAT FEDERAL CONTRACTORS NEED TO KNOW

E-Verify. What is it and who has to use it? What started out as a voluntary governmental program under the Bush administration designed to help employers verify the employment eligibility or work authorizations of their new hires, has become mandatory for certain federal contractors. Currently, the existing regulations require federal contractors to verify the employment eligibility of (1) all persons hired during the contract term by the contractor to perform employment duties within the United States;

and (2) all persons assigned by the contractor to perform work within the United States on the Federal contract. This regulation applies to companies that receive prime contracts longer than 120 days and valued above $100,000. It also applies to subcontracts for services and construction valued at more than $3,000 if the prime contract contains the E-Verify clause.

If a Federal Contractor falls within the parameters set forth above, it will be required to electronically verify the employment eligibility of all of its existing employees as well as its new hires during the contract term, regardless of whether or not those individuals are working on the federal contract. Only state and local governments, institutions of higher learning, Indian tribes, and sureties performing under a takeover agreement are required to verify only those individuals working on the contract itself.

Exemptions to the E-Verify regulation do exist. If the contract is for less than 120 days or valued at less than $100,000, the federal contractor is not obligated to E-Verify its employees. Likewise, if the contract is only for commercially available off-the-shelf items and related services, or the work to be performed is to be done outside of the United States, E-Verify would not apply.

To use the E-Verify system, employers submit information provided on an employee's Form I-9 in to the E-Verify web site. The E-Verify system will return one of three results:

(1) "employment authorized"- the employee is employment authorized;
(2) "SSA Tentative Non-Confirmation" – the Social Security Administration database is showing the employee's name and social security number are not matching;
(3) "DHS Verification in Process" – The Department of Homeland Security will respond within 24 hours with either an Employment Authorized or DHS Tentative Non-Confirmation.

If a worker shows up as "employment authorized", the employer will record the system-generated verification number on the Form I-9. If an employer gets a "tentative non-confirmation", the employer must promptly provide the employee with information about how to challenge the information mismatch and the employee can then contest the determination and resolve the mismatch with the Social Security Administration or Department of Homeland Security. The employee will have eight days to resolve the issue. The employee may continue to work while the case is being reauthorized.

If the employee does not contest the finding, the determination is considered final and the employer may terminate the employee and resolve the case. Employers are also required to post a notice in an area visible to prospective employees that the company is an E-Verify participant. And the employer must post an anti-discrimination notice issued by the Office of Special Counsel for Immigration – Related Unfair Employment Practices, Department of Justice (DOJ) in an area visible to prospective employees.

Pennsylvania is one of several states that have passed bills regarding the use of E-Verify. Pennsylvania HB 2310, enacted on May 11, 2008, prohibits state contractors from knowingly employing or knowingly permitting their subcontractor to employ undocumented workers. During a hearing on the legislation, the Center for Immigration Studies' Jessica Vaughan estimated that there were between 18,000-35,000 illegal aliens in the Pennsylvania workforce.

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WHEN AN OWNER OR CONTRACTOR'S POOR PERFORMANCE IS NOT A BREACH OF CONTRACT

Some construction projects seem destined to complete their close out in the court room, and with a down economy, the trend seems to be in that direction. Most contractors define success by whether they get their full retention, while owners look instead to whether the project was delivered on time and on budget. Between these lines is where most lawyers make their living, but lawyers who fail to understand the process of construction fail their clients by forcing close-out into the court room when that result could have been avoided.

Neither Owners nor Contractors typically care much about the contract documents until a dispute arises. Contractors often finance the construction and get nervous when the pay applications are slow to get certified and even slower to get paid. Owners get nervous when they see the schedule starting to slip, their budget leaking, or work being done that is of questionable quality. Most Owners are not sophisticated enough to know conforming work from non-conforming work, or when a schedule slip is worth worrying about, so they frequently contract with design professionals, construction managers, or owner's representatives to give them advice. If these concerns are minor, they usually get resolved in the field, but when a major dispute erupts, everyone calls their lawyer and starts dusting off the contract. That's when the letter writing campaigns begin and the threat of work and payment stoppages become real concerns.

Owners justifiably want their project delivered in accordance with the contract documents, but how much conformity is truly required? Most contractors will claim that no project can be built exactly as drawn, without a busted tolerance here or there, and any Owner who insists on strict conformity is unreasonable by definition. Contractors cannot afford to have major disruptions in their project cash flows, and abusive Owners are a real hardship. These unmet expectations are where the disputes originate, so we return to the contract documents to find out who is being the most unreasonable.

When this happens, the lawyer adds value to the Project by helping the client understand what rights they have and what rights they do not have. The Owner wants to know if he has the right to withhold payment. The Contractor wants to know if she has the right to

stop work. The contract general conditions usually provide the answers to these questions, but rarely are those answers easy to come by. It's not enough for the lawyer to know what the contract says – but what it actually means, and the only way to know what it means is to understand project delivery.

For various reasons, many projects have some level of subjectively poor performance by one party or another, but the key to keeping close-out on the project and out of the court room is knowing when that poor performance translates into a breach of contract and when it does not. Thankfully, the courts have recognized that insisting on strict compliance with contract documents would result in clogged court dockets, so they embraced the concepts of "material breach" and "substantial performance" a long time ago. This means there is no breach of a construction contract unless the party's poor performance is "material," or stated another way, a party who has "substantially performed," can not be found in material breach.

Determining what constitutes a "material breach" on a construction project is a very specific analysis that involves not only legal advice (based upon the contract language and any relevant court decisions or statutes), but the advice of other professionals, such as architects, engineers, construction managers, or other consultants. The challenge lies in being able to integrate this information cogently and efficiently so the client can be told: "Yes, you have the right to withhold payment," or "No, you can not stop working."

Courts have typically favored the Contractors when it comes to an Owner's poor performance on payment. Although Contractors will usually put up with a slow paying Owner for a while, if it gets so bad the Contractor is considering its rights to suspend or stop work, the Owner should be worried about their poor performance being converted into a "material breach". When considering whether the Owner's failure to make on-time payments constituted a material breach, the court in *General Ins. Co. of America v. K. Capolino Const. Corp*., 983 F. Supp. 403 (S.D.N.Y.1997) not only found it was a material breach, but that the Contractor's failure to properly certify that all his sub-contractors were paid was *not* a material breach excusing payment. Even though a clear contract violation, the Contractor cured that poor performance within two weeks**.**

The Owners have a more difficult time declaring a material breach when it comes to a Contractor's poor performance. Most performance complaints boil down to non-payment of subcontractors (including lien filings) and poor work (either construction defects or delays). When the Contractor is under scrutiny, the analysis becomes case specific, and the courts are all over the place as to what level of poor performance must exist before the Owner can declare a material breach and terminate for cause. Consequently, Owners take tremendous risk when making termination decisions.

Almost all contracts require notice to the Contractor and an opportunity to cure the non-conformity. Most warranty clauses give the Contractor the right to repair or replace the non-conforming work before being found in breach. As such, the mere presence of non-conforming work, *by itself*, is rarely a condition of breach. In those cases, the lawyer has to focus on whether the Contractor has met its cure obligation.

The same holds true in delay situations. If a contractor is behind the current schedule, he may not be in breach of contract until he actually delivers the project late, which is usually not known until the milestone or substantial completion dates have past. Most times, an Owner does not have the right to declare a breach just because the Contractor is behind schedule – because they can still make up the time by the date. In these cases, the contract language is very important as to the conditions that must exist regarding the Contractor's poor progress before being in material breach.

Both Owners and Contractors also have to watch out for remedy clauses when it comes to poor performance. Delay scenarios have this common trap, and it can become a problem because many states have statutes that trump contract language. Many contracts have "no damage for delay" or "time extension as a sole remedy" clauses. They apply to either waive a Contractor's right to pursue delay damages, or limit a Contractor's remedy for delays to a time extension (rather than compensation). In Ohio, the Legislature thought that was unfair and wrote a law stating that such clauses are not enforceable against Contractors when the Owner is the cause of the delay. In states without such statutes, an Owner's interference is neutralized by the remedy clause, so the Owner avoids a material breach. While in states with these statues, the Owner's poor cooperation on scheduling matters can bring major liability.

Owners need to realize and accept that not every deviation from the specifications or schedule means the Contractor has committed a material breach and may not give them the right to withhold payment. Contractors need to realize that to avoid being hit with the nuclear option of termination for cause or having payments withheld; they can avoid being set-up by responding quickly to Owner issued notices. If lawyers are involved, there has been at least a perception of poor performance by someone. Lawyers are often quick to draw their sword, attack the other side, and focus on the poor performance. What is really necessary is an honest assessment of whether the poor performance rises to the level of material breach. No project that gets closed-out in the court room comes in on-time or on-budget. Sometimes, a court battle is necessary to be sure, and when they are, such battles must be fought aggressively. But most of the time, we can best serve our clients by avoiding premature declarations of material breach and keep close-out on the project where it belongs.

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