

PUBLICATION

Will the Surety Industry Slow the Enactment of a Green Building Code?

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The landscape of green building initiatives is undergoing a quiet but steady revolution. Until recently, both the incorporation of green building techniques and the pursuit of Leadership in Energy and Environmental Design (LEED) certification have been largely voluntary. Gradually, some municipalities and states, such as Florida, Indiana, Maryland, New Jersey, Oklahoma, and South Dakota, have begun requiring that all public construction projects over a certain dollar amount obtain LEED certification.

Mandatory green building standards are now being introduced into private sector projects as well. California was the first state to adopt a building code, commonly referred to as CALGreen, mandating compliance with certain green building specifications. Since the passage of CALGreen, other states, such as Pennsylvania and New Jersey, are considering adopting green building codes. The International Code Council (ICC), an association that creates uniform building codes that have been adopted by all 50 states and the District of Columbia, is drafting an International Green Construction Code (IGCC) based in large part upon CALGreen. It is too soon to tell whether, and to what extent, any IGCC will be adopted by local and state governments. Nevertheless, the initiative appears to have support all over the United States, including in the Southeast. The ICC lists the cities of Franklin, Tennessee; Jackson, Mississippi; Decatur, Georgia; Arlington, Virginia; and Destin, Florida among the municipalities that have pledged their support for the development of the IGCC.

The green building revolution has stumbled, however, over the issue of performance bonds. In 2006, the District of Columbia passed landmark legislation requiring that all public and private building projects larger than 50,000 square feet meet certain green building criteria. The legislation was heavily criticized for its requirement of a "green performance bond," which was a new kind of bond that had not previously been offered by the surety market. The new performance bond enforces green building criteria by requiring any project that fails to meet green standards to pay up to 4 percent of the building's costs into a city green building fund. Whereas a typical performance bond guarantees the achievement of a quantifiable objective, the green performance bond relies instead upon a prescriptive rating system that depends upon the assessment of a third party. It hasn't helped that the same government agency maintaining the green building fund is also in charge of assessing whether a particular building has met the green building criteria.

The surety industry has been wary of green performance bonds not only because of the perceived conflict of interest, but also because of vague standards and the reliance on a third-party assessment. As surety companies continued to lobby against the D.C. legislation, some believed the battle over the green performance bond requirement threatened the future of green building codes altogether. In response to this controversy, in December 2009 the District of Columbia Council introduced a revision of the Green Building Act in which all references to "performance bond" were struck and replaced with the word "bond." Despite this recent revision, the problem still remains that bond instruments that guarantee green building certification do not exist in the current market, and surety companies are resistant to issuing such bonds.

With the development of the IGCC and the push for mandatory green building codes in many jurisdictions, it remains to be seen how the surety industry will react to the increased demand to insure the performance of green specifications. It also remains to be seen how public projects will get built if the law's requirement that contractors provide performance bonds cannot be met because green bonds are not available. If the surety industry fails to meet this demand, the future of green building will become a classic example of an

unstoppable force coming up against an immovable object. The ultimate resolution is anyone's guess, but odds are that green building codes will be written to make them objective and sureties will write performance bonds to guarantee compliance with them.

If you want to have some input into the development of the IGCC, it is not too late. Comments and suggestions will be received from November 3, 2010 until January 3, 2011.