



Managing the Risks of Sustainable Design

Stuckey Insurance

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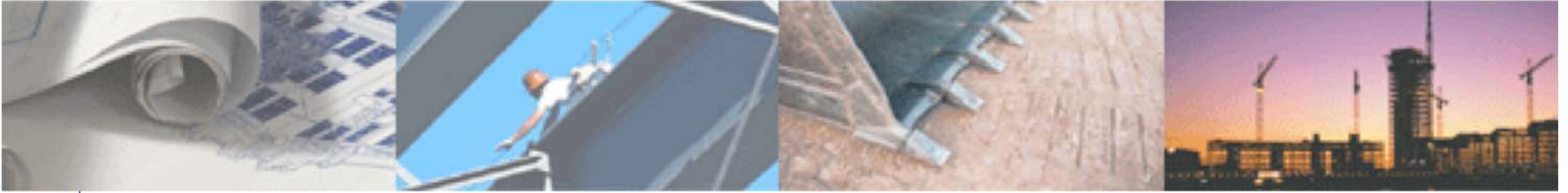
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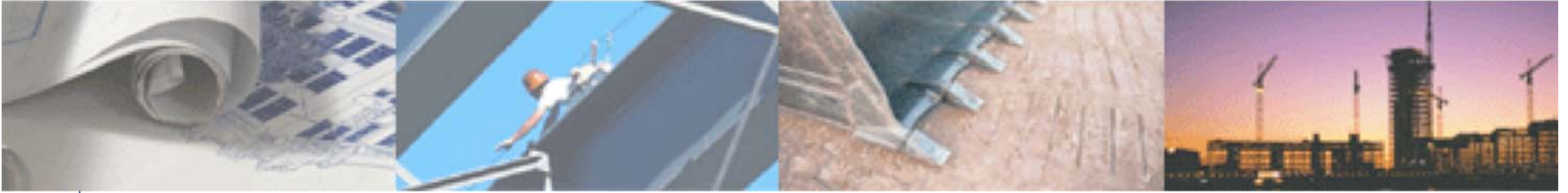
Objectives

- Discuss primary drivers behind the sustainability movement
- Review risks specific to sustainable design
- Learn how to manage major specific risks of the LEED certification process
- Discuss a few “war stories”



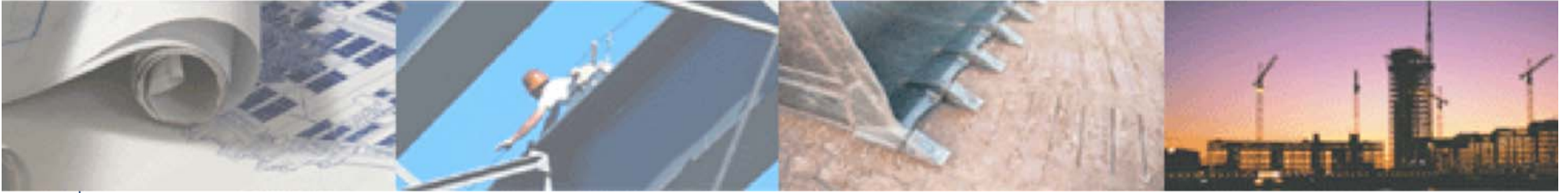
Private Developers/Owners

- What is the Incentive?
 - Market Differentiation
 - Life Cycle Costs
 - Expedited Approvals
 - Improved Health/Life Quality/Productivity
 - Socially Responsible



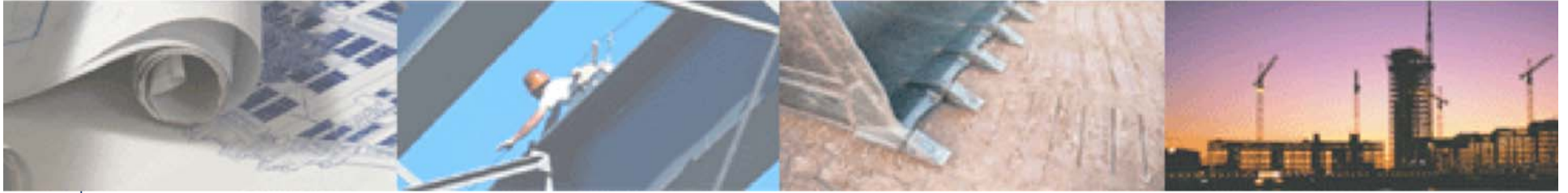
Public Owners

- What is the Incentive?
 - Public Pressure/Demand/Expectations
 - Socially Responsible
 - Life Cycle Costs
 - Improved Health/Life Quality/Productivity



Design Professionals

- What is the Incentive?
 - Socially Responsible
 - Market Differentiation
 - Client Expectations



Contractors

– What is the Incentive?

\$

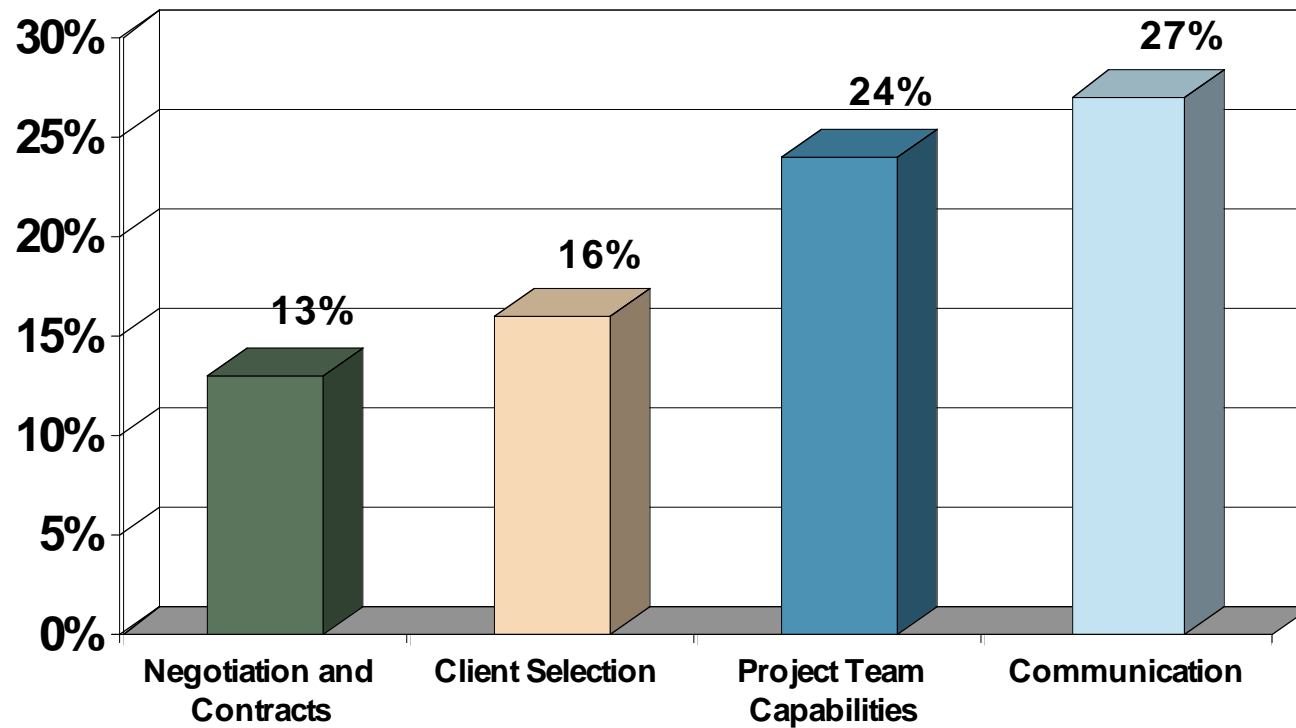


XLDP Risk Drivers Research

- Groundbreaking study of over 24,000 closed claim and LP files over a 13-year period.
- These files represent over \$1 billion in claim payments
- Found causes of losses fell into two categories:
 - Technical causes
 - Non-technical causes
 - A breakdown in project or practice management

Top 4 Non-technical Contributors

Percentage of Claims Affected







AIA B101 Requirement re Sustainability

§ 3.2.3

The Architect shall. . . discuss with the Owner alternative approaches to design and construction of the Project, including the feasibility of incorporating **environmentally responsible** design approaches.

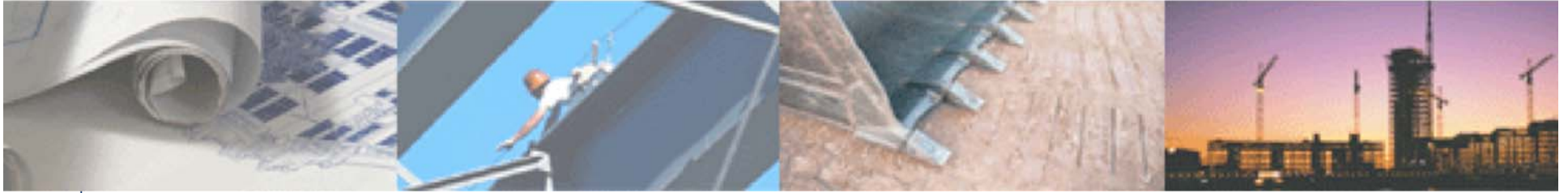
AIA “2030 Challenge”

AIA B101 Requirement re Sustainability Solutions

Cross it out.

OR

Consider “environmentally responsible design alternatives”, discuss them with the client and *document the discussion.*



Warranties & Guarantees and LEED

Warranties and Guarantees – **Exclusion in Professional Liability Policies**

- **“ . . . any CLAIM(S) based upon or arising out of express warranties and guarantees.”**

However, this exclusion does not apply to a warranty or guarantee by the INSURED that the INSURED's PROFESSIONAL SERVICES are in conformity with the standard of care applicable to that PROFESSIONAL SERVICE.



Warranties & Guarantees and LEED

The design professional is required to submit a number of documents for the USGBC in order for LEED certification.

The words *declare, affirm & certify* are used in every LEED template as part of the submission process confirming compliance with LEED standards. By definition the words can mean to confirm absolute compliance.

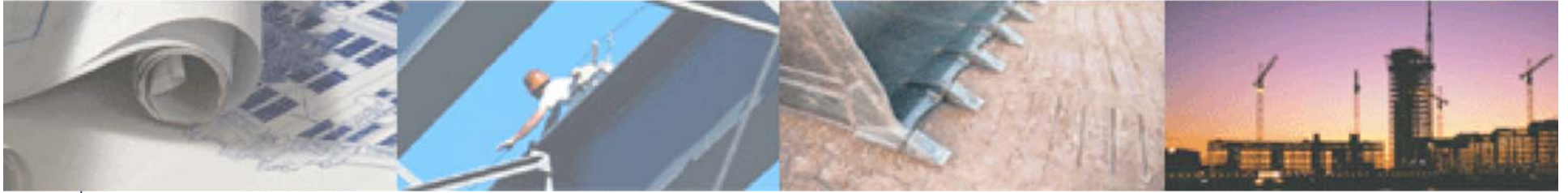
Using any of the words listed above can create a coverage issue by triggering the Warranty/Guarantee exclusion in the policy

Warranties & Guarantees and LEED Solution

Agreement language:

“The preparation and execution of documents for submission to the USGBC are for purposes of the LEED certification process only and **are to be considered an owner/client service benefit** and as used therein, the words “certify”, “affirm” and “declare” shall mean an expression of the Consultant’s professional opinion to the best of its information, knowledge and belief, and does not constitute a warranty or guarantee by the Consultant.”

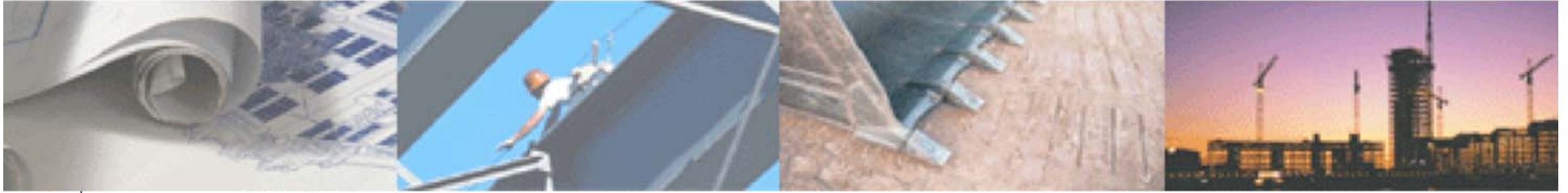




Innovative Technologies & Materials

Issues

- Sustainability Encourages Use of New Technologies & Materials
- Interplay between Innovation and the SOC
- Time and Resources to Investigate



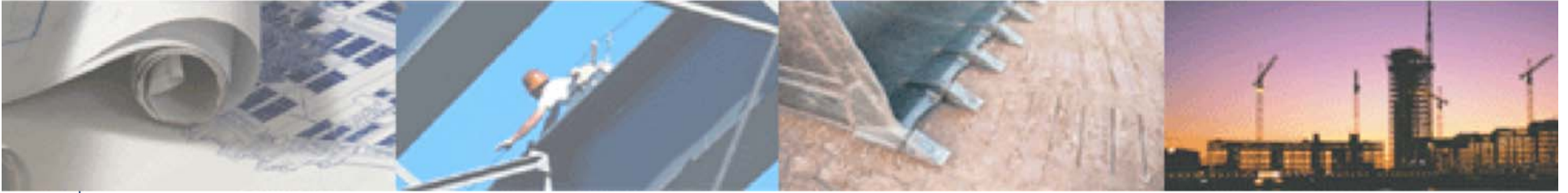
Innovative Technologies & Materials Solutions

- Educate the Client and Manage Expectations
- Do the Due Diligence on Technologies and Materials and Document it
- Midstream Changes – Add Addendum and/or Document the Change
- Address Innovation in the Agreement

Innovative Technologies & Materials Solutions

Agreement language:

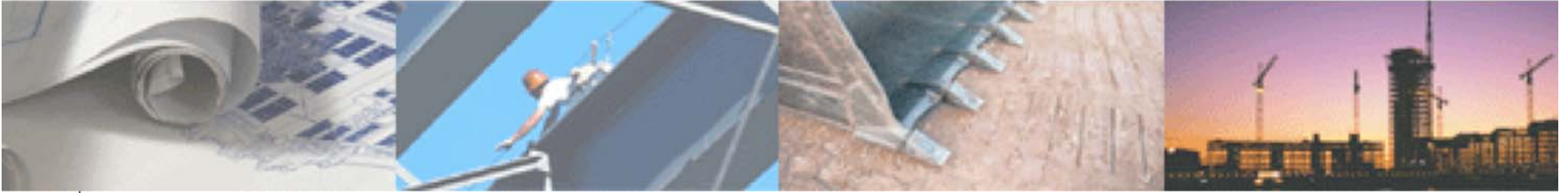
- “The client acknowledges that sustainable design features will be incorporated into the project which include **new or innovative products, technologies, and methods** and that these innovative products, technologies and methods **lack a proven history of successful application, durability and/or performance.**
- The client further acknowledge that as such, the innovative products, technologies and methods are being **incorporated into the project in order to accomplish recognized objectives**, but that due to the innovative nature, there is a significant **possibility that they will not realize those objectives** or that they may have collateral and possibly negative consequences.



Agreements – AIA B214

AIA Document B214 -- Architect's scope of services for LEED Certification

- Standard form Owner & Architect can modify to suit the needs of the project
- B214 is not a stand alone document—it may be used with the B141-1997



Contracts – AIA B214

AIA Document B214 -- Architect's scope of services for LEED Certification

–3.3 LEED Certification Documentation

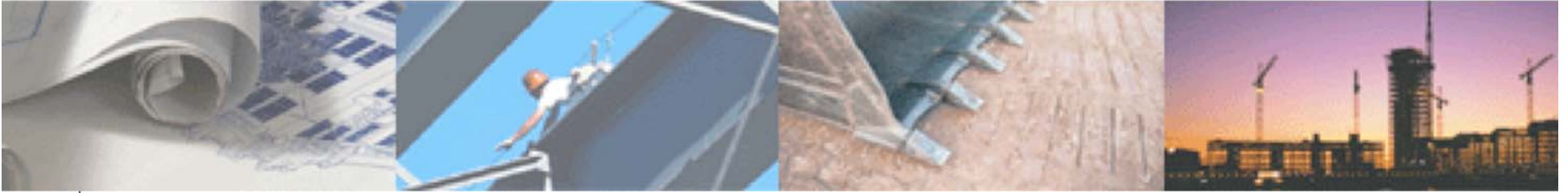
3.3.1 The Architect shall organize and manage the LEED design documentation and certification process.

3.3.4 The Architect shall register the Project with the USGBC.

3.3.5 The Architect shall prepare submittals...

–3.7 Final LEED Certification Report

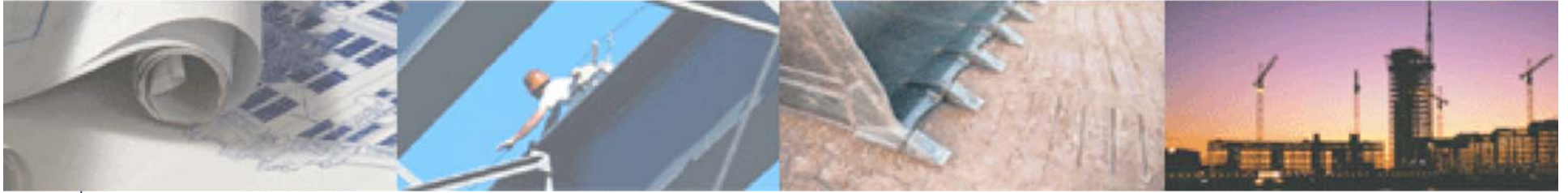
The Architect shall prepare a final LEED Certification Report documenting the LEED rating the Project achieved including...



Case Study – “*Grass on the Roof*”

Sustainable Design of Retirement Home in Pacific Northwest

- Mid-rise building
- Designed with grass and other vegetation on roof
- Details on drawings “not great”
- Guess what happened?
- Lawsuit alleged water intrusion *and* maintenance issues



Case Study – “*Grass on the Roof*”

What is the event that triggers the most design and construction defect lawsuits?

Water intrusion.

Need to:

- Possess or Acquire Appropriate Expertise
- Consider O&M Issues
- Manage Client Expectations

Case Study – “*The Big Oops*”

Another Sustainable Office Building in Pacific Northwest

- Architects proposal stated building “will incorporate. . . elements resulting in a facility that is 40% more energy efficient than conventional designs”
- As designed and built, building was arguably 25% more efficient
- Claim by owner for “the difference”



Case Study – “*The Big Oops*”

Agreement Issues (proposal was incorporated into the agreement)

Warranty/Guarantee Issues

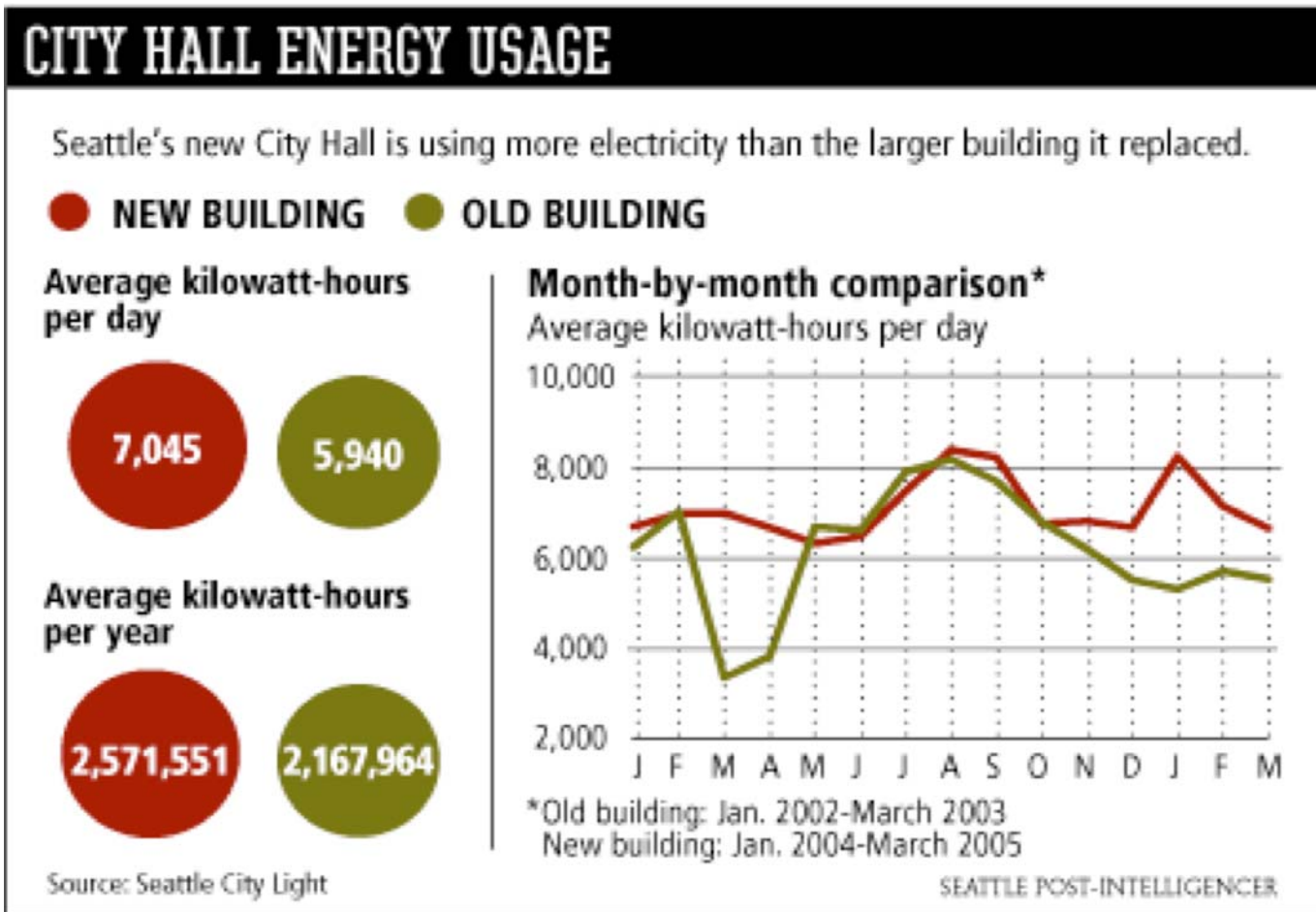
Owner Expectation Management

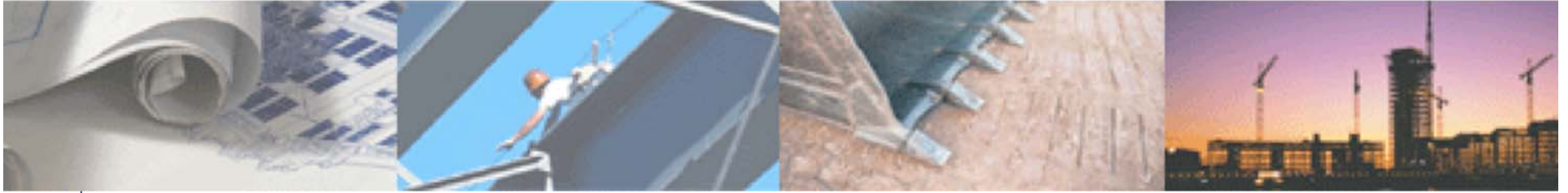
Risk Drivers: Negotiation & Contract Issues



Case Study – “The Big Oops”

At Least We Went in the Right Direction





In Summary

- Set client expectations and manage them
- Document discussions with client
- Are there warranties and/or guarantees?
- Agreement *must* incorporate sustainable design considerations
- For innovative products/processes, “do the due”

You Don't Want to Go Into A Project Feeling Like This Guy!





Questions



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