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Why Recycling Makes Sense

By Dennis Roberts and Margo Maher

The most commonly asked question in New Mexico, "Red or Green?"—usually applies to the type of chili one would like for his or her meal. There is no consensus as to which is the most popular hue.

However when it comes to building construction in New Mexico the answer is getting clearer. The choice is green.

Public officials in the Land of Enchantment continue to mandate that new public buildings be designed and built according to the Leadership in Energy Efficient Design (LEED) standards set by the U.S. Green Building Council.

Recycling Guide Published

One of the important parts of the green building process is the use of recycled materials. To help with this part of the process, the New Mexico Recycling Coalition, a non-profit statewide professional membership organization, has developed "*A New Mexico Construction and Demolition Recycling Guide*" in conjunction with the Construction and Recycling Task Force, appointed by Governor Bill Richardson.

The guide was developed at the urging and with the support of the New Mexico Construction and Illegal Dumping Alliance, a 13-person group appointed by Gov. Bill Richardson to provide grant funding to support projects that will promote environmentally sound methods for reuse and recycling. Another aim of this alliance is to encourage economic and community development that promotes efficient and sustainable use of resources, sustainable recycling, and a cleaner and healthier environment. It can be accessed and downloaded at www.recyclenewmexico.com.

The guide contains a construction and demolition recycling overview, a detailed outline for a Waste Management Plan, contract language for recycling, a list of recycling resources, and individual case studies of New Mexico projects that have been built green using recycled materials.

Sponsored by Industry Partners

The New Mexico Building Branch, AGC, sponsored the publication in conjunction with the New Mexico Home Builders' Association; Builders' Trust of New Mexico; Build Green New Mexico; and the New Mexico Environment Department Solid Waste Bureau.

Vicki Mora, AGC CEO, was appointed by the governor to the alliance, by the mayor to the task force, and is a board member of the coalition.

She points out, "The guide is a perfect example of AGC keeping pace with the latest green construction issues and keeping its members informed of industry trends and compliance matters. The collaboration of AGC with industry partners helps make sure our members are best prepared to address industry challenges and advance sustainable building in New Mexico."

Facts and Figures on Recycling

Did You Know?

- Construction and Demolition (C&D) debris represents 28 percent by weight of waste sent to New Mexico landfills.
- Composition studies have found over 75 percent of C&D material is potentially recyclable.

Continued on page 4

Nationally-Known Communicator Scheduled for AGC Planning Retreat

Dr. Frank Luntz, nationally-known consultant, author, commentator, and public opinion pollster, will present a morning seminar on October 5 as part of the New Mexico Building Branch, AGC, 2008 Program of Work and Conference October 3-7 at the Gaylord Opryland Resort in Nashville, TN. Dr. Luntz has been a guest on such shows as "60 Minutes"; "Meet the Press"; "The Today Show"; "Crossfire"; and "Hardball." He will speak on "Words that Work".

Please see Brook Henderson's President's Message on page two for further details, and register now for the AGC Planning Retreat.

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CONTRACTOR WAR STORIES: Illustrating the VALUE of PROFESSIONAL LIABILITY

Sponsored by the Kinney Agency

This is "the one" risk management event contractors and specialty contractors do not want to miss. Professional liability insurance isn't just for architects and engineers. As a contractor, you too need to be covered.

The event will feature Gene Todaro with Victor O. Schinnerer and Company. Mr. Todaro has 28 years of experience. His primary focus is underwriting, servicing and marketing of accounts in the Contractor's Professional and Pollution Liability Program. Previously, he was involved in Project Liability Insurance, Architect/Engineers, and National Accounts and as the Underwriting Manager for the Construction Industry Group. He is a member of the Metropolitan Washington Association of Independent Insurance Agents and is a licensed Property and Casualty agent in the State of Maryland. Currently, he is an AGC Active Member in the Maryland State Chapter and was appointed to the AGC National Risk Management Committee in 2004.

The following claims scenario is based on a real case—and they illustrate that despite your best efforts, things sometimes go wrong. Professional liability protects you from unsatisfied

clients and potential faulty or defective work by your subcontractors.

Don't Let This Be You!

School Woes 1.

XYZ Construction Company was hired as the construction manager overseeing the construction of a new elementary school. After the project was completed, the school district filed suit against various parties, including XYZ Construction Company, alleging damages due to defective workmanship and shoddy construction. The school district also alleged damages as a result of construction debris left behind when construction was completed.

The school district claimed XYZ Construction Company as the construction manager, was required to monitor the work and notify the school district and the district's architect of any problems. As part of the lawsuit, the school district argued XYZ Construction Company had not made as many site visits during construction as required by the contract.

The main issue in this claim was defective workmanship. The school district claimed that XYZ Construction Company should have been able to spot the defective work during its site visits. XYZ Construction Company used AIA B801 contract documents that specified the required number of site visits. The company had documentation showing the dates and times of all site visits, as well as specific notes describing what it had observed. XYZ Construction Company's professional liability insurance carrier paid over \$70,000 in defense costs to have this claim dismissed. If XYZ Construction Company had not carried professional liability coverage; this expense would have come out of the company's bottom line.



Why Construction Mediators and Arbitrators Need to Specialize

By Peter G. Merrill

The Alternative Dispute Resolution (ADR) industry has long been advocating that mediators and arbitrators (ADR Specialists) need only to be trained and experienced as mediators and arbitrators and that it was not necessary for the ADR Specialist to have any specific knowledge concerning the issues in dispute. It was helpful for the ADR Specialist to have a limited knowledge of the issues but not necessary. I have heard many times that "A good mediator is a good mediator" and can assist the parties in coming to a satisfactory resolution to their dispute. In many cases, that is true. The ability of an ADR Specialist to listen to the parties and use reason and understanding is without question a major necessity of an effective mediator or arbitrator. When dealing with disputes related to general business decisions, divorce or matrimonial issues, family matters and other general disputes, well-trained and experienced ADR Specialists can be very effective in helping the parties come to a final resolution to their dispute. Construction is another matter.

If the construction dispute relates to financial matters, breach of contract, legal issues or other issues not directly related to construction issues, an ADR Specialist without construction knowledge can be very effective in assisting in settling the dispute. If the dispute directly relates to construction issues, it is imperative that the ADR Specialist have a construction background and/or construction experience.

If you were sick or injured, you would go to a doctor. If your illness or injury was of a specific type, with the doctor having only a limited knowledge of that type of illness, the doctor would most likely refer you to a specialist. You go to a doctor because they have been trained to know how your body is constructed and what steps and remedies would be effective in helping to cure your illness or injury. In a similar manner, if a construction project is

Continued on page 5

When: September 19
Where: The Marriott Pyramid
Registration: 3:30-PM
Program: 4:00 - 5:30-PM
Reception immediately follows
Cost to attend: \$35.00 per registrant

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sick and develops a defect or is injured during the construction process, that defect or dispute needs to be handled by someone who has a similar training and experience to a doctor but related to construction. If the dispute is specific in nature and relates directly to a special construction expertise, that dispute should be referred to a specialist such as an HVAC, plumbing, electrical, structural or similar ADR Specialist who is capable of understanding the issues in the dispute due to his/her own construction knowledge and experience.

It is my opinion that if a construction dispute involves specific construction issues and is handled by an arbitrator, judge or jury who "doesn't know the difference between rebar and a Hershey bar" they should not be the decision maker handling the dispute. It becomes necessary for the parties to spend a great deal of money hiring construction specialists and experts to testify and attempt to convince the decision maker that they are right in their position. The expense of the presentation becomes very costly and time consuming. At the end of the process, whether it is binding arbitration or litigation, the verdict or award is usually based on which party had the best and most convincing presentation as opposed to which party was right or wrong.

Some months ago, I had a discussion with a very prominent and experienced construction attorney. When I asked him if he recommended ADR as opposed to litigation in the contracts of the construction clients that he represented, he informed me that he generally did recommend ADR but in some cases he recommended the litigation process. I asked him if those that he sometime recommended to use litigation was based on the fact that he would earn more money using the litigation process. He responded that his income was not involved at all in his decision but that his obligation as an attorney was to represent his client whether his client was right or wrong. If his client was right, he hoped he would win the case and would be the prevailing party. If his client was wrong, it was his obligation to attempt to lessen or mitigate the damages to his client. He used the example that if his client was sued for \$150,000.00 and he was able to get the verdict reduced to \$50,000.00, he would have done his job effectively.

He went on to explain that he had one client that in his opinion was a "less than

Continued on page 10

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Mediators and Arbitrators—Continued from page 5

experienced builder". When he heard that the builder was building a house, he knew that he had a case coming as there was no way the builder would be able to close on the house without his intervention and assistance. He went on to explain that he is a very experienced construction attorney. If he could get before a judge who basically knows nothing about construction and the opposing attorney is not as experienced as he is, he not only could lessen or mitigate the damages; he might even win and be the prevailing party. If he goes before a construction-knowledgeable arbitrator, he has much less of a chance of winning or even mitigating the damages for his client."

My personal feeling is that when two parties go before a decision maker who has the authority to render a final and binding decision, it is the obligation of the decision maker to have as much knowledge of the issues in dispute as possible. This policy does not in any way benefit the contractor or the owner. Both parties are entitled to have a decision rendered that is fair and equitable to both parties based on which party is right or wrong and not based on who has the best and most convincing presentation. Keep in mind that binding arbitration is more final and binding than going to court. Judges decisions can be appealed and appealed whereas an arbitration award is generally not subject to appeal other than on certain specific procedural grounds.

I am the President and CEO of a firm that has construction ADR Specialists who are located in every state in the US and in several foreign countries. We consistently turn down about 2/3 of the ADR Specialists who apply to join our National or International panels due to their lack of knowledge and expertise related to construction or construction law. Green building and remodeling is becoming so popular and is such a specialized field that we have developed a "National Green Dispute Panel" of ADR Specialists who have a special expertise related to green building or remodeling, energy conservation, resource conservation and related green topics.

Construction is such a specialized field that it is virtually impossible to take a general ADR Specialist and teach them to become a "Construction ADR Specialist". I have seen several contractors and individuals who have spent the majority of their career in the construction industry become very effective and experienced construction ADR Specialists. I was a

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contractor for the majority of my life and pursued a career related to construction ADR only in my latter years.

If you are a "good" contractor, it is to your advantage to specify ADR to settle your disputes but only if you specify a provider of ADR services who specializes in construction ADR. If you are a lousy contractor, I suggest that you stick with litigation. If you are an owner and are anticipating any construction in the future, make certain that you specify ADR and a Construction ADR provider in your upcoming construction contract. ADR is much faster, simpler to conduct and is usually far less expensive than trying to settle construction disputes through the litigation process. Many things are not controllable during the construction process. The dispute resolution process that you will use to settle disputes is under your control. If you plan ahead and properly prepare for disputes, you will most likely see your construction project stay on time and within budget.

Please consult with an experienced construction ADR provider prior to negotiating any construction contracts. There are special ADR processes available such as "Fast Tract Agreements" or "Accelerated Arbitration Processes" that offer the most inexpensive, simple and expeditious dispute resolution processes available for construction projects.

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