4 Ways Contractors Can "Stay Out of the Weeds" When Building a Cannabis Facility or Retail Store

By Bradley L. Croft on February 15, 2017



With passage of the Massachusetts Medical Marijuana Initiative in 2012 and the more recent Regulation and Taxation of Marijuana Act of 2016 which legalized recreational marijuana. Massachusetts is on its way to becoming the east-coast hub for the marijuana industry. As growers and dispensaries scramble to become operational and seek experienced contractors to build their facilities and retail stores, now is the time for building professionals to address the unique challenges posed by the construction of cannabis facilities. Here are four basic tips to help contractors approach these projects:

1. ***Confirm Financing Is In Place Before Signing the Contract.***

The primary risk that a contractor undertakes when performing any construction project is that it will not be paid for its work. These risks increase for cannabis projects because the federal government prohibits federally insured banks from lending money to cannabis-related businesses. Contractors must take care to ensure that adequate resources are available and dedicated to fund the construction project and should include provisions in their contracts requiring owners to provide proof of funds.

2. ***Understand Any Specialized Equipment Needs.***

It is estimated that nearly half of the hard costs on a cannabis construction project are accounted for by HVAC and electrical costs given the heating, humidity, air-exchange, room pressurization, climate, exhaust, and lighting demands required by the production and storage process. Given the impact that such systems and controls can have on the facility's construction and operational budget and bottom-line, Contractors must keep abreast of the latest technological developments in order to ensure that the equipment selected is appropriate. In addition, contractors must make sure that any warranty obligations they are providing to the project owner are consistent with the product warranty from the equipment manufacturers.

3. ***Meet the Local Building Authorities and Involve them Early and Often.***

Cannabis facilities are more likely to face community opposition than many other types of businesses. Local zoning, planning, and building authorities will feel increased pressure to make sure that these facilities are built according to code and consistent with license and permit requirements. Contractors should expect little flexibility in this regard. Reaching out early to the local municipal authorities, building officials, and fire departments and even community groups to introduce the project and keeping them involved at each stage of construction may help avoid problems and delays as the project progresses.

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4. ***Pay Careful Attention to Indemnification Provisions.***

Contractors should never expose themselves to liability for risks which they do not control or for which they do not have insurance coverage. Given the uncertain federal landscape concerning the production and sale of cannabis, contractors should specifically seek indemnification from the owner for any claims or losses related to the use of the project as a cannabis related facility. For example:

"*To the fullest extent permitted by law the Owner shall indemnify and hold harmless the Contractor and all subcontractors from and against any claims, losses, injuries, fines, penalties or consequential delays arising out of or related to or resulting from the intended use of the Project as a medical marijuana facility*."

In addition, it is reasonable for a contractor to request a written representation from the Owner that it is in full compliance with all state and local regulations, by-laws, ordinances, and/or other laws regarding the design, construction, or operation of a medical marijuana facility. Any additional work or delays caused by the Owner's failure to be in compliance should entitle the Contractor to a change order. Contractors should be aware of the related federal law and policy applicable to the production, distribution and sale of marijuana before taking on these projects.

With a multi-billion dollar cannabis production and sale industry set to explode in Massachusetts, contractors must understand and address the risks associated with constructing these facilities and retail stores. Specific risk-shifting contractual provisions designed to properly address and apportion these risks is a critical first step to avoiding potential pitfalls.

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