

CONTRACT RISKS ON LEED® “GREEN” CONSTRUCTION PROJECTS

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Green building is expected to eventually become the standard rather than the exception in the construction industry. High-performance and environmentally friendly “green” buildings are designed and built to minimize resource consumption, reduce life cycle costs, maximize health and productivity for the building’s occupants and improve environmental performance. To achieve these goals contractors must engage new construction practices and behaviors.

The most common program and standard in the green construction movement is the Leadership in Energy & Environmental Design program (LEED®). LEED is a building certification process that looks at various aspects of green building and awards recognition to buildings that meet certain standards. LEED projects earn credits on a point based system in several categories associated with green buildings. Based upon the number of points earned the project will earn one of four graduated certification levels: Certified, Silver, Gold or Platinum.

From a construction lawyer’s perspective green construction raises both new and old risk management issues. Whether the client is a general contractor, subcontractor, architect or owner understanding the differing processes and site conditions related to green construction contracts is critical.

If the contractor intends to take responsibility for obtaining LEED certification, then it should do so with full knowledge of the contractual risks it is assuming. The contractor may instead agree to build the project in accordance with LEED principles and assist the owner in obtaining credits, but not guarantee LEED certification and leave the burden of certification with the owner and/or architect.

There are a couple of industry contract forms that are appropriate in certain circumstances (Consensus Docs® 310 Green Building Addendum; AIA® B214 (2007) Standard Form of Architect’s Services: LEED® Certification). However industry contracts have generally fallen behind and failed to thoroughly address the unique issues arising in LEED construction projects. Both owners and contractors usual “standard contracts” do not address green building risk and liability.

A LEED projects contracts must address responsibility for LEED certification, paperwork and fees, liability for green materials, building performance and construction waste recycling and management. There are also significant and unique issues related to insurance

coverage, indemnity clauses, substantial completion and design defect liability that arise in a LEED project.

Importantly the prime contract must also address what damages the parties can or cannot recover related to the LEED process and certification. From the contractor's perspective, it may want to stipulate that certain damage categories are not recoverable such as lost rental income or resale value if the building fails to reach certification. Contractors should clearly state that energy savings and LEED certification are anticipated, but not guaranteed.

Although construction lawyers predict a significant amount of litigation regarding green building in coming years, there are not many green construction appellate cases recorded presently. *Southern Builders, Inc., v. Shaw Development, L.L.C.*¹, is the seminal LEED / green construction lawsuit. There were numerous problems on the project and the general contractor filed a lien on the project and sued the developer. The developer countersued and claimed, among other things, a loss of \$635,000 in tax credits under a state run program due to the failure to timely achieve certification.

Unfortunately, the only statement in the *Southern Builders* contract documents pertaining to the green nature of the project was a statement in the project manual that the project was designed to comply with the Silver Certification Level of LEED. But the contract did not stipulate who was responsible for obtaining the certification. Ultimately, the case settled but not before both parties expended substantial monies in litigation. Sustainability is changing the face of the risk management equation and the *Southern Builders* case will likely go down in history as just the tip of the coming iceberg of these types of cases. The lawsuit demonstrates the danger for contractors, owners and design professionals to simply rely on form construction contracts on green projects. Although the claim was asserted against the contractor, a slight twist in the facts above could have easily resulted in a suit being asserted against the architect, engineer, or LEED consultant.

While owners obviously want to get their projects out of the ground as quickly as possible and given the present economic conditions, contractors and design professionals may feel pressure to sign up for work quickly, but *Southern Builders* demonstrates the need for caution and the need for careful contract preparation. Contractors should utilize all of their bargaining power and endeavor to negotiate clear contract terms that do not unreasonably hold the contractor and subcontractors responsible for the owners design, energy and efficiency goals. Sophisticated and forward thinking contractors who spend the time to educate their team and address unique green contractual liability issues will avoid significant costs and lengthy litigation as we all forge forward into this new green phase of modern commercial construction.

¹ Case No. 19-C-07-011405, Somerset County Circuit Court, Maryland (2007)