

Anticipate the Opportunities and Risks of Green Building Projects

Legal pitfalls arise as Green Building becomes more prevalent

Green buildings featuring sustainable design is one of the hottest trends in the commercial real estate and construction industries, rapidly moving from a specialty niche into the mainstream of commercial building construction and design. Within this, the U.S. Green Building Council's (USGBC) LEED certification is rapidly becoming the industry standard in green design and construction.

While LEED certification has always been desirable in terms of energy benefits and conservation, the stakes are increasing. The federal government and an increasing number of state governments¹ are mandating LEED certification for new public design and construction. Additionally, a variety of state and federal incentives for certain energy efficiency and sustainability measures are now making green design and construction not just a "feel good" luxury but an important financial benefit for many private owners. For example, the American Recovery & Reinvestment Act, or "Stimulus" as it is popularly known, provides billions of federal dollars in funding for the development of state and federal Green Building projects.

As LEED certification continues to become more important, so does the issue of buildings that fail to meet that certification – whether in design or construction – and the consequences of that failure. It should come as no surprise that failure to obtain LEED certification can lead to claims and litigation just as with failure to meet other design criteria, scheduled milestones or performance standards can lead to litigation.

In the Maryland case of *Southern Builders v. Shaw*, for example, the building owner tried to recover fees from the contractor for a project that failed to meet its projected LEED certification level. The owner had required the project achieve LEED

¹ Currently, Arizona, California, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Maryland, New Jersey, New Mexico, Nevada, Rhode Island, South Carolina, South Dakota, Utah, Virginia, and Washington all require that public building construction achieve LEED Silver Certification.

Silver Certification but the contract was unclear which party bore the ultimate responsibility for this level of attainment. The contract documents also did not clearly address whether the owner could recover lost tax incentives as damages. These issues arose because the parties used a standard form contract without any modifications to reflect the responsibility for Green Building Certification. As a result, the owner's ability to recover damages for the project's certification failure was limited and the building owner eventually settled the case.

These claims exist and are growing, and yet *Southern Builders v. Shaw* is currently the only major reported lawsuit over a failure to meet Green Building standards. This leaves little legal guidance for building owners and contractors who want to properly allocate the risks of failing to achieve a specific level of Green Certification.

So what can be done in the current environment to help mitigate some of these risks? One step is to gain a good understanding of the LEED Certification process and ensure that the project team has LEED experience. This experience may be in-house, through the design team, or via one of the increasing number of independent LEED consultants. It is also important to understand the mechanics of the LEED certification process and ensure that both the design and construction are planned toward obtaining the necessary amount of LEED certification "points" while allowing room for error.

Perhaps the largest risk factor in LEED certification is the fact that certification cannot be formally obtained from the USGBC until the project is substantially complete. Since about a third of LEED certification credits relate to the construction process and not design, this risk cannot be removed entirely. However, under the current LEED certification standards (called "LEED v.3" as of April 2009) applicants have the option of submitting design-related credits for "pre-evaluation" before the construction phase, which can help reduce surprises, and mitigate certification risk, at the end of the project.

Another avenue to mitigate risks comes through well-designed contract documents. Most of the major form families of construction documents have yet to specifically address Green Construction and LEED Certification. However, the ConsensusDOCS organization recently adopted one of the first Green Building Addendums – entitled "ConsensusDOCS 310." This document is designed to work in

concert with the main contract documents and sets out explicit responsibilities among the project team as well as consistent definitions for Green Building Certification and goals.

Regardless of whether a project utilizes form documents or custom-drafted agreements, the key ingredient in achieving the desired LEED certification, and successfully defending your position if that level is not attained, is communication. Be sure to incorporate documents that facilitate a clear and shared understanding of the precise certification goals, the acceptable methodologies to meet those goals, and who is ultimately responsible for attainment.

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