

LEED Could Lead to Litigation

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In its "Quality and Performance Standards" promulgated in June 2008, the West Virginia School Building Authority incorporated the LEED green building certification system and introduced the concept of funding one project per year to become LEED-certified. As construction is underway on Spring Mills Primary School in Berkeley County--the SBA's first project slated for LEED certification--West Virginia schools now have a test case for whether and to what extent LEED certification will affect the construction industry. However, construction within the LEED system has been ongoing for several years--indeed, several non-school projects are certified in West Virginia--and experience suggests several issues of which the parties involved should be aware. As always, addressing these issues early in the contracting phases reduces the likelihood of litigation later.

What is LEED?

First, a bit of background. LEED is a recognized green building certification system, intended to provide verification that a building was designed and built using strategies aimed at improving both energy efficiency and environmental impact. LEED was developed by the U.S. Green Building Council, and subsequently, has been amended. Its most recent rating system was launched on April 27, 2009, and the new version will apply to all new projects beginning after June 27, 2009. A separate ratings system applies to school construction and is an adapted form of the 2009 ratings system.

The LEED system requires certain things of all projects; for example, all projects must meet certain standards to reduce the use of water. In addition, the LEED system gives point values in categories; certification is possible if the project attains threshold number of points. By way of example, a project may earn points for using recyclable building materials or by using low-emitting lighting. A project can simply be certified, or certified as silver, gold, or platinum, based upon the number of points obtained. The SBA has announced that its annual LEED project will be certified silver.

Who Takes Responsibility for Certification?

One question that has arisen in LEED construction projects is whose responsibility it is to see that the project meets LEED standards. Typical school construction projects--and for that matter, many construction projects--use standard forms (usually the AIA forms), which state only that the contractor must build according to designs and standards. Assuming the contract provides nothing further, the question becomes: is the contractor liable if the project is not LEED-certified? What if it is certified but not certified silver? Or what if the contract states only that the project is designed to comply with the LEED standards but does not discuss responsibility for building accordingly?

Both contractors and owners should be concerned about this potential area of confusion. If the SBA awards funds to a project based upon an understanding that it would be certified silver, or if other benefits are

awarded to a non-school project because it will be certified silver, and it is not, significant damages could result. The contract should provide the specific standards that will apply and dictate up front who is responsible for following those standards during construction.

What are the damages?

Even if the contract does state whose responsibility it is to build the project to be certified, the contract should go one step further. LEED certification, in and of itself, is simply a recognition that the US Green Building Council has certified it as meeting certain criteria. More than likely, a project is to be certified, because it is energy-efficient, to gain additional funding, or to reap some other state-provided or locally-provided benefit. Although West Virginia has not yet done so, other localities have mandated certain green building requirements for all or certain commercial buildings, with liability on the owner's part if the building does not comply.

Again, the standard form contracts may discuss liquidated damages generally, or it may provide a waiver of consequential damages (as do the AIA standard forms), but they do not directly address damages that might arise in these situations. The contract should, at a minimum, address what the parties' expectations are as to the building requirements and whether one party is to be liable entirely, or if liability is shared (perhaps based upon the parties' responsibilities for design or the availability of conforming materials). Green building insurance products are now available that allocate the risk of failing to achieve certification or lost reputation to an insurance company and provide coverage for the resulting loss, but again, the parties must anticipate the need for that coverage and negotiate its purchase in advance.

If the parties anticipate these and other issues at the outset of a green building project, the owner is much more likely to be rewarded with the cost savings that such building criteria are intended to produce, rather than spending additional funds litigating later.