

WOLFE LAW GROUP

MIND OF A LAWYER. HEART OF A CONTRACTOR.

Is Failure To Achieve LEED Certification Consequential Damages?

The LEED Certification process can be quite complex. It takes months after a project's completion to get the paperwork process, the paperwork itself can be a hefty stack, and that's not even taking into account the complicated points framework, the certification gray-areas, the de-certification process and more.... (Want a good discussion of all these frustrating and unanswered questions? - See our friend [Chris Cheatham's great Green Building Law Update Blog](#)).

Since I'm a lawyer, the LEED rating system begs this question: What happens is a project shoots for certification, and fails? What are the damages? Whose on the hook?

These are some intensive questions and I can spend a few posts trying to answer. See some of our previous posts for discussions, including review of the the [LEED tag](#), and this post: [Uh-Oh: I Made A LEED Mistake and Don't Know What To Do](#).

What I want to focus on in this post is an interesting point that I recently read in legal article hosted at Consensusdocs.org: [Legal Commentary: Green Building Risks](#).

The well-written article, by attorney [Martha Perkins](#), discusses some issues a contractor should keep in mind when entering a green building contract. It is the following point, however, that caught most of my attention:

Generally, a contractor should include a disclaimer guaranteeing a particular outcome such as a green-building certification or specific energy efficiency. Failure to achieve a desired certification or a specific green performance is often deemed a consequential damage. As a result, ensure that consequential damages are waived.

Two things strike me.

First, her statement that certification failures are "often deemed a consequential damage" seems a bit off the mark. I'm not saying that these failures will not be

considered consequential damages - they may - but, I'm not aware of any case law on the issue. I would be particularly concerned about advising a construction client that a simple waiver of consequential damages could plug this liability hole.

Second, however, is her opinion that a LEED Certification failure might be considered a consequential damage...and therefore, sometime waived out of many construction contracts.

Could this be the case?

[Wikipedia, the great collection of legal definitions, defines consequential damages](#) pretty well, as follows:

When a contract is breached, the recognized remedy for an owner is recovery of damages that result directly from the breach, such as the cost to repair or complete the work in accordance with the contract documents, the loss of value of lost or damaged work. Consequential damages (also sometimes referred to as indirect or "special" damages), include loss of product and loss of profit or revenue and may be recovered if it is determined such damages were reasonably foreseeable or "within the contemplation of the parties" at the time of the contract.

Looking at this issue from a big-picture standpoint and not getting bogged down with case-law, I think there is some argument on both sides of the issue.

On the one hand, failure to certify can be considered a damage caused to the owner directly from the breach. Now, just as the owner may have to repair an improperly constructed wall, so too does the owner have to repair his building to achieve the proper certification (or take it without the certification and assume a credit).

On the other hand, a failure to certify certainly is different than an improperly constructed item within the building. You sometimes can't put a dollar figure on a certification failure to calculate a credit, and the "loss" may be more closely aligned with a loss of profit or revenue as a result of the certification failure.

I found this to be an interesting point made by Ms. Perkins...but not one that is settled. What does everyone think about this question - a consequential damage, or no? Anyone know of any case law on the topic?