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GOING GREEN

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Green Construction: *New Liabilities Require New Practices*

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Seemingly, after Al Gore's environmental documentary "An Inconvenient Truth" came out in 2006, a trend was started. Pop culture was infused with a cause celeb — going green. Green building, in turn, gained considerable exposure. But what started as a movement is quickly becoming a reality with both public and private works projects.

Like any new practice, potential areas of previously unanticipated liability exist.

Despite the economic downturn, "green construction" continues to grow, particularly in the public sector. Growth has occurred, in part, as the result of local, state and federal legislation mandating energy efficient and environmentally friendly building requirements, in conjunction with financial incentives such as tax breaks. In addition, the American Recovery and Reinvestment Act of 2009 (the stimulus act) budgeted \$4.5 billion to transform federal facilities into exemplary high-performance green buildings.

Despite the increase in green construction, case law has not, as of yet, kept pace with the issues presented to this once fledgling, niche construction industry. In fact, there is a noticeable absence of litigation and published court opinions specific to green building legal issues.

The absence of case law highlights the lead time necessary for the law to develop. To date, the only noteworthy lawsuit in the realm of green construction is *Shaw Development L.L.C. v. Southern Builders Inc.*, a case filed but not fully litigated in Somerset County, Md.

In *Shaw*, the owner sued the general contractor because the building failed to achieve a USGBS LEED (U.S. Green Building Council Leadership in Energy and Environmental Design) Silver Certification Level. As a result of not meeting the LEED Silver Certification, the owner failed to receive \$635,000 in anticipated green building tax credits.



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In *Shaw*, the parties utilized an American Institute of Architects (AIA) A101-1997 standard form of agreement between owner and contractor, which incorporated a project manual as part of the contract documents. The project manual, in turn, referenced green building certification.

Specifically, the project manual stated that the "project is designed to comply with a Silver Certification Level according to the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) Rating System, as specified in Division I Section 'LEED Requirement.'"

While this language suggests that the project's design should comport with a Silver Certification Level, absent other contract provisions, it fails to address key issues regarding achieving the certification. Some of these issues include responsibility for documentation; achieving specific credits and/or a set number of credits; and commissioning and testing. Without clear and concise contractual provisions, the duties, obligations and scope of work of

parties to a green building construction contract will have to be determined by a court or arbitration panel.

The ability to recognize the potential liability associated with green construction contracts early in the process will help prevent costly litigation down the road.

The remainder of this article addresses some of the main areas of potential liability. In addition, a brief overview on how to minimize the risk of that liability is addressed.

FAMILIARITY WITH THE LAW AND RATING SYSTEMS

The goal of most green construction projects is to meet a set of predetermined standards. Regardless of whether you are an owner, design professional or contractor, an understanding of the different standards should be reflected in both your proposal and final contract documents.

Green building standards may be established through local, state or federal law or through adoption of one of the standards created by the LEED rating system. The LEED rating system, which is the most well-known and utilized system, was formed to establish a common standard of measurement for the evaluation of sustainable buildings. It is the predominant rating system that has been adopted on both the state and federal level.

Under the LEED system a building can qualify for four levels of certification. The scale of the four levels of certification, from the easiest to the most difficult is Certified, Silver, Gold and Platinum. The certifications are achieved through the accumulation of points, which are awarded based on an evaluation of three categories: resource and energy efficiency; healthy indoor environments; and the use of natural renewable resources.

Regardless of whether the standard is established through the LEED rating system or by law, the owner, designer or contractor should understand the requirements prior to commencing work for a project. The various levels of certification

and the categories from which points are accumulated must be specifically contemplated in the final contract documents, as well as your proposal. Many credits are either obtained in the early phases of the project or require significant lead time and vast planning. Once a contract is executed and a notice to proceed is issued, unfamiliarity with the standards and how they are achieved can result in unanticipated costs or liability.

GREEN CONSTRUCTION CONTRACTS

The AIA created various form construction contracts that are widely utilized in the construction industry as templates. The AIA form contracts contain many provisions that address frequent issues which arise on a project and which have been interpreted by the courts. While AIA form contracts provide many benefits to owners, design professionals and contractors, they do not address the issues specific to green construction projects.

One of the primary areas that must be clearly identified in the contract documents is segregating the responsibility for documentation and achieving the required certification level. The contract documents should clearly delineate between design responsibilities and construction. The burden between providing required documentation and the review of the documentation should be clear.

Likewise, the distinction between constructing the project per the specifications and contract documents and the design of them must be unambiguous. The party or parties that are responsible for achieving certification need to be clearly identified so that the risk and potential damages can be accounted for in the contract documents and establishing the respective contracts' sum.

Other contract provisions specific to green building that deserve special attention include: the required insurance for each party; liability for future loss of certification; warranties for materials and construction; consequential damages related to failure to achieve certification; and owner maintenance responsibilities.

Further, any green construction issues addressed in the contract with the owner should similarly be addressed in any performance bonds and/or subcontracts. All parties responsible for the design and construction of a green building project need to understand that business as usual has

changed and that they must adjust their standard contract documents to address the changes.

GREEN CONSTRUCTION SPECIFIC MATERIALS

Under the LEED rating system, an owner can obtain credits by using materials that include recycled content, that are made of sustainable plants, or that are located within a certain geographic distance. Because of the relative infancy of the industry, many green materials are hard to find and even harder to replace.

An issue could arise if the specifications for the project call for a precise or proprietary product that is not available or requires a long lead time. Design professionals and contractors should investigate the availability of green construction materials and the replacement or substitution for such materials and their prices as early in the process as possible.

An issue could arise if the specifications for the project call for a precise or proprietary product but that product is not available or requires a long lead time. Design professionals and contractors should investigate the availability of green construction materials and the replacement or substitution for such materials and their prices as early in the process as possible.

Further, the use or integration of green construction materials into a system may void the warranty or guaranty of other standard construction materials or systems. In any event, until green construction

materials become commonplace, all implications related to a material's usage need to be analyzed and addressed.

DELAY DAMAGES

Delays, a potential and costly problem on any construction project, are equally problematic on a green construction project. The construction schedule on a green project should address delays in achieving certification, difficulties in procuring green materials and time associated with the installation and commissioning of new technology.

In addition, provisions, such as those that allow liquidated damages, state that time is of the essence or establish a date certain for certification should be carefully analyzed and considered, depending upon whether you are an owner, design professional or contractor. Such provisions may require a party to assume risks and in turn liability for factors that are outside of the party's control.

Ideally, a certain amount of delay should be expected and accounted for in the construction schedule and contract documents. The contract documents should capture potential delay factors, create float for them and allow for excusable delay where appropriate.

The expansion of green construction will necessarily cause contract drafting and case law to evolve. Like any situation, those owners, design professionals and contractors that are proactive, educate themselves and contemplate the appropriate contract structure and provisions will be best insulated and positioned for a successful project. As green building becomes standardized, so too should your evaluation and negotiation of the risks. •