



Legal Brief

by Timothy J. Woolford, Esquire

Address the Unique Risks of Green Building in the Contract

Not so long ago, green buildings were an exception to the norm. In 2011, however, nearly every project contains numerous green design aspects with many others expressly seeking formal LEED recognition. Virtually all owners and developers now seek either LEED certification or the inclusion of green aspects on every project. Naturally, contractors and architects are eager to fulfill their customers' requests for green buildings. Before making commitments for green design and construction, however, contractors and architects must consider the serious legal issues and must address these risks in the contract.

The best way to avoid an expensive legal dispute is to make sure the contract addresses each participant's role in attempting to achieve the desired level of LEED certification or other designation. On many projects, the parties use standard form agreements or their "usual" contract forms, which typically do not address the issues unique to green projects. The contract must clearly indicate who is responsible for tracking, collecting, assembling and submitting documentation to support LEED certification. If these roles are not clearly delineated, disputes can arise.

In one case, a large public owner hired an architectural firm to serve as its architect on an ongoing basis. The relationship between the architectural firm and the public owner was squandered, however, when the firm's green building

specialist left the firm before the LEED documentation was submitted. Disputes arose between the owner and the architect concerning responsibility for submitting the documentation. In the end, certification was eventually achieved, but not until long after the project was completed. Frustrated, the owner terminated the relationship with the architectural firm. Clear contract language regarding submission of these documents would likely have avoided the problem and the relationship might not have been destroyed.

Before making commitments for green design and construction, contractors and architects must consider the serious legal issues and must address these risks in the contract.

Another significant risk on a green project is that despite the parties' best efforts, the project fails to achieve the intended LEED certification level desired by the owner. A recent court case illustrates how the failure to address this in the contract resulted

in an expensive legal dispute. There, a condominium developer in Maryland sued the contractor after the building failed to achieve a LEED Silver rating. As a result, the developer became ineligible for a \$635,000 tax credit and sued the contractor for this amount. Essentially, the developer argued that the contractor had guaranteed that the project would attain a LEED Silver rating by a date certain and the failure to achieve it constituted a breach of contract.

After several years of expensive litigation, the case settled for an undisclosed amount. The contract did not address who was responsible for the failure to achieve the designation. Had the contract contained the following language, the lawsuit probably would never have occurred.

Not with standing anything to the contrary, while Contractor (or Architect) will endeavor to achieve LEED certification, it does not warrant or guarantee any result with respect to LEED certification or the performance of materials specified to attain LEED points or certification.

Along the same lines, contractors and architects should avoid even implying a guarantee or warranty concerning the ultimate energy performance of the building or the savings that will be achieved by the green design. In a recent lawsuit, a school district sued the design team when green upgrades on three projects did not "reduce operating costs by fifty

continued on page 10



Woolford Law, P.C. represents over 150 contractors, subcontractors, suppliers, owners and design professionals in all aspects of the construction process:

- Payment Rights' Enforcement
- Mechanic's Liens
- Prevailing Wage
- Change Order Disputes
- Consultation On Day-To-Day Issues
- Labor And Employment
- Competitive Bidding Issues
- ... And Many Others

Woolford Law works exclusively with construction professionals and speaks the language of the construction industry. Our professionals can serve all the legal needs of your construction business without reinventing the wheel. To learn more about our rapidly growing construction-focused law firm, please visit www.woolfordlaw.com.



Timothy Woolford
Founding Partner

twoolford@woolfordlaw.com

2007 Recipient of the Central Penn Business Journal's Forty Under 40 Award and Adjunct Professor of Law, Penn State Dickinson School of Law

www.woolfordlaw.com


P 717.290.1190 F 717.290.1196

Wheatland Place | 941 Wheatland Avenue | Suite 402 | Lancaster, PA 17603

Address the Unique Risks of Green Building in the Contract

percent" over comparably-sized schools as stated in the contract. Carefully drafted contract language can avoid an allegation that implied warranties on these subjects were made. Design professionals and design/build construction firms should be extra careful to avoid making even implied guarantees because most professional liability insurance policies exclude coverage where the claim is based on breach of an express or implied warranty.

Another risk pertains to the unavailability or shortage of green building materials. Contracts should address responsibility for delays that result when materials are not available. In one case, an architect discovered materials from a green product manufacturer and informed the owner about them, and the owner agreed to use them on the project. It was later discovered that the product was out of stock and the project was delayed as a result. The owner sued the architect claiming it incurred additional costs due to the delays and claimed that the architect failed to inform the owner of the potential for delays. To avoid a dispute like this, the contract should address delays and state that time extensions and delay costs must be provided if a specified green source material is unavailable.

In summary, all construction project participants must consider the unique risks presented by green projects when negotiating contracts. Obtain advice from counsel familiar with green building rating systems and the risks that green design and construction entails. 

Regional News ...

Bigger the Bid Pool, More Competitive the Bids

Contracts for construction of a sewage treatment plant serving Palmyra and North Londonderry Twp. were given contingent approval by the township sewer authority January 28th. Bids totaled \$13,422,400, which is under original estimates of \$17.5 million, said Gordon Watts, township manager. More than 375 Mid Atlantic BX Members reviewed the posted project 3,283 times on COOL (Construction Opportunities On-Line), Mid Atlantic BX's comprehensive construction reporting service. COOL enables users to gain access to current projects out for bid, project blueprints, specifications, addenda, bidders lists, and low bid awards.

"Mid Atlantic BX services foster a much more competitive bidding environment, saving owners, and in this case taxpayers millions of dollars every day," said Pete Gum, Mid Atlantic BX CEO. In 2010, Mid Atlantic BX surpassed its all-time record of posted construction projects reported - ending 2010 with 13,603 Mid Atlantic regional projects posted.

