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GREEN CONSTRUCTION, GREEN LIABILITIES

CONSTRUCTION PROFESSIONALS WILL NEED MORE THAN A YELLOW-BRICK ROAD TO REACH THE EMERALD CITY OF CERTIFIED GREEN CONSTRUCTION. GREEN CONSTRUCTION IS GROWING IN POPULARITY FOR SEVERAL REASONS – ENERGY EFFICIENCY, GOOD PUBLIC RELATIONS, BETTER TREATMENT IN THE INSURANCE MARKETPLACE – AND TO REAP THE BENEFITS, CERTIFICATION IS A MUST.

Getting certification often requires careful and patient navigation of a maze of compliance rules and rating standards and raises important questions about who is responsible, and potentially liable, for making sure a building achieves the increasingly coveted emerald-green light. Little has been published about design and construction risk management issues in the context of green construction, and to date, there have been only a few claims to use as a guide. As the volume of green construction increases, however, so will the number of green claims. We recommend that our architect/engineering/construction professional (A/E/C) clients consider a few key risk management tactics. First, though, we suggest a thorough understanding of the ratings systems at play.

IN THE LEED

The most familiar rating system is LEED (Leadership in Energy and Environmental Design) from the U.S. Green Building Council (USGBC). While it has been in use since 1998, only in the past few years has the volume of rated projects begun to register an impact on the A/E/C industry as a whole. Firms involved in design, construction, materials supply, and operations and maintenance of buildings and facilities throughout the U.S. are being affected by the new standard.

USGBC's objective in developing the rating system was to promote environmentally friendly "whole building" planning, design and construction practices and to establish a common standard for measurement of building performance. The four categories of certification are:

- LEED Certified (26 to 32 points)
- LEED Silver (33 to 38 points)
- LEED Gold (39 to 51 points)
- LEED Platinum (52 or more points)

The more points a building scores, the more it is assumed to be environmentally friendly. According to USGBC's website, 96 buildings are now LEED Platinum, and more than 1,696 buildings are currently LEED Certified.

Complicating the picture is that under the USGBC umbrella, there are other discrete LEED programs for different project types, such as LEED for schools. Fragmentation of standards is

compounded by competing systems and standards (e.g., the Green Globes program from the Green Building Initiative (GBI)) and more narrow-focus groups maintaining special programs for different types of projects (such as the Collaborative for High Performance Schools (CHPS)).

USGBC, GBI and other entities are all non-governmental organizations, but an increasing number of municipal, state and federal government entities are adopting – and in many cases further modifying – USGBC, GBI and other systems and standards, using them as the basis for green building programs targeted at greening large public, and sometimes private, construction projects. The State of Florida, New York City, Miami, Atlanta, Seattle, Washington, D.C. and other areas have instituted legislation adopting and promoting green construction policies, as have a number of federal agencies. In more and more jurisdictions, green criteria are being tied to zoning and other development incentives.

WHEN IS A STANDARD A STANDARD?

Of growing concern is the use of the LEED rating and other systems as the basis for a project owner's qualification for funding or grant eligibility, receipt of tax credits, increased floor-area ratio and other zoning or planning incentives. Serious ramifications may befall the facility that fails to achieve the applicable standard. However, responsibility for such failure is often unclear. This uncertainty is exacerbated by the widespread trend in construction documents and specifications to contain broad generic performance criteria wording that blurs responsibility for compliance and fails to clearly define the designer's and contractor's respective compliance duties.

Contracts should clearly allocate the risk in the event of failure to achieve the applicable standard and discuss redress in the event of a loss of an entitlement under zoning and planning regulations. Contracts should also address the impact on payment and performance bonds in the event of a failure to comply. Conceptually, LEED certification is similar to the Americans with Disabilities Act (ADA) in that it involves subjective judgments and factors including the owner's use of the project and the willingness to incur additional expenses. These factors are not within the A/E/C's control.

STANDARD OF CARE

The diversity of rating systems, criteria and standards creates a volatile environment in which it is increasingly difficult to define a suitable standard of care for the professional services deployed in the design and construction of green facilities. To avoid uncertainty over what may constitute standard of care, contracts should clearly state what is meant by "green" and identify the standard(s) that will apply to the specific project. Responsibilities should be clearly stated. For example: "The A/E/C shall exercise its professional skill and care in accordance with the

Standard of Care to provide services compliant with the LEED Requirements and Procedures but cannot guarantee LEED Certification."

THE BUCK STOPS – WHERE?

Who is responsible for determining what paperwork and documentation are required for certification? Who is responsible for preparing, reviewing, approving and submitting the application? What is the timeframe for submittal? Contracts are often unclear on these critical questions. Contracts must establish responsibility for appeal and/or resubmission – as well as mitigation and possible rework – in the event that certification is denied or the desired level not attained.

WHEN GREEN IS NOT GREEN-LIGHTED

The failure of a project to achieve LEED certification – or a failure to deliver the benefits represented to the project owner – is the root cause of the disputes and claims we have seen to date. The damages flowing from such alleged failures can be significant. Depending on the contractual provisions and indemnities respecting performance and fitness of purpose, such allegations may trigger the Warranty and Guarantee exclusion – or potentially the Project Finance exclusion – of a Professional Liability policy and result in an uninsurable loss.

The green city is there, but to arrive unscathed, your firm's risk management approach should include working closely with the various stakeholders in a green project to identify and understand the legal and risk allocation issues inherent in certification and performance. (Data, figures, etc. from www.usgbc.org.)

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