

LEED and Liability: Construction Contract Concerns for Green Building Projects¹

By Marc A. Stroope, Associate Attorney
LEED Green Associate

Construction projects have a way of finding trouble, and it looks like green building projects may be no exception. There are numerous risks, rights, responsibilities and procedures unique to sustainable construction projects seeking LEED certification or another green credential. It is prudent for owners, developers and contractors to address these issues thoroughly in their construction contracts.

Green building projects accounted for an estimated \$8 billion worth of construction in 2006, and will account for an estimated \$60 billion worth of construction in 2010. These numbers will have a significant impact on the construction industry in the San Antonio area. Among the major contributors to the green building movement in the San Antonio area is the Base Realignment and Closure (BRAC) initiative. The U.S. Army Corps of Engineers, Fort Worth District awarded a \$26.4-million contract for a new headquarters building for the Army's Installation Management Command which will move to Fort Sam Houston from Arlington, Virginia. This contract is the first of 26 expected to be awarded in 2010 for military construction in San Antonio, in total worth of \$390 million.

Despite a critical need, construction contracts have simply not kept pace and most form contracts or standard clauses do not address contractual issues specific to green building projects. Basic issues regarding terminology, process, and risk are often left unaddressed. Several commentators predict increased litigation and frustration among project owners seeking to build green. The key question that always arises is, "Who will be found responsible when a supposed green building fails to obtain the LEED certification or other green credential that the developer was counting on?"

The first green building litigation facing this issue was *Shaw Development v. Southern Builders*. *Shaw Development* involved a condominium project in Maryland that included a number of green design features intended to gain the project at least a LEED Silver rating. The LEED rating was critical to the project, because the project had been accepted into a Maryland Energy Administration program that provided an 8 percent green building tax credit. Obtaining the tax credit required both achieving at least a LEED Silver rating, as well as project completion prior to the expiration date established when the project was admitted to the program. The project did not meet its LEED Silver rating and the developer sued alleging that the contractor was responsible for the project losing the tax credit, worth \$635,000. The developer cited both the contractor's failure to construct the building in accordance with the LEED rating system requirements and blowing the completion deadline, as bases for its claim for the lost tax credit. The contractor and developer signed a 1997 AIA form A101 agreement; although it is not clear to what extent the parties deviated from the form's standard language.

While the *Shaw Development* lawsuit has come and gone, and since it was settled, there were no judicial pronouncements; but we have an idea of principles which may govern many future cases.

¹ This article first appeared in the Newsletter of the South Texas Chapter of the Associated Builders & Contractors Association.

To avoid disputes in green building projects, one must focus on the need for careful risk allocation provisions that allocate the risk among the key participants.

Questions to ask when reviewing the terms of a green building contract include:

1. Does the building require third-party certification or does it simply need to meet client's demands?
2. Is there a provision that identifies the sustainable standard the parties have chosen (e.g. LEED 2009 for New Construction, Gold Level)?
3. Who is responsible for paying for the various certification fees?
4. Who will bear the cost of the required tests, inspections, and approvals necessary for certification?
5. Are there unusual documentation requirements during construction?
6. Who is responsible for the loss of a credit if a contractor makes a materials substitution and the owner consents to the substitution?
7. Does an employee or subcontractor need to have previous green project experience to be considered properly skilled?
8. Do submittals of product data necessary for various credits fall within the contractor's or subcontractor's scope of work?
9. May construction debris be taken to a landfill or must it be diverted to a recycling center?
10. Is final completion defined as the point in time when the project is certified?
11. Will a portion of the final payment be withheld pending certification of the project?
12. Do sustainability requirements create a longer warranty or correction period?
13. Are damages that may result if a building is not certified classified as consequential damages?
14. Who is responsible for compiling and providing the documentation required for certification?

Contracts do not solve all of the problems on a construction project, but they do provide for the allocation and shifting of the risk associated with green building projects. A well drafted green building contract will clarify and establish roles, responsibilities and procedures for green building projects to maximize successful delivery of the green building objectives, while mitigating the risks of contractual disputes and litigation.

Marc A. Stroope is an attorney with Gardner Law and is LEED accredited as a LEED Green Associate. Mr. Stroope also chairs the ABC—South Texas Chapter Green Building Council.