

Green Building on the Rise

by Donald Gregory, Esq.

The construction industry has traditionally emphasized efficiency over environmental harmony. However, the trend toward “green building” is sweeping the country and changing this mindset dramatically. Whether green building is being encouraged for altruistic reasons or simply as a “politically correct” marketing technique, one thing is certain: Green building is here to stay. McGraw-Hill Construction estimates that green building will represent more than 10 percent of the nonresidential market by 2010. Subcontractors who quickly educate themselves and implement green building strategies will position themselves to successfully compete in a rapidly growing market and find that green is still the color of money.

What Is ‘Green Building?’

The goal of green building is to reduce the impact of construction on the environment and to promote human health and energy efficiency. Many proponents of green building believe that, for a nominal cost, dramatic operations and maintenance savings can be realized over the long run, in addition to a reduced environmental impact or “footprint.”

Frequently, but not always, the rating system used to evaluate green buildings is the U.S. Green Building Council’s LEED® system. (LEED stands for “Leadership in Energy and Environmental Design.”) LEED includes rating systems for different types of construction (e.g., homes, commercial and institutional), and

four levels of certification, ranging (from highest to lowest) from Platinum to Gold, Silver and Certified. When an applicant (usually the project owner) seeks LEED certification of a building, a rating service company awards a certain number of points to the project based on different factors of design, construction, materials, water efficiency and waste removal. Achieving one of the levels of LEED certification requires a collaborative approach throughout the project, because no single party on the construction team — owner, architect, contractor, subcontractor or supplier — controls all the factors for which points may be awarded.

Subcontractors should be aware that green building may also mean something other than LEED certification. In recent years, a number of municipalities and states have adopted their own green building codes. For example, California adopted standards designed to achieve a reduction of 15 percent in energy and 50 percent in landscape water use. Other green rating systems exist as well.

What Are the Risks for Contractors?

For many subcontractors, the future business opportunities presented by green building are almost boundless, but as with any exciting opportunity, there are risks as well.

First, subcontractors should generally expect to incur many more hours of paperwork on a green building job as they need to document the “chain of custody” on materials and conform to other green building requirements. For example, the specifications may require a casework subcontractor to prove that the wood materials came from a local source. Contractors need to read the bid documents carefully and include adequate costs for these additional requirements in their bids.

Second, many bid documents will list a particular product or process to use to try to gain as many LEED points as possible. But what happens if the specified material (e.g., drywall from a source within 500 miles of the project) is not available in a timely fashion, or at a reasonable price? Will the subcontractor receive a time extension or a price

increase to provide the owner’s desired product?

Third, some bid documents require subcontractors to attest to the quality of their work for LEED certification purposes.

However, such a guarantee leaves subcontractors wide open to claims in case the project does not attain that level of LEED certification.

Because subcontractors don’t have the responsibility



for all the factors, including design, that determine whether a building can earn LEED (or any other green) certification, generally they shouldn't guarantee LEED certification or any given result. Unless acting as a true design-builder, a subcontractor is not hired to design and can only guarantee to build "per plans and specs." Whether that design, as constructed, can achieve LEED or other certification is unknown and cannot be controlled by the subcontractor. Similarly, a certain end performance, such as energy savings, may be difficult to predict or control.

Design professionals should be reluctant to guarantee or promise certification results, as they do not control the waste stream or other construction efforts, nor do they know exactly how the third-party rating service will evaluate the submission for certification at the end of the job.

What Can You Do to Minimize Risk?

Subcontractors that want to make it clear they cannot guarantee results on a project seeking LEED certification

LEED Update

The U.S. Green Building Council launched the latest update to the LEED rating system, LEED 2009, on April 27, 2009. LEED 2009 is a reorganization of the existing LEED system that is intended to take advantage of improvements in building science and emerging technologies. LEED 2009 consolidates and aligns credits and pre-requisites for commercial and institutional LEED building rating systems (New Construction, Core and Shell, Commercial Interiors, Existing Buildings: Operations & Maintenance and Schools), which were previously separate. The re-organization of these rating systems into LEED 2009 does

not affect other categories, such as LEED for Homes. One of the major changes in LEED 2009 is a revision of the credit system to give more weight to strategies that increase energy efficiency and reduce CO₂ emissions. LEED 2009 includes a new 100-point scale, and projects may earn bonus points for addressing region-specific environmental priorities. Previously, LEED ratings were based on a 69-point scale. June 26, 2009, is the cutoff date for projects to register projects under the LEED rating systems that LEED 2009 replaces.

For more information, visit www.usgbc.org.

Subcontractors will want to modify their *force majeure* clauses to entitle them to additional time in the event that a green source becomes unexpectedly unavailable, just as they are entitled to extensions in the event of an unexpected disaster or shortage.

should seek assistance from an experienced insurance professional to determine what policies are best for them in the event of a claim. Risk allocation on green building projects will become easier when ConsensusDOCS publishes its planned green addendum for construction projects.

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might use simple contract language such as:

"Notwithstanding anything to the contrary, Subcontractor does not warrant or guarantee any result with respect to LEED certification."

To avoid guaranteeing that material will secure points for LEED certification, subcontractors could insert language on submittals such as the following:

"With this submittal, Subcontractor makes no representation that this material will satisfy the requirements needed for LEED credit."

Design professionals and design-builders may find it preferable to state that they will simply "endeavor to" achieve certification or exercise "good faith" efforts in that regard, rather than provide a guarantee.

How Should Risk Be Allocated and Insured?

All members of the construction team benefit from educating one another on reasonable expectations up-front before misunderstandings or conflicts develop. This is particularly true when dealing with an emerging subject like green building. Of course, there is always a risk of a claim on any project. Special green liability insurance is becoming available, and subcontractors

Set for release in late 2009, the addendum will help clarify the responsibilities and risk allocation on green projects.

Green building is far more than a fad, and has the potential to dramatically improve the environment. As sustainability becomes increasingly important, subcontractors that adopt the strategies to work on green building projects will be well-situated to compete against those that are unwilling to change.

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