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Special Concerns with Green Building Projects

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They are intended to highlight a specific area of the law. This communication is not legal advice. The reader should consult an attorney to determine how the information applies to any specific situation.

Experts have predicted that, even as other types of construction projects decline due to economic conditions, green construction projects will continue to rise. This demand is at least partially due to new governmental mandates or incentives for green building, and to increased tenant demand for space in green buildings. To avoid potential liability arising out of this relatively new area of construction, contractors and others in the construction industry must be aware of special concerns that may arise on a green building project.

LEED and Other Green Building Certification Programs

Those in the construction industry seeking work on green building projects should be familiar with third-party green certification programs. Project owners find official certification desirable because it indicates to the building's potential purchasers, tenants, or users that the building unquestionably has met and adheres to objective green standards. Without such certification, potential purchasers, tenants, or users would have to make their own assessment of a building's "greenness," or would have to take the project owner at his or her word. Today, project owners with green concerns may be most interested in having their buildings obtain certification through the United States Green Building Council's ("USGBC") Leadership in Energy and Environmental Design ("LEED") certification program. Although competing green building certification programs exist, LEED has become by far the most popular green building certification program due to its comprehensive nature. It is thus the one contractors are most likely to encounter.

The USGBC is a non-profit organization comprised of organizations, corporations, and institutions from numerous industries. The USGBC formed to promote the development of green buildings – buildings that are both ecologically responsible and healthy places in which to live or work. With this goal, the USGBC created LEED certification programs for green buildings. There are many different LEED programs through which a project can obtain certification, addressing the complete lifecycle of a building, from new construction to renovation. Some LEED programs are geared toward specific types of buildings, including residential, school, retail and healthcare developments.

A registered project receives certification through a particular program if it meets that program's prerequisites and if it earns specified number of "points," indicating that specific green goals have been attained. Points are awarded for goals focusing on the sustainability of the project site, energy usage, water usage, material and resource purchasing and usage, and indoor environmental quality. Special points are awarded if a project achieves a green goal in an innovative way. Because a project is unlikely to qualify for every possible point offered under a program, LEED project teams carefully select goals to target that are both 1) possible given the project's location and planned use and 2) cost-effective to achieve.

The Green Building Certification Institute ("GBCI"), an affiliated entity created by the USGBC, oversees the award of points and certification of registered projects. No certification will be awarded until construction is complete and a complete application is submitted. The GBCI has contracted with third-party private "accreditation firms" for the review of the applications and the award of points and certifications. An accreditation firm reviews each completed application to determine if all prerequisites for the program have been met and if enough points have been earned. After an initial review, the accreditation firm may require a project team to submit additional information to assist it in its determination. The accreditation firm then determines whether certification may be awarded and, if so, at what level.



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Its decision is based only upon the documents the project team submits to GCBI; the accreditation firm never visits the project site.

There are four levels of certification, with platinum certification awarded to the “greenest” buildings. If certification is not awarded, or if a lower level of certification is awarded than was desired, the project team can appeal the denial of certain points or can make modifications to the project and submit a new application. Either avenue may be costly to the project owner, who has already paid for registration and application review, but abandoning the hope of certification at a certain level or at all may prove more costly.

Green Project Contract Issues

There are special concerns with green projects that must be addressed contractually. Contracts need to clearly define what parties have responsibility to achieve the desired green goals and standard. The American Institute of Architects (“AIA”) has developed standard form contracts that attempt to address certain green concerns. The AIA B214 (2007) standard form documents set forth special duties and responsibilities on a project where the project owner seeks LEED certification. As the AIA B214 (2007) is a “scope of services” document only, it must be used as part of a more comprehensive agreement. All other contracts (owner-contractor, contractor-subcontractor) should also define each party’s green responsibilities.

Many green building laws or regulations (at all levels - local, state, and federal) mandate that new buildings must be “built to LEED standards.” Some project owners have adopted this “standard” even if it has not yet been mandated by law in the project owner’s jurisdiction. This standard simply means that although the project would receive LEED certification if it was registered for certification and an application was submitted to the GCBI for review, actual registration and certification is not required for compliance. Although adoption of this standard may save the project owner money in registration and administration costs, it can be downright impossible to determine whether a project complies with it. It is unclear who, exactly, is to make this determination. And, as the project is not being subjected to review by a third-party accreditation team, it is equally unclear how this determination would be made. Contractors working on projects which are to be “built to LEED standards” should make certain that these issues are addressed clearly in their contracts.

Other laws or regulations and contracts require that LEED certification actually be attained, with some specifying that a certain minimum level of LEED certification be attained. Contractors should be wary if a contract promises the attainment of a certain green building certification, as under such a contract compliance directly depends upon a third party’s determinations, made solely upon whatever documents were submitted to it. Contractors should also be wary of a contract relating payment to an ultimate result such as the successful award of certain LEED points or certification, rather than to the contractors’ successful performance of specific services during construction. This is not only due to the unpredictable nature of LEED certification, but also because the LEED review and certification process may take a long time to complete and is dependent upon timely, complete submissions of documents – something out of the contractor’s control. Similarly, contractors should provide warranties for their specific services only, and not guarantee the award of certain LEED points or LEED certification.

Green Concerns on the Construction Site

A project owner’s green concerns will not only affect contracting, they will also change life on the project site during construction. If a green building project is planning on eventual LEED certification, another professional may be introduced into the project owner/architect/contractor relationship – the LEED-AP consultant, a LEED-educated and accredited professional who will guide the project team through LEED certification. The LEED-AP consultant will engage in continuous reviews of the project throughout its design and construction, and may become a familiar figure on site.

During construction, project owners will likely require contractors and subcontractors to recycle at least some portion or certain types of materials and to otherwise implement a waste management policy. For example, for an existing building to earn a point toward LEED certification, at least 70% of “base building” waste generated by facility alterations or additions must be diverted from landfills or incinerators. Project owners may require contractors to keep thorough documentation of materials used, recycled, or thrown away, as careful documentation is vital to LEED certification.

With the rise of green construction projects, green materials are often temporarily unavailable or subject to delayed delivery. Because of this, contractors should be aware that out-of-sequence construction or delays may be epidemic on green projects. Contractors should document any such delays as specifically as possible. And, even in the face of such a delay, contractors and subcontractors should never substitute materials without prior approval. Even a “green”

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substituted material may not be “green” enough. For example, certain points under LEED mandate the use of green products or materials with the proper amount of recycled content, are locally produced, have obtained certain certifications, or otherwise meet defined green standards. If the specified green materials are not used in the specified ratios, GCBI will not award the project those points. This may result in a project obtaining certification at a lower level than expected, or failing to achieve certification altogether. An unattained certification can be devastating to a project owner, who may lose tax incentives, governmental funding, and potential purchasers or tenants who wanted a LEED certified building. Removing and replacing problematic material so that certification may be obtained may be costly at best and impossible at worst. This clearly opens the door for liability to fall on the contractor or subcontractor’s head.

Finally, contractors and subcontractors should also know that green products or materials may have specialized installation or use requirements, and that those new to green projects will not have experience working with these materials. Improper installation can potentially damage a building and result in default claims even if LEED certification is achieved.

The Ins and Outs of Federal Contracting

By *Matthew Jane*

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The economic stimulus act consists of \$787 billion in federal spending, includes \$150 billion for highways, bridges, mass transit, airports, utilities and water and sewer systems, \$29 billion focused on clean energy and \$25 billion for public school construction. Michigan is expected to receive approximately \$7 billion in stimulus funds allocated for construction projects. Of that amount, \$847 million is for highways and bridges, \$135 million for public transit, \$249 million for winterizing homes and \$84 million for energy related projects. Project funding will occur over 2 years, in part due to increased regulation on the accounting and tracking of these funds.

Thus despite the challenging economic conditions, there are future opportunities to work on significant federal construction projects. To get started with the federal contracting process, a contractor must register with the Central Contractor Registration at www.ccr.gov (which includes completing an Online Representations & Certifications Application). A contractor then needs to select and register with the specific agency (and their small business liaisons) that it seeks to do business with. Helpful information can be obtained at the following websites: www.fedbizopps.gov, www.fbo.gov and www.qsa.gov.

In order to be awarded federal contracts for public projects and to ensure a successful and profitable engagement, a contractor must understand the intricate requirements and regulations that control federal contracts, which include new ethics and disclosure rules for federal contractors. These requirements and regulations differ vastly from the world of private contracting. The Federal Acquisition Regulations (FAR) govern the bidding and contract process for federal contracts and seek to ensure open and fair contracts through competitive bidding. The FARs contain uniform policies and procedures for acquisitions by all federal agencies and implement and address almost all procurement-related issues.

When contracting with the federal government, a contractor must appreciate that he/she has little or no ability to negotiate the terms of the contract. This includes the numerous terms and conditions clauses that accompany the contract, including some that are characteristic of public contracts such as termination for convenience and onerous clauses regarding change orders and defaults. Federal contracts may contain socio-economic obligations like affirmative action, drug-free workplace and minimum employee wages. Federal contractors may also must comply with numerous ethical requirements, including the Truth in Negotiations Act, the Federal False Claims Act and, of course, the various bribery and anti-kick-back statutes. A higher level of documentation and cost accounting is required on federal contracts, especially relating to notices, schedules and problems encountered on the project in the event a claim must be filed for delays or additional compensation.

There are many public construction projects in the pipeline that present opportunities for contractors. By having a basic knowledge of the process and requirements, a contractor can better navigate the potential landmines that accompany working on a federal project.

Ten Tips to Limit Harm from “Economic” Project Changes

By *Harvey W. Berman*

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The past eighteen months have been marked by a deluge of under-water construction projects. To address their plight, struggling owners have employed various measures to cut their losses, including, descoping, delaying, suspending, and terminating projects. The impact of such a move on a contractor can be catastrophic. However, some of the effects on a contractor can be minimized by carefully scrutinizing contracts and negotiating provisions that protect against harmful economic measures sought by savvy owners.



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Ten Tips to Limit Harm from "Economic" Project Changes *(continued)*

The following are ten tips to help level the playing field for contractors:

1. Utilize provisions that give the contractor a broad right to request adequate financial assurances from the owner to ensure that the contractor is not performing work for which it will not be paid. One of the ways to do this is to broaden the contractor's right to request financial assurances from the owner before and during construction. Strike out language that conditions or limits the contractor's right to request financial information from the owner.
2. Carefully review the provisions in the Contract Documents relating to the amount of compensation the contractor is entitled to receive in the event of project termination. In this regard, seek to limit the scope of the waiver of consequential damages clause that is present in most standard industry contracts. For example, be sure that the waiver does not apply to a contractor's termination fee. Also, be sure that the contractor is entitled to overhead and profit in the event of termination for cause or for convenience. This may require agreeing in advance to certain limits.
3. Specify that the contractor is entitled to a termination fee in the event that the project is terminated for convenience, for lack of funding, or for other reasons not arising from the contractor's work. If the owner objects, consider including a provision entitling the owner to a credit for some or all of the termination fee in the event the project is restarted and the contractor is selected to complete the Project.
4. Specify the contractor is entitled to a demobilization fee upon a prolonged delay or termination of the project and a remobilization fee in the event of restart of the project.
5. Consider including a right of first refusal from the owner that requires the owner to offer to the contractor the right to match any proposal or bid from another contractor in the event the project is restarted after project termination.
6. Most contracts provide that the owner has the right to require changes in the Work within the general scope of the Contract; however, given the possibility for disputes over the meaning of this provision and the possibility that this clause may be used by an owner to unjustly reduce the size of the Project to limit its economic loss, the contractor may want to specify various circumstances that are a change in the general scope of the project and which entitle the contractor to terminate the project.
7. To prevent the owner from improperly slowing down a project while the owner is struggling with finances, ensure that the Contract gives the contractor the right to control access to the site including the days and hours of work and shifts, provided that this does not increase the cost of construction.
8. Avoid or restrict the use of no damage for delay provisions imposed by owner.
9. Be sure that the contractor is entitled to payment for work off-site or materials purchased but not delivered and stored at the project site to be sure that the contractor is fully compensated in the event of project termination.
10. Avoid provisions that limit the contractor's rights in the event of a substantial change in the project. While owner's may resist these contract changes, don't shy away from discussing the impact of an unanticipated financial problem. The addition of even a few of these changes will be a worthwhile benefit to the contractor.

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