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ARCHITECTS & ENGINEERS NEWSLETTER

GREEN BUILDING CHALLENGES

LEED, or Leadership in Energy and Environmental Design, is an internationally recognized green building certification system developed by the U.S. Green Building Council. LEED provides building owners and operators with a framework for implementing practical green building design, construction, and maintenance solutions that contain strategies related to improving environmental and health performance. LEED has grown from one standard for new construction to a comprehensive system of six standards encompassing commercial as well as residential building types, including the category Neighborhood Development which is in pilot.[1] There are various statistics regarding energy efficiencies in new construction resulting from the LEED program. Additionally, there are claims (albeit of a subjective nature) regarding increased worker productivity, decreased absenteeism and generally improved health resulting from the LEED program. Regardless of the claims being made as to the benefits of the LEED program, without question LEED building design is here to stay. There have not been a lot of articles written concerning the legal ramifications of LEED design. However, for those that are interested, I recommend reading the entirety of Maura K. Anderson's article entitled *Hidden Legal Risks of Green Building* (84 Florida Bar Journal 35) and Ujjval K. Vyas' article entitled *Growing Demand for Green Construction Requires Legal Evolution* (30 Const. Lawyer 10). Both articles raise and address many of the issues that revolve around green building design.

There are many initiatives, on the national level as well as the local level, to incentivize green building. Regulatory and co-compliance for energy and sustainable models continue to evolve. Additionally, green building has made its way into leasing requirements, lending practices, performance contracting, pension fund preferential treatment, and other areas. The focus of this article is on the potential legal challenges and ramifications surrounding LEED building design.

EFFECT ON STANDARD OF CARE

How has the evolution of green building affected the designer's standard of care? To begin with, AIA B101-2007 requires the architect and engineer using the AIA flow-through documents to consider and present green options to the owner. Sections 3.2.3 and 3.2.5.1 make it mandatory for the architect to discuss with the owner the feasibility of incorporating "environmentally responsible" designer approaches, alternatives, materials, building orientation, as well as program aesthetics. If this provision is not stricken by a party, it becomes a contractual obligation and a failure to discuss "environmentally responsible" design and material could put the architect at risk of being in breach of contract. If this provision remains part of the contract, designers should carefully document what discussions took place and whether or not the owner decided to employ a green design. If the owner does not choose to implement a green design, the designer should seek written confirmation of the owner's choice which should remain part of the designer's file. Another approach is to add affirmative provisions to contracts between owners and design professionals that make green building considerations an "opt in" rather than an "opt out" provision.[2]

Designers, through their own marketing and puffing, may inadvertently create a standard of care for green design. Websites and other marketing materials may, for example, tout energy savings or other claims, upon which owners rely, to be achieved on their own project. In essence, the designer may have voluntarily raised the standard of care and created a new risk for themselves. Designers must be careful to not voluntarily raise their standard of care by making representations for building performance or qualifications. A potential disastrous effect could be voluntarily raising the designers' standard of care to achieve these performance standards to a point where it is outside of their present insurance coverage.[3]

[1] U.S. Green Building Council, What LEED Is, http://www.usgbc.org/DisplayPage.aspx?CMSPageID-1988 (last visted June 7, 2010).

[2] Ujjval K. Vyas & Edward B. Gentilcore, *Growing Demand for Green Construction Requires Legal Evolution*, 30 CONSTR. LAWYER 10, 14 (2010)

[3] *Id.* at 15.

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Not only could these representations raise the standard of care, but they also could create unintended and non-desirable warranties or guarantees as to LEED certification. By agreeing to "warrant" or "guarantee" LEED certification, the architect may, for example, create a higher duty than the standard of care required, which may also adversely impact insurance coverage. By making a warranty or guarantee of LEED certification in its contract, the designer may inadvertently contractually create a higher standard of care, potentially resulting in such warranties or guarantees being considered outside of E&O coverage, leaving the designer and his firm exposed.[4]

AIA DOCUMENTS

In addition to the provisions contained within AIA B101-2007 that have been previously discussed, the American Institute of Architects offers two documents that specifically address LEED certification. Document B214-2007 addresses LEED certification services, and document B211-2007 pertains to building commissioning services.[5] B214 is not a stand alone document and needs to be incorporated into an owner/architect agreement. Although B214 is helpful in obtaining LEED certification and explaining what is expected in the process to accomplish that goal, there is nothing within the document that addresses what happens if LEED certification is unsuccessful. It is certainly recommended in the Article 6 "Special Terms and Conditions" clause of the document that language be inserted stating the architect will "endeavor" to accomplish, but makes no "guarantees or warranties" that a particular LEED certification will be obtained. Additionally, a limitation of liability clause should also be addressed in this part of the agreement in the attempt to place some parameters around this risk.[6]

SOUTHERN BUILDERS V. SHAW DEVELOPMENT

Attorneys looking at the legal ramifications of green building construction have cited the case of *Southern Builders, Inc. v. Shaw Development,* No.: 19-C-07-011405, Cir. Ct., Summerset Cty. MD (2008). This case focused on a dispute between the owner and general contractor when the desired level of LEED certification was not accomplished. The project consisted of a 23 unit condominium that was designed to obtain LEED Silver certification. The owner applied for state income tax credit, but when the building failed to obtain the desired LEED certification, the owner forfeited more than $600,000 in tax credits. The owner alleged claims of negligence and breach of contract against the general contractor. The parties used an imprecise contract; therefore, the owner was forced to rely upon the language in the project manual which indicated the project was designed to comply with the LEED Silver certification level. More importantly, the language in the project manual did not require the builder to take responsibility for constructing or obtaining LEED certification.[7]

In the *Southern Builders* case, there was no clear understanding as to how LEED certification was to be accomplished, nor were the contract documents designed to set forth responsibilities regarding obtaining LEED certification. However, the case does demonstrate that contractors play a large role in obtaining LEED certification by providing detailed documentation as to the types of materials and the collaborative effort needed to obtain LEED certification.[8]

What about the waiver of consequential damages? B101-2007 Section 8.1.3 provides a waiver of consequential damages. Does it protect the designer if LEED certification is not obtained? Consequential damages are losses within the reasonable contemplation of the contracting parties at the time of the contract. On the other hand, direct damages are those that are a natural and proximate result of the breach of a contract. Is the failure to obtain tax incentives because of the inability to obtain LEED certification a direct or a consequential damage?[9] Much could depend upon the way the contract is written. A way to avoid this uncertainty would be to specifically address in the contract that the failure to obtain LEED certification (or a certain level of LEED certification) is considered a consequential damage by the parties, thereby subjecting it to the waiver of consequential damages clause. Most certainly, however, a "warranty" or "guarantee" of obtaining LEED certification (or a certain level of LEED certification) would in all likelihood be considered a direct damage, making the waiver of consequential damages clause ineffective.

CONCLUSION

Green building demand is here to stay, and there are a good many uncertainties for the designer. The designer needs to take a great deal of care in its marketing materials so as not to create unrealistic expectations or unintended guarantees or warranties. The same is true in regard to the contract language used. Rather than guarantee or warrant, a designer is better suited to use words like "endeavor" or "make reasonable efforts." A designer is also encouraged to pursue a waiver of consequential damages clause directed at LEED certification, as well as a limitation on liability clause. How these types of clauses will be enforced by the courts is not yet fully known, but these types of provisions will help to place a designer and its lawyer in a better position to make arguments against liability or at least in favor of attempting to minimize it. ■

[4] Maura K. Anderson et. al., *Hidden Legal Risks of Green Building,* FLA. BAR J., March, 2010, at 35, 13.

[5] *Id.* at 14.

[6] *Id.* at 16.

[7] Vyas, *supra* note 2, at 16.

[8] Vyas, *supra* note 2, at 17.

[9] Vyas, *supra* note 2, at 17.

PITFALLS OF TERMINATING A CONTRACTOR FOR CAUSE

This article addresses the potential pitfalls of terminating a contractor for cause and contains recommended dos and don'ts.

The AIA A201-2007 requires the involvement of the "Initial Decision Maker" ("IDM") when termination of a contractor for cause is being considered. That term is defined in Section 1.1.8 which states, "The Initial Decision Maker is the person identified in the Agreement to render initial decisions on claims . . . and certify termination of the Agreement under Section 14.2.2." Article 15 of the AIA A201-2007 allows the owner and contractor to identify an IDM other than the architect in the owner/contractor agreement. However, if the owner and contractor do not select a third party IDM, the architect will serve as the IDM, thus maintaining its traditional role as the initial decider of claims and also certify termination of the contractor. Section 14.2.2 of the A201-2007 requires the owner to obtain certification from the IDM that sufficient cause exists to terminate. Section 14.2.1 sets forth the basis for termination for cause.

Section 14.2.2 also requires that seven days written notice of the termination for cause be given to the contractor and the contractor's surety. Courts have recognized two important reasons for giving notice. First, the breaching parties should be given a reasonable amount of time to cure the default. Second, a notice to terminate gives the contractor time to wind down the job. Assuming the design professional is the IDM, notice should be given to all parties of the construction contract, not just to the contractor and the contractor's surety. Subcontractors and all respective sureties should also be notified. This notice should be provided by certified mail. The notice should further be explicit in regard to termination. Why? Because ambiguities as to the intent of the owner to terminate will be construed against the owner and will not constitute proper notice. The notice of termination should also adequately describe the subject matter of the default. It should not contain mixed threats of termination and offers of resolution. It must be clear and unequivocal that the owner considers the contractor to be in violation of the contract documents.

The design professional functioning in the role of the IDM is thrust into a potential tempest. When termination is being considered, emotions are generally at a fever pitch. Typically, both sides have complaints about the other. The owner wants the design professional to terminate due to the owner's frustrations. The design professional, however, must separate himself from the desires of the owner and make a reasonable, good faith evaluation as to the circumstances. Perhaps, even more importantly, the design professional must be prepared to advise the owner of the repercussions of the decision. Many factors need to be considered that impact the project completion, product warranties, building codes, financial considerations, and litigation. These considerations are discussed below.

From the standpoint of terminating the contractor, it is not unusual that weeks could be lost toward the project schedule. The bonding company typically performs an investigation and subsequently makes a determination of how to proceed. This requires extensive review of what has happened, as well as multiple layers of decision making within the surety company. Therefore, if a project is at a critical stage, the decision to terminate may have significant repercussions on the schedule. Product warranties may also be voided if the original contractor is removed and not allowed to install the product. This process is even more complicated if items are already installed.

Additionally, a construction project that remains idle can constitute a public nuisance. Building Code officials have the authority to require abatement of the nuisance. Therefore, if a project remains idle for a prolonged period of time, complications with the authorities can and, most likely will, develop. Another potential complication arises if, because of the removal of a particular contractor, significant changes are made to the originally approved plans and specifications. New permits will have to be obtained, which can delay the project even further.

Perhaps the most significant consideration pertains to the potential for litigation. Litigation is costly and time consuming. Often when a contractor is terminated, he pursues claims for wrongful termination against the owner. If a court determines the termination was wrongful, the contractor would then be entitled to recover the amount which has not been paid for the work performed, cancellation charges, lost profits, and potentially other damages. The contractor can additionally seek, and often does seek, damages as a result of tortious interference of contract with its bonding company. Obviously, the power of a contractor depends on the extent of bonding available to it. Any interference with the contractor to receive proper bonding affects its capacity to bid and work on other projects, thereby resulting in damages. The contractor may also pursue a direct action against the design professional for tortious interference of contract. Section 766 of the *Restatement of Tort Section* defines "tortious interference of contract" in the following manner:

> One who intentionally and improperly interferes with the performance of a contract (except a contract of marriage) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

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The design professional is often in the uncomfortable position of making a determination to certify termination, when at the same time, his/her plans and specifications are at issue. A contractor, for example, may be alleging that the plans and specifications are either inaccurate or omit crucial details which are the real causes for the contractor's delay or unwillingness to proceed. On the one hand, the owner will be pushing the design professional for a decision to terminate, while on the other hand, the design professional may recognize that he has made a design error which is at the heart of the contractor's unwillingness to perform. The design professional is then faced with the following dilemma: does the design professional certify to appease his client, the owner, or does the design professional hold the termination in abeyance until the allegations relating to inaccurate or otherwise deficient plans are addressed? If he does certify termination, it is most likely that the design professional will be considered to have not made the decision in good faith and on a reasonable basis. Termination of the contractor would then most likely result in litigation exposing both the owner and design professional to damages. A design professional may be fully responsible for the damages if his decision to certify termination is not made in good faith or is without reasonable basis. On the other hand, if the design professional refuses to certify termination, then the design professional may create a contentious relationship with his/her client, may be found to be in breach of contract, and still be faced with litigation. What's the bottom line? A design professional's failure to properly evaluate all of the facts and circumstances surrounding the termination request in good faith could result in claims that greatly exceed his/her contract amount with the owner.

CONCLUSION

When called upon by the owner to terminate a contractor, assuming the design professional is the IDM, due care must be taken to analyze all that has happened to help ensure that the grounds for termination set forth in Section 14.2.1 have been met. ■

SHOP DRAWING LIABILITY

Shop drawing review has been referred to as a "necessary evil." (*Design Cost Data* magazine, March/April 2003, Arthur O'Leary.) Our office has been involved in cases in which the owner or contractor has made a claim against a designer for approving what turned out to be a defective or contradictory shop drawing. All designers recognize this is a tedious and costly part of the construction process that has potential risks.

SUBMITTALS DEFINED

The terms "Shop Drawings," "Product Data," and "Samples" are defined in AIA A201-2007 Section 3.12.1. The term "Shop Drawings" refers to drawings, diagrams, illustrations, schedules and other data. They are typically prepared by specialty contractors or fabricators. The process requires them to be submitted to the contractor for review and then to the architect or engineer. "Product Data" are illustrations, standard schedules, performance charts, brochures, and similar other materials. "Samples" are physical examples that illustrate materials, equipment or workmanship. These submittals are not part of the Contract Documents unless otherwise specified. They are simply for the purpose of illustrating how the contractor proposes to conform to the intent of the design. Architects and engineers review the shop drawings to ascertain whether the contractor understands the design intent and concept before the work is performed in the field.

LIABILITY ARISES WHEN

If shop drawings are not part of the Contract Documents, how does liability arise? Regardless of the status of these submittals, owners and contractors have argued that the acceptance of a shop drawing that differs from the design intent constitutes a change in the design and an acceptance of the new design, and if it is defective, it now becomes the responsibility of the architect or engineer. In *D.C. McClain v. Arlington County* (1995) 249 Va. 131, the Supreme Court of Virginia did not accept this argument. The Supreme Court of Virginia pointed out that the approval of a shop drawing did not relieve the contractor, and more importantly did not create liability for the engineer, when the deviation was not specifically noted on the shop drawing submittal.

The *McClain* case appears to have dealt with a proprietary contract, but the provisions were similar to provisions in the AIA documents. AIA B101-2007 Section 3.6.4.2 states that review of submittals is "…for limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents." This is similar to the language the *McClain* court relied upon. Additionally, the AIA B101-2007 Section 3.6.1.2 states "… nor shall the Architect be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents." Should the contractor build according to the defective shop drawing which is not a Contract Document, Section 3.6.1.2 can be asserted to exculpate the architect who reviewed the shop drawing.

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The contractor is also required to review the submittals before submission to the architect. Section 3.12.5 of AIA A201-2007 requires the contractor to review all submittals "…for compliance with the Contract Documents…" Section 3.12.6 further provides that such submittal by the contractor represents that the contractor has reviewed and approved, verified for materials and field measurements, and checked the information contained within the submittal with the requirements of the work before sending them to the architect or engineer. Sections 3.12.8 and 3.12.9 require that the contractor disclose all deviations from the Contract Documents in writing and obtain the architect's written approval of specific deviations. It is incumbent upon the architect or engineer to make certain that the contractor has reviewed the shop drawing and stamped it showing "approved." If in fact the contractor notifies the architect or engineer of the deviation and the architect or engineer does not take exception with the deviation, any flaw in the deviation of the shop drawing from the design intent will arguably now be the responsibility of the architect or engineer.

Architects and engineers should not accept shop drawings and other submittals that have not been specified. Accepting them potentially creates a duty to review. Shop drawings are generally requested for the critical trades such as structural, safety, function, building code compliance, and the like. There is no standard list but the architect and engineer need to be mindful of what trades from which the majority of architects or engineers in their vicinity generally request shop drawings.

ARCHITECT'S STAMP ON SHOP DRAWING

The checking of a shop drawing, although mundane and tedious, is nonetheless an important undertaking and must be performed by someone with knowledge of the project. Section 3.6.4.2 of the AIA B101-2007 requires that shop drawings be checked for conformance with the design concept. This infers that someone familiar with the project from the designer's office will be performing the task. If the individual assigned to this task does not have a good working knowledge of the project and approves defective shop drawings inconsistent with the design intent, this could certainly lead to a breach of contract claim by the owner.

For years, designers have attempted to distance themselves from having to "approve" shop drawings. Instead, architects and engineers have removed that term from their shop drawing review stamp and substituted "No Exception Taken." This is despite the fact that the AIA A101-2007 Section 3.6.4.2 uses the term "…approve or take other appropriate action…" Arbitrators and courts have rejected the idea that by merely changing the language to "No Exception Taken" changes the responsibility and/or liability of the architect. With this reality, it is incumbent upon the architect and engineer to task a competent person who is familiar with the project with the review of the submittals. Further, when reviewing any submittals in which the contractor has notified the architect and/or engineer of any deviation, no matter how big or small, special care should be taken. Additionally, other exculpatory language such as "Review is for general compliance with Contract Documents – No responsibility is assumed for correctness of dimensions or details," while recommended, will not relieve responsibility for having someone not familiar with the project review the submittals.

TIMING OF REVIEW

Section 3.6.4.2 of AIA A101-2007 requires the architect to review submittals in accordance with the agreed upon schedule, or in absence of a schedule, with "reasonable promptness." Taking an inordinate amount of time in the review of submittals can delay the progress of the construction. In numerous cases in which a delay claim has been submitted by a contractor, the turn around time for the submittal review was one of the critical aspects evaluated. Owners who get tagged on a delay claim are quick to direct their attention to the submittal review process looking for someone to blame.

CONCLUSION

So what is the bottom line? The three Bs. Be competent, be timely, and be careful. ■

CASE SUMMARIES

- In a 1993 Cuyahoga County Court of Common Pleas case, the project engineer was sued for making limited verbal representations to a welder about whether certain chemical tanks to which catwalks were being welded contained flammable substances, indicating there was nothing to be concerned about, when that turned out not to be the case. The chemical tanks exploded when the welder ignited his welding torch, killing one worker and seriously injuring another. No one disputed the "limited direction" provided by the engineer was beyond the engineer's contracted scope of services. Yet, this case resulted in a $7 million confidential settlement. See 1993 WL 1467277 (actual names of parties omitted), JVR No. 1117837.

- In the Stark County case of *Seifert Techs., Inc. v. CTI Eng'rs, Inc.*, Stark App. No. 2010 CA 00011, 2010-Ohio-5917, the court strictly construed an indemnity provision. Because the provision did not specifically use the words "corporation or firm," but only used the word "person," the court held the indemnity provision only applied to human beings, precluding the plaintiff company's indemnification claim against the defendant corporation. The court's rationale was had the parties wanted to include corporations or firms, they should have done so.

- In the Warren County case of *Cooper v. Chateau Estate Homes*, Warren App. No. CA2010-07-061, 2010-Ohio-5186, the court held that an arbitration clause placed under the "warranty" heading limited the parties' right to invoke arbitration only as it related to warranty claims. Had the drafter of the provision wished for the arbitration clause to be applicable to the parties' entire agreement, the arbitration clause should have been placed in a conspicuous location in a separate paragraph, not just under the section entitled "Contractor's Warranty." ■

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