

When Everything Goes Green, LEED, Follow, or Get out of the Way by Heather Shore, Esq. * and David LeFevre, Esq.

Whether one calls it a growing trend or a revolution in the industry, “green” construction and its imprimatur of greenness, LEED certification, are among the principal topics of conversation among construction professionals and those that assist them. The trend (or revolution, depending on your perspective) has showed no signs of slowing down.

In the public sector, more and more city and state governments are requiring their buildings to be LEED certified. For example, this past July, Florida Governor Charlie Crist signed three executive orders that, having the force of law, require all new state construction be LEED certified and that all such projects “strive” to meet LEED Platinum level certification, the most ambitious of the LEED levels. Similarly, efforts have been successful in a number of U.S. cities to require LEED certification of municipal projects, including Atlanta, New York, and Washington, D.C. In the private sector, the demand for green building seems to be even stronger. Kansas City-based general contractor JE Dunn recently reported that it sees requirements for various elements of green building in the vast majority of the requests for proposals to which it responds. All told, the drive of the private sector, and continuing developments in the public sector, will make LEED requirements as important as OSHA standards or building code regulations.

The implications of this rise in green projects are two-fold. First, as with any standard or regulation, there is risk of noncompliance and the need to assign that risk. LEED is fairly unique, so standard form contracts do not necessarily address the green building aspects of a project. Legal professionals attribute most disputes on green building projects to the failure of the parties to understand the differences between a “normal” project and a LEED project. Second, from a purely economic standpoint, subcontractors must develop working knowledge of the LEED process and its differences from other projects, or else risk becoming uncompetitive. Estimates of the cost variance between LEED projects and “normal” projects of the same kind range from 2 to 10% of the total project cost or more. Failure to account for this and other issues in the bid process will destroy profit margins or price a bid out of consideration.

Many LEED issues arise as front-end matters between owner and general contractor, but they trickle down to the subcontractors in the form of plans, specifications and directions from the general contractor’s construction managers. The clearer and more organized these things are, the less interpretation is required by the subcontractor and the less risk there is that something is done incorrectly. If it appears that the general contractor has little experience with LEED projects, then subcontractors should factor the associated risk into their bids or accept that much more effort will be required to clarify the subcontractor’s instructions. Before bidding, there are a number of questions one could ask of the general contractor to assess these factors:

- Is the general using and circulating to the subs a LEED checklist? The EPA’s Office of Federal Activities has compiled a Pollution Prevention/Environmental Checklist for Building/Housing Construction that lists some of the issues to be considered at the early stage, found at www.afcee.brooks.af.mil/green/resources/EPAChecklist.doc.

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- How many of the general's team are LEED accredited professionals (LEED APs)? The fewer LEED APs there are, the more risk there is that there will be some miscommunication in the general's direction of the subs' work.
- Has the general provided all environmental reports and design documents before a sub agrees to bid on the project?
- Did the general specify the LEED materials and systems to be implemented and utilized? LEED requires not only that certain "green" materials be used, but also that specific construction processes be implemented.
- Will the general be implementing a "commissioning" plan to verify that the building system is designed, installed and tested to perform in conformance with the design intent, the owner's operational needs, and the project documents? What kind of feedback will the sub get from such a plan, and when will it receive that feedback?
- Does the timeline account for the increase in time associated with LEED inspection?

When compiling a bid on a LEED or green building project, a number of factors should be considered, such as the availability and replacement cost of green construction materials. Limited availability and costly materials will affect the bid's bottom line. Also, thought should be given to the different processes used on a LEED project, like proper storage of materials that will be reused, as these tend to increase overhead costs.

Other factors will affect the actual performance of work at the project. The following are a few best practices that a subcontractor might use:

- Ensure that all project managers have reviewed the asbestos, lead-based paint, PCB and hazardous materials plans before undertaking demolition activities.
- Familiarize yourself with the soil conditions of the site in order to implement erosion control measures prior to and during construction.
- Ensure that all building materials that are re-used are properly stored in a covered structure, protected from the water, and maintain recycling bins on site for all materials to be recycled.
- Implement a detailed waste management plan for the demolition and construction phases, or make sure that the sub's waste management plan tracks the general's.
- Keep accurate records of the amount of waste diverted from the local landfills because such proof may be required to earn LEED points.
- Develop a plan to minimize dust and other contaminants during the construction, and be certain to educate all sub-trades concerning the plan.
- Be sure to link progress payment milestones to LEED paperwork submittals.
- Document the origin and supplier of all materials because LEED credits for local materials involve detailed documentation.

Other differences between LEED projects and "normal" projects may find their way into the contract documents and will affect the rights and liabilities of the parties to those contracts. Here are a few questions that a subcontractor should ask when reviewing LEED project contracts:

- Who is responsible if the project fails to achieve LEED certification, and how do the damages from that failure flow down?
- Does insurance cover the materials and systems to be used on the project?
- Will green building techniques affect the warranties and guarantees of the products used?
- Are there long term performance goals that the general contract may hold a subcontractor to?
- What nonstandard contract language is used and how will that nonstandard language change what is normally expected in a construction contract?

As can be seen even from these short lists, there are many issues that will affect all phases of bidding and performing work on a green building project, and a misstep with respect to any of the above issues could lead to a dispute and possibly litigation. Typically, disputes on green building construction projects arise from the lead architect or engineer having insufficient qualifications to lead the design and construction of a LEED project; the wrong materials being used (LEED points may be lost as a result) and/or there being insufficient documentation to prove point eligibility; insufficient protection of the materials to be installed to minimize dust and other contaminants; insufficient research of materials and/or systems; local, state and federal codes, ordinances and guidelines governing green building construction not being followed; an incomplete and marginalized life-cycle-cost study for the project; under-design of the project; missing or improperly installed integral components (*i.e.*, fire dampers are not installed in fire-rated walls, return air paths to handling equipment are missing, high limit humidity sensors are not installed); and bids not sufficiently taking into account the increased costs of supplying, using and/or handling “green” materials during construction.

Consideration and communication of the issues and questions discussed herein prior to the bidding and construction process will lead to fewer disputes down the road. There is a certain learning curve that comes with green building and LEED certification, as they involve many innovations in building materials, processes, and technologies. The members of the subcontractor community and those that advise them must similarly adapt to the new issues that these changes present so as to take full advantage of the opportunities created.