

The Legal Side of Green

BY GEOFF WEISENBERGER, LEED GA, AND ANGELA R. STEPHENS, LEED AP-BD&C

Taking part in a green project means living up to certain green expectations—and taking steps against potential green litigation.

WHAT DOES LEED mean to you? Do you think of it as a buzzword? Or a point system that rates buildings based on their eco-friendly systems, materials and design and construction practices? Or maybe as “that annoying thing that’s requiring me to do more paperwork?”

It’s true. LEED, which stands for Leadership in Energy and Environmental Design, has certainly given fabricators, producers, engineers and others in the steel supply chain—and in the construction world in general—more to think about in terms of tracking materials and answering questions about recycled content and location of recovery. And as its use spreads and an increasing number of states and municipalities mandate LEED certification, design and construction teams will have even more to think about—in the form of legal considerations.

As a matter of fact, the United States Green Building Council itself recently became the target of a class action lawsuit in which the plaintiff—Henry Gifford, a respected energy efficiency expert and owner of Gifford Fuel Saving—accuses USGBC of making “misleading representations in the marketing promotion of their LEED product line.” (USGBC is the developer of the various incarnations of the LEED system.)

While it’s still unclear whether the suit will be successful or even has any merit, what is clear is that USGBC’s claims about LEED buildings are being challenged from a legal standpoint. Similarly, companies involved in LEED projects—or any projects with green goals or claims—could find themselves being challenged as well when it comes to their role on a project.

Here is a list of 11 ways to minimize potential legal risks relating to green projects. While some of these do not relate

directly to fabricators or engineers, they are important for all members of the building team to be aware of.

1. Don’t Promise More Than You Can Deliver. There are many recognized benefits to sustainable design and construction such as energy and operational cost savings, healthier workspaces, increased worker productivity, increased tax incentives, and financing incentives. However, make sure that your marketing materials only promise what you can measurably deliver, and include clauses in your contracts that limit all warranties to those expressly provided in the contract.

2. Don’t Guarantee the Level of Certification. Likewise, do not guarantee the level of certification on any project unless required by law. In many cases, the determination on whether a project achieves a certain level of certification is regulated by a third party over which you have no control. Instead of guaranteeing a certain level of certification, warrant that the work will be in accordance with the contract, the plans and specifications, and accepted industry standards.

3. Identify the Participants, Their Roles, and Their Responsibilities. On most sustainable construction projects, no one party is in control of obtaining all of the points or goals. The parties must collaborate and work together in order to obtain the project’s goals, but most importantly the parties must understand who is responsible for all of the aspects of meeting the project goals. Additionally, owners and contractors should select an experienced green building team and consider inserting clauses in their contracts affirming that the contractor and/or subcontractor has read, understands, and will comply with the LEED or green requirements for the project.

4. Clarify the Standard of Care. There is a lot of discussion over whether architects and engineers (and potentially LEED APs) are going to be held to a heightened standard of care on sustainable design and construction projects. Dissatisfied owners may argue that because certain Codes of Ethics require design professionals to promote



Geoff Weisenberger, LEED GA, is AISC’s director of industry sustainability. You can reach him at weisenberger@aisc.org. Learn more about steel and sustainability at www.aisc.org/sustainability. Angela R. Stephens is an attorney with the Construction Law Service Group of law firm and AISC general counsel Stites & Harbison, Louisville, Ky. You can reach her at astephens@stites.com.

sustainable buildings, they should be held to a higher standard of care which ensures the building is sustainable. In 2007, for example, the AIA in its Standard Form of Agreement between Owner and Architect, B101 (2007), expressly identified the standard of care that design professionals would adhere to in the performance of the contract. It provides:

§ 2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

Similar language can be incorporated into “green” construction contracts in an effort to decrease the risk of being held to a heightened standard of care.

5. Only Take Responsibility for Delays You Can Control. On a sustainable construction project, delays may arise from lack of green material availability, the lack of skilled workers in sustainable construction technologies, longer durations to install new materials and technologies, flushing out the building, or the time to obtain certification. The key is to only take responsibility for delays that you can control.

6. Include a Mutual Waiver of Consequential Damages. Although many construction contracts include mutual waivers of consequential damages, it is unclear whether courts would consider lost tax incentives and/or credits, decreased energy savings, decreased water bill savings, green grants, or future development rights consequential damages. To be certain that these types of damages are deemed consequential damages, and therefore, waived by the parties, they should be expressly included in the clauses waiving consequential damages.

7. Insurance. In order to minimize the level of exposure your company has on sustainable design and construction projects or to know what exposure your company will have, show your insurance agent a copy of the contract before executing it, and talk with your agent about what will be covered by insurance in the event that the building fails to achieve energy and operational cost savings, healthier workspaces, increased productivity, tax incentives, and/or LEED Certification.

8. Don't Tie Payments to Achievement of Certification. The submission,

review, appeal, and award of credits may take months or up to a year to be completed after substantial completion has been reached. Therefore, don't tie payments to the achievement of a certain level of certification.

9. LEED Rating System Appeals. Be familiar with the LEED Rating System Appeals process and timing established by the Green Building Certification Institute. Updates can be found on the GBCI website (www.gbci.org). The current appeals policy provides for two levels of appeal for decisions on program requirements, prerequisites, credits, or Credit Interpretation Requests: First Level Appeal, and Final Level Appeal.

10. Include a Notice and Opportunity to Cure. Sustainable design and construction projects tend to use new materials and technologies that do not have a proven track record of performance. This may lead to long-term maintenance and performance issues. Specify who will bear the responsibility for maintenance of building components, and who will bear the risk if

a manufacturer goes out of business or the component malfunctions.

11. Evaluate the Need for Additional Insurance for Green Projects. Owners, design professionals, and contractors should make sure that they have adequate insurance coverage in place to cover any potential risks. However, insurance companies are still evaluating whether special coverage is needed on sustainable design and construction projects; currently, only a few companies offer specialized coverage for green projects.

These points and others will be covered in the session “Legal Pitfalls of Green Design and Construction” at the Sustainable Steel portion of the upcoming NASCC: The Steel Conference in Pittsburgh on May 12, 2011. To register for and find out more about the conference, visit

www.aisc.org/nascc.

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