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Contractual Protection from Third Party Green Building Certification

Authors: Vincent G. Nelan

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No one on a construction project wants to be held captive by a third party's subjective determination of whether the construction project complied with standards that are open to differing interpretations, such as the U.S. Green Building Council's LEED rating system for sustainable construction. Construction industry participants can protect themselves from such subjective analyses with certain contractual language incorporating sustainable building practices, but not leaving themselves open to the subjecting decision making of a third-party ratings body. A few recent examples shed light on this issue.

Recently, a project to build an energy efficient public library in Florida was nearly derailed when a provision was added to the contract the day before ground-breaking requiring the building to obtain LEED certification. Members of the county commission questioned whether the benefit of obtaining LEED certification was worth the added expense of doing so. These members argued that the library would be built with sustainability and efficiency in mind because the plans were based on the LEED requirements, and that obtaining formal LEED certification would equate to paying \$80,000 for a certificate to hang on the wall. Nevertheless, in the end language requiring LEED certification was added to the contract, and the project moved forward, with the added cost associated with this certification and the potential breach of contract or similar legal claims if the project does not obtain the required certification.

An alternative route is that recently followed by the U.S. Army when it adopted a policy for compliance with a new sustainable construction code of its own, rather than requiring that projects obtain certification from a third-party rating system. The U.S. Army received input from the U.S. Green Building Council when drafting the code, but did not make formal LEED certification a mandatory requirement (although it still promotes obtaining LEED certification).

This blog addressed compliance with green building requirements in two previous articles addressing green zoning and adoption of green building codes.

Participants in the construction industry can protect themselves from subjective evaluation of green compliance by incorporating certain language into their construction contracts. Construction contracts may include language requiring a completed project to achieve a certain level of sustainability certification, to be awarded through a third-party, such as the USGBC, Green Globes, or Energy Star.

However, contracting parties should consider revising this language to make clear that the contracting parties do not warrant or guaranty that the completed project will achieve a certain level of certification because the certification process requires an evaluation by a third party beyond the control of the contracting parties. Alternatively, the contract could simply incorporate various sustainable construction requirements, while not requiring specific certification. If properly drafted, such language could remove uncertainty and potential financial exposure for contracting parties, while still achieving the objective of meeting sustainability and efficiency goals.

Parties must be mindful to watch other areas of the contract so they are not dependent on an outside certification process. Some areas to be mindful of are:

- Progress or final payments based on achieving certification;
- Substantial completion based on a certification award;
- Achieving certification as part of the scope of work;
- Tying certification to a standard of care; or
- Use of untested materials in construction.

Contract language can likely protect you and obviously must be dealt with early. With this introduction you should have a better understanding of what to look for.