

Green Buildings:

A Breakdown of LEED Standards

by James W. Potter

In April 2009 the U.S. Green Building Council released its most recent version of Leadership in Energy and Environmental Design (LEED) green building rating system. This standard is a voluntary system but is used (like ASTM) as a reference system for this type of construction. As discussed below, contractual standards can be based upon using this system.

The LEED 2009 rating system weighs the following six categories for use in certifying compliance:

1. Water Efficiency;
2. Sustainable sites;
3. Energy and atmosphere;
4. Material and resources;
5. Indoor Air Quality; and
6. Innovation and Design

The LEED 2009 rating system has increased its weighting for available credits to emphasize energy efficiency and carbon dioxide reductions. The “point” system used under LEED 2009 is a 100 point base system with 10 additional points available through regional priority and design innovation. Certification can be awarded for:

1. New Construction;
2. Core and Shell;
3. Schools; and
4. Existing Building: Operation and Maintenance projects.

The scoring system is as follows:

1. Certified 40-49 points;
2. Silver 50-59 points;
3. Gold 60-79 points; and
4. Platinum 80 points or above.

LEED provides for project certification and accreditation programs for professionals. See <http://www.usgbc.com/>. Scoring is undertaken by third-party auditors.

BENEFITS

In the United States, buildings consume 39 percent of energy and 72 percent of electricity (and 38 percent of CO2 emissions). The American Recovery and Reinvestment Act of 2009 allocates billions of dollars for green building projects and increasingly, tenants are demanding these standards. There are potential tax credits and grant monies for this type of construction.

Economic benefits to buyers/tenants include reduction in energy and water use and improved indoor air quality. Sellers and builders may enjoy higher selling prices or market desirability.

Costs

The costs of a green building are somewhat higher than conventional construction. These upfront costs are recovered over the life cycle of the building. The trend to require “green building” is growing in incentives and mandatory or voluntary green building programs. You can expect government tenants or construction projects to incorporate some or all of LEED 2009 requirements in the next few years. Sophisticated tenants will also be looking at life cycle costs if they are responsible for utility bills under a long term lease.

In South Carolina, there is a local chapter of the U.S. Green Building Council (www.usgbc.org) with examples of local green building projects. Food Lion is currently

building a certified store in Columbia, South Carolina and Lexington Medical Center's new construction is LEED certified.

Legal Issues

Green building projects are vulnerable to project risks just like conventional projects. In addition, risks associated with attaining certain levels of certification and efficiency benchmark can be additional concerns for the following:

1. Project Owners: special risks are failure to achieve certification and/or failure to qualify for tax credits or loan documents. Time deadlines may be critical as well.
2. Design Professionals: high standard of care in being a LEED accredited professional. Design defects causing failure of certification or liability during life cycle for components to perform adequately.
3. Contractors: failure to build to LEED standards and/or construction defects.
4. Tenants: Failure of a structure to decrease utility costs and/or improved worker health and productivity. Failure to follow OSM procedures to maintain standards.

POTENTIAL CAUSES OF ACTION

1. Breach of contract/warranty
 - a Parties
 - b Elements of a claim
 - c Remedies
2. Fraud or misrepresentation
 - a Parties
 - b Elements of a claim
 - c Remedies

3. Statutory claims – Unfair Trade Practices

- a Parties
- b Elements of a claim
- c Remedies

4. Negligence

- a Parties
- b Elements of a claim
- c Remedies

MINIMIZING LEGAL RISK

- 1. Project Management** – clarifies project goals and requirements upfront and monitors all aspects of construction and certification. This may require a multidisciplinary approach to be successful (engineers, architects, lawyers and contractors).
- 2. Contracting** – well drafted legal documents incorporating LEED standards will mitigate potential problems. Careful contractor/subcontractor selection is essential (low bid is not a good idea).
- 3. Product Specification** – since we are focusing on a life cycle approach, details on even specific brands or models of equipment may be needed.
- 4. Liquidated Damages and Indemnification**
- 5. Leasing Issues for Landlord/Tenant**
- 6. Insurance**
- 7. Marketing Materials**

CONCLUSION

Green Building is good for the environment and can be an attractive proposition for sellers, buyers and tenants. Careful preparation and follow through is needed to assure all parties satisfaction with the process.

Over time, I expect many of these standards to become mandatory and institutional incentives to grow.

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