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Risk Allocation in LEED® Certification

Q. Many owners pursuing a green building include a clause in their contract stating that the design-builder is responsible for achieving a certain level of LEED® certification. At the same time though, owners who employ a design-build bridging philosophy sometimes provide the design-builder with detailed drawings and specifications for the project. What happens when the design-builder follows the owner's plans and specifications, but the project does not achieve the level of LEED certification stated in the contract? Can the design-builder be held legally responsible for this short-coming?

*David A. Blake, Esq., LEED AP * provides some guidance as to ways you might avoid this predicament.*

A. Initially, there are no reported court decisions addressing this issue. However, there are well-established legal principals concerning design and performance specifications that are relevant to this matter which may shape the outcome. As a general proposition, courts characterize the information an owner provides a contractor for the construction of a building in one of two ways — as a design specification or as a performance specification.

Design specifications describe in detail how the project is to be built, leaving little if any discretion to the contractor concerning how it achieves the final result. *Blake Constr. Co., Inc. v. United States*, 987 F.2d 743 (Fed. Cir. 1993). There is an implied warranty that if a contractor complies with a design specification, he is not responsible for results that are unsatisfactory to the owner. *United States v. Spearin*, 248 U.S. 132 (1918). On the other hand, performance specifications set forth objectives to be achieved, and leave it to the contractor to determine how to design and build the project in order to meet those objectives. *Rhone Poulenc Rorer Pharm. Inc. v. Newman Glass Works*, 112 F.3d 695 (3rd Cir. 1997). Some projects employ a combination of design and performance specifications for different aspects of the work.

Difficulty arises when performance requirements and design specifications are provided for the same item of work. Initially, "the inclusion of language requiring the completed project or assembly to pass certain performance tests or standards does not convert a design specification into one for performance." *Neal & Co., Inc. v. United States*, 19 Cl. Ct. 463 (1990). Further, the contractor generally is relieved of its obligation to satisfy the performance requirement if it was reasonable to believe that the performance requirement would be met by following the design specifications. *R.J. Crowley, Inc. v. United States*, No. 90-1150, 1990 U.S. App. LEXIS 21618 (Fed. Cir. Dec. 12, 1990); *R.E.D.M. Corp. v. United States*, 428 F.2d 1304 (Ct. Cl. 1970).

In *Crowley*, the owner provided the contractor with a set of plans and specifications to construct a roof. The drawings detailed with specificity how the roof was to be constructed (design specification). Additionally, the specifications stated that the roof must achieve a U-Value that does not exceed .030 Btu/hour (performance specification). Unfortunately, constructing the roof in accordance with the plans did not result in a roof with the specified U-Value.

In assessing whether the contractor was responsible for achieving the specified U-Value, the court initially focused on whether there was a patent ambiguity between the plans and specifications; specifically, whether it was glaringly obvious upon initial review that the U-Value would not be met by constructing the roof in accordance with the plans. If there was a patent ambiguity, then the contractor was required to clarify the issue prior to submitting its bid. If it failed to do so, then it would be required to construct the roof in accordance with the plans and satisfy the performance requirement concerning U-Value. The court found that there was no patent ambiguity between the plans and specifications.

The court then determined that it was reasonable for the contractor to conclude that the performance requirement concerning U-Value would be satisfied by following the plans. The court's finding was based largely on the fact

that the contractor had little if any discretion concerning how to build the roof. Because the plans detailed how the roof was to be built, and because the contractor therefore did not have discretion to build the roof however it saw fit, it was reasonable for the contractor to conclude that by following the owner's plans the owner's desired U-Value would be achieved.

This line of cases could be applied to disputes over projects that do not achieve LEED® certification. Specifically, if the owner provides the design-builder with drawings and specifications that detail how aspects of the project are to be constructed, then those documents could be construed as design specifications. If the owner also states that the project must achieve LEED® certification, that directive could be construed as a performance specification. Similar to the case discussed above, this would present a performance specification overlaid on top of the same work that is the subject of a design specification, only on a larger scale. As a result, a court could conclude that if a design-builder adheres to the owner's plans and specifications, it is not responsible for a project that fails to achieve LEED® certification. The analysis will likely turn on the specific work that did not comply with LEED® standards, and the degree to which the owner's plans and specifications detailed how that work was to be performed.

A similar line of cases holds that when the owner provides a contractor with design specifications, and also states that the contractor must comply with all applicable building codes and regulations, the contractor is entitled to follow the design specifications, and it is not responsible to the owner if the applicable codes are not satisfied. *Castle Constr. Co., Inc.*, ASBCA 28509, 84-1 BCA ¶ 17,045; *Huber, Hunt & Nichols, Inc.*, GSBCA 4311, 75-2 BCA ¶ 11,457. These cases are very similar to the LEED® scenario discussed above. The primary difference is the standard that the owner has directed the contractor to achieve (building code/LEED®). Under these cases, a court could conclude that if LEED® standards are not satisfied by following the owner's design specifications, the contractor is not responsible for that failure.¹

In summary, the practice of directing design-builders to achieve LEED® certification, while placing certain design decisions that are necessary to do so in the hands of others, may result in unenforceable expectations for owners. Instead, owners would be well served to allocate responsibility for the various tasks that are required to achieve LEED® certification to the entities that actually perform those activities. This is best achieved through careful contract drafting. If done properly, this not only solves a legal problem, it also increases the chance that the owner will achieve its goal of LEED® certification for the project.

¹ The principles discussed in this article were developed in the arena of federal contracting, but have also been widely applied to state and private procurement.

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