

## Phrasing is key to LEED contracts

What should an owner desiring a certified project include in their contracts?

In the Portland metro area these days, there are virtually no major commercial or multi-family residential buildings being developed that are not announced as “LEED certified” projects – and increasingly as LEED gold or platinum projects.

But if you are a project owner or developer who wants your project to be LEED certified, what should you include in your contracts to achieve your LEED certification goal and to protect your rights if your goal is not achieved? It is a good question, and one that is often ignored or given short shrift in the contracting process.

The following are key concepts for project owners and developers to understand and apply in contracting for projects they want to be LEED certified.

LEED is only one type of “green” or “sustainable” certification for buildings. LEED certification, which stands for “Leadership in Energy and Environmental Design,” is the most well-established and popular certification by far. But there are competing certifications, the most common being Green Globes U.S. There also are certifications available for specialized building types, such as those of the Green Restaurant Association, Green Seal for hotels, and Green Guide for Health Care.

It is critical for the project team to include an architect, engineers, a prime contractor and key



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subcontractors and consultants that are experienced in and knowledgeable about green and sustainable development generally, and LEED certification specifically. The team should include a LEED-accredited professional who is designated as the project LEED manager.

The most important contract in which to address LEED is the owner-architect agreement. The owner-contractor contract should also address LEED. The prime contractor’s obligations can be included in the construction specifications, and those specifications are prepared by the architect and its engineering consultants. As such, the key is to obligate the architect to address LEED issues, not only in the specifications, but also in the drawings and basic design of the building.

Typical owner-architect and owner-contractor contracts have little or no language dealing with LEED. The standard 2007 AIA B101 owner-architect agreement merely requires the architect to “consider environmentally responsible design alternatives.” More specific LEED-related requirements must be addressed through specialized text added to the agreement or by use of a specialized AIA form.

The specialized AIA form that focuses on LEED, the 2004 AIA B214 document should be used by most owners and developers, although it is a process-oriented form that fails to specify a LEED goal. The owner’s LEED goal thus must be added to the AIA B101 owner-architect agreement or the AIA B214 document.

When specifying the owner’s LEED goal in owner-architect agreement forms, care should be taken in phrasing the architect’s LEED obligation. If the architect has a flat obligation to achieve the owner’s LEED certification goal, that obligation likely would be viewed as a “warranty” by the architect’s insurance company resulting in a denial of professional liability insurance coverage should the architect fail to achieve the goal. The owner could assert that the architect also committed negligence by failing to achieve the LEED goal, and that there should be insurance coverage on that basis. The owner also could assert a breach of warranty or negligence claim against the architect, irrespective of insurance coverage. These issues suggest that legal advice be sought, regarding how to phrase the architect’s obligation relating to achievement of the LEED goal.

Even though the AIA B214 form provides substantial text regarding LEED, the process described will likely not be the same as the LEED process the owner’s project team, including the Project LEED Manager, will want to follow. This

difference, between the process described in the AIA B214 form and the process the owner’s project team proposes, must be reconciled. The process should also include early and direct involvement of the owner in LEED decision-making. Such owner involvement is very important, both so that significant trade-offs inherent in LEED decisions are made by the owner and so that LEED-generated decisions do not inappropriately skew the remainder of the project’s design.

The LEED text in owner-architect agreement forms should address the architect’s obligations regarding the owner’s specialized certification goals, as well as the owner’s interest in qualifying for tax and other governmental incentives for “green” projects. Such incentives are particularly significant in Oregon.

There is an administrative appeal process within the LEED system. If a project is not issued a LEED certification, or is issued a certification at a lower level than the owner or developer sought, there is a right of appeal that should be considered.

LEED projects are all the rage these days for good and understandable reasons. But project owners and developers, intent on having a LEED-certified project, should carefully address the subject as part of their contracting process.

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