

# Legal and business issues abound in fertile 'green' construction world

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By now, everyone is aware of the devastation caused to the construction industry from the 2008 economic downturn, the effects of which we still feel today. Since 2008, however, "green" construction actually grew from 2008 through 2010 and is expected to continue its remarkable growth into 2011 and beyond, according to McGraw Hill's report, "Green Outlook 2011: Green Trends Driving Growth."

According to the report, green construction grew by 50 percent from 2008 to 2010 and market size by 2015 will be in the range of \$135 billion. Given this trend, those involved in construction should be familiar with this growing construction industry segment.

By far, the most familiar green building metric is the U.S. Green Building Council's (USGBC) "LEED" program. "LEED" stands for "Leadership in Energy and Environmental Design." LEED is a system that takes into account a variety of aspects related to increased efficiency and design. It provides a checklist that is used to measure the extent to which a structure is environmentally friendly and sustainable. Other standards for high efficiency buildings exist, like Green Globes and the International Green Construction Code (IGCC).

With the advent of these new standards, many communities are adopting them as standards that apply to construction within their jurisdictions. For example, Ann Arbor, Michigan, offers a floor area bonus for projects that achieve points under LEED's atmosphere and energy credits. In Wilmington, Ohio, developers of commercial and industrial projects may receive a 75 percent reduction in building and permitting fees, while existing residential and commercial properties undergoing green retrofits may receive a 50 percent reduction in building and permitting fees. Developers in Indianapolis, Indiana, may receive a green building rebate for new construction and major renovation projects.

State governments have adopted green building as a goal of some construction projects. In Indiana, an executive order requires that all new state buildings achieve LEED Silver or two Globes under the Green Globe standard. The Ohio School Facilities Commission passed a resolution that mandates that all K through 12 school projects achieve a minimum of LEED Silver. Michigan has an executive directive from the governor that states that all state construction projects in excess of \$1 million meet LEED.

The federal government also now requires green building for many of its projects. The General Services Administration (GSA) is the largest civilian landlord in the United States. The GSA requires all lease construction to achieve LEED Silver certification.

Even the military has gotten involved, as the Army requires all new vertical construction meet LEED Silver with similar requirements applying to the Navy and Air Force. In all, the Department of Defense has 162 projects registered for LEED certification.

It should be evident by now that “green” building is with us to stay. But, what does that mean for those in the construction business? How is it different than traditional building?

The techniques and technologies used in green building are, for the most part, not new or particularly exotic. What is different about green building is that from the identification of the site, through managing waste, through selecting the materials, through occupation and beyond requires the incorporation of sustainability principles. In short, everything about the building must have an environmental component, a social component, and must make economical sense. At one time, building a green building meant incurring additional costs that one would not incur in traditional construction, but as techniques become more common and materials more available, those additional costs have become negligible.

Much of the focus of green building relates to reducing energy and water use, but also includes considerations of minimizing resource use, the use of environmentally sustainable building products, providing a comfortable and healthy environment and incorporating the building in the community. This begins well before a shovel meets the dirt as all those involved, from architects, construction managers, engineers and owners meet to map out a strategy to reach the goals of constructing a green building that incorporates life-cycle considerations, instead of short-term costs.

As green building requires a cooperative effort on the part of all participants, there are unique challenges and with those challenges come potential legal pitfalls. Standard construction contracts are inapt for these types of projects, especially if the owner seeks to meet a specific green building standard.

Failure to meet standards may have ramifications as there may be tax or other incentives that could be lost if the building lacks essential elements or does not perform as designed. Also, the owner may not be able to market his property or lose the federal government as a tenant for failure to achieve a certain standard.

Contract terms for each of the participants should spell out exactly who has responsibility for what and a contractor should be very careful about making specific promises about whether a building will ultimately achieve the sought certification.

There are, of course, legal issues that arise in all construction projects. Green building or renovations require additional considerations and careful contract drafting in order to avoid liability or apportion it appropriately. As green building becomes ever more prominent, these issues will become more commonplace and more easily anticipated. Until then, it is imperative that those involved in constructing

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and maintaining green buildings know what potential liabilities they may face and how best to minimize those potential liabilities.

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