

# ***The Foundation for a Legally Green Construction Practice***

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The new and innovative approaches that green building brings to the design, construction and operation of buildings have the potential to reduce the adverse effects on climate change and rising energy prices. In addition to these benefits to the natural environment, a green-built structure offers owners of a building the potential to reduce operational costs and the ability to obtain financial incentives from a local, state or federal agency.

But as with most things, these benefits come at some cost to those involved with the green building project. The legal risks a contractor faces on a green building project include failing to achieve a certain level of green certification, or failing to comply with an applicable legislative scheme that relates to your project. In this regard, it is critical to not only contractually define the goals of your project, but to

also stay apprised of the applicable regulatory requirements.

Many federal, state and local governments now require that public buildings meet green standards. According to research conducted by the University of Wisconsin, in 2008 there were 134 mandatory green building programs in place in 118 counties in the United States. In addition to these mandatory programs, many local, state and federal agencies offer a variety of financial incentives to promote sustainable construction. The Database of State Incentives for Renewables & Efficiency, [www.dsireusa.org](http://www.dsireusa.org), provides information on state local and federal renewable energy and energy efficiency incentives and policies in the United States. Being aware of and understanding these regulatory programs is critical in any green building project.

A perfect example of how these risks can create liability for a contractor is a case from the state of Maryland, *Southern Builders v Shaw Development, LLC*, No. 19-C-07-011405 (Md. Cir. Ct. 2007). The *Southern Builders* lawsuit arose out of a developer's failure to obtain approximately \$635,000 in state tax credits for a \$7.5 million condominium project. The potential state tax credits were offered through the Maryland Energy Administration. Under that program, a green building project could only obtain the tax credit after receiving a certificate of occupancy after construction was complete, and a submittal that the building satisfied the criteria necessary to receive the tax credit.

The developer sought tax credits available to a project that achieved LEED Silver. The contractor was required to deliver a certificate of occupancy within 336 calendar days from the date of their agreement in order to qualify for the credits. The contractor failed to deliver the certificate of occupancy, and as a result the project missed the deadline to obtain the tax credits. The contractor actually filed a lawsuit against the developer asserting its lien rights, and the developer then filed a counterclaim against the contractor for, among other things, the lost tax credits. In the counterclaim, the developer claimed that it failed to obtain the tax credits as a result of the contractor's failure to timely complete the project. The parties utilized a standard form contract, a 1997 AIA form A101 agreement, and incorporated a project manual which stated that the project was "designed

to comply with a silver certification level according to USGBC's LEED Rating System." The risk of completion was likely allocated to the contractor under this form agreement, which gave the developer significant leverage. The *Southern Builders* case was eventually settled out of court. Although the court never issued an opinion analyzing the issues involved, there are clearly lessons to be learned.

This case emphasizes the importance of understanding the applicable legislative scheme and clearly describing the responsibilities of the owner, design professional and contractor. In *Southern Builders*, the parties utilized standard-form agreements rather than directly addressing the issues inherent in a green building project. The parties failed to recognize the risk created by the regulatory scheme that led to the loss of the tax credits, and the contract documents did not include a risk transfer mechanism with respect to securing the tax credits. Just as in *Southern Builders*, many current form contracts do not contain language specific to green projects. The negotiations of these documents should address the specific third party rating system that is being used; should delete any requirement to achieve a certain level of certification if another party designed the structure; should avoid guarantees of a certain performance or certification level; should not warrant the performance of any material, product or system manufactured by a third party; should include a liquidated damage provision; should obtain a waiver of consequential damages; should include a specific *force majeure* that takes into account that some materials required by a third party rating system are not readily available; and should allocate responsibilities and risks for, among other things: obtaining certification and specified rating, seeking applicable incentives, and complying with applicable regulations.

The *Southern Builders* case has been one of the few lawsuits of its kind, but it sets forth important lessons for those involved in green building. The case is a reminder not to blindly rely on standard form construction documents, and to be keenly aware of the regulatory framework which governs your green building project.

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