feature

New Perils for Contractors in the 'Greening' of Connecticut

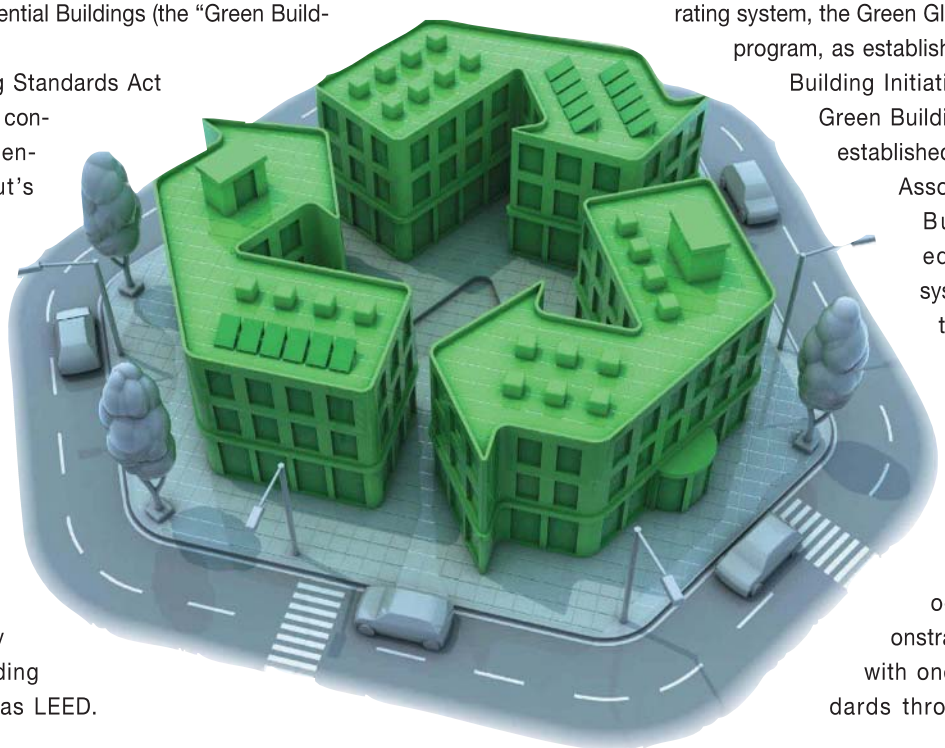
By Timothy T. Corey, Jared Cohane and Michael J. Pendell

For the past five years, Connecticut has attempted to join the green building movement, with limited legislative success. Connecticut adopted a Green Building Code back in 2007 that required state-funded projects to implement certain green building construction standards to public buildings; however, that law met with serious scrutiny. The Green Building Code required the Connecticut State Building Inspector to mandate that any new building over $5 million, and any renovation to existing buildings that exceeded $2 million, meet or exceed LEED standards. Following passage of that law, Connecticut's Attorney General issued an advisory opinion that the Green Building Code was most likely unconstitutional because it took powers away from the state and delegated them to an unregulated third party, namely the United States Green Building Council, which sets the LEED standards. Connecticut's contracting community recognized the law was uncertain and unworkable, and pushed for its overhaul. On July 8, 2009, Connecticut formally joined the green building movement with the adoption of Public Act 09-192, an Act Concerning Green Building Standards and Energy Efficiency Requirements for Commercial and Residential Buildings (the "Green Building Standards Act").

The Green Building Standards Act attempted to rectify the constitutional problem identified by Connecticut's Attorney General by removing the mandate that commercial and residential buildings and building elements meet or exceed LEED standards. Instead, the Green Building Standards Act only requires the State Building Code to reference nationally accepted green building rating systems such as LEED. More significantly, the Green Building Standards Act no longer just applies to public buildings, but also to private construction.

Under the Act, the State Building Inspector and the Codes and Standards Committee must revise the State Building Code to require commercial and residential buildings and building elements be designed to provide optimum cost-effective energy efficiency over the useful life of the building and to incorporate the 2012 International Energy Conservation Code, no later than 18 months after the publication of said code. The Act also mandates revisions to the State Building Code to include provisions requiring certain newly-constructed buildings of or over a specified minimum size, or a major alteration of a residential or nonresidential building, to meet or exceed optimum cost-effective building construction standards concerning the thermal envelope or mechanical systems. This includes standards for indoor air quality and water conservation, and the lighting and electrical systems of the building.

The Act requires that the new code provisions reference nationally-accepted green building rating systems, including, but not limited to, the Leadership in Energy and Environmental Design rating system, the Green Globes USA design program, as established by the Green Building Initiative, the National Green Building Standard, as established by the National Association of Home Builders, or an equivalent rating system approved by the State Building Inspector and the Codes and Standards Committee.



Contractors must set forth a methodology for demonstrating compliance with one of these standards through third-party

verification of compliance at the time of application for a certificate of occupancy.

Connecticut is, by no means, ahead of the curve in the green building movement. However, its efforts to establish green building standards in both the public and private sectors is demonstrative of the unique challenges facing contractors in developing construction means and methods, especially quality control procedures. From a legal standpoint, the revisions to Connecticut's Building Code required by the Green Building Standards Act have the potential to increase a contractor's legal liability to the owner. At the very least, there will undoubtedly be additional and unfamiliar claims associated with the traditional theories of legal liability. Contractors married to traditional, time-tested building methods and the standard materials used on construction projects can be caught off guard by the potential for increased exposure to financially devastating claims. Because the landscape for contractors is changing quickly as green building laws take shape, it is important that contractors take steps to address and manage the additional risks inherent in any new building trend before the first pair of work boots hits the project grounds.

Design and material risk

In a traditional construction project, design documents flow down from the architect, through the owner, to the contractor and then from the contractor to the subcontractors, suppliers, and fabricators. In the typical design-bid-build context, the contractor has little, if any, input

during the design phase. This downward flow of design documents and design information defines and reinforces the distinct roles, responsibilities and liabilities of the contractor. This scheme provides the contractor with its most potent weapon – in this context, the owner impliedly warrants the adequacy of the plans and specifications. This is sometimes known as the "Spearin Doctrine," after the seminal Supreme Court case, *US v. Spearin*, 248 U.S. 132 (1918). In *Spearin*, a contractor sought to recover from the government for the government's failure to provide accurate plans reflecting the overflow issues which preexisted at the Brooklyn Navy Yard. The Court held: *[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.*

This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check plans, and to inform themselves of the requirements of the work. The duty to check the plans does not impose the obligation to pass upon the adequacy of those plans to accomplish the purpose in view. The imposition of green building standards through legislation, such as Connecticut's Green Building Standards Act, arguably changes that dynamic.

A significant concern for contractors on green building projects is the need to obtain the certification of compliance with the green building standards. If the contract states that the contractor is responsible for achieving certification, any failure to achieve that certification would create liability for breach of contract and/or negligence. Green building projects change the traditional model and roles in several respects, as evidenced by projects built in sister states with laws that have been on the books much longer than Connecticut's. First, some contracts have attempted to shift responsibility for a project obtaining green certification to the contractor, much in the way performance specifications do. Contractors should be wary of specifications that shift the obligation to obtain certification solely to the contractor, especially if the design team is specifying certain green building materials without any input from the contractor.

The new green building trends also permit and facilitate the second variation from the traditional model: increased collaboration and coordination, in the design phase and after, between owners, designers, and contractors. This increased collaboration also creates potential liability for contractors where none previously existed. For example, because of a contractor's unique familiarity with building materials, a contractor may be asked to suggest and/or select green materials for a particular project. If a contractor agrees to collaborate on project design and constructability by selecting green materials necessary to comply with design specifications, contractors could foreseeably lose the protection normally afforded under the *Spearin* doctrine. Moreover, assuming responsibility for selecting green materials could lead to potential product liability claims.

Courts have yet to fashion rules of liability peculiar to green building projects in Connecticut, and the law is just beginning to develop in other states as well. Any liability analysis would likely depend on the application of existing exceptions to the *Spearin* doctrine, such as the scope and timing of the input that a contractor provides in the preparation of the design documents and the contractual division of responsibility between the designer, owner and contractor.

Consequential damages

Contractors who lack experience in sustainable building projects risk exposure to claims for consequential damages that result from a project's failure to achieve certification under the new green building laws. Unanticipated liabilities stemming from lost sales, termination of leases and/or rent rebates to tenants as compensation for unfulfilled expectations, and loss of tax credits are a few of the dangers lurking beneath the surface of green building projects for contractors unfamiliar with the law or their contractual responsibilities. A thorough contractual risk analysis should be undertaken in initial pre-bid assessment and again during contractual negotiation to identify these potential pitfalls.

One of the earliest green building cases arose because a contractor and owner failed to recognize the financial risks implicated by the state of Maryland's green building laws. In *Southern Builders, Inc. v. Shaw Development, L.L.C.*, a contractor that built a condominium in Somerset County, Maryland, filed a

$54,000 mechanics' lien against the project in 2006. The owner countersued seeking, among other things, $635,000 in lost tax credits it would have been entitled to under Maryland's green building laws if the project had been certified in accordance with the United States Green Building Council's LEED rating system. The owner alleged that the contractor failed to "construct an environmentally sound 'green building' in conformance with the LEED rating system."

The contract between the owner and the contractor in *Southern Builders, Inc. v. Shaw Development, L.L.C.*, failed to clearly delineate which party bore the risk if the owner was unable to secure the owner's anticipated tax credits. Although this lawsuit settled out of court and provides no clear guidance on how the judiciary is likely to rule on these types of issues, its lesson for contractors is clear: make sure responsibilities, and the owner's expectations, are clearly defined before the parties sign the contract.

Managing green building risks

The risks associated with satisfying green construction laws can be satisfactorily managed. First, a contractor should avoid expressly assuming sole responsibility for achieving certification required by the contract or local law if they do not control or have any input into the design. Clauses imposing blanket liability on the contractor for failing to achieve certification under the applicable law should either be negotiated out of the contract, or softened to reflect the extent of the contractor's participation in the design phase. In addition, contract documents should include language that clearly delineates performance and certification expectations, and explicitly limits a contractor's liability if asked to provide input on material selection. The contractor should also reaffirm, in writing, the owner's implied warranty of design except to the extent of the contractor's design input.

If a contractor chooses to provide guidance and advice on material selection, that guidance and advice should be limited to materials with which the contractor is familiar. A contractor should by no means guarantee new materials with which it is unfamiliar. In addition, a contractor required to assume responsibility for obtaining certification under the law and/or providing guidance on material selection should maintain adequate errors and omissions insurance as these activities are usually not covered under general construction liability policies.

Finally, contractors should consider negotiating liquidated damages provisions that limit financial exposure for failing to achieve certification to cap potential exposure. These provisions could address issues that arise from alterations to the construction project that affect the building's overall performance and cap a contractor's exposure for "green damages."

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