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Home Page >> News & Events >> In the News >> Looking Beneath

## Looking Beneath the Green Surface at Bid Considerations

By David S. Merker, Account Manager, The Graham Company

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As sustainability standards are heightened across the country, your firm has likely already been awarded a sustainable project that incorporates a Leadership in Energy & Environmental Design (LEED®) certification level requirement, or you are in the process of bidding on one. Participation in LEED projects reflects positively on your firm's commitment to supporting the environment and undoubtedly opens doors for future Green construction opportunities.

While the benefits to the environment and community, owner, contractor and designer are undisputed, there are significant bidding and negotiating risk exposures lurking just beneath the green surface.



No one is more familiar with these risks than Mark Purcell, CCM, AIA, LEED AP, Project Executive and David L. Gehringer, LEED AP, Preconstruction Manager at Nason Construction, a firm operating in Philadelphia, Wilmington and Delmarva region that developed a proven partnering approach to the preconstruction phase. With numerous completed projects featuring sustainable elements such as the vegetative roof at the Helen F. Graham Cancer Center in Newark, DE and the geothermal heating/cooling system at the North Dorchester Middle School in Hurlock, MD, their experience has proven that project success is determined before you even break ground.

### Lesson 1: Get a Road Map

Before your construction firm gets behind the wheel of a LEED-certified project, insist on a LEED Charette (a collaborative session during which designers, owner, and contractors discuss solutions to design problems) – it will be your road map to insure seamless collaboration between owner, designer and contractor so performance goals are achieved efficiently. "When you receive bid documents and there is no LEED Charette included – that's a major red flag that you absolutely must heed," advises Gehringer. "The Charette is critical to identifying the sustainable concepts and strategies as well as aligning the owner, designer and contractor – without it, you are blindly bidding," he continued.



If the bid documents don't include a Charette, you must immediately facilitate a meeting with the owner and design professional so that all parties agree on expectations. "Overall, LEED requirements do bring out the best in integrating the owner, designer and contractor – however you must be diligent in initiating such collaboration early on in the bid process to adequately manage expectations and insure your responsibilities," added Purcell.

### Lesson 2: Be Wary of Low Bids

When it comes to increasing profits in a LEED-registered project, there are many unforeseen costs not associated with traditional building that are often overlooked by inexperienced subcontractors. "The lowest subcontractor bid can look tempting, but a savvy general contractor must conduct a comprehensive assessment of all the non-traditional costs before accepting such a bid," warns Gehringer. "If your subcontractor has not accounted for these costs, you must not accept it, as it would later become a burden to your profitability," he advises.

In addition to accounting for such costs, you must insure that your subcontractors have the necessary experience to meet the demands of the LEED checklist. "The last thing you want is an inexperienced subcontractor laying down carpet without first following the appropriate off-gas procedures; an oversight like that could cost you air quality credits that would have been earned otherwise," said Purcell.

In addition to the above lessons learned, The Graham Company and Nason Construction recommend the following preconstruction best practices:

#### Read the Contract ... and Then Read it Again

If not properly managed, LEED projects can be cost prohibitive, but fortunately special attention to your contract can significantly enhance your profit margin. In order for an owner to capitalize on tax credits or other cash-flow opportunities such as surplus energy sell-off or increased occupancy rates, specific performance requirements within the design may be required. Unless these metrics and standards are clearly defined in the contract, the designer and/or contractor could be held responsible for not meeting expectations.



A thorough review of the bid documents and agreement on the clarifying particulars are critical from the outset; this should include a detailed assessment of all materials used and contractual obligations for each. "With so many new materials being used in LEED construction, from vegetative roof membrane to low-VOC flooring adhesive, it is easy to find your construction firm in the middle of a blame game with the product manufacturer," said Gehringer. "To avoid this finger pointing and the resulting claims that could follow, be sure that your contract clearly defines your installation obligations versus product warranties," he continued.

#### Amend Express Warranties/Guarantees

Standard LEED contract templates will include the terms: "declare," "affirm" or "certify," which imply you warrant or guarantee that your work will achieve a level of performance (i.e., LEED standard). Since such claims are non-defensible, every General and Professional Liability policy will contain a standard exclusion for Express Warranties/Guarantees, raising concern over insurability of the contract. In order to reduce your exposure, avoid signing warranties/guarantees in contracts. Instead, have the contract amended to include Rating Satisfaction language that clarifies that your firm will *endeavor* to design/build to a performance standard. The "endeavor to" language is less stringent.

#### Adhere to the Timeline

Realization of tax credits and satisfactory completion of LEED documentation often contain a milestone or deadline component. Ensuring that these milestones are incorporated into your overall project plan are keys to success – for example, failure to satisfy application requirements for the Final Credit Certificate prior to its expiration date, such as obtaining a certificate of occupancy, would disqualify the owner from obtaining the credit. Damage claims for both negligence and breach of contract may be the owner's only recourse to obtain financial compensation for the lost tax credits.

#### Consult with Experts

While the additional work to satisfy the requirements of a sustainable project may at first be daunting, the ultimate rewards can be considerable. A thorough review of the contract and incorporation of the aforementioned items within your project management system can reduce your liability exposures considerably. Consultation with your insurance broker and legal counsel regarding any specialized indemnification and/or satisfaction of insurance requirements is always encouraged to reduce your overall liability exposure.

#### About the Author:

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#### Green Office Tip

Bring a reusable water bottle and plastic containers to work instead of brand name bottles and paper bags.

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