



CONSTRUCTION LAW NEWSLETTER

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LEEDing to Future Problems? Reports of Delays in LEED Processing May Be a Harbinger of the Future

by Timothy R. Hughes, Esq., LEED AP

Interest in green building has expanded exponentially over the last several years. This explosive growth is one of the few silver linings in the otherwise moribund state of the current construction economy. That success, however, may contain the seeds of significant problems looming in the future. There are reports of significant processing delays in the pipeline for Leadership in Energy and Environmental Design certification requests to the United States Green Building Council ("USGBC"). The bulge in upcoming future projects registering for LEED certification may only compound these problems moving forward.

LEED Submittals, and Response Times

LEED for New Construction ("LEED NC") provides that parties interested in registering and applying for certification can submit materials in either a single combined review after construction or a two stage process split between design and construction. The chance to have better definition of anticipated and denied credits during the design phase, and also to redesign and submit later design changes, makes a split submittal highly attractive. When using the split review, for design phase credits, the project administrator can submit materials and get a preliminary reaction as to the likelihood of obtaining these credits during the design phase. The balance of the project can then be submitted during "construction" submittals.

The USGBC estimates, but does not guaranty, response times to submittal. According to the USGBC website, preliminary design reviews are estimated at 25 business days. Final design phase reviews are estimated at 15 business days. Similarly, preliminary construction phase reviews are estimated at 25 business days and final construction reviews are estimated at 15 business days.

USGBC Information on Delays in Responses and Reports from the Field

The USGBC website acknowledges that USGBC is currently suffering delays beyond the estimates quoted above. The website states, "The following review delay estimates are updated on a weekly basis." The website indicates further that, "[D]ue to increasing review volume, review results may be delayed by up to 6 weeks." These statements may be overly optimistic. In conversations with USGBC staff, staff estimate twelve week review times for design and construction phase submittals.

Even the USGBC staff position of twelve weeks may be overly positive. A recent report in the Washington Business Journal cites delays in processing of certification requests extending the process, "from what should be five weeks closer to five months." The report provided specific examples of projects struggling to achieve final certification in a timely fashion and the associated heartburn of project officials.

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Demand As the Source of the Delays

USGBC appears to be struggling with its own success. The number of LEED registered projects, USGBC members, and certified buildings have continuously skyrocketed over the last several years. The Washington Business Journal cited the volume of projects as the primary cause of the delays in reviews and certifications. While USGBC has indicated it is adjusting its process in response, increased volume is simply not going to go away. Local governments here and elsewhere are beginning to more aggressively “encourage” or even require LEED certifications. Many Federal government contracts that are currently released for requests for proposals include explicit LEED certification requirements. Indeed, the United States General Services Administration is requiring that, “[A]ll new GSA construction projects and substantial renovations must be certified through [LEED] ... Projects are encouraged to achieve the LEED Silver level.” This growing governmental push towards LEED certifications will only increase volume and further strain the review and certification process.

Potential Impacts of Delays

The Washington Business Journal article reflects that some owners are concerned that delays in obtaining the ultimate LEED certification will hamper their ability to timely and effectively market their buildings. There are other serious direct financial impacts that could flow from delays in certifications. Delays in certifications cause ripples into overall project accounting and corporate accounting if anticipated tax credits are delayed or even denied. Delays in certifications can tie up anticipated contracts, occupancy dates or overall project approvals if the approvals are tied to certification. Such delays could conceivably lead to delay claims or even terminated leases for tenants.

The elimination of the advantage of design phase submittals is perhaps the biggest impact of delay. This impact could cascade through a project and lead to serious monetary damages. Without design phase reaction, designers and owners do not know which design credits their project is likely to achieve. If the design phase submittal responses are received after construction documents are completed, or even during the construction of the project as is now sometimes the case, redesign may be difficult if not impossible. There are far fewer spare points to go after during construction so the project’s ultimate certification may be negatively impacted.

This type of problem may be fatal to the success of a project that needs a particular level of certification. The construction

industry will be seeing far more of these required certifications as more jurisdictions follow the example of GSA. Educated owners, designers and involved parties should know the submittal times at the very beginning of the project and plan accordingly. The best advice is to assume you will face substantial submittal delays to give your project the best chance of successfully submitting and getting timely reaction during the design phase. If you build this into your schedule, you will have a far better chance of avoiding the extremely harsh consequences that some projects may face as LEED certifications become log-jammed.

Tim Hughes is a construction and business lawyer and is a LEED Accredited Professional. He is Of Counsel to the law firm of Bean, Kinney & Korman in Arlington, Virginia, www.beankinney.com. He can be reached by e-mail at thughes@beankinney.com and by phone at 703-525-4000.

Preventing Financial Ruin from Construction Contracts

by Juanita Ferguson, Esq.

The construction industry has realized the enormous impact of the financial crisis over the last several months. Even with the prospect of new business from the economic stimulus package, contractors have had to readjust to these uncertain times to ensure survival. With a little planning, you too can weather the financial storm.

Investigate your customer – Many resources exist for owners of projects to determine whether a contractor is licensed or has violated state laws. Unfortunately, contractors are not privy to the same amount of information for prospective customers. The reason – contractors do not usually report customers to credit reporting agencies. However, prior to entering into an agreement, contractors can and should secure their financial position. Be proactive in obtaining credit information about your prospective customer. If the project owner is a sole proprietorship or a partnership, find out information about the principals such as home addresses and social security numbers. Find out if the owner of the project has ever done business under another name. If a prospective customer has operated under three different business names in a span of five years, it may be an indicator that the business has experienced reorganizations on a routine basis to avoid satisfying financial obligations. Confirm that the name of any other parties to your construction contracts are existing entities. Find out the names of the banks where your prospective customer does business as well as the account numbers for primary bank accounts. The information will be useful in the event that you have to garnish the owner’s bank accounts in an effort to collect for unsatisfied judgments. Obtain the names of other trades with which a prospective customer has done business. Then contact the trades to discuss what type of customer with which you may be entering in to an agreement. Check to see if your prospective customer has been a party to any lawsuits. There is no cost to access court records in a majority of jurisdictions and the information is often available on the Internet. It is better to know the benefits and the burdens associated with a prospective customer prior to signing a contract to

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do business and it makes it a lot easier to address any issues which could tarnish the relationship.

Review your contract language – Ensure that your standard contracts include provisions that allow for you to suspend work in the event that a customer fails to provide financial information or until disputes are resolved if a customer fails to make payment for any reason. If a customer fails to provide assurances of its ability to make payment, you can make a case for breach of contract and position yourself to suspend work or even terminate the contract. Other contract provisions that can benefit a contractor include authorization for a contractor to run credit reports or to verify proof of a customer's ability to pay if the cost of the construction project exceeds the original budget. Protecting your rights in the event that you have to take legal action against your customer should be addressed in part with a forum selection clause that allows for you to sue or to be sued in a court that is near your place of business. The goal is to minimize your litigation costs while to make it less convenient and more expensive for your customer to take action against you. A provision addressing attorneys fees is important and often a disincentive for either party to take action by way of a frivolous lawsuit. Limited resources should not prevent you from consulting with an attorney to review your contracts. While the contract price, fee schedule, and scope of work are key provisions in any contract, those provisions embedded within or at the end of a contract can become crucial in determining substantive rights in the event that problems arise in the contractor-customer relationship.

Have a contingency plan – A seemingly lucrative contract may be difficult to turn down even if your investigation produces less than stellar results. If you are a subcontractor growing your business and are prepared to accept the risks that may be associated with a bad debt, factoring may be an option that you may want to consider. Factoring is the purchase of accounts receivable at a discount for cash. Factoring allows the contractor to minimize inconsistent cash flow and to convert assets into cash in order for business operations to continue while the project is completed. The following is an example of how factoring works for a contractor or a subcontractor:

- The contractor delivers the product or service and submits an invoice;
- The invoice is sold to the factoring company, who advances a majority (maybe up to 80%) of the invoice's value to the contractor as a first installment;
- The factoring company waits for payment while the contractor gets immediate use of the funds;

- Once the factoring company is paid, the contractor receives the remaining percentage of the value of the invoice, less a small fee. Depending upon the nature of your business, factoring provides an attractive alternative to experiencing lengthy delays in receiving payment.

Common sense and attention to details prior to entering in to a construction contract will minimize the unforeseen situations that can disrupt your business and threaten your ability to get paid for supplies provided and services performed. Proactive measures are a main ingredient to successful prevention of catastrophic losses and ensuring the long-term financial health of your business.

This article is not intended to provide specific legal advice but, instead, as a general commentary regarding legal matters. You should consult with an attorney regarding your legal issues, as the advice will depend on your facts and the laws of your jurisdiction.

Juanita Ferguson is an Associate with the law firm of Bean, Kinney & Korman in Arlington, Virginia. She can be reached by e-mail at jferguson@beankinney.com and by phone at 703-525-4000.

Keep Those Records Straight! BPOL Tax and You, Part Two

by Heidi Meinzer, Esq.

Since our last edition of this Newsletter, the Supreme Court of Virginia recently sided with a contractor in an opinion construing Virginia's Business, Professional and Occupational License ("BPOL") Tax Laws. *See City of Lynchburg v. English Construction Co., Inc., et al.*, 277 Va. 574, 675 S.E. 197 (2009). The Court stated its opinion by outlining the five basic categories of contractors' gross receipts that are affected by the BPOL laws: (1) receipts from work done within the locality where the contractor has its principle office; (2) receipts from work done in another locality in which the contractor has a definite place of business but which *are not* taxed by that locality; (3) receipts from work done in another locality in which the contractor has a definite place of business but which *are* taxed by that locality; (4) receipts amounting to \$25,000 or less in any year from work done in another locality in which the contractor does not have a definite place of business and (5) receipts amounting to more than \$25,000 in any year from work done in another locality in which the contractor does not have a definite place of business. The case involved the second category of receipts- from work done in a locality in which the contractor has a definite place of business, but which *are not* taxed by that locality.

The contractor had its headquarters and principle office in the City of Lynchburg, which has imposed a BPOL tax on contractors for many years. The City of Lynchburg identified

Contact Us

2300 Wilson Boulevard, 7th Floor
Arlington, Virginia 22201
703-525-4000 fax 703-525-2207
www.beankinney.com

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gross receipts in excess of \$115,000 that the contractor had received from work done in localities outside the City over a four year period and that had not been reported to the City. In each of these localities, the contractor had a definite place of business for its construction projects. These localities had the authority to tax the receipts, but declined to impose the tax on the contractor.

The City of Lynchburg argued that it was entitled to tax not only these receipts, but all receipts from work done anywhere in Virginia, subject only to taxes actually paid by the contractor to other localities. The Court rejected the City's argument, finding under these facts, that the City of Lynchburg could tax only those receipts derived from business performed in localities in which the contractor has no definite place of business.

If you would like to ensure that you understand and are compliant with your BPOL tax obligations, please feel free to call at (703) 525-4000.

This article is not intended to provide specific legal advice but, instead, as a general commentary regarding legal matters. You should consult with an attorney regarding your legal issues, as the advice will depend on your facts and the laws of your jurisdiction. Heidi Meinzer is a Shareholder with the law firm of Bean, Kinney & Korman in Arlington, Virginia. She can be reached by e-mail at hmeinzer@beankinney.com and by phone at (703) 525-4000.

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2300 WILSON BOULEVARD, 7TH FLOOR
ARLINGTON, VA 22201

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