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Stricter LEED Could Hike Project Costs, Send Gov't Running

By **Natalie Rodriguez**

Law360, New York (June 26, 2012, 6:53 PM ET) -- A newly proposed building code standard could drive up the costs of development projects by discouraging the use of many construction materials and prompt the government to pull its backing of the popular LEED green building rating system, sending a major ripple effect through the private sector, experts say.

At the center of the issue is LEED v4, an update to the popular green building rating system run by nonprofit trade organization the U.S. Green Building Council. While still in its draft stages, the new standard proposes to make stringent restrictions on various construction categories, including what chemicals and materials will qualify for points under the rating system.

And with several U.S. government agencies currently reviewing their measures for green construction, at stake for building part manufacturers, developers and various lobbying groups are the billions in both private and federal funds that will be funneled to future projects.

"It's a big issue because a lot of the commercial market relies on the LEED system. If LEED v4 is adopted in 2013, [companies] may have a lot materials that won't be able to go into projects," Christopher W. Cheatham, an attorney with Cheatham Consulting LLC, told Law360.

LEED, which stands for Leadership in Energy and Environmental Design, has fast become a staple in building circles and an important certification to pin on major development projects. The 12-year-old standard already has put its stamp on about 9 billion square feet of building space, according to experts.

But the proposed restrictions could discourage some materials — including certain insulation, roofing, wiring and window products — because of what they're made of, despite the fact that they can boost a building's energy efficiency, opponents say. Since builders have to get a certain number of points under the standard's rating system to tout a project as LEED-certified, the standard will make it harder for developers to achieve LEED status and may make projects more expensive, they argue.

Earlier this month, the USGBC decided to table a vote to adopt the new standards, which had been dubbed LEED 2012, until June 2013 to accommodate concerns by building professionals that it would be too much to digest so soon after the 2009 update. Even after the 2013 vote, the trade group plans on leaving LEED 2009 as an available option until 2015, it said.

But to the dismay of many corporations and trade groups, the USGBC signaled that the final version would not radically veer from the current version and would still push the envelope of green building.

The standard and the USGBC's comments have set off Congress members and more than 20 trade groups, who have come out swinging against the possibility that the federal government will adopt the new building standard that is still — at minimum — a year away from even being on the books as an option.

"You're seeing a lot of pushback against green on the federal level," Cheatham said, noting controversies over stimulus-funded companies, like the failed Solyndra LLC, haven't helped the issue. "I think you're going to see agencies totally abandon rating systems and create their own building codes."

Last year, Congress banned the U.S. Department of Defense from pursuing LEED Gold or Platinum certification, arguably to help rein in the costs of projects. But some experts have noted that at the heart of the legislation was a nitty-gritty debate among building professionals over LEED's handling of rating credits for wood products.

Points are given only for wood items certified by the Forest Stewardship Council, and USBGC has refused to accept allegedly less stringent standards, incensing big lumber companies that want in on LEED projects, including federal ones. The DOD ban openly challenged the rating system's influence on the government's building policy, and now, policymakers and major stakeholders in the real estate development game are turning to the latest front up for debate: LEED v4.

"The new standards maybe are getting more people to think about LEED, and LEED may be more hotly contested by interest groups over time," Gabriel Schnitzler, a real estate attorney with Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC, told Law360.

The U.S. General Service Administration, for its own part, is currently evaluating the existing LEED 2009 standards, along with two other certification systems, to decide what standards it should be using and held its first public session on the issue Monday. It is not even able to consider the merits of LEED v4 until its passed by the USGBC.

But as the largest holder of real estate in the U.S. — about 400,000 buildings scattered across the country — the GSA tends to influence real estate and development practices, according to experts.

"Many believe GSA has been key in driving LEED adoption," Stuart Kaplow, a green building and sustainable business attorney based in Maryland, told Law360.

Should the GSA opt out of the program, the USBGC likely will see a drop in LEED applications, but not an overly significant one, since the federal government accounts for about a tenth of those projects nationally, according to Schnitzler.

"The more worrisome concern is that if LEED becomes increasingly contested by interest groups, then the virtuous feedback loop where voluntary green building programs like LEED inspire federal, state and local governments to adopt green building standards could break down," he said.

USGBC, though, has fired back that its rating system is expected to save the government billions in upping the energy-efficiency of its projects over the last four years, and that major corporations like Coca-Cola Enterprises Inc., Procter & Gamble Co., Duke Energy Corp. and Apple Inc. rely on LEED certification to reduce operating costs and increase their bottom lines. Due to its success, the council contends it will not allow itself to be pulled into the bickering.

"The economic value of LEED would be destroyed if narrow special interests or government were allowed to manipulate its independent, expert-driven review process. Government should not pick winners and losers," Roger Platt, senior vice president for USGBC's global policy and law division, said in a statement June 19.

Whatever the USGBC or GSA ultimately choose to adopt, attorneys should brace themselves to handle the changes and the issues that will arise.

"I think that this creates an urgency for the legal profession. ... This new LEED v4 is a much more complex set of issues that attorneys need to be aware of in counseling their clients and ultimately in drafting construction documents," Kaplow said.

--Editing by Elizabeth Bowen and Richard McVay.

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