

# Green Bidding: Recent Challenges to LEED Experience Requirements in Bidding Documents

Michele M. Herrmann, J.D., Esq.  
Mississippi State University  
Starkville, Mississippi

Since the inception of the Leadership in Energy and Environmental Design (LEED) rating system by the United States Green Building Council (USGBC), many agencies, states and localities have adopted green building policies in one form or another. While case law is limited with regard to the achievement of LEED at the conclusion of the project in compliance with contract documents, several cases have emerged relating to LEED requirements in bidding documents. The purpose of this paper is to examine several case studies dealing with prequalification on public projects, primarily cases where contractors have been disqualified from consideration due to failure to satisfy LEED requirements established in bidding documents.

**Key Words:** Bidding, LEED, Pre-qualification, USGBC

## Introduction

The United States Green Building Council (USGBC) implemented the Leadership in Energy and Environmental Design (LEED) rating system in 2000 with the aspiration to entice builders to push a green building agenda. According to the USGBC, LEED can result in lower operating costs, increased value, conservation of energy, water and other resources, healthier and safer buildings for occupants, and incentives such as tax rebates and zoning allowances (USGBC 2014). The LEED rating system awards credits/points in five major categories: sustainable sites, water efficiency, energy and atmosphere, materials and resources, and indoor environmental quality (USGBC 2014). If enough credits are obtained, a building can be certified at the level of Certified, Silver, Gold, and Platinum.

Initially the marketing focus of LEED was environmental; encourage people to implement LEED strategies because of the environmental benefits listed above. While growth of the system was steady in the early years, the program truly began to grow in popularity when Richard Fedrizzi became CEO in 2004. Fedrizzi shifted the marketing focus from an environmental appeal to a business model focus (Kamenetz 2007). With the focus no longer primarily on the environmental benefits of LEED, but rather on the purported dollars and cents advantages of LEED (lower utility costs, higher rents, etc.), the program grew tremendously in popularity. That is not to say the LEED system is not without criticism. There is a great deal of literature debating whether LEED buildings cost more (both initially and over the lifecycle of the building) and whether the lower utilities bills predicted actually result (Scofield 2009) (Newsham 2009). In the past critics also questioned the validity of the points system itself, including the perceived inequity of how points are awarded/bought. For example, in a 2004 survey by the Green Building Alliance, one respondent stated "In a recent building, we received one point for spending an extra \$1.3 million for a heat-recovery system that will save about \$500,000 in energy costs per year. We also got one point for installing a \$395 bicycle rack" (Schendler 2005). For those parties who are interested in pursuing LEED certification for the dollars and cents business model, there is potential to accrue points without accruing the environmental benefits associated with LEED.

Nevertheless, LEED seems to be here to stay. Although LEED itself is entirely voluntary, LEED policies are now required or encouraged by at least two federal agencies, 22 states, and 75 localities nationwide (Kamenetz 2007). While state bidding laws have been in existence and in many respects have withstood various court challenges in order to become accepted and standard practice, they often fail to address current trends in construction, such as Leadership in Energy & Environmental Design (LEED) requirements. With more and more agencies, municipalities, cities and states requiring varying levels of environmentally friendly design and construction, whether it be in the form of LEED requirements or some form of green building codes, questions have arisen as to whether requiring prior LEED experience on similar projects is allowed under state bidding laws. The purpose of this paper is to examine several case studies where prequalification in general, and LEED requirements specifically, have been an

issue with respect to bidding requirements. Because private owners are free to establish bidding requirements as they see fit, this paper addresses bidding requirements as they relate to public projects only.

### **Selected State Bidding Laws**

Although the language and requirements may vary from state to state, the purpose of state laws regulating bids on public projects are typically similar in nature. Because public projects are funded with tax revenue, it is generally recognized that the public at large benefits from a competitive bidding process that is open and transparent. The often-stated goals of competitive bidding are to: encourage fair and honest competition, obtain the best quality work at the lowest price, and guard against fraud, corruption, and favoritism.

In some states, pre-qualification of bidders is allowed on public projects. States that allow or require pre-qualification on public projects often justify the practice out of concern for ensuring high quality projects that are completed on time and on, or under, budget. Such was the situation in Alabama in 1997 when it amended its Public Works Law, Section 39 of the Code of Alabama, to allow – but not require – prequalification on public projects in the state (Kramer 2002). By requiring prospective bidders to submit, among other things, evidence of prior work experience, references, and relevant financial information, theoretically only those contractors capable of completing the project on time, on budget, and to a sufficient quality will be allowed to bid on the project. In a study commissioned by the Alabama Building Commission, contractors who provided feedback used to develop Alabama’s prequalification criteria were in favor of prequalification of public projects, stating that they felt limiting bidding to only those bidders who were qualified served to increase competition, resulting in better quality for the taxpayers (Kramer 2002). The resulting language of Section 39-2-4(b) of the statute reads, in part:

“...any awarding authority that proposes to prequalify bidders shall establish written prequalification procedures and criteria that (1) are published sufficiently in advance of any affected contract so that a bona fide bidder may seek and obtain prequalification prior to preparing a bid for that contract...; (2) are related to the purpose of the contract or contracts affected; (3) are related to contract requirements or the quality of the product or service in question; (4) are related to the responsibility, including the competency, experience, and financial ability of a bidder; and (5) will permit reasonable competition at a level that serves the public interest...”

On the opposite end of the spectrum, some states prohibit pre-qualification of bidders on public projects. For example, New York General Municipal Law Section 103 requires open competitive bidding on the premise that “competitive bidding statutes were not enacted for the benefit or enrichment of bidders, [but] ‘[l]ogic and experience teach that competition for public contracts may be promoted only by fostering a sense of confidence in potential bidders that their bids will be fairly considered’” (Jerkens at 132, 1992). New York State General Municipal Law Section 103(1) states in part:

“...all contracts for public work involving an expenditure of more than twenty thousand dollars...shall be awarded...to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section...”

General Municipal Law Section 103(1)(a) further states, in part:

“Whenever possible, practical, and feasible and consistent with *open competitive bidding*...”  
[emphasis added]

Although it is easy to overlook the significance of the phrase “open competitive bidding” in General Municipal Law Section 103(1)(a), the phrase is key in the interpretation of the bidding laws of New York by the courts. In New York, the phrase has been interpreted to prohibit prequalification of bidders on public projects. As will be discussed below, in New York consideration of prior experience – even experience of a particular type – is allowed in determining who is the lowest responsible bidder. However, unless it can be viewed as essential to protecting the public’s interest in seeing a project successfully completed at the lowest possible cost, prior experience requirements cannot serve to eliminate bidders from consideration altogether.

## Case Law

Case law related to green building issues, LEED specifically, is limited at this time. There are, however, a small number of cases that address certain LEED criteria at the bidding phase of a project. The following cases illustrate some of the uncertainty bidders face with regard to prequalification and LEED criteria included in bidding documents.

### *Construction Contractors Association of Hudson Valley, Inc. v. Board of Trustees of Orange Community College*

Although not directly related to LEED, the case of *Construction Contractors Association of Hudson Valley, Inc. v. Board of Trustees of Orange Community College (Construction Contractors)* serves as precedent in New York for an interpretation of General Municipal Law Section 103 with respect to prequalification. In that case, in 1993 the Appellate Division, Second Department found that the requirement in the bidding instructions requiring bidders to have performed two historic preservation, restoration, and renovation projects of similar size, scope and nature within the past five years constituted pre-qualification in violation of General Municipal Law Section 103.

The court reasoned that “assuming that no serious blemishes are found with regard to past performance, the work history of the bidder may not serve to bar it from consideration altogether unless it fairly may be said that successful completion of the project will be jeopardized by that bidder’s inexperience. A municipality must err on the side of inclusion, and eschew unnecessarily narrow definitions of the statutory term ‘responsible bidder’.” The court went on to state that the restrictions in that case could very well eliminate a responsible bidder with sufficient experience to complete the project if, for example, a company had completed work on the requisite number of buildings, but not all within the five-year period specified, or if not all of the buildings were listed on the Historic Register, even if they were historic. Additionally, a new company may not have the requisite experience itself. However, even if it hired key personnel who had the requisite experience elsewhere, that company would not qualify and could therefore not expand its business practices into the area of historic preservation if future bidding requirements were similar to those at issue in this case.

### *E & A Restoration, Inc. v. Town of North Hempstead*

In the 2010 case of *E & A Restoration, Inc. v. Town of North Hempstead*, E & A Restoration, Inc. (*E & A*) was the second lowest bidder on a project to construct a community center in New Cassell, New York. After the town rejected the proposals from the four lowest bidders and awarded the contract to the fifth lowest bidder, Racanelli Construction Co., Inc. (Racanelli), E & A sought to annul the contract between the Town of North Hempstead and Racanelli.

The bid solicitation notified prospective bidders that the community center was to be a U.S. Green Building Council (USGBC) Leadership in Energy & Environmental Design (LEED) Certified Platinum rated building. The Notice to Bidders stated:

“The Town will not accept bids from, nor award a contract to, anyone who cannot prove to the satisfaction of the Town Board that he has sufficient experience in this type of construction and financially able and organized to successfully carry out the work covered by the Plans and Specifications in the required completion time. Special qualification requirements are contained in the Contract Documents.”

The bid documents further required responsive contractors to demonstrate, among other things:

- (a) “Sufficient experience in the completion of five projects similar in nature, size and extent to this Project, and familiarity with the special requirements indicated in the bid documents.
- (b) The experience and expertise required to perform the work so as to achieve the desired LEED rating; and
- (c) An experienced LEED accredited professional be engaged to coordinate the LEED requirements of the Project.”

In addition to the provisions above, the Supplementary General Conditions of the bid notice stated:

“Contractor shall perform the work as necessary to achieve a minimum LEED rating of Platinum (the “Desired Rating”) for the Project under the LEED program, in accordance with the meaning given such rating and program descriptions as of the date of this Agreement...The Contractor represents and warrants to the Construction Manager that the Contractor has the expertise required to perform the work so as to achieve the Desired Rating.”

When the bids were unsealed the Town deemed the lowest bidder non-responsive because, among other things, it had no experience with projects of a similar nature, no experience with public projects of similar size and cost, no LEED experience and did not have LEED accredited people on staff.

The Town then decided to conduct post-bid interviews with the three lowest bidders. Those bidders were given three days to provide detailed information regarding their LEED experience, and the interviews were conducted on the fourth day. E & A responded to the request for additional information by stating that (1) it was working with a LEED Accredited Professional (AP) on a project intended to achieve LEED certification, (2) although there were no LEED AP's on staff, its staff members had plans to attend a LEED AP Course, and (3) it had carefully considered the LEED aspect of the project when it prepared its bid. During the interview process E & A further stated that it had met with a LEED AP prior to submitting its proposal, it planned to hire LEED AP's to work on the project, and planned to hire one or more subcontractors with LEED experience.

Following the interview process, the Town concluded that the three lowest bidders, including E & A, were non-responsive for not meeting the bidding criteria. The Town then repeated the same interview process with the fourth and fifth lowest bidders, ultimately awarding the contract to the fifth lowest bidder, Racanelli.

E & A challenged the award under New York State's General Municipal Law Sections 100-a and 103, arguing that the bidding criteria amounted to a prohibited form of pre-qualification because the requirements could eliminate bidders with adequate experience and expertise. E & A relied on legal precedent and cited *Construction Contractors*, discussed above, to argue that the bid requirements “reduced competition for reasons which did not insure to the benefit of the public, but rather serve other, unrelated purposes.”

With regard to E & A the Supreme Court of Nassau County, which is bound by the precedent established in *Construction Contractors* by the Appellate Division, Second Department, upheld the Town's award of the contract to Racanelli. Because the standard of review in a challenge such as this is limited to whether the Town acted in an arbitrary and capricious manner, the court did not elaborate on how or why it did not follow the precedent established by *Construction Contractors*, nor how the current case was distinguishable. Instead, the court simply found that the Town did not act arbitrarily because it properly considered the qualifications of the bidders in light of the clearly stated goals of the project. Unlike E & A, Racanelli had completed five similar projects, worked on one LEED Gold project and two LEED Certified projects, and had two full-time LEED AP's on staff.

### *Hampton Technologies, Inc. d/b/a Gordon Group Electric v. Department of General Services*

In 2011 the Supreme Court of Pennsylvania heard an Emergency Application for Stay involving the protest of a \$20 million contract. In response to a Request for Proposal (RFP) from the Department of General Services (DGS) for a prime contract for electrical work on a Family Court Project, Hampton Technologies, Inc. d/b/a Gordon Group Electric (*Gordon*), was the low offeror. However, DGS awarded the contract to Farfield Company. According to DGS, Gordon had received “weak” scores in certain evaluative categories based on a weighted scoring system. The weighted scoring formula was 50% for cost, 45% for technical, and 5% for disadvantaged business submissions. As applied to the raw scores, Farfield had a weighted score 8.38 points higher than Gordon's weighted score. However, when Gordon asked to review the score sheets used to evaluate the proposals, DGS refused to provide them.

Gordon filed a timely protest arguing, among other things, that DGS had improperly considered its experience with LEED Certification, claiming that criteria was not included in the RFP. DGS responded that Appendix M to the RFP provided a scoring matrix that referenced LEED experience as being worth 21 of the potential 400 technical points –

or 9.45 weighted points – 1.07 weighted points more than the number of weighted points separating Gordon and Farfield.

Gordon further alleged in a supplement to its original protest that Farfield had provided false statements in its proposal when it stated that the firm had not had any professional license suspended or revoked when in fact, its Chief Operating Officer (COO) had had his Master Electrician License suspended. Although Gordon's initial protest was filed in a timely manner, and although the statute does not address the timeliness of supplements to the protest, DGS responded that Gordon's supplemental protest was untimely under the state statute and was "wholly without merit." DGS distinguished between the revocation of a license held by the firm and the revocation of a license held by an individual. In its opinion because the firm had not had any professional licenses revoked, the fact that its COO had had his license suspended for using improperly licensed electricians was irrelevant because the RFP only asked about licenses held by the firm.

When Gordon's protest was denied, Gordon continued to appeal the award of the contract to Farfield and eventually asked the Supreme Court of Pennsylvania to issue a Stay, preventing the award of the contract until the issue of the protest had been resolved. The Supreme Court of Pennsylvania was equally divided in this case and therefore the Application for Stay was denied. Although the LEED aspect was not the primary focus of the court in this case, the narrow point spread separating Gordon and Farfield illustrates the importance of clear bidding criteria with respect to LEED and the expectations of bidders to be fairly considered. The points allocated toward LEED experience were enough to potentially be the deciding factor on this \$20 million dollar contract. That, combined with an agency that is willing to overlook the distinction between a company responding that it had not had a professional license revoked when its COO had his license revoked, is a narrow margin on which to rely for future bidding prospects.

## Discussion

Despite differing statutory language, Alabama and New York substantively share a similar view of prequalification. Alabama Section 39-2-4(b)(2) requires prequalification criteria that "are related to the purpose of the contract or contracts affected." The court in *Construction Contractors* interpreted New York General Municipal Law Section 103 to stand for the premise that potential bidders can be removed from consideration altogether, but only if completion of the project could be jeopardized by that bidder's inexperience. Protecting the public's interest is at the core of the views taken by both states. The real issue for debate then becomes what is the most effective way to protect the public's interest on a LEED project? Was it necessary to deem E & A non-responsive? If the case had taken place in Alabama would it have been acceptable to reject E & A at the prequalification stage? After all, E & A was working on a project intended to achieve LEED certification, was taking steps to have its employees attend a LEED AP course, and intended to hire LEED AP's to work on the project. Is that enough insurance to protect the public's interest? There is no indication that E & A was unable to provide the required bonds. Would E & A's prior experience, LEED and otherwise, combined with the ability to provide the required bonds adequately protect the public's interest? What about contractual remedies to protect the public's interest?

What is a company such as E & A to do to remain competitive? E & A may have been on the right path by scheduling its employees to attend a LEED AP course. Since the inception of LEED, approximately 62,000 people have become LEED Accredited Professionals (Bruce 2009). In a 2009 survey of more than 9,000 LEED APs, approximately 16% of which were prime/general contractors, the respondents indicated that they feel the LEED credential positively impacts their recognition from others, professional opportunities, acquisition of knowledge and confidence in their ability to do their work (Bruce 2009). Certainly having LEED APs on staff would have been a step in the right direction for E & A. However, that alone may not have saved E & A because it may have still lacked sufficient experience on similar LEED projects. That begs the question, how will E & A, or other similarly situated companies, ever qualify for any future LEED project when the selection criteria require prior LEED experience – regardless of whether that selection criteria are evaluated during prequalification or simultaneously with bid submission? Will those companies who jumped on the LEED bandwagon when it was purely voluntary eventually have a monopoly on all LEED projects? The court in *Construction Contractors* posed similar questions in the context of historic preservation, questions that appear to be unanswered in the context of LEED experience requirements.

With respect to *Gordon*, the question arises how significant was the LEED aspect of the project to the public's interest? LEED experience was worth 21 out of 400 technical points, equivalent to 9.45 weighted points. Keep in mind *Gordon* was the low bidder in terms of cost, but *Farfield* had a weighted score that was 8.38 points higher. Was LEED a significant enough aspect of the project for it to potentially be a deciding factor in awarding the contract? After all, the RFP did reference LEED – in Appendix M. Compare the inclusion of a LEED reference in Appendix M in *Gordon* to the multiple LEED references contained throughout the bidding documents in *E & A*. In comparison to *E & A*, would a *Gordon* bidder expect prior LEED experience to be paramount to protecting the public's interest?

In reality, a variety of factors probably played into the final weighted scores and likely LEED was not the single determining factor. However, if you were *Gordon* and a competitor with a higher cost had just been awarded a \$20 million dollar project what would you do? Does the public have an interest in properly licensed electricians being used on a public job and if so, does that interest take precedence over LEED aspirations? Remember *Gordon* argued that *Farfield* provided false statements by stating that the firm had not had any professional license suspended when its COO had had his Master Electrician License suspended. DGS said that argument was entirely without merit but was it really? What *professional* license can be granted to a business? Professional licenses are typically awarded to individuals, not businesses, and typically require (and are therefore also subject to suspension and/or revocation related to) certain ethical expectations - ethical expectations that are intended to protect the public's interest.

While there are no easy answers to such questions, in the context of public projects, protecting the public's interests must remain at the forefront of any discussions about possible solutions. One possible solution may be to allow for a transitional period for a company such as *E & A*. For example, if a company was working on but had not yet completed, or did not yet have prior LEED experience but had LEED APs on its staff, perhaps for a period of time that could suffice to satisfy the LEED selection criteria for awarding a project. Alternatively, perhaps a company such as *E & A* could partner with a company that did have prior LEED experience, or hire subcontractors with prior LEED experience. Scenarios such as these would give companies time to adequately train staff members and obtain experience on one or more LEED projects. After that transitional period ends, companies who are interested in continuing to pursue LEED projects would have had time to train employees and begin building that successful record of experience on LEED project. The public's interest in having a project delivered on time, on budget, and in accordance with the construction documents could still be fulfilled.

## Conclusion

While the case law with respect to LEED Certification is limited, the significance of it should not be overlooked. Because LEED is relatively new there has not been sufficient time for legal issues related to LEED and green building to be thoroughly vetted. As LEED and green building principles continue to gain popularity, and slowly become mandatory requirements rather than voluntary, construction professionals will need to be prepared – not only to complete the building according to the requirements of the contract documents, but to meet the bidding criteria in the first instance.

While the first LEED project any company procures will present new challenges to the company and its employees, if a company has been otherwise successful in the fulfilling its contractual obligations on prior projects, there is not necessarily reason to believe the LEED project cannot also be successfully completed. Such was the point made by the Court in *Construction Contractors* when it reasoned that prior work experience should not bar a company from consideration if it otherwise has a successful work history.

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