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## Green Building: Design and Construction Contract Issues

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“Green Buildings” feature energy efficient and environmentally friendly elements. Governmental regulation, cost savings and public relations are driving the trend. While architects, engineers, contractors and facilities managers focus on Green Building design, construction, equipment and operation issues, lawyers may wish to consider Green Building issues in the contracts entered into between the owner and the design and construction professionals. This article addresses the special contract issues that may arise in connection with the design and construction of Green Buildings.

### A. Introduction

Green Buildings generally refer to those that are designed and constructed in an environmentally friendly manner. Specifically, it refers to buildings that are located and landscaped so as to minimize ecological impact and maximize conservation and biodiversity; building design and construction that is efficient in the use of energy, water and other resources and materials; and building operation that provides a healthy, high quality indoor environment.

The concept of rating or certifying buildings with respect to environmental issues originated in the United Kingdom in 1990 by the Building Research Establishment’s Environmental Assessment Method, which has come to be known collectively as “BREEAM”. BREEAM, or variations of it, are found in many other countries today.

In 1998, the U.S. Green Building Council (“USGBC”), a non-profit organization, developed the Leadership in Energy and Environmental Design (“LEED”) Green Building Certification System for rating the design, construction and operation of buildings. LEED provides four levels of certification: certified, silver, gold and platinum. The level of certification attained is based on satisfying certain mandatory prerequisites and earning a certain level of specified points and credits awarded to the building for its design and construction. For example, reducing water usage through low-flow fixtures will earn points. For a complete discussion of LEED visit [www.usgbc.org](http://www.usgbc.org).

Today, LEED certification is required for many public projects by federal, state and municipal governmental authorities. It is also required by law in many states and municipalities for private projects, or is necessary in order to obtain zoning benefits, financial incentives or other benefits, such as an expedited building permit. Finally, many businesses seek LEED certification voluntarily to be consistent with a corporate “green” policy or image, for the economic benefits of increased energy efficiency or other purposes. The Green Building movement is so prevalent that some believe non-LEED certified buildings may become unmarketable, obsolete or, at least, less valuable than LEED certified buildings.

An organization similar to the USGBC, but not as popular, is the Green Building Initiative. It has a “Green Globes Design” program that was established in the United States in 2005 and modeled after a

## Green Building: Design and Construction Contract Issues

Canadian version of BREEAM. Under the Green Globes program, buildings can achieve a rating of one to five “Green Globes” based on a points accumulation program like LEED.

Of course, some owners choose to build “green”, but do not pursue certification under LEED, Green Globes or other program. Such owners may simply be satisfying the applicable Green Building legal requirements or are voluntarily pursuing their own program of environmentally friendly design and construction.

### B. LEED Accreditation and Experience

Individuals can obtain LEED accreditation to demonstrate their expertise with respect to Green Buildings and the LEED certification system. Many LEED accreditations are available by taking certain courses and passing an appropriate exam. Among them are LEED Green Associate (basic knowledge), LEED AP BD+C (accredited professional in building design and construction), LEED AP ID+C (accredited professional in interior design and construction), LEED AP Homes (accredited professional in homes), LEED AP O+M (accredited professional in building operations and maintenance) and LEED AP ND (accredited professional in neighborhood development).

Green Buildings and LEED certification raise a number of issues to be addressed in design and construction contracts. Owners may wish to require representations and warranties from the architect/engineer that they are not only LEED certified in an appropriate category, but also experienced in that area. Similarly, owners will want the standard of care required of the architect/engineer to cover its expertise both as an architect/engineer as well as a LEED accredited professional. However, architects and engineers must be careful about how the standard of care is drafted to ensure that it is fair and does not unreasonably elevate their potential liability.

Separate LEED consultants are often hired and integrated into the project team. Typically, they are entrusted with managing the overall LEED certification process, from integrating the desired LEED certification into the owner’s program, to making certain that the architect/engineer incorporates the design elements necessary to achieve the required LEED points into the plans and specifications, to applying to the USGBC for the LEED certification and shepherding the application through the USGBC until the certification is granted. In such a case, the other project team members might be obligated to follow the LEED consultant’s directions and the LEED certification requirements without obligations or liabilities with respect to the LEED certification.

### C. Architect/Engineer

It is common for major economic aspects of a project to depend on obtaining a certain LEED certification. It might be a condition in a build-to-suit lease for the tenant that will occupy the building or the municipality that granted special zoning for the building, such as increased height, might require it. Because LEED certification is not granted until after the building has been constructed, Owners usually seek some assurance that the design will produce the desired LEED certification.

Ideally for owners, the architect/engineer or LEED consultant would have an obligation to obtain, or provide a guaranty of obtaining, a certain LEED certification. However, because the ultimate certification rests with the discretion of the USGBC and is beyond the control of the project team members, a reasonable compromise is often for the architect/engineer to represent and warrant

## Green Building: Design and Construction Contract Issues

that, to the best of their knowledge, information and belief, the design will satisfy the requirements for the LEED certification that is sought and that they shall use diligent or reasonable efforts to obtain it.

It is important to note that professional liability insurance basically covers only the negligent errors and omissions of the architect/engineer. If LEED certification is not obtained due to the negligence of the architect/engineer, then the loss might be covered. However, if the architect/engineer is not negligent and LEED certification is not obtained, then the professional liability policy might not cover any resulting loss. Please note that the insurance products with respect to LEED and Green Buildings are changing and different policies contain different terms, so a thorough investigation of current insurance products is always recommended.

Because the LEED certification will not be issued until after the completion of construction, and may require significant follow-up services by the architect/engineer, the compensation for the architect/engineer should address such post-construction services. Similarly, owners will want all provisions of the owner-architect/engineer agreement relevant to LEED certification including, without limitation, all insurance and any indemnification provisions, to remain in effect until LEED certification is obtained.

### D. Contractor

LEED certification or other Green Building goals are not solely the responsibility of the architect/engineer or separate LEED or other consultant. The construction contract must require the contractor to adhere to the LEED certification or other Green Building requirements of the project. In turn, the contractor must ensure that such requirements flow down to its subcontracts.

For example, materials purchased by the contractor may need to be obtained regionally or made of recycled materials. Material substitutions and change orders must be consistent with and not reduce the LEED points set forth in the plans and specifications. Construction work satisfying performance specifications might also need to satisfy the LEED or other Green Building goals of the project.

The means, methods and techniques of construction can also impact LEED certification or other Green Building goals. For example, a project can earn LEED points by reducing construction waste (one point for a 50% reduction and two points for a 75% reduction). The contractor, therefore, must develop and implement a construction waste management plan which includes careful reporting and documentation to ensure that the USGBC has sufficient proof of the claimed waste reduction. The construction contract must impose on the contractor whatever LEED certification or other Green Building obligations are necessary in order for the project to achieve its LEED certification or other Green Building goals.

Also, if the construction contract provides for retainage to be withheld until substantial completion or final completion of the project, final payment or other milestone, the owner and the contractor should address whether all or any part of the retainage should be withheld until LEED certification is granted, at least to the extent of the contractor's responsibilities for it. Although LEED certification is subject to the discretion of the USGBC and beyond the control of the contractor, if the USGBC withholds LEED certification due to an incorrect or incomplete construction item, the owner might wish to treat it as a punchlist item that must be corrected or completed as a condition to final payment. On the other hand, the contractor will likely assert that once it has completed construction and the architect/engineer has issued a certificate of

## Green Building: Design and Construction Contract Issues

substantial completion, its work is done and it should be paid in full with any additional work to be covered by its warranty.

### E. Green Insurance

If a building is completed and receives a certain LEED certification and later burns down, will the owner's fire and casualty insurance policy provide funding to reconstruct the building to the same level of LEED certification? Maybe not. It will probably be rebuilt to a "like kind and quality and serving the same purpose" as the damaged building. If the building had energy efficient light bulbs that cost \$10 each, the insurance adjuster might only allow \$2 each for a standard bulb, as one example.

Furthermore, the insurance adjuster will probably not be a LEED Accredited Professional and simply lack any expertise with respect to LEED. The adjuster might hire a restoration company that inadvertently uses cleaning solvents, disposes of waste or purchases replacement materials that could jeopardize the LEED certification of the building. The owner of a LEED certified building that is under construction or completed, therefore, needs to be aware that its standard property insurance might not provide the full coverage and adjustment expertise it needs.

"Green insurance" can be procured which provides that if the building is damaged by fire or other casualty, it will be rebuilt to the same level of LEED certification as originally obtained for the building. For buildings under construction, "green builder's risk" insurance is available. These policies typically provide that a LEED Accredited Professional will adjust the claim. Such insurance can provide a source of funding to maintain special zoning, economic incentives or other benefits or to continue to satisfy leasing requirements of tenants based on the building being LEED certified to a certain level.

Additionally, non-LEED certified buildings can be insured to be rebuilt to a certain LEED certification level in the event of a casualty. In the event of a casualty that forces an owner to reconstruct its building that was not LEED certified (perhaps because it predated the USGBC and LEED certification), some owners would prefer to reconstruct it to LEED standards. This insurance product provides funding for it.

Some insurance products purport to afford third-party liability coverage to include insurance against claims seeking monetary or non-monetary relief for alleged failure to meet or comply with industry recognized Green Building standards. Unlike the other products discussed above which provide funding to reconstruct a building to LEED standards, this coverage insures against third party claims which may be seeking monetary damages or injunctive relief against an owner with respect to the failure of the owner to achieve LEED certification or other Green Building standards.

The parties to design and construction contracts in LEED and other Green Buildings should consider the foregoing insurance products and any new products that become offered in the insurance market.

### F. Consequential Damages

The owner should be advised of the potential negative consequences of not receiving the planned LEED certification. This depends on the particular project. For example, if the zoning for a particular building allows it to be taller than usual on the condition that it achieve LEED Silver certification, the owner has it built and the LEED Silver certification is not granted, then the

## Green Building: Design and Construction Contract Issues

owner will likely have a serious problem with the local municipality that granted the zoning! Accordingly, the owner may wish to consider over-designing the building in terms of LEED credits so that there is a safety cushion to ensure LEED certification. Better to wind up with one extra credit point than to fall short one credit point and not be certified. Owners will want their contract with the architect/engineer and/or LEED consultant to specify such a LEED point contingency.

Many design and construction contracts today provide for a total or partial waiver of consequential damages. Failure to obtain LEED certification or the planned environmental or energy benefits due to the fault of the architect/engineer or contractor may result in consequential damages of a type and magnitude not present in non-LEED certified or non-green projects. The liability (or non-liability) for it should be discussed and addressed in these contracts. For example, if the low-flow water fixtures were planned to reduce water consumption by 40%, but only reduce it by 20%, then the owner might not obtain LEED certification and will be burdened with higher than expected water bills unless and until those fixtures are replaced.

The parties should recognize that failure to obtain LEED certification or the planned environmental or energy benefits may be caused by the negligence or willful misconduct of one or more of the parties or, in the case of LEED certification, it may be the result of a good faith, unexpected negative decision by the USGBC that was beyond the control of all of the parties. If one party is given responsibility for LEED certification or otherwise achieving certain environmental or energy benefits, then all liability for its negligence or willful misconduct with respect to obtaining LEED certification might be allocated solely to that party with the other parties expressly having no liability for such matters. To be negotiated is whether the liability to be borne by that party will be limited to a certain dollar cap, type of damages or otherwise.

### G. LEED Decertification

LEED certification is more than a getting a plaque, hanging it in the lobby and forgetting about it. Owners remain at risk of losing LEED certification. The USGBC has the power to not only certify a project for LEED compliance, but also to decertify it. Newly certified LEED building owners must report the actual energy and environmental performance of the building to the USGBC for a period of five years. If the actual performance falls short of the forecast performance on which the LEED certification was based, then the USGBC may decertify the building.

Similarly, some governmental authorities require the owner to post a bond for a certain period of time, such as five years, as collateral to guaranty that the actual performance of the building is consistent with that which was reported to achieve the LEED certification, comply with a local Green Building law or otherwise.

Accordingly, the contracts with the parties who are given responsibility for LEED certification or other Green Building goals need to address the risk of LEED decertification or other failure to achieve Green Building goals. The possibilities range from the owner obtaining a bond or holding retainage from the responsible party to the responsible party being liable for all or part of the damages resulting from such failure to the responsibility party having no liability for such failure, except for bad faith or willful misconduct.

## Green Building: Design and Construction Contract Issues

### H. Post-Completion Issues

The foregoing post-completion obligations with respect to LEED certification (and decertification) or other Green Building goals raise a number of contract issues. The parties should discuss whether contracts with parties responsible for LEED certification (and decertification) or other Green Building goals will remain in effect after the completion of construction (including whether final payment by the owner or the completion of construction will result in termination of the contract or a waiver of all claims by the owner), or the parties may agree that such risks and liabilities will be borne entirely by the owner.

Owners may want professional liability insurance and any green third-party liability insurance to be maintained for some period, perhaps at least five years, after LEED certification. For non-LEED certified buildings or buildings subject to local Green Building laws, such insurance might be maintained at least for the period of time necessary to coincide with such laws. For buildings simply seeking to achieve certain Green Building goals voluntarily, such insurance may be maintained for some reasonable time after the completion of construction, perhaps one to three years, to ensure that the actual performance of the building is consistent with the performance planned for it. Of course, the party to bear the cost of such insurance is to be negotiated between the parties.

Finally, the parties need to negotiate any indemnities in the context of LEED certification or other Green Building goals and any related post-completion reporting or bonding requirements. The parties should consider whether they will remain in effect for a period of time the coincides with, or is greater than, the five year reporting period for LEED, any reporting or bonding period required by applicable law or some reasonable time for Green Building goals sought voluntarily and not subject to any such reporting requirements or other restrictions.

### I. USGBC Liability Limitations

As the parties consider how to allocate liability for the risk of not obtaining LEED certification, or obtaining it and later being decertified (as well as the failure to achieve the planned environmental or energy benefits), they should be mindful of the fact that the Project Registration Agreement (the “PRA”) and the Project Certification Agreement (the “PCA”) entered into with the USGBC as part of the LEED certification process contain various limitations of liability and disclaimers in favor of the USGBC. Damages for claims against the USGBC are limited to fees paid plus \$5,000 under the PRA and \$15,000 under the PCA. The USGBC also disclaims all warranties and claims against them must be made within 180 days after the event occurs that gives rise to the claim. Finally, the applicant (owner) is required to indemnify the USGBC against claims from third parties. The bottom line is that the USGBC will probably claim that it is not a source of any significant funding for any economic damages arising from failure to obtain LEED certification or LEED decertification.

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## Green Building: Design and Construction Contract Issues

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