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Contract pitfalls for the unwary green builder

Like it or not, there is a growing demand for greener construction and a regulatory scheme designed to drive this demand. As with any construction project, green and sustainable building poses its own set of issues that if left unaddressed could leave the owner, builder, design professional and engineer pointing at each other to take responsibility. (Read: Pay \$\$.)



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If you are considering taking on green building or sustainability projects or you have done so already, you may need to revise your contract documents to avoid the following traps. The widely utilized form documents are starting to address green building contractual issues. Form green building contracts, like the American Institute of Architects' Guide for Sustainable Projects Form D503-2011, are good mechanisms for risk avoidance so long as they are tailored to your particular circumstances.

Design-build liability – potential liability of contractors for failure to achieve green targets – The AIA and AGC form contract documents generally shield the contractor from design-build liability – that is, liability for defects in the design specifications. However, LEED certification, energy efficiency and other sustainability certifications could impose design liability on you as the contractor unless you specify otherwise. Achieving green certifications depends on more than the contractor's performance of the contract. Such certifications depend on third-party approval. You would be wise to clearly allocate responsibilities

between you, the owner, architect and/or engineer in the contract for future third-party approvals.

The U.S. Green Building Council Inc., which oversees LEED certifications and energy efficiency specifications, allows third parties to challenge a building's LEED certification long after a project is completed. If you are involved in a LEED project, avoid making any written guarantees of future performance of the project or guarantee that the project will achieve and maintain its LEED certification. Under LEED 3.0 released in 2010, buildings are required to maintain their certification for five years, which is likely long after any warranty period. Ownership of the building may also change during the five-year period. Therefore, you might need to address change of ownership in your contract.

Be sure your contractual liability to the owner ends when your project is completed. The date of award of certification or sustainability rating will likely be later than the date of substantial completion of the project. As such, you should consider including language specifying that the parties agree the contract requirements are satisfied when the project is substantially completed, i.e., when the owner can occupy or use the premises, and not when green certification is obtained. You might seek indemnity from the owner for suits brought by third-party for failure to obtain certifications.

Consequential damages – Consequential damages are damages that are not a direct result of the breach of contract but are contemplated by the parties at the time the contract is formed. Consequential damages in the green building context could include lost tax rebates, unachieved energy or water savings, unrealized public image benefits or increased operational expenses for the building. Many contracts contain mutual waiver of consequential damages pro-

visions. You should discuss whether you should add specificity to the consequential damages waiver to address your unique concerns with your attorney.

Delay damages – The potential causes for delay unique to green building projects are delays in obtaining materials, obtaining specialized permits and applications and approval for green certifications. To mitigate your potential responsibility for delay, you should confirm the availability of sustainable materials and the applicable procedures for permits and green certifications before you commit to a construction schedule. Additionally, be sure the contract allows reasonable time extensions for delays beyond your control.

Builders should be vigilant in deleting "no damages for delay" provisions whenever possible. Likewise, take care with lien waivers and payment applications. You should review your payment application forms and lien waivers to ensure you are not waiving your claim for delay damages. You might consider adding language to carve out delay claims from your lien waivers.

Green building codes and certifications – The International Code Council released the final International Green Construction Code "IgCC" in March 2012. The IgCC addresses water-use efficiency and conservation, materials resource conservation, indoor environmental quality, energy efficiency and the building's impact on the local environment. The IgCC applies to new and existing commercial buildings, as well as residential buildings over three stories, and it includes penalties for non-compliance. Unless the parties expressly adopt the IgCC in a contract, the IgCC will not apply to construction projects in Virginia until it is adopted by the Department of Housing and Community Development.

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