LEED Certification Litigation: Emerging Risks
Minimizing Liability Through Green Building Contracts and Effective Insurance Coverage

THURSDAY, JANUARY 6, 2011
1pm Eastern    |    12pm Central    |    11am Mountain    |    10am Pacific

Today’s faculty features:

Bruce W. Merwin, Partner, Haynes and Boone, Houston
J. Scott Dickens, Partner, Starnes Davis Florie, Birmingham, Ala.
James d'Entremont, Phelps Dunbar, Baton Rouge, La.

The audio portion of the conference may be accessed via the telephone or by using your computer’s speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.
Continuing Education Credits

For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

- Close the notification box
- In the chat box, type (1) your company name and (2) the number of attendees at your location
- Click the blue icon beside the box to send
Tips for Optimal Quality

**Sound Quality**
If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory and you are listening via your computer speakers, you may listen via the phone: dial **1-866-873-1442** and enter your PIN when prompted. Otherwise, please send us a chat or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

**Viewing Quality**
To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.
LEED Certification Litigation: Emerging Risks

Thursday, January 6, 2011
1:00 p.m. – 2:30 p.m. EST

Bruce Merwin
bruce.merwin@haynesboone.com
713.547.2116

Scott Dickens
sdickens@starneslaw.com
205.868.6003

James d’Entremont
james.dentremont@phelps.com
225.376.0266
UNDERSTANDING THE LEED PROCESS

Bruce W. Merwin
Haynes and Boone
Houston, Texas
I. Understanding the LEED process

*a brief overview before you use industry forms for green building*

Know the process before you draft.

- In the most basic sense, a green building, or a green lease for that matter, incorporates ecologically sustainable construction and development and management principles to ensure that a building’s ongoing operation and maintenance minimizes environmental impact. More specifically, a green building is designed, constructed and operated to achieve, and a green lease addresses, sustainability related to energy and water efficiency, minimizing the use of non-renewable resources, improved indoor environmental quality, alternative transportation methods, reduction of construction waste, and recycling measures.

- In the most generic of terms, when an Owner decides to attempt a green building certification and has decided upon its objectives (energy savings, improved interior environment, and so on), it works with its Architect, engineer, designer or consultant on a green building project checklist summarizing the various green building credits it wishes to obtain. A Checklist and a Responsibility Matrix are included in the Appendix to this presentation.
- Project plans and specifications are developed and include protocols for design and operations (for example, for recycling, green cleaning, maintenance), which are intended to qualify for these credits.

- The project is registered with the certification body and design plans sometimes can be submitted to the certification body for early review.

- Even before the project is underway, Contractors and maintenance personnel must be involved in, and buy into, the green building process to assure that the protocols are followed and not accidentally sabotaged in construction and operations. Often this requires diligence by the project manager, consultant, Owner, Architect, Contractor, and operations and maintenance personnel.
- Detailed evidence of green building standard compliance (down to receipts for materials) is compiled and submitted for certification. Sometimes credits are disputed, appealed or lost, and changes need to be made in order to attain the desired certification.

- Three to six months is typical for final LEED certification - although you may be able to accelerate final certification with expedited service and it could take up to nine to twelve months to obtain certification.

- Potential de-certification of LEED status for failure to file energy performance reports or other failures to satisfy or continue to maintain minimum project requirements.
II. CERTIFICATION SYSTEM

A. LEED Tracks -

LEED is not a single rating system, but rather a family of rating systems. Currently, there are nine LEED tracks for certification. The existing LEED tracks are:

- **LEED for New Construction (and Major Renovations):** Designed to guide and distinguish high-performance commercial and institutional projects, including office buildings, high-rise residential buildings, government buildings, recreational facilities, manufacturing plants and laboratories.

- **LEED for Existing Buildings: Operations & Maintenance:** Measures operations, improvements and maintenance on a consistent scale, with the goal of maximizing operational efficiency while minimizing environmental impacts. LEED for Existing Buildings addresses whole-building cleaning and maintenance issues (including chemical use), recycling programs, exterior maintenance programs, and systems upgrades.
- **LEED for Commercial Interiors**: Green benchmark for the tenant improvement market. It is the recognized system for certifying high-performance green interiors that are less costly to operate and maintain; and have a reduced environmental footprint.

- **LEED for Core & Shell**: Covers base building elements such as structure, envelope, and the HVAC system. LEED for Core & Shell is designed to be complementary to the LEED for Commercial Interiors rating system, as both rating systems establish green building criteria for developers, owners, and tenants.

- **LEED for Schools**: Recognizes the unique nature of the design and construction of K-12 schools. Based on LEED for New Construction, it addresses issues such as classroom acoustics, master planning, mold prevention, and environmental site assessment.

- **LEED for Homes**: Promotes the design and construction of high-performance green homes.
- **LEED for Retail**: New Construction, including Mixed Use retail, which recognizes the unique nature of retail design and construction projects and addresses the specific needs of retail spaces.

- **LEED for Healthcare**: Healthcare promotes sustainable planning, design and construction for high-performance healthcare facilities.

- **LEED for Neighborhood Development**: Integrates the principles of smart growth, urbanism and green building into the first national program for neighborhood design.
B. Point Areas and Prerequisites

LEED is a point-based certification system where projects earn LEED points for satisfying specific green building criteria. Within each of the seven primary LEED credit categories, projects must satisfy particular prerequisites and earn points. The seven primary categories include:

1. Sustainable Sites (SS): Concerned with building location, preservation, restoration practices, and limiting the environmental impact of buildings on local ecosystems.

2. Water Efficiency (WE): Focuses on water efficiency and water use reduction.

3. Energy & Atmosphere (EA): Addresses the reduction in energy use and use of renewable energy resources.
4. **Materials & Resources (MR):** Focuses on the reuse of materials and use of locally renewable resources to minimize natural resource consumption.

5. **Indoor Environmental Quality (EO):** Aimed at minimizing off-gassing of harmful chemical compounds, as found in adhesives, paints, carpets, wood products, and furniture in the indoor environment.

6. **Innovation in Design (ID):** Provides design teams and projects the opportunity to be awarded points for exceptional performance above the LEED requirements and/or innovative performance.

7. **Other Categories:** There are other categories relating to Homes and Neighborhood Development as follows: Awareness in Education (Homes), Location and Linkages (Homes), Smart Location and Linkages (ND), Neighborhood Pattern and Design (ND), and Green Infrastructure and Building (ND).

In 2009, the USGBC also added a bonus point category based on regional aspects. Regional points are determined by zip codes and localized priority issues. In Houston, Texas, construction waste minimization, water quality and quantity issues and renewable energy on-site issues are key factors.
LEED 2009 successfully passed member ballot on November 14, 2008. In February 2009, the USGBC began transitioning to LEED 2009 with full roll out by September 1, 2009. LEED 2009 now incorporates New Construction, Core and Shell, Commercial Interiors, Existing Buildings: Operations & Maintenance, Schools, Homes, Retail, Healthcare and Neighborhood Development.

Each LEED track allocates points to each of the seven categories depending on the unique aspects of each track. Additionally, several categories include prerequisites. Failure to meet a single prerequisite in any category will preclude building certification. One example of point allocation is LEED for New Construction 2009:

Ratings are now determined based on a 110-point system - 100 points, plus 10 potential bonus points - five potential points for Innovation and Design (only 3 are available for exemplary performance) and five potential points for regional priority. The point thresholds are higher - more points are needed to reach each level of certification, however, I understand that the percentages of v2.2 to v3, otherwise known as LEED 2009, remains the same.
The number of points the project earns determines the level of LEED Certification the project obtains. LEED certification is available in four levels: Certified, Silver, Gold, and Platinum:

<table>
<thead>
<tr>
<th>Certification Level</th>
<th>Version 2.2 Point Range</th>
<th>2009 Point Threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>Certified</td>
<td>26-32</td>
<td>40</td>
</tr>
<tr>
<td>Silver</td>
<td>33-38</td>
<td>50</td>
</tr>
<tr>
<td>Gold</td>
<td>39-51</td>
<td>60</td>
</tr>
<tr>
<td>Platinum</td>
<td>52-69</td>
<td>80</td>
</tr>
<tr>
<td>Point Category</td>
<td>Prerequisites</td>
<td>Possible Points</td>
</tr>
<tr>
<td>------------------------------------</td>
<td>---------------</td>
<td>-----------------</td>
</tr>
<tr>
<td>Sustainable Sites</td>
<td>1</td>
<td>26</td>
</tr>
<tr>
<td>Water Efficiency</td>
<td>1</td>
<td>10</td>
</tr>
<tr>
<td>Energy &amp; Atmosphere</td>
<td>3</td>
<td>35</td>
</tr>
<tr>
<td>Materials &amp; Resources</td>
<td>1</td>
<td>14</td>
</tr>
<tr>
<td>Indoor Environmental Quality</td>
<td>2</td>
<td>15</td>
</tr>
<tr>
<td>Innovation in Design</td>
<td></td>
<td>5</td>
</tr>
<tr>
<td>Regional Priority Credits</td>
<td></td>
<td>5</td>
</tr>
<tr>
<td><strong>Total Possible Points</strong></td>
<td></td>
<td><strong>110</strong></td>
</tr>
</tbody>
</table>
B. USGBC Releases Draft Version of LEED 2012 for Public Comment

On November 8, 2010, the USGBC released a draft of the next version of its LEED Green Building Rating System, referred to as LEED 2012. The new draft includes changes to all LEED rating systems, including LEED for New Construction, Existing Building Operation and Maintenance, Homes and Neighborhood Development, among others.

According to USGBC, LEED 2012 seeks to address several issues, including aligning the credits across rating systems more uniformly, and attempting to bridge the gap between projected and actual building performance by encouraging expanded reporting of utility performance and expenses and focusing on operations. To that end, LEED 2012 includes specific prerequisites and credits for water metering, advance water metering and building-level metering.
The most significant changes are:

- The rating system begins with a new “Integrated Process” category;
- Includes a new “Location and Transportation” category that collects location-related credits from LEED-NC with others from LEED for Neighborhood Developments; and
- A new “Performance” category which includes commissioning credits along with a handful of new measurement in reporting prerequisites and credits.

According to USGBC, the first public comment period was open from November 8 through December 31, 2010, and a second public comment period is expected to run from July 1 through August 15, 2011. The projected date for release of LEED 2012 is November 7, 2012.
LEED Certification
Litigation

J. Scott Dickens
Starnes Davis Florie
Birmingham, Ala.
Southern Builders, Inc. v. Shaw Development, LLC
Circuit Court of Somerset County, Maryland

- First significant litigation involving green building.
- Waterfront Condominium Project.
- 23 residential units on six levels.
- Restaurant.
- Boat slips.
Southern Builders, Inc. v. Shaw Development, LLC

- $6,995,000.00 Project.
- Contract Completion date of June 2006.
- Southern Builders sued for $54,000.00 in remaining contract funds.
- Shaw filed counterclaim in February 2007.
Southern Builders, Inc. v Shaw Development, LLC

- Shaw’s counterclaim alleged breach of contract and negligence.
- Southern Building failed to “construct an environmentally sound ‘green building’ in conformance with the LEED rating system.”
- Project was still not complete.
- Claimed damages of $1.3 million.
- Claimed $635,000 for lost tax credits under State green building incentive program.
Southern Builders, Inc. v. Shaw Development, LLC

Contract Requirements:

(1) Project manual stated that the project was “designed to comply with a Silver Certification Level according to the USGBC’s LEED Rating System; and

(2) Southern Builders was required to deliver a certificate of occupancy within 336 calendar days from the date of the agreement.
Southern Building, Inc. v. Shaw Development, LLC

Potential Problems

(1) Failure to obtain Silver Certification.

(2) Failure to deliver certificate of occupancy on time.

Prevented application for Final Credit Certificate for tax credit.

Was that a risk that Southern Builders knew it was taking?
Northland Pines High School

- First published discussion of USGBC/GBCI’s Certification Challenge Policy.
- $28.5 million school.
  - 250,000 sq. ft., general and specialized classrooms, band and choir rooms, media and technology center, 750-seat auditorium, 200-meter regulation indoor track, 4 full-sized basketball courts.
- Opened in fall of 2006.
- **First** LEED Gold Certification of a public high school in the U.S.
Northland Pines High School

- Five area residents filed a 125-page complaint with USGBC claiming Northland Pines failed to meet gold standard requirements.
- “Re-examination” was conducted on 12/15/2009.
- USGBC upheld its certification (6/2010).
Northland Pines High School

- USGBC stands by its decision.
- Appellants still disagree.

They say building does not meet LEED standards and that independent review noted failure to meet prerequisites.

Suggest appeals process should be conducted by independent unbiased third parties, like American Arbitration Association.

Question whether review process is credible and want USGBC to have more experienced individuals.
RISKS TO DEVELOPERS

- Failure of project to achieve certification.
- Failure to qualify for tax credits.
- Failure to meet loan or incentive program requirements.
- Increased cost due to delays.
- Failure to meet claims of marketing or promotional materials for the project.
RISKS TO THE CONTRACTORS

- Failure to deliver features promised by the contract.
- Increased risk of construction defect.
- Failure of structure or system to perform as intended over life cycle of the building.
- Exclusions from insurance coverage or more costly insurance.
RISKS TO CONTRACTORS

- Delay Risks.
- Damages.
- Design Risks.
- Payment Risks.
- Disputes.
COMMON CAUSES OF DELAYS IN GREEN PROJECTS

- Obtaining Materials.
- Inspection/ Permits because of new and developing designs.
- Paperwork necessary for green certifications.
GREATER POTENTIAL FOR CONSEQUENTIAL DAMAGES

- Increased overhead of contractor and owner.
- Potential municipal penalties.
- Lost sales.
- Lost market opportunities.
- Diminution of market value.

*Green projects increase the prospect of delays because related technology and designs are new and are developing.
DESIGN RISKS TO CONTRACTORS

- Standard AIA contracts require document review and site observation.
- Contractor is not required to confirm that contract documents and design comply with applicable laws and regulations or to discover design flaws.
- Modifications to standard contract provisions can shift responsibilities to the contractor.

- Spearin Doctrine: A contractor will not be liable to the owner for loss or damage that results solely from insufficiencies or defects in project plans and specifications. An owner impliedly warrants the information, plans, and specifications that the owner provides to the general contractor.
THINGS CONTACTORS SHOULD AVOID

- Responsibility for selecting materials that comply with design specifications.
- Choosing alternative materials, if specified materials are unavailable.
- Alternative designs.
- Confirming that “The Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations.”
- Doing anything that is excluded from insurance coverage.
Risk of Non-Payment

- Owner financing contingent on project meeting certain green conditions.
- Funding contingent on LEED Certification levels.
- Funding delayed pending inspections by municipalities.
RISKS RELATING TO DISPUTES

- Arbitration provisions in contracts.
- Arbitrator’s decision does NOT have to be based on correct application of law.
- Speedy process vs. danger or irreversible arbitrator error.
- AIA A201 (2007) – Revised to provide default provision requiring litigation.
RISKS TO DESIGN PROFESSIONALS

- Higher standard of care.
- Failure to achieve LEED certification.
- Failure to achieve performance goals.
- Insurance coverage issues.
GROUNDS FOR POTENTIAL LIABILITY

- Breach of Contract.
- Negligence Claims.
- Misrepresentation Claims.
Breach of Contract

Claims may arise based on failure to deliver a building that meets certain criteria, such as:

- Promised or expected level of certification.
- Energy efficiency requirements or expectations.
- Delivery of desired materials or functionality.
Negligence Claims

- A design professional must exhibit the care and skill ordinarily possessed and exercised by similarly situated professionals.
- When a design professional’s actions meet the skill ordinarily possessed and exercised by similarly situated professionals, he/she has met his/her duty.
- Is it possible that the design professional will be held to a higher standard when they are LEED accredited?
- Will the new “green” statutes and regulations be used as evidence of negligence against the design professional when his/her work does not meet these new standards?
Misrepresentation Claims

- Claims are brought because of “high expectations” influenced by misleading marketing of “green” products.
- Claims are brought because of the lack of uniform standards in “green” construction.
- Promises to reach “green” standards or certain LEED Certification levels.
- Claims regarding the failure of “green” buildings to provide reduced costs, improved air quality, and improved worker productivity.
DESIGN PROFESSIONAL’S PERSPECTIVE AND INSURANCE COVERAGE ISSUES

James d’Entremont
Phelps Dunbar LLP
Baton Rouge, Louisiana
LEED contemplates an integrated, cooperative effort with all project participants working together through shared responsibilities to achieve common goals and objectives.
However, if things go wrong, design professionals should assume that they will be the focus of the blame.
• LEED projects:
  
  (a) pose new litigation and liability risks

  and

  (b) present the potential of exacerbating recognized risks of any project.
“[T]he architect’s response should be similar to what it has been historically. Educate the client, don’t advocate to a client unless it is fully transparent as advocacy, and remember that a client expects to be given objective counsel. Document the process and the decisions. Make certain the client has realistic expectations relative to what the architect can likely deliver. Don’t over-promise. Make certain marketing materials and statements are consistent with capabilities. Understand the products you recommend or specify, along with any manufacturer’s warranties. Be cautious of new materials that lack a track record. Question the manufacturer’s specifications and prototype testing results. Don’t make representations regarding products or performance that could be considered a warranty. In short, do all of the things the architect would normally and should normally do on any project.”

New risks from LEED include:

- Increased expectations of building performance;
- Increased standard of care;
- Express, implied or inadvertent warranties and guarantees both through contract documents and project documents such as submittals, LEED letter templates, etc;
- Certification failure - lost tax credits, government incentives, decreased/lost return on investment, code and/or zoning issues, increased financing and/or insurance costs, risk of negligence per se, etc;
- Failure of traditional insurance products to cover LEED-specific losses.
Traditional risks – exacerbated or affected by LEED include:

- Delays (Owner and Contractor delays);
- Cost overruns;
- Product or system failures or defects: design v. workmanship;
- Failure to adequately supervise, manage or administer the project (if within the services provided);
- Means and methods v. design;
- Material selection - satisfying owner’s aesthetics within owner’s budget, on-schedule without adversely affecting LEED points (while using new, novel and/or untested products, systems, materials, etc).
Managing Owner Expectations

Ethical codes and guidelines of the AIA, NSPE, ASCE and ASLA all address “sustainability” and encourage design professionals to consider and/or promote “sustainable design.” AIA B101-2007, §3.2.5.1 and B201-2007, §2.2.5.1 state that “[t]he architect shall consider environmentally responsible design alternatives, together with other considerations based on program and aesthetics, in developing a design that is consistent with the Owner’s program, schedule and budget for the Cost of the Work. The Owner may obtain other environmentally responsible design services under Article 3.” Although these provisions place new responsibilities on architects that may raise the applicable standard of care, they also present the opportunity to manage owner expectations.
Documenting Owner Expectations, Communications and Decisions Concerning “Sustainable Design”

Important to document:

• Owner’s *understanding* of the inherent risks and limitations of LEED; and

• Owner’s *acknowledgement and acceptance* of risks and limitations of LEED.
These include:

• Potential for increased initial design and construction costs with no guaranty of decreased operational, maintenance or life-cycle costs over time;

• Increased risk of construction delays/delayed occupancy;

• Use of new, novel and/or untested products, materials and systems present increased risk of product failure;

• Actual building performance is subject to factors outside the Design Professional’s Control, including but not limited to the Owner’s use, operation and maintenance of the completed project;

• Achieving LEED certification is also subject to factors beyond the Design Professional’s control: LEED is subject to interpretation by USGBC, on USGBC’s timeline, with no assurance or guaranty that any particular level of certification will be achieved if the project is constructed in accordance with the project’s plans and specifications (cf. typical permitting scheme).

• Certain LEED points are reliant upon or affected by Contractor’s means and methods.
Communications to/with Owner:

• “In pursuing LEED certification, the Owner acknowledges and understands that the Design Professional makes no warranties, representations or guarantees that any level of LEED certification will be achieved or that any energy, water or life-cycle cost savings will be achieved or realized.”

• “The Owner acknowledges and understands that the performance of LEED certified buildings may vary due to factors including but not limited to building type, use, location, climate zone and level of certification.”

• “The Owner acknowledges and understands that in pursuing LEED certification, the Design Professional makes no warranties, representations or guarantees, express or implied, regarding the environmental quality or performance (environmental or otherwise) of the completed project.”

• The foregoing should be incorporated into the contract (e.g., sustainable design section and/or via addendum).

• May also be prudent to document specific LEED points being pursued and those not pursued (particularly where Owner chooses/directs not to pursue specific points that could conceivably be achieved - e.g., if such points are not compatible with Owner’s aesthetics, budget and/or schedule).
Refining and Defining Scope of Liability Risks

• Standard of Care
• Damages
• Insurance Requirements
• Dispute Resolution
• Defining and Delineating Roles and Responsibilities of Project Participants
Standard of Care

• AIA B101-2007, §2.2 incorporates the locality rule stating, “[t]he Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.”
• Other provisions affecting standard of care include those addressing sustainable design and substitutions.
Standard of Care

• Added to these provisions should be language documenting that the design professional makes no representations, warranties or guarantees, express or implied, with respect to services rendered and/or performance of the completed project.

• In addition, the contract should make clear that the Design Professional shall not be responsible for Owner directed substitutions and/or design changes/revisions made without the Design Professional’s approval (and/or over objections) and, ideally, providing that the Owner will defend and indemnify the Design Professional against claims, demands, losses and/or damages arising from such substitutions, changes and/or revisions.

• Sustainability section should be revised to document that the Design Professional not only “considered” but communicated/discussed “environmentally responsible design” options/alternatives and the risks and limitations associated thereto with the Owner and that the Owner acknowledges and accepts such risks. Sustainability section should also incorporate disclaimer of warranties and standard of care (locality rule) even where addressed elsewhere in the contract.

• Consider provision whereby Owner agrees that failure to achieve any level of LEED certification shall not be considered negligence per se.
**Damages**

- The Design Professional should seek to refine and limit the scope of potential liability through disclaimers, waivers of consequential damages and limitations of liability including:
  - **Disclaimer of warranties**: e.g., “The Design Professional makes no warranties, representations or guaranties, express or implied, with regard to the services performed or the completed project.”
  - Also incorporate specific disclaimers regarding LEED certification, building performance, etc.
• **Mutual waiver of consequential damages:** The waiver should not merely refer to “consequential damages.” Rather, it should expressly identify certain damages included within the waiver, e.g. “including but not limited to loss of use, loss of profits, loss of income, lost rents, loss of reputation, decreased return on investment, increased financing costs, increased insurance costs, unrealized savings or diminution of property value.”
• Waiver of consequential damages should also state that it applies regardless of the cause of action pursued, e.g., “The foregoing mutual waiver of consequential damages shall apply to any cause of action including but not limited to negligence, negligence per se, strict liability, breach of contract and/or breach of warranty.”

• Seek limitation of liability to set outer limit of risk, e.g., limit liability to amount of Architect’s fee or limits of insurance coverage.

• Note: Liability for intentional torts generally cannot be waived (e.g., fraud).
**Damages**

• Seek defense and indemnity from Owner for claims by general contractor, subcontractors and/or any other project participants not engaged by Architect.
• Liquidated damages may effectively set definable outer limit of liability (but may also implicate insurance coverage issues).
Insurance Requirements

• AIA B101-2007, §2.5 and B102-2007, §1.5 set forth insurance requirements and require the Owner to reimburse the Architect if such requirement exceed the levels the Architect normally maintains.
• Should also seek to have the Design Professional(s) named as additional insured(s) to the Contractor’s CGL coverage, e.g., revise A201-2007, §11.1 to include “Architect and Architect’s Consultants.”
Dispute Resolution

• The 2007 AIA documents deleted the mandatory arbitration provisions contained in the 1997 documents and, instead, provide a “check the box” approach, with litigation as the default if no dispute resolution process is checked.
• Indicative of the trend away from arbitration due to associated costs as well as other perceived drawbacks such as lack of evidentiary and/or procedural rules and rights (e.g., rules of evidence, discovery rules, summary judgment, appeal, etc.) and ill-defined legal standards.
**Dispute Resolution**

- In considering proposed dispute resolution process, weight should be given to status and relative bargaining power of Owner - e.g., whereas litigation may be preferable as between equals, arbitration may be preferable where Owner is governmental entity, religious institution, educational institution, etc.
- Jurisdiction/venue where litigation would/could proceed also must be considered - at a minimum, should seek forum selection clause to avoid “worst of the worst” if possible.
Dispute Resolution

• If arbitration is specified, may be prudent to specify where arbitration is to be filed and conducted, governing law, rules of evidence apply, discovery allowed, etc.
• 2007 AIA documents retain provision requiring mediation as a condition precedent to arbitration or litigation.
Dispute Resolution

• 2007 (and 1997) AIA documents also contain provisions addressing contractual limitations period and governing law.
• e.g., B101-2007, §8.1.1 and B102-2007, §4.1.1 specify that dispute resolution proceedings be initiated “within the period specified by applicable law, but in any case not more than ten years after the date of substantial completion of work.”
• e.g. B101-2007, §10.1: governing law is “the law of the place where the Project is located” except the FAA applies to arbitration.
Defining and Delineating Roles and Responsibilities of Project Participants

• Document which points are being pursued and which LEED points are not being pursued
• Document what each party is supposed to do, when they are supposed to do it (e.g., site visits, progress reports, submittal and approval of/response to RFIs, submittals, substitutions, etc.) and how, when and in what form it is to be documented.
• Include a LEED “scorecard” or matrix in contract/contract documents.
• Include a sample LEED letter template in contract/contract documents.
• Designate responsibility for record maintenance and identify which sets of records are critical path for certification.
Defining and Delineating Roles and Responsibilities of Project Participants

• Set schedule for project meetings, or “Charrettes,” including pre-design and pre-construction meetings/workshops.
• Clarify which consultants are under Architect’s umbrella and which are engaged by Owner, Contractor or others (e.g., Commissioning Authority, LEED consultant).
• Consider using AIA B214-2007 or ConsensusDOCS 310 - Green Building Addendum.
Defining and Delineating Roles and Responsibilities of Project Participant


• Addendum to Owner-Architect Agreement which applies only to LEED certification and not other green certification systems; places significant responsibilities upon Architect.

• Architect’s Services include: pre-design workshop; preparing LEED certification plan, specifications and final report; organization, management and submittal of certification documentation; contract administration services and services during bidding phase.
Defining and Delineating Roles and Responsibilities of Project Participants

• ConsensusDOCS 310 sets forth a more formalized process which attempts to better clarify roles of Contractor and Architect and utilizes a “Green Building Facilitator” (“GBF”) who is answerable for failure to achieve certification (may be architect, engineer, contractor, CM, etc. as long as independent of Owner).

• ConsensusDOCS 310 contemplates that the Owner and GBF have collaborated to determine Owner’s objectives and program subject to a separate contract.

• Intended to be appended to all other project contracts so that all project participants are aware of each other’s roles and responsibilities.
Defining and Delineating Roles and Responsibilities of Project Participants

- ConsensusDOCS 310 appears more uniquely tailored to green building certification (LEED or otherwise) and, therefore, may be preferable to certain clients and/or for certain projects. On the other hand, AIA B214-2007 sets forth a workable framework for LEED projects and may be preferable for certain clients who are more comfortable with it given that its form and content is more in-line with existing AIA forms, particularly if Architect intends to perform all services set forth therein.
Other Comments and Considerations

• Design v. Performance specifications: *Spearin* doctrine does not apply to performance specs.
• Project Delivery: Design-Bid-Build not optimal (but may have no choice, e.g., public contract).
• Fixed price and fast-tracked projects not optimal - increased risk of cutting corners.
• Understand manufacturer warranties and their limitations - warranty likely covers only replacement and not consequential damages (and is only as good as the company warranting the product).
• Know all penalty provisions of GC’s contract (e.g., LDs for late completion).
• Recognize realities of construction industry: trades that typically may not be subject to much oversight/scrutiny during performance may be critical to establishing certain LEED points (e.g., painters, drywall, carpet installers, waste haulers, etc.); GC, subs and Owner need to be educated/aware (and vigilant in managing the project properly).
Other Comments and Considerations

• **Means and Methods**: Construction phase LEED points may be reliant or affected by Contractor means and methods, particularly MR and IEQ points (e.g., Construction Waste Mgmt., Construction IEQ Mgmt. Plan) which address sequencing, protective measures, documenting performance and/or obtaining proper documentation from vendors/suppliers. Architect should recognize risk of blame for missing these points (e.g., site visits and observation = duty to inspect and ensure work done properly) and emphasize to Owner, GC and subs that this goes to means and methods and is not Architect’s responsibility. Also prudent to document that Owner acknowledges and understands this and chain of command/lines of communication (e.g., Architect-Owner, Owner-GC-sub).

• Understand the risk of certification failure - if LEED certification is missed, **someone has to pay** - and price it into the contract.

• Note: pricing structure where LEED certification results in a “bonus” to Design Team, GC and/or subs may be optimal risk management tool if feasible given time lags, code/zoning issues and other practical realities.
Liability Insurance

• Major Coverage Concerns Include:
  • Losses for certification failure = breach of uninsurable warranty or guaranty;
  • Contractor’s liability excluded by Professional Services Exclusion;
  • Other coverage exclusions and/or defenses may apply to certain losses;
  • Project participants have insufficient coverage or inadequate risk management in place.
Liability Insurance

- **Warranties and Guarantees**: Careful contract drafting can help reduce these risks, e.g., disclaiming warranties and guarantees (not foolproof but serves as reference point).
- **Argo Insurance Brokers** offer a Sustainable A&E Professional Liability Program which is silent on warranties and guarantees (i.e., not excluded but not expressly covered).
Liability Insurance

• Professional Services Exclusion: LEED contemplates that non-professionals (e.g., GC and/or subs) may perform services that may be deemed “professional;” if liability arises out of such services, may be excluded.

• Attempt to reduce risk through contract drafting.

• Require GC to maintain professional liability coverage (if feasible).

• Pay attention to deductible and retention amounts (if any) and “drop down” language (if any).
Liability Insurance

• Other coverage issues include: losses are not “damages” or “loss” covered by the policy; intentional acts/fraud exclusions; mold/fungus, EIFS exclusions, losses not ones for which insured is “legally obligated to pay;”
• GL specific: trigger; lack of an “occurrence;” PL exclusion; contractual liability exclusion; work-product exclusions; impaired property exclusions, etc;
• PL specific: losses do not arise from performance of “professional services” (Argo Sustainable A&E PL policy has expanded definition of “professional services”); claims made/claims made and reported coverage; eroding policy limits
Liability Insurance

• **Managing professional risks:** Inexperienced and/or unsophisticated professionals (e.g., newly minted APs without construction experience) may not recognize requirements of claims made and particularly claims made and reported coverage (e.g., need to timely notify insurer of claim or facts and circumstances).

• Eroding policy limits have significant effect on recoverable insurance proceeds if claim goes to litigation, arbitration or otherwise triggers “defense costs” or “claim expenses,” particularly on high-end/high value projects.
Liability Insurance

**Additional Insured Coverage:** Contractor should include Owner (and, ideally, Architect and Architect’s consultants) as additional insureds for CGL coverage and, at a minimum, require subcontractors to name Contractor as additional insured to subcontractors’ CGL policies.
Builder’s Risk and Property Insurance

• Owner and Contractor should maintain sufficient Builder’s Risk and Property Insurance during construction.
• Wider variety of insurance products (purportedly) aimed at coverage “green” specific risks and losses.
• Builder’s Risk = intended to cover property damage losses occurring prior to substantial completion; generally do not insure against design error, faulty workmanship/materials, losses resulting from theft.
Surety Bonds

• Not insurance but important risk management tool.
• Bid Bond: intended to assure that contractor will honor bid and sign all contract documents if awarded the contract.
• Performance Bond: intended to assure performance of contractor/subcontractor per contract terms (including price and time).
• Payment Bond: intended to assure proper and timely payment of subcontractors and suppliers to prevent work delays.
• D.C. Green Building Act of 2006: requires a performance bond that is forfeited if the building fails to meet LEED certification requirements of the Act - no such bond currently exists.
OWNER’S AND CONTRACTOR’S PERSPECTIVES

Bruce W. Merwin
Haynes and Boone
Houston, Texas
III. Owner’s Perspective

■ State which green building rating system applies, together with year, category and version.

■ Require the Contractor and subs to achieve the specified rating within the contract price and completion date.

■ Are Owner’s objectives clear?

■ Be aware of risk resulting from changes in laws and standards.

■ Identify who must determine and undertake the special incentives, permitting, fee refunds, grants or tax rebates? The parties should agree upon a matrix that outlines the respective responsibilities of the parties.

■ Get representations in writing as to Contractor’s LEED experience, review of documents and conformity to LEED requirements.

■ Avoid allocation of inappropriate duties to the Owner.

■ Prescribe damages – liquidated and otherwise – modify waiver of consequential damages provision.

■ Allocate responsibility to Contractor for the design to meet the LEED standard if design-build project.

■ Anticipate unexpected issues with new products and processes.
Owner’s Perspective

- Who will post bonds or other assurances required by permits or governmental ordinances?

- Integrate LEED specifications, including performance specifications designed to achieve target points, into the contract.

- Pay attention to substitution clauses, particularly if new products or processes involved - limit substitutions without demonstration/guaranty of No Adverse LEED impact.

- Require Contractor to bind suppliers, subs to key terms of the contract involving LEED-related requirements.

- Get warranties of new materials, processes.

- Analyze how the force majeure clause will affect your goals, timing, tax credits, incentives.

- Retain some money until certification is obtained.
Owner’s Perspective

- Make a conscious decision about design-build versus the alternatives (Architect, Contractor, construction manager, constructor).

- Is your client's property insurance coverage sufficient? Need for special endorsements to property and builder’s risk policies.

- Are green risks covered under the bond or insurance the Architect and Contractor provided?

- Are credits available for your environmental insurance?

- Will training, long term operational policy changes or oversights be needed with respect to operation and maintenance of the property - role of tenants?

- Make sure design of building and construction contract comply with requirements of leases, including right of Tenant to inspect and approve design and construction (particularly important with respect to government buildings and satisfying GSA requirements).
Owner’s Perspective

- Consider the effect of AIA contract standard clauses.

- There is currently no Contractor counterpart to AIA B214-2007, but the AIA is currently in the process of revising several documents to incorporate additional green building provisions in Architect’s Agreements and Construction Contracts.

- Agreement with the Contractor, Construction Manager or Constructor: e.g. AIA Al21 2003 and AGC 565.

- Consider using ConsensusDOCS 310 Green Building Addendum.

- General Conditions - AIA A201. Check clauses on substitution of materials, insurance, extensions of time, compliance with laws, schedules, storage of materials on site, cleanup, indemnity, excusable delays, damages, changes, progress payments, final payment, insurance and correction of work and make modifications to address satisfaction of LEED requirements.

- Appendix attaching specific clauses addressing Owner’s Green Building concerns.
IV. Contractor's Perspective

- Limit representations of qualifications and promises of results or vague representations.

- Document Owner’s understanding of the risks inherent in the LEED certification process and Contractor’s inability to guarantee USGBC acceptance.

- If Contractor lacks LEED experience, consider retaining services of Architect to assist Contractor in satisfying LEED standards from Contractor’s perspective.

- Allocate responsibility for the design to Architect and consultants to meet the LEED standards and applicable laws.

- Define job responsibilities regarding LEED certification through Responsibility Matrix.

- Build-in contingencies to achieve LEED certification - seek additional LEED points - 5%-10% is reasonable.
Contractor’s Perspective

- Leave time and sufficient compensation for significant delays, “learning costs” of new products, and difficulties with installations.

- Develop a clear way to deal with changes in work and a clear procedure for product substitutions.

- Bind subcontractors to LEED Requirements.

- Obtain warranties from subcontractors and suppliers to back-up Contractor’s warranties-specific reference to performance standards to satisfy LEED Requirements.

- Obtain insurance and bonds.

- Factor in any extra permit, certification, bonding or other costs, but also any additional timing or other costs.

- Use caution in compliance with laws provisions.

- Avoid deletion of waiver of consequential damages or modification that excludes LEED certification damages.
Consider training subcontractors in LEED to avoid significant slush in bids.

Are you covered for delays, time and cost of new products and installations?

Are you covered for products liability risks on new products and processes or innovative uses for existing products?

Minimize retainage until final LEED certification - consider letter of credit.
Contractor's Perspective

- There is no AIA Form A214 — don't get lazy (Consider using ConsensusDOCS 310 Green Building Addendum).

Incorporates contractual best practices to identify the project participants' roles and responsibilities, as well as the implementation and coordination efforts critical to achieving a successful project using green building elements, particularly those seeking third-party green building rating certification.

Drafted to work well with other ConsensusDOCS contract documents and other form contracts.

- AIA A201 — General Conditions — Check clauses on substitution of materials, insurance, extensions of time (includes specific references to LEED-related delays caused by Architect or others), compliance with laws, schedules, storage of materials on site, cleanup, indemnity, excusable delays, damages - liquidated and waiver of consequential, changes, progress payments, final payment, insurance and correction of work.

- Identify LEED credits in the Project that may add minimal value but dramatically increase risks - is the building’s complexity increased because of Green design and construction? Complexity = greater chance of failure.

- Limit use of Green products that have a very limited in-field service history.

- Avoid implementing innovative and largely new technical practices with little expertise that result in increased chances of construction deficiencies.

- Better management of assuming liability for the emerging long-term building performance requirements that many green rating systems are beginning to implement.
Contractor's Perspective

- Make sure that your client’s standard contract covers all aspects of LEED compliance if applicable. Many Contractors have simple forms that may not even include compliance with laws provisions and changes in laws entitling Contractors to additional compensation pursuant to the Change Order process.

- What is the timetable for completion? Have the parties considered LEED compliance delays?
Contractor’s Perspective

- How will Contractor’s LEED services be coordinated with the services of the Owner, Architect and other consultants and separate contractors?

- What has your client promised?

- Caveat: A word on indemnities - avoid indemnities against loss of leases or tax incentives.

- How are damages quantified or limited? It is probably better to agree upon a liquidated damages provision for failure to achieve LEED certification in a timely manner due to Contractor’s default.

- Appendix attaching specific clauses addressing Contractor’s concerns.