



The Green Building Law & Justice Project: Tips on Drafting Green Contracts

This website has discussed the myriad of potential risks and consequences that are associated with green building projects. One of the most effective strategies to prepare for these risks is to clearly address them in the multiple contracts that are executed by and among a project's stakeholders. A well-drafted green contract can:

- Identify and clarify a project's green design objectives, specifications and goals;
- Define each party's roles, responsibilities and expectations with respect to the green elements of a project;
- Assign inherent risks (foreseen and unforeseen) to the party who is in the best position to control or mitigate those risks; and
- Determine outcomes or consequences in the event of problems, such as delays, failure to reach green goals and other "what-if" situations.

The ultimate question then becomes: **what should be included in a well-drafted, green contract?** It would be difficult to write a model green contract that would adequately address all of the risks in any situation because each project is different. However, based on our review of the growing literature on green contracting, and based on our experience representing non-profit owner/developers, there are some best practices that attorneys can follow when drafting a design or construction contract for a green project or an agreement with a consultant, such as a LEED or energy consultant. The following is a summary of a few of these practices.

Consistency with New AIA Forms

In 2007, the American Institute of Architects (AIA) released its most recent set of form contracts. One of the changes that the AIA made in creating the 2007 versions of its forms was the inclusion of language on environmental sustainability in the B101-2007, "Standard Form of Agreement between Owner and Architect."

This new standard form of agreement also includes two sections (below, emphasis added), that require the architect to promote sustainable design and consider environmentally preferred approaches.

§ 3.2.3. The Architect shall present its preliminary evaluation to the Owner and shall discuss with the Owner alternative approaches to design and construction of the Project, including the feasibility of incorporating environmentally responsible design approaches. The Architect shall reach an understanding with the Owner regarding the requirements of the Project.

§ 3.2.5.1. The Architect shall consider environmentally responsible design alternatives, such as material choices and building orientation, 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 4.

While these sections only require the architect to consider environmentally sustainable design alternatives and present them to the owner, it is a positive step towards greening design and construction contracts generally. If an

owner uses an older set of AIA forms, as is common in the non-profit community development field, it is a good practice to add these sections or similar language in a rider to the architect agreement.

Identifying an Objective Green Standard or Goal

A contract that calls for the construction of a “green building” is inadequate and ambiguous unless the contract provides a specific definition of the phrase¹. Shaw Development, the plaintiff in Shaw Development v. Southern Builders, a well-known green building case filed in a Maryland court but later settled, learned this the hard way. The construction contract for this project included specifications to enable the project to achieve the LEED Silver designation, but the contract itself was silent regarding the contractor’s obligation to secure this certification. Additionally, the contract did not specify a date at which certificate of occupancy would be achieved. When the contractor failed to deliver the certificate of occupancy in time for the owner to obtain \$635,000 in state green building tax credits, Shaw sued the General Contractor².

Thus, it is important for contracts to specifically acknowledge that the owner intends for a project to reach a particular green standard or goal. Those standards or goals should be described as objectively and clearly as possible. If a project will be certified as green by a third party, that should be described in the contract. The most common objective standard for green buildings in this country is the LEED Green Building Rating System, developed by the U.S. Green Building Council³. Other third party green certification programs include Green Globes, administered in the United States by the Green Building Initiative, Green Communities, developed for affordable housing projects by Enterprise Community Partners, Inc. and the federal Energy Star program. Whatever the certification standard, it is also important that the contract drafter identify the correct version to apply to the project because green rating systems can change rapidly⁴.

Even if no third party certification is sought, but the owner seeks a specific sustainability outcome in order to comply with a government program or qualify for a tax credit, such expectations should be clear in the contract⁵. If a project will seek third-party certification, the requirements of that particular program can also be attached to the contract in a separate rider⁶.

The bottom line is that without clarity on what type of green building the project will be, parties are vulnerable to disputes if, as in Shaw, the finished product falls short of its green goals. The following are some examples of contract provisions that describe green outcomes.

Example One:

Architect/Contractor acknowledges that Owner intends to seek LEED v.3 Silver Certification for the Project⁷.

Or if LEED Certification is not being sought, but there are other programs relevant to the project:

Architect/Contractor acknowledges that Owner intends for the Project to be constructed in accordance with the [list applicable green certification/funding/incentive programs], herein defined as the “Green Programs.”

Example 2:

In addition to completing the Work as described in the Contract Documents, the Contractor will construct the Project to meet the requirements of the [list of incentive programs and/or green funders] and any other green program that may be applicable to the Project, collectively referred to as the “Green Programs.”

¹ Mary Jane Augustine, Project Owner Strategies for “Greening” Design and Construction Contracts, The Green Real Estate Summit 2009: What Attorneys, Developers, Bankers and Lenders Need to Know, 565 PLI/REAL 121 (2009).

² Id. at 131. See also Andrew Ness, Shaw Development v. Southern Builders: The First Green Building Litigation is Settled, March 2, 2009, <http://www.globalclimatelaw.com/2009/03/articles/environmental/shaw-development-v-southern-builders-the-first-green-building-litigation-is-settled/>; and Chris Cheatham, Southern Builders v. Shaw Development: Green Building Damages, October 6, 2008, <http://www.greenbuildinglawupdate.com/2008/10/articles/legal-developments/southern-builders-v-shaw-development-green-building-damages/>.

³ Supra note 1 Mary Jane Augustine at 126.

⁴ Peter S. Britell and Smita G. Korrapati, What Does ‘Green’ Mean?, New York Law Journal at 9, col. 1, June 11, 2007.

⁵ Kate Bowers and Leah Cohen, The Green Building Revolution: Addressing and Managing Legal Risks and Liabilities, Environmental Law & Policy Clinic, Harvard Law School, March 10, 2009, available at <http://www.mgkflaw.com/Green%20Building%20Revolution.pdf>.

⁶ Id at 18.

⁷ Supra note 1 Mary Jane Augustine at 140.

Example 3:

The Architect will provide Services that will [enable][assist] the Owner to meet the requirements of [list applicable green certification/funding/incentive programs] and/or any other green or sustainable building program that may be applicable to the Project, collectively referred to as the “Green Programs.”

The word enable is much more owner-friendly, but architects may be uncomfortable with that language. Using the word “assist” is a weaker alternative, but using it is better than contract silence on the issue.

In some cases, owners may want to construct a green building, but at the time it must sign contracts with project partners, it may not know whether it will seek LEED Certification or comply with any other green program. Or, it may just want the project to be as green as possible within the budget. While it is always better to specifically define the desired green outcomes using a specific or objective standard, as discussed above, this may not be possible for some owners. The following is an example of how to describe a project’s green goals under these circumstances.

Example 4:

The Architect understands that the Owner intends to make the Project as environmentally sustainable, energy-efficient or “green” as possible within the constraints of the budget. The Architect will make every effort to incorporate sustainability into the design of the Project, to identify and specify green products, materials and systems for the Project and to hire subconsultants with green building experience.

Intermediate Requirements

In addition to specifying a project’s final sustainability goals, it is also a good practice to, whenever possible, impose intermediate deadlines or requirements on project partners. A contract could require parties to follow a specific timeline, complete certain components by specific dates and/or require its partners to submit intermediate documents so that owners can follow the progress of construction more closely⁸. Owners could even require that the construction be reviewed monthly by an owner’s representative or a green consultant⁹. Additionally, a contract could specify a means to resolve any disputes that might arise while the project is ongoing¹⁰.

Performance by Project Parties

In order for a project to achieve any green outcome, the owner must first assess the requirements for reaching a given result and then contract with the members of the project team to ensure that each requirement is accounted for¹¹. Each contract should clearly state the work required of each party so that the project will ultimately achieve the desired sustainability outcome¹². Examples of these responsibilities might include tracking, collecting, assembling and submitting any documentation necessary for certification¹³. In coordinating the responsibilities among the parties, an owner should consider who among the project team is in the best position to manage a particular responsibility¹⁴. When drafting, be sure to include these particular responsibilities in the section of a contract that discusses the scope of the work.

For additional protection, an owner may insert more general language in its contracts to describe its expectations of its project team members. For example, a contract may require each project team member to perform its duties in a manner consistent with the green building principles required to meet a particular certification program. The following is an example of this approach:

Architect/Contractor shall perform the Work in accordance with green building principles and practices including, but not limited to, those associated with the LEED Silver Rating System, and in a manner consistent with the Owner’s goal of attaining LEED Silver Certification for the Project¹⁵.

⁸ Supra note 5 Kate Bowers and Leah Cohen at 19.

⁹ Supra note 4 Peter S. Britell and Smita G. Korrapati at 7.

¹⁰ Id.

¹¹ Shannon D. Sentman, “Greening the Documents: Design and Construction-Related Contracts, The Green Real Estate Summit 2008: What Attorneys, Developers, Bankers and Lenders Need to Know, 556 PLI/REAL 163, 196, (2008).

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Supra note 1 Mary Jane Augustine.

If a project does not intend to obtain LEED Certification, but there are other green building incentive programs being applied, these can be referenced in this section in place of “LEED Silver Rating System.”

Parties, Qualifications, and Standards of Care

Perhaps the most crucial factor in determining whether a green building project will be a success is whether the owner has hired the right partners. Therefore, contract provisions that discuss parties’ qualifications and responsibilities are also very important. If an owner hires a particular architect, contractor or consultant because of that party’s specialized credentials, then the contract with that party can and should reference such qualities and as is indicated below identify that such credentials and knowledge were an essential element in that party being chosen/retained. These might include LEED Professional Credentials. Administered by the Green Building Certification Institute, LEED Professional Credentials demonstrate current knowledge of green building technologies, best practices and the rapidly evolving LEED Rating Systems¹⁶.

Aside from clarifying expectations regarding a party’s credentials, another reason why an owner might choose to specify its project partners’ green building qualifications is to elevate the standard of care. Contractors and design professionals have long been held to a standard of care to provide services in a “workmanlike” or “professional” manner¹⁷. In the commonly used AIA form B101-2007, “Standard Form of Agreement Between Owner and Architect,” architects must “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 circumstances¹⁸”. For contractors, the common law negligence standard is applied, which is similar to the standard applied to architects¹⁹.

Many commentators, practitioners and others working in the real estate industry have speculated that the standard of care is shifting rapidly for design and construction professionals²⁰. This shift may be self induced when a party holds itself out to be a LEED Professional²¹ or advertises specialized skills with respect to sustainable design. Thus, it is favorable for an owner to include contract language that specifies the other party’s green building qualifications, especially if that professional has trumpeted such expertise in order to be hired. If there is a dispute between the owner and that project partner, the latter is more likely to be held to a higher standard of care.

The following is an example of contract language that elevates the standard of care.

Example 1:

Architect/Contractor represents to Owner that it is experienced in green building principles and practices consistent with the LEED Rating System, and that it has sufficient, experienced personnel on staff, including, but not limited to, one or more LEED APs, who will oversee and coordinate the LEED Certification process on behalf of the Architect/Contractor. The Architect/Contractor acknowledges that the above representations constituted a material inducement in the Owner’s decision to engage the Architect in connection with the Project²².

Not all projects seek LEED Certification, so there are many ways you can vary this section. You can reference another certification or green funding program or just indicate that the other party is experienced in green building. The following is another example.

Example 2:

Contractor warrants to the Owner that the Contractor and its supervisory staff are knowledgeable and experienced in the type of Work required by the Contract Documents, [including but not limited to green building practices][including but not limited to the green building principles consistent with the Green Programs, as defined herein].

Remedies

¹⁶ <http://www.gbci.org>.

¹⁷ Shari Shapiro and Christopher Hill, Greening the Standard of Care. March 9, 2009, <http://www.greenbuildinglawblog.com/2009/03/articles/insurance/greening-the-standard-of-care/>.

¹⁸ Supra note 10 Shannon D. Sentman at 207

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Supra note 1 Mary Jane Augustine.

Contracts between a project's various parties should contemplate what would happen in the event that the project does not achieve a desired green outcome. If problems arise, an owner will want to assign some liability to another party, either in the form of liquidated damages or performance remedies. Liquidated damages can be calculated by envisioning any of the potential costs associated with a project's failure to meet an intended green goal (e.g., loss of tax credit or other funding source, consequences of noncompliance with a green building law, etc.). Then, require another party, ideally the one who is in the best position to prevent the failure, to bear all or most of these costs if problems occur

Another option is to impose performance remedies on another project partner. In other words, if the project does not meet a particular sustainability outcome, an owner can require another party, such as a contractor or consultant, to take the necessary actions to correct the problem at no additional cost.

The following are examples of liquidated damages and performance remedy provisions.

Example of Green Liquidated Damages:

Contractor shall be liable for all damages, losses, costs and expenses (collectively, "Green Damages") incurred by Owner that arise out of or relate to failure of the Project to [obtain LEED Certification] [comply with the Green Programs] to the extent caused by or arising out of negligence in performance of the Work or failure to comply with the Contract Documents by the Contractor or any subcontractors. However, Contractor's liability for Green Damages shall in no case exceed _____ [Insert amount of money owner may lose if requirements of Green Programs are not met]²³.

Example of Performance Remedies:

In the event that any action or inaction on the part of the Architect adversely affects the Owner's ability to [obtain LEED Certification] [meet its sustainability goals/the green design requirements of the Funders/Green Programs, if any], the Architect shall promptly take all actions reasonably necessary to correct the situation, including but not limited to revising any documentation and submissions that the Architect agrees to provide in this Agreement, at no additional cost to the Owner²⁴.

Owners may encounter considerable resistance from project team members when attempting to negotiate final remedies, like liquidated damages²⁵. Thus, another strategy to mitigate the risk of green outcome failure is to tie payment of fees to the performance of specific services during the design and construction process²⁶. Also, final payment to project team members could be withheld until all services necessary to achieve the final green goal (e.g., LEED Certification or receipt of the Energy Star label) have been rendered²⁷. The following are examples of this approach.

Example 1:

Consultant's services as described in this Agreement ("Services") shall commence as of the date of this Agreement and shall continue until the Contract End Date, which shall be defined as the later of the determination that the Project has achieved the Energy Star Label or Client has received the final incentive payment under the [green incentive program]. Client will withhold five (5) percent of each payment made to Consultant as retainage and will release such retainage to the Consultant at the occurrence of the Contract End Date.

Example 2:

If the applicable green certification or incentive program has an appeal process (like LEED), you can also continue the party's obligations through such an appeal.

Architect's obligation to perform Services relating to LEED Certification for the Project shall continue until issuance of the Certification by the U.S. Green Building Council, including but not limited to, the filing of an

²³ See Supra note 1 Mary Jane Augustine.

²⁴ Id.

²⁵ Kenneth M. Block, 'Green' Contracts: Documents Should Reflect LEEDS Requirements, New York Law Journal at col. 2, November 14, 2007.

²⁶ Id.

²⁷ Id.

appeal and participation in the appeal process in the event that LEED Certification is denied for any reason that relates, in whole or in part, to negligence or failure to comply with LEED requirements on the part of Architect and/or its Subconsultants²⁸.

Example 3:

Final payment shall be made to the Contractor upon completion of all Contract Closeout Work. Contract Closeout Work shall include, but not be limited to, all labor, materials, equipment, and services necessary to complete the Work under the Contract, including but not limited to the following:

[Insert list of various final obligations of contractor, e.g., obtaining a permanent certificate of occupancy.]

- Receipt of notification from [USGBC/EPA/any administrator of a green program] that the Project has [obtained LEED Certification] [met the requirements of the Green Programs].

Changing Legislation

New legislation mandating green buildings is a significant risk for members of green building project teams, as the pace at which municipalities are enacting such legislation has increased²⁹. Contracts with design professionals and contractors should require these parties to comply with all laws applicable to the performance of the work.

Luckily, many of the standard design and construction contract forms (e.g., AIA A201-2007, "General Conditions of Contract for Construction" and AIA B201-2007, "Standard Form of Architect's Services: Design and Construction Contract Administration") include such language³⁰.

However, these provisions do not assign liability to a contractor or architect for noncompliance with newly enacted laws³¹. Thus, risk that a new green building law might be adopted while a project is being constructed should be dealt with in the contracts. Owners could require project parties to be responsible if a new law is passed, or owners could require its attorney to survey existing state and local green building legislation and keep the project team informed of any such new laws that could adversely affect the project³². Alternatively, these contracts could require an architect or contractor to obtain "grandfather protection" for the project if a new regulation is put into place.

These are only some ideas of how to alter agreements that are typically executed in relation to a real estate development project when such a project is green. As mentioned above, each project is different and any good contract drafter will ensure that the agreements properly address the unique elements of a particular client. However, as green building becomes more common, we hope to see that the special issues introduced by sustainable development will be more readily incorporated into standard agreements. As our experience representing clients in green development projects and as the literature on green contracting grows, we hope to share more thoughts and practice tips on the Green Building Law and Justice website.

²⁸ Supra note 1 Mary Jane Augustine.

²⁹ Supra note 5 Shannon D. Sentman at 198.

³⁰ Id. at 202.

³¹ Id.

³² Id at 203.