

# Contract Drafting Tips for Green Projects

BY DAVID BLAKE

Green projects generally are defined by three primary characteristics: the construction process minimally impacts the environment; the completed building requires less energy and water to operate than a similar, non-green building; and the indoor environment provides enhanced occupant comfort.

Green projects accounted for an estimated \$8 billion worth of construction in 2006, and will account for an estimated \$60 billion worth of construction in 2010. These numbers partially are being driven by new laws, as approximately 12 federal agencies, 31 states, and 200 counties, cities



and towns across the country have passed regulations that either require, or provide incentives for, green construction.

Yet, green projects involve numerous contractual issues that are not specifically addressed by most form contracts or standard clauses. The following are standard

contract clauses that should be modified with certain custom provisions for green projects.

## BASIC DEFINITIONS

Green projects involve numerous terms that the parties should define in the construction contract. Further, the parties should add a provision that identifies the sustainable standard they have chosen, or that is required by law or regulation, for the project (e.g., LEED 2009 for New Construction and Major Renovations, Silver Level).

## INSTRUMENTS OF SERVICE

In most instances, it is necessary to use instruments of service (drawings, specifications, sketches or other documents)

to establish achievement of the sustainable standard applicable to the project. However, it often is unclear whether instruments of service can be used for this purpose. For example, some clauses provide that instruments of service may be used “solely and exclusively for execution of the work.” Does this include submitting drawings and specifications to the Green Building Certification Institute (GBCI) as part of the LEED certification process?

This and similar provisions should be modified to address the expanded use of instruments of service for green projects.

### **PERMITS AND APPROVALS**

Most contracts contain a clause that discusses who is responsible for obtaining and paying for permits and required approvals.

Is LEED certification an approval within the scope of this clause? Is the party that is responsible for paying for approvals responsible for paying the LEED certification fees (which can exceed \$20,000)?

Accordingly, the parties should modify the permits and approvals clause to specifically address who will pay for the various fees charged by the GBCI and similar organizations.

### **TESTS AND INSPECTIONS**

The typical tests and inspections clause requires the contractor to make arrangements for, and bear the cost of, all required tests, inspections and approvals. This clause should be adjusted in the same manner as the permits and approvals clause.

### **COMPLIANCE WITH LAWS**

Many contracts contain a clause that states the contractor is not required to ascertain that the contract documents are in accordance with applicable laws. This clause is especially relevant to green projects because hundreds of local jurisdictions across the country have laws and regulations that require sustainable construction. The parties should discuss whether this clause should be adjusted if the contractor agrees to determine how to satisfy aspects of a legally required green standard.

### **SUBSTITUTIONS**

The contractor is typically allowed to make substitutions with the consent of the owner, but substituted materials

may invalidate certain credits under the U.S. Green Building Council’s LEED rating systems, such as credits for using low volatile organic compound (VOC) materials, materials with recycled content and regionally manufactured materials. Substituting a material with a high VOC content for one that has a low VOC content could prevent this credit from being achieved. Assuming the owner consents to such a substitution, which party is responsible for the loss of this credit? This and similar issues should be addressed in the substitutions clause.

### **SKILLED WORKERS**

Contracts often contain a provision that states the contractor shall not employ persons or subcontractors not properly skilled in the tasks assigned to them. Does an employee or subcontractor that has not previously worked on a green project fall into this category? This issue should be specifically addressed in the skilled workers clause.

### **ALLOWANCES**

Sometimes the owner does not select green materials, equipment and systems until after the contractor has executed its contract. An allowance clause can be used to structure the payment for these items. Issues such as payment caps, payment for actual costs and approvals should be addressed in the allowance clause.

### **SCHEDULING**

Many green activities associated with a sustainable project should be included in the project schedule, including commissioning, flushing out the HVAC system, procuring green materials and equipment with long lead times, and submitting the supporting documentation for LEED certification. Scheduling clauses should be modified to address green activities.

### **SUBMITTALS**

Much of the information required to support an application for LEED certification can be obtained through the typical submittal process. The submittals clause should be modified to address the inclusion of the product data necessary for the various credits that are within the contractor’s or subcontractor’s scope of work.

Certain data, however, such as material costs necessary to support specific

credits, only can be obtained at the end of the project and should be addressed in the final payment clause.

### **CLEANING UP**

Most contracts contain a fairly generic clause that requires the contractor and subcontractors to keep the site clean and free of construction debris. While simply throwing all debris in construction dumpsters and hauling it to a landfill may satisfy this clause, it almost certainly will prevent the contractor from satisfying the LEED credit for construction waste management, which requires that a certain percentage of construction waste be diverted from landfills. Accordingly, the standard cleanup clause needs to be tailored for green projects.

### **SEPARATE CONTRACTORS**

Most contracts allow the owner to perform aspects of the work with its own workforce or with separate contractors. This raises significant issues on a green project because the credits under the LEED rating system are based on all work performed. As a result, the work performed by an owner’s separate contractor will impact these credits and may prevent them from being achieved.

For example, if the owner’s separate contractor had all its construction waste hauled to a landfill, the LEED construction waste management credit might not be satisfied. The contractor should not be held responsible for this result. Similarly, the contractor should not be required to divert more of its waste from landfills than it had reasonably planned in order to compensate for the separate contractor’s conduct, at least not without compensating the contractor for its additional efforts.

The separate contractors clause should be adjusted and carefully managed to account for these issues.

### **SUBSTANTIAL COMPLETION AND CONTRACT TIME**

Substantial completion typically is defined as the point in time when the owner can occupy or utilize the project for its intended purpose. Contract time typically is defined as the amount of time allotted for substantial completion of the work. Two issues concerning these clauses are whether LEED certification is a prerequisite for substantial completion, and

whether LEED certification must be achieved within the contract time.

The standard clauses for substantial completion and contract time should be modified to address these issues. This is particularly critical given the contractual link between substantial completion and the imposition of delay damages.

#### **FINAL COMPLETION**

Final completion typically is defined as the point in time when the contractor or subcontractor has completed all of its work in accordance with the contract. As with substantial completion, the parties must determine the proper correlation between final completion and LEED certification.

This concept is not addressed in the standard final completion clause, which should be modified to account for this issue.

#### **FINAL PAYMENT**

Most final payment clauses include a list of items that contractors and subcontractors must provide at the end of a project before they receive final payment. The list of items should be supplemented to include documentation of certain LEED credits that are only available at the end of the project.

Further, the parties should address whether any amount will be withheld pending certification.

#### **BONDS**

Many contracts state the contractor must furnish a performance bond that covers the faithful performance of its contract. Further, some local governments require certain types of projects to achieve LEED certification and have a performance bond that can be called upon by the local government if certification is not achieved.

Can the owner use the bond clause to force the contractor to provide the “green bond” required by a local law or regulation? The parties should specifically address this issue in the contract.

#### **ONE-YEAR WARRANTY**

Contractors typically are required to correct defective work that is discovered within one year of substantial completion. The entity that decides whether a project has met the requirements for LEED

certification may not complete its evaluation until that one-year period has expired. If certification is denied because of “defective work,” but that decision is communicated more than one year after substantial completion, is the contractor obliged to correct the defective work so certification can be achieved? The parties should specifically address this issue in the one-year warranty clause.

#### **CONSEQUENTIAL DAMAGES**

Many of the damages that may result if certification is not achieved or if the owner does not attain a green building could be classified as consequential damages. Accordingly, the parties need to pay special attention to the waiver of consequential damages clause that appears in most contracts.

#### **ALLOCATION OF RESPONSIBILITY**

Achievement of LEED certification, or satisfaction of other sustainable standards, is a multi-party effort that involves at least the owner, architect and contractor. No one party holds all the cards, and great care must be taken to avoid contract clauses that impose overall responsibility

on one party to achieve the certification. The parties should carefully identify and assign the specific tasks required to satisfy the green standard chosen or required for a particular project.

#### **LEED DOCUMENTATION**

An application for LEED certification requires the compilation and submission of a significant amount of data. The parties should include a well-crafted provision that specifically addresses each party’s responsibility with respect to this process.

#### **LIQUIDATED DAMAGES**

Given the uncertainty concerning the damages that may result if LEED certification is not achieved or if the building is not as green as required, the parties should consider a liquidated damages clause for green damages.

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**David Blake is a partner in the Washington, D.C., office of Seyfarth Shaw, LLP. For more information, email [dblake@seyfarth.com](mailto:dblake@seyfarth.com). Seyfarth Shaw’s complimentary Green Building Addendum for construction contracts can be requested at [www.seyfarth.com/Alert111309/](http://www.seyfarth.com/Alert111309/).**