

# EFFECTIVE RISK MANAGEMENT IN GREEN BUILDING

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# Contracts - It's What's Up Front That Counts

- What are the applicable laws and legal standards?
- Should standard contractual language be changed to cover LEED issues?
  - ▣ Clarity in expectations and contractual requirements for each stakeholder in the Green Design/LEED
- How to be proactive?
- Other considerations

# Where do you find LEED standards?

- U.S. Green Building Counsel
- The LEED standards have not been codified.
  - ▣ It is likely that the City of Seattle will make them law within the next year or two.
- Standards continue to evolve.
  - ▣ USGBC released LEEDv3 on April 29, 2009
  - ▣ [www.usgbc.org](http://www.usgbc.org)

# Terms of Your Contract

## *For Developers and Project Owners*

- Tailor the contract specifically to your business and the project
- Beef up your standard warranty and indemnity language
- Ensure your contract or specifications fully incorporate the LEED standards to be satisfied, and set the level
- Rely on your architect to ensure specifications are sufficient for compliance throughout the project

# Terms of Your Contract

## *For Developers and Project Owners (Part 2)*

- Focus on the submittal schedule as a means of ensuring LEED compliance – attach to the contract, or include in the specifications
- Tie final completion and release of retention to LEED certification

# Terms of Your Contract

## *For General Contractors & Subcontractors*

- Tailor contract specifically to your business (GC, subcontractor or material supplier) and the project
- Understand your own contract
- Define your standards and certifications
- Insist on contractual language that indicates signing is for the purpose of the rating system, but is not a warranty or guarantee
- If your Green Design/Construction is not using LEED construction standards, define the standards (*if any*) being used, or specifically disclaim them

# Warranty

- No standard warranty (unless it's a condo)
- Consider protection and time limitation clauses in the warranty terms of your contract
- Little reason to change standard warranty and indemnity language, just bolster it
  - ▣ Specifically state the LEED obligations or incorporate the specifications, since “Code Compliance” is not yet a reality for LEED
- See sample language at end of these materials

# LEED Scorecard

- This LEED Scorecard sets forth the standards to be met, the requirements, and the points system
  - ▣ See sample LEED Scorecard at end of these materials
- Break down your LEED Scorecard according to component parts
- Allocate responsibility among the various contractors early in the project
- Use the Submittal schedule

# Risk Transfer Provisions and Insurance

- Indemnity provisions – Bolster your standard provisions
  - ▣ See Sample Language at end of these materials
- The insurance conundrum. – What is covered?
  - ▣ Insurance brokers and underwriters do not yet have their arms around this problem
- What are the risks?
- What are they actually insuring?
- What is the likely cost of an insurable event?

# Risk Transfer Provisions and Insurance (Part 2)

- Bottom line – **TALK WITH YOUR INSURANCE BROKER**, and consider talking with your attorney on this as well.

# Subcontractor Compliance – How to ensure?

- Again, use the standard techniques– require the general contractor to include indemnity, warranty and Additional Insurance provisions in their subcontracts, so Owner has a breach of contract remedy against the general contractor.
- Also require subcontractors to specifically follow LEED standards as set forth in the specifications.
- Use standard language incorporating all project documents in the contract.

# Enforcement provisions and payment issues?

- Use standard provisions and right to withhold if contractor fails to comply, but be aware of the Prompt Pay act and follow the guidelines.
- Impose Liquidated Damage or penalty provisions?
- Could be difficult to enforce unless tied to realistic damages
  - ▣ Delay in getting project approval or diminution in value of property

# Potential Liability

- Not exactly clear...
  - ▣ No substantive litigation, but one example (*later*)
- Third-party or tort liability scenarios?
  - ▣ Even less certain what precise damages may be
- Failure to meet LEED standards, as specified in the contract
  - ▣ Remediation of warranty work (*not covered by insurance*)?
  - ▣ Loss of tax credits or other credits?

# Potential Liability (*Part 2*)

- Government Imposed Penalties
- Industry Standards?
- Can you rely on a consultant/architect who certified your building?
  - ▣ Will architects accept the risk?

# Leasing Concerns

- Owners constructing building likely intend to lease it. If they want Green Construction, they will likely strive for Green Operations as well. Particularly with the anchor tenant, there are several issues to consider as follows:
  - ▣ Will expenses be passed through?
  - ▣ Will savings be passed through or deducted from rent or operating expenses?
  - ▣ How will building marketing be impacted?

# Additional Considerations

- Is there yet a premium on the value of “Green” properties for re-sale purposes?
  - ▣ Will buyers or renters care about green standards?
  - ▣ Can owners charge a premium?
  - ▣ Will lenders care about green standards?
    - Generally yes, although it is unlikely they will require compliance. They currently have bigger fish to fry.
- Obtaining credits for other projects, or for certain aspects of the same project.

# Additional Considerations (*Part 2*)

- How to improve your LEED Score on the project?
  - ▣ Read the Scorecard carefully
  - ▣ Have project personnel become LEED certified
  - ▣ Consider how to minimize or reduce “use” in every possible way
- Meet recycling levels
- LEED standard for ongoing building maintenance and operation

# Additional Considerations (*Part 3*)

- Incorporating your business for separation of business from personal assets
- Change Orders
- Unforeseen Circumstances
  - ▣ Process to handle issues which may arise?
- Record Keeping
  - ▣ Materials Used
  - ▣ Recycling
  - ▣ Accounting Records (labor and material costs)

# Shaw Development v. Southern Builders

- \$7.5M, 23-unit condominium project which was intended to support a LEED Silver rating
- Southern Builders (GC) wasn't fully paid and filed a mechanic's lien for \$54k and started lawsuit
- Shaw Development counterclaimed for \$635k
  - ▣ Breach of contract
  - ▣ Lost tax credits
  - ▣ Failure to conform with the LEED rating system
  - ▣ Non-conforming work

# Sample Warranty Language

CONTRACTOR warrants for a period of three (3) years from the date of Final Project Completion or Final Payment, whichever is later, to OWNER that (1) all work and services provided under this agreement shall be performed in a professional, workmanlike and diligent manner, (2) that all materials and equipment furnished under this Contract shall be new and free from defect unless otherwise specified, and (3) that all work, services and materials provided hereunder will be of good quality, free from faults and defects, and in conformance with all Contract Documents, Project Specifications, codes, ordinances, regulations, laws and industry standards, including LEED Standards set forth in the Contract Documents or Project Specifications. All work, services or materials not conforming to these requirements, including substitutions not properly approved and authorized by OWNER, shall be considered defective and shall be replaced or removed promptly by CONTRACTOR upon written notice from OWNER, at CONTRACTOR's sole cost and expense. This warranty shall be cumulative and in addition to any other warranty contained in the Contract Documents or provided for by law.

# Sample Indemnity Language (*Part 1*)

To the fullest extent permitted by law, CONTRACTOR shall indemnify, defend and hold harmless OWNER and ARCHITECT, and their respective officers, directors, shareholders, members, affiliates, invitees, nominees, employees, agents, representatives, co-lessees, co-venturers, contractors, subcontractors, insurers, successors and assigns (collectively the “Indemnified Parties”), from and against any and all claims, damages, losses, liabilities, expenses, costs, rights, remedies, demands, causes of action or suits (collectively “Claims”) including attorney's fees, arising out of or resulting from (1) the performance or breach of this Contract, or (2) any fault, negligence, unlawful act or omission of CONTRACTOR, any subcontractor or sub-consultant, anyone directly employed by any of them, or anyone for whose acts any of them may be liable, regardless of whether or not such Claims are caused in part by a party indemnified hereunder. Pursuant to RCW 4.24.115, CONTRACTOR’s duty to indemnify shall not apply to liability for Claims arising out of or resulting from the performance of this Contract which are caused by or resulting from the sole negligence of the Indemnified Parties. CONTRACTOR will require all subcontractors to provide similar indemnity and defense obligations to the Indemnified Parties in all subcontracts.

# Sample Indemnity Language (*Part 2*)

CONTRACTOR's duty to defend is independent of its duty to indemnify, and CONTRACTOR agrees to defend the Indemnified Parties regardless of whether its duty to indemnify is disputed. If the allegations raised in the claim, lawsuit, or demand for arbitration, by any party against the Indemnified Parties, allege the claim arose in whole or in part by actions of CONTRACTOR, then CONTRACTOR agrees to defend the Indemnified Parties. CONTRACTOR will retain and pay for an attorney to defend the Indemnified Parties for any Claims hereunder, to be selected or approved by the Indemnified Parties. By initialing below, CONTRACTOR specifically and expressly waives any immunity that may be granted it under the Washington State Industrial Insurance Act, Title 51 RCW. Further, the indemnification obligation under this Contract shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable to or for any third party under workers' compensation acts, disability benefits acts, or other employee benefit acts; provided CONTRACTOR's waiver of immunity by the provisions of this paragraph extends only to claims against CONTRACTOR by the Indemnified Parties, and does not include, or extend to, any claims by CONTRACTOR's employees directly against CONTRACTOR.