

# A/E RISK REVIEW

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## Green Design: It's a Go

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Sustainability. Green Design. LEED Certification. These are terms that design firms are becoming very familiar with and that significantly impact their present and future design practice. Clients in both the public and private sectors are becoming more environmentally conscious and eco-friendly with their projects and green design continues to grow and grow.

Why the growth? There are three major factors green design is going strong:

1. **Owners demand it.** They are realizing financial and other benefits of building environmentally-friendly and energy-efficient projects. Solar energy systems are now a feasible option for virtually any project. Wind turbines are popping up on residential and commercial buildings. Owners are being rewarded for lessening their carbon footprint.
2. **Regulations demand it.** Cities, counties, states, provinces and other government bodies are requiring that designers and builders follow an ever-growing list of green codes, laws and regulations. The development of the International Green Construction Code (IgCC) brings continuity to this effort. Some foreign countries have adapted

their own uniform green design requirements that must be followed if you are to perform design services within their borders.

3. **The design industry demands it.** The AIA, ACEC, NSPE, ASCE, RAIC and other design organizations in the U.S. and Canada are establishing ground rules for practicing green design and setting benchmarks for sustainability. They are helping create and support accreditation and certification programs such as Leadership in Energy and Environmental Design (LEED) as well as groups such as the U.S. Green Building Council (USGBC). In a nutshell, the design industry is encouraging its members to adopt and follow uniform principles for being environmentally responsible with their designs.

## What Are the Risks?

As with every emerging trend that hits the design field, green design presents challenges for both the design firms that eagerly pursue a future developing environmentally friendly buildings and those who would rather not enter this new frontier. Here are a few of the liabilities you can expect to encounter with green projects:

### ***Guarantees and warranties.***

Promises, promises, contractual promises. That's what your client will likely seek from you when it comes to LEED certification or other accreditations for a green project. The problem is that if you make such promises, you might not be able to keep them, resulting in a breach of contract. What's more, that breach of contract may not be covered by your professional liability insurance policy since it is a liability you voluntarily

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accepted by signing the contract. It is not up to you to certify that a building is LEED compliant or meets some other green regulation or code. That's up to an outside agency or regulatory body who just might disagree with your assessment of how green a building really is.

### ***Schedules and budgets.***

Clients who are building their first green project often underestimate the time and money it takes to build green. They hear stories of dramatically improved energy efficiency and the cost savings that result, but fail to recognize that creating this energy efficiency typically requires added upfront costs and extended time schedules. This can result in an underfunded project that is not robust enough to deliver the anticipated efficiencies, or a project that takes much more time to complete than the now irritated owner and/or occupant expected.

### ***Scope creep.***

When you accept a green project with a tight budget, scope creep is usually not far behind. All of a sudden the owner starts demanding more and more of your time to make the project perform as the owner anticipated. These added services were not contracted for, and the owner has no intention of increasing your fee. Your profit margin shrinks as your time on the job increases.

### ***Heightened standard of care.***

Design firms wanting to make their name in green design face a dilemma: they want to actively market their specialty to potential clients, but they want to avoid unnecessarily raising their standard of care. By marketing itself as a green designer, an architect or engineer sets the expectation that it is greater skilled in sustainability and energy efficiency than the run-of-the-mill design firm. If the green designer falls short in delivering a green project, it will likely face a claim by the client. The trier of fact, whether a judge, jury, arbitrator or mediator, will likely hold the designer to a higher standard since it presented itself as a specialist in green design.

### ***Project team weaknesses.***

Certain project types rely heavily on a highly skilled team of consultants, subconsultants, contractors and subcontractors. Nowhere is this more true than with green buildings. The execution of precise designs is

crucial to energy efficiency. Complex mechanical systems can play a large part in a green building's climate control, air quality and efficient electrical and water delivery.

### ***Unproven systems and materials.***

Green design has come of age in the 21st century, and many of the products, materials and systems being specified are relatively new and untested. Designers who specify these materials and systems face claims from building owners, building tenants and others if these new technologies fail to perform. The cost of replacing or repairing damaged or failed equipment can be substantial and this liability can present itself years after design and installation.

### ***Nonperformance of maintenance.***

Even green buildings that pass the initial performance tests and are successfully commissioned can present problems later on if the owner and occupants fail to perform proper maintenance. The failure to replace filters, clean vents, and provide other routine scheduled maintenance as recommended by the manufacturer can lead to a dramatic drop in the performance of the building and irate clients and occupants.

### ***Regulatory challenges.***

Green laws, regulations, performance standards and certification requirements continue to evolve. What might have been sufficient yesterday in terms of meeting green design mandates may be considered inadequate tomorrow. Similarly, what might be sufficient in your jurisdiction may not suffice if you do a project across the nearest border.

While the liabilities associated with green design are certainly real, they are far from insurmountable. Design firms of all sizes are successfully moving into the green arena and many are now making a name for themselves and broadening their markets by focusing on sustainable design. Some are even becoming facilitators for LEED and other rating agencies (more on that later).

## **Green Light for Green Design**

Success in green design begins with education and training for your internal staff. For those with the time and energy to commit fully to green design there are bachelor and masters degree programs in environmental and sustainable design. There are also online certification programs available to designers. For

instance, the U.S. Green Building Council (USGBC) offers the LEED voluntary professional credential with seven different levels of LEED certification offered. Continuing education courses offered by design associations and others address the latest developments in green design, renewable energy, and sustainability. On-the-job training can also be an excellent way to get your feet wet in green design. Working as a subconsultant for a lead designer experienced in green design is often an effective inroad. Ideally, your initial green project will also have a contractor experienced with green construction and a client with a history of successful green projects.

Indeed, project selection will be a vital part of your risk management when taking a sojourn into the green world. You'll want to minimize unknowns wherever possible by sticking with familiar project types, working with a long-term client, and staying in a familiar locale where you know the climate and weather elements that come into play.

### **Contract Tips**

Of course, your contracts with clients and subconsultants will require careful wording that recognizes the unique risks and liabilities of green projects. Here are a few suggestions you and your attorney should consider:

- When applicable, recognize that your goal is for the project to achieve LEED or other green certification. However, stress that you cannot assure, warrant or guarantee such certification. Getting certified will be subject to the processes of outside organizations such as the USGBC as well as the performance of the contractor, the client and other parties to the project.
- Similarly, your client contract should state that you cannot warrant or guarantee that the project will achieve specific benefits such as a given level of energy efficiency, lowered life-cycle and maintenance costs, or any credits, incentives or grants offered by municipalities,

government organizations or other public or private groups.

- Establish a reasonable standard of care by noting in your contract that you will perform your services in a manner consistent with the degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances at the same time and in a similar locale. Don't tout yourself as a "green expert" in any of your company documents, including your contract and marketing materials.
- Acknowledge in your contract that in your quest to deliver a project that qualifies for LEED or other certification requested by the client, you may need to specify relatively new or untested products, technologies, materials and systems. Recognize that these state-of-the-art resources may be of higher cost than traditional materials. Also note that the client assumes all risk for inadequate performance of new or inadequately tested materials they have recommended or approved.
- Have the client contract recognize that you are not responsible for project delays caused by others (such as reviews of the project by certification agencies), and that your schedule will be adjusted accordingly if such project delays occur.
- Refer to the building owner's and occupants' responsibility for providing regularly scheduled maintenance of the facility and its mechanical systems. Identify which party is responsible for what element of the building and include the manufacturers recommended maintenance schedule as an addendum to your contract with the client.

Be sure you and your attorney check laws in your state or province regarding contract provisions that transfer liabilities to your client or limit their ability to seek redress from you. You'll also want to review the

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contractor's contract with the client as well as any agreements between the client and any LEED consultant or other certification body. Address any concerns you may have regarding contractual liabilities that increase your exposure.

### **Providing Standalone Facilitation Services**

Design firms who gain experience with green design may find the opportunity to offer services as a standalone facilitator. Here, the designer works as an agent to the owner, reviewing the designs of the project lead and offering recommendations for getting the project certified by LEED or another rating organization.

When serving this roll as standalone facilitator, it is imperative that you have a very detailed and specific scope of services. The lead designer of record remains responsible for all project designs. Your role is to provide recommendations that you feel will enhance the chances of the project achieving its goals and obtaining the desired green certification. Your contract should make it clear that it is the lead designer's and the owner's responsibility to make all final decisions regarding any changes to design plans that are made based upon your recommendations. Your agreement should also state that you are making no guarantees or warranties that the project will achieve the desired level of certification.

AIA Document B214™–2012, Scope of Architect's Services: LEED® Certification, establishes duties and responsibilities when a client seeks LEED certification. This is a good starting point for you and your attorney to develop your scope of services, whether as a standalone facilitator or as a lead designer of record providing certification services.

*We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, including the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.*