



# Client Alert

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## Managing the Risks Involved in Building Green Projects

"Green" building projects are now becoming the norm. Only a few years ago green buildings appeared to be a market trend, but countless projects are now focusing on environmentally friendly design and construction. How can parties involved in the construction, design and development of green projects manage their risks?

### Financial risks

Green building practices can be known to greatly increase the costs of the project due to more expensive building materials and increased building and design costs. Typically, the higher the LEED certification or the more complex the project, the higher the costs. Financial risks involved if the project fails to achieve LEED certification or desired green status include loss of tenants or sale of the project, loss of government incentives and tax credits, increased design and construction costs, penalties on public projects with green mandates, increased energy costs, and diminished asset value.

On the other hand, increasing evidence rejects the concept of a "green premium" for a variety of reasons including an increase in professionals with LEED accreditation, increased experience by owners and consultants in working on green projects, and an overall global increase in green and sustainable projects. Additionally, offsets by green incentives, lower operational costs due to increased efficiency levels, the ability to attain higher rental premiums, decreased vacancy rates, and reduced insurance premiums may also lead to financial savings.

### Standard of care and legal risks

A large part of understanding the legal risks of a green project is understanding the challenges in attaining certain LEED certification for each party involved, such as the owner, contractor, and architect. It is also important to consider how attaining certain LEED certification will affect other parties, such as tenants. Because attaining LEED credits involves more than just the actions of a single party, conflicts of interest may arise and additional legal hurdles may be posed by contractors and designers being wary of guaranteeing LEED certification.

### Performance risks

The ability of products, systems and buildings to perform at a certain level is a key component of the green project. The parties should evaluate new and innovative construction technologies in comparison to other projects where the product or system has been used. The parties should also take into account that some products may be in high demand and have the potential to cause project delays. Additionally, the performance of professionals on the project is a key factor. Using professionals with appropriate educational and work experience and familiarity with the type of work can provide an advantage in calculating LEED credits and result in more efficient implementation of the LEED processes.

### Regulatory exposure

There is increased uncertainty about the regulatory environment as the number of governmental entities adopting green building initiatives and building codes and regulations continues to expand. This increase in green building laws and regulations may lead to overlap or inconsistencies in different requirements or unreachable standards. It is important that the parties involved in any green project have an understanding of the regulatory environment as it applies to that particular project.

### Ways to avoid these risks

Your legal team can help you with a number of steps to minimize risk, such as:

1. Do your homework on the background of any professional involved on the project. If you are a professional, do not oversell your capabilities or experience with regard to green projects.
2. Address issues contractually and be particularly diligent when using standard industry contracts to be sure to address all green issues, such as:

- Describe the additional level of work and diligence needed to achieve the desired green standard. Be sure to address project objectives and expectations, criteria for green achievement and responsibilities of performance in regard to each party involved in the project.
  - Allocate risks to parties best equipped to control the outcome of the venture. Contracts that put all the risk on one party are usually not appropriate because certification of a green project is not completely within the control of any single member of the project team.
  - Design documents must be complete and/or updated often as this is one of the largest causes of construction disputes. Do not assume old contracts will serve an expanded scope of work as the project progresses.
  - Contracts should allow for flexibility and ongoing evaluative processes to allow for such things as changes in budget, allocation of LEED points and to adapt to changed circumstances.
  - Contracts should allow for adequate oversight by the green building designer or consultant on the construction of the project.
  - Address the need to train the owner/operator of the operations and maintenance systems once the project is complete.
  - Address the issue of damages. Contractors and architects may lean towards liquidated damages, limits on corrective work, and waivers of consequential damages to reduce risk, while owners will strive for consequential damages. One potentially useful alternative to damages involves the use of performance bonuses for achievement of the desired level of certification. This gives incentive to collaborate effectively while not posing intolerable and potentially inequitable risk on the designer or builders.
  - Allocate the responsibility for registering the project, compiling and maintaining LEED documentation, applying for certification, responding to requests for information, and making payment contingent upon receiving certification documentation.
3. Maintain proper commercial insurance coverage as this field is evolving to address changes in green building exposures. Understand your risks and compare your services and coverage accordingly.
  4. Monitor design and construction of the building. Owners retain a lot of risk of green building and should take an ongoing responsibility to monitor its design and construction. This could include active involvement in material selection, mechanical systems, and site planning priorities, and overseeing builder's compliance with contract and local regulations. Designers need to monitor the green elements of the design and stay current with the construction of the project. The builder should have the necessary capabilities to properly document green-related activities.
  5. Avoid third party claims. All parties involved must be careful not to expressly or impliedly warrant the ultimate performance of a green project. By promising a certain level of energy savings or healthier environment for building occupants parties can expose themselves to additional risks. Misleading or overstated claims of unverifiable benefits or performance may lead to claims of misrepresentation or fraud in the inducement from an end user who materially relies on such statements.

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