

Standard Form Contracts Take Different Approaches to Sustainable and Green Project Goals

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Commensurate with the emergence of new technologies and innovative processes associated with green building has been the emergence of new areas of potential liability for owners, contractors, designers, suppliers, and other entities involved in the design and construction process. Complicating these new risks somewhat has been the treatment (or lack of treatment) of these issues in standard form contract documents that are typically used on conventional projects.

At least two standard contract forms—the 2007 AIA design-bid-build contract forms and the 2009 DBIA design-build contract forms—have developed contractual provisions that are designed to address these issues. This article provides an overview of each of these contract forms, as well as a comparison and contrast of some of the key similarities and differences in the forms.

AIA and “Environmentally Responsible Design”

In 2007, the American Institute of Architects (AIA) revised the 1997 version of the AIA Contract Documents for design-bid-build projects. Perhaps one of the most noteworthy additions to the 2007 contract forms was the inclusion of sustainable design requirements as both a Basic Service and an Additional Service for the Architect. Specifically, the B101 Standard Form of Agreement Between Owner and Architect contains multiple references to “environmentally responsible” and sustainable design requirements.

For example, Article 3.2.3 provides that during the schematic design phase, the Architect shall discuss with the Owner alternative approaches to the design and construction of the Project, including “the feasibility of incorporating environmentally responsible design approaches.” Similarly, Article 3.2.5.1 provides that the Architect shall consider “environmentally responsible design alternatives” during the schematic design phase.

Significantly, the terms “environmentally responsible design” are not defined in the contract forms. However, some guidance is provided by the fact that consideration of “environmentally responsible design approaches” is a Basic Service under the B101, while certification through a green building rating system, such as the Leadership in Energy and Environmental Design (LEED) rating system, is specifically considered to be an Additional Service.

AIA’s Approach to LEED Certification

For those projects that will seek some level of certification under the LEED rating system, AIA Document B214-2007 contains a scope of service to be provided by the Architect for the achievement of that certification. The B214 is specifically designed to be an attachment or addendum to the B101 for those projects seeking LEED certification, and it provides the basic framework for how LEED goals will be targeted, how those goals will be included in the bid and contract documents, and what services the Owner must provide in the process.

Given the fact that the B101 is geared toward a design-bid-build project delivery method, it is of no great surprise that the B214 contemplates that all LEED goals for the project will be identified before the Contractor ever submits a bid. For example, Article 2.3 provides that the Owner, Architect, and their respective consultants will conduct a “Pre-design Workshop” to review green building goals, identify potential LEED points, examine strategies for implementation, assess the impact on the Owner’s program and budget, and determine the LEED points to be targeted. The Architect is then required to prepare a “LEED Certification Plan”, in which the Architect will describe the green building goals for the project, identify the LEED points targeted, list the participants and their roles and responsibilities, and identify the certification documentation required.

Based upon the identified green building goals for the project, Article 2.6 of the B214 requires the Architect to provide specifications that incorporate the LEED requirements for inclusion in the Contract Documents, and to define the Contractor’s responsibilities and documentation requirements related to LEED Certification. Article 2.7 states that the Architect will conduct a pre-bid meeting to review the differences between standard construction practices and the LEED principles, procedures and requirements for the project.

There are both potentially positive and negative implications for the Contractor based on the fact that the LEED goals and specific LEED points are identified and targeted before the Contractor ever submits a bid. On the positive side, the Contractor is aware of the LEED goals and individual points targeted for the project before it submits its bid for the project, and, thus, it can specifically determine the cost impact on its scope of work that such LEED goals may have. On the negative side, the Contractor has no input in the initial creation of the LEED goals and individual points targeted for the project, and the Contractor may be wary of lofty project goals that potentially expose the Contractor to liability if those goals cannot be fully achieved.

Significantly, neither the B101 nor the B214 includes any provisions dealing with what happens if the Project does not achieve the desired or targeted LEED rating level. Instead, the contract forms deal with the green or LEED “goals” for the Project, rather than any formal contractual requirements for achieving a desired outcome. Further, from the Contractor’s perspective, the AIA contract documents treat the LEED goals as specifications for the Project, rather than contractual provisions or requirements (either in the Owner-Contractor agreement or the General Conditions) that specifically address the LEED goals for the Project.

DBIA and “Sustainable Project Goals”

In 2009, the Design-Build Institute of America (DBIA) released revised versions of its contract forms between the Owner and Design-Builder for a design-build project. Among the revisions to these contract forms was the release of a new exhibit referred to as the “Sustainable Project Goals Exhibit”. That exhibit was designed to be an addendum to either DBIA Document No. 525 (Standard Form of Agreement Between Owner and Design-Builder, Lump Sum, 2009 Edition) or DBIA Document No. 530 (Standard Form of Agreement Between Owner and Design-Builder, Cost Plus Fee with an Option for a Guaranteed Maximum Price, 2009 Edition).

In general, the Sustainable Project Goals Exhibit provides that prior to executing their agreement, the Owner and the Design-Builder will discuss and determine whether the project will incorporate sustainable design elements, including whether LEED certification will be required. Based upon the decisions made by the parties, the exhibit contains a “check the box” set of options, depending on whether the sustainable goals are more general (i.e., the shared goal of the parties is to “construct a Project that imposes a minimal impact on the environment while maximizing the health and comfort of the Project’s users and occupants...”) or are more specific and tangible (i.e., a specific rating or level of certification under LEED or other green building rating system).

The individual credits and points targeted for the Project under the LEED rating system are to be identified in the Basis of Design Documents for the Project. If those credits are not included in the Basis of Design Documents, then the Design-Builder may be entitled to a Change Order once those goals are established.

Legal Requirements and Remedies

With regard to the targeting of green or sustainable goals for the Project, DBIA’s Sustainable Project Goals Exhibit does not materially differ from the approach taken by the AIA B214 document. The most significant difference in this regard relates to the fundamental differences in the project delivery methods, such as the inclusion of LEED goals in the bid documents and specifications under the AIA approach, and in the Basis of Design Documents under the DBIA approach. In this regard, both contract forms contemplate that the Owner and Designer will address the sustainable project goals (including whether the project will seek LEED certification) as early as possible in the design process.

Where the two contract forms most significantly differ is the treatment of what occurs if the Project fails to achieve the desired sustainable goals. As noted above, the AIA B214 does not specifically address the effect of failure to achieve the project’s green or sustainable goals. Alternatively, the Sustainable Project Goals Exhibit contains several provisions directed at this issue.

The Sustainable Project Goals Exhibit provides includes a section on “Legal Requirements”, which addresses the existence of any federal, state or local laws require LEED certification or other sustainable standards. The exhibit places the onus on the Owner to identify any such legal requirements, and the Design-Builder is specifically entitled to rely on the Owner’s representations “without any independent verification.” In addition, the Design-Builder will not be liable for any costs or delays due to changes in any such legal requirements that occur after the establishment of the agreed Contract Price.

The Sustainable Project Goals Exhibit further provides a “Remedies” section that allows the parties to determine what will occur if the Project fails to achieve the desired sustainable goals or the targeted level of LEED certification. The parties can elect to treat such an occurrence in one of three ways. First, the parties can agree to a waiver of claims, such that the failure to achieve the desired sustainable goals (including the targeted level of LEED certification) will not be deemed a breach of contract or otherwise give rise to any claim by the Owner against the Design-Builder. Second, the parties have the option to agree that the failure to meet the sustainable goals for the Project will cause the Design-Builder to be liable for liquidated damages in an agreed upon amount. Under this remedy, the parties agree that the liquidated damages will be the Owner’s sole remedy, and the Design-Builder will not be liable for any consequential damages related to the failure to achieve the sustainable goals.

Under the third option, the parties can agree that the Design-Builder has an obligation to cure any failure to achieve the desired sustainable goals through the addition, replacement or correction of materials, configurations, systems or equipment in order to obtain the targeted level of LEED certification or to satisfy the identified sustainable standards. However, under this remedy, the Design-Builder’s obligation to cure will be limited to (1) its remaining contingency, if any; (2) its share of the savings, if the agreement is a Guaranteed Maximum Price contract; or (3) an amount to be agreed upon by the Owner and the Design-Builder.

The Future of Sustainable Project Contracts

While the AIA and DBIA contract forms appear to have taken the lead on attempting to capture the responsibilities and risks for a sustainable or LEED project in their respective contract forms, other standard form contracts are in the works. For example, the ConsensusDOCS contract forms are soon to have their own Green Building Addendum to address these sustainable project goals. Other forms are sure to follow.

In addition, while AIA may have been the first standard contract form to specifically address how to incorporate LEED into its family of standard form contracts, it appears that the DBIA exhibit presents some new ideas not contemplated by the AIA forms. DBIA’s inclusion of the “check the box” damage provision is an innovative and creative approach to answering the question of how to measure damages for the failure of a project to meet a desired level of LEED certification. Additionally, the limits on liability (i.e., the stipulated amount for liquidated damages and the cap on the cost to

cure) appear directed at quantifying the potential liability for the Design-Builder, where such damages could otherwise be somewhat difficult to measure or limit. However, parties that decide to pursue liquidated damages or other such remedies in their contract forms must be aware of the potential insurance coverage issues involved (e.g., whether liquidated damages or monetary damages for the failure to achieve a desired level of LEED certification will be covered by a CGL or professional liability insurance policy).

No matter what contract form the project participants elect to use, it is imperative for all project participants to review and understand those contracts to determine how the sustainable project goals are treated in those contracts, how damages or remedies for failure to achieve those goals will be addressed, and what contractual responsibilities each project participant has in achieving the desired project goals. Although green building projects carry a lot of exciting opportunities for all project participants, an ounce of prevention at the outset of a LEED project may very well be worth a pound of cure if the project fails to achieve the desired LEED goals.