

MILLER THOMSON LLP

Barristers & Solicitors
Patent & Trade-Mark Agents

Recent Developments in Construction Law – a Potpourri

June 2010

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Recent Developments in Construction Law – a Potpourri

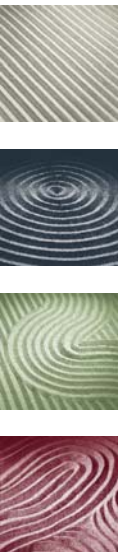
TOPICS

ACEC Document 31

P3s and Risk

Tendering – Will the Fun ever Stop?

Green Buildings (LEED Issues)



ACEC Document 31

Engineering Agreement Between Client and Engineer



ACEC Document 31

Background

- Created 1981 (revised 1996)
- Small / medium projects
 - Engineer as prime OR one of consultants
 - Services part of larger Project
- Intent
 - equitable agreement (Client/Engineer)



ACEC Document 31

- ACEC 31 can be used for:
 - construction
 - feasibility studies
 - front-end engineering design
 - project management roles



ACEC Document 31

Read the Guide!

- Plain English
- Gives Client Understanding of Agreement
- Protection of Client (design and construction)
- Use of Schedules - Fees and Services
 - Checklist of Services
- French / English



ACEC Document 31

General Organization

CCDC format:

- Agreement
- Definitions
- General Conditions
- Schedules



ACEC Document 31

PART 8 – Certification by Engineer

- Schedule A - Engineer to certify (payment, completion)
- Engineer - certifications with professional care, i.e.:
 - care, skill and diligence normally provided by engineers providing similar services
- If Engineer estimates costs / time:
 - ONLY estimates, AND
 - many factors may mean
 - estimates can't be achieved



ACEC Document 31

PART 11- Ownership of Documents

- Engineer's proprietary rights:
 - patents, trademarks, copyright, intellectual property
- Client has non-exclusive license to use
 - BUT only on payment
- Client not to give documents to 3rd parties without Engineer's consent:
 - if Client does provide information to 3rd party, Engineer not liable for any misuse



ACEC Document 31

PART 14 – Insurance and Liability

- Nature of engineering means
 - mistakes do happen, so...
- Limit liability - two methods:
 - monetary limit (cap liability)
 - re-perform deficient Services is max liability



ACEC Document 31

PART 14 – Insurance and Liability (con't)

- Monetary limitation of liability
 - to amount of available insurance; or,
 - \$250,000 (if no insurance)
- limitation – cost to re-perform defective Services
 - At Engineer's expense
 - This is to Client's benefit: Engineer can redesign quicker (for less \$) than replacement engineer



ACEC Document 31

PART 14 – Insurance and Liability (con't)

- Liability is limited to damages and costs for:
 - Claims from 3rd parties
 - Breach of contract
 - Negligent acts
 - or acts by anyone for whom party is responsible



ACEC Document 31

Reasons to use ACEC 31

- Legal fees can be significant
 - Engineers can always write their own contracts
- BUT CAUTION: do NOT:**
- omit clauses; incur liability; fail to limit liability; put insurance off-side; or, gaps in coverage
- Intent of ACEC 31:
 - even-handed;
 - reduce legal fees;
 - ensure rights & obligations are clearly defined;
 - convince Client by “industry standard” document



ACEC Document 31

Benefits of Standard Form Contracts

- ACEC 31 is familiar industry standard
- Provides balance, uniformity and standardization for clients:
 - procurement and contracting procedures
- Protects interests, preserves rights of both parties, without unfair risks



ACEC Document 31

Benefits to Standard Form Contracts (con't)

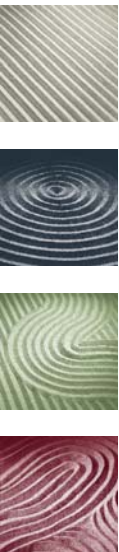
- Developed through collaboration
- Serious consideration of rights, interests and obligations of both parties
- NOTE: problems with unbalanced contracts:
 - increased risk of claims / disputes
 - Disputes are costly to both parties:
 - additional expense, effort and time



ACEC Document 31

Conclusion

- Revisions to ACEC 31 (2009) - substantial
- Revisions address previous problems
- Language is improved
 - more precise - reduced misunderstandings and disputes
- ACEC 31 is standard document that:
 - reduces legal fees
 - offers benefits to project and industry
 - Is insurable!



P3s and Risk



P3s and Risk

- **Traits**

- Long term agreement
- Private sector financing (usually)
- Design, construction, maintenance, operation
- Later transfer to public sector
 - Specified condition

- **Allocation of risks**

- To party best able to address



P3s and Risk

- **Transfer of Risk to Private Sector**
 - Which risks motivate efforts to mitigate?
 - Financing
 - Schedule
 - Budget/overruns
 - Life cycle costing
 - Quality of operational service



P3s and Risk

- **Advantages of P3**

- On time, on budget
- Creative financing mechanisms
- Design build innovation
- Improved O&M cost-effectiveness
- Reduced life cycle costing



P3s and Risk

- **On Time, On Budget**
 - Good track record
 - Due to public sector payment
 - Only on completion and commencing operations
 - Up-front financing of capital costs!
 - Lenders, investors **VERY** motivated
 - To meet or beat completion dates!!



P3s and Risk

- **Design Innovation**
 - Long term perspective
 - Realize savings:
 - Construction costs AND
 - O&M costs



P3s and Risk

Reduced life-cycle costs: why?

- Long term contract
- Turn-back requirements are clearly described
- So... incentive on private sector to:
 - Reduce O&M costs over term
 - Ensure durability for turn-back condition



P3s and Risk

- **Risk allocation is key to P3**
 - If private sector manages risk better - then
 - lower price
 - Better value for money

- NOTE: Lenders are keenly involved with risk analysis!



P3s and Risk

- **Major areas of P3 risk**
 - Procurement
 - Financing (including income stream projections)
 - Design
 - Construction (site, inflation, extras, delay)
 - Commissioning
 - O&M (including uptake/patronage)



P3s and Risk

- **Design, Construction Commissioning**
 - Design risks
 - Failure to meet performance requirements
 - Claims by public sector
 - Construction risks
 - Delays
 - Income stream delayed!
 - Overruns (inflation, unexpected costs)
 - Usually fully allocated to private sector



P3s and Risk

- **Financing risk**

- Long term contract BUT fixed returns

- Inflation

- Shared risk?

- Unexpected increases in overhead

- Taxes

- General or specific application



P3s and Risk

- **Force Majeure risk**

- Delay of income stream – define carefully!
- Impacts
 - Material damage or delay
 - Operations interruption
 - Inability to deliver infrastructure
- Options
 - Shared risk
 - Thresholds
 - Extension of time
- Insurance coverage



P3s and Risk

- **Change in Laws**

- No fettering public sector jurisdiction
- Could have serious impacts:
 - Increased labour/material costs
 - Delayed performance
 - Project may become economically non-viable
- General or specific application laws
 - General law risk to private sector (or threshold?)
 - Specific application to public sector



P3s and Risk

- **Mechanisms to manage risk**
 - Due diligence
 - Monitoring over term
 - Transfer to (or share) with others
 - Subcontracting
 - Insurance
 - Technology (e.g., electronic tolling)
- **Avoid risk gaps**
 - Back to back
 - Lenders involvement!



P3s and Risk

- **Private Sector Default - Step In Rights**
 - Cure period
 - Termination if no cure
 - Balancing services with private investment
 - Notice requirement
 - Liquidated damages/deduction from payments



P3s and Risk

- **Private Sector Default - Step In Rights (con't)**
 - Termination
 - Rare but ultimate remedy
 - Fundamental default required:
 - Failure to deliver project
 - Persistent breaches
 - Insolvency
 - Breach of material terms of contract



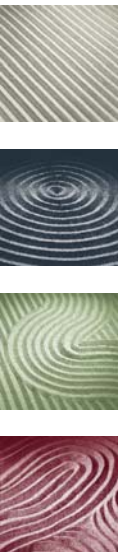
P3s and Risk

- **Private Sector Default - Step In Rights (con't)**
 - Lenders keenly involved
 - Due to severe consequences (termination)
 - Require step-in priority by direct agreement
 - Surety involvement also possible
 - Performance/maintenance bonds
 - ISSUE: Who steps-in first?
 - Complex notice, cure, step-in timelines!



P3s and Risk

- **Proper O & M through Term**
 - Due diligence
 - Deductions for non-compliances
- **Handback at end**
 - Most of payments made!
 - Specific end of term requirements
 - Holdback to ensure condition is met
- **Contract security (LC/ bonds)**



TENDERING

Will the Fun Ever Stop?

TENDERING - Will the Fun Ever Stop?



TENDERING - Will the Fun Ever Stop?





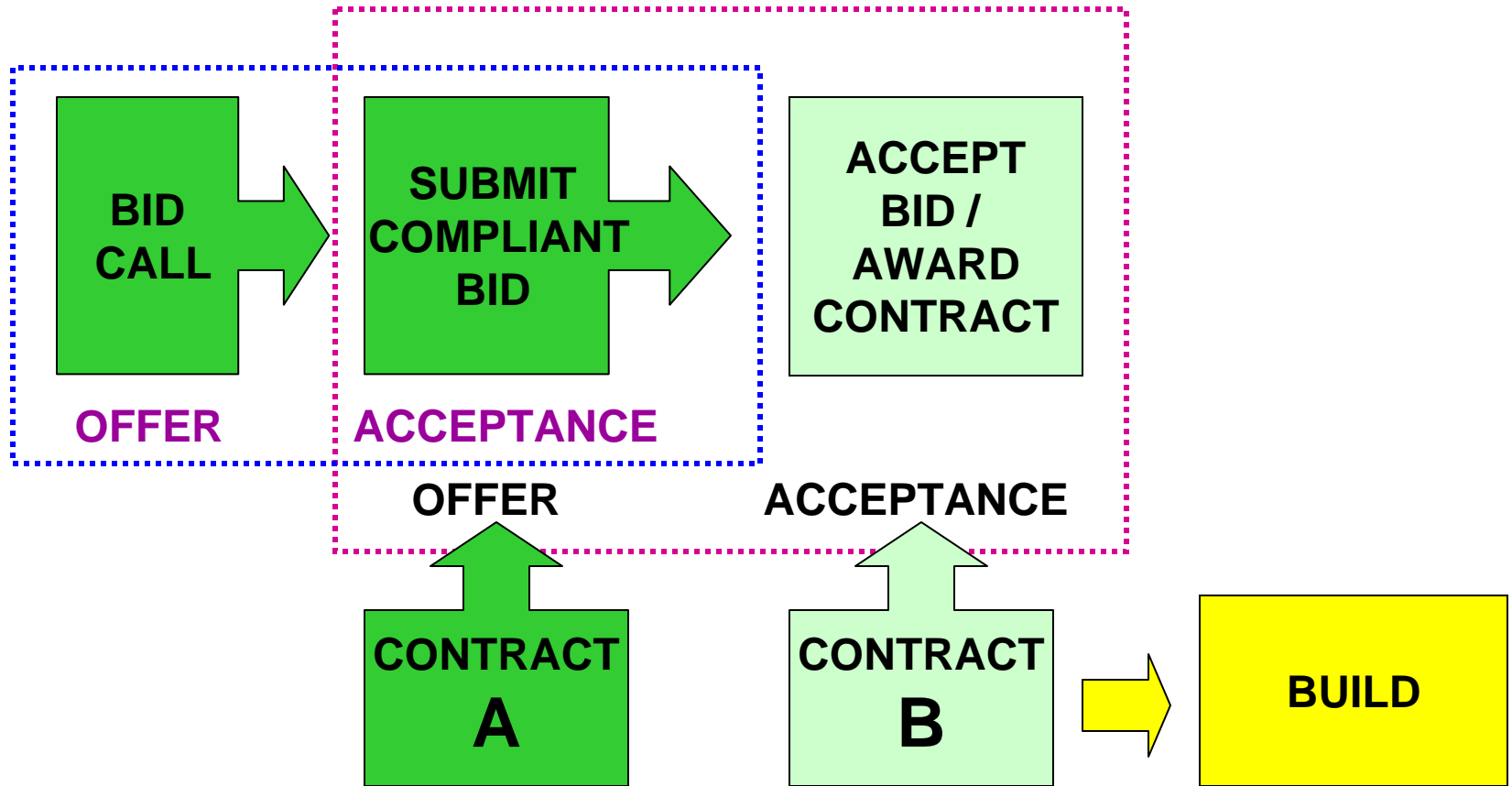
TENDERING - Will the Fun Ever Stop?

Her Majesty v. Ron Engineering (SCC, 1981)

- R bids \$2.75 m: next bid \$3.3 m
- R price close to HM estimate
- R discovers \$750,000 mistake
- Mistake invisible in bid
- HM says sign: R says no
- HM grabs \$150,000 bid security
- R sues and loses at S.C.C.

HOW CAN THIS BE?

TENDERING - Will the Fun Ever Stop?

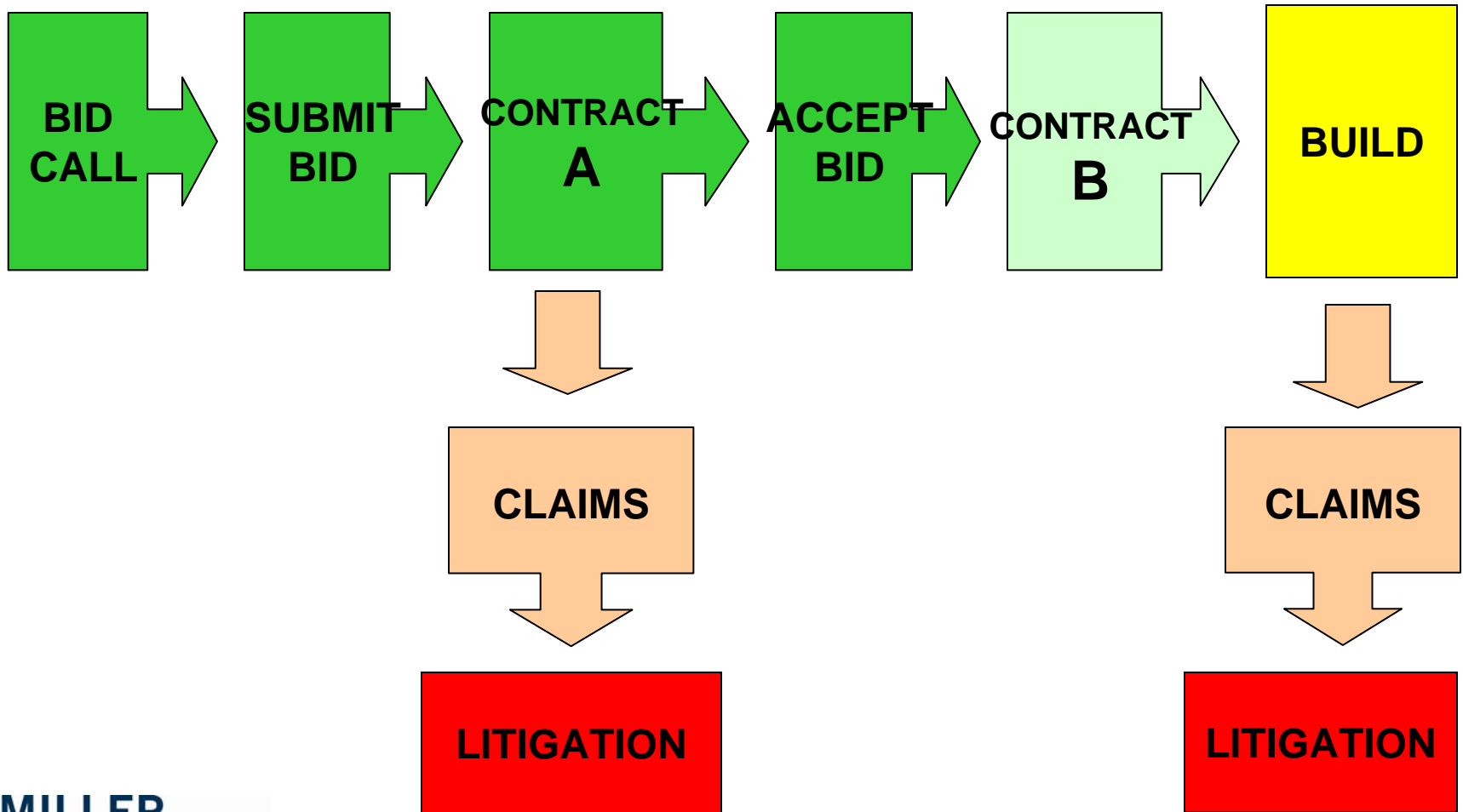


1981 – The *Ron Engineering* Revolution

Recent Developments in
Construction Law

TENDERING - Will the Fun Ever Stop?

THE BIG BANG





TENDERING - Will the Fun Ever Stop?

Recent Cases:

- MJB v. Defence Construction
- Martel v. Canada
- Double N v. Edmonton
- Kinetic Construction v. Comox
- Tercon Contractors Ltd. v. BC



TENDERING - Will the Fun Ever Stop?

- **Double N v. Edmonton (City) (SCC, 2007)**
- E calls equipment tenders in '86
 - Must be 1980 or newer
 - Provide equipment reg. # to E
 - Right to negotiate
- S bids
 - 2 machines as 1980 (not!!)
 - DN complains
 - S promises specified machines
 - E does not check registry
- E awards to S
- BUT - S uses older machines
- DN sues



TENDERING - Will the Fun Ever Stop?

Double N v. Edmonton (SCC 2007) (cont'd)

- Now What?
 - 21 years to 5/4 decision
 - Two solitudes
 - New features
 - Negotiation OK in Contract “A”
 - No duty to investigate
 - Contract “A” ends at award

WHO COULD PREDICT THIS?



TENDERING - Will the Fun Ever Stop?

Tercon Contractors Ltd. v. B.C. (BCSC)

RFP for highway construction

- Bidders must be pre-qualified
- Successful bidder joint venture
 - One member pre-qualified
 - Other member not pre-qualified
- Second bidder (T) claims breach of Contract “A”
- RFP includes exclusion of liability
 - Part of Contract “A”
 - No compensation of any kind



TENDERING - Will the Fun Ever Stop?

Tercon Contractors Ltd. v. BC (BCCA 2007)

- Tercon wins at trial
 - Exclusion too vague
 - Award is \$3.3 million!!
- Appeal court reverses trial
 - Parties on same footing
 - Clause “clear and unambiguous”
 - Don’t like? Don’t bid!



TENDERING - Will the Fun Ever Stop?

Tercon Contractors Ltd. v. B.C. (SCC 2010)

- Tercon wins – BUT barely (5/4 again)
- SCC says Ministry unfair
- BUT that exclusions clauses are generally OK
- In this case, clause not broad enough to cover facts

SO Now:

- Owners – use broad exclusion covers all bases!!??
- Contractors – consider risk of those clauses
 - NO remedy for unfairness!!
- **DO YOU WANT TO BID??**



TENDERING - Will the Fun Ever Stop?

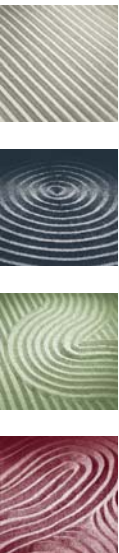
Privilege Clauses

- Lowest or any bid etc.
- Usual clause means:
 - Cannot accept non-compliant
 - Low bid no lock
- Privilege clause will not:
 - Excuse unfairness
 - Permit breach of Contract “A”
- Privilege clause will permit
 - “nuanced view of cost”
 - Process cancellation/expiry



TENDERING - Will the Fun Ever Stop?

- **Avoiding Accidents**
 - Know what you want
 - If intent is non-binding, avoid:
 - Irrevocability
 - Bid security
 - Form of contract
 - Requesting an offer
 - Avoid “bid”, “tender”, “bidder”
 - Careful in developing Contract A!!
 - Either way
 - State intentions: be clear
- CALL A ROSE A ROSE!**



Green Buildings (LEED Issues)

Green Buildings

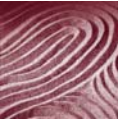
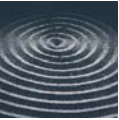
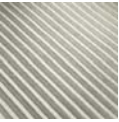
- Introduction

Building “Green”

Drafting and Negotiating Design and Construction Contracts for Sustainable Buildings

Green Buildings

- Introduction (con't)

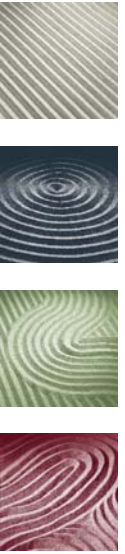


“NO LONGER A FAD, GREEN HITS
MAINSTREAM . . .”

– *ENR Magazine*

Green Buildings

- Introduction (con't)



“Green Building for several years had been a novelty, an extra, sometimes expensive, set of bells and whistles to hang on signature buildings. But over the past two or three years, concerns about the environment and global warming have brought sustainable design to the forefront of the construction industry. And with the proliferation of green products and materials, and sudden surge in energy prices, building green no longer is an expensive luxury, but an often cost-effective alternative to traditional design.”

– *ENR Magazine; June 28, 2008*

Green Buildings

- Why Should Buildings be “Green”?

- **Buildings are a major source of:**
 - CO2 (Greenhouse Gas) Emissions
 - climate change; environmental degradation
 - Energy and Water Consumption
 - Conventional Water and Air Pollution
 - e.g., Coal fired power for energy requirements
 - Solid Waste Stream
 - e.g., demolition materials in landfills

Green Buildings

- Why Should Buildings be “Green”? (con’t)

Impact of Buildings on natural resources

- currently account for:

- 39% of total energy use
- 72% of electricity consumption
- 38% of CO2 emissions
- 40% of raw materials use
- 12% waste output
- 30% of potable water consumption

Green Buildings offer significant reductions

Green Buildings

- So ... What is a “Green Building”?

No common definition of “Green Building”

- Therefore, using the term in contract causes ambiguity
 - unless measured against objective standard
- So ... LEED certification
 - offers objective standard for “Green Building”



Green Buildings

- LEED

Leadership in Energy and Environmental Design

- developed by U.S. Green Building Council (USGBC) - late 1990's
- continues to be refined
 - open discussion by Industry participants
- widely recognized for rating of Green Buildings
- offers objective standard to measure:
 - design, construction and operation of Buildings



Green Buildings

- LEED Rating System

Voluntary / Consensus based

- Continues to evolve
- Market driven
- Based on accepted principles for energy use and environmental principles
- Balances Construction practices / emerging ideas
 - Attempt to establish best practises
- In 2009 – 35,000 projects (92 nations) in LEED system
 - Approx 4.5 Billion sq ft (likely 60 Billion sq ft by end of 2010)



Green Buildings

- LEED Rating System (con't)

LEED Certification

- Register Building at start of design
- process continues for 5 years post completion
- design and construction per LEED requirements
- Min. “points” under applicable LEED Rating System
- points for perf. benchmarks in certain categories:
 - Site
 - Energy and atmosphere
 - Indoor air quality
 - Regional priorities
 - Water
 - Materials
 - Design process

Green Buildings

- LEED Rating System (con't)

LEED Certification (con't)

- Owner establishes certification goal
- Building registered under LEED may be awarded 1 of 4 Certification levels
 - depends on points achieved:

Certified - **Green**

Silver - **Greener**

Gold - **More Green**

Platinum - **Most Green**



Green Buildings

- Contracting for Green Buildings

Clauses applicable to Green Building/ LEED should involve sub-consultants, sub-trades and suppliers

Standard Form Industry Contracts need modification:

- RAIC 6 - Owner-Architect Agreement
- ACEC 31 – Engineer/Client Agreement
- CCDC 2 - Owner-Contractor Agreement



Green Buildings

SO.....

Guidelines for “Greening” Design and Construction Contracts



Green Buildings

- Guidelines for “Greening”

Guideline No. 1:

Don't rely on frequently used contract forms to document a Green Building

- Modify appropriate standard documents, or
- Develop custom contracts for Green Building issues.



Green Buildings

- Guidelines for “Greening” (con’t)

Guideline No. 2:

Clearly state Owner’s “Green Building” goals
(more specific than “give me a green building”)

Objective standards (e.g., LEED certification)
tied to time schedule

- *Describe tax incentives or other specific benefits sought by Owner*
- *Tie Owner’s “Green Building” goals to the Project Schedule, if appropriate*



Green Buildings

- Guidelines for “Greening” (con’t)

Guideline No. 3:

Identify objective standard to measure Green Building goals

- *State Owner target of a specific level of LEED Certification in contract in relevant contracts.*
- *Even if LEED Certification is not required by Owner, LEED standards can still be used as a reference point - defines “Green Building” in connection to a specific Building*



Green Buildings

- Guidelines for “Greening” (con’t)

Guideline No. 4:

Engage competent Green Building team

- coordinate “Green” provisions in each team member’s contract.

- *Green Building involves design and construction aspects, therefore, Green Building issues to be addressed in both the Consultant Agreement and Construction Contract.*
- *Consultant and Contractor must include similar provisions in their respective Subconsultant Agreements and Subcontracts.*
- *Owner’s Contract with an independent LEED Consultant must be similarly coordinated.*



Green Buildings

- Guidelines for “Greening” (con’t)

Guideline No. 4: (con’t)

- *Make LEED AP for each Team member a “Key Employee” under that party’s contract*
- *Anticipate issues by introduction of an independent LEED Consultant on Team*
- *Contractually obligate all Team members to cooperate and coordinate*



Green Buildings

- Allocating LEED Certification Risks

Potential Risks for failure to get LEED certification:

- Loss of tax benefits
- Loss of expedited permitting opportunities
- Failure to comply with mandatory certification (where required)
- Loss of increased density and other zoning incentives
- Detrimental impact on project financing
- Damage to building branding opportunities
- Loss of competitive advantage

Green Buildings

- Allocating LEED Certification Risks (con't)

Essential Contract Provisions

1. Specify LEED Certification level being sought
2. Identify Green Building Team in Contracts and make LEED AP's "Key Employees"
3. Include representations of prior Green Building/LEED experience
4. State all Professional Services and contractor work to be consistent with LEED requirements
5. Specify Green Building incentives that are essential for Owner
6. Establish performance-based remedies for performance failures that threaten LEED Certification
7. Consider ways to quantify Owner's damages for Green Building related breaches of contract



Green Buildings

- Contract Issue

Documenting LEED Certification level being sought by Owner

Sample Contract Language:

- *“Consultant [Contractor] acknowledges that Owner intends to seek LEED Gold Certification for the Project.”*



Green Buildings

- Contract Issue (con't)

Green Building representation by Consultant or Contractor

Sample Contract Language:

- *“Consultant [Contractor] acknowledges that representations by Consultant [Contractor] regarding its knowledge of and experience with Green Building principles and practices including, but not limited to, those associated with the LEED Rating System, constituted a material inducement in Owner’s decision to engage Consultant [Contractor] in connection with the Project.”*



Green Buildings

- Contract Issue (con't)

Document requirement for performance of Services and Work in conformity with LEED requirements

Sample Contract Language:

Consultant

- *“Subject to the applicable standard of care, Consultant shall develop Drawings and Specifications for the Project in a manner consistent with Green Building principles and practices including, but not limited to, those associated with the LEED Rating System, and with Owner’s goal of attaining LEED Silver Certification for the Project. Consultant shall engage Subconsultants who have knowledge of and are experienced with such Green Building principles and practices. Consultant shall include a corresponding obligation in its agreement with each of such Subconsultant.”*



Green Buildings

- Contract Issue (con't)

Establish performance-based remedies for actions that threaten LEED Certification

Sample Contract Language:

Consultant:

- *“In the event that any action or inaction on the part of Consultant or any Subconsultant threatens Owner’s ability to obtain LEED Silver Certification for the Project, Consultant and its Subconsultants shall promptly take all actions that may be reasonably necessary to correct the situation, including, but not limited to, revising the Drawings and Specifications, at no additional cost to Owner.”*



Green Buildings

- Contract Issue (con't)

Establish performance-based remedies for actions that threaten LEED Certification (con't)

Sample Contract Language:

Contractor

- *“In the event that any action or inaction on the part of Contractor or any Subcontractor threatens Owner’s ability to obtain LEED Certification for the Project, Contractor and its Subcontractors shall promptly take all actions that may be reasonably necessary to correct the situation including, but not limited to, replacing materials and equipment that do not meet LEED requirements, and removing and redoing any Work that does not meet LEED requirements including, but not limited to, those instances of non-compliance discovered during Contractor’s return and repair period after Final Completion of the Project.”*



Green Buildings

- Contract Issue (con't)

How to address damages for Contract breach relating to Green Building obligations

Sample Contract Language:

Consultant:

- *“Consultant shall be liable for all damages, losses, costs and expenses (collectively, ‘Damages’) incurred by Owner, that arise out of or relate to the failure to obtain LEED Certification for the Project to the extent caused by or arising out of negligence on the part of Consultant in the performance of professional services under this Agreement; provided, however, that Consultant’s liability under this Section for LEED-related Damages shall not exceed \$ _____ (‘LEED Limitation of Liability’)”.*



Green Buildings

- Contract Issue (con't)

How to address damages for Contract breach relating to Green Building obligations (con't)

Sample Contract Language:

Contractor:

- *“Contractor shall be liable for all damages, losses, costs and expenses (collectively, ‘Damages’) incurred by Owner, that arise out of or relate to failure to obtain LEED Certification for the Project to the extent caused by or arising out of negligence in performance of the Work, or failure to comply with the Contract Documents by Contractor or any Subcontractor; provided, however, that Contractor’s liability for LEED related Damages under this Section shall not exceed \$ _____ (‘LEED Limitation of Liability’)”.*

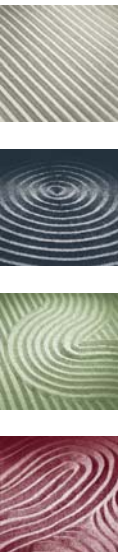
Green Buildings

Importance of Green Building Contract Strategy

“Green buildings are replacing traditional construction as corporations and organizations become aware of the financial and environmental advantages of sustainable building development. Many anticipate that green construction will eventually become the norm and that non-green buildings will likely become functionally obsolete.”

Greenbiz.com

January 2008



QUESTIONS?