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Field of Greens:
*Green Building and the Current State
of Sustainable Contract Documents*

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What is “Green” Building?

- Need to know with what we are dealing
- Today, “Green,” “Sustainable,” and “High-Performance Building” labels are often used

What is “Green” Building?

- What say the EPA? (circa 10/9/14): “Green building is the practice of creating structures and using processes that are environmentally responsible and resource-efficient throughout a building’s life-cycle from site to design, construction, operation, maintenance, renovation and deconstruction. This practice expands and complements the classical building design concerns of economy, utility, durability, and comfort. Green building is also known as a sustainable or high performance building.”
- <http://archive.epa.gov/greenbuilding/web/html/about.html>
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Why are We Building “Green”?

- To reduce waste stream of the construction process
- To reduce the impact of buildings on the environment
- To reduce energy used in the construction process
- To encourage use of systems having reduced impact on environmental quality of building on inhabitants
- To maximize the energy efficiency of the building
- To reduce water usage and consumption of the building
- To achieve tax and other benefits
- To achieve a public status of “going green”

Elements Found in Many Current Green Building Approaches

- Sustainable Site Selection
- Re-use of Existing Materials and Resources
- Energy Efficiency
- Reduction of Building Emissions
- Water Use Efficiency
- Use of Sustainable Materials
- Indoor Environmental Quality
- Commissioning that is Tied to Initial and Ongoing Operation of the Building to Enhance Usage

Defining The “Green” Approach For Your Project

- If there is an election to “go green,” determining and defining green goals are important and must be done as early as possible
 - As key as defining other elements of a project’s program requirements
- Defining “green” objectives for a project can’t be by label alone
- As with other performance requirements, be as specific as possible as early as possible
- Determine whether using rating track – whether with or without label

The Biggest Names in Green: U.S. Green Building Council and LEED

- LEED: Leadership in Energy and Environmental Design
- Third party certification through GCBI
- Project can be “green,” at four different levels: Certified (40–49 points), Silver (50–59 points), Gold (60–70 points), and Platinum (80–110 points)
- Prerequisites and elective credits used to achieve points/levels
- Many categories tied to areas mentioned earlier
- USGBC now has many different rating systems tailored to specific types of projects
- E.g., much new construction and major renovations are generally within the BD+C category, which also has sub-categories (data centers, hospitality, retail, schools, warehouses and distribution centers)

LEED No Longer the Only Game in Town

- Green Building Initiative's Green Globes
- Passive House Institute's Passive House
- EPA's Designed to Earn the Energy Star
- International Living Future Institute's Living Building Challenge
- Some of these approaches very similar to LEED in terms of their green/sustainable focus (although some emphasize different elements, e.g., Energy Star has more focus on energy efficiency elements)

Green is a Choice...Or Then Again, Not So Much

- Early days of green were more voluntary in nature
- Then, in many jurisdictions, green incentives began to sprout
 - Taxes, permit acceleration, greater occupancy
- Many government incentives urged “going green” using LEED
- More recently, many jurisdictions are gravitating to making green building elements mandatory as code requirements:
 - International Green Construction Code (IgCC)
 - ANSI/ASHRAE/USGBC/IES Standard 189.1–2014: Standard for the Design of High-Performance Green Buildings (actually a compliance path for IgCC)
 - State/local green building codes based on voluntary/model standards or on “home-grown” green standards (e.g., CALGreen)
 - Federal, state or local requirements that those who build for governments or rent to them meet stated green standards

Green is a Choice...(cont.)

- Green/sustainable elements being incorporated into local and state-based (among other) building codes
- For example, the DC Green Building Act of 2006, effective January 1, 2012, requires all non-residential buildings within district larger than 50,000 square feet be built to meet LEED certification standards
- Act extends to private buildings

Green is a Choice...(cont.)

- Other jurisdictions have enacted own standards governing sustainability
- For example, California Green Building Standards Code (“CALGreen”), which was adopted with an effective date of January 1, 2011
 - Son/Daughter of LEED?
 - Both mandatory and voluntary measures identified in CALGreen
 - Elements of both construction and building component performance are mandated
 - Other measures encouraged by inclusion on “Voluntary Measures” and “Checklist[s]” for both Nonresidential and Residential Projects

Green is a Choice...(cont.)

- Most ambitious and comprehensive code effort to date is the International Green Construction Code (“IgCC”)
 - IgCC was developed by ICC in close cooperation with ASTM, ASHRAE, AIA, USGBC and GBI
 - IgCC more mandatory in nature, although incorporates certain voluntary concepts
 - IgCC creates regulatory framework for new and existing buildings, establishing minimum green requirements for buildings and complementary voluntary rating systems which may extend beyond IgCC baseline

Green is a Choice...(cont.)

- **Key Point:**
 - There are now both voluntary and mandatory elements to be considered on many green/sustainable buildings and projects
- This impacts the planning, the programming, the scope, the specifications and the overall design/construction/commissioning approach

Beyond Construction and Commissioning -- Performance

- LEED v4
 - Water and Energy metering
 - Post-occupancy monitoring and reporting
- Could be a reaction to criticisms that LEED achievement was not proof of actual green/sustainable building or better performance than traditional models

Defining Green Requirements Is Not Just Slapping on Labels

- Mandatory green codes must be met, if applicable (e.g., CALGreen and equally strict requirements).
- Warning there are “codes” out there that are actually not mandatory for all (e.g., Oregon Reach Code)
- Follow “adoptions” of the IgCC green building code – look out for those only applying to projects seeking green incentives or more mandatory approaches
- These need to be considered in all phases of project
- Also to be considered are applicable incentives and those targeted
- Parties often have their own green goals
- Just as traditional schedule, budget, and project functional requirements can conflict – and must be reconciled – green requirements must also be reconciled with other requirements
- Define green requirements as clearly and as early in the project as possible

This Just Does Not Cut It Anymore

- “Shall achieve LEED certification”
- “Shall achieve LEED Gold certification”
- “Shall meet the standards for LEED Gold certification”
- “Shall design the project to meet the requirements to achieve a LEED Silver rating”
- Instead of labels, focus on the underlying requirements, credits and goals and incorporate those into the program, the budget, the design the specs and the contract documents

Spread the Wealth... of Responsibility That Is

- No single member can achieve the credits to achieve a given level of LEED certification
- So no single project team member can be made solely responsible for achieving the project's overall green goals.
- Look for coordinated approaches to achieve goal
- Do not embrace approaches pushing responsibility to the Owner as a default
- EARLY planning, green goal definition, allocation of responsibilities, and reconciliation of conflicting green goals are critical

Green Litigation – Not A Lot, Yet, But What Does It Tell Us, So Far...

- Clarity of Scope of Work is ALWAYS important
- With “green” projects, you cannot rely on labels and catch phrases
- Need to be even more clear and concise about:
 - The expectations of the parties...all of them
 - Who is responsible for what
 - Coordination among the parties

Green Litigation – Fast Forwards and Crystal Balls – Professional Negligence

- Breach of the Professional Standard of Care can give rise to a claim against a designer (Architect or Engineer) for Professional Negligence
 - What is the Standard of Care?
 - How is it determined?
- Heightened Standard on Green Projects?
 - By Contract?
 - By Experience or by Representations?
 - By Other Sources?
- Other Possible Arguments on the Horizon?
 - Breach of Fiduciary Duty?

So Who *Should* Be Responsible?

- Strong demand remains for pursuing green/sustainable design and construction
- So, how do we allocate roles, risk and responsibility?
- Great debate remains on proper allocation of risk on a “green project,” even after all major construction form families have weighed in
- Owner, Design Professional and Contractor views on allocating liability need to be considered
- Pendulum cannot swing too far in any one direction

So Who *Should* Be Responsible? (cont.)

- Consider alternative approaches to advance more objective risk/responsibility allocation
- Identify a potential equilibrium in contractual allocation of green/sustainable liabilities
- Party most closely responsible for delivering certain aspects of green/sustainable credit/component of project should have relatively equal amount of responsibility/liability/risk
- Difficult where multiple parties are essential to achieve credit/deliver component

Some Additional Background Necessary to Understand Allocation Challenge

- Design professionals advocating for green
- AIA B101 – 2007 Standard Form of Agreement between Owner and Architect
- In a number of instances in that document, Architect is charged to advocate to owner the consideration and pursuit of green/sustainable project approaches

Allocation Challenge (cont.)

- Architectural (and engineering) ethical standards/canons equally compel design professionals to proselytize for green/sustainable buildings
- On top of these forces are market perceptions urging Owners to go green
- So, even absent mandatory provisions, Owner almost compelled by design community and marketplace to embrace green/sustainable building goal

Form Construction Contracts: An Initial Step Towards Allocating Risk

- Key risk driver in sustainable design/construction emanates from incentives and penalties that derive from achievement/failure to meet specified sustainable goal
- AIA Treatment of Green
- AIA came out with one of first, but basic, contractual treatment of LEED services with B214–2007 Standard Form of Agreement of Architect’s Services: LEED Certification (now in second 2012 version/iteration)

AIA Approach

- LEED–Centric
 - Article 2 calls for providing Owner all agreements required for LEED registration/certification
 - Also discusses:
 - LEED Workshop
 - LEED Certification Plan
 - Various LEED certification–related services

AIA Approach (cont.)

- Article 4 addresses Owner's responsibilities
- Number of provisions requiring Owner to actively perform certain functions in pursuing LEED
- E.g., Owner's obligation to advise Architect of proposed changes to project which may affect LEED Certification Plan
 - Question of whether or not the Owner is practically equipped to discharge that function remains unaddressed by B214-2012

AIA Approach (cont.)

- In Section 6.2, Owner and Architect (really more the Owner) required to acknowledge that LEED Certification “is awarded by an independent third party organization, and is dependent on factors beyond the Architect’s control”
- Section 6.3 inserts *theoretically* mutual waiver of consequential damages (runs more to the benefit of the Architect)
- Speaking of consequences—liability and risk largely Owner’s under document

AIA Approach (cont.)

- Not only contract document form issued by the AIA addressing green/sustainable design/construction
- In 2012, AIA released five (5) new members of the AIA family of contract documents specifically developed to be used on “Sustainable Projects”

AIA Approach (cont.)

- Sustainable Project Family of Documents
 - AIA acknowledges difference of green projects
- AIA also proffers that documents have been drafted to allocate duties and risks to party that is best able to manage them
 - Has AIA really achieved stated goal?
 - Actually place great deal of responsibility on the Owner
 - Little participation of Contractor in the early (critical) collaborative process

AIA Approach (cont.)

- In AIA D503 Guide (edition released after the SP Family of Documents introduced), AIA states that “[b]ecause the Sustainable Projects documents have been drafted with these [IgCC] issues in mind, they are likely the best place to begin when the IgCC is applicable to your Project. These Documents have been drafted to allocate duties and risks to the party that is best able to manage them and provide a framework for the Architect to develop a sustainability plan that efficiently allocates the requirements of the IgCC to the appropriate party.”
- Again, whether or not AIA has achieved stated goal remains to be seen

AIA Approach (cont.)

- AIA points out in the 2013 version of the D503 (Guide) that the mutual waiver of consequential damages has been specifically modified to deal with unachieved energy savings, lost financial or tax incentives, or unachieved gains in work productivity associated with a failure to achieve desired level of sustainable objective
 - Leaves Owner with little recourse

AIA Approach (cont.)

- In November of 2013, AIA introduced additional members to Sustainable Projects documents family, including:
 - Construction Manager as Advisor Family
 - Construction Manager as Constructor Family

AIA Approach (cont.)

- Sustainable Project (SP) Forms: The Initial Family Portrait:
 - B214–2012, Architect Services: LEED Certification
 - A101–2007 SP, Standard Form of Agreement between Owner and Contractor for use on a Sustainable Project Where the Basis of Payment Is a Stipulated Sum
 - B101–2007 SP, Standard Form of Agreement between Owner and Architect, for use on a Sustainable Project
 - A201–2007 SP, General Conditions of Contract for Construction, for use on a Sustainable Project
 - C401–2007 SP, Standard Form of Agreement between Architect and Consultant, for use on a Sustainable Project
 - A401–2007 SP, Standard Form of Agreement between Contractor and Subcontractor, for use on a Sustainable Project

AIA Approach (cont.)

- Then, AIA introduced even more members to this newest SP branch of the AIA document family (SP counterparts to AIA's construction manager as advisor, construction manager as constructor, and large/complex project series):
 - A132–2009 SP, Standard Form of Agreement between Owner and Contractor, for use on a Sustainable Project, Construction Manager as Advisor Edition
 - A132 SP Exhibit A, Determination of the Cost of the Work
 - A232–2009 SP, General Conditions of the Contract for Construction, for use on a Sustainable Project, Construction Manager as Advisor Edition
 - B132–2009 SP, Standard Form of Agreement between Owner and Architect, for use on a Sustainable Project, Construction Manager as Advisor Edition
 - C132–2009 SP, Standard Form of Agreement between Owner and Construction Manager as Advisor, for use on a Sustainable Project

AIA Approach (cont.)

- A133–2009 SP, Standard Form of Agreement between Owner and Construction Manager as Constructor, for use on a Sustainable Project where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price
- A133 SP Exhibit A, Guaranteed Maximum Price Amendment
- A132–2009 SP, Standard Form of Agreement between Owner and Construction Manager as Constructor, for use on a Sustainable Project where the basis of payment is the Cost of the Work Plus a Fee without a Guaranteed Maximum Price
- B103–2007 SP, Standard Form of Agreement between Owner and Architect for a Large or Complex Sustainable Project
- Detailed discussion of each beyond scope of presentation
- Note: The 2007 and 2009 dates refer to the base document issuance date, not when they were released with sustainable project revisions

AIA Approach (cont.)

- But the AIA was not yet done -- took very aggressive approach on disclaiming architect responsibility with the Client Waiver and Informed Consent to Use Experimental Green Product
- I HAVE READ THIS CONSENT FORM AND UNDERSTAND THAT I AM WAIVING CERTAIN LEGAL RIGHTS BY SIGNING BELOW. I SIGN THIS CONSENT AS MY OWN FREE ACT, WITH KNOWLEDGE OF THE RISKS INVOLVED AND SIGN THIS UNDER NO COERCION OR DURESS
- Waiver/Informed Consent could not be clearer about who, between owner and architect, bears more responsibility for “Green Product[s]”

ConsensusDOCS Approach

- Green Building Addendum (“GBA”) Document No. 310
 - Law had not yet caught up with technology developments
 - Managing information
 - Early in design/planning process
 - Continuing to manage information throughout project

ConsensusDOCS Approach (cont.)

- More detailed and broadest treatment of allocation of risk and responsibility
 - GBA emanated from recognition that law had not yet caught up with technology developments driving interest in green/sustainable projects
 - GBA's approach focuses on managing information early in design/planning process continuing to manage information throughout project

ConsensusDOCS Approach (cont.)

- Facilitate submission of necessary information during design and construction
- Emphasis on providing maximum input by all of potential project participants to address challenges
- Intended to be used with host of potential contract document forms (but not design-build)
- Also intended to be appended to subcontracts in connection with project (encouraging participation in the process)

ConsensusDOCS Approach (cont.)

- One of most significant features of GBA was creation of Green Building Facilitator
 - GBF can be an individual or an organization, but is not intended to be part of Owner/development team
 - GBF's role primarily one of coordination, cooperation, collaboration and documentation of project's design, construction and certification
 - Finally (at the end) provisions addressing risk/liability allocations are included

DBIA's SPGE Approach

- DBIA utilizes a Sustainable Project Goals Exhibit (“SPGE”)
- DBIA's SPGE intended to be used with the DBIA's other design-build forms
- LEED-centric
- Notable regarding the DBIA's approach is increased responsibility placed upon owner as a part of green/sustainable design/building process

DBIA's SPGE Approach (cont.)

- Article 2 addresses commissioning and engagement of independent commissioning authority
- Article 3 prominently covers legal requirements, but places responsibility on owner to investigate/identify, and adopts “best efforts” approach to LEED compliance

DBIA's SPGE Approach (cont.)

- Distinctive feature of Article 4 is a “check-the-box” approach for specifying remedy where there is failure to achieve desired level of LEED Certification “after a timely appeal to the USGBC or other certifying organization ...”

DBIA's SPGE Approach (cont.)

- Three options:
 - (1) waiver of Design–Builder liability;
 - (2) liquidated damages; or
 - (3) a “Limited Obligation to Cure”
- DBIA has tackled question of what happens where there is failure to achieve identified sustainable project goal

DBIA's SPGE Approach (cont.)

- Article 5 covers “Experimental Products, Designs or Systems”
- Section 5.3 (*“in the event the Owner is not satisfied with the performance of the [sustainable product], the Owner shall look solely to the manufacturer, supplier or installer of the same, and waives any claim against the Design–Builder and its Design Consultant that result from the Owner’s selection of the sustainable product for use on this Project.”*)

DBIA's SPGE Approach (cont.)

- Ultimately, DBIA places great responsibility on owner at conclusion of SPGE (using disclaimer similar to that in AIA's Waiver/Informed Consent document):
- ***“I HAVE READ THIS CONSENT FORM AND UNDERSTAND THAT I AM WAIVING CERTAIN LEGAL RIGHTS BY SIGNING BELOW. I SIGN THIS CONSENT AS MY OWN FREE ACT WITH KNOWLEDGE OF THE RISKS INVOLVED AND SIGN UNDER NO COERCION OR DURESS”***

USGBC Approach

- Perhaps even USGBC/GBCI are somewhat complicit with shifting risk to Owner
 - Under LOL3, which is vehicle for registration and certification of LEED project, the Project Registration Agreement used by GBCI limits monetary exposure of GBCI and excludes simple negligence and breach of contract liability
 - LEED Product Certification Agreement, required to begin project certification process, contains similar limitations on liability and adds certain indemnity obligations running in favor of GBCI/USGBC

USGBC Approach (cont.)

- Confirmation of Agent Authority document, typically signed by the Architect, makes Architect the Owner's agent and places a great deal of responsibility on the Owner (e.g., holding the Owner accountable for the Architect/agent's actions)
- USGBC/GBCI default model would appear to place green project risks and responsibilities on Owner

Preferred Green Risk Allocations

- Consideration of the Different Party Perspectives
 - One-sided contracts are often crucibles for dispute
 - Instead, with more balanced contract approach in mind, there can be better allocation of responsibilities, risks and liabilities
 - Should incentivize reason among parties involved and will likely lead to more successful projects overall/having much less risk of winding up in front of arbitrator/judge/jury

Risk Allocations (cont.)

- Perhaps best way to appreciate how to contractually approach a green/sustainable contracts is to understand what distinguishes them from their traditional building counterparts
 - Emerging technologies may be far more prevalent
 - Success is oftentimes dependent upon even closer interrelationship and coordination of performance between owner, design and construction teams

AIA Allocation

- Under AIA approach, quite possible that Owner's "desire" for green/sustainable project objective driven by Architect's advocacy for such a project
 - B101-2007 – portions of this document put Architect in role of salesperson for green/sustainability
 - B214-2012 – portions make it apparent that Owner is largely left unprotected re: shortcomings in project's achievement of the "desired" sustainable objective

AIA Allocation (cont.)

- Owner required to:
 - advise to perform in accord with Sustainability Plan
 - provide “any necessary information” for achievement of Sustainable Objective
 - comply with requirements of Certifying Authority regarding ownership, operation and maintenance of project
 - responsible for appeals
 - provide commissioning agent

AIA Allocation (cont.)

- No warranty or guarantee language
- B101– 2007 SP § 3.3.7.7 emphasizes “[a]ny certification, declaration or affirmation the Architect makes to the Certifying Authority shall not constitute a warranty or guarantee to the Owner or to the Owner’s Contractors or Consultants”

AIA Allocation (cont.)

- Sections 5.13 through 5.17 of the B101 – 2007 SP emphasize Owner's responsibilities in achievement of the Sustainability Plan, Sustainable Measures and the overall Sustainable Objective
- Owner is required to:
 - a) advise its contractors and consultants to perform services in accordance with Sustainability Plan
 - b) provide Architect any information requested by architect relevant and necessary for achievement of Sustainable Objective
 - c) comply with requirements of Certifying Authority regarding ownership, operation and maintenance of project during construction and following completion

AIA Allocation (cont.)

- d) “be responsible for preparing, filing and prosecuting appeals to the Certifying Authority, or taking any other action determined by the Owner to be necessary or desirable, arising from the revocation or redirection of an awarded Sustainability Certification,”
- e) provide services of commissioning agent, unless that service is specifically engaged from Architect

AIA Allocation (cont.)

- One final provision to note is B101 – 2007 SP’s Section 10.9:
 - Owner and Architect acknowledge that achieving the Sustainable Objective is dependent on many *factors beyond the Architect’s control*,
 - such as the Owner’s use and operation of the Project;
 - the Work provided by the [others]; or
 - interpretation of credit requirements by a Certifying Authority
 - “Accordingly, the Architect does not warrant or guarantee that the Project will achieve the Sustainable Objective”

AIA Allocation (cont.)

- While there is much in green/sustainable realm Architect cannot control (particularly with regard to certification), also a great deal of success of these projects largely depends upon Architect's performance
 - Green goal may be result of Architect's advocacy in first instance
 - Owner should proceed with caution before it embraces green/sustainable advocacy of Architect
- Other AIA documents similarly look to Owner to discharge key functions dealing with green projects

ConsensusDOCS Allocation

- Intentional approach to provide liability considerations at very end
- Other defined elements of the GBA were intended, if at all possible, to make the liability provisions almost superfluous
- Key to GBA is unique allocation of risk/responsibility to GBF
 - GBF does accept a great deal of responsibility the project failing to achieve the desired green status, specified green measures or overall green/sustainable project objective
 - Efforts by some in insurance community to underwrite insurance for GBF

DBIA Allocation

- Notwithstanding check the box option for allocating liability, DBIA also resorts to approach placing greater responsibility on Owner
 - Namely, there is an Owner consent to use of the sustainable product and a disclaimer of warranties and responsibilities for the sustainable product.
 - See Section 5.3 of the SPGE (“in the event the Owner is not satisfied with the performance of the [sustainable product], the Owner shall look solely to the manufacturer, supplier or installer of the same, and waives any claim against the Design–Builder and its Design consultant [sic] that result from the Owner’s selection of the sustainable product for use on this Project.”)

DBIA Allocation (cont.)

- DBIA's SPGE uses same disclaimer as AIA in Waiver/Informed Consent document
 - What is notable (aside from the use of the identical language from the AIA's Waiver/Informed Consent document) is the SPGE takes what appears to be a contractual addendum and turns it largely into a one-sided mechanism, requiring acquiescence by owner to the terms of SPGE in order for owner to seek desired goal of project sustainability

General Owner Considerations

- Advocacy of the Architect
- Reality of Consequential Damages
- Accountability/Incentives for Performance
- Sophistication of Owner
 - Responsibilities attributed to Owner
- Involvement of third parties
- Aggressive risk shifting

Owner Participation

- With often least construction and design experience
 - Most of current trends of managing risk and responsibility have placed into motion a pendulum which, at the moment, is trending against Owner/developer in terms of risk for achievement of project's sustainable goal

Owner Participation (cont.)

- Theorem:
 - Owner wants a building to own or sell
 - Owner stands to benefit from green/sustainable elements of project
 - Owner will likely have control over operation and maintenance of building after project completion
 - Even prior, Owner will have an interest in appearance of building along with site selection and material detailing for project

Owner Participation (cont.)

- Therefore, the conclusion is Owner should be charged with the responsibility of the project's ultimate success or failure
 - Keep in mind that in voluntary model, Owner is oftentimes encouraged by outside forces to consider or pursue sustainable approach
 - Parties should keep in mind potential liability imposed upon Owner under current contract models and work to defuse potential liabilities before they arrive on courthouse steps

Owner Participation (cont.)

- In context of sophisticated Owner/Developer, allocations of responsibility in either AIA SP Documents or the USGBC's LOL3 Project Registration Agreement may very well be reasonable
 - However, in scenario where Owner is not sophisticated green/sustainable participant, placing this degree of responsibility on owner could be, from knowledge/expertise standpoint, the worst possible choice

Design Professional General Considerations

- Design Professional – Least Able to Pay Risk
- Lack of Control Over Enforcement/Certification
- No Real Control Over Available Materials
- Budget Limitations
- Access to Information
- Consequential Nature of Damages

Contractor General Considerations

- Design Decisions by Others With Little Input
- Access to Information Limited at Times
- Materials/Processes Are Not Within Control of Contractor
- Performance Bond Issues
 - Do bond forms cover green liability – especially those long tail obligations?

Suggestions for Moving Forward

- If form documents are going to be utilized, provisions broadly placing responsibility on Owner and/or severely curtailing Owner's potential liability recovery options need to be considered as a part of Owner's risk management calculation
- Optimally, the project could utilize the more balanced GBA allocation approach at the same time incorporating some of the features tied to GBF responsibility

Suggestions for Moving Forward (cont.)

- Could look to the DBIA's check the box approach to liability management as method or starting point for having reasonable liability allocation dialogue among various project participants

Suggestions for Moving Forward (cont.)

- Overall, goal should be to place liability and responsibility in hands of party most directly responsible for delivery of that particular green or sustainable project component
- If criteria is established by code, either by CALGreen, IgCC, or other mandatory-type codes, then those code requirements should be carefully reviewed and considered so that contract documentation can be tailored accordingly

Suggestions for Moving Forward (cont.)

- If green/sustainable objective is more voluntary in nature and pursued as a part of a green rating system, such as LEED, a deeper understanding of LEED certification process, LEED credits themselves, and how LEED intersects with potential project incentives, will all be important points to be kept in mind when drafting design and construction contract documents

Suggestions for Moving Forward (cont.)

- Additional challenges are likely to present themselves in the future will come from more widespread use of newer version of LEED, now known as LEED v4
 - Building life-cycle impact reduction
 - Building product disclosure and optimization
 - Construction and demolition waste management
- Given these additional criteria, it may be necessary to once again return to existing contractual documentation to make certain new requirements are finding their way into appropriate bucket of project participant responsibility

Concluding Thoughts

- Through evaluation and consideration of some of these provisions, and techniques to address them, it is possible that Owner can move the pendulum away from the current Owner exposed position
 - A pendulum swing into an equilibrium status may result in a more efficient achievement of project's green/sustainable objective
 - Also likely to reduce potential for litigation and other costly disputes