Liability
The Liability Implications of Pursuing LEED Certification
by Jeffrey W. Cavignac, CPCU, ARM, RPLU, CRIS, president & principal, Cavignac & Associates
(Editor’s Note:  Jeff Cavignac, CPCU, ARM, RPLU, CRIS, is president and principal of Cavignac & Associates, a commercial insurance brokerage firm providing a broad range of insurance and expertise to design and construction firms. More information about the company can be found on the web at www.cavignac.com.)

The advantages of LEED certified buildings are numerous. They use resources more efficiently than conventional buildings, and generally provide healthier work and living environments. The USGBC cites an impressive “laundry list” of benefits arising out of LEED certified construction ranging from improved air and water quality to reduced solid waste.

However, these benefits are often offset by additional costs inherent in green construction. Further, many design professionals and contractors don’t fully understand sustainable construction principles and methods. Often, this requires additional research, and the confusion leads to disagreements between owners, designers, and contractors.

Availability of building components that meet LEED standards are sometimes the problem, not to mention that many of these "green materials" are usually more expensive. Then there is the added cost of having the building certified. Added costs come in the form of extra time corresponding with the USGBC, the cost of LEED design-aid consultants, and the hiring of the required commissioning authority. The USGBC will point out that these higher initial costs will be offset by lower operating costs over the life of the building, and employee productivity gains incurred as a result of working in a healthier environment. Additionally, there are potential tax
credits for developing a green building, as well as possible variances from local building codes.

Whether or not green buildings will generate the savings owners are looking for remains to be seen. Tim Corbett, a risk management consultant to the design community, pointed out that the National Renewable Energy Laboratory (NREL) in Golden, Colo., (a unit of the U.S. Department of Energy) is midway through construction of a $64 million project that lays claim to the title of being the "Greenest Building in America.” Architects and engineers have spent hundreds of hours calculating the energy use of every aspect of the building, from the elevator to the exit signs. They have tweaked the design again and again with the aim of getting the 218,000-square-foot building to perform at net zero, consuming so little energy that it won't need to draw a single electron from the grid.

All of these techniques cost money. A run-of-the-mill office tower in Denver costs about $140 per square foot to design and build, according to an analysis by RS Means, a unit of Reed Construction Data. The NREL building will cost twice that, at $280 a square foot unfurnished, according to Haselden Construction. But NREL states, "its building meets federal guidelines for government construction costs," saying federal buildings generally cost more because of added safety and security requirements.

Rob Watson, editor of GreenerBuildings.com, is well known for developing the USGBC’s Leadership in Energy and Environmental Design rating system (LEED). Recently Watson issued a report that identifies market trends, water efficiency, and energy use for LEED projects. The data is discouraging. “Some LEED buildings are not performing as expected given their design and technology elements,” states Watson.

Another report released last fall by USGBC’s Chicago and Partners evaluates efficiencies of LEED certified buildings in Illinois. What they learned was LEED buildings were performing only 5% better than non-LEED
buildings throughout the region. Platinum and Gold LEED structures were found to be "no more efficient" than Silver or basic LEED certified buildings.

What does this mean for designers and constructors? Most likely, some unhappy clients and increased risk. Many clients are expecting to recoup increased costs for design and construction of a LEED building through better performance and energy savings. To the extent these expectations are not met, fingers will be pointed.

The Challenges

Owner Expectations. If an owner expects a "Gold" certified building and receives a "Silver," he may want someone to make changes so it can rise to the "Gold" standard. Similarly, if an owner expects energy savings to offset increased construction costs and those savings are not there, disputes may/will arise.

Scope/Schedule. Green buildings may require additional research, approvals, and unique coordination challenges. Unless you have built these into your fee and schedule, you may end up underpaid, with a schedule that is impossible to meet.

LEED Reporting Requirements. LEED 2009 requires that certified properties share data on energy and water usage in their building for at least five years. Although this is the owner's responsibility, the owner could transfer the research to the design professional or design/build contractor. This five-year reporting requirement also creates uncertainty: What if a building initially qualifies for certification but subsequently fails to comply with LEED requirements?

Guarantees. You may be asked to “guarantee” a certain level of certification, or your marketing materials might imply that you are an expert in LEED design or construction. Recognize that professional liability policies
only cover your negligence, not for risk you assume contractually that goes beyond the standard of care.

**Unique Building Systems and Materials.** LEED certified buildings require the use of "green" products. Many of these are new and untested. In addition, it is unclear how some of these products will perform with existing building systems.

**Project Team Capabilities.** A LEED accreditation doesn’t make one an expert. An inexperienced project team might not know what they don’t know.

**Maintenance and Operation.** The payoff of a green building is often decreased maintenance and operation costs. But if the owner doesn’t understand how to maintain and operate the building, and if the savings are not there, both designers and builders will be involved with solving “the problem.”

The Solutions

**Manage Owners’ Expectations.** You need to be the reality check. Insist on a “pre-bid” LEED meeting or charette. This is a session where the owner, designers, and constructors discuss the project and specifically the unique aspects of the green construction. Make certain the owner understands that building a Green Building requires additional time, innovation, and planning – and in many cases, a higher fee. In addition, achieving a certain LEED level does not guarantee savings.

**Negotiate a Fair Contract.** Review your contract carefully, specifically guarantees, timelines, and indemnities. Don’t promise something contractually that you can’t provide. You should not guarantee performance. The law only requires you to perform to the Standard of Care. You can endeavor to achieve a certain level of LEED Certification, but you should avoid guaranteeing it. LEED certified buildings will also take longer to design
and build. They require research, and in many cases additional time to satisfy the LEED reporting requirements mentioned above. These issues are compounded by unique aspects of green construction, which inevitably will extend the construction schedule. Make certain the schedule or timeline is reasonable. Finally, beware of any specialized indemnity agreements or insurance requirements.

**Research and Document.** Understand what you are designing and what you are building. Make time to do appropriate research. If you are asked to specify products you are unfamiliar with, or if you are not confident the product being used is appropriate, call this to the appropriate parties’ attention and document it. Where possible, get assurances from manufacturers and suppliers.

**Have an Experienced Project Team.** You should only pursue LEED certified projects if you know what you are doing. If you don’t have the expertise, get it. If you are subbing out work that requires LEED experience, make sure your consultants or subcontractors have the requisite expertise.

**Maintenance and Operation.** It is imperative that there be a “commissioning process” to educate the owners on how their building works, and what their responsibilities will be to maintain and operate the facility.

**Conclusion**

Sustainable design and accreditation are moving targets. Problems will arise with green construction. This is a risk, however, that lends itself to be managed.

You need to make certain your client understands the unique requirements of building green. Your contract should have a clear scope of services, outlining not only what you will do, but also what you are not doing and what you can do for an additional fee, as well as the owners’ responsibilities.
Particular attention should be focused on fee, construction budget, and scheduling aspects of the contract. Make certain the client understands that designation of a certain level of LEED certified building is outside your control. You can make reasonable efforts to achieve the LEED objectives on the project, but you cannot guarantee a certain level of LEED certification. Nor can you guarantee actual performance of the building or dollar savings.

The green building boom appears to be here to stay, and this will create opportunities and challenges. It is important to remember that these projects require additional attention and should not be considered "business as usual." Proactive risk management cannot only help you identify the challenges, but it can help you manage them as well.

•••