

# LEEDing the Way

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The current economic slowdown has significantly reduced new commercial real estate

development; however, as the industry prepares to move out of the meltdown, there will be a need for developers and landlords to distinguish their product from a crowded field. As a result, green-certified buildings will be back in the forefront. You can see this currently in the marketing efforts being undertaken with retrofitted existing properties as well in the new structures. While green developers focus most of their efforts on accepted benchmarking for the design, construction, and operation of green buildings, there are inherent legal risks that must be understood in green development.

**ISSUES FOR CONTRACTORS:** There are numerous federal, state, county,

and municipal executive orders, guides, rules, and regulations governing LEED programs and green development. What happens when a contractor is hired to construct a building to achieve a particular level of green certification, and the certification is denied? If the contract documents set out the certification as a requirement, then the contractor will have breached its obligations if the failure to certify was a result of construction issues. If the contract documents are not clear, the courts will become the forum for determining liability. Issues of insurance coverage for consequential damages arising from such a breach of contract will also be present. Well drafted contracts are critical – the days of using “old forms” are not going to work in green development. Most of the design or construction industries have not developed appropriate language to include in their standard contracts or attachments. Contractors must be aware of the special provisions for each LEED

will know the requirements, be qualified and capable of performing.

**ISSUES FOR OWNERS:** Before kicking off a new project, owners should include the aspects of sustainable design and planning that are required (or appropriate) to the project as well as the jurisdiction. Owners should specifically address LEED certification requirements for the building and project and the certification goal. They must decide whether their bid packages provide for the minimum LEED certification level or state precisely which level must be achieved. An owner must also reevaluate their current insurance policies. A special form property policy will ordinarily insure a damaged or destroyed commercial property. But if a building is changed to achieve LEED certification, the existing policy may not have enough coverage for these additional costs, especially when you consider the cost of recertification fees, construction delays for green certification, and the loss of income from the loss of alternative energy production during restoration. Furthermore, from a legal standpoint, Owners and their lawyers should make sure that:

- Contractors and design professionals must be contractually obligated to follow specified green requirements. This sounds basic, but many contracts don't clearly identify design and performance specifications



issue and how certification is affected. These provisions may not be in the specifications. Contractors must also focus on their subcontracts so that the subcontractors

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- Specify who is at risk for failure to meet green standards. For example, LEED certification points may be acquired based on design/specifications and others focus on performance. These distinctions will help assign responsibility – and liability.
- Additional liquidated damages may be necessary, especially for developers/landlords looking for specific certification. Failure to get that certification may result in damages over and above the typical damages for failure to timely complete a project since such failure will adversely affect the value of the property and diminish the rental stream.

**RISKS FOR DESIGN PROFESSIONALS:** It is well known that design professionals may be sued for the failure to perform contractual obligations. And considering that LEED stands for “Leadership in Energy and Environmental Design”, it is no surprise that design professionals are typically most at risk for failure to achieve proper green certification. Since green building standards are new and evolving, design professionals are often educating their clients about the levels of LEED certification, and these advisory sessions may give rise to a performance warranty that exposes design professionals to greater potential liability that may not be covered by their professional liability insurance. From a



legal standpoint, design professionals should do the following to manage risk:

- Work with an insurance professional to evaluate their E & O coverage for “green design” and whether the work to be performed is covered by the policy.
- Consider including a specific indemnification and release from the owner and indemnification from the general contractor for damages sustained by the owner in the event certification is denied as a result of value engineering or contractor negligence.

Green building can provide a variety of benefits to clients and the community; however, clients should clearly understand the risks as outlined above and approach their projects accordingly.

## IREM CALENDAR



**JANUARY 11, 2011**

**Membership Luncheon**

W Hotel – Downtown Dallas

**FEBRUARY 8, 2011**

**Joint Luncheon with Apartment Association of Greater Dallas**

Renaissance Hotel – Dallas

**FEBRUARY 17-19, 2011**

**FEBRUARY 24-26, 2011**

**RES201 – Residential Management**

Spectrum Center

**MARCH 8, 2011**

**Membership Luncheon**

Location TBA

**MARCH 16, 2011**

**1/2 Day Seminar**

**Innovation in Management**

8:30 am - Noon

Spectrum Center

**MARCH 24, 2011**

**ETH800 – Ethics for the**

**Real Estate Manager**

Spectrum Center

**APRIL 9-13, 2011**

**IREM® Leadership and**

**Legislative Summit**

Washington, DC

## SAVE THE DATE

**APRIL 28, 2011**

**IREM® Dallas Signature Event**

Celebrating “Earth Day”

In the Wide World of IREM®