

PLI

Practicing Law Institute

Drafting and Negotiating “Green” Contracts



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Key Concepts Addressed in the GBA

- ◆ What is Green Building?
- ◆ Key Risk Categories:
 - Risks inherent in Certifications
 - Risks of Performance

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Key Concepts Addressed in the GBA

- ◆ Who assumes liability and responsibility?
 - Owner?
 - Architect?
 - Contractor?
 - Green Building Consultant?
- ◆ Do the responsibilities divide along the lines of design and construction?

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Key Concepts Addressed in the GBA

- ◆ Who bears responsibility for various elements of green performance?
- ◆ Can it be answered by imposing responsibility in one place?
- ◆ What are the consequences – liable for what?

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Key Concepts Addressed in the GBA

◆ Addressing:

-Process & Procedure

◆ Solved Most Issues Pertaining to:

-Liability

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Overview of the GBA

1. GENERAL
2. DEFINITIONS
3. GREEN REQUIREMENTS AND PROCEDURES
4. GREEN BUILDING FACILITATOR
5. GREEN STATUS
6. GREEN MEASURES
7. PLANS AND SPECIFICATIONS
8. RISK ALLOCATION

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Green Building Facilitator

- ◆ 4.1 The Owner has appointed the Project Participant whose box is checked as indicated below to serve as GBF, unless and until replaced by Owner:
 - Architect/Engineer
 - Contractor
 - Other _____

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GBF Guides the “Green” Process

- ◆ 4.5 The GBF shall coordinate and facilitate the process of obtaining the Elected Green Status, including identifying Green Measures, alternatives and providing such other services, advice and guidance as provided in this Addendum. The GBF is not, however, assuming the role or responsibilities of the Architect/Engineer, who shall retain responsibility for the design of the Project...

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What is Meant by “Green”

- ◆ 3.1 Owner has elected to incorporate Green Measures into the Project so that the Project can achieve (check as applicable):
 - ___ The Elected Green Status
 - ___ Benefits to the environment or natural resources, either as part of the construction process or during the life cycle, use or maintenance of the Project.

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Goal of Building “Green” is Defined

- ◆ 2.4 “Elected Green Status” means the Green Status elected by Owner in accordance with Article 5 of this Addendum.

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How is the Green Status Selected?

- ◆ 5.2 Upon Owner's determination of the Green Status that Owner elects to seek, such election shall be confirmed in writing by Owner to GBF, Architect/Engineer and Contractor...

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How Will the Green Status Be Achieved?

- ◆ 2.11 “Green Measures” means that specific performance required of the Project Participants to achieve Green Status as further described in Article 6 of this Addendum.

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How are Green Measures Selected?

- ◆ 6.2 The GBF shall meet with Owner and such other Project Participants then engaged by Owner as may be reasonably required to assist Owner in determining which combination of Green Measures identified in the report prepared by the GBF are acceptable to the Owner and result in attaining the Elected Green Status.

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How are Green Measures Selected?

- ◆ 6.5 When acceptable revised reports are provided to Owner..., Owner shall provide written approval of such reports and together the approved reports (with subsequent revisions...) shall be referred to herein as the Elected Green Measures.

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Who Does What?

- ◆ 2.12 “Physical Green Measures” means Green Measures that are incorporated in the Plans and Specifications as part of the design of the Project and that are intended to become a component of the physical Work when constructed.

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Who Does What?

- ◆ 2.14 “Procedural Green Measures” means those Green Measures that set forth specific means, methods or procedures that are to be followed or employed in the performance of the Work, including the preparation and submission of Green Certification Documents that are not intended to become a component of the physical Work when constructed.

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Who Does What?

- ◆ 6.1 The section of the report presenting the Procedural Green Measures shall specifically identify the Project Participant that is proposed by GBF to perform each Procedural Green Measure.

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Who Does What?

- ◆ 6.7 Architect/Engineer shall promptly incorporate in the Plans and Specifications the Elected Green Measures that are to be performed, implemented or satisfied by the Contractor...

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Who Does What?

- ◆ 6.7 Elected Procedural Green Measures that are to be performed, implemented or satisfied by the Contractor shall be set forth in a separate and distinct section of the Plans and Specifications by the Architect/Engineer so that Contractor may readily identify such Elected Procedural Green Measures.

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Who does What?

- ◆ 7.2 Plans and Specifications that include the Elected Green Measures shall be prepared in accordance with the following procedure ...

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What If the Architect Has Concerns?

- ◆ 6.7 Architect/Engineer... shall not be required to incorporate any Elected Green Measures to which Architect/Engineer may reasonably object as being inconsistent with Architect/Engineer's professional responsibilities or judgment. Objections by Architect/Engineer, if any, shall be raised and addressed as provided in this Article 6.

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What if the Contractor has Concerns?

- ◆ 7.3 If Contractor is then a Project Participant, within 30 days (or such other period of time period as Owner and Contractor may agree) of Contractor's receipt of the Plans and Specifications... Contractor shall provide a written statement to Owner, Architect/Engineer and GBF of objections...

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GBF's Role

- ◆ 7.4 GBF shall coordinate the effort to provide information and resolve any objection(s) or request(s) related to Green Measures. Contractor shall not be deemed to have assumed the responsibilities of Architect/Engineer or GBF, nor shall Contractor be liable or responsible for any defects or deficiencies in the Plans and Specifications...

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GBF's Role

- ◆ 7.1 GBF shall periodically review the Plans and Specifications as they are being developed by the Architect/Engineer and shall consult with and provide written advice and guidance to Architect/Engineer (if Architect/Engineer is not the GBF) and Owner regarding the incorporation of the Elected Green Measures into the Plans and Specifications

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Checking to Determine if Changes Affect “Green” Goals?

- ◆ 7.9 Should, during the course of the Project, modifications to the Plans and Specifications arise or be proposed, such modifications shall be addressed as follows ...

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Acknowledges Potential for Change Orders

- ◆ 7.6 Should the Plans and Specifications issued by the Architect/Engineer... impose obligations or responsibilities that differ from those previously assumed by any of the Project Participants in their respective Governing Contracts..., a Change Order or other comparable document shall be prepared.

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Drafted to Accommodate Architect or Contractor Serving as GBF

- ◆ 6.8 In the event that the GBF is not the Architect/Engineer, should Architect/Engineer identify any reason to object to any Elected Green Measure...

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Risk Allocation

- ◆ 8.2 Liability of the Project Participants... shall be subject to any limitation or specific assumption of liability in their respective Governing Contract.

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Risk Allocation

- ◆ 8.2 Owner's loss of income or profit or inability to realize potential reductions in operating, maintenance or other related costs, tax or other similar benefits or credits, marketing opportunities and other similar opportunities or benefits, resulting from a failure to attain the Elected Green Status or intended benefits to the environment, shall be deemed consequential damages subject to any applicable waiver of consequential damages in a Governing Contract unless specifically excluded from such a waiver in the Governing Contract.

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Risk Allocation

- ◆ 8.3 Unless otherwise expressly provided in a Governing Contract, no Project Participant other than GBF shall be liable or responsible for the failure of the Elected Green Measures to achieve the Elected Green Status or intended benefits to the environment or natural resources. This Paragraph 8.3 does not relieve any Project Participant from any obligation to perform or provide Elected Green Measures as required by its Governing Contract.

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