



## » Sustainable Building Requirements Increasingly Getting the Green Light from Public and Private Owners: What Does it Mean for Contractors & Sureties?

Consideration and lessening of environmental impacts in all manner of human endeavors is a hot topic these days. Construction is no stranger to the subject. No doubt that you are seeing an increasing number of articles in construction trade publications and from consultants about interest in “green” construction. The term “green” is a catch-all word that may mean different things to different people. In the construction context, however, “green building” often is equated with a focus on sustainability and on building performance by incorporating “green” criteria into the design, construction, operation, and maintenance of facilities.

One set of green building guidelines is developed by the United States Green Building Council in the form of LEED (Leadership in Energy and Environmental Design) guidelines. LEED is a voluntary green building rating system in which projects are eligible for certification based on earning a sufficient number of points in key performance areas, such as in site planning, water conservation and efficiency, energy efficiency, materials and resources utilization, and indoor environmental quality. LEED programs exist for a number of building types, such as homes, schools, retail projects, and new commercial construction, and for building lifecycle stages, such as major renovations, existing building operations and maintenance, and commercial interiors. Through its emphasis on sustainability, efficiency, and consideration of environmental impacts, green building practices offer many potential benefits to building owners, occupants, and the public at large.

To achieve a LEED certification level or rating, decisions and follow-through actions must be made by all members of the project team—that is, each principal project participant—the owner, the designer, and the constructor—will bear some responsibility to achieve the desired outcome or rating. Optimally—as some commentators relate—the principal project participants engaged on a green building project likely will pursue an integrated approach to the design and construction of the facility. In such an environment, responsibilities may be shared, leaving bright-line distinctions among the respective responsibilities of the parties not always discerned easily.

The inclusion of new and innovative techniques and materials and the potential for blending traditional lines of project responsibilities by utilizing a “green building” approach raises a number of issues. How might “green building” practices impact underwriting considerations and the liability of contractors and of sureties providing performance bonds? I’m not sure that anyone has the exact answers at this point in time, but I do know that there is no time like the present for the surety industry to be thinking about these questions. I cannot help but believe that, in view of public and private owners’ considerable interest in pursuing green building projects, the surety industry should be proactive, not complacent, in being aware of and examining the issues posed by green construction. To that end, prudent producers and sureties

will need to take a careful look at construction contracts incorporating green building requirements. They will have to ascertain that the construction contractor understands the scope of its "green building" responsibilities and possesses the requisite experience and qualifications to perform the techniques and to work with the new materials called for in the contract. Special attention will need to be paid to the specifications and warranty provisions so that the contractor is not unwittingly agreeing to risk shifting language that ensures that the contractor will warrant certain building performance results or outcomes, especially outcomes that are beyond the scope and control of the contractor.

Is the contractor being asked to certify as to the level of recyclable content in a material specified by the architect? Is the contractor being asked to guarantee a certain level of yearly energy savings in the operation of the facility? Are there environmental protection requirements being placed on the shoulders of the contractor that are outside the contractor's control or that exceed existing legal parameters? These are just a few potential red flags; no doubt you will think of and see many more. The key, simply put, is to be prepared to look for and understand the ways in which green building requirements may change the nature of the contractor's undertaking and to assess whether the contractor is in the proper position to manage such undertaking.

Recently, a number of states, counties, and municipalities have considered and, in some instances, enacted laws requiring or encouraging green building practices. These laws have taken various approaches. One such law, the Green Building Act of 2006, was enacted at the end of 2006 by the District of Columbia. Among other things, this new DC law incorporates green building requirements, in the form of LEED criteria, into the construction code for public and private construction of a certain size. These requirements will be phased in over a period of years. Of particular interest is a requirement that any party applying for a construction permit provide security, in the form of cash, a letter of credit, or a "performance" bond, which may be forfeited in the event that the building fails to meet the law's "verification" requirements.

It is evident from a reading of the "performance" bond requirements contained in the new law that the underwriting and operation of surety bonds was not well understood by the drafters. Due to concerns with such requirements, NASBP and The Surety & Fidelity Association of America (SFAA) recently submitted written comments to the DC Government (which may be accessed by clicking [here](#)) and are coordinating efforts with the legislative committee of the Associated General Contractors of Metropolitan DC.

If the new DC law is a harbinger of "things to come," surety professionals must be poised to offer their expertise to legislators and to clients to sort through issues posed by green building requirements and to ensure that such requirements are not implemented at the expense of the building team and those that provide them surety credit.

*These materials are provided to NASBP members solely for educational and informational purposes. They are not to be considered the rendering of legal advice in specific cases or to create a lawyer-client relationship. Readers are responsible for obtaining legal advice from their own counsels, and should not act upon any information contained in these materials without such advice.*

