

AIA Document D503™ – 2013 Appendix G

This document is intended to provide general guidance and discussion and is not intended to provide legal advice. For a more thorough understanding of the issues raised in this document, readers may wish to consult legal or insurance counsel.

Special Terms and Conditions Imposed by Third Party Certification or Rating Entities (“Certification Authorities”), and in particular GBCI and USGBC

In addition to mandatory or optional credits and other specific requirements necessary to achieve a given certification, Certification Authorities may require users of the certification or rating system to enter into agreements directly with the Certification Authority. These agreements can create unique obligations and liabilities, and may include waivers, disclaimers, releases, and indemnification obligations. A project participant that simply accepts the terms of those agreements, without fully understanding them, may be accepting significant, unanticipated liability.

In addition, even in circumstances where the project owner has primary liability under the agreements, the owner may assert claims against other participants that flow down from the owner’s agreements with the Certification Authority. For example, the agreements might require the owner to indemnify the Certification Authority for third party intellectual property infringement claims arising from the Certification Authority’s use of information or materials submitted to it by, or on behalf of, the owner. In those circumstances, while the owner might be primarily responsible to the Certification Authority, the owner might seek to assert a claim against another project participant who negligently or intentionally allowed the information to be submitted. Because of this potential for secondary liability, it is important for each project participant to fully understand the range of possible outcomes associated with fulfillment of their specific project obligations, and to clearly delineate their roles and responsibilities. Project participants should carefully review the agreements required by the Certification Authority, and related documents, and when appropriate consult with legal and insurance counsel.

As an example, the following discussion outlines some of the additional obligations and requirements imposed by USGBC and GBCI as part of the LEED® registration and certification process. While the discussion focuses on the agreements and related documents required as part of the LEED process, and highlights the importance of reading and understanding those agreements and documents, the general concepts and obligations covered by this discussion might be applicable to other certification or rating systems, now or in the future.

LEED and LEED Online Version 3

In 2009 USGBC released LEED® version 3.0. As part of that release, USGBC mandated the use of LEED® Online™ Version 3 (“LEED Online”) as the vehicle for project registration, document submission, and project certification. The 2009 LEED registration process requires that all parties who will submit documentation, in furtherance of project registration or certification, agree to Terms and Conditions for the Use of LEED Online. In addition, there are several other agreements that must be accepted by the person or entity seeking to register a project for LEED Certification, or ultimately applying for that certification. Those agreements also incorporate by reference requirements and terms found in other LEED-related documents.

As originally drafted, the LEED Online required agreements placed significant obligations and responsibilities on the project registrant and on the persons or entities submitting the project for certification.¹ Concerns over

¹ In some instances, those obligations went well beyond what that person or entity could reasonably control. For example, the original Project Certification Agreement required the registrant, regardless of whether the registrant was the owner or some other project participant, to provide site access to documentation, and access to project specific energy and water performance documentation for a significant period of time after project completion. Clearly these matters would be within the purview of the project owner and would normally be beyond the scope of matters a project architect, contractor, or green building consultant could control.

the structure and terms of these agreements were raised with USGBC and GBCI by several industry groups. USGBC and GBCI considered the concerns and, in January 2011, issued revised agreements and related documents for use in conjunction with LEED Online and the LEED certification process (“the January 2011 LEED Online Documents”). The revised documents addressed many of the concerns raised.

The January 2011 LEED Online Documents, and the Confirmation of Agent’s Authority in particular, clarify that USGBC and GBCI are primarily interested in holding the project owner accountable for compliance with the requirements for seeking and maintaining LEED certification. Having said that, non-owner participants may still assume potential liability arising from the use of LEED Online and participation in the registration and certification process. It is therefore important that all project participants thoroughly read and understand the agreements and related documents associated with the use of LEED Online. It is particularly important for project owners to be aware of the content of these documents and the practical and legal obligations they impose.

The following sections discuss some of the key terms and conditions contained in the following January 2011 LEED Online Documents:

1. **Terms and Conditions for the Use of LEED Online Version 3.** All project participants submitting any information required as part of the registration or certification process must accept the terms of this document in order to utilize the LEED Online process.
2. **Confirmation of Agent’s Authority.** This document is used to identify individuals or entities authorized to act as agents of the Owner for the purpose of taking actions required to register a Project for LEED certification and to achieve and maintain certification. It also establishes an understanding that, in general, GBCI and USGBC will seek to hold the project Owner responsible for actions taken in furtherance of project registration and certification, even if those acts are taken by an agent of the Owner. In most instances, the onus will be on the agent (design professional, contractor, consultant, etc.) to have the form duly executed. Non-owner participants who do not get this form properly executed and submitted to GBCI and/or USGBC may find themselves liable directly to GBCI or USGBC for claims associated with the use of LEED Online and the registration and certification process.
3. **LEED Project Registration Agreement (“Registration Agreement”).** The terms of this agreement must be accepted in order to register the project and begin the LEED certification process.
4. **LEED Project Certification Agreement (“Certification Agreement”).** The terms of this agreement must be accepted in order to have GBCI review and certify a project.
5. **LEED Certification Policy Manual (“Policy Manual”).** This document contains many of the detailed requirements that must be met in order to maintain project registration and ultimately achieve project certification. The content of this document is incorporated by reference in the Registration Agreement and Certification Agreement.

NOTE: The following sections are based on the January 2011 LEED Online Documents. USGBC and GBCI may amend these documents, or add new documents to the certification program, at any time. Accordingly, the comments in the following sections are for general information and discussion only. Project participants should independently confirm that they have the most recent version of all documents applicable to their project, and review those documents carefully. Moreover, while many of the items noted or discussed in the following sections are also elements of the USGBC and GBCI required agreements issued prior to January 11, 2011, those earlier agreements have much different content and structure, and in many instances create different obligations among the project participants and USGBC and GBCI. For additional information about issues associated with these earlier documents, view the presentation [LEED Online Version 3: Be Wary of its Agreements](#).

Terms and Conditions for the Use of LEED Online Version 3

This agreement is required for the use of LEED Online and must be accepted by all LEED Online users on the project. The agreement is between the LEED Online user and GBCI. Though not designated as a party to the agreement, USGBC is designated as a third-party beneficiary to the agreement and therefore may

have enforceable rights under the agreement. The agreement contains a number of terms and conditions that impact the LEED Online user's rights and responsibilities, including the following:

1. The user warrants and represents that the user owns or controls all rights in any content posted by the user to any portion of LEED Online, or has obtained the necessary permissions from the Owner of those rights.
2. There are a number of disclaimers and waivers that seek to significantly limit GBCI's and USGBC's liability, including a clause seeking to limit GBCI and USGBC's liability generally to claims that are the direct and proximate result of GBCI's and/or USGBC's willful misconduct, gross negligence, or wanton or reckless behavior.
3. For those claims against GBCI and/or USGBC that might be allowed under the agreement, there are notice requirements and deadlines; as well as provisions that establish (i) venue for dispute resolution in the District of Columbia and (ii) application of the laws of the District of Columbia.
4. This agreement also contains provisions seeking to place indemnification obligations on the LEED Online users, including a very broad indemnification provision pursuant to which the user agrees "to indemnify and hold GBCI, USGBC, and both GBCI and USGBC's subcontractors, affiliates, officers, agents and employees harmless from any claim or demand, including reasonable attorney's fees, made by any third party due to or arising out of any content or information [the user] submit[s], post[s], transmit[s], modif[ies], or otherwise make[s] available through LEED Online, or [the user's] violation of this agreement."

While this and other agreements are presented digitally and can be accepted by the click of a mouse, it is very important that each LEED Online user understand the extent of liability that user may have to GBCI or USGBC arising out of the use of the LEED Online process; and how limited their rights might be with regard to recourse against GBCI or USGBC. In particular, it will be important for each user to determine if they have the proper authority to post all information they intend or need to post in LEED Online. So, for example, if an architect intends to post materials in LEED Online that were in whole or in part created or provided by its consultant, the owner, the contractor, or some other project participant, the architect will want to know that any person or entity who created or provided the content, including any downstream participant such as a subconsultant or subcontractor, has authorized its publication in LEED Online or in some other way has waived any claim it might have arising from such publication.

Confirmation of Agent's Authority

This document was prepared by USGBC and GBCI in direct response to the concerns raised by industry participants.² The Confirmation of Agent's Authority establishes that GBCI and USGBC are principally interested in holding the Owner accountable for compliance with the requirements of the various agreements and related documents required for the use of LEED Online and project registration and certification.

Pursuant to the Confirmation of Agent's Authority, the Owner and Agent named in the document are asked to confirm, for the benefit of GBCI and USGBC, that "the Owner understands and acknowledges that the LEED Certification process is based on contractual relationships between GBCI and the Owner" and also provides that "[i]f someone other than the Owner of the Project is, or will be, submitting materials, executing documents and agreeing to various obligations, GBCI requires explicit confirmation from the Owner that these actions are being taken on [the] Owner's behalf by an authorized party."

The Confirmation of Agent's Authority calls for identification of the Project, the Owner and the Agent; a statement as to the registration or certification status of the project; and indication of the LEED Green Building Rating System under which the project is, or will be, registered. Additional key terms include the following:

1. An express grant of authority by the Owner to the Agent to take any and all actions the Agent deems necessary or advisable in connection with the LEED certification process, an express

² See FN 1.

acknowledgment that Owner will be bound by the actions taken by Agent, and ratification by the Owner of all acts taken by the Agent in connection with the project prior to execution of the Confirmation of Agent's Authority.

2. An acknowledgement that the Owner is liable for the acts of the Agent and that the Owner, and not the Agent, will be liable to GBCI and USGBC for obligations and liabilities arising under or in connection with the LEED certification of the Project, regardless of whether Owner acted on its own behalf or the Agent acted on behalf of the Owner.
3. An acknowledgement that the definition of "you" in the LEED Project Registration Agreement and the LEED Certification Agreement applies only to Owner and not to Agent.³
4. A provision establishing that "[a]ny rights or remedies of GBCI or USGBC arising under or in connection with the LEED certification process as it applies to the Project are expressly acknowledged to be enforceable solely against Owner and shall not be enforceable against the Agent."⁴

It should also be noted that it may be incumbent upon the party acting as the Agent of the Owner to get the Owner and GBCI to sign the Confirmation of Agent's Authority; otherwise, the Agent may be liable to USGBC and GBCI as well as to the Owner. (See for example the discussion of Certification Agreement.) It will be important for the Owner and Agent to review the Confirmation of Agent's Authority at the outset, and agree to its execution. Moreover, in some circumstances failure to submit the Confirmation of Agent's Authority might have devastating impact. (See for example discussion of Section 13 of the Policy Manual below.)

While execution of this document might help insulate non-owner participants from direct claims from GBCI or USGBC, it does not completely isolate those participants from potential liability. The laws relating to agency can vary from jurisdiction to jurisdiction, and can impose specific obligations and standards of conduct on the agent and principle. Due consideration must be given not only to the terms of the Confirmation Agreement, but also to the implications of the agent and principal relationship. While the Certification Agreement may make the Owner liable to USGBC and GBCI, the Owner may still have independent claims against the Agent for the Agent's acts. Agents may wish to consult with legal counsel regarding the obligations and implications that might arise in these circumstances, and discuss whether additional agreements or documentation might be necessary.

LEED Project Registration Agreement ("Registration Agreement")

This agreement is between GBCI and the person or entity seeking to register a project under the LEED certification program ("registrant"). The registrant may be an individual or an entity, and may act as an agent for the project owner, thereby binding the project owner to the terms of this agreement. (See the discussion of Confirmation Agreement above.) As with the Terms and Conditions for the use of LEED Online, USGBC is also described as a third-party beneficiary under this agreement.

The Registration Agreement incorporates the following documents by reference, including all updates and addenda published at the time of registration:

1. The LEED Certification Policy Manual ("Policy Manual") specifically identified in the Registration Agreement as pertaining to the Project registered. The Registration Agreement indicates that the applicable Policy Manual will contain extensive information and instructions related to the LEED certification program, including associated policies, processes, services, requirements, guidelines and fees. It also indicates that GBCI may revise the Policy Manual prior to acceptance of the LEED Project Certification Agreement and the registrant will be required to comply with the then-current

³ This provision also references the LEED Project Application Review Agreement and/or the LEED Volume Certification Service and Licensing Agreement.

⁴ Despite this broad language seemingly abolishing all potential claims against the Agent, subsequent text in the Agreement may create a potential carve out for claims against the Agent by USGBC and GBCI if the "Agent has knowledge that Owner lacks the requisite authority to appoint agent as Agent of the Owner or that Owner is not the entity which holds the legal right to possess and control the Project"

version of the Policy Manual when seeking to submit their application for review. (See the discussion of Policy Manual below.)

2. The LEED Green Building Rating System published by USGBC, and available in LEED Online, under which the project is to be registered.
3. Other documentation specifically identified in the Registration Agreement as applicable to Project, including documentation that contains the minimum program requirements for participation in the LEED certification program.
4. The LEED Green Building Rating System Reference Guide specifically identified in the Registration Agreement as applicable to the Project.

It will be important to obtain and review the documents that are incorporated by reference, including all addenda and updates, to fully understand the requirements for certification.

The Registration Agreement also provides for a license to GBCI to access and view all information submitted to GBCI by or on behalf of the registrant, in relation to the project. The Registration Agreement provides that this license also includes the right for GBCI and USGBC to use, reproduce, publish and display this information in the ways identified in the Policy Manual. Therefore, parties who upload documents to the website should (i) make sure that they are not breaching any confidentiality obligations they may have with their clients (strict confidentiality clauses contained in contracts may have to have a carve out for LEED submittals), and (ii) make sure they have the necessary copyrights, licenses or other rights to upload such material.

The Registration Agreement contains a “Default” provision indicating that the certification process, while regulated by specific policies and standards, also requires some discretion and judgment and, therefore, GBCI, its subcontractors, and USGBC are not to be considered in default of the Registration Agreement except in the case of willful misconduct, gross negligence, or wanton or reckless behavior. The accompanying “Disclaimer of Warranties” provision states, among other things, that GBCI and USGBC expressly disclaim all warranties, express or implied, with regard to the services or the certifications provided by them or their subcontractors, and that they make no representations that such applications or services are complete and/or free from all errors or omissions. The Registration Agreement’s “Limitation on Damages” provision states that if GBCI, its subcontractors and/or USGBC are found liable to the registrant, then the maximum amount recoverable from all of those entities collectively for “any and all injuries, claims, losses, expenses, costs, and damages arising out of, or in any way related to, registration, the use of the application, and/or the LEED certification process is capped at and shall not exceed the sum of (i) five thousand dollars (\$5,000) plus (ii) the fees that [the registrant] paid to [GBCI] to register the project that is the subject of [the registrant’s] claim, and (iii) the fees that [the registrant] paid to [GBCI] with respect to any optional services requested that relate to [the]Project, less any refunds that [GBCI] provide[s] to [the registrant] in relation to such Project.” Here again, it is important for owners, and others, to understand the limited recourse they might have against GBCI or USGBC.

The Registration Agreement further explains that the application provided under the agreement is made available exclusively within LEED Online; that each application consists of a collection of electronic data screens (“forms”) that are particular to the rating system and minimum program requirements applicable to the project; that while GBCI takes efforts to ensure that the forms function properly, these forms may contain calculative or programmatic errors that could potentially cause a form to misrepresent compliance or non-compliance with a minimum program requirement, prerequisite or credit; that regardless of the presence or impact of any error within the forms, each project must demonstrate compliance with the applicable minimum program requirements, prerequisites and attempted credits; and that during a certification review, GBCI may request additional documentation or resubmission of calculations for the purpose of determining compliance. It will therefore be important that each project participant responsible for completing or submitting all or part of a form, independently verify the accuracy of the compilations or computations in the form and not generally rely on the functionality of the form.

The Registration Agreement states that it is to terminate upon the execution of a LEED Project Certification Agreement, and the latter agreement governs participation in the LEED certification program from the point of execution forward.⁵ The Registration Agreement includes a number of other important terms including claim notice provisions, provisions relating to assignments of rights, and choice of law and forum provisions.

LEED Project Certification Agreement (“Certification Agreement”):

This agreement is between GBCI and the project owner, and is required to allow a project that has been previously registered to progress to the application and submittal review phase of the certification process. The Certification Agreement must be entered into by the project owner, or a properly designated agent of the owner. If an agent accepts the Certification Agreement, the owner and agent must provide GBCI with a signed Confirmation of Agent’s Authority form (see above). The Certification Agreement also provides that if an agent enters into the agreement, the agent represents that it holds actual authority granted by the owner to enter into the Certification Agreement. In addition, the Certification Agreement provides that if it is later determined that the person accepting the Certification Agreement is neither the project owner nor the project owner’s agent, the person accepting the Certification Agreement agrees that they will become a party to the Certification Agreement and, among other things, “be responsible for the entire liability of the entity or entities for which you lack the authority to bind.”

The Certification Agreement, like the Registration Agreement, also incorporates several documents by reference, including the following:

1. The LEED Certification Policy Manual, specifically identified in the agreement as pertaining to the project being registered. (See general description above);
2. The LEED Project Registration Agreement executed at the time the project was registered with GBCI (See general description above.) In addition, the Certification Agreement provides that while the Registration Agreement may have been entered into by another party, the owner and GBCI specifically agree that the terms and conditions of the Registration Agreement, as well as the documents incorporated therein by reference, are incorporated into the Certification Agreement; and
3. The Application, comprised primarily of a collection of data entry screens (“forms”).

In addition, the Certification Agreement contains a provision that requires the Owner to indemnify GBCI and USGBC against all third-party claims (including judgments, liabilities, causes of action, losses, damages, costs and expenses) arising from or in any way related to registration, the application review process, and/or the award or revocation of LEED certification for the project. This indemnity requirement is subject to the following exceptions: (i) the claim was caused by gross negligence, willful misconduct, or wanton or reckless behavior by GBCI, USGBC or both; or (ii) the claim was caused by negligent behavior by GBCI, USGBC or both and there was no contributory negligence on the part of the owner.

The Certification Agreement contains language disclaiming liability for the functionality of the project application forms. (See discussion of Registration Agreement above.) The Certification Agreement also contains other provisions similar or identical to those found in the Registration Agreement, including licensing provisions to GBCI; a “Default” provision; a “Disclaimer of Warranties” provision; a “Limitation on Damages” provision; claim notice provisions; provisions relating to assignments of rights; and choice of law and forum provisions. (See discussion of Registration Agreement above.) Once again it is important for owners, and others, to understand the need to have proper authorization to post specific information in LEED Online and also to understand the limited recourse against GBCI or USGBC.

⁵ However, see discussion on the Certification Agreement below. Note that terms of the Certification Agreement provide that the parties agree that the terms of the Registration Agreement, and all documents incorporated by reference, are incorporated into the Certification Agreement.

LEED Certification Policy Manual (“Policy Manual”)

The Policy Manual contains important general information and terms regarding the LEED certification program, as well as information and terms applicable to specific rating systems such as LEED for New Construction and Major Renovations, LEED for Commercial Interiors, etc. The Policy Manual includes the current policies, procedures and pricing established by GBCI for the purposes of administering the LEED certification program.

Key provisions in the Policy Manual include the following:

1. **Section 3, LEED Certification Policy Manual Updates and Revisions Policy.** This section includes provisions explaining how Policy Manual updates and revisions will be handled, and the impact those updates and revisions might have on a registered project.
2. **Section 4, LEED Green Building Rating Systems.** This section contains information about the various LEED rating systems. It also includes provisions about how rating systems updates and revisions will be issued, and the impact of those updates and revisions on registered projects. This section also contains provisions related to rating system closures, and the impact the closure of a rating system might have on a registered project. Those provisions include the fact that “[p]rojects that are registered under a rating system or rating system version that is subject to closure will be allowed to proceed through the LEED certification process in accordance with the requirements of that rating system version provided that they adhere to the policies and timelines as outlined in this manual.” (emphasis added) Accordingly, it will be important for all project participants to be aware of the rating system timelines, and adhere to them in order to assure participation in the selected rating system or rating system version originally selected for the project.
3. **Section 6, LEED Reference Guides.** The Project Manual provides that “LEED Reference Guides are supporting documents to the LEED rating system and they are officially incorporated into the LEED certification program.” It also provides that in some cases, these guides identify documentation requirements necessary to complete a LEED certification application.
4. **Section 11, Documentation Requirements.** This section discusses various aspects of the documentation that might be required for project certification. It also points out that in addition to the documentation necessary to complete a LEED application, some section of the application may require separate validation of the submitted documentation by a specific project team member, or by a properly licensed professional. This section also discusses requirements for the retention of project documentation. It specifically states that “Owners must retain all documentation related to the satisfaction of all prerequisites, credits, and MPRs including but not limited to all information pertaining to information that has been submitted to GBCI for the purposes of procuring a LEED project application review. Such information must be maintained at the site of the completed project for a period of not less than two (2) years commencing on the date of award of LEED certification. Note that documentation which has been submitted to GBCI via LEED Online will be maintained by GBCI and does not need to be retained by the Owner.” (emphasis added) It will obviously be very important that the Owner know of these documentation and retention requirements, and that the Owner be in possession of that documentation at the time of LEED certification. This might require provisions in the various agreements among the project participants to ensure that all such documentation is compiled and turned over to the Owner. Also, there seems to be some ambiguity around what the Owner must retain and produce on site—if it has been submitted to GBCI through LEED Online—and clarification from GBCI might be required.
5. **Section 12, Registration Cancellation Policy.** This section discusses the various circumstances under which a project’s registration might be cancelled, including passage of a rating system’s sunset date, inactivity, and failure to meet deadlines following project completion; as well as the potential consequences associated with registration cancellation.

6. **Section 13, Application Submission and Review Policies.** This section addresses many of the requirements for application review and also contains some post-review and post-certification requirements. Among other things, this section provides that if a Owner wishes to authorize members of the project team to accept the Certification Agreement on their behalf, they must do so using the Confirmation of Agent's Authority form (See discussion above), and any attempt by members of the project team to accept the Certification Agreement without a properly executed form "will render the accepted review agreement null and void and without affect" and "GBCI will not commence a review of any application, and no submission deadlines will be extended in the event of an improperly accepted [Certification Agreement]."

This section also provides that GBCI will strive to meet the timelines stipulated in the application review policies set forth in the Policy Manual; however, if GBCI is unable to meet those timelines, the project team will not be entitled to a refund of any portion of fees paid. To the extent that GBCI is unable to meet the timelines, the applicable submission deadlines will be extended one day for each day GBCI is late in returning the review.

Other text of note in this section includes the provision stating that if the Owner does not accept, or request the appeal of the results of, GBCI's final review within twenty-five days, those results will be deemed conclusive. There is also a provision requiring that GBCI be provided with current contact information for the Owner for the duration of time that the project maintains LEED certification, and if the project changes ownership, the contact information for the new owner must be provided to GBCI.

7. **Section 15, Certification Expiration Policy.** This section provides that, in some circumstances, GBCI may require that a project team undertake some action within a specified time following the award of certification or other official determination by GBCI, such as Plan Approval or Precertification, and if a project team does not complete the specified action, the certification or designation will expire and the project can no longer represent that it is LEED certified or that it holds the other official designation.
8. **Section 16, Certification Challenge Policy.** This section contains many provisions associated with the rights and responsibilities of the parties to challenge a certification that might have been wrongfully awarded, or to defend a certification. This section makes it clear that GBCI intends for this policy to function both as a quality check on GBCI LEED reviews, and as an instrument designed to detect and remedy incidents of misrepresentation that might have resulted in the inappropriate award of LEED certification. This section also provides, among other things, that all persons participating in the submission of information in applying for LEED certification must be truthful, forthcoming, and cooperative in dealing with GBCI; and it is the responsibility of the Owner to confirm and represent the veracity and accuracy of the documentation submitted. This section also provides that GBCI may initiate a certification challenge and revisit its determination that documentation demonstrates satisfaction of the requirements for LEED certification; and that GBCI reserves the right to institute investigations and reviews for any reason or for no reason at all. There are also a number of other provisions outlining the process and requirements of a challenge.

This section also makes it clear that GBCI reserves the right to revoke LEED certification if GBCI is denied access to a project for purpose of performing an audit or site visit or is prevented from examining documentation pertaining to LEED certification, including post-certification water and energy usage data (See Project Monitoring Policy discussion below).

9. **Section 17, Project Monitoring Policy.** This section discusses requirements for post-certification monitoring of energy and water usage data. Specifically it calls for authorization to allow GBCI and USGBC to access and collect energy and water usage data from project metering systems and/or utility service providers. Each project must begin to comply with the terms related to project monitoring within one year after the project achieves LEED certification and maintain compliance for five years. This section specifically states that it is the burden of the Owner to notify all subsequent owners and/or occupants of the monitoring requirements.