

Contracts

- ◆ There are no set definitions for green building terminology. You can prevent misunderstandings with your customer, and the possibility of a lawsuit for breach of contract, if you define the "green" terms in the contract. Identify the specific rating system to be used (such as the NAHB Model Green Home Building Guidelines or the National Green Building Standard), and the certification process for that rating system (like the NAHB Research Center's National Green Building Certification).
- ◆ Green building may involve heightened labor and installation costs, and in-demand green components and materials may prove to be more expensive than anticipated. Consider allocating responsibility for these unexpected costs in the contract.
- ◆ Delays may occur in green construction (from installation missteps and uncertainties when using novel products), in the approval process (inspectors and review boards may be unfamiliar with green building techniques), and in certification or verification (backlogs can develop). Consider planning for the possibility of such delay in your construction schedule, and listing them as excusable delay in your contract.
- ◆ The contract should specify who is responsible for obtaining certification and the relevant rating—owner, designer, architect or builder. Third parties determine green certification, so your contractual promise that the home will be green certified may be risky. A failure to obtain certification should not be grounds to cancel the contract. Consider language that provides a sliding scale of liquidated damages, dependent on how compliant your project may be, should your otherwise well-constructed building fail to receive green certification.
- ◆ Since specific green building components and materials could be unavailable, could be ineffective or inappropriate for certain climates, or could be prohibited in certain areas, it may be prudent to allow for substitutions.

Warranties

- ◆ All green product manufacturers' warranties should be passed on to the customer, and it would be advisable to exclude your responsibility for their performance. You should provide a list of the manufacturers' warranties to your customer.
- ◆ Avoid promises of future benefits such as enhanced indoor air quality, health benefits, homeowner comfort, or higher re-sale value. These are subjective and will depend on occupancy preference and habits, effective maintenance, and market conditions.
- ◆ Avoid unintended warranties. Promises that you may make in your advertising materials, and the statements made by you or your employees to potential customers can be construed as a warranty.
- ◆ Consider the use of a third party maintenance contract (built into the price of construction) to assure that adequate maintenance is being conducted for the period of your express warranty. You may thereby avoid a customer's claim of defective construction that actually was the result of a failure to maintain.
- ◆ Consider adding a limitation of liability section to your express warranty (e.g., exclusions for consequential and punitive damages, damages related to emotional distress, and loss of use or relocation expenses). Anticipate that disputes might arise and consider how those disputes will be resolved (e.g., mediation, arbitration or court). State and local laws may regulate warranty content. It is recommended that a local attorney be consulted for the purpose of drafting warranty language.

Compliance with laws, rules, verifications and building inspections

- ◆ Are the green components and green building techniques compliant with your building code? It is recommended that you check in advance with your local code official to avoid added costs and delays.
- ◆ Do you know if there are any beyond-code green building laws in the jurisdiction where you are building? These laws may mandate compliance with specific green building rating systems, such as ENERGY STAR® requirements or meeting certain green building certification minimums. Such laws may obligate you to perform additional work and to incur added expense that was not contemplated in your contract. It is advisable to investigate before you sign the contract.
- ◆ Is your project subject to private covenants that may restrict certain architectural designs, or the use of certain building materials? These restrictions may run counter to your green building plans or certification needs. If there is a homeowner association architectural committee that has veto power over your plans, consider getting a written approval before you become bound under your contract.
- ◆ If you are aware of the verification requirements of your green building certification process, you may avoid unnecessary delays and the incurrence of additional costs from changes that are required by the verifier, and the resultant re-inspections.

Training

- ◆ Trade contractor training - Assume that your trade contractors will need adequate training to familiarize themselves with new green products and their installation requirements. Defective installation might negate the manufacturer's warranty, might disqualify the component for green building certification purposes, and might result in a claim brought against you by the customer.
- ◆ Homeowner training - Help the homeowners understand that their maintenance of the home will be critical to achieving their environmental objectives. Many green building certification programs, like the National Green Building Certification from the NAHB Research Center, require homeowner education programs for compliance. Ensure that your customer has received all the needed maintenance and operations manuals. Consider having the customer sign an acknowledgement of receipt, and a pledge to conduct all the required maintenance at the proper intervals. Consider instructing the customer on how to properly perform the maintenance.
- ◆ Staff Training— Assign someone in your office to be responsible for evaluating green materials, systems, and technologies.

Installation

Green building utilizes the “whole house” approach, which emphasizes the interaction of all of the parts of a home - its systems and equipment, its occupants and the structure itself. In some instances green building will incorporate the use of new and innovative construction technologies and materials. In other instances green building will use existing materials in new applications. In any event it is essential to know how the products will work when incorporated into the home and to ensure that the products are installed properly.

Before beginning a project familiarize yourself with the green materials, systems, and technologies that will be used in the construction of the home and make sure that they are compatible with other components in the home and that you understand your responsibility for ensuring their satisfactory installation.

Consider asking manufacturers’ representatives to review plans and details to assure compatibility.

Where applicable, determine whether the product manufacturer provides training for installers of its product or system.

Consider getting a third party to verify or certify that all building systems are functioning properly and meeting design specifications. The contract should address who will pay for the verification.

Resources

From NAHB (www.nahb.org)

- ◆ **Builder Liability Materials**
- ◆ **“The Risks and Rewards of Green Building”**
- ◆ **“Builders Guide to Handling Mold Claims and Litigation”**

From BuilderBooks (www.builderbooks.com)

- ◆ **Warranties for Builders and Remodelers, 2nd Edition**
- ◆ **Contracts and Liability for Builders and Remodelers, 5th Edition**

From FTC (www.ftc.gov/bcp/menus/business/energy.shtm)

- ◆ **Green Guides**
- ◆ **Complying with Environmental Marketing Guides**

www.nahbgreen.org - For additional technical and educational services.

This pamphlet was developed by the Building Product Issues Committee of the National Association of Home Builders.

This pamphlet is not intended to be exhaustive and all-inclusive but merely a guide to some issues and practices that builders should consider when contemplating green building. Satisfaction of all of the items set forth in this pamphlet is no assurance that the builder will not incur legal liability in any particular green project.

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Before You Build Green

A Primer on Avoiding Liability Pitfalls

Green building is generating a lot of well-deserved excitement and NAHB shares in this enthusiasm. This enthusiasm should be tempered with caution, however. To avoid green building claims and liability green builders should follow good business practices. While the process of incorporating environmental considerations into the home building process is not new, today’s green building activity is expanding quickly, and as with any emerging field the potentiality exists that mistakes will be made and the unexpected will occur. Take proactive steps to reduce the risk that your green building project could become a major headache for you and your customer, ending in litigation.



Marketing

- ◆ Inflated or unsubstantiated statements by your sales reps and employees, in your advertisement materials, or on your web site, such as non-supportable claims of utility bill reductions or health benefits, could lead to unmet results, and even claims of fraud. Customers who develop unrealistic expectations based on these representations could bring action under their state’s unfair trade practices act for delivering less than the quality promised. Suits under these acts typically allow treble damages and recovery of attorneys’ fees. Make plain that no specific level of comfort or savings has been promised or will necessarily be achieved beyond measurable claims. Before making promises, ask yourself: “Is this verifiable and/or measurable? And, if so, how and by whom?”
- ◆ Claims of general or unsubstantiated environmental benefits are prohibited under federal law, and may subject you to an enforcement action by the Federal Trade Commission. Consult the FTC’s “Green Guides” (Guides for the Use of Environmental Marketing Claims). The guides provide safe harbor advice on marketing.
- ◆ The FTC is currently exploring an expansion of the Guides to cover specific residential green building products and green building advertising claims.