

## SPECIAL GREEN CONTRACT CONSIDERATIONS

The importance of using the right language

» PETER G. MERRILL

The June issue of *BN Magazine* featured an article on Green disputes, and the August article was written on basic price-escalation contract language. If you are at all involved in Green building, the language specified below should prove to be most useful for you in your construction contracts. Proper contract language can save you thousands of dollars and can help you avoid costly and lengthy litigations; and it costs you nothing to place the language into your contracts. Although the article is short, the contract language should prove to be invaluable to you.

Although there will be the traditional “prescriptive” disputes concerning the quality of construction and the manner in which the construction is installed, the really true Green disputes will be performance-based and will center more on the performance of the building as it relates to Green construction. These disputes will most likely relate to indoor air quality, the proper utilization and costs related to energy usage of the building, and the utilization and sustainability of natural resources, such as water conservation and the recapture and use of gray water and other similar performance-based issues. It is not only the contractor who may be the defendant in a Green-related construction dispute; it will most likely also involve the building designer or architect, HERS Rater, Green Verifier, Energy Star Rater and other individuals who perform the Green-related ratings and tests such as blower door, moisture and duct tests, thermal testing, etc. When people sue each other, anyone and everyone gets named in the suit as a potential source of funds for the plaintiff.

**PROPER CONTRACT LANGUAGE CAN SAVE YOU THOUSANDS OF DOLLARS AND CAN HELP YOU AVOID COSTLY AND LENGTHY LITIGATIONS.**

All contractors and other professionals who are involved in the construction of a Green building must be careful to make certain that they do not make promises or provide misleading information to the public, and especially to a buyer of a Green building. Through proper contract language, Green professionals or contractors can cover themselves as to exactly what they are providing to a customer. Misleading claims or advertising claims that can’t be backed up or proven to a customer may be viewed by the courts as not only false advertising but fraud, which in itself is usually considered a felony by the courts. What you say and what you advertise, print in your brochures, or publish on your website should be scrutinized to make certain that it is factual and is not misleading as to what you will be providing to the public.

I always recommend that any information you publish on your website, use in advertising, or you write in your contracts or agreements should be reviewed and approved by your attorney prior to its utilization. Keep in mind that

## Green Contract Clauses

BUILDER, CONTRACTOR, OR SUBCONTRACTOR

\_\_\_\_\_ company (your name) will attempt to build the building as specified by the plans, drawings and other documents provided for the construction of the building by a designer, architect or other individual or entity.

As to the Green aspects of the building, \_\_\_\_\_ company (your name) will utilize the materials specified and will endeavor to have the building perform as expected as a result of the Green construction specified for this building.


\_\_\_\_\_ company (your name) can not guarantee that the building will perform as expected as the Green performance of a building depends on several other issues besides than the construction of the building. If any dispute to our (my) services should occur, the dispute shall be settled through binding arbitration as provided by \_\_\_\_\_ (firm).

The cost for the arbitration shall be shared equally by the parties although personal attorneys, experts or other personal expenses shall be paid directly by the party utilizing those special services.

The parties acknowledge that they are giving up their right to utilize the court system to settle any disputes. The arbitration award shall be binding upon the parties and may be enforced in any court of competent jurisdiction.

Green construction is still a new and evolving industry and the perceptions as to the meaning of Green will most likely be interpreted differently by different people. Adding clarity through proper contract provisions can only assist the Green professionals and their clients in having a better understanding of their roles and responsibilities.

The contract clauses shown above are designed for the contractor or subcontractor who will be doing the actual construction of the Green building. These contract clauses can and should be modified to suit your own individual operation. These are examples of the contract language that you can specify in your construction contract or agreement to lessen your responsibility as to the performance of a Green-built building. Your attorney should be able to assist you in developing the proper

clauses for your contract to protect yourself from future Green-related disputes. Please feel free to contact me if you should have any questions. 

*\*CDRs assumes no responsibility for any legal issues that might develop through the utilization of the above contract clauses.*



PETER G. MERRILL is president and CEO of Construction Dispute Resolution Services LLC, an NAHB Executive Board member and past president of the New Mexico Home Builders Association. He has received Builder of the Year and Remodeler of the Year awards.

CONSTRUCTIONDISPUTES-CDRS.COM  
888-930-0011