

## Liability Exposures for Green Contractors

Green building is a growing trend, as businesses want to do their part to help the environment while lowering energy costs at the same time. Plus, green building is becoming increasingly more difficult to avoid because federal, state and municipal governments are starting to mandate it for new residential and commercial construction.

Jumping into the green movement might seem like a lucrative and logical step for your business to take. Before you go green, educate yourself to avoid costly lawsuits and common liability exposures for those engaging in green construction.

### What it Means to Go Green

A large majority of lawsuits against parties involved in green construction stem from the fact that the building does not function as promised after completion. This could be because of faulty energy sources, poor design or higher energy costs than anticipated. Often, the client will claim that because of a contractor's negligence, the finished product does not measure up to green standards and thus does not give them the return on investment they expected. To avoid these situations, it is first important to understand how the U.S. government arrives at a building's green rating.

In the United States, the dominant standard is the Leadership in Energy and Environmental Design (LEED) rating, which is administered by the U.S. Green Building Council. Commercial buildings that are LEED certified not only have lower operating costs and provide a healthier, safer environment for occupants, they also allow the owner to qualify for tax rebates, zoning allowances and

other incentives. In addition, owners of green buildings receive a reputational boost, as they are publically demonstrating their commitment to the environment and their social responsibility. Clients have a lot at stake and would very likely file a claim if they spend hundreds of thousands of dollars for a green building, only to have it fall short of LEED certification.

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As a contractor, you need to understand LEED certification, which measures performance in six areas:

1. Sustainable sites
2. Water efficiency
3. Energy and atmosphere
4. Materials and resources
5. Indoor environmental quality
6. Innovation and design process

Rating systems differ depending on the type of building and whether the construction is new or an addition to an existing structure. Each rating system includes its own prerequisites and assigns points to the six performance areas. Buildings that achieve a certain number of points

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may attain certified, silver, gold or platinum LEED status.

The interesting thing to note about LEED ratings is that contractors and builders have a large amount of latitude on how they reach the certification. LEED does not specify what kinds of technologies or green components must be used to reach each level, and aside from the established prerequisites, points need not be attained in certain combinations. That means two buildings with identical point totals and LEED status may use completely different strategies, techniques and technologies to attain unique green results. One may excel in innovation and the other may focus on sustainability, but they both could ultimately achieve the same status.

## Negligent Misrepresentation

With the latitude the LEED certification process allows comes more liability exposure for you. Many contractors are so eager to try their hand in the green market that they forget about the risks. One of the most common claims is negligent misrepresentation.

Consider this example. An extremely lucrative opportunity comes along to bid for a new, multi-million dollar LEED-certified building for a famous client. You want this job but have never taken on a large green project before, so you go above and beyond to present plans for a building that is LEED-certified, highly innovative, a completely sustainable site and will save thousands of dollars in energy costs each month.

You win the bid, begin construction and then realize that what you have planned is impossible to build, given your resources. When you tell your client that you can't deliver on all of your promises, the client may stick you with an extremely expensive negligent misrepresentation suit. They will claim you had no basis for believing you could deliver on all your design elements and promises in the first place, and, if they had known, they would have gone with another bid.

You can protect yourself from these claims with proper insurance coverage, but you can also avoid them in the

first place by learning more about green construction and your limitations, improving project management and carefully managing the client's expectations.

## Contractual Claims

Contractors and builders are at risk of contractual liability during green building. Liabilities in this area include:

- Failure of green systems to perform throughout the expected lifetime
- Failure of systems to reach promised level of LEED certification
- Improper installation of green systems
- Failure of the building to qualify for tax credits or meet loan or incentive program requirements
- Failure to stay within the allotted budget or time restraints due to greater than anticipated costs of green building

In short, for anything that your company promises to a client via contract, you must be able to deliver. Because green technologies are still relatively new, they may not function as efficiently or for as long as you anticipate. Therefore, you open yourself up to the risk of being sued by building owners for breach of implied warranties of materials, workmanship and purpose.

## Higher Risks with Green Building

One of the biggest questions contractors ask is why the risks of green building are so much higher than regular construction. The answer is because of the LEED certification process and higher demands for ROI. Building owners anticipate in advance what kinds of credits they will qualify for, and if the building is unable to attain promised certification in the end, they will not hesitate to file a claim. The bottom line is that green buildings have a much more concretely defined scale of success and failure, and that means you can easily be held responsible for unexpected shortcomings.

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Also, building green is very expensive. If owners are going to pay the extra money to go green, they want to see the return on that investment. With green buildings, this is a very quantifiable investment. If the heating and electricity bills are not as low as promised, clients will not be happy with the building.

The best thing you can do to protect yourself from risk is to be open and honest.

- Create marketing materials for your company with reality in mind, rather than making lofty promises.
- Do not allow clients to have high expectations for things you are not sure you can deliver on.
- Pay attention when drafting or signing contracts to make sure the language accurately reflects expectations and realistic goals.
- Improve your project management process to more clearly define your company's goals, requirements and limits.
- Seek insurance coverage for green-specific areas, especially for your green services and warranties on green projects.