



# **RISK MANAGEMENT FOR GREEN BUILDING**

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## **I. AVOIDING BREACH OF CONTRACT CLAIMS**

**Owners, developers, architects, general contractors, subcontractors, suppliers and manufacturers have different roles, responsibilities and expectations so the best way to avoid risks associated with green building is to have precise and tailored contract language. If a particular certification, code or regulation is required, you may want to include it in the contract to help define the scope of work.**

**Before signing a contract, make sure to identify and fully understand the green obligations in terms of the means and methods to be used and factor that into the price. Identify any green component processes that may add time to the overall construction period and/or impact the build sequence.**

**Find out if any of the green products to be used are in short supply or made to order and tailor your lead time and completion obligations accordingly.**

**Be comprehensive in your approach to all contracts and make sure everyone understands the objectives. For example, if low volatile organic compounds (VOC) interior paint is required make sure the painting subcontractor knows it and understands why substituting a high VOC paint is not acceptable.**

**If there are any green certifications required, specify what they are, when they are determined, how they are determined (third party testing - if so by whom), their duration (is it a one time certification or is it ongoing), and of course who is responsible for them. If it is ongoing, spell out demand/load parameters because you have no control over the occupant's usage of the building.**

**Provide exclusions for design or construction alterations (change orders) that may adversely affect the performance of the building or any of the green components.**

**A waiver of consequential damages clause may shield you from certain types of "green damages" claims such as loss of tax deductions or loss of a below market interest rate if performance criteria are not met. The available green building financial incentive programs are evolving, so you want to stay ahead of the curve when it comes to liability for "green damages". For example, if you are the contractor and you build exactly per the architect's specifications, which turn out to be flawed, you want to protect yourself against "green damages" claims from the owner.**

**Be very specific with any Guarantees and Warranties that you make. Try to limit them to performances within your control. Avoid making a manufacturer's product warranty your own by promising it yourself. If the manufacturer makes the warranty, specify that in writing because you don't have control over the manufacturing process. You may want to include a clause limiting material and/or product warranty claims to those warranties offered by the manufacturers.**

## **II. AVOIDING TORT CLAIMS**

**The combination of high buyer expectations, aggressive marketing of green building, and a lack of uniform green building standards is a recipe for confusion. Confusion creates a real danger of tort claims for negligence, misrepresentation and fraud. When it comes to advertising, avoid overreaching in marketing and representations.**

**To minimize the risk of a negligence claim, always make sure to identify and follow the applicable codes and regulations that may apply to the means, methods and performance objectives of your work. Assess performance issues that may arise with integration of green and non-green components.**

**With regard to misrepresentation and fraud, the general rule is that statements of opinion are not actionable as fraud in Virginia. However, false statements of fact are generally actionable as fraud. For example, if something is advertised as “green”, “sustainable”, “energy efficient”, or certified as such, make sure to explain exactly what that means and what standard(s) you may be referring to. Does “sustainable” mean less maintenance? Also, you may want to avoid a blanket characterization of the structure as “green” and instead provide an inventory of green components together with performance information from the manufacturer. Do not make manufacturer warranties and guarantees your own with advertising.**

**Be wary of any new untested “green” products that do not have reliable performance data.**

**Exercise due diligence to gather as much information as you can to evaluate a new technology.**

**Consider required maintenance procedures and costs.**

**Consider a purchaser orientation program for proper operation and maintenance.**

**Be aware of the tort of Constructive Fraud which is defined as follows:**

**“A misrepresentation of a material fact, innocently or negligently made, with the intent that a person will rely on it and which that person relied upon with the result that he was damaged by it”. (emphasis supplied) Va. Model Jury Instruction No: 39.040**

**That is why it is so important to attribute rating/certification promises to those who make them and not to make those promises your own in your advertising or your contracts. Don't promise the buyer what the product will do when you can just as easily say what the manufacturer promises the product will do. This should reduce the risk of a claim against you for misrepresenting the product or for defects in the product.**

### **III. INSURANCE COVERAGE FOR GREEN LIABILITY**

**Another way to reduce your risk is to check with your insurance carrier to see if a green building endorsement is available to address claims that may arise due to changes in environmental standards, new construction, remodeling, repairs using green materials, loss of tax credits, loss of favorable interest rates and the like.**

### **IV. CONCLUSION**

**This brief topical outline merely scratches the surface of some of the issues that may arise, but I hope it is helpful to you as you navigate the uncharted territory of green building liability. Given the lack of uniform standards, the evolving technologies and the expanding involvement of government at the federal, state and local levels, I anticipate that this will trigger a significant amount green building litigation over the rights and responsibilities of everyone involved. As you know, an ounce of prevention is worth a pound of cure, so please consult with an attorney about the various options available to minimize your legal risks both now and in the future.**



Any suggestions or analysis contained herein are general and do not take into account an individual's or entity's specific circumstances. This outline does not constitute legal advice. Recipients should consult their legal advisors prior to acting on any information set forth herein.