

Construction Issues to Consider When Building a New Home.

By Davis House¹

I am always troubled when a family comes to my office and tells me they are having problems with their building contractor returning to complete punch list items or that they are experiencing foundation problems within a few years of completion. Unfortunately, in many instances there is little the homeowner can do unless the building contractor is reputable and solvent. While there are many reputable home builders, there are also residential contractors who are only interested in building a home as quickly as possible for the least amount of cost, then selling it to a buyer. This article is intended to provide some insight to new home builders.

Check References. No references, no deal.

Find out how long the contractor has been in business. Most reputable residential builders have been in the business for at least five or more years. Therefore, if you are building your new home, it is important to take a number of preliminary steps before retaining a home builder. First, go to the Mississippi State Board of Contractor's website to see if they have a residential construction license. Next, if your contractor is not a sole proprietor, go to the Secretary of State's website and check to see if the contractor is registered and in good standing. Your builder should also provide in writing the names of any subcontractors that will provide work on your house. This is especially important for the subcontractors that install your foundation, plumbing, mechanical, and electrical systems. Do the same due diligence checking their background as you do your builder's, and ask your builder how long their subcontractors have worked on projects for them.

Find out if your contractor has been associated with other construction companies. There is an unfortunate trend where individuals will set up a construction business and, when something bad happens, that individual just sets up a "new" business with a different name and lets the "old" business go defunct. It's a shell game to keep someone from being able to get to the contractor's assets. If a contractor has had multiple businesses or within the last two years has changed business entities, then you need to ask why this is occurring. It could be a signal you need to walk away from that contractor.

Have the contractor provide a list of at least three references, each of whom you should contact and inquire about their satisfaction with their home and their home-building experience. Of these three references, one should be from a homeowner whose house was constructed within the last two years. One should be from a homeowner whose

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house was constructed at least three to four years ago. The third should be from a homeowner whose house was constructed at least six years ago.

The reason for this range of references is because the New Home Owners Warranty Act covers defects for noncompliance with building standards within the first year of construction and six years following the completion date for major structural defects due to noncompliance with building standards. *Miss. Code Ann. §§ 83-58-5 et seq.* This will afford you the opportunity to ask the homeowner if there were any new home warranty issues and how the contractor handled these issues. After the new home warranty expires, you will not get the original builder to return to perform any work on the home unless you can demonstrate the work was not performed in a good and workmanlike manner and/or not in compliance with the building standards. Note: If you are not building within a city or municipality but in the county, you will need to specify the “building standards” with which you expect the contractor to comply.

The need for a reference for a home constructed at least six years ago will allow you to check with the homeowner about any foundation issues. Generally, foundation issues will begin to emerge after three to five years. You can find out if the builder was willing to address these issues or simply ignored requests for corrective work.

Go further than contacting references provided to you by the builder. Ask the builder if there are any judgments against him or her or any pending lawsuits, arbitrations or mediations involving prior or existing construction. Check behind them by searching court records for judgments that may be entered against your builder, including any judgments against a prior business entity owned by your builder.

Invest in a geotechnical report and a structural engineer to design your foundation.

Invest in a geotechnical report and a structural engineer to design your foundation for your home. To ensure the design is followed by your builder, make sure your engineer observes the foundation preparations and installation. This expense is well worth it in the long run to ensure the proper site work is performed for your professionally designed foundation. If you have not yet purchased your lot, it is also prudent to invest in a geotechnical report before you purchase the site. Site preparation for a foundation can involve removal of unsuitable material and importing suitable fill, which can be extremely expensive. This additional cost should be taken into consideration in your building budget.

Make sure your builder has sufficient insurance to cover any potential negligence in the construction of your new home, including workers compensation insurance.

Every builder should have sufficient General Liability Insurance to protect you and your new home from any potential negligence during construction. Do not accept your contractor’s representation regarding the extent of the insurance coverage. Obtain a

complete copy of the builder's policy and a Certificate of Insurance that identifies you as the "Additional Insured" for coverage. Then, contact the insurance agent identified on the Certificate of Insurance in writing and request written verification of coverage. It is also important to ask the contractor if insurance is required of subcontractors or if the contractor's policy includes a Rider that covers its subcontractors who do not carry insurance.

You also need to verify whether your contractor and the subcontractors carry workers compensation insurance. If the subcontractors do not have workers compensation insurance, the prime contractor may have to provide that insurance. Most home buyers don't realize that they may even need to provide workers compensation insurance if neither the contractor nor subcontractors carry it. You don't want a worker hurt on the job building your house and then realize there is no insurance to cover it.

Make sure your contract requires the contractor and its subcontractors to provide the general liability insurance and workers compensation insurance. Verify coverage for all this before work ever starts. Your insurance agent can assist you in this review.

Purchase Builders' Risk insurance to protect your structure against potential catastrophic events during construction.

Builders' Risk insurance protects the structure from a catastrophic event during construction. For example, if you were 75% complete with construction and a tornado or fire destroyed the structure, Builders' Risk insurance would pay for the replacement of the structure. Check with your contractor to see if your contractor is going to secure Builders' Risk insurance or it is something you will need to purchase.

Consider requiring the contractor to provide a payment bond.

Mississippi now has lien rights. *Miss. Code Ann. §§ 85-7-401 et seq.* Subject to the requirements of the statutes, this means that the contractor can file a lien against the property in the event of a payment dispute. It also means subcontractors and suppliers may be able to file liens if the contractor does not pay them. These liens will have to be addressed prior to securing permanent financing. However, the potential for the filing of liens by subcontractors and/or suppliers can be avoided by requiring the contractor to furnish a payment bond. The contractor may add this cost to the price of construction but it may be worth it in the long run to avoid addressing liens later.

All changes to the scope of work should be discussed and agreed upon in writing in advance of the changed work.

As a preliminary matter, the scope of the contractor's work should be well defined. The "scope of work" is a clearly defined description of what work the contractor is to perform. The homeowner's plans should be as detailed as practical. Anything of particular importance to the homeowner should be specifically listed and identified with as much detail as possible. The homeowner should also provide a list of appliances and finishes

or make sure the contractor has an adequate allowance for these items. An allowance is an “estimated” amount for items such as appliances and finishes. It should include all of the cost to the contractor for the material and equipment. The costs for labor, installation costs, overhead and profits should be included in the total contract price. In other words, if you have an allowance for a dishwasher of \$500.00, this amount is just for the cost of the appliance. The cost to install it should be included in the total contract price. If you only spend \$300.00 for the dishwasher, the homeowner is entitled to a change order for credit of \$200.00 from the contractor.

Owners can frequently be “nickel and dimed” to death by contractors if they are not careful. It is not uncommon for a contractor to tell the homeowners that a desired feature in the home was not included in the contractor’s original price. If this is the case, the homeowner should reach an agreement on the scope and cost of the additional work and execute a change order or document the agreement in writing before the work is started.

Inspect the work of the contractor before it is covered up or hire a design professional to ensure the work is performed in a good and workmanlike manner, in accordance with your design specifications, and industry standards.

It is wise for a homeowner to keep an eye on the contractor as the work progresses. If the house is built within a city or municipality, owners have the benefit of building inspectors. However, while the building inspector may catch deficiencies which ultimately protect the homeowner, the building inspector is not there to make sure every detail of the homeowner’s contract with the builder is done properly. The building inspector’s job is supposed to make sure the contractor has complied with the building codes adopted by the city or municipality and the plans for which a building permit was issued. Ask your contractor when these inspections will occur. If you can be present during these inspections, you can see what is being inspected and ask questions to ensure that everything is code compliant. This also gives you an opportunity to see the progress of the work and ask the contractor any questions. You may also want to retain a design professional to perform occasional inspections of the contractor’s work to afford you with an additional level of protection and advice on how to handle non-compliant work.

If you are building in the county, the homeowner should retain the services of a professional to inspect the contractor’s work during the various phases. This is an additional cost but worth the peace of mind knowing that your house is constructed in accordance with the building code and specifications that you included in the contract.

Final words of advice

All of this may seem burdensome and more than what you may have originally thought to be necessary. However, building a home is a substantial investment. Further, any reputable contractor should not be offended by your asking for this information. If the contractor balks at providing any of this information, it may be wise to look for someone

else to build your home. Finally, have both a lawyer and/or a design professional look over the contractor's proposal and contract to make sure you are adequately protected and the contractor's price includes what was agreed upon to avoid any surprises or disagreements. It is important that your contract is reviewed by a lawyer knowledgeable about construction to confirm that your rights are protected so that if construction goes awry you can take action. In the end, however, the success of your homebuilding project starts and ends with the integrity and experience of your contractor. Make sure you do your homework before you ever enter into a contract.

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