



## IN THIS ISSUE

Green Building Watch:  
The Destiny USA  
Project Is Likely Destined  
for Litigation ..... 2

Utah Legislature  
Significantly Changes  
Utah's Mechanic's Lien  
Laws (Again) ..... 3

S.F. 25: Wyoming  
Overhauls Mechanic's Lien  
Statutes ..... 4-5

The Economic Loss Rule  
in the Mountain West ..... 6

Utah Immigration  
Law Update ..... 7

Construction Case  
Alerts ..... 8



## ConsensusDOCS 2011 Revisions: Updated for Today's Construction Industry

By: **Melissa A. Orien**  
Salt Lake City and  
Las Vegas Offices



On January 19, 2011, ConsensusDOCS releases its 2011 revisions.

### What are ConsensusDOCS Contracts?

Initially released in 2007, ConsensusDOCS is a library of more than 90 standard construction contract documents that address all project delivery methods. The documents are written by a coalition of 29 design and construction organizations that represent designers, owners, contractors, subcontractors and sureties. The contracts address similar contract arrangements as AIA contracts.<sup>1</sup> With the publication of ConsensusDOCS, of which the Associated General Contractors of America (AGC) is an endorsing party, the former AGC documents are no longer available.

### Why Change?

The 2011 revisions arise from best practice trends, industry feedback, and legal developments. The revisions fall mainly into the categories of adding clarity and additional provisions to the documents, without significantly altering the risk allocation existing in the documents.

### What Changed?

Some general changes throughout the entire documents include the following:

- Changing party references including "Contractor" to "Constructor" and "Architect/Engineer" to "Design Professional";
- Definition of "Contract Documents" refined to provide more specificity and precision;

<sup>1</sup>For a comparison of document offerings by document number, go to <http://consensusdocs.org/wp-content/uploads/2010/09/Updated-Matrix-6.4-Release.pdf>.

- Definition of "Cost of the Work" for lump sum agreement to add clarity regarding compensable costs for additional and changed work;
- Changing Owner's obligation to provide approvals from "so as not to delay the Work" to "with reasonable detail and in a timely manner";
- Eliminating (i) insurance deductibles paid and (ii) cost of correcting defective work from the definition of Overhead; and
- Revising default sections to provide that Owner can either (i) supplement work or (ii) terminate Constructor upon default, as alternative remedies.

### SPECIFIC CHANGES

#### ConsensusDOCS 240: Design-Professional Agreement

- Making standard of care provision more objective and replaced to similar projects;
- Incorporating references to sustainable and green building;
- Incorporating references to building information modeling;
- Adding a "time is of the essence" clause;
- Clarifying design delegation and cooperation responsibilities;
- Providing a notice of default and opportunity to cure prior to termination; and
- Providing that transmission of copyrighted materials is deemed an express representation that such transmission is with permission.

#### ConsensusDOCS 750: Subcontract Agreement

- Altering mutual waiver of consequential damage claim to allow contractor to

CONTINUED ON PAGE 2

Ms. Orien is a LEED accredited professional who frequently counsels clients on litigation and transactional construction matters including green and performance-related projects. She may be reached at 702-669-4634 or [morien@hollandhart.com](mailto:morien@hollandhart.com).

pass-through consequential damages assessed by the Owner to the Subcontractor;

- Requiring Contractor to automatically share information regarding material alterations in the Owner's financing with Subcontractor;
- Requiring Contractor to reduce Subcontractor retention if Owner reduced retainage;
- Eliminating obligation to perform work in a manner "necessary to produce the intended results" but maintaining obligation to perform work "reasonably inferable" from the Contract Documents; and

- Requiring a "second" notice of default to Subcontractor before the Contractor can terminate for cause.

#### ConsensusDOCS 410: Design-Professional Agreement

- Requiring that Design-Builder submit accounting of costs deducted from contingency;
- Removing from Cost of the Work (i) demobilization costs arising from suspension and (ii) costs arising from copyright infringement claims, to allow such items to be compensable changes;
- Changing required notice of differing site conditions from "twenty-one (21) days notice" to "prompt written notice"; and

- Requiring that design documents become Contract Documents after they are approved at each phase.

#### Documents to Address Emerging Trends

ConsensusDOCS has also released additional documents, including:

- a BIM Addendum (ConsensusDOCS 301),
- a Green Building Addendum (ConsensusDOCS 310),
- a revised purchase order agreement (ConsensusDOCS 703), and
- a sub-subcontract agreement (ConsensusDOCS 725).

## GREEN BUILDING WATCH

**The Destiny USA project—benefiting from tax-exempt green bonds worth hundreds of millions due to its uber-green promises—is likely destined for litigation.**

**By: Sean Hanlon  
Denver Office**



As demand for green projects continues to increase and evolve, savvy design professionals, contractors, and other construction professionals must be armed with sufficient information to confidently take advantage of these opportunities, with a keen awareness of the risks. The Destiny USA project provides an example of some of the risks in failing to deliver on green promises.

### The Destiny USA Project and Undelivered Green Promises

In a July 2005 news article titled, "The Mall That Would Save America," The New York Times described the Destiny USA Project as a plan to "change the world" and to "produce more benefit for humanity than any one thing that private enterprise has ever done." The price tag? \$20 billion. Plans indicated the "retail city" will include the usual shops and restaurants as well as an extensive research facility for testing advanced technologies, and a 200-acre recreational biosphere complete with spring-like temperatures and an artificial river for kayaking.

In 2004, Congress passed the "American Jobs Creation Act," part of which authorized up to \$2 billion in federally tax-exempt bonds to support green building projects (Green Bonds).

The Destiny USA project received \$228 million in Green Bonds. Private investors then purchased the Destiny USA Green Bonds and assumed two benefits:

- (1) receipt of interest paid over the lifetime of the bonds, and
- (2) tax-free status on the interest received.

In order to qualify for these Green Bonds, the developer had to provide written assurances to the federal government, which included written statements from the United States Green Building Council (USGBC), that the project would achieve certain Leadership in Energy and Environmental Design (LEED) certification, renewable energy systems, and brownfield redevelopment.

Reports indicate that Destiny USA has fallen far short of its goals, including

- No 45-megawatt electricity generating plant running on biofuel made from soybean oil and recycled cooking grease (enough to consume more than one-third of the total U.S. biodiesel supply).
- No 290,000 square feet of solar panels on the mall's roofs and other surfaces (enough to blanket six football fields).
- No fuel cells that were to make seven megawatts of electricity (five times more than the nation's largest existing commercial fuel-cell installation).

- The project has also not achieved LEED certification.

#### Enter the IRS

Because of the alleged failure to incorporate green building components and LEED certification promised to the federal government, the Internal Revenue Service (IRS), after an audit, may revoke the project's Green Bond tax exemption. If so, the Destiny USA project would lose its approximate \$120 million in saved financing costs, and the individual bondholders would incur substantial investment income losses.

#### Litigation Likely to Spawn from an Adverse IRS Ruling

Who will face effects from an adverse IRS ruling? Parties could include the following:

- Investors would likely sue Syracuse Industrial Development Agency, the bonds issuer for lost tax benefits.
- The bond issuer, likely through its insurer, would sue the Destiny USA developer for any losses.
- And of course, the developer would likely point the finger of blame on the design professionals, contractors, or other construction professionals for failure to achieve LEED certification and other green features.

Sean Hanlon is a member of the litigation department, with a focus on construction and real estate litigation. Contact Sean at (303) 295-8270 or smhanlon@hollandhart.com.