

The New ConsensusDOCS 310 Green Building Addendum: Avoiding Green Legal Liability With Actions Over Words

By Gary L. Cole AIA, Esq.

ConsensusDOCS, the construction industry's leading standardized construction contracts and general analogue to the American Institute of Architect's *Contract Documents*, recently unveiled a new contract addendum for "green building" projects - the "[ConsensusDOCS 310 Green Building Addendum](#)." The two most interesting things about the new document are: (1) that it exists at all; and, (2) that ConsensusDOCS has very cleverly taken steps to shield its users from what, to some, is the Achilles Heel of the entire *green building* movement: that in any useful design, construction or legal sense, the term "green" has no reliably consistent meaning at all. That the new *ConsensusDOCS 310 Green Building Addendum* achieves its goals by contractually defining a project's *greenness* through *actions* instead of *words* is perhaps its most admirable achievement.

"Green Building" - "Green Living" - "We've gone Green!" In any real design, construction or legal sense, exactly what does "green" mean? And what does "green building" mean? Ask a hundred people at the next green building conference you attend to define "green building" and I promise that the answers will range somewhere between "energy and resource-efficient humanistic design and construction" to "a sacred calling to protect [Gaia](#) from rapacious bottom-dwelling Industrial-Capitalists."

Don't get me wrong – it's not as if green building advocates don't attempt to define "green" or "green building" – they do, with varying degrees of success. And I'm not suggesting that a perfect combination of words and sentences that would satisfy everyone's requirements ever could, or even should exist. Flexibility can be a good thing and sometimes just stating a set of principles that are intended to achieve substance through actions is enough. Sort of like the [Ten Commandments](#), or the slightly lesser – to some - [Secretary of the Interior's Standards for Rehabilitation](#) – it's what you do with them that counts.

Which is great when you're preaching to the already-converted, but not so great when trying to convince everyone else, like say, a court of law, where skepticism and burdens of proof tend to run a little higher. Sure, thanks to aggressive marketing, the term "green" has evolved enough general meaning in the public mind to be used on bumper stickers and t-shirts with reasonable definiteness – if by "definite" we mean "less vague." But for legal contracts involving the transfer of massive amounts construction-related capital, and all the legal liabilities that attach like barnacles to everyone involved – a slightly higher standard of clarity is probably in order.

Enter the new *ConsensusDOCS 310 Green Building Addendum*, which doesn't even attempt to define uncertain terms like "green" or "green building" with mere words – it does so through the *actions* of a project's parties. And as much as lawyers like words, when constructing contractual bulwarks for our clients, we like actions a lot too. The new ConsensusDOCS addendum allocates the responsibility for defining what "green," and therefore what "green building" means on any

given project to the parties who should be responsible for defining it – the owner, its architect/engineering team and a third party referred to as the “*Green Building Facilitator*” (the “GBF” - who may, or may not be the architect, contractor or construction manager). After all, unless a contractor is part of a design/build team and/or intends to assume the role of the GBF, then absent shoddy construction, why should it be dragged under when green turns to brown and the finger pointing starts? Its job is to build, not design. And it’s certainly not to save Gaia.

ConsensusDOCS was kind enough to provide me with a copy of the new addendum to review. There are no less than ten (10) defined terms that use the word “*green*” – which at first made me wonder why they didn’t just define “*green*” for any particular project in the usual way, such as: “. . . For purposes of this Addendum, the term “*green*” shall mean and refer to, etc., etc . . .” But a little closer look made that clear. The *310 Green Building Addendum*’s real purpose is to identify the roles of relevant parties and to define the methodology they’ll use to plan and implement a project’s sustainability goals. It also serves to clarify that unless a contractor has specifically accepted the role of *Green Building Facilitator*, their job is to build – planet saving’s outside their scope of work - and an extra.

Here’s a snapshot of how the ConsensusDOCS *310 Green Building Addendum* goes about that:

First, the GBF, working with the architect/engineering team, advises the owner on alternatives for achieving a project's desired “*Green Status*” – such as a LEED designation goal;

Second, how a project achieves its *Green Status* is defined by its “*Elected Green Measures*” (comprised of the “*Elected Physical Green Measures*” + “*Elected Procedural Green Measures*”) which arises from reports and discussions between the owner, its A/E team and the GBF; and

Third, the details of the first two steps are incorporated with specificity into a project's plans and specifications – again, not something for which a contractor is usually responsible.

Of course, the above simplifies a fairly complex procedure, but unless a contractor wants to step into the center of the green action - such as becoming the *Green Building Facilitator*, or if the project is *design-build* – by using the ConsensusDOCS *310 Green Building Addendum*, it may avoid being *directly* in the green legal liability line of fire by requiring a project’s greenness to be defined by the decisions, work product and actions of *other* parties. And if that weren’t clear enough, the addendum wraps it all up with an entire final section on risk allocation.

So, when a green roof leaks, or an HVAC system underperforms, or a project's new, imported and unvetted “sustainable” materials off-gas toxic chemicals killing every parakeet within a square mile, or a project doesn’t achieve its LEED designation and the owner doesn’t obtain its proforma-required tax benefits and starts looking around for someone to blame – the contractor has something of a defense.

Will it provide absolute protection when the plaintiff’s attorney lets loose with both barrels of 12 gauge, no. 10 buckshot and names everyone who ever glanced at a project in a lawsuit?

Probably not - but the ConsensusDOCS 310 *Green Building Addendum*, along with the many other documents produced during discovery that support it by substantiating the relative roles of a project's parties, might make for a very nice place to start crafting a defense.

The ConsensusDOCS 310 *Green Building Addendum* is an admirable end-run around the *green building* movement's obvious shortcomings – defining what “*green*” really means. But perhaps it's time for *green building* advocates to convene their own *Council of Nicaea* and hammer out the canons and doctrinal orthodoxy of *green building* – take it to the next level – the one that recognizes the inherent legal dangers of vagueness. It won't be pretty or easy. Or, here's a thought – ditch the marketing slogans and just start calling *green building* what it is - maybe: “*energy and resource-efficient humanistic design and construction.*” Or something like that.

Sure, it's not as snappy as “*green*” and might not fit as well on a Prius's bumper – but what more do you really need to say? *Green Building* has enjoyed a good run of public support over the past decade, but anyone with their ear to the ground lately has heard the approaching hoof beats of the inevitable pushback. The time may be fast approaching when words and actions – not to mention results – must merge into one for green building to sustain its credibility as a valid design and building ethic.

Is it possible that's what ConsensusDOCS recognized when it created its new 310 *Green Building Addendum*?

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