



Construction Risk Management NEWSLETTER

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CONSTRUCTION CORNER

New Standard Contracts Available this Fall

Every 10 years or so, the American Institute of Architects (AIA) updates its General Conditions of the Contract for Construction (A201), a foundational document for many construction contracts. The 2007 edition is scheduled for release this fall.

A new set of contract documents, ConsensusDocs, will also be available at the end of September. This family of documents is a joint effort of owner and contractor organizations, including the Associated General Contractors (AGC), Construction Owners Association of America (COAA), Construction Users Roundtable (CURT), the American Subcontractors Association (ASA) and the Associated Specialty Contractors (ASC). These contracts (over 70 in all) revolve around a unique collaboration agreement, which is designed to minimize delays and disputes between contracting parties.

More details on these documents will be provided in the fall supplement to *Construction Risk Management*.

INSURANCE INFO

Update on Broker Compensation Models

The Hartford has joined Chubb and Travelers in developing supplemental compensation arrangements for insurance brokers. These supplemental arrangements, which are designed to compensate brokers for services they perform on behalf of the insurer, replace some of the income lost by brokers who opted to stop accepting highly controversial contingent commissions. The formulas for calculating supplemental compensation remain somewhat of a mystery, but unlike contingent commissions, supplemental payments are fixed, based on prior performance

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of the broker. Individual brokers can further negotiate supplemental compensation levels based on actual services provided, as well as performance criteria.

Marsh, Aon, and Willis have softened their prior position on supplemental compensation, joining Arthur J. Gallagher & Co. in deciding to accept alternative forms of revenue such as supplemental compensation in at least some circumstances, provided they are fully disclosed to clients. The Risk and Insurance Management Society (RIMS), which previously expressed strong opposition to both prospective and retrospective contingent compensation for brokers, has also softened its stance, giving its

approval to at least one broker's negotiated supplemental compensation agreement, as long as this income is properly disclosed.

LEGAL LANDMARKS

Texas Supreme Court Decides in Contractors' Favor

As this newsletter was being finalized, the Texas Supreme Court issued a ruling that resolves a major coverage issue for Texas contractors. In *Lamar Homes, Inc. v. Mid-Continental Cas. Co.*, ___ S.W.3d ___, 2007 WL 2459193 (Tex. Aug. 31, 2007), a case that has garnered national attention, the court held that defective workmanship that results in unexpected and unintended property damage is an "occurrence" of "property damage" as defined in the standard commercial general liability (CGL) insurance policy. The court further discredited additional arguments advanced by insurers that defective workmanship cannot give rise to coverage under the CGL policy. As a result of this ruling, insurers will have to rely on the policy exclusions in denying coverage, which has much narrower consequences than denying that coverage was ever triggered in the first place. In light of this ruling, as Texas contractors prepare for coverage renewals, they should be on the lookout for subcontractor exclusion endorsements, which eliminate coverage retained in the standard CGL policy for damage to, or damage arising out of, a subcontractor's work.

Find more on this momentous decision, which some legal analysts expect to have a ripple effect on courts in other jurisdictions, in the fall supplement to *Construction Risk Management*.



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OSHA "Controlling Employer" Doctrine Held Invalid

by Frank Keres, President,
Construction Risk Associates

In 1976, a federal court initiated the "controlling employer" doctrine (also called the "multi-employer job site" doctrine) by stating that a general contractor (GC) has a supervisory role and thus should be able to stop job site violations. Although this statement was in nonbinding *dicta*, OSHA began citing general contractors for subcontractors' safety violations on the GC's construction site. OSHA strengthened its position on this matter in 1999 with a directive to its field forces to issue citations to the "controlling employer." (CPL2-0.124.)

Many GCs fought "controlling employer" citations, arguing that there was no standard holding them responsible for the safety of another's employees, nor should there be. Only rarely did these arguments result in a citation being overturned. For example, a citation was upheld against a GC regarding a trench that was newly dug by a subcontractor several miles from the main site.

In April, 2007, the Occupational Safety and Health Review Commission, OSHA's highest level of internal review, issued a split opinion that invalidated the "controlling employer" doctrine. In that review, Summit (a GC) was appealing citations it received for a scaffold erected by a subcontractor. The Review Commission cited 29 CFR 1910.12(a)—the enabling standard for the entire Construction Standard (29 CFR 1926)—which says: "Each employer shall protect the employment and places of employment of each of *his employees* engaged in construction work..." (emphasis added). The Commission held that a "controlling

employer" citation to a GC whose employees were not exposed to the hazard was incompatible with the "his employees" language. This decision is not consistent with the "controlling employer" doctrine as previously defined. OSHA has appealed this ruling to the federal appeals court in St. Louis, but prevailing will be difficult. Although this court has previously upheld GC citations as the controlling employer, it has not ruled on the "his employees" language. We do know that, in non-construction cases, several appeals courts have considered similar language and held that only the employer should be cited for a safety violation. Further, OSHA's own review board has ruled it inapplicable.

What impact will the *Summit* decision have in construction? Time will tell. Many safety professionals will agree that the potential for a GC to be cited for the acts of its subcontractors resulted in a greater attention to job site safety. Will *Summit* change that? Safety associations don't think so. "Good" contractors will recognize that the benefits of safety extend beyond avoidance of OSHA citations, and will continue to enforce safety practices on subcontractors. While that may be true, the reality is that OSHA is the primary driver of safety efforts, particularly at the field level. Therefore, the actual effect of *Summit* may be a decrease in job site safety and a corresponding increase in accidents and insurance costs.

Although the "controlling employer" doctrine had a positive effect on safety, the method by which it was implemented—via court *dicta* and an employee directive—was contrary to basic principles of OSHA and other legal tenets. Therefore, regardless of the outcome of its appeal, OSHA should begin the process of enacting a fair and enforceable legislative standard with regards to construction job site safety.

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New Law in Texas Regarding Contingent Payment Clauses

With the passage of SB 324, the Texas legislature has clarified the legality of contingent payment clauses in certain types of construction contracts. Effective with respect to contracts executed on or after September 1, 2007, this bill represents a compromise between general contractor and subcontractor groups. While contingent payment clauses are declared legal under this law, they can be invoked only under specified circumstances. Specifically, a general contractor can invoke the clause if the owner is insolvent and fails to pay the general contractor for work performed by a subcontractor. The clause cannot be invoked, however, if the failure to make payment is due to a defect or deficiency in the work, or other conduct of the general contractor or another subcontractor. Likewise, a general contractor who is also the owner of the project cannot invoke a contingent payment clause with regards to a subcontractor. Other limitations also apply. A comprehensive update of states' positions on conditional payment clauses will appear in the fall supplement to *Construction Risk Management*.

INSIDE IRMI

27th IRMI Construction Risk Conference

Registrations for the 27th IRMI Construction Risk Conference, in Orlando October 29 through November 1, are rolling in, but it's not too late to sign up. Select from over 28 workshops offered on topics such as building information modeling, public-private partnerships, contractual risk allocation, green building strategies, safety, wrap-ups, builders risk, CGL and umbrella liability, accident investigation, soft

market strategies, and more. If you work for a construction company or project owner, you may qualify for a discount on your registration fee. Check www.IRMI.com for full details and to register online. Fees go up after October 12, so don't delay.

CRIS Program Exceeds 1000 Designees

More than 1,000 construction risk and insurance professionals have completed the Construction Risk and Insurance Specialist (CRIS) program. Developed by IRMI in 2005, the CRIS program offers a designation demonstrating specialized expertise in construction risks, but also counts toward continuing education requirements. Find out more about CRIS at www.cris-ce.com.

GUEST ARTICLE

Risk Management for Green Construction

**by Don Neff
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The concept of green or sustainable development first emerged in the residential construction market in connection with individual, single family homes. The demand for green construction has now migrated to attached townhomes, condominiums, and master-planned communities.

As expectations have grown for building performance, so has the risk of failure for not delivering the promised (either outright or implied) performance standards. Risk management in green or sustainable construction requires attention in three key areas: 1. integrated design and construction, 2. third-party verification, and 3. measurement of actual system performance. This article provides an overview of the first of these topic areas. More detailed information on this and the

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remaining topics will be provided in a future addition to *Construction Risk Management*.

Integrated Design and Construction

Successful green development programs integrate design and construction elements under one of several voluntary programs. Nationally recognized voluntary green building programs, and the organizations that sponsor them, are listed in Figure 1. The intent of these various programs is to encourage a rational and systematic approach to building with sustainable or "green" designs and products, creating homes that are healthy to live in and healthy for the environment. In particular, the more comprehensive programs provide measurement tools to assess the level of success in compliance with the program objectives. While some require more technical discipline and rigor than others, all are driven by common forces, including greater awareness of global warming issues, higher customer expectations, desire for healthier living environments, and a greater awareness of the need for environmental stewardship.

Regardless of the program selected, decisions made by different players will ultimately impact the environmental efficiency of a home or community. For example, in a large master-planned community, the master developers are in a position to affect the local environment via decisions about site selection, design, and construction of regional infrastructure (water, sewer, drainage systems, and common recreational amenities), housing density, and layout of transportation networks. The choice and layout of land uses and densities in a master-planned community bear directly on circulation and traffic flow, which have significant, community-wide environmental impacts.

Builders who construct houses on lots purchased from the MPC developers likewise have an environmental impact through their selection of materials and equipment (which impact energy efficiency and indoor air quality of the home, among other things), incorporation of water conservation devices, and recycling of construction waste. Finally, the lifestyle choices of home buyers will determine how sustainable, or green, a home and neighborhood becomes as it evolves.

Figure 1
Nationally Recognized Voluntary Green Building Programs*
(ranked from most comprehensive to least comprehensive)

Program	Sponsor
Zero Energy Homes	Department of Energy
Leadership in Energy and Environmental Design (LEED)	United States Green Building Council
Energy Star Certified New Homes	Environmental Protection Agency
Green Building Guidelines	National Association of Home Builders
Variety of Local U.S. Programs	Local Governments and Nonprofits

*A voluntary program is one undertaken without governmental or legal mandate for compliance. Private market mandates may be imposed, however, through the purchase and sale of documents between the master developer (land seller) and merchant builder (lot buyer).

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Leadership in Energy & Environmental Design ("LEED")

To demonstrate how green compliance can be achieved and measured, consider the LEED compliance program guidelines promulgated by the United States Green Building Council (USGBC), which are largely accepted as intellectually objective. LEED covers a range of product types, including existing buildings (EB), new construction (NC), core and shell (CS), commercial interiors (CI), neighborhood developments (ND), and residential homes (H). For each of these focused disciplines, LEED guidelines address six major concerns, as outlined in Figure 2. For each product type listed above, the degree of "greenness" is calculated based on key factors. These point scores represent a measure of the level of environmental achievement or sustainability for buildings constructed in the stated manner. The four levels of building sustainability in LEED-H are, in increasing order, LEED Certified, LEED Silver, LEED Gold, and LEED Platinum.

Figure 2
Focus of LEED Guidelines

1. Sustainable Sites
2. Water Efficiency
3. Energy and Atmosphere
4. Materials and Resources
5. Indoor Environmental Quality
6. Innovation and Design Process.

Rigorous application of standard performance specifications and independent third-party verification by accredited professionals (LEED-APs) are the foundation of the LEED program. This topic will be explored in more detail in a subsequent addition to *Construction Risk Management*.

Litigation Risk

The need to manage expectations of building users flows directly from the green building compliance guidelines. It is a reasonable expectation that "platinum" buildings should perform at a higher level than ones built, and promoted, as "silver" buildings. Earning the platinum registration requires many more points—more "green" assemblies and products, more innovation and creative design, etc. The disconnect occurs if a home builder's marketing materials say one thing but the homes constructed are not consistent with the marketing message. Project sponsors (landowners, builders, and/or owners) encounter legal problems when they fail to meet buyer expectations regarding energy costs, water consumption, and indoor air quality. By adhering to well-developed criteria such as LEED, compliance failures and the risks of litigation are minimized. The measurement of actual building performance through the commissioning process is a critically important topic and will be discussed in more detail in a forthcoming addition to *Construction Risk Management*.

Conclusion

Ensuring that homes perform up to expectations requires integrated pre-construction planning and execution of many intricate construction details by trade contractors. Builders and owners need to keep a sharp focus on the overall goal of targeted greenness along with more traditional concerns of budget, schedule, and quality controls within the selected delivery system. Furthermore, they must avoid the temptation to "over-promise" the benefits of green building to the end user—the home buyer.

Don Neff is president of La Jolla Pacific, Ltd., of Irvine, Cal., a leading provider of third-party peer-review and quality assurance services. Don can be reached at (949) 788-0300 or drneff@ljp ltd.com.