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Partial Lien Waivers on Projects: Obtaining Progress Payments While Preserving Claims [Ralph A. Finizio](#), [Jane Fox Lehman](#), [Stephen W. Kiefer](#), [Pepper Hamilton LLP](#)

Project owners, general contractors and construction managers commonly require their contractors and subcontractors to submit partial waiver and release forms with progress payment applications. The language used in these forms varies, but all function to extinguish certain lien rights and claims. In exchange for the progress payment sought in the application, the contractor represents by signing the form that it is releasing its right to lien the project or seek additional compensation for any and all claims existing as of the date of the application.

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Pennsylvania courts generally enforce such partial waiver and release forms, holding that the contractor releases all existing claims in exchange for the progress payment. See *Bricklayers & Allied Craftworkers Local 1 of PA/DE v. ARB Constr., Inc.*, No. 13-3883, 2016 U.S. Dist. LEXIS 37956 (E.D. Pa. Mar. 23, 2016); *Sauer, Inc. v. Honeywall Bldg. Solutions*, 742 F. Supp. 2d 709 (W.D. Pa. 2010); *Kleinknecht Elec. Co. v. Jeffrey M. Brown Assocs., Inc.*, No. 4997, 2006 Phila. Ct. Com. Pl. LEXIS 180 (Apr. 10, 2006).

Contractors should thus be aware that submitting a partial release risks waiving claims for events that transpired before the date of the payment application, such as claims for additional costs because of delay or acceleration. It is important for Pennsylvania contractors and subcontractors to take action to reduce their risk of unintentionally waiving claims for additional costs due to delay, acceleration and other events. Such actions include reviewing and revising the content of forms during negotiation of the contract, noting known claims when submitting releases, and documenting instances of waiver by the owner or general contractor.

Contractors' first opportunity to reduce their risk of waiving claims comes during the contract negotiation phase. Contracts that require the execution of partial waiver and release forms with progress payment applications often include a copy of the form as an exhibit to the proposed contract. If the contract does not include a copy as an exhibit, contractors should ask to see a copy or propose the use of their own form.

Contractors should carefully examine the scope of the release language in the proposed form. Very broad language releasing all claims and lien rights through the date of the payment application, including words and phrases like "any," "all," "any and all," "claims and rights whatsoever," "of whatever kind or nature," "it may now or hereafter have" is common. Courts have consistently treated such broad language exactly as it sounds, ruling that it clearly and unambiguously waives *all* contractor claims, including claims for delay and acceleration. See, e.g., *First Gen. Const. Corp., Inc. v. Kasco Const. Co., Inc.*, No. 13-3883, 2011 U.S. Dist. LEXIS 55349 (E.D. Pa. May 24, 2011). Contractors should work with counsel to identify broad language, evaluate its potential implications, and explore options to modify or strike it. Contractors should also request that waiver and release forms include a specific, conspicuous space in which to identify reserved claims and except them from the release.

Having studied the contract and settled on the content of the release form, contractors should next meet with their project staff to review the process for documenting and preserving claims during the execution of the project. The most critical action contractors can take to reduce their risk of unintentionally waiving claims is to specifically identify claims they wish to preserve on the release forms, enlisting counsel to help when needed. If the release form contains a specific space in which to identify claims, the contractor should absolutely do so. In *Bricklayers*, cited above, the subcontractor represented in its release forms that "to the extent that there are claims that the undersigned wishes to reserve and except out of this release, they are detailed with specificity on the reverse side of the release." The subcontractor did not detail any reserved claims on its release forms, and when it later filed a breach of contract claim against the contractor, the court predictably ruled that the subcontractor had waived its claims by failing to note them on the form as instructed.

In the absence of a specific place on the form to note excepted claims, the contractor should modify the form in a manner that clearly evidences its intent to except a claim from the scope of the release. For example, the subcontractor in *Sauer*, cited above, released all claims it had through the date its 18th

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payment application by signing and submitting the partial releases. Beginning with its 19th application, however, the subcontractor began manually crossing out the waiver language on the release form and inserting additional language stating that the release “excludes any claims for delay, disruption and inefficiency which Sauer has already written about under separate cover.” As a result, the court found that the subcontractor had not waived its claims for delay, disruption and inefficiency that arose during the periods covered by the 19th and subsequent payment applications.

Finally, project staff should also be reminded to keep detailed records of actions and communications with respect to payment issues during the course of the project. These records should include meeting minutes, phone memoranda, field logs, correspondence (both formal and informal), and any settlement communications. Such records may become important in a subsequent dispute because Pennsylvania courts have occasionally refused to enforce partial release forms where claimants were able to produce records showing that the owner or general contractor acted inconsistently with an intent to enforce the release.

Such inconsistent actions have included a general contractor’s overtures – after having already received the subcontractor’s release – that it would “take care” of the subcontractor, discussions of a possible “liquidating agreement” and joint proceeding against the owner, actual attempts by the general contractor to present the supposedly released subcontractor claims to the owner, and discussions between the parties that claims would be tabled for resolution at the end of the project. See *Lydon Millwright Servs., Inc. v. Ernest Bock & Sons, Inc.*, No. 11-7009, 2013 U.S. Dist. LEXIS 65019 (E.D. Pa. May 7, 2013); *Quinn Constr., Inc. v. Skanska USA Bldg., Inc.*, 730 F. Supp. 2d 401 (E.D. Pa. 2010); *United States ex rel. Pioneer Constr. Co. v. Pride Enters.*, No. 3:CV-07-0994, 2009 U.S. Dist. LEXIS 110935, *21-22 (M.D. Pa. Nov. 27, 2009); *Carson/Depaul/Ramos v. Driscoll/Hunt*, No. 02166, 2006 Phila. Ct. Com. Pl. LEXIS 277 (June 29, 2006). These cases demonstrate the importance of documenting facts that can later prove the owner’s or general contractor’s express or implied waiver of the right to rely on the releases.

In sum, careful scrutiny of proposed contracts during the negotiation phase, meticulous adherence to contractual claim procedures, and thorough recordkeeping during the project phase will aid contractors in avoiding the unintentional waiver of claims and lien rights. As always, contractors would be prudent to consult experienced construction counsel about payment issues before, during and after the life of any project.

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Methods of Forensic Schedule Delay Analysis – Pros and Cons

[Rolly L. Chambers](#), Partner, [Smith, Currie & Hancock LLP](#)

Time, like money, is a resource spent in building a construction project. In one sense, construction project schedules are a kind of budget or estimate for the way a contractor expects to spend time to build a project. Since the 1960's, critical path method (CPM) scheduling has grown in use in the construction industry as a tool contractors employ to plan and budget the time available to construct a project.

As with any budget or plan, there is always risk that unexpected events will disrupt the plan and result in an overrun—a construction schedule delay in the context of construction scheduling. Construction schedule delays in turn can lead to disputes and claims. Disagreements about the causes of delays, their impact on the construction process, and which contracting party must bear the consequences can become contentious. However, by working with and analyzing CPM construction schedules, often it is possible to quantify and determine with reasonable certainty the cause of and responsibility for delays occurring on a project. Courts, boards, and agencies in many jurisdictions favor the use of CPM construction schedule analysis in deciding legal claims for construction delays.

Forensic Construction Schedule Delay Methods

The growth in CPM construction scheduling for the past fifty years has brought with it a number of different methodologies for analyzing construction delays. It also has given rise to a specialized discipline—forensic construction schedule delay analysis. Forensic schedule delay analysis is the study and investigation of events using CPM scheduling methods to establish the cause and extent of delays and to resolve construction delay claims through negotiations or legal proceedings. It is a field for experts trained and experienced in CPM scheduling.

Various approaches to analyzing construction schedule delays have evolved over the years, but no standard method has emerged. AACE International (formerly the Association for the Advancement of Cost Engineering) in its Recommended Practice 29R-03 Forensic Schedule Analysis (2011), sets out basic technical principles and guidelines for CPM scheduling in forensic schedule analysis. It offers nine “method implementation protocols” for analyzing delays. Robert D’Onofrio and Anthony Meagher have described fourteen different schedule delay analytical methods, *What is a Schedule Good For? A Study of Issues Posed by Schedules on Complex Projects*, Construction Lawyer, Vol. 33, No. 1, Winter, 2016. The AACE’s Forensic Schedule Analysis publication observes that forensic schedule analysis is both science and art involving professional judgment based on knowledge and experience, which suggests there are as many methods of forensic schedule delay analysis as there are analysts. Although there isn’t a consensus, John Livengood has suggested that methods of forensic schedule delay analysis can be grouped into four major families in terms of measuring days of delay, *The Future of Forensic Schedule Delay Analysis*, Insight from Hindsight, No. 7 (February, 2016).

- As-planned vs. as-built – measures delays that occur on the days they occur and delays that have actually accrued at a specific point compared to the plan;
- Contemporary period analysis (Windows) – measures a combination of accrued delay to the start of an evaluation period and projected delays through the end of the project;
- Retrospective time impact analysis – measures projected delays at the start of an evaluation period as reflected in CPM schedule updates and calculates additional delay at the end of the project by inserting a fragnet (a network fragment, or a portion of the project schedule that relates to the specific delay) into the evaluation period, and
- Collapsed as-built – compares actual dates and events with after-the-fact assumptions about what hypothetically should have been planned.

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Selecting the method of evaluating a delay is important because various methods of forensic schedule delay analysis will produce different results even when applied to the same set of facts. Moreover, each method has its own strengths and weaknesses. Further, practical considerations may render a particular analytical method useless or infeasible in a given situation. For instance, contractual constraints, such as a contract clause requiring the use of a particular method to analyze project delays, the project records and source schedules available, the cost and time to prepare a forensic schedule delay analysis, or the forum in which the delay analysis will be presented can make one method more suitable than another.

Pros and Cons of General Methods of Forensic Schedule Delay Analysis

Because no consensus exists regarding a single method of analyzing schedule delays to be followed in every situation, selecting the analytical method most appropriate for a given situation is vital. The general strengths and weaknesses of the basic methods of analyzing schedule delays always should be weighed. Using the four general methods of delay analysis as a framework, some basic pros and cons for each analytical approach can be identified.

- As-planned vs. as-built – comparison of an as-built schedule to an as-planned schedule

Pros

- Relatively easy to perform
- Simple to present and easy to understand
- Can be persuasive if performed correctly
- Useful when data is limited

Cons

- Susceptible to manipulation through selection of as-built data
- Not generally accepted by many courts
- Causation is based on experts' opinions
- Does not measure concurrent delays
- Not suitable for complicated projects or projects built significantly different than planned

- Contemporaneous period analysis (Windows) – measures accrued delay at start of evaluation period and projected delays to end of project

Pros

- Accurate when there are regular CPM schedule updates
- Measures each delay and documents causation
- Can be performed on an ongoing project
- Difficult to manipulate and accepted by many courts and agencies.

Cons

- Can be difficult to present and expensive and time consuming to perform
- CPM updates may not be accurate
- May not adequately consider concurrent delays

- Retrospective time impact analysis – measures projected delay as reflected in CPM schedule updates and inserts fragment into evaluation period to calculate delay at end of project

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Pros

- Useful for analyzing complicated CPM schedules
- Measures each delay and documents causation
- Can be performed on an ongoing project and measure evolving delay
- Can determine concurrent delays
- Accepted by many courts and agencies

Cons

- Can be difficult to present and expensive and time consuming to perform
 - Can be subject to excessive decision making by analyst
 - Can be susceptible to manipulation
- Collapsed as-built – compares actual dates and events with after-the-fact assumptions about what should have been planned or could have been done

Pros

- Easy to present and understand “but for” analysis
- Theoretically measures concurrent delays by separate “collapse runs” for contractor delays and owner delays
- Offers documented evidence of causation

Cons

- Reconstructing as-built schedule is costly and time consuming and may be seen as after-the-fact analysis
- Limited acceptance by many courts or agencies
- Susceptible to manipulation
- Requires substantial decision making by analyst

Conclusion

Deciding which method of CPM schedule delay analysis is the most suitable for evaluating a particular construction delay is a crucial step in evaluating the cause and impact of a given delay. While no consensus exists regarding a standard analytical method that is appropriate for every situation, the pros and cons of various methods should be kept in mind. When an unexpected event disrupts and delays a construction project, using a sound analytical method to identify the cause and quantify the extent of the delay will be important for negotiating a fair result or for obtaining a fair outcome in arbitration or litigation.

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The Most Litigated Contract Document in Constructions Just Got More Complicated **[Brian Perlberg](#), AGC Senior Counsel, [AGC of America](#)**

The American Institute of Architects (AIA) has just released an update to the AIA A201 General Conditions Document and other related contract documents. AIA updates their documents once every ten years. The AGC Contract Documents Forum has formed a working group to evaluate the new AIA A201 and will provide analysis soon to AGC members.

For the first time in AGC's history, AIA did not ask for AGC's input in developing the 2017 AIA contract

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documents. In 2007 and with significant AGC chapter input, AGC's Board unanimously voted NOT to endorse the AIA contract documents. AGC does not sell AIA documents and AGC members do not receive a discount on AIA documents. Also note, that the 2007 edition will be available for 18 months.

Alternatively, AGC endorses [ConsensusDocs](#) contracts. AGC actively participates in the drafting of ConsensusDocs and AGC members get a 20% discount (discount code AGC100). [Here](#) is a numerical comparison chart of AIA and ConsensusDocs documents.

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ESI – What it is and Why It's Important in Today's Fast, Digital-Oriented Construction Project

[R. Sean McDonald](#), Senior Counsel, [Peckar & Abramson, P.C.](#)

By now you have already been asked about, or have inquired about, electronically stored information ("ESI"), whether as part of your daily business operations or in connection with a claim or dispute in which your company has been involved. Construction Litigation often involves many different people and companies (developers, owners, architects, engineers, contractors, subcontractors, experts, sureties, insurance companies) and utilizes a large number of information, and documents, and encompasses many different industry-specific issues (like construction defects, insurance claims, design and construction workmanship and timeliness of performance, mechanics liens, and surety-related claims). The expansive nature of construction disputes (which often grow over time) will lead to large ESI preservation and collection obligations with usually little or condensed time for collection and review by companies and their attorneys. And, once a claim is brought, the overall complexity and potential high volume of information and data impacting a construction dispute presents unique discovery and review challenges. Claim-related information, data, and documents need to be quickly collected, processed, indexed, and made accessible for review.

There is no question that project records tell the story of any dispute, no matter the type. People involved in a construction project are utilizing both industry specific software and hardware to become more efficient and sophisticated, and the "Internet of Things" is fast becoming more widespread and accepted. The largest category of ESI data are tied to Emails, and construction projects (and subsequent disputes) can be very Email intensive – the very nature of Email communications (utility, convenience, timeliness, etc.) produces more information about what happened and when an event actually occurred than the traditional hard copy document stored in a file.

This article explores the scope of discoverable ESI in U.S. Federal Courts, and provides practical guidelines and support for establishing a consistent, uniform policy and program for handling ESI generated by your company and your projects.

Federal Rules – The Inception of ESI's Importance.

In December 2006, the U.S. Supreme Court approved a number of significant changes to the Federal Rules of Civil Procedure (FRCP), which regulate the discovery of ESI. For the first time, these amendments allowed parties to conduct electronic discovery, obliging other litigants in a dispute to not only identify but preserve, collect and produce ESI in all forms and formats. Since 2006, most states have adopted same or similar approaches to the discoverability of ESI as well.

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As the name suggests, ESI includes any and all types or formats of electronic data, including emails, voicemails, instant messages, text messages. But the list also includes digital documents, spreadsheets, databases, file fragments, metadata, digital images, and digital diagrams. ESI includes any information stored in every type of electronic medium, including hard drives, thumb drives, computers, handheld devices, backup tapes, and optical disks. The differing types of ESI, and the ease with which ESI can be generated, stored, altered, transmitted, and destroyed, further complicates the discovery process — the sheer volume of information that is processed and the various formats in which it can be created, stored, and produced — make managing ESI a priority for any construction company. Those that do not do so may face difficulties in compliance, increased risks of the imposition of sanctions (even claim dismissal), and higher litigation costs.

Early Attention to ESI

FRCP 26(f) requires parties to meet shortly after litigation has started and confer about discoverable ESI and other related issues. The necessity for proficient ESI management on a client's part becomes evident even at this initial meeting since attorneys are responsible for knowing the details of a client's information systems and retention policies. Attorneys will also need to know the ESI that their clients will rely on for claims or defenses, and whether that ESI is accessible or potentially contains privileged information. Knowing where information is stored and processed not only will assist in controlling litigation and discovery costs, but also offers an advantage by providing some certainty when responding to the initial discovery question and to be able to answer key preliminary questions with a high degree of certainty even before litigation begins.

Reasonable Accessibility

FRCP 26(b)(2) permits parties to avoid discovery of ESI if the information is not reasonably accessible due to undue burden or cost. Although the phrase "reasonably accessible" is not defined, cases decided since 2007 have provided some guidance. For example, information in readily usable formats will almost always be deemed "reasonably accessible." This includes the information stored on active hard drives, servers, and disks as well as systematically organized and easily retrievable backup tapes or disks. Data that is *not* reasonably accessible includes electronic information that has to be converted or recovered in order to be usable. This typically includes data backup tapes that are not systematically organized or indexed and data that is deleted, damaged, or fragmented. Regardless, as a general rule a party seeking ESI discovery should have (whether in-house or via a third-party vendor) sophisticated computer forensic capabilities to counter any assertions that the data and information being sought is not reasonably accessible and thus not subject to discovery.

Forms of Information

FRCP 34(b) provides that ESI is to be provided in a form in which it is ordinarily maintained or a form that is readily usable. Good ESI management, therefore, requires companies to keep, maintain, and store ESI in a readily usable form or, at a minimum, in the form in which it is ordinarily maintained. Conversely, companies receiving ESI produced as part of the claim process should have sufficient knowledge regarding their own system capabilities (and those of their attorneys) and the format of the ESI that can be used by them. Once notice of a claim is given, or the existence of a claim is known, attorneys and their clients have a duty to preserve evidence relevant to the actual or potential litigation. Since 2007 there have been numerous examples of courts imposing sanctions on companies who cannot produce information that has been improperly stored or wrongfully destroyed (whether intentional or not). The new FRCP 37(e) provides that the court may impose sanctions when a party destroys ESI when a claim is known or notice given, even if done as part of its "routine, good faith" operations. Companies must establish and follow an ESI

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retention and destruction policy as part of their overall ESI management program — written ESI retention policies coupled with evidence that the policy is routinely followed may become key to avoiding additional litigation and discovery costs. The retention policy must include provisions whereby a "litigation hold" is placed on all potentially relevant ESI. And it must be noted that an effective litigation hold procedure should provide that notice be given to all the relevant people in the company as to what information must be retained and for how long, and reminders and updates about the litigation holds should be circulated periodically.

Handling Data Properly

Aside from the issues regarding storage and forms of production discussed above, companies must also take responsible measures when handling data, whether it be their own or ESI received as part of the operation of their business or as part of the litigation process. Unfortunately, some may still be handling data haphazardly, like using the same flash drive or portable hard drives for both work and personal use, or failing to segregate information maintained from data produced or received. More importantly, a chain-of-custody must be established and maintained so that there is never any question regarding who has reviewed, manipulated, altered, or stored information in a company's possession. In short, long gone are (or should be) the days when a hard drive is turned over for processing without first verifying the recipient to ensure the person or company receiving the gigabytes or terabytes of data which is potentially critical to a dispute has actually been given authority to access the information. To better keep the integrity of your ESI intact, and for your own cyber security, employees should not use the same flash drive or portable hard drive for both work and personal use. The last thing you want is to hand over a flash drive of your company's emails to your attorney for processing and production only to have forgotten (or not know) that personal files or data are saved alongside company data. And, realize too that a forensic image can be made and everything anyone has ever saved but "deleted" from a flash drive or a hard drive, and this information is now recovered and mixed in with your company's own data. This is akin to giving a waiter your social security number, bank account number, pictures of your last four family vacations, and that family reunion video from 1996 when handing him or her your credit card to pay the bill. The point is that companies should not use the same media to save and store work and personal data, and clients should work hard to ensure employees are keeping them separate.

The Internet of Things (IoT)

The Internet of Things (IoT), which includes any type of electronics embedded inside objects that collect and exchange data—is fast becoming a common fixture in the workplace. While still relatively new for contractors, these smart devices generate data about activities, occurrences, and other performance factors, providing transparency and supporting short and long term decision-making.

When applied properly, construction industry IoT includes equipment and employee monitoring through wearables, drone surveillance and other information collection devices. Wearables track employees by monitoring work locations, unsafe access to hazardous environments and overall efficiency. Equipment sensors monitor operation and maintenance needs in real time before costly breakdowns occur. Drones track work progression in a specific location or an entire project over time. All IoT systems correlate directly to streamlining production and maximizing profits. The challenge is how best to utilize collected data while transforming it into a usable format. Companies who understand and properly interpret data collected soon recognize that these newest of technologies afford enhanced performance opportunities and bolster profitability. In terms of ESI, the challenge is how to properly collect and store relevant project data while avoiding the glut of information which may be subject to discovery in future litigation.

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Using Your own Device – BYOD

The use of mobile devices in the workplace is an ever-evolving and more common practice. When clients first started taking advantage of increasing mobile technology, particularly cell phones and laptops, most implemented “Company Owned, Personally Enabled” (“COPE”) policies. The mobile device remained the property of the Company, and the employee used it primarily for work-related tasks. With COPE, the type and scope of mobile devices is restricted, affording clients the ability to fully understand the technology of a limited number of devices and thus providing predictability when the data stored on those devices becomes discoverable. However, as mobile technology has become more accessible, and lines have gradually blurred between work-related and personal use of mobile devices, some companies have transitioned to “Bring Your Own Device” (BYOD) policies. BYOD provides a different kind of predictability from COPE because clients can be reasonably assured that their employees’ work product is contained in one device. With COPE, employees often use two devices, one professional and one personal, but they don’t always draw a strict line between the two. This can make it difficult for employers to pinpoint discoverable data when the need arises. BYOD usage policies may also result significant cost savings for clients — employee purchase their own device(s) and providers and generally work more efficiently using devices of their choosing. Nonetheless, with these advantages come certain ESI discovery complexities that need to be addressed at the outset before creating or switching to a BYOD policy.

- **The Who and the What: Who is using mobile devices to create work product and what devices do they use?**

It’s critical to maintain a detailed inventory of all employees who use their mobile devices to create work product, as well as what type of devices they use. When the need for a litigation hold arises, companies need to be able to act quickly to ensure all relevant individuals and devices can be easily identified so as to defensibly preserve important data.

- **The How: Does our IT department understand how the mobile device technology works?**

With BYOD, IT departments have the complex task of understanding the nuances of many different types of devices due to varying employee preferences and the myriad of devices and platforms available. From Galaxies to iPhones, tablets to laptops, achieving and maintaining a strong understanding of the associated technology used by each platform and type of device is critical to ensure that the correct data is identified and collected.

- **The Where: Where is the relevant data located?**

The risk of BYOD is that it puts the device largely under the control of the employee, and thus data may be destroyed (intentionally or accidentally) that would have otherwise been maintained under a client’s official document retention program. To avoid data deletion and costly collections, it’s important to ensure that all data is also stored somewhere other than on the device itself, whether on the company servers, in the cloud, or with a third-party hosting service. Regardless of the backup and storage method, clients need first to ensure that all employees back up their mobile devices onto the organizational network.

- **The Why: Why did the employee use this device?**

Understanding what each employee uses their devices for can cull down the time and cost associated with identifying any relevant content. Regardless of whether a client prefers COPE, BYOD or a hybrid of the two, the best protection from ESI storage, maintenance and production complications is to implement an effective and practiced ESI program and policy – one that is detailed, documented, and well- communicated

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so that all employees understand that they must follow all established safeguards in order to maintain the integrity of discoverable data and preserve any private or outdated information from inadvertently being produced or accessed by third parties.

Even before litigation begins, construction companies can take simple steps to reduce their e-discovery costs.

Keys to Successful ESI Program

- Employee qualified IT Personnel – When it comes time to take a dispute to litigation, the process for collecting and producing documents becomes more efficient if one person or one department in your company has primary responsibility for interacting with your lawyer on ESI issues. Your information technology ("IT") person (or department) needs to know the full scope of the company's systems and software/hardware capabilities.
- Email – Like project documents, organizing email files can reduce ESI costs and issues. Companies should try to avoid allowing employees to create their own folders to store emails by project (which is commonly done out of convenience if for no other reason), and instead develop a company-wide system where all emails pertaining to a project are stored. If the project warrants it, a unique email domain can be set up specifically for the project so that emails can later be easily identified. By following these simple rules, identification and collection becomes more efficient because it targets emails in a certain file, a specific storage location, or a specific domain, thus reducing overall collection, processing and hosting costs. Finally, any deletion mechanisms for project emails should be suspended to comply with a company's retention policy in order to preserve potentially relevant evidence and avoid costly sanctions and litigation costs.
- Implement a Consistent Retention Policy Which Employees Can (Must) Follow – Companies need a tailor-made document retention policy with different retention standards for different data and documents related to a project. A company is smart to seek assistance from its attorneys and IT department to advise on the various legal and practical requirements for collecting, processing, and preserving project data and records. But even a well-designed document retention policy depends largely on employees uniformly implementing and following it. Drafting, saving and filing procedures and protocols should be laid out in easily followed written instructions and policies. These procedures then need to be published to all project employees, regardless of their level of involvement. Finally, designated personnel need to conduct routine monitoring of project ESI collection and storage to ensure project personnel understand and are adhering to the system.
- Get and stay organized – Properly organizing the (sometimes) overwhelming amount of data and documents involved in a construction project can significantly streamline future claim litigation. If possible, all ESI related to a project should be stored in one location which is accessible to all employees involved in the project, set up to prevent unauthorized deletion or modification of stored data. Separate folders should be set up to hold each type of project document — contracts, design documents and specifications, change orders, schedules, payment applications and the like. If economical, all paper documents should be scanned and added to the project's electronic database. Doing so will alleviate the need to perform system-wide searches through multiple document storage sites once a claim arises. Project file organization also reduces expensive document review, leaving more time for attorneys to focus on arguments and claim issues.

Construction companies who can both understand and applying the emerging and ever-changing ESI landscape will more-readily use, identify, collect, review, and produce electronically stored information, whether doing so means more efficient and cost effective performance or avoiding the potentially high costs of failing to do so when a claim arise. Doing so helps companies in pursuing a more proactive than reactive position in connection with successfully completing contract performance or handling the myriad of potential construction claims. Doing so will also mean that your attorneys can devote less energy to discovery and

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more to the substantive legal issues involved, benefitting both the lawyer and client alike, setting a clearer path for successful, cost effective claims resolution.

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Economic Loss Doctrine Prevents Contractors from Suing Design Professionals

[Michael Kennedy](#), General Counsel, [AGC of America](#)

On February 21, 2017, the Maryland Court of Appeals decided *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, where a general contractor had sought to hold the design firm that developed the plans and specifications for a large public project liable for the economic losses that defects in their designs had allegedly caused the contractor to suffer. Significantly, the project was design-bid-build and the contractor did not have a contractual relationship directly with the designers. The question that the case presented was whether the “economic loss doctrine” precluded the contractor from suing them in tort. Siding with the designers, the court held that the doctrine does apply “to large-scale government construction projects such as this one,” and as a result, the contractor could not bring a tort action against the designers for its purely economic losses.

At the outset, the court observed that the case law on the economic loss doctrine “varies widely.” The court explained that some states “apply[] the . . . doctrine to parties in the construction industry to bar tort claims for purely economic losses” while other states focus on the foreseeable fact that design-bid-build contractors will rely on the work that design firms perform and hold that such firms therefore owe such contractors a “duty in tort.”

In 2000, the Court of Appeals had held that accountants have such a duty to essentially anyone expected and intended to rely on their reports. Seeking to split the difference between the two lines of authority on the economic loss doctrine, the court expressly rejected a “categorical distinction” between accountants and design professionals but then refused to extend the accountants’ “duty” to the design professionals involved in this particular case.

The court’s reasons were two. The first was that a “complex web of contracts . . . typically undergirds a public construction project.” The second was that the court’s decision would have implications for “the public purse.” The court maintained that the parties to such a construction project “have sufficient opportunity to protect themselves . . . in negotiating [their] contracts.” The court also expressed a fear that “[i]mposing a tort duty on design professionals will likely correlate with an increase in project costs.”

Last September, AGC of America, the Maryland Chapter and the General Building Contractors Association jointly filed a friend-of-the-court brief in the Maryland Court of Appeals in an effort to influence the outcome. That effort met with some but obviously not complete success.

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Which Standard Form Design-Build Contract is Right for You and Your Project?

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One of the foundations for a successful design-build project is a fair, balanced and clear contract. As a statement of the parties' relationship, obligations and expectations, the contract should promote and not hinder design-build best practices. The negotiation of the design-build agreement should be among the first collaborations among the project team and set the tone for a successful project.

Many owners and design-builders start with an industry standard form published by ConsensusDocs, the Design-Build Institute of America or the American Institute of Architects.

Understanding how the various industry documents approach design-build and how that approach aligns with the unique needs of the design-build team and project will be essential. While standard forms provide the flexibility to draft additional or alternative language, they also each promote a certain philosophy that manifests in approaches, practices, preferences and even biases that must be considered by users of the documents. What is the underlying philosophical approach of the document and the publishing organization? When does the design-builder first enter the picture? Is a bridging approach required? When is price set and how does the form address GMPs and contingencies? How is the standard of care and performance guarantees addressed? What procedures does the document use to manage the development of the design?

This article will examine some of these considerations as addressed in each document family's primary documents: ConsensusDocs CD 410 Design-Build Agreement and General Conditions Between Owner and Design-Builder (Cost of the Work Plus Fee with GMP), DBIA 535 General Conditions of Contract Between Owner and Design-Builder, and AIA A141 Agreement Between Owner and Design-Builder. Further topics will be discussed in subsequent articles.

Philosophy

As the products of industry associations, the ConsensusDocs, DBIA and AIA design-build standard forms each attempt to articulate best practices and contract language that can be used for a variety of users, projects and jurisdictions. While the forms enjoy many commonalities, they each still reflect the unique philosophy of their publishing organization.

The product of an association of industry associations, the ConsensusDocs design-build forms have as their benchmark the question "what is in the best interest of the *project*." The various members of the design-build project team, owners, designers, design-builders, subcontractors and others, as represented by their respective industry groups, define by consensus what should be best practices.

For the DBIA, their entire mission is the design-build project delivery system and promoting the effective integration of design and construction services. The documents were drafted to incorporate DBIA's Best Practices documents, summed up in its slogan – Design-Build Done Right.

Embedded in the AIA design-build forms is the idea that designers should lead the design-build project. Though not mandated, the AIA design-build forms are written to align with a bridging approach by which an owner and its designer develop a preliminary project design before the design-builder is even retained. This is the AIA's answer to the "problem" of owners giving up some direct control over the design process in exchange for the collaborative nature of design-build. There is a presumption but not a requirement that the owner retain a separate consultant for the development of the Owner's Criteria. While any of the families of standard forms could be used with a bridging approach, philosophically the AIA documents anticipate bridging in a way the others do not.

Relationship of the Parties

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The ConsensusDocs establish a team relationship based on mutual “trust, good faith and fair dealing” (CD 410 2.1). Similarly, the DBIA forms commit both the Owner and Design-Builder “to cooperate fully with each other, and proceed on the basis of trust and good faith, to permit each party to realize the benefits afforded under the Contract Documents.” (DBIA 535 §1.1.1). In contrast, the AIA documents do not characterize the parties’ relationship in mutual terms. Instead, “The Design-Builder accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to exercise the Design-Builder’s skill and judgment in furthering the interests of the Owner...” (AIA A141 §A.5.6), language that could likely be interpreted to create a fiduciary relationship between the Owner and Design-Builder, a higher standard of care than may be acceptable to a design-builder or its architect.

When the Design-Builder First Enters the Picture

All of the standard forms have the flexibility to allow for the earliest possible involvement of the Design-Builder in the development of the project. Under the ConsensusDocs, the Design-Builder can be retained under a preliminary agreement (CD 400 Preliminary Agreement Between Owner and Design-Builder). This preliminary agreement enables a Design-Builder to get a project “off the street” without necessarily committing either the Owner or the Design-Builder to the full project should it not prove feasible. The Design-Builder will assist in the development of the Owner’s Program, and develop a preliminary evaluation, schedule, estimate and schematic design documents, based on which an Owner can make a “go/no go” decision. Alternatively, the parties can use the CD 410 right from the start, with the Design-Builder assisting with the development of the Owner’s Program. Compensation can be established once the project scope has been sufficiently developed to allow for GMP pricing.

Similarly, DBIA offers DBIA 520 Standard Form of Preliminary Agreement Between Owner and Design-Builder, under which the Design-Builder can assist the Owner in developing its Project Criteria is not already developed. So too, the parties can start right off with DBIA 530 Agreement Between Owner and Design-Builder – Cost Plus a Fee with an Option for a GMP. The Design-Builder can work with the Owner to establish its program and Project Criteria, with a GMP established at the outset or developed later.

The AIA does not have a preliminary design-build agreement, though AIA A141 provides for optional preliminary design services including the evaluation of the Owner’s Criteria. The lack of a preliminary design-build agreement may be explained in part by the AIA’s embrace of the bridging approach. Under the AIA C141 Agreement Between Owner and Consultant for a Design-Build Project, the Owner’s consultant develops the Owner’s Criteria before the Design-Builder is even retained. Then under the AIA A141 the Design-Builder’s services benchmark off of the Owner’s Criteria. This has prompted the criticism that the approach can impede pure or truer design-build because the value of the Design-Builder’s early involvement and input is delayed or even negated.

Understanding these philosophical and procedural differences among the ConsensusDocs, DBIA and AIA design-build standard agreement will enable users to decide which forms best suit them and their design-build project.

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