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Construction project electronic communications must be managed and preserved

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Despite increased utilization of electronic communications over the past ten years in the construction and design workplaces, protocols to manage, preserve and catalog such communications have often failed to keep pace. Construction companies that fail to recognize the potential impact of these trends do so at their own peril.

In this age of digital connectivity, increasing numbers of project level and senior project management utilize laptops, computers, tablets and smart phones for the majority of project-related communications. There are many advantages. E-mails are much easier and quicker to draft and send and they are received all but instantly. Plus, typically, the sender is able to verify receipt. In fact, the use of electronic communications has very likely substantially increased the number of written statements exchanged concerning project-related issues.

This phenomenon, however, raises several significant concerns. One is the fact that individuals tend to be much less careful concerning statements written in an e-mail as opposed to a formal letter. E-mails are often sent on the "spur-of-the-moment." Nonetheless, statements in an e-mail may result in the same legal consequences as carefully drafted letters that go through multiple revisions and are carefully reviewed by senior management. Electronic communications can create legally binding contracts and may be used as admissions in a courtroom or during arbitration. As opposed to phone calls or in-person discussions, e-mails provide documentary evidence of contemporaneous communications. Unless irretrievably lost, the content of an e-mail is not subject to debate or memory loss. As such, management should initiate specific protocols with respect to which employees are permitted to communicate with outside entities/owners and for the review of the content of such communications before they are issued.

Equally important is the need to preserve and maintain electronic communications along with other project records. Typically, there is a set protocol with respect to traditional correspondence and a designated document custodian is responsible for their safekeeping. E-mails, however, are often deleted by the recipient or otherwise fail to make their way into a document depository.

Failure to properly preserve communications, or, worse still, "spoliation," may result in significant sanctions by the court if the subject matter of such communications ends up in litigation. Spoliation refers to the destruction or material alteration of evidence or the failure to preserve property for another party's use as evidence in a pending or reasonably foreseeable litigation. As soon as litigation is foreseeable, the law imposes a duty upon potential litigants to preserve all relevant communications including those electronically generated.

In the event of spoliation, a court has the ability to: (a) shift the cost of discovery to the party that failed to retain documents; (b) impose fines; (c) make special jury instructions; (d) preclude a party for entering evidence at trial; and (e) in the most severe situation, enter a default judgment or

dismiss a party's claims, counterclaims and/or cross-claims. Courts do not hesitate to impose such sanctions where a party fails to take all necessary steps to preserve documents when it was reasonably foreseeable that litigation would occur, even if destruction or loss of the documents was unintentional. This is true even if destruction was in compliance with a corporate document management policy.

According to a recent court decision, the duty to preserve "means what it says and that the failure to preserve records, paper or electronic, will inevitably result in the spoliation of evidence." In that particular case, because a party failed to take the necessary steps to ensure that relevant records were preserved when litigation was reasonably anticipated, the court imposed monetary sanctions.

To avoid the consequences for spoliation, contractors must establish standard document retention/destruction policies. When litigation is foreseeable, (which is typically long before a complaint or demand for

arbitration is served), a "litigation hold" plan must be put into effect to preserve all relevant documents. Among other things, such a plan will include: (a) identifying where potentially relevant documents exist, including stored within individuals' personal computers; (b) begin efforts to collect such documents; and (c), most importantly, to make sure that documents are not lost even if such documents would typically be destroyed pursuant to corporate document policies. If litigation occurs, proper planning and preservation efforts will typically reduce the time and costs required to segregate documents for discovery purposes.

Preserving electronic communications is also important for contractors engaged on projects where the contract imposes demanding notice and documentation requirements, such as the City of New York's standard construction contract. By example, the city's contract requires a contractor to provide written notice within seven days of any condition that is or may cause a delay in the completion of the work. The highest court in New York has held that strict compliance is required or claims will be deemed waived. The city's contract, however, does not specify how notice must be given, other than the deadlines and recipients for notice. Therefore, e-mails concerning delay and claims-related issues, whether from project level personnel or senior project management, may constitute written notice or fulfill other notice and documentation requirements. The ability to quickly locate and produce such e-mails may prove critical to overcome an owner/public agency's defense based upon lack of notice.

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