ConsensusDocs Construction Law Newsletter

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The Legal Implications of Using Construction Management Software Applications

Susan Elliot, Peckar & Abramson, P.C.

Over the past several years, the construction industry has seen the development of new construction management software applications providing builders with mobile project management tools like task management and scheduling, issue tracking, plan viewing, reporting and archiving. Software applications like Fieldwire and e-Builder raise the question of how these types of programs could potentially protect or expose users to liability should the contractor or construction project become the subject of a lawsuit.

There are no shortage of software applications that have been developed in recent years aimed at streamlining all aspects of the construction process and simplifying communication between team members on the project site. Programs range from those offering targeted services, such as bid management, to overall project management software that assists users in managing day-to-day field operations, keeping track of workers, equipment and materials, managing punch-list work and streamlining payments to workers.[1]

Like other new technologies, these software applications are aimed at improving and increasing productivity on a project. However, the documents and information they produce and store are subject to discovery by opposing parties in a lawsuit. These programs may offer protection to builders by documenting their efforts to comply with contract requirements and project-site safety measures, and assist in avoiding scheduling delays. However, the real-time task management and scheduling features of these applications could potentially expose

[1] See, i.e. Fieldwire (www.fieldwire.com); Primal Sensors (www.primalsensors.com); Uptake (www.uptake.com); PlanGrid (www.plangrid.com); e-Builder (www.e-builder.net); BuildingConnected (www.buildingconnected.com); Rhumbix (www.rhumbix.com); AccuLynx, (www.acculynx.com); and improveit 360 (www.improveit360.com).

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users to liability for certain causes of action if care isn't taken when communicating with team members or documenting a project's progress. For example, a general contractor that hastily records or assigns tasks to team members in ways that do not align with the terms of the construction contract or the scope of work could potentially inadvertently expose him or herself to claims of negligence or breach of contract. Similarly, a prime contractor using software to collect bids on a government project from small or disadvantaged business entities could potentially face liability if bids are quickly dismissed based on price after a quick glance at the software application's contract price-comparison list without evaluating the bidder's underlying qualifications in accordance with government solicitation requirements. Contractors could also potentially face liability for failing to properly retain and safeguard sensitive bid documents and pricing information should users inadvertently share this information through the application with other users or competing bidders.

The benefits of construction management software applications have clearly been embraced by the industry. Given the fast-paced nature of communication made possible by today's texting and social media applications, it remains important for construction industry software users to ensure that care is taken in using these applications to avoid potential legal liability.

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When a Defendant Loses, but Still Collects Attorney Fees, in a False Claim Act Case

Ted R. Gropman and Aria Soroudi, Pepper Hamilton LLP

Under the federal False Claims Act (FCA) the prevailing plaintiff — be it the government or a *qui tam* plaintiff — is automatically entitled to recover attorney fees. 31 U.S.C. § 3730(d)(1) and (2). Prevailing defendants, however, must not only defeat the lawsuit, but also persuade the court that the claim was clearly frivolous, vexatious, or brought primarily to harass. But in a recent and significant case, the U.S. Court of Appeals for the Sixth Circuit held that attorney fees were available to a *nonprevailing* defendant. In doing so, the Sixth Circuit relied not on the FCA's attorney fees provisions, but on the attorney fees provisions of the Equal Access to Justice Act. *United States ex rel. Wall v. Circle C Constr., LLC*, No. 16-619, 2017 U.S. App. LEXIS 15646 (6th Cir. Aug. 18, 2017). In *Circle C Construction*, the court found that, while the government was the prevailing party at trial, attorney fees were nevertheless available to the defendant as a necessary means to curtail the government's overreaching damage claims, stating that the government's claims were "fairyland rather than actual."

At its core, the FCA is designed to impose liability on individuals and companies who defraud the federal government. As a primary tool in combating fraud, the FCA includes a fee-shifting provision, which goes against the usual "American rule" of each party bearing its own attorney fees and expenses. Pursuant to sections 3730(d)(1) and (2) of the FCA, a prevailing plaintiff is

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entitled to a mandatory award of attorney fees and expenses. Defendants are only entitled to attorney fees when the "defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 31 U.S.C. § 3730(d)(4). However, a close examination of section 3730(g) provides that,"in civil actions brought under this section by the United States, the provisions of Section 2412(d) of Title 28 shall apply."

Section 2412(d) of Title 28 refers to the Equal Access to Justice Act, which the defendant in *Circle C Construction* relied on in seeking attorney fees. In this seminal case, the government sought recovery against a warehouse construction contractor that had falsely certified that two subcontractor electricians were paid wages in accordance with the Davis-Bacon Act. Rather, the two subcontractor electricians were paid $9,900 less than the mandated wages. As a result, the government sought a windfall recovery of $1.66 million, which included all electrical expenses, of which $554,000 was purportedly "actual damages" for the $9,900 underpayment.

Ultimately, the government's extreme demand drew a sharp rebuke from the Sixth Circuit, and, in its earlier 2016 opinion, the court drastically reduced the judgment to $14,748 — less than 1 percent of the government's original demand. Thereafter, the action returned to the district court, where the contractor sought recovery of the $468,704 of attorney fees it incurred defending the action against the government. After the trial court denied the defendant's fee request, the Sixth Circuit once again overturned the district court's decision, ruling that the contractor was entitled to its attorney fees under section 2412(d)(1)(D) of the Equal Access to Justice Act.

Section 2412(d)(1)(D) provides, in relevant part:

> If, in a civil action brought by the United States . . . the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

The government challenged the Equal Access to Justice Act's applicability, arguing that the title "Fees and expenses to prevailing defendant" rendered the provision inapplicable to the nonprevailing defendant. However, the majority panel found that the plain text of section 3730(g) provides that "the provisions of Section 2412(d) of title 28 shall apply —'which means that *all* of those provisions apply, including Section 2412(d)(1)(D).'" In addition, the court found the federal government's demand for $1.66 million as compensation for the defendant's underpayment was excessive and unreasonable compared to the final judgment of $14,748. The court pointed to its earlier ruling, stating that "the damages the government sought to recover in this case were 'fairyland rather than actual.'"

In conclusion, *Circle C Construction* serves as a warning to the federal government and *qui tam* relators that excessive damage demands under the FCA may be met with increased scrutiny. Indeed, the Equal Access to Justice Act was passed in response to congressional findings that certain parties, particularly small businesses, were deterred from pursuing their rights in opposition to unreasonable government action because of the expense involved. As a last result, the government attempted to persuade the court that its ruling "would have a

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chilling effect on its efforts to vigorously enforce the False Claims Act." Despite its plea, the court provided the following response:

> One should hope so. In this case the government made a demand for damages a hundredfold greater than what it was entitled to, and then pressed that demand over nearly a decade of litigation, all based on a theory that as applied here was nearly frivolous. The consequences for Circle C included nearly a half-million dollars in attorneys' fees. Section 2412(d)(1)(D) makes clear that the government must bear its share of those consequences as well.

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The ConsensusDocs 260 Performance Bond—Simpler Is Better

Charles W. Surasky, Smith, Currie & Hancock LLP

General contractor performance bond forms are published by ConsensusDocs and AIA. Which one is better for general contractors and owners? The answer is evident from a quick look at the forms. AIA A312 – 2010 has more than 30 paragraphs and subparagraphs. ConsensusDocs 260 has seven. For contractors and owners, if not for lawyers, simpler is better. But that is not the end of the story. ConsensusDocs 260, while short and straightforward, embodies important provisions that can reduce costs and reduce the likelihood of unnecessary litigation.

Let's begin by looking at what's not in ConsensusDocs 260. Unlike the A312 ¶ 3.1, ConsensusDocs 260 does not require the owner to notify the contractor and surety that it is considering a declaration of default and it does not give the owner or surety the opportunity to request a conference. If the owner's notice doesn't request a conference, the A312 gives the surety five days from receipt of the owner's notice to request a conference which the owner must attend. Either way, the conference must be held within 10 days of the surety's receipt. A312 ¶ 3.1 appears to make this notice of consideration of a declaration of default a condition precedent to the surety's obligations, except that ¶ 4 says it isn't, unless the surety demonstrates actual prejudice. Why is any of this bad? There are at least two reasons.

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First, it's unnecessary. While there are likely projects where a pre-default conference will be useful, that is not true for all projects and may not be true for most projects. If a sophisticated owner feels a pre-default conference would be useful ConsensusDocs 260, does not preclude it. The owner can request a conference and the surety and contractor are free to agree or disagree. Mandating, or sort of mandating, a conference may be useful, or it may be a waste of time, or it may lead to kicking the problem down the road for a few weeks or months by which time the problem may be worse.

Second, the conference requirement is a fertile source of disputes unrelated to the underlying problem. Suppose that an A312 bonded contractor runs into cash flow problems and stops performing a time sensitive project. Suppose further the owner declares the contractor in default and notifies the surety without first giving notice that it is considering a declaration of default. Will the surety respond to the default or will it avoid responding by arguing prejudice from lack of notice? If the surety chooses the prejudice option, the owner loses much of the value of the bond and the contractor's indemnitors face substantial legal fees. If the contractor had given a ConsensusDocs 260 bond, no such extraneous argument would be available.

Apart from the notice and conference requirement, the post-default procedure required by both bond forms is similar. There are, however, important differences. Both bonds condition the surety's obligation on the owner not being in default and the owner declaring a contractor default. But only the ConsensusDocs 260 requires the contractor to be in default. The difference gives the owner invoking an A312 bond additional, and arguably unwarranted, leverage in instances where the contractor contests a declaration of default.

The A312 requires the owner to terminate the contract, ConsensusDocs 260 does not. ConsensusDocs 260 allows the surety to promptly remedy the default, the A312 does not. With these two differences, ConsensusDocs 260 gives both the owner and the surety much more flexibility to deal with a problem that may not require a default termination or require the surety to formally take on the contractor's responsibilities. Like the flexibility to have or not have a conference, this flexibility can potentially save time and money for both the owner and the contractor or the contractor's indemnitors.

Another important difference is ConsensusDocs 260's unambiguous limitation of the surety's liability to the amount of the bond. The A312 ¶ 8 appears to limit the surety's liability in certain circumstances while ¶ 7 arguably imposes obligations that could exceed the amount of the bond. While these ambiguities might seem to favor the owner that advantage may prove illusory if it leads to a dispute that interferes with prompt completion of the owner's project. There is significant value to all parties—owner, contractor, and surety—in knowing where they stand from the outset of any claim on the bond.

Finally there are the different time limits for lawsuits. Any proceeding on an A312 bond must be started within two years after a declaration of default, the contractor ceasing work, or the surety refusing to perform its obligations, whichever occurs first. Suit on a ConsensusDocs 260 bond must be started within two years after default by the contractor or substantial completion, whichever occurs first. While these deadlines appear similar at first glance, they aren't. Contractors sometimes continue working long after substantial completion and sometimes continue to work on warranty issues long after final completion. Post-completion performance bond claims are not uncommon. This means that lawsuits on A312 bonds may be possible much longer than two years after substantial completion. As with the ambiguous limitation of liability, this may seem favorable to owners. But the same counter-thought also applies. What if the seemingly longer time to file suit misleads the owner into an expensive lawsuit? There is value in certainty. The purpose of performance bonds is to guarantee completion of projects. Two years after substantial completion is more than adequate time to evaluate and start a performance bond lawsuit.

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The ConsensusDocs 260 performance bond incorporates the contractor owner contract by reference. If that contract is the ConsensusDocs 200 Standard Agreement and General Conditions Between Owner and Constructor, the first substantive contract provision reads as follows:

> 2.1 PARTIES' RELATIONSHIP Each party agrees to act on the basis of mutual trust, good faith, and fair dealing, and perform in an economical and timely manner. The Parties shall each endeavor to promote harmony and cooperation among all Project participants.

The ConsensusDocs 260 performance bond builds on and reinforces these important obligations of trust and cooperation. Rather than imposing a detailed, one-size-fits-all procedure, it allows owners, contractors and sureties the flexibility to resolve performance problems in the manner best suited to their particular project.

Smith, Currie & Hancock LLP is a national boutique law firm that has provided sophisticated legal advice and strategic counsel to our construction industry and government contractor clients for fifty years. We pride ourselves on staying current with the most recent trends in the law, whether it be recent court opinions, board decisions, agency regulations, current legislation, or other topics of interest. Smith Currie publishes a newsletter for the industry "Common Sense Contract Law" that is available on our website: **www.SmithCurrie.com**.

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Industry leaders from our coalition partners across the A/E/C industry celebrating our many successes and planning for the future.

ConsensusDocs 10-Year Milestone Marks a Brighter Outlook for the A/E/C Industry

Brian Perlberg, Esq., ConsensusDocs

ConsensusDocs is a unique coalition developed to publish best practice industry standard construction contracts. On September 27th, ConsensusDocs reached a 10-year milestone. The ConsensusDocs coalition is a first of its kind industry-wide effort to bring the A/E/C industry together to create standard construction contracts that create a better contractual foundation to build successfully. The original mission and current mission continues to be to optimize better project results with less transactional costs – namely claims, contingencies, litigation, and contentious contract negotiations.

Now there is a ten year-track record of success for projects utilizing ConsensusDocs contracts that experience less claims and litigation than other standard contract documents which are

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written. The key was getting away from the traditional perspective of a particular segment of the industry writing the contract to getting all the players perspective to better align all parties to reach project completion successfully. Project histories using ConsensusDocs contracts help demonstrate that there really is a better way to build. This contrasts an approach that creates contractual silos that attempt to legitimize itself from reams of reported court cases that keep getting longer. Today, with a growing construction economy that craves more construction qualified labor, brings an accelerating subscriber base for ConsensusDocs contracts.

The milestones demonstrate a better path forward. ConsensusDocs offers a fundamental contractual difference that enables an Owner of construction project to be more active in construction decisions. At the end of the day, an Owner has the most to gain or lose in a project's success, so their default role for everything should not just be as a check-payer. Also, a principle tenant of the coalition effort is that fair contracts get better results. Moreover, contract documents should be written clearly to be understood and facilitated contract administration, not to obfuscate and litigate. Direct party communications can actually be positive to help reduce and mitigate claims, rather than create contractually silos.
One of the most difficult obstacles to effectuate change is to demonstrate a proven track record of success in traditionally slow moving industries that are reluctant to change. Construction and legal contract drafting both fit into that category. However, there are compelling reasons to change.

First, construction contracts traditionally flow down risk to the lowest and often weakest party in the contractual change is broken and needs to be fixed. Studies, including one from Construction Industry Institute (CII), conclude that unfair contract provisions raise prices and get poor project results. Secondly, even if the old way of contracting were working, your competitors are ready to disrupt you will a significantly more efficient and collaborative way to get better results. Cleary, the industry is starting to change. While IPD is not the most common project delivery method, most construction companies are trying to incorporate lean principles into their construction processes. Your contracts need to keep up with your business processes. And third, today's construction economy has vastly improved to the point that those "weaker" parties in the contractual change might just be chooses which project they want to most aggressively compete upon, or condition their bids on a fair contract.

Conclusion

Even if you do not use a standard contract document whole cloth, updates to consensus standard contracts are extremely valuable to ensure your contractual practices are keeping up with today's industry. ConsensusDocs will continue to create new documents, guidebook comments, and updates to help move the entire industry forward in a way that benefits constructors, owners, and design professionals alike with better project results and less claims. In 10 years, ConsensusDocs has become a viable option with a track record of success. During the next 10 years, they should become the defaults standard for a better foundation to build.

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ConsensusDocs Publishes New Contract Documents

This past month, ConsensusDocs published two new agreements in an effort to keep subscribers ahead of the curve.

With the release of **ConsensusDocs 230**, we now offer a standard prime agreement for construction owners and constructors that provides a best practice industry standard contract with integrated general conditions where the payment is based upon the cost of the work and includes a guaranteed maximum price (GMP). Unlike the **ConsensusDocs 500 CM At-Risk** agreement that contemplates preconstruction services and a GMP amendment once the design is sufficiently complete, this agreement, ***ConsensusDocs 230***, contemplates a GMP upon contract signing.

The **ConsensusDocs 910 Standard Operations and Maintenance (O&M) Agreement** is the first agreement that ConsensusDocs has published that focuses on construction work services that take place after final completion. The agreement provides an off-the-shelf contractual solution for an Owner seeking to procure standalone O&M services. A unique feature of this agreement is that it allows for a flexible one-to-five-year agreement period for which bonds may be provided to meet the challenges of a project with an extended period of performance.

“The 910 fills an important role in many projects,” comments Ernest Brown, CEO of Ernest Brown & Company, who chaired the ConsensusDocs working group that produced the O&M agreement. “It can be easily adapted for use for Design/Build/Operate (DBOT), Design-Build Plus (O&M), and Public Private Partnership (P3). It encompasses third-party services provided for a contractor's warehouses, buildings, and heavy equipment."

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