ConsensusDocs Construction Law Newsletter

Sponsored by

Pepper Hamilton LLP Attorneys at Law | SMITH CURRIE | P&A Peckar & Abramson, P.C.

SUBSCRIBE

Older Newsletters

Volume 2, Issue 3
June 2016

Table of contents

ConsensusDocs 750 Article 10: Subcontractor Defaults – Step By Step

Charles W. Surasky, ***Smith Currie & Hancock*, LLP, Partner**

ConsensusDocs 750 – Standard Agreement Between Constructor and Subcontractor Article 10 “Suspension, Notice to Cure, and Termination” provides an excellent set of tools for dealing with subcontractor and sub-subcontractor performance issues. Most of these tools can be used without resorting to the harsh, and possibly litigation-inducing, remedy of termination for default. In this article we’ll take a step-by-step look at the default remedies in CD 750 Article 10.

Throughout this article I refer to contractor and subcontractor. However, CD 750 is equally useful for subcontractors who use sub-subcontractors. Using ConsensusDocs’

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

Dashboard software, it is a simple process to modify CD 750 for use as a sub-subcontract.

Most construction disputes don't occur overnight. Frequently, performance problems by a subcontractor continue over much of the length of a project. All too often the only steps taken to remedy such problems are harsh letters and emails. This may occur because the prospect of termination a problem sub is simply too daunting. If you use CD 750, termination for default is not your only option. Thoughtful application of the other remedies in Article 10 may allow you to complete your project successfully without resort to default termination.

Step One—Is There a Default?

The first step in using Article 10 is to determine whether there has been a default. Paragraph 10.1.1 sets out three specific categories of default and a catch-all category. The specific categories are: persistent failure to maintain progress, failure to pay subs and suppliers, and failure to follow laws and orders of public authority. The catch all covers any other action amounting to a material breach. While this appears fairly straight forward, there are potentially difficult questions that must be answered before a sub can be found to be in default. What constitutes "persistent" failure to make progress? What is a "material" breach? The answer to these questions may vary depending on the nature of the project and the severity of the performance deficiency. But remember—CD 750 is an agreement between contractors, not lawyers. While consultation with your lawyer will do you far more good when a problem arises than it will at the end of the job, the words still mean what you as an experienced contractor reasonably understand them to mean. Certainly persistent means more than once. Material means important, not technical or insignificant. Use your common sense to determine whether your subcontractor's failures justify implementing the remedies laid out in Article 10. If they do, then your subcontractor is in default and you can proceed to step two.

Step Two—Notice.

Paragraph 10.1.1 provides for a very specific two-step notice procedure. Once you have determined your subcontractor is in default you must provide written notice to cure twice before you can begin to implement Article 10's remedies. Can this written notice be given by email? It probably can, but that doesn't mean that email is a good idea. If you have reached the point of giving written Article 10 notice, you probably will have already exchanged numerous emails with your sub requesting or even demanding improved performance. You do not want your Article 10 notice to be lost in the flood of email that is now common on construction projects of all sizes. It is much better to put your Article 10 notice in a letter and hand deliver that letter to the subcontractor's representative

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

designated in Paragraph 3.11 “Subcontractor’s Representative”. Send a copy by overnight delivery to the subcontractor’s home office. Article 10 notice is serious business. Do your best to make sure you have your subcontractor’s attention.

What should your written notice say? First, it should say that it is an Article 10 notice. Make it plain you are invoking the notice to cure process. Second, it should specify in detail the circumstances giving rise to your notice to cure. It is good practice to reference the grounds stated in Paragraph 10.1.1. For example: “As a direct result of the inaction described above, you have persistently failed to maintain the Project Schedule.” Third, it should specify in as much detail as possible what you expect to be done to commence to cure the default. Keep in mind that whatever you specify must be capable of being started within three business days. If not, you will have no reasonable basis for proceeding to the second notice.

If all goes well, your first notice will accomplish its purpose and your project will get back on track. You have three days to decide whether your subcontractor has commenced and is continuing satisfactory correction of its default with diligence and promptness. If not, then a second notice to cure must be given to the subcontractor and its surety, if any. Note that if your sub is bonded the first notice to cure goes to the sub alone. The second notice must also go to the surety. And the second notice should also be a letter, not an email. A copy of the second notice should go to the subcontractor’s home office and the surety by overnight delivery. Be certain to send the surety’s notice to the address specified for notice in the subcontractor’s performance bond.

This decision to send the second notice to cure can be a difficult call. Over the years I have worked on many projects where the contractor gave an initial notice to cure that was followed by limited and ultimately ineffectual efforts by the subcontractor, but no second notice. It is important to give a defaulting subcontractor a fair chance to cure its default. It is equally important to be clear eyed as to whether a cure is working. This underlines the importance of giving your subcontractor detailed and doable instructions to cure its default in your first notice to cure. Barring unusual circumstances, there should be no reason to give additional cure instructions in your second notice. After the second notice to cure is given to the subcontractor and its surety, the subcontractor has an additional two business days to commence and continue satisfactory correction of its default. If the sub does not comply, the contractor then has the right to implement any or all of the remedies set out in Article 10, only one of which is termination for default.

Step Three—Implement Remedies.

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

Paragraphs 10.1.1.1 through 10.1.1.4 provide four remedies, the last of which is termination for default. If you have paid for a subcontractor performance bond, you should consider default termination because that will likely trigger the surety's obligation to complete the subcontractor's work. If you do not have a performance bond, the other Article 10 remedies allow you to shore up you sub's ability to perform without resorting to default termination.

Paragraphs 10.1.1.1 and 10.1.1.2 provide two different ways to supplement the defaulted subcontractor—self performance and subcontracting. Paragraph 10.1.1.1 allows the contractor to supply workers, materials, equipment and facilities as the contractor deems necessary to perform or complete the defaulted sub's work. The contractor is further allowed to charge the defaulted subcontractor costs and expenses including reasonable overhead, profit, and attorneys' fees. The latter provision is important because it allows the contractor to take on the additional field staff necessary to separate, track and account for the cost of performing the defaulted sub's work. While Article 10 does not require it, it is good practice to provide the defaulted sub with frequent and detailed notice of the costs being incurred for its account. Thorough and accurate cost accounting is a good tool for avoiding unnecessary litigation. Even if litigation cannot be avoided, good cost records will help reduce the litigation's costs. Since litigation following a declaration of default is always a significant possibility, it is also wise to take advantage of the provision allowing recoupment of attorneys' fees. The earlier you involve your lawyer in a potential dispute, the lower your overall legal fees are likely to be.

Paragraph 10.1.1.2 allows the contractor to let one or more additional subcontracts to perform all or part of the defaulted subcontractor's work. Note that this is not an either or choice. Paragraph 10.1.1 allows use of any or all of the Article 10 remedies. Depending on the size and complexity of the project and the scope of the defaulted subcontractor's work, it may make sense to use a combination of self performance and subcontracting. Otherwise a choice between the two remedies will depend on factors such as the availability of replacement subcontractors and whether the contractor has supervisory personnel available to manage additional self-performed work.

Regardless of whether supplemental work is self-performed or subcontracted, Paragraph 10.1.1.3 allows the contractor to withhold payment otherwise due the defaulted subcontractor in an amount sufficient to pay the costs allowed by Paragraphs 10.1.1.1 and 10.1.1.2. As above, it is good practice to notify the defaulted sub on an ongoing basis of funds withheld along with an ongoing accounting of the cost of supplemental work. The defaulted sub should be requested to notify the contractor of any disputed costs within a reasonable time and notified that the contractor will rely on the accuracy of the costs reported if no dispute is noted. It may become necessary to

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

litigate the propriety of the default declaration, but any such litigation will be less expensive and time consuming if it does not also involve arguments about money.

As an adjunct to the remedies provided in Paragraph 10.1.1, Paragraph 10.1.2 allows the contractor to use the defaulted sub's materials, implements, equipment, appliances, or tools for the purpose of performing the defaulted sub's work. This is a very useful provision, especially with regard to materials located on site and needed for completion of the work. The right to use the defaulted subcontractor's tools and equipment is probably best used sparingly and with the defaulted sub's agreement if at all possible. The contractor incurring costs for a defaulted sub's account has a duty to minimize its damages as much as reasonably possible. Using the defaulted subs tools and materials may be one of the best ways to accomplish this. But it should always be done with notice and with agreement if possible. If the defaulted subcontractor does not consent and alternative sources of tools and equipment are available, it is probably wise to use the alternative sources and notify the sub that it will be held responsible for the increased costs caused by the refusal of consent.

Bankruptcy.

Paragraph 10.2 contains provisions for dealing with a subcontractor who files a petition under the federal Bankruptcy Code. Paragraph 10.2.1 provides that the subcontract will be terminated if the trustee in bankruptcy rejects the subcontract. As a general rule, bankruptcy trustees, who are obligated to maximize the value of the bankrupt's estate, assume favorable subcontracts and reject unfavorable subcontracts. But keep this in mind. Even though the trustee rejects your subcontract, he or she may still view any unpaid contract balance at the time of rejection to be part of the bankrupt's estate. If you need the bankrupt subcontractor's unpaid contract balance to finish the sub's work, it is a very good idea to petition for relief from the automatic stay. The same is true if the subcontractor files a petition in bankruptcy, defaults and is unable to give adequate assurance of performance. While you may have the right to terminate the subcontract, you should carefully consider seeking relief from the automatic stay before using any unpaid amounts to finance completion of the subcontract.

Paragraph 10.2.2 provides interim remedies that may be used while the contractor awaits the trustees decision to assume or reject the bankrupt's subcontract. If the bankruptcy action is filed under Chapter 7, liquidation, the trustee will generally assume or reject within 60 days. Under Chapter 11, reorganization, the decision to assume or reject may not be made until after the plan of reorganization is approve. Nevertheless the automatic stay goes into effect the day the Chapter 11 petition is filed. Not all bankruptcy courts recognize the right of recoupment provided for in Paragraph 10.2.2. Again, you should seriously consider seeking relief from the automatic stay before using any unpaid amount of the bankrupt's subcontract balance. It is also a good idea to

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

consult a lawyer who knows the Bankruptcy Code and the insular world of the bankruptcy courts.

Takeaway.

If you use ConsensusDocs 750 – Standard Agreement Between Constructor and Subcontractor, you have excellent tools for dealing with subcontractor performance issues. Like any tool, CD 750 works best when used as designed. Careful use of the step-by-step procedure laid out in Article 10 can save money and possibly save successful completion of your 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**.

The "Lien-Ability" of Field Change Directives Under Typical Construction Lien Laws?

Jonathan Preziosi, ***Pepper Hamilton, LLP*, Partner**
Stephanie L. Jonaitis, ***Pepper Hamilton, LLP*, Senior Attorney**

Consider this scenario taken from an actual project dispute: The contractor has entered into an agreement with the owner for a project of any size. During the course of the project, the owner directs the contractor to perform additional work under a written "field change directive," pending execution of a formal change order.[1] The written field change directive sets forth the scope of the additional work to be performed by the contractor and states that payment will be calculated on a time and materials basis. The original contract documents contain a schedule assigning unit price values to particular categories of labor and materials. The contract also states, however, that the stipulated contract price shall not be amended until there is a fully executed change order.

Prior to the written field change directive being embodied into a final, formal change order, the owner becomes insolvent and does not have the funding to pay for work already completed. The contractor, now being owed some or all of the original contract price plus payment for work performed under the field change directive, wants to file a lien under the construction lien law of the state where the project is located (the Lien Law). Because construction lien laws in some states provide that a lien can only be filed for the unpaid portion of the stipulated contract price or amended contract price,

[1] Field change directives are also often referred to as construction change directives, field change authorizations or other nomenclature defined by contract. The ConsensusDocs® 200 refers to them as "Interim Directed Changes."

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

however, a very legitimate question arises: Is the unpaid portion of the work performed under the written field change directive "lien-able" under the Lien Law?

Owners might answer this question in the negative. They would argue that, until the work performed under the field change directive is finalized and perfected into a final change order pursuant to the terms of the contract, there is no amended contract price and the work cannot form the basis for a lien. Contractors, on the other hand, would answer the question in the affirmative, arguing that the written field change directive constitutes a written amendment to the contract price and therefore will support a lien. To resolve the obvious disagreement and differing of interests of the owner, contractor and, in most cases, subcontractors, one needs to the turn to the express language of the applicable Lien Law and the policy behind it.

New Jersey's Construction Lien Law, for example, is typical in limiting lien claims to the unpaid portion of the contract price or amended contract price. The law permits contractors or subcontractors to lien property for the value of the work or services performed "in accordance with [a] contract and based upon the contract price." The law defines "contract" as "any agreement, or amendment thereto, in writing, signed by the party against whom the lien claim is asserted and evidencing the respective responsibilities of the contracting parties[.]" Therefore, in order to support a lien, a lien claimant must demonstrate that there is a contract or amendment thereto that (i) is in writing, (ii) sets forth the parties' respective obligations and (iii) evidences a contract or adjusted contract price.

Thus, to the extent that the field change directive is in writing and sets forth (i) the parties' obligations (e.g., scope of work to be performed) and (ii) the manner by which the extra work will be priced, the argument may be made that the additional work should be lien-able. Provided that these elements are present, the contractor would argue that it should be entitled to assert a lien related to the unpaid portion of the written field directive in accordance with the typical Lien Law.

The policies behind the typical Lien Law, it could be argued, also support the conclusion that written field directives are lien-able. The purpose of the "written contract" requirement of the New Jersey Construction Lien Law, for example, is to "provide 'tangible evidence that will reduce the factual proof problems in litigated matters and provide a sound basis for third parties to evaluate the merits of the lien claim.'"[2] That legislative purpose of the "written contract" requirement, the contractor could assert, is fully satisfied by field change directives that are in writing and set forth the respective responsibilities of the parties and the applicable pricing terms for the extra work.

[2] *Patock Const. v. GVK Enters.*, 372 N.J. Super. 380, 386 (App. Div. 2004) (quoting *Legge Indus. v. Joseph Kushner Hebrew Acad./JKHA*, 333 N.J. Super. 537, 562 (App. Div. 2000)).

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

Additionally, the contractor could argue that the "written contract" requirement should also be construed in a manner consistent with the broader underlying policies of the typical Lien Law. The New Jersey Lien Law, like many others, was primarily enacted to "guarantee effective security to those who furnish labor or materials to enhance the value of the property of others [.]"[3] The statute is to be read "sensibly" and "with an understanding of the policies underlying the Lien Law."[4] Accordingly, so long as the written field change directive and the associated contract price change are readily quantifiable and verifiable, the field change directive is enforceable, the contractor would maintain, because it satisfies both the letter and the spirit of the common Lien Law's "written contract" requirement.

There is another policy consideration to be explored. If field change directives are not lien-able until they are processed into "final" change orders, the ability of construction projects to continue without interruption and delay would be severely impeded. Field change directives are not only customary in the industry, but are also integral to the industry's ability to ensure that projects do not come to a halt every time a change is encountered or extra work is assigned, until a final change order can be issued. Owners need the ability to direct the performance of extra work while the total cost of that work is still being quantified, and contractors who dutifully perform that work on a lump sum or time and materials basis pending issuance of a formal change order need to know that their work is protected by the Lien Law. The vital role of the field change directive or "construction change directive" is well-established in the construction industry and "common practice … to get the work rolling when the owner, contractor and architect are unable to agree on the price or time adjustments for the change."[5] Consequently, contractors engaging in the customary industry practices of performing additional work pursuant to a field change directive should most certainly be afforded a Lien Law's protections. The use of field change directives would be severely chilled, and the progress of construction projects throughout the industry would be obstructed, if the courts were to adopt a rule that extra work performed on a time and materials basis pursuant to a field change directive cannot be liened, no matter how well documented, if the party who issued the field change directive goes defunct while that work is midstream and issuance of a final change order is still pending.

---

[3] *Craft v. Stevenson Lumber Yard*, 179 N.J. Super. 56, 67 (2004) (quoting *Thomas Group, Inc. v. Wharton Senior Citizen Hous., Inc.*, 163 N.J. 507, 517 (2000)).

[4] *Id.* at 68. *See also Thomas Group*, 163 N.J. at 517-19 (stating that the lien statutes "are designed to guarantee effective security to those who furnish labor or materials used to enhance the value of property of others and, *where the terms of the statute reasonably permit, the law should be construed to effect this remedial purpose*") (emphasis added).

[5] J. Charles Sheak & Timothy J. Korzun, Old Game, New Rules: A Brief Guide to 1987 Changes in the A.I.A. A201, General Conditions of the Contract for Construction, 8-AUG Construction Law 3, 5 (1988) (noting the amendment to A.I.A. Form A201, which incorporated a construction change directive provision, is in accord with the industry standard to use such directives during the course of a project).

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

These arguments would weigh in favor of the contractor's position that written field change directives are lien-able. Accordingly, and absent other countervailing circumstances, a contractor could credibly argue that it should not be considered a violation of a Lien Law for the contractor to file a construction lien that includes unpaid amounts billed pursuant to a written field change directive that sets forth a method for calculating the changed price.

Pepper Hamilton's Construction Practice Group has an unparalleled record of resolving complex construction disputes and winning complex construction trials. Our litigation experience – and success – informs everything we do, including translating into better results in our contract drafting and project management. Our lawyers counsel clients on some of the biggest, most sophisticated construction projects in the world. With more than 25 lawyers – including 15 partners who all have multiple first-chair trial experience – and a national network of 13 offices, we have the depth and breadth to try cases of any complexity, anywhere at any time. For more information about Pepper's Construction Practice, visit **www.constructlaw.com**.

Mitigating the Risks of Cyberattacks in the Construction Industry

Ralf R. Rodriguez, Partner, Peckar & Abramson P.C.
K. Stefan Chin, Senior Associate, Peckar & Abramson P.C.

Cyberattacks on companies in the United States and abroad are on the rise. According to the Threat Metrix Digital Identity Network, more than 100 million attacks were detected and stopped in real time during the first quarter of 2016, which represents a 52% increase over the previous year. As a result, companies are now beginning to perceive the issue of cybersecurity as part of their compliance and integrity program – not just an issue for their IT Department. In light of numerous high profile data breaches resulting in significant financial losses to affected companies, corporate executives are treating cybersecurity as a governance and risk management issue just like they would any safety issue. Construction companies are no exception and should include cybersecurity as part of their risk management policy.

An alarming trend is the increase in use of ransomware to take over a company's computer systems and the data stored within the systems. In February 2016, Hollywood Presbyterian Medical Center, a hospital in Los Angeles, paid hackers $17,000.00 to regain control of its computer system, which had been locked by ransomware. Likewise, in March 2016, MedStar Health Inc. suffered a cyberattack which shut down the records systems of 10 hospitals in Maryland and Washington, D.C.

Cyberattacks continue to target critical infrastructure facilities such as hospitals and energy facilities, as well as secure government systems in the United States and overseas. As an example, in 2009-2010, the Stuxnet virus infiltrated the Natanz uranium

enrichment plant in Iran, reportedly causing damage to hundreds of nuclear centrifuges. Cyberattacks have also targeted large retailers and banking institutions for monetary gain. Examples include the November 2013 hack of Target which compromised credit and debit card information for tens of millions of U.S. Target customers, and the successful transfer by hackers of $100 million out of Bangladesh Bank's account at the Federal Reserve Bank of New York in February 2016 (the hackers initially attempted to transfer more than $950 million by taking advantage of lax network security systems; officials have thus far been able to recover only approximately $20 million of the stolen funds).

In our digitally interconnected global society, any company with access to the internet is at risk of a cyberattack. Therefore, contractors and others in the construction industry must be aware of the attendant risks posed by cyberattacks and should take steps to mitigate such risks.

A cyberattack and/or data breach could result in significant costs to the breached company, including:

- First-party costs associated with hardware and electronically stored information, including, for example: IT expenses; data loss and restoration expenses; public relations costs; and extortion costs.

- First-party costs associated with federal and state regulatory compliance, including fines and penalties.

- Costs arising from third-party claims for privacy breaches, including contract liability (*e.g.*, for breach of contract as a result of failure to comply with required data security measures) and tort liability (*e.g.*, for negligent failure to protect private or sensitive information).

Businesses of all sizes – including those in the construction industry – are collecting increasing amounts of personal, confidential, and proprietary information which is accessible via the internet or the cloud. Given the increasing popularity of Building Information Modeling, Integrated Project Delivery, and file sharing between participants in a construction project, contractors may be at increased risk of liability in the event of a data breach. A successful hacker may be able to access architectural designs, including the designs of security systems and features; sensitive financial information; confidential project-specific information, and personal information of employees and clients.

A construction company can take several proactive steps to mitigate the risk and costs of a cyberattack and/or data breach. Recommended steps include: (1) assessing potential vulnerabilities of existing network security systems and addressing those vulnerabilities to the extent feasible; (2) developing and enforcing an information security and compliance program, including an incident response plan to be executed in the event of

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

a cyberattack; (3) considering cyber insurance options; and (4) working with outside counsel to manage contractual risks.

There are a number of companies which can provide varying levels of cybersecurity testing, diagnostics, and monitoring of a construction company's network security systems. As this market becomes more developed, more options will become available to fit the particular needs and budgets of contractors of different sizes.

Internally, the contractor should develop and enforce a Written Information Security Program ("WISP") which sets forth a protocol for protecting personal and other sensitive information and complying with applicable regulatory requirements. The WISP should include employee training with periodic reinforcement, given that poor "cyber hygiene" – including, for example, the use of weak, easily-guessed passwords; carelessness with company devices and credentials; and inadvertent download of malware – is the cause of the majority of network breaches. The contractor should also prepare a preemptive Incident Response Plan in order to maximize the efficiency and effectiveness of the contractor's response in the event of a cyberattack and/or data breach. Notably, several states now have laws in place that require companies to have an Incident Response Plan in place.

Federal and state laws and regulations may govern how covered entities must prepare for and respond to data breaches. There are several federal laws which contain provisions addressing information privacy and security. For example, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") includes data privacy and security provisions regarding electronically stored protected health information. The Federal Information Security Modernization Act of 2014 requires information security compliance from federal government contractors. The Federal Acquisition Regulation also contains provisions for the safeguarding of contractor information systems that contain non-public information provided by or generated for the federal government. The Gramm-Leach Bliley Act requires financial institutions – including insurers – to explain their information-sharing practices to their customers, safeguard sensitive data, and notify affected customers of a data breach.

Moreover, there is increasing federal oversight on information security and data breach issues. The Federal Trade Commission ("FTC") is becoming increasingly aggressive in regulating what it considers unfair and deceptive business practices – including lax information security practices which result in data breaches. In *FTC v. Wyndham Worldwide Corp.*, 799 F.3D 236 (3rd Cir. 2015), a Federal Court of Appeals ruled that the FTC had authority to regulate data security under the Federal Trade Commission Act in connection with hackers' alleged access of unencrypted information for approximately 619,000 credit card accounts stored in Wyndham's network systems, resulting in more than $10 million in fraud loss. The Consumer Financial Protection Bureau ("CFPB") is

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

also becoming aggressive in the realm of information security. On March 2, 2016, the CFPB filed a Consent Order against Dwolla, Inc. ("Dwolla"), an online payment platform, in Administrative Proceeding File No. 2016-CFPB-0007 relating to Dwolla's data security practices. Among other things, the Consent Order sets forth the CFPB's position that the Consumer Financial Protection Act gives the CFPB authority to police data security practices where a financial company makes false or misleading representations to consumers regarding its practices.

As of January 2016, 47 states and the District of Columbia, as well as Guam, Puerto Rico, and the Virgin Islands, had enacted legislation requiring private, governmental, or educational entities to notify affected individuals of security breaches of personally identifiable information; only Alabama, New Mexico, and South Dakota had no security breach laws. Thus, in the event of a data breach, federal and state laws will most likely require notice to various entities, including federal and/or state regulators or agencies and the individuals or companies whose data has been compromised.

Given the potential application of both federal and state laws and regulations, the contractor should consult with outside counsel in the state(s) in which it is operating to confirm applicable laws and regulations and their requirements with respect to protection of personal and other sensitive electronically stored information.

A contractor may consider purchasing cyber insurance to cover first-party costs including, for example, costs of data restoration; business interruption; extortion; and other associated losses. The contractor may also be able to purchase third-party coverage for costs of liability to third parties damaged by a covered event. Given that data breaches may remain undiscovered for some time, the contractor may want to consider retroactive coverage for unknown losses that occurred prior to the policy period. Another key consideration is the 'trigger' for cyber insurance coverage: since it may be difficult to prove unauthorized use of lost or stolen information, coverage should not depend on proof of actual access to or misuse of information.

Effective contract management is an important component of mitigating the risks associated with a cyberattack and/or data breach. A contractor may be required by contract to implement specific data security measures; provide notice of data breaches within specific time periods; carry cyber insurance; and/or indemnify the owner for costs arising from a data breach. Thus, a careful review of the contract is critical. Optimally, cyber insurance should be coordinated in order to cover any potential liability the contractor assumes under its contract. The cyber insurance policy will likely contain notice provisions which must be followed in the event of a data breach. The contractor should also include hold harmless and indemnity clauses in contracts with subcontractors and third-party vendors who have access to confidential, proprietary, and/or sensitive electronic data.

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

The foregoing proactive measures could result in notable cost savings and reduced exposure to liability in the event of a cyberattack and/or data breach.

In conclusion, given the increasing frequency of cyberattacks against companies in the United States and abroad resulting in huge data breaches, contractors and others in the construction industry should be proactive in order to mitigate the attendant risks. Construction companies should treat cybersecurity as a compliance and risk management issue and should include cybersecurity as part of any risk management program going forward. A coordinated effort between IT, management, and in-house and outside counsel is key to an effective cyber-defense strategy.

Long known for leadership and innovation in construction law, Peckar & Abramson's Results FirstSM approach extends to a broad array of legal services — all delivered with a commitment to efficiency, value and client service since 1978.Now, with more than 100 attorneys in eleven U.S. offices and affiliations around the globe, our capabilities extend farther and deeper than ever. Find Peckar & Abramson's newsletter here.

A Growing Family: My Secret Life with ConsensusDocs over the Years

Matthew J. DeVries, Partner, Burr & Forman LLP

I am a construction attorney. I am happily married. My wife and I have seven children. This is the story about my secret life with another I am happily married.

Our First Date

I first started seeing ConsensusDocs in 2009. I had heard about her a few years prior, but I didn't talk to my other construction attorney friends about her. I will admit it—I was going out with that other set of contract documents. Why? Because, well, that's what everyone did. But I am an open-minded person. I will try anything (well, almost anything) once. So, when the opportunity arose for the right project, I was happy to take ConsensusDocs out on a date … a trial run so to speak. I was even happier to learn that, at that time, ConsensusDocs offered a metered account that allowed me access to all of the documents, while paying for only the final product. I thought that one final set of contract documents on the project for one low price was a good deal. So I loaded up the account with a couple hundred dollars and started what would be an ongoing relationship.

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

We hit it off from the start, and I dated the metered account for a number of years. Due to the full library of documents available, she served me and my clients' purposes well. At the time, my construction law practice consisted of representing primarily small- to medium sized contractors and subcontractors. The projects ranged from retail build-outs, hotels, schools, multi-family developments, water treatment plants, and the occasional Music City Center in downtown Nashville, Tennessee.

Why ConsensusDocs?

This new set of contract documents was very attractive for a number of reasons:

As of the date of my confession today, ConsensusDocs has a comprehensive catalogue of over 100 form contract documents, including a standard lump sum agreement, design-build agreements, joint venture agreements, change orders, collaborative agreements, BIM and green construction, and many more (www. ConsensusDocs.org/Catalog).

ConsensusDocs are the only standard contracts developed by a diverse coalition of 40 leading associations with members from all stakeholders in the design and construction industries, including designers, owners, contractors, subcontractors, and sureties (which, coincidentally, makes up the DOCS in ConsensusDocs). In this aspect, the documents seek to protect the interests of the project, as opposed to one particular party.

As I am advocate of the written word, I appreciated that ConsensusDocs incorporated a concise, English style of writing (no legalese) which provided clearer contract interpretation and project administration.

With ConsensusDocs, I had a new set of fair, even-handed construction contracts that I could tailor to the particular project, circumstance, and client.

The longer we dated, the more our relationship grew. ConsensusDocs has consistently responded to the industry in a timely matter with new agreements that address a multitude of contracting issues or project types. Following are just three examples:

> 1) On June 11, 2009, ConsensusDocs released what was reported to be the first and only standard contract designed specifically for federal government construction projects. The ConsensusDocs 752-Subcontract for Federal Construction Projects provided all of the necessary terms and conditions essential to comply with the Federal Acquisition Regulation ("FAR"). In addition to being FAR-compliant, ConsensusDocs 752 included all of the federally-mandated flow-down provisions, and the release was particularly important in light of the then-pending Federal stimulus funding bill.

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

2) On November 10, 2009, ConsensusDocs released its much anticipated 310 Green Building Addendum. When I first blogged about its release, the release had an entire blogosphere of architects, engineers, owners, contractors, LEED APers, and attorneys responded with excitement. The document incorporated a set of new terms, such as “Elected Physical Green Measures” and “Elected Green Status.” There was a new contractual party, called the “Green Building Facilitator”, who was integral to the green construction process. Finally, the document included a meaty “Risk Allocation” provision to address issues such as: (a) the role of the contractor during the process, as well as a provision that limits the contractor’s responsibility for performing certain services; (b) a waiver of consequential damages, which is the provision that every green attorney will want to take a look at first; and (c) a general limitation of liability provision that addresses the failure to attain the targeted status, as well as the failure to receive any intended benefits to the environment.

3) On March 28, 2013, ConsensusDocs released the 498 Design-Build Teaming Agreement, which provided a standard contract for parties desiring to form a team for the purpose of submitting a bid on a design-build project. The agreement has the flexibility for team members to include design professionals, contractors and other parties. One team member serves the role as team leader for the purposes of compiling and submitting the proposal, as well as for negotiation of the owner agreement, if awarded. Critical issues – such as confidentiality, withdrawal from the team, and document ownership – are included. Post-award considerations are addressed, and team members are required to enter good faith negotiations for a subsequent agreement covering the work, such as a joint venture agreement (ConsensusDocs 298) or a joint venture operating agreement (ConsensusDocs 299).

More recently, ConsensusDocs re-leased its 301 BIM Addendum. This adden-dum revised its 2008 document for building information modeling (“BIM”) to include updated terminology and best practices within the BIM world.

A Digital Makeover

While I was happy with the metered account, it was often difficult describing its utility and benefit to my clients who wanted to work directly with the document among multiple users. Our review and edit process at that time often included emails or faxes back and forth, with me or my assistant handling the final work product. Then, on April 23, 2012,

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

ConsensusDocs released a new tool allowing for online collaboration. When I first saw her come to the door, she looked stunning!

In full disclosure, I was one of the beta-testers for the ConsensusDocs online portal. (Is that like knowing the girl is going to say “yes” before you ask her out?) During my beta-testing period, though, I only found good things. The portal offered around-the-clock access; easy editing; easy collaboration among multiple users; ability to convert, compare and track changes; and new legal commentary and user guides for the online documents. Neither my client nor I had to be in the office to access the working documents. I controlled the editing rights and could invite anyone with an email address and internet access to the party. With document control tools, I could easily track versions and edits before making a final draft. And, depending on the size of your organization, you can purchase single

Looking Back

I have used ConsensusDocs on more than 20 projects over the past seven years. My clients have included owners, contractors and subcontractors. Of course, through the review and revision process online, I have been able to negotiate and edit more owner-favorable provisions when I represent an owner, or more contractor-favorable terms when I represent a contractor. All in all, it’s been a great relationship and I look forward to growing with the ConsensusDocs family. Just don’t tell my other family!

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.

Project of the Month

Kings Theatre Redevelopment, Brooklyn, NY

Please email Jordan if you would like to advertise your construction project to the ConsensusDocs Project History page.

You need to include: Project name, Contracts Used, Name of the Owner, Name of the Developer, Name of the Developer, Name of the Project Design Professional, Name of the Project Contractor, a Project Description, a short Testimonial, and a Project Photo.

Project Histories

The views expressed in this newsletter are not necessarily those of ConsensusDocs. Readers should not take or refrain from taking any action based on any information contained in this newsletter without first seeking legal advice.