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CONSTRUCTION PROJECT DOCUMENT MANAGEMENT

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“Any party can be burned by the failure to modify contracts to accurately and precisely account for how the parties will govern communications and notice”

In construction, project success requires effective, consistent and well-documented communication between multiple parties: the owner or project developer driving the construction project; the design professional preparing the drawings and specifications for the project; and the contractor developing and implementing the means and methods to build a project matching the owner/developer's goals and the design professional's plans and specifications. The owner must constantly communicate any changes it desires during construction. The contractor must seek clarifications from the owner and design professional regarding the design

and any changes, while also complying with contractual requirements to notify the owner of various claims and other issues in a timely manner. With all of this communication, snail mail seldom suffices.

For these reasons and with the evolution of communication (word processed letters to facsimile to emails and texts), innovative and highly sophisticated construction management and document software has revolutionized the construction industry by making it easier for parties to connect and share project information. Ideally and if used properly, these software programs such as Procore, CoConstruct, PlanGrid,

and Viewpoint consolidate project communications into a single forum and avenue of transmittal, allowing all project participants to more efficiently submit questions, answers, requests and responses. When the contractor discovers a gap in the drawings and cannot determine if a type of floor covering applies to all areas of the project, neither traditional nor modern communication methodologies guarantee that all parties maintain unfettered access to one singular source of information, including open requests for information or approval, with real-time notification of responses. Even with an email copying all parties, parties never know if another party responded and failed to copy them. When relying on email and phone call communications, one party often remains out of the loop or uncertain as to subsequent responses. Modern project management software programs streamline those communications.


However, these technological and innovative software programs, while intended to decrease inefficiencies and miscommunications, can result in unintended consequences if not incorporated in project management guidelines and appropriately drafted contracts.

Very few people mistakenly credit lawyers for quickly adapting to technology and innovation. In this regard, construction contracts, especially the commonly used industry wide

templates, lag far behind technological advances in project management software. For example, the standard unmodified AIA 201 General Conditions (AIAA201-2017) notice provision states “notice shall be provided in writing to the designated representative” and delivered by “mail, by courier, or by electronic transmission if a method for electronic transmission is set forth in the Agreement.” It goes on to state that notice of claims shall be given through “certified or registered mail, or by courier providing proof of delivery.”

This provision fails to properly account for the use of project management software through which the parties would transmit and document all project communications, requests, approvals, clarifications, changes, claims and other communications. While the provision allows for delivery by electronic communication, it does so only “if a method for electronic communication is set forth in the Agreement.” Thus, unless modified, the AIA contract templates do not include a method for electronic communication and even if the parties appropriately modified the AIA contract templates to use a specific project management software for delivery of notice by electronic communication, the parties would need to take an additional step to satisfy the requirement that notice must be in writing “to the designated representative.”

Moreover, the AIA standard language for notice of a claim goes further and requires written notice through certified mail without any mention of electronic communication. If the parties intend to utilize a project management software for all project communications, the parties must modify this provision.

Any party can be burned by the failure to modify contracts to accurately and precisely account for how the parties will govern communications and notice. If the parties do not modify the language and set forth how and to what extent communications through a project management software shall constitute effective notice under the contract, the owner may argue the contractor failed to provide notice of a claim and therefore waived the claim, despite the parties’ clear communication regarding the underlying issue within the project management software. Further, if the parties agree to use project management software for all communications but the owner insists on receiving notices of claims through certified mail with distinct labeling as a Notice of Claim, and the owner consistently approves change orders based on claims communicated solely through the project management software, then the contractor might argue that the owner cannot deny a claim on the basis of the contractor’s failure to provide notice because the owner modified or amended the contract by course of dealing. 



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