NEWS

Information Governance (IG) Programs

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As every contractor knows, the volume of Electronically Stored Information and Data (ESI) generated by a typical construction project has exploded. Yet many contractors have a hodgepodge of systems and practices regarding data management. In addition to the standard office products such as Microsoft Word and Excel, and Adobe PDF, companies also store financial records in databases that may be as simple as QuickBooks or as complex as an SAP or Oracle system. There are also a myriad of CAD programs available today, as well as project management software and collaborative products such as SharePoint. Construction projects tend to generate an enormous amount of digital photographs and video in addition to e-mail, text messages, and IMs. Many companies also maintain paper copies of some of this information and supply their employees with laptops, smart phones, and tablets to enable immediate access to relevant information and generate new documents, drawings and change orders in the field. While this practice doubtless promotes efficiency, it multiplies the volume of ESI.

This growing volume of ESI, coupled with the multiple locations where those data can reside, can lead directly to significant costs when a company finds itself involved in litigation or some form of dispute resolution, such as arbitration, where ESI is discoverable. What can contractors do to manage the volume of this information and also help protect their company from expensive e-Discovery costs?

The best way is to implement a comprehensive Information Governance (IG) Program to address first why a company has the documents and data it has, and then determine where those documents and data should reside. An IG Program is effective because it recognizes the critical role of identifying and retaining records in a logical manner, including the proper disposition of both documents that are *not* “records”, as well as documents that are “records” but have exceeded both their utility and any legal or regulatory retention requirements. (endnote 1)

Here are a few big picture items that companies must consider when creating or

updating an IG Program.

1. Define your company's "records" and where they are stored

Most companies have large volumes of documents that should never have been retained in the first place because they do not constitute a "record". This includes e-mail chit-chat, as well as long-discarded drafts of documents and multiple copies of the same document or e-mail. Defining your company's "records" should be done well before you find yourself involved in a legal dispute. Defining the source of the record, e.g., a network share or designated folder, is equally important because it will help eliminate the need to collect data from individual devices and the related expense.

2. Recognize the difference between record retention and disaster recovery

Many companies retain multiple copies of ESI for long periods of time just in case they "might" need them. To the extent this means "just in case a catastrophe happens", there are much easier and more cost-effective methods of preparing for a disaster, including ensuring that critical data are stored in network locations and backed up in a secure manner with media stored in a secure location. Disaster recovery generally refers to getting your business up and running again after a disaster strikes, whether natural or man-made. General "record" retention for completed projects is quite different. Look to the terms of your contract to see if there is a provision requiring retention for a specific time, such as to allow an audit. Also, look to see if "records" is defined. Do you need to retain every e-mail communication and document draft or just the final version? As a general rule, accounting records and contract documents should be retained at least five years following project completion. As with any business, project completion should include a protocol to clean out files, whether paper or electronic, before sending them to off-site storage or copying them to a hard drive.

3. Implement a Litigation Readiness Plan

If you wait until a dispute arises or litigation commences to figure out how to respond, it is likely too late. Every construction company should consider how it will respond to litigation when—not if—it happens. Start by designating an individual or committee able to respond quickly to a complaint, arbitration demand, or government investigation; to ensure that any data potentially at issue are identified and preserved; and to make certain that key custodians are notified that a claim has been filed and that they know to preserve any potentially responsive data in their possession.

4. e-Discovery in Advance in Contracts

In addition to recognizing the need to govern information effectively outside of the

litigation context, construction companies should work to decrease the risks and costs of e-discovery by including provisions in contracts that limit e-discovery obligations in the event of litigation or dispute resolution. This groundbreaking proposal, advanced by e-discovery practitioners, is featured in the most recent e-discovery issue of the Richmond Journal of Law and Technology. (endnote 2)

Consider one or more of the following limitations in contracts:

- Circumscribing the duty to preserve ESI until a notice or request to preserve is received (as opposed to the requirement that each party preserve once it reasonably anticipates litigation);
- Limiting the amount of discovery allowed, including what needs to be preserved (e.g., eliminating the duty to preserve backup tapes); and
- Limiting the application of sanctions for purported e-discovery failures (e.g., requiring evidence of malicious intent).

Assuming both parties are similarly motivated, such contractual provisions can provide certainty and foreseeability should a dispute arise. (endnote 3)

Maintaining ESI in the Information Age can be daunting and expensive. Construction companies can mitigate the risks and costs associated with modern discovery by governing their information effectively and efficiently before they become involved in litigation, and by implementing or updating an IG Program.

Endnotes:

1. Monica McCarroll, Bennett B. Borden, Jay Brudz and Brian C. Vick, "Information is Your Company's Most Valuable Asset-Are You Treating it That Way? How Information Governance Can Help You Support Revenue Growth and Decrease Expense, Risk and Operational Cycle Time," http://www.williamsmullen.com/sites/default/files/wm-url-files/12.04.01_Retailer.pdf

2. Jay Brudz & Jonathan M. Redgrave, "Using Contract Terms to Get Ahead of Prospective eDiscovery Costs and Burdens in Commercial Litigation," XVIII RICH. J. L. & TECH. 13 http://jolt.richmond.edu/v18i4/article13.pdf

3. Some caveats to consider before incorporating such contractual provisions include, without limitation: (i) the likelihood of enforceability will increase the more closely tailored these provisions are to the facts and circumstances of a particular transaction; (ii) the functionality of these provisions will depend on how well they are adapted to a party's objectives in a particular transaction; and (iii) the scope of these provisions will be confined to the contract terms; i.e., a party may still owe preservation duties, for example, to third parties or pursuant to regulatory obligations.

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