

Document Policies 101

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Construction industry players are deluged with documents. Aside from the essential contract documents, there are record documents, critical communications, billing records, testing and inspection records, progress reports and related photographs, meeting minutes, RFIs, CORs, change orders, employment and visa records, cost accounting records, and a variety of notices, to name a few.

Where and for how long do these records live? Who is responsible for their upkeep? And how does the harried record keeper respond when served with a subpoena or a document retention request?

EMPLOYMENT RECORDS

As noted in a recent firm publication, the North Carolina Wage and Hour Act was recently amended to require that employers give employees written notice of the terms for their payment, including the rate of pay and the time and manner of payment. That notice should be kept in the employee's file. If an employee's rate of compensation is reduced, then the employee must be given written notice of the new rate of pay at least one pay period before the new wage rate takes effect.

The North Carolina Wage and Hour Act mandates financial penalties for failure to maintain records required by the Act. Employers must maintain the following information for each employee in each workweek (absent a specific exemption): full name, home address, birth date, occupation, time and day the workweek begins, regular rate of pay, hours worked each workday, total hours worked each workweek, total straight-time earnings, total overtime earnings, total additions to or deductions from wages, gross wages paid each pay period, and date of each payment.^[1]

PROJECT RECORDS

Construction administrative records are sometimes prepared and retained by the project's designer of record. Participants in meetings should be sure they receive copies of the meeting minutes, and review them for accuracy.

The party who has the best records of what was done, when, and why, will have an advantage in the event of claims on a construction project. Be sure to review the contract general conditions to ensure compliance with notice provisions, and retain copies of the notice given for any condition that may result in a change order or claim. Even if everyone has actual notice of conditions giving rise to a claim, it is always best to document the condition with the notification required by the contract documents. A claim may fail if there is no proper notice of the circumstances or condition giving rise to the claim. Creating the record notice is only half the picture. Delivery of the notice is the other half, so be sure to comply with the notice provisions for delivery of formal notices.

The form in which records are created is important. Most projects have some simple forms for the most common notices and information. And there is usually a set procedure for routing those forms. But some communications are conducted by email, text message, or phone call, and sometimes those communications contain important information that can be lost if there is no follow-up. Managers should train on effective forms and means of communication on projects so that critical content is not lost. Those methods should include following up on text messages and email messages with memos to the project file. Whether such records are maintained electronically or on paper, the key is to retain the information where it can be retrieved.

RECORD ORGANIZATION AND RETENTION

Depending upon the type work your company does, there could be several mandates for record retention. For example, the Code of Federal Regulations often requires grantees of federal funds to incorporate provisions in contracts that allow the project owner, the granting agency, and the Comptroller General access to “any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions,” and to require retention of all required records for three years after grantees or sub-grantees make final payments and all other pending matters are closed.”^[i] Document retention mandates applicable to a project should be in the general or supplemental conditions.

Public construction contracts in North Carolina carry documentation requirements that are listed by the State Construction Office. A current list of required documentation can be found at https://files.nc.gov/ncdoa/documents/files/required_docs_construction.doc. Public capital projects in North Carolina are tracked in InterscopePlus, which is “North Carolina’s Construction Projects Management System. The system is designed to track the life cycle of Capital Projects from the time they are authorized until they are closed out, including funding sources and HUB data.”^[iii] InterscopePlus uses the BlueBeam document management system to create an electronic project record. A “Package” is created within InterscopePlus, providing a place to record detailed information captured during design review, bidding, award, and the construction administration phases of a state construction project.

Public construction contracts in South Carolina are tracked by the Office of the State Engineer (OSE), with the assistance of the project designer. The OSE prescribes documentation that is required on all projects.^[iv]

Once a project is completed, the project file should be preserved until all claims that might arise from the project have either been resolved or are legally barred. In North Carolina, the statute of repose for construction is six years. A prudent rule would be to hold project records three extra years, a total of nine years. In South Carolina, the statute of repose applicable to construction is eight years, so a prudent retention period would be eleven years.

Neither North Carolina nor South Carolina has adopted the Uniform Preservation of Private Business Records Act, which provides that, absent a different specific legal requirement, any records may be destroyed after three years without violation of the law that requires the records to be retained.

RECORD PRODUCTION

Retained records may need to be accessed and produced to comply with contractual or statutory reporting requirements. The owner of the project can review them to determine whether certain work was performed in accordance with the terms of the agreement. The contractor's insurer requires information about payroll. The contractor needs the record of what subcontractor performed certain work in order to fulfill warranty obligations.

Project records can be vital to the prosecution or defense of a claim. Preservation and production of records may be required to fulfill a condition on the insurer's duty to indemnify. In these circumstances, it is important to be aware that the premature destruction of records can lead to adverse consequences, especially after the keeper has been made aware of a potential claim. Records do not always support the position of the keeper. If a keeper destroys information that is needed to prove what happened during the construction project, the court might preclude the keeper from contesting an adverse party's position.

A record-keeper may be called upon to produce records in response to a subpoena. There are any number of reasons why other parties may need records created during a construction project: for example a worker claim for injuries, a dispute between subcontractors over damaged work, a dispute between the building owner and the designer, or a dispute between the owner and the contractor. OSHA or the GAO may subpoena information. Rules governing subpoenas require that the subpoenaed party have time to gather the records, be protected from unreasonably intrusive document demands, be able to produce them locally, and receive reasonable compensation for the time and expense involved in producing the records.

Document management services can be indispensable in document intensive dispute resolution. NIP attorneys are experienced in handling all sorts of document requests. Our affiliated service provider, NEXTRA Solutions, provides a range of related services, from collecting, to storing, searching, and producing electronically stored information.

[i] 13 NCAC 12.0801(a).

[ii] 41 CFR 105-71-136. There are many such regulations in other procurement provisions of the Code of Federal Regulations.

[iii] <https://ncadmin.nc.gov/businesses/construction/interscope>

[iv] The OSE Manual can be found at <https://procurement.sc.gov/manual>.