CONSIDERATIONS FOR RETAINING CONSTRUCTION PROJECT RECORDS

How long should a party to a construction project retain its project documents after completion? The good news: not forever. The bad news: longer than expected.

After completion of a construction project, the likelihood of becoming a party to a lawsuit should lessen over time. Claims regarding such issues as non-payment, delay and scope of work disputes are typically raised and pursued soon after completion of the project. These types of claims are usually recognized by the claimant sometime during or after completion of construction and soon acted upon for economic reasons.

However, a claim for negligent professional services or for defective construction work may not become apparent to an owner until years after the completion of construction. This is particularly true regarding unseen or “latent” defects discovered through resulting damages to exterior wall assemblies, roofs and mechanical systems, often years after completion of a project. Investigating the extent and cause of damages often takes considerable time, sometimes up to a year, before an opinion is reached and the potentially liable parties are notified by the owner. Altogether, the time from project completion to notification to the designer or engineer of alleged professional negligence or to the contractor for alleged defective construction may be many years.

Statutes of limitations

The applicable state’s statute of limitations creates a deadline for filing an action. For example, under Missouri law, a suit must be filed within five years from the time the party bringing the action knew or should reasonably have known of the act or omission supporting an action in tort or contract.

Statutes of repose

To protect architects, engineers and contractors from unending liability to owners, many states, including Missouri and Illinois, have enacted a statute of repose. Many such state statutes of repose, including those in Missouri and Illinois, create a time limit for the commencement of litigation or mandatory arbitration at 10 years from the date of the act or omission comprising a breach of contract or negligence.

In Missouri, this 10-year date draws a bright line for bringing such an action. If the owner discovers a latent defect in the design or construction just days before the 10-year tolling period expires but fails to file an action on or before that date, the action is barred by the statute of repose. However, under the Illinois statute of repose, the owner would have the full time afforded by the Illinois statute of limitations, four
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years, in which to bring such an action, from the date of discovery of the latent defect. Therefore, in
Illinois, the 10-year statute of repose could be extended another four years to accommodate the Illinois
statute of limitations using the same scenario.

How long should project records be retained?

Storing and maintaining project documents can be a costly burden on a company of any size. Large
projects can generate enormous amounts of paper and electronic documents. Unfortunately, due to the
possible discovery of latent defects in the design or the construction work, all parties in a construction
project, including the owner, should retain project documents for a predetermined period of years after
project completion.

Under state and federal law, many types of documents created and kept in the normal course of business
can qualify under the business records exception to the hearsay rule. This business records exception
can be very important particularly if several years have passed and the person(s) who created a business
record either cannot be later found to testify or has died. It is important to keep and maintain project
records such as: 1) drawings and specifications, 2) design/engineering calculations, 3) project diaries, 4)
reports, 5) requests for information (RFI) and responses, 6) meeting notes and minutes, 7) contracts and
purchase orders, 8) change orders, 9) all versions of shop drawings and other submittals, 10)
construction progress photographs, 11) site progress/field reports, 12) certificates of insurance, and 13)
emails and other correspondence.

Any of these documents may contain key information that affects the outcome of a dispute regarding
allegations of defective design and/or construction. Even if the witness who created a document is
available to testify, these types of project records will likely be persuasive and will refresh recollections of
important events that may have taken place many years before. In these types of suits, evidence of a
directive or an approved alternative (or not) to the specified material, equipment or construction detail can
be dispositive proof supporting one of the parties in a trial or arbitration.

The following recommendations apply to only construction project documents, not to other types of
company records.

Missouri projects: If Missouri is the governing law, project records should be maintained and preserved
for a minimum of 11 years after the project completion date, (one year beyond the statute of repose date
of 10 years).

Illinois projects: For projects governed by Illinois law, project records should be maintained and
preserved a minimum of 15 years (one year beyond the four-year statute of limitations period plus the 10-
year statute of repose date).
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However, if the party is aware at any time prior to the destruction of any project documents of defective design and/or construction issues, the project records must be retained until the issues are resolved. A “litigation hold” should be issued within the company advising everyone to not destroy or discard any project-related documents.

Other states: If another state’s law is governing, it is necessary to determine whether that state has a statute of repose, the length of the repose and the length of that state’s applicable statute of limitations. An analysis should be done to determine whether that state’s statute of limitations can extend the time to file a suit or other action beyond the statute of repose (as it does in Illinois). Although many states have a 10-year statute of repose, there are notable exceptions (i.e., Florida – 15 years, Alabama – 13 years, Pennsylvania – 12 years, Arkansas – eight years, Colorado – six years, Kentucky – none). These and other states’ statutes should be verified for each project.

Public projects under federal or state law and contract requirements: For all projects, private or public, check the contract to see whether record retention is addressed and mandated. In both federal contracts and federally assisted contracts, such a provision is commonly included. For example, by incorporating 24 CFR 85.42, a federally assisted construction contract contains a requirement that certain kinds of records shall be retained by the contractor for a minimum of five years (or longer if any litigation, claim, negotiation, audit or other action is initiated before expiration of the five-year deadline). Otherwise, Federal Acquisition Regulation (FAR) 4.7 is applicable to all contractors working on most federal projects (with several exceptions). FAR 4.7 identifies categories of documents to be retained and the minimum of years (either two years or four years from the end of the contractor’s fiscal year in which it allocated a cost to a government contract). However, a newly enacted FAR 4.805 sets internal record retention minimums for the federal government’s departments and agencies that are longer than the minimum retention requirement imposed upon federal contractors.

Develop and follow a company document retention protocol

All design and engineering firms and construction companies should develop and follow a written document retention protocol for all project documents. The company’s protocol will state that project documents can be destroyed after a stated period of time following final completion unless there is pending or threatened litigation or arbitration.

If there are actions that could lead to actual litigation or arbitration or if such a dispute resolution proceeding has been initiated, a designated person within the company should issue a written “litigation hold” to all employees and officers of the company in order to prevent the destruction of any project documents. Failing to preserve such records when a company is or should be aware of a pending dispute may lead to the imposition of sanctions against the company by a court or arbitrator for the company’s illegal spoliation of evidence. Such sanctions can be serious and impair a company’s ability to protect its
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interests in an action.

However, if a company has followed a reasonable document retention protocol and destroys project documents in accordance with its protocol while not aware of any dispute or claim against the company that could lead to litigation or arbitration, the company should not face sanctions for destroying evidence if such an action is later commenced by the owner. If the document destruction takes place after the statute of repose period (or the combined statute of repose/statute of limitations period) has passed, there should be no issue of spoliation of evidence because the action would be time barred as a matter of law.