Set-Aside Alert™

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Vol. 23, No. 15 *Your source for Federal set-aside and small business contracting news since 1992* July 24, 2015

Column: The importance of preservation of electronically-stored information in contract disputes

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Contract disputes, whether over performance, payment or interpretation of terms, are an inevitability of doing business and, in an ideal world, when they arise they would all be resolved through compromise and agreement.

But we do not live in an ideal world, and contract litigation appears to be on the uptick as the economy improves.

Whereas in the "old days" the largest part of your contract file might have been taken up by the contract itself, the Information Age has led to an explosion of document generation and a concurrent and exponential increase in the size of electronic contract files and related electronic communications. Not only has the volume of information and communications mushroomed, but new devices and storage media are being introduced virtually every day which enable the electronic information to be shared, stored and easily transported by any employee to whom access is given.

This article addresses the requirements to preserve this electronically stored information ("ESI") when your company becomes aware that it is the subject of a contract dispute, and the dangers of failing to do so.

Duty to preserve

The duty to preserve all ESI that is relevant to a contract is clearly triggered when your company either initiates a lawsuit or is on the receiving end of one. In addition, courts have held that the duty can also arise when, based on the receipt of a settlement demand or threatening letter, litigation is not yet pending, but is reasonably foreseeable.

This same duty to preserve ESI has been found to arise in contexts where a company is not the actual party to litigation--for example, when a third-party subpoena is served, or an EEOC claim or other governmental or agency investigation is commenced.

Often, the duty to preserve ESI is explicitly stated in what is commonly known as a "litigation hold" letter, usually sent by counsel for a party that is either currently, or about to be, engaged in litigation.

Such letters typically contain a brief recitation of the nature of the dispute and will advise the recipient that it is required to preserve, until further notice, all documents and records, in paper form or ESI, relevant to the dispute.

However, while the actual notice and demand remove any doubt as to whether there is a duty to preserve, the duty also arises when the facts are such that a reasonable person would conclude that a dispute is pending such that would involve the production of relevant documents.

The discovery process

One of the most challenging, time-consuming and costly aspects of litigation is the discovery process—whereby each side, if asked through interrogatories and document requests, must show its respective hand, in the process producing all relevant documents and communications, in whatever format, that might have a bearing on the case. In the Information Age the discovery process has largely become an (expensive) exercise in retrieving and reproducing, in an agreed format, relevant documents and communications in the form of ESI. Even a relatively small contract can generate thousands of communications back and forth among the parties, all of which, if related to the contract in dispute, must be preserved.

Immediate actions required

Assuming that your company—whether as a named party, a potential party, or a third party—is thought to have information relevant to a dispute and has become aware of a pending or threatened action where the duty to preserve ESI has been triggered, immediate action is required.

As an initial matter, all key players in your organization whom may have relevant information should be advised that they need to preserve it, whether in ESI or other form, until further notice.

Your IT department should be directed to ensure that all auto-deletes or other processes that may be in place to routinely purge ESI are disabled until further notice. And, if you have not already done so, a document retention policy and readiness plan for litigation should be implemented that will facilitate the orderly organization and preservation of relevant ESI.

Failure to preserve ESI

There is a substantial downside if your company fails, after reasonable notice of a dispute, to promptly move to preserve ESI and inadvertent deletion or destruction of relevant information occurs during the course of a contract dispute. If your company has negligently, or worse, willfully deleted ESI relevant to a dispute, it can be exposed to a claim of spoliation of evidence.

Spoliation has been defined as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." And the results of spoliation of evidence, whether from negligence or as part of a "cover-up," can range from a negative inference being drawn against the spoliating party (in other words, the court or jury assume whatever you deleted was harmful to you) or, in extreme cases of deliberate destruction, barring the offending party from putting on evidence, the striking of defenses and monetary sanctions.

In sum, the absence of a sound document retention policy and a plan in place for ESI preservation when a contract dispute arises can lead to an unpleasant experience becoming vastly more so if relevant ESI is not preserved. An ounce of prevention in the form of the implementation of such plans will serve your company well in the long run.

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