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On-Line Real Time Simultaneous Contract Drafting and Negotiation

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INTRODUCTION

Standard construction documents in the construction industry have been available for quite some time. These standard documents not only provide norms and standards in the highly fragmented construction industry, but often define best practices, and provide time and cost savings to the users. For a number of years these standard construction documents, such as AIA Documents-on-Demand and ConsensusDocs, have been available on-line. These on-line documents could then be downloaded into Go-To-Meeting, Google Docs, or into a company's proprietary system for future and further use. However, AIA Documents-On-Demand does not allow editing and real time collaboration and, until recently, ConsensusDocs required specialized document-editing software for shared use, while proprietary systems required granting rights to other users with passwords and/or access codes.

THE ADVENT OF CLOUD COMPUTING

With the advent of cloud computing, contract collaboration has become much easier, and in response to contractor demand, many of the standard document providers have gone to the cloud. In cloud computing, users are provided access to program applications software and data on a web browser while the software and data are stored on remote, not local, servers.¹ The advantages of cloud computing are many. First, use of the cloud is relatively cheap, affording the user the ability to access powerful programs that would be much more expensive if locally controlled and customized.² Use of the cloud also eliminates the need for in-house servers and the maintenance and support of these in-house servers.³ These last two features are usually attractive to the smaller and less sophisticated construction companies and those that do not have their own proprietary documents. Cloud computing also provides ready access wherever there is internet connection,⁴ and some cloud applications allow the flexibility to work offline as well as

on-line.⁵ The cloud websites usually can be accessed by the standard internet browsers such as Microsoft Internet Explorer, Mozilla Firefox, Google, and Apple Safari. The cloud system requirements are usually compatible with both Microsoft Windows and Apple Macintosh.

The major disadvantage of cloud computing is the security concern about unauthorized access to the data stored on the cloud provider's server.⁶ Other concerns are the reliability of cloud based applications generally, lack of customization of documents with cloud based application,⁷ the lack of ability to work off line, and quickly familiarizing all users to the process.

Current cloud technology allows for on-line document management, negotiation, collaboration, and storage. To fully understand the operability of the technology and how these cloud based platforms operate, it will be useful to examine a particular system in some detail. I have selected on-line ConsensusDocs as one model of the current technology platforms. Each on-line document management, negotiation and collaboration system should be carefully reviewed as to its strengths, limitations, and costs before purchase and use in terms of the user's needs and expectations.

CONSENSUSDOCS ON-LINE

ConsensusDocs on-line allows for anywhere/anytime access to contract documents, secure on-line management of multiple project negotiations, complimentary sharing and collaboration on document editing with designated stakeholders, version control, comparison of edited contracts, discussion threading, and document storage.⁸ As with the majority of these platforms, the stated goal of on-line ConsensusDocs is to allow collaboration and to promote and encourage direct communication among the parties while giving the creator or originator of the document the control to organize negotiation and integration of the terms of the document while securing sensitive project information.⁹ Document security is provided through the finalization

process where a security code is inserted into the footer of the document, indicating to users and recipients that it is a valid ConsensusDocs contract.¹⁰ While the finalized contracts can be commented upon by shared users employing Track Changes and Comments, the contracts are automatically locked and can only be unlocked for editing, that is enabling accept/reject changes, by the originator of the contract.¹¹

As with the majority of cloud based collaborative platforms, the ConsensusDocs technology does not require the downloading of any specific software, is fully compatible with Microsoft Word, updates automatically, and provides a secure location to manage and share documents.¹² ConsensusDocs on-line also includes comparison tools and a personal project website, the Dashboard,¹³ allowing the setting up of multiple projects, assigning contracts to those projects, and collaborating with designated individuals on a project and document basis. The Dashboard functions like Facebook for contracts, including messages, Collaborator contact lists, and a central repository for contract documents and negotiations. Users enter ConsensusDocs on-line by one of three (3) ways: (1) the Originator, who has purchased the contracts, has full website and related resource access, manages the project negotiations, invites collaborators to review documents, and controls editing rights; (2) the Invited Collaborator, who need not purchase the documents, has limited website access, reviews and edits contracts, and participates in project negotiations as an invited collaborator; and (3) the Browser, who need not purchase the documents, but may browse contracts, preview sample contracts and select related resources.¹⁴

The Dashboard is accessible only to the Originator and allows the Originator to manage and organize multiple projects, multiple negotiations within a given project, multiple contract documents within each negotiation, and supporting documents.¹⁵ Supporting documents are

documents other than standard ConsensusDocs contracts and may be uploaded and shared from the project Dashboard. On-line ConsensusDocs provides for the supporting documents to be converted from PDF to Microsoft Word and from Microsoft Word to PDF. Once in a project, the Originator can download a document as a Microsoft Word document for editing or in PDF for viewing only.¹⁶ The Originator can enable “accept/reject changes” before downloading.¹⁷ The uploaded document will be saved onto the Dashboard in the same format it was saved on the local computer drive.¹⁸ For example, if redlines were saved prior to upload, redlines will show when the document is shared. This feature is to provide flexibility to the Originator and ease to all parties in reviewing documents. The accepted/rejected changes are permanent for the newly uploaded document, and any prior version would have to be used if any of the edits during accept/reject changes were not wanted.¹⁹ This process is for document control and to ensure that the parties are reviewing the same version of the document.

The Originator opens the downloaded document on his/her local computer, edits in Microsoft Word, and then saves to his/her local computer. A “Draft” watermark appears in the footer and remains in the footer throughout editing and sharing, again for control purposes.²⁰ The Originator clicks “Upload” in the ConsensusDocs Dashboard and brings the modified contract onto the website for sharing, comparisons, and/or storing.²¹ By clicking “Add File” on the Dashboard, the Originator can then select the contract document from his/her local drive for uploading.²² Automatically, a redline “comparison document” of the new contract version and the standard ConsensusDocs contract is posted under “Comparison Documents” to allow the Originator and Invited Collaborators to clearly see how the new contract version differs from the standard ConsensusDocs template.²³

On-line collaboration is the major focus of the platform. The Originator invites Collaborators to share a contract version by clicking the “Share” link.²⁴ Any number of collaborators can be invited to review, edit, or comment upon the document by the Originator by merely entering the e-mail addresses of the Invited Collaborators.²⁵ The Invited Collaborator has the choice of selecting the contract document in Microsoft Word for editing or in PDF for viewing only. The Originator may also include a personal note in the e-mail to the Invited Collaborators²⁶ to allow for elaboration.

The Originator sees who is sharing the document(s) for that particular negotiation on a “negotiations management page”.²⁷ While Collaborators who are not subscribers to on-line ConsensusDocs need not purchase the program to access the shared file(s), they must register. This is for tracking purposes and for document control. Collaborators are e-mailed an auto-generated message with a link to download the shared document(s) and are provided instructions on uploading the edited version back to the project website. Collaborators will see all contracts they have been invited to view by the Originator for one or multiple projects. Collaborators click on the project name, then the contract negotiations name to download the document for editing on their local computers. The Collaborator edits the contracts, saves it, and then uploads the edited version to the ConsensusDocs website. The Originator then automatically receives an auto-generated email that the contract or contracts are ready for review.²⁸ The edited version of the contract appears on the Originator’s project dashboard with a new version number and a system generated comparison document comparing the newly edited version to the immediately preceding version. All comments made on a shared document will be seen by all collaborators invited to share the given version.²⁹ Auto-generated e-mails are sent to all Collaborators with the complete comment attached.³⁰

There is a “Favorite” tool that allows users to save a Microsoft Word version of a document that has been negotiated and edited and is in a format the Originator believes will be useful on other projects. This tool is particularly useful and saves time and money when the Originator (i.e. a prime contractor) contemplates subcontracts or purchase orders with a given subcontractor or vendor on future projects where only scope, price, and schedule may change. In these cases, the prime contractor has created and maintained in the cloud a particular subcontractor/vendor specific template that is easily accessible to those persons within the prime contractor’s organization who will be issuing the subcontracts and/or purchase orders. The project personnel then know that this template is to be used for a given subcontractor or vendor.

Flexibility of use is also a main feature of the platform. The Originator can also e-mail or share a draft contract offline and outside of the platform.³¹ This can be useful when the Originator desires for a particular individual, who does not have internet, to review or access the document. Additionally, and importantly, Microsoft Word compatible documents are sufficiently flexible to be used in other Cloud based environments, like GoogleDocs, for simultaneous cloud based contract negotiations. Where there are relatively few items remaining and/or minor wordsmithing is required, simultaneous cloud based contract negotiation may be preferable.

For document finalization, the Originator selects the contract version he/she wants to finalize and clicks on the Finalize button.³² A clean document with watermark and footer removed and with a ConsensusDocs Content Secure ID is created and saved in the Projects section of the Dashboard.³³ Additionally, a redlined Comparison Document of the final version to the ConsensusDocs standard contract is automatically generated and accessible to the

Originator in the Compare Document column.³⁴ For those who regularly use the template ConsensusDocs, this feature affords a quick overview of the differences in the two documents.

While finalized contracts cannot be “re-finalized” if additional changes are needed, changes can be made to the Microsoft Word version of the finalized contract. The Originator downloads the last Microsoft Word version from the project Dashboard to his local computer, makes additional final edits, and then saves and uploads this document to the project Dashboard. The Originator makes a Favorite of the newest version, then selects and adds this Favorite to the project Dashboard on the “In Progress” tab. The “In Progress tab” then allows the document to be finalized by clicking on the “Finalize” button.

During negotiation, files are saved on the ConsensusDocs platform as long as the Originator’s subscription is active. Finalized project files are saved on the ConsensusDocs platform for up to twelve (12) months after finalization.³⁵ Documents and projects can be deleted or archived anytime during the negotiation process. Archival zip files also can be created any time during negotiation by clicking on the “Archive” button.³⁶ A zip file of all documents and comments within each negotiation selected will be created. A zip file can also be created by clicking on the “Negotiation Name” line and then clicking on the “Create Zip” button.³⁷ Since zipped files are not stored on the ConsensusDocs platform, the zipped files must be immediately saved on one’s local hard drive.³⁸

To illustrate contract collaboration in the cloud, we will present a hands-on demonstration of the on-line negotiation and collaboration between three parties.

LEGAL QUESTIONS RELATED TO CLOUD COMPUTING

From a legal perspective, cloud computing can raise several questions and concerns. The first question that may arise from the parties’ drafting of the contract is in the absence of a

valid and enforceable choice-of-law provision, which state's law governs when a contract dispute arises. Usually in the absence of an effective choice of law clause by the parties, a court will look to the following factors to determine the law applicable to an issue: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business.³⁹ Cloud technology makes this scenario even more pertinent. It is easily imaginable that two parties, one in Louisiana and one in Minnesota,⁴⁰ use cloud technology to draft and negotiate a contract. In such a scenario, it may be difficult to determine the proper choice of law for any contract dispute. As can be imagined, due to the nascence of cloud computing and technology, not much case law exists on this issue. Therefore, it is likely that a court may turn to its tried and true conflicts of laws principles. In many states then, a court could determine the choice of law based on the place of performance or the location of the subject matter of the contract if the place of contracting and the place of negotiating are too vague or difficult to decipher due to cloud technology.⁴¹

Another issue that may arise in a contract dispute over a contract drafted using cloud technology involves the black letter rule of "contra proferentem." Contra Proferentem is the age-old legal principle that "in interpreting documents, ambiguities are to be construed against the drafter."⁴² When two parties utilize cloud technology to draft a contract, it can become unclear who is the "drafter" for purposes of enforcing this principle.

When it comes to interpreting an ambiguity in a contract, "contra proferentem" is a "rule of last resort" and is to only be applied "when there is genuine ambiguity, and where after examining the entire contract, the relation of the parties and the circumstances under which they executed the contract, the ambiguity remains unresolved."⁴³ Moreover, courts are hesitant to

apply such a principle when the contract at issue is a result of a series of negotiations, especially negotiations between experienced drafters.⁴⁴ Almost by definition, collaboration of cloud contracting renders this principle inapplicable. As such, a court will likely avoid using the principle of “contra proferentem” to interpret any cloud contract and instead will likely reach for another instrument of contract interpretation.

Finally, can lawyers even ethically use cloud computing? Cloud computing presents a legal ethics questions to all lawyers who elect to utilize this technology. Lawyers are always cognizant of keeping client data confidential, however, the advent of new technology and specifically cloud computing has transferred client data from a locked file cabinet or desk drawer to the cloud system. When placing client data onto a cloud platform (or any remote server), an attorney in some respects places the client data out of his or her direct control.⁴⁵ Such a reality gives rise to several concerns but mainly (as with all cloud platforms) unauthorized access to protected data. To assuage these concerns, twelve state bar associations have handed down opinions regarding use of cloud computing. All twelve jurisdictions found it acceptable and not a violation of the Lawyer’s Code of Ethics.⁴⁶ Indeed the State Bar of California investigated whether an attorney violates the duties of confidentiality and competence by using technology to transmit or store confidential client information, even when the technology may be susceptible to unauthorized access by third parties.⁴⁷ The Bar found that “Because of the evolving nature of technology and differences in security features that are available, the attorney must ensure that the steps are sufficient for each form of technology being used and must continue to monitor the efficacy of such steps.”⁴⁸ As such, if a lawyer evaluates the security precautions and limits third party access, while all the while maintaining reasonable care of the sensitivity of the data, using cloud computing is not an ethical violation.

CONCLUSION

In conclusion, cloud based contract collaboration is the present and the future. Cloud based contract collaboration provides powerful functionality at a relatively low cost, and the current best practice is to allow on-line collaboration while retaining the flexibility to allow users to work online in a manner in which they are both comfortable and familiar.

¹ Mickey Meece, “A User’s Guide to Finding Storage Space in the Cloud.” N.Y Times (May 16, 2012), *available at*: <http://www.nytimes.com/2012/05/17/technology/personaltech/a-computer-users-guide-to-cloud-storage.html?pagewanted=all>.

² Tim Weber, “Cloud Computing: How to get your business ready,” BBC News (March 18, 2011) *available at*: <http://www.bbc.co.uk/news/business-12779201>.

³ Marcy Hoffman, “Solutions for the Small Business Owner: Did USA Today Get It Right?” InfoStreet Small Business Blog (July 21, 2011), *available at*: <http://smallbusinessblog.infostreet.com/2011/07/solutions-for-overworked-small-business-owners-did-usa-today-get-it-right/>.

⁴ *Id.*

⁵ About Google Docs and Sheets Offline, *available at*: <http://support.google.com/drive/bin/answer.py?hl=en&answer=1628467>.

⁶ Top Threats to Cloud Computing. Cloud Security Alliance. (March 2010), *available at*: <https://cloudsecurityalliance.org/topthreats/csathreats.v1.0.pdf>

⁷ Weber, *supra*, note 2.

⁸ Consensus Docs 2012 New Technology, at p.2, *available at*: consensusdocs.org.

⁹ *Id.*

¹⁰ *Id.*, at p. 6.

¹¹ *Id.*

¹² *Id.*, at 2, 4, 6.

¹³ *Id.* at 8.

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 21.

¹⁶ *Id.* at 5.

¹⁷ *Id.*

¹⁸ *Id.* at 26.

¹⁹ *Id.* at 26.

²⁰ *Id.* at 14.

²¹ *Id.* at 27.

²² *Id.*

²³ *Id.* at 35.

²⁴ *Id.* at 28.

²⁵ *Id.*

²⁶ *Id.* at 29.

²⁷ *Id.*

²⁸ *Id.* at 32.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 27.

³² *Id.* at 35.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 37.

³⁶ ConsensusDOCS - Document Finalization, at pg. 6, *available at*: consensusdocs.org.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Restatement (Second) of Conflicts s. 188.

⁴⁰ It is also not too farfetched to envision parties in foreign countries using cloud technology to negotiate and draft a contract as well.

⁴¹ See Restatement (Second) of Conflicts s. 188.

⁴² Black's Dictionary (9th ed. 2009).

⁴³ *Gardiner, Kamyra & Associates, P.C. v. Jackson*, 467 F.3d 1348, 1352 (Fed. Cir. 2006).

⁴⁴ *E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1995).

⁴⁵ "Cloud Ethics Opinions Around the U.S." ABA Law Practice Management, *available at*: http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyi_s/cloud-ethics-chart.html.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ State Bar of California Standing Committee on Professional Responsibility and Conduct - Formal Opinion No. 2010-179, at p. 7.