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-  **How to Negotiate Retainage**
-  **The Retainage Conundrum — The Industry Needs a Paradigm Shift**
-  **Disarming A Dozen Dangerous Subcontract Clauses — Part 3**
-  **Protecting Lien Rights on Retainage**
-  **ASA Attorneys' Council Examines Terms and Conditions of Textura's Construction Payment Management System**
-  **Legally Speaking: Eliminate or Reduce Financial Impact of Retainage**

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Miami, FL • See page 16

ASA Attorneys' Council Examines Terms and Conditions of Textura's Construction Payment Management System

by Dan McLennon

The American Subcontractors Association's ("ASA") Attorneys' Council was privileged to review the Standard Terms and Conditions ("Contract") for the Textura Construction Payment Management ("CPM") System and speak with two Textura executives in connection with the ASA's annual convention, SUBExcel, held in March in Seattle. This article flags concerns about CPM from a subcontractor's point of view.

Overview

In general terms Textura's CPM provides a neutral, cloud-based platform for exchange of information among participants in a construction project leading to payment. Textura is clear that CPM does not act as agent for any party, and the platform is flexible to allow the controlling party, typically the general contractor, construction manager, design-builder or other prime contractor ("GC"), to set parameters on what documentation and modifications to that documentation will and will not be accepted.

Subcontractors' complaints about CPM are not so much levied at Textura, though Textura has its share, as levied against GCs using it.

Primarily, subcontractors argue that it is unfair to make them pay for this service. In essence, CPM allows GCs to shift part of their construction management overhead cost to subcontractors by requiring subcontractors to pay for the system GCs use to lighten their burden in checking and verifying payment applications and supporting documentation. To the extent that GCs need to satisfy themselves that the paper they receive from subcontractors meets

the contract requirements, GCs and not subcontractors should pay that overhead.

When asked whether the Textura developers ever considered a model whereby owners or general contractors pay for the CPM service, the Textura executives did not know of any. However, the Denver International Airport is widely publicized (including by Textura (<https://www.denvergov.org/Portals/743/documents/Textura-CPM%20FAQs%20pricing.pdf>)) to have required GCs to use the CPM service and include the cost of the service as part of their bids. This would seem to be a fairer model than requiring subcontractors to bear this cost.

GCs may argue that subcontractors would ultimately not bear this cost, because they can increase their bids to include amounts to cover it. However, in the low-bid world, the reality is that the low-bidding subcontractor will absorb that cost so as not to be underbid, so in reality competition among subcontractors will force subcontractors to eat that cost. The better solution would be to follow the Denver International Airport lead by requiring GCs to include the cost in their bids so that the cost is not forced down to the subcontractors.

A complaint levied at Textura that belongs to GCs is the apparent rigidity of the system. CPM may

appear rigid to subcontractors, but that is due to the rules adopted by GCs in setting up CPM for their projects. For example, a GC may set a parameter in CPM that will not allow subcontractors to modify lien waiver forms, though subcontractors need to modify the forms to preserve claims already presented to the GC. A Textura representative commented that CPM always allows subcontractors to attach additional documentation to any upload, which could include the claim-preserving language, but the lien waiver itself cannot be modified to incorporate this language, so a subcontractor cannot rely on this method to preserve claims.

To the frustration of subcontractors, reportedly, the restriction on

IN THIS ARTICLE . . .

- ***Textura's CPM solution provides a neutral, cloud-based platform for exchange of information.***
- ***Subcontractors argue that it is unfair to make them pay for the CPM service.***
- ***One complaint levied at Textura that belongs to GCs is the apparent rigidity of the CPM system.***

documents modification and other CPM rules employed by GCs are used to delay payment to subcontractors.

CPM does include traps for the unwary subcontractor. Once a subcontractor has uploaded an enforceable lien waiver, it will sit in the system until 72 hours after payment instructions have been transmitted to the GC's bank. If Textura receives no notice within 60 hours that the payment has not gone through, Textura will release the waiver. If Textura receives the notice of non-payment 61 hours after payment instructions are issued, the lien waiver may already have been transmitted to the GC.

In addition, one subcontractor counsel related a case in which, after a GC determined that it would lose a subcontractor's payment claim, the GC issued payment and obtained the lien waiver, thereby barring the subcontractor's right to recover attorney fees incurred in prosecuting the claim. A Textura representative noted that a subcontractor owns the materials it uploads until it has been shared, and the subcontractor may withdraw a lien waiver until payment issues. Therefore, subcontractors are forewarned to withdraw lien waiver forms by at least the start of litigation. This will require communication with Textura personnel, because there is no online way to do this yet, although the Textura representatives indicated the firm might consider adding a withdrawal button. Withdrawn forms can later be resubmitted if needed as part of the claim's resolution.

Finally, subcontractors rightfully complain that they are forced to pay for a system that provides them no promises and no protections — although ostensibly promises and protections are found in the Contract — these are illusory because “what the one hand giveth, the other taketh away” in the form of releases, waivers and limitations of liability.

Issues with CPM are explored below.

What Does CPM Cost?

The Contract does not specify the actual cost of using CPM, other than to state that the subcontractor

agrees to three different fees: usage fees, subcontractor deferral fees, and subcontractor service fees by ACH. The fees are nowhere defined in the Contract, but the user is directed to the Textura Web site. However, review of the Web site leads only to the direction to contact Textura sales staff. Absent incorporating a writing by reference, the Contract cannot include statements by sales staff, so the Contract in reality does not state what subcontractors will have to pay for the service.

However, while Textura reserves the right to change fees on three months' notice, for a project already started, Textura agrees that the rates will be locked for the duration of the project.

What Does The Subcontractor Get In Return For These Fees?

The subscriber is a limited, non-exclusive, non-transferrable license to use the Textura site and the CPM service. However, the Contract provides no description or guarantee or promise on what these actually do or provide.

Can General Contractors Use CPM to Claw Back Prior Payments?

The Contract is not clear whether the general contractor may use the Textura system to claw back prior payments, for example to recover back-charges or damages. Nothing in the Contract suggests that the ACH could be used this way, but nothing in the Contract says that it cannot.

What Is Textura's Role?

Textura goes to great lengths to clarify that it is a neutral third party and is not an agent or employee, joint venturer or partner of any party using the system. In two separate clauses, Textura states that it is not an agent of the subcontractor or the GC. The Textura executive explained that CPM simply provides a platform for exchange of information between the parties.

Are Notices Posted to CPM Effective?

The Textura executives confirmed that any notice given by a subcontractor to a GC through the CPM system is ineffective unless and until the GC actually downloads that notice. Uploading a change order request or claim notification to the CPM site in itself is ineffective since Textura is not the GC's agent. Therefore, any change order or claim documentation must be transmitted by traditional means outside of the CMP platform to guarantee effectiveness.

Does The CPM Protect Subcontractors?

Only superficially. The terms and conditions promise to use commercially reasonable efforts to protect any information uploaded to the site by subcontractors. However, those promises are backed up by nothing. The Contract contains at least 13 different clauses waiving and releasing any liability by Textura for any breaches by Textura. In at least three different places, Textura waives any warranty whatsoever. Textura's waivers and releases are as broad as any attorney could imagine.

Does Textura Require General Contractors To Protect Subcontractor Information?

The Contract does state that a person receiving a subcontractor's confidential information agrees not to use it for any purpose other than to complete the construction payment management process or for other specified, limited uses, and to take such precautions to protect the confidential information as the receiver would take to protect its own information. However, the GC is not signatory to the Contract and, therefore, is not bound by it.

Moreover, when asked if subcontractors may view a GC's contract with Textura to confirm its confidentiality provisions, the Textura executive stated flatly that Textura

respects the GC's confidentiality and Textura does not release those contracts to anyone other than the GC itself.

Thus, subcontractors must ensure that their subcontracts with GCs using CPM require the GC to maintain in confidence any information received by the GC from the subcontractor directly or through CPM.

Does Textura Protect a Subcontractor's Lien Rights?

Comfortingly, Textura promises that it may release unconditional lien waivers only after payment has been completed and only if expressly agreed by both the subcontractor and the GC. Textura reserves the right to demand reasonable verification of the existence of such agreement.

On the other hand, the devil is in the details. A payment is considered "completed" 72 hours after payment instructions have been transmitted to the GC's bank unless Textura receives a notice of non-payment within 60 hours after transmission of the payment instructions. Notice of non-payment requires written notice to Textura either from the subcontractor or the ACH network that the payment has not been received. If timely notice of non-payment is not received, the payment will be deemed completed after 72 hours whether or not payment has actually been received. If the release of the lien waivers goes through without payment being received, that is too bad for the subcontractor, because the subcontractor waives any claim against Textura for such release.

Lower tier subcontractors have no protection whatsoever. If a subcontractor uploads a lien waiver for a sub-tier who is not in the CPM system for invoicing and payment, CPM will release that waiver immediately. Textura takes no responsibility for ensuring the sub-tier will be paid.

Does Textura Protect Itself?

You bet. In addition to the limitations and disclaimers of warranties and the waivers and releases of liability mentioned above,

Textura has no fewer than three clauses requiring the subcontractor to indemnify Textura for any damage related to the use of the site or the service. Moreover, Textura reserves the right to have any dispute be decided on its own home turf in Illinois, using local Illinois law. Subcontractors can expect to be hauled into Illinois court for any dispute arising out of or related to the use of the site or the CPM service. Moreover, if a subcontractor were lucky enough to get by all of the disclaimers, waivers, and releases, and liability against Textura were found, Textura's aggregate liability would be the lesser of any fees paid to Textura in the six months before the claim or \$100. Also, Textura creates its own special statute of limitations, requiring that any claim be brought within one year after the claim or cause of action arises, or it is forever barred.

In addition, Textura requires users to protect its intellectual property, in about 23 separate paragraphs. It reserves the right to obtain equitable relief, in addition to damages caused by a user's wrongful conduct. Interestingly, the contract nowhere provides for recovery of attorney fees.

Can The Contract Be Terminated?

By its terms, the Textura CPM contract may be terminated at any time by a subcontractor. However, the subcontractor may not have that leeway under its subcontract with the GC. Before terminating, the subcontractor would need to review the subcontract to determine whether it requires use of the CPM system for the duration of the project. On the other hand, Textura may terminate the agreement for any breach of any of the terms and conditions.

Conclusion

The Textura CPM product is a tool for transmitting payment applications and supporting information to general contractors in an acceptable form to make it easier for general contractors to approve payment applications and seek payment from the owner.

However, the system allows general contractors to be unduly rigid in the processing of payments, and user experience is often that the generals blame the system and use it to delay issuing payments, when Textura allows general contractors flexibility in setting the parameters for acceptable payment documentation. When a general contractor blames a system requirement, essentially the general contract is saying "we set up the system that way, and we are not willing to change it."

Subcontractors have no leverage to negotiate the Textura terms and conditions. Because the Textura contract provides no protections for subcontractors, subcontractors must be vigilant and persistent in negotiating with general contractors the terms of use of that system.

Dan McLennon, managing partner, McLennon Law Corporation, San Francisco, Calif., has been in private practice since 1986. His legal career has focused on cases litigated in the State and Federal Courts in California, representing defendants and plaintiffs, alike. He has resolved hundreds of cases through mediation, arbitration and trial, and he has been awarded Martindale-Hubbell's "AV" rating, the highest rating in legal ability and ethics as established by confidential opinions of members of the Bar. McLennon represents public entities, general contractors, subcontractors, suppliers, premises owners, manufacturers, professionals, corporations, and individuals by prosecuting or defending cases in the follow subject areas: insurance subrogation and equitable contribution among carriers; licensure disciplinary proceedings; mechanic's liens and stop notices; partnership disputes; payment issues under construction contracts, including acceleration and delay claims; bond claims; commercial landlord-tenant disputes; construction defect actions; contract disputes; indemnity among contractors; insurance bad faith; unfair business practices, and business torts. He can be reached at (415) 394-6688 or dmclennon@mclennonlaw.com.