



By Matthew DeVries

Technology and the Law

Can Digital Signatures or Emails Be Used to Create a Valid Contract?

Last month, we addressed the question of whether there are limits to what can be included in a construction contract. We learned that the laws can be different in each state relating to the venue for disputes, waiver of liens, and indemnification. In the same manner, the law can vary in each state as to what constitutes “acceptance” of a valid contract. That’s right; you may find that you have accepted the terms of a contract or a change order without signing the document.

CONTRACT FORMATION

Under general principles of contract law, a contract must result from a “meeting of the minds” of the parties who have mutually agreed to the terms. To form a contract: (1) one of the parties must make an offer; (2) the other party must accept the offer; and (3) there must be some

type of consideration, or something of value, that must be exchanged. If both parties sign a written agreement, then it is likely that the “offer” and “acceptance” elements will be established. But what happens when the parties have not exchanged a written agreement and instead have exchanged electronic drafts of the contract or only emails about the terms of the contract?

DIGITAL SIGNATURES

As to contract formation, some commentators have found a distinction between an electronic signature and a digital signature. However, the real issue depends on whether the parties manifested an intent to be bound by the contract provisions. If it can be shown that the digital marking is evidence of “acceptance” of the agreement—whether by affixing an image of a signature, typing the name of the party

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on the signature line, or clicking an “I accept the terms of the agreement” button—then it is likely that the signature can be used to form a valid contract.

EMAILS

When talking about the digital world, another important inquiry is whether an email can create a valid and enforceable agreement. For example, can a change order agreed to in a string of emails be used later to establish that the change order was “in writing” as required by the contract? Or, can a string of emails be used to show that the parties had agreed to a price on an oral agreement? It generally comes down to the following question: Is an electronic document more likely to prove a claim than a hard copy document?

The courts respond differently. One appeals court in Montana has held that an email was sufficient to support a finding of increased costs for a change order, while another court in North Carolina concluded that an email promising additional work was not an enforceable contract for purposes determining whether a change order was valid. A case in Florida demonstrates that an electronically faxed release was not the same as the original document because one party demanded the original to be provided.

In addition, there may be a statute in your state that addresses the use of electronic documents. For example, in Tennessee there is the Uniform Electronic Transactions Act (UETA) that applies to electronic records and electronic signatures relating to a transaction. The statute expressly states that:

- (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
- (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
- (c) If a law requires a record to be in writing, an electronic record satisfies the law.
- (d) If a law requires a signature, an electronic signature satisfies the law.

The UETA was recently relied upon by an appellate court in Tennessee

where the parties had reached a settlement agreement through the email communications of the attorneys. Although one party later attempted to renege on the settlement agreement, the court found that the emails by counsel constituted a valid contract.

Just like a digital photograph can be used to demonstrate installed quantities

on a project or an electronic schedule (and its logic ties) can be used to impeach a witness, an electronic signature in the form of a “digital signature” or typed signature can prove acceptance of a contract or the terms of an agreed change order. As such, you need to be careful about how you are communicating through email. ■

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