Dispute Resolution Under the Revised A201 I 2017 AIA Document Series I Revisions to the Core Contract Documents (Part 1)

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Recently, the AIA issued its once-every-ten-year revisions to some of the most commonly used documents in construction contracting, including the A101, B101 and A201 documents. The revisions are significant, and will impact all players in the industry, including owners, contractors and architects. Many revisions constitute notable improvements to these time-tested contract documents. Others pose threats to the unwary, and unintended consequences may follow in the absence of careful negotiation on the front end of a particular project. This article is the first in a series that will explore those changes and offer brief insight into potential negotiation options.

Part 1: Dispute Resolution Under the Revised A201 General Conditions Document

Part 1 of the series will focus on modifications to the dispute resolution provisions of the A201 General Conditions document. While this article does not address all such modifications, it seeks to tee up those that potentially have the greatest impact.

The definition of "Claim" in Section 15.1.1 features two important changes. First, the definition now expressly includes requests for changes in Contract Time. While this may, to some, be simply a recognition of what has always been implicit, it clarifies that requests related to Contract Time will be subject to the same notice and timing requirements as any other claim. Second, a provision was added which now states that an Owner is not required to file a claim to impose Liquidated Damages (LDs) in the event of a delay. On the one hand, this makes sense in that the imposition of LDs has already been agreed upon elsewhere in the contract. On the other hand, it poses a potential trap to the Contractor. Specifically, in the absence of a claim by the Owner for LDs, a contractor may not then know the importance of making its own claim for a time extension (or to recover acceleration costs), thereby unwittingly finding itself time-barred from raising its best defense to an LD claim.

As has always been the case, timely Notice of Claim is required to trigger the claims resolution process. The revisions have modernized the mode for giving many types of notices under the A201 to include, for example, electronic transmissions. Beware that Notices of Claims under Section 1.6.2 must still be given the old-fashioned way: in writing, and delivered by certified or registered mail, or by courier. Given that this document will not be revised for another ten years, this trap for the unwary seems out of touch with current practice.

Claims must still be resolved by an Initial Decision Maker (IDM) as a prerequisite to Mediation or formal dispute resolution. The Architect is automatically deemed to be the IDM unless otherwise agreed upon. The revisions to Section 1.1.8, however, now protect the Architect from liability in its performance of that function "for results of interpretations or decisions rendered in good faith." The problem here lies in the reality that many claims present issues that potentially could result in liability for the Architect (i.e., defective design). In such cases, it would appear that the Architect would be placed in a potentially-intolerable conflict of interest situation. Worse, the exculpatory language of Section 1.1.8 could in some circumstances be outcome determinative of another party's ability to get a remedy, as long as the Architect was acting in good faith. This provision needs careful consideration in the negotiation phase, and perhaps further provides a good rationale for the use of an outside neutral party (i.e., a dispute review board) to serve in the IDM role.

An important provision was added regarding the timing of mediation and binding dispute resolution. The new Section 15.3.3 now provides that, within 30 days of the conclusion of unsuccessful mediation, or within 60 days after mediation has been demanded (with no resolution), either party may demand that the other file for binding dispute resolution. In the event the receiving party does not so file within 60 days thereafter, both parties waive their right to binding dispute resolution on the scope of IDM's decision on that issue. The advantage of this requirement is that it promotes finality by putting the parties on a faster track to ultimate resolution. The disadvantage – and it is potentially a very big one – is that it might prematurely foster the filing of an arbitration demand or a lawsuit before mediation has an adequate chance to play out. This is particularly true in large, multi-issue cases when a mediation effort can span many months just premised on the availability of the parties, counsel and the mediator. Arguably, rather than promoting mediation, the new language may be promoting just the opposite.

The revisions draw an important distinction between Notice of Claims requirements depending on whether the claim arises during the corrective work period. Section 15.1.3.1 requires that Notice of Claims arising during the corrective work period be given within 21 days, and be presented to the IDM. Under Section 15.1.3.2, there is no contractual time limit for giving Notice of Claim for claims arising after the corrective work period. Moreover, such claims do not require resolution by the IDM.

An important change also was made to Section 15.1.4.2 concerning the making of payments while a dispute is pending. The revisions require that, once the decision of the IDM is rendered, the Contract Sum and Contract Time are to be adjusted in accordance with the decision, and Certificates of Payment are to be issued accordingly. While subject to the result of whatever dispute resolution procedures that later take place, this revision appears to add teeth to the decisions of the IDM, and takes a powerful lever away from the Owner to control the purse strings in the short run.

Perhaps the biggest surprise of the revisions to the dispute resolution provisions is the absence of any meaningful changes to the arbitration provisions of Section 15.4. In recent experience, many parties to construction contracts have opted for litigation, not arbitration, as the designated means of resolving disputes. The reasons are multiple, but often center upon the lack of limits on various aspects of the arbitration process that ultimately make arbitration as expensive and lengthy as litigation. Yet, the revisions essentially do nothing to right this ship by making arbitration desirable again. This might ensure that litigation continues to gain a foothold as the predominant choice for the resolution of construction disputes. But it also provides parties and their counsel with great opportunities to be creative in negotiation to design procedures, like limits on the discovery process, deadlines for certain events to occur, and other logistical matters that could streamline the arbitration process.

Though this article generally addresses a few negotiation considerations within the dispute resolution section of the A201, many other variables may uniquely impact any given project.

- **Notice Requirements Under the Revised A201 | 2017 AIA Document Series | Revisions to the Core Contract Documents (Part 2)**
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