

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

Article

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Part 2: Notice Requirements Under the Revised A201 General Conditions Document.

This article is the second in a series which addresses the 2017 modifications to the AIA's most commonly-used construction contract documents. Discussed herein are changes to the various notice requirements under the A201 General Conditions Document. While notice requirements are sometimes perceived as trite, they also can be outcome-determinative on large-impact issues. Understanding the changes that will now govern, absent modification of the form language, is critical to a successful outcome – whether an owner, contractor or architect.

Notice Requirements Generally. As has always been the case, there are numerous references in the A201 to the many notices required under various circumstances. The 2017 revisions centralize the form of the notice requirements in Section 1.6, and modernize the mode in which notices may be given. All notices still must be given in writing, but the methods are enlarged to now include delivery “in person, by mail, by courier, or by electronic transmission if a method for electronic transmission is set forth in the agreement.”

Key Cautions:

Three cautions are important here:

1. First, regardless of the topic, notices must always be given in writing, despite the fact that many references to notice requirements throughout the document are not always prefaced by the word “written.”
2. Second, the convenience of electronically transmitted notices is not automatically available, but it must be specifically agreed upon in the document. No such agreement is set forth in the boilerplate, so it is important to draft a custom modification that suits the communication

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needs of the project.

3. Third, a Notice of Claim – still a necessary prerequisite to a party's right to invoke the chosen dispute resolution provisions – must not only be written, but be delivered by certified or registered mail, or by courier.

Owner/Contractor Communications. Related to the topic of notice is an important, new provision regarding Owner/Contractor communications. Formerly, direct communications between the Owner and Contractor were outright prohibited, and instead, were required to be conducted through the Architect. Section 4.2.4 now expressly contemplates direct communications as long as the Owner promptly notifies the Architect of the substance of any such communications. This would appear to be a welcome change on two fronts: 1) it should help promote a more collaborative approach to the project; and 2) it should streamline what had formerly become a bureaucratized and inefficient communications process.

Key Caution:

One caveat is that the Owner and Contractor are still required to include the Architect in all communications “that relate to the Architect’s services or professional responsibilities.” Many issues discussed on a project often touch on interpretations of the design, submittal review, or the approval of payment applications, all of which arguably “relate to the Architect’s services.” As a result, this caveat could be interpreted very broadly, undermining the purpose of the new language by requiring Architect involvement in most communications. Careful negotiation over this point would be helpful to ensure that the exception does not trump the rule.

Notice of Underground Claims. An important notice modification is contained in Section 3.7.4. Formerly, the Notice required to make a claim for concealed or unknown conditions was required to be made within 21 days “after the first observance of the conditions.” The new document shortens that time period to 14 days.

Key Caution:

Particularly in light of the magnitude of many underground conditions claims, this one needs to be understood, and drilled into the on-site supervisors to ensure that what could potentially be large claims are not time-barred.

Notice Regarding Minor Changes in the Work. It has always been the province of the Architect to authorize “minor” changes in the Work as long as the changes did not impact Contract Sum or Contract Time. Like other changes, the Contractor was required to proceed, even if there was a dispute over impact. Revised Section 7.4 changes this, and appears to add a power lever to the Contractor’s arsenal. As was previously the case, the Architect can order, in writing, “minor changes.” If, however, the Contractor believes that the proposed

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change will impact Contract Sum or Contract Time, the Contractor “shall notify” the Architect and “shall not proceed” to perform the change. Presumably, the matter would then be subject to dispute resolution or the Owner’s issuance of a Construction Change Directive.

Key Caution:

This option (actually, this requirement) to refuse to proceed could potentially have a huge impact on project progress. Note, however, that if the Contractor does not give the notice to the Architect before proceeding with the change in the Work, it altogether waives its right to later get an adjustment in the Contract Sum or Contract Time.

Notice of Disputes Over Payment Applications. In prior practice, payment disputes brought about when an Architect disapproves or only partially approves a Contractor’s pay application were often handled differently than disputes over, say, delay damages or scope changes. Some preferred this, believing that payment disputes would be resolved quicker if a more streamlined approach was followed. This practice appears to have been changed by the new one sentence provision of Section 9.5.2, which places payment disputes on the same track as any others.

Key Caution:

Essentially, disputes (no matter how large or small) regarding a Certificate for Payment must now be submitted as Claims under the dispute resolution procedures of Article 15 (see Part 1 of this series). The trap here is that parties who rely on their past practices could be hurt badly by not timely (within 21 days) giving formal Notice of Claim under Section 15.1.3.1. Beware of this trap, or be ready to negotiate alternative language.

Notices Relating to Contract Time. Claims related to Contract Time are now expressly within the purview of modified Section 15.1.1, thereby requiring the same Notice of Claim as any other Claim. Note, however, that there is a potential ambiguity between the requirements of Section 15.1.1 and Section 8.3.1 relating to delays. The latter suggests that, in certain circumstances, the Architect alone can decide issues involving time extensions, while the former would suggest that all requests for time extensions would be governed by the dispute resolution process.

Key Caution:

Parties would be advised to talk about Contract Time at the negotiating table, and to devise language that would clear up that ambiguity, to avoid confusion later.

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Though this article generally addresses certain notice modifications and a few negotiation considerations within applicable sections of the A201, many other variables may uniquely impact any given project.

- **Part 1: Dispute Resolution Under the Revised A201 General Conditions Document**
- **Part 3: 2017 AIA Contract Document Series: Revisions to the AIA Core Contract Documents**
- **Part 4: Insurance and Bonding Provisions | 2017 AIA Document Series – Revisions to the Core Contract Documents**
- **Part 5: B101 Owner/Architect Agreement | 2017 AIA Document Series – Revisions to the Core Contract Documents**
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