

TWELFTH ANNUAL SOUTHERN SURETY AND FIDELITY CLAIMS CONFERENCE

AIA DOCUMENTS: SOME BASIC PROBLEMS WITH A201

Pitfalls in the use of the standard AIA "General Conditions of the Contract for Construction" from the point of view of the owner and point of view of the contractor/surety.

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USING THE AIA GENERAL CONDITIONS

What I want to try to do in this paper is to develop a group of primary concerns a surety should address when faced with the opportunity to influence a construction contract negotiation of amendments to the AIA documents. When you only have a few shots at making changes, and want to concentrate on the important ones, what do you pick?

Let me say at the outset that I am not attempting to address business points in this paper, rather I am attempting to address the primary legal pitfalls that I have seen in years of litigating disputes representing the parties to this document.

THE CONTRACTOR'S/SURETIES PERSPECTIVE - FIVE PRIMARY CONSIDERATIONS

I. ARCHITECT AS JUDGE

Paragraph 4.2.11 provides that the Architect will “interpret and decide matters concerning performance under, and requirements of, the Contract Documents.” Paragraph 4.2.12 provides that the architects “interpretations and decisions will be “consistent with the intent of and reasonably inferable” from the Contract Documents, and goes on to state that, “the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to each other and will not be liable for results of interpretations or decisions so rendered in good faith.”

A few paragraphs earlier, at 4.2.2, the architect is described as the “representative of the Owner.” Now in 4.2.11 and 4.2.12, the architect is charged with putting off the Owner’s coat and putting on an impartial judicial robe. He is to automatically forget who is paying his bills, who may have another project coming down the pike, and that the subject he is evaluating more often than not is how to interpret one of the drawings he cranked out back when he was the owner’s representative. It is unfair to the contractor (and the architect for that matter) for there to be a presumption that the decisions that an architect makes are not made consistent with the architect’s own self interest and that of his client. (When the judge hearing a case is covered in brown fur, has a pocket on his belly and jumps around a lot, he may just be a Kangaroo.)

In dispute after dispute between contractors and owner, I have seen owners point to the “independent” decision of the architect as controlling an issue. It is unclear how much effect will be given to an architect’s unreasonable interpretation of contract requirements. Several recent cases are set out in the footnote at the end of this section.¹ There does not appear to

¹In *Standard Electric Service Corporation v. Gahanna-Jefferson Public Schools*, et. al., 1998 WL 542696 (Ohio App. Unrep.), (not released for publication) the contractor sued the architect with negative results. The contractor had filed its claims at trial court; the trial court granted summary judgment on every single cause of action against the architect.

On appeal, the contractor argued that the trial court erred in finding that the architect’s decision was final and binding upon the contractor. Citing 4.2, 4.3, and 4.4., (adapted from AIA provisions and highly similar) the court reasoned that the wording indicated that the architect’s decision would be final, at least until arbitration.

However, the parties in this case had deleted all the references to arbitration in an effort to allow themselves access to the court system. Through errors in editing, however, the parties had made the mistake of also deleting references to litigation, which the court viewed as appropriate, since the litigation references had been there merely to enforce arbitration decisions. *4. Consequently, the court found that the architect’s decision was not merely final until arbitration, but was absolutely final, since there were no provisions left in the contract that referred to arbitration or litigation. *5.

From the stand point of contractors it is important to obtain some softening the language of 4.2.11 and 4.2.12. Some possible suggestions:

“The architects decisions are final only if they are reasonable” OR

“Nothing in paragraphs 4.2.11 and 4.2.12 give rise to any obligations of the contractor beyond the

obligation it otherwise has under other provisions of the contract.”

In another ground of error, the court was unsympathetic with the contractor’s failure to timely submit claims to the architect. (The contractor had instead submitted its claims to the owner).*Id.* The court found that the architect’s obligation to respond within 10 days was waived if the claims were not submitted to the architect him/herself. *6. In addition, the contractor had not submitted the claim within the requisite time deadline of 21 days after occurrence.

This case, although unpublished, is noteworthy for two reasons. First, the court grants no leniency to the contractor in its failure to make the proper and timely submittals, and allows the architect the last word even in a summary judgment context. Second, this case shows the danger of careless editing of these documents!

International Fidelity Insurance Company v. County of Rockland, SWCF Architects, et. al., 51 F.Supp.2d. 285 (S.D.N.Y. 1999).

Where a contractor had tried to claim that an architect’s failure to render a decision in 60 days negated contractual provisions re: the finality of the architect’s decision, the court noted that the defense would not work when the contractor himself was responsible for not submitting the claims within 21 days. *Id.* at 289.

Luckily for the contractor, the court ruled that the initial contract between the two parties did not foresee the architect to hear delay damages disputes, which were primarily at issue. *Id.* at 290.

In RJR Construction Co., Inc. v. R.W.Granger & Sons, Inc., and others, 1999 WL 706717 (Mass.), 10 Mass L.Rptr. 385, the contractor brought forth various claims against the architect, including bad faith claims, as well as money for dishonored claims. The court granted summary judgment on all claims that were not brought forth within the 21 day occurrence rule. *13.

In *Meco Systems, Inc. v. Dancing Bear Entertainment*, 948 S.W.2d 185 (Mo.App. S.D., Jun 25, 1997), (*aff’d on appeal after remand*, 2001 WL 122010), the court dealt with both the finality of the architect’s decision, as well as its immunity (see below). The contractor sued the owner, but the owner cross claimed for delay damages. The contractor’s response was that the architect had extended the time deadlines. The contractor obtained summary judgment on this basis.

In this case, the arbitration clause had been removed. Unlike the *Standard Electric* case, *supra*, the court in this case found itself unable to make a conclusion as to what the deletion of the arbitration clause meant. *Id.* at 191. The court further noted that various clauses of the AIA document (regarding finality of the architect’s decisions) appeared to conflict with one another. *Id.* Consequently, the court reversed the contractor’s summary judgment, based on the fact that the contract language was susceptible of differing interpretations “about whether Architect’s decision on time extension was intended as ‘final and binding.’” *Id.*

In a related issue about the architect’s authority, it should be pointed out that architectural decisions can sometimes be overturned if there is any sort of evidence of bad faith, unreasonableness, or murky contract terms.

E.C. Ernst, Inc. v. Manhattan Const. Co. of Texas, 551 F.2d 1026, (C.A. Ala. 1977, *pet. for rehearing granted in part, denied in part* (based on issue of damage calculations, 559 F.2d 268 (5th Cir. 1977)) is an instructive case regarding the architect’s immunity in making these decisions. In explaining this immunity, the court stated that the quasi-immunity that architects enjoy will cease when the architect makes decisions which are not “functionally judge-like”. *Id.* at 1033. In examining the pattern of conduct of the architect, the court found that the architect had constantly equivocated, failed to list reasons for its disapprovals, and procrastinated excessively. The court wrote that, “This pattern of action demonstrates a consistent failure to make decisions in a way that could enable construction to continue. Only [the architect] had the authority to make these decisions, and it failed to fulfill that responsibility. The resulting damages [are not so much a function of a failure to pick a proper generator] but rather this failure to decide. We cannot extend the arbitral immunity to such conduct. *Id.* at 1034.

In *MECO Systems, Inc.*, *supra*, the architect had been sued by the contractor, but had won summary judgment at the trial level. On appeal, the court reversed the summary judgment on the grounds that the contractor had

be a clear pattern.

We may infer from the decisions below that an architect's decision is not always final; there may be a back door to proceed directly to arbitration. Indeed, the AIA documents indicate that once arbitration has started, an architect's decision will only be considered as evidence.

II. AVOIDING THE SERIAL CLAIMS PROCESS

Under the claims process outlined in Paragraph 4 of the 201 General Conditions, if a contractor has a claim for a matter that arises during the first week of contract performance (e.g. wrongful failure of the architect to allow an equal substitution that cost the contractor \$300,000 and 2 months of performance time) the contractor must give notice of that claim within 21 days (Paragraph 4.3). The claim is first referred to the architect. Once the Architect has made a final decision, a demand for arbitration must be made within 30 days (Paragraph 4.4.6). Thus on this example, the contractor may be required to actually institute an arbitration proceeding within 2 months of the start of the project. The contractor could be required to be in an arbitration hearing, sitting across the table from the architect, complaining about the architect's incompetence at the same time the architect is continuing to approve pay estimates and evaluate work. If a second claim matter arises in the 4th month of the project, with a quick adverse final decision by the architect, the contractor could be in a second arbitration with the owner while the project continues. The prospect serial arbitration during the project is not a pretty sight, and prospect of it could chill the practical right to pursue early job claims for fear of poisoning the contractor-architect-owner relationship. It could also take the focus of contractor's staff away from completing the project.

While the effect of the serial, early arbitration provision of the 201 format may be avoided on Texas projects because of the likely ineffectiveness of the 21 day notice requirement under Texas law, it seems advisable to include a clause such as the following:

"Contractors may elect to defer the commencement of arbitration until 60 days following substantial completion."

III. THE SCHEDULE PROVISIONS

Although the construction schedule format set out at 3.10 of the 201 form does not contain a requirement of any particular type construction schedule, it does provide for the following:

1. Preparation of a construction schedule promptly after award
2. Submission of that schedule to the Owner and Architect (not approval)

produced enough evidence to proceed on a bad faith claim.

Primarily, the court noted that the architect did not require the contractor to substantiate its claim for time extensions. Furthermore, the architect issued a decision letter on the matter many months after the time for contract administration had ceased. The court also reviewed correspondence which showed that the architect only selectively addressed claim concerns (specifically, the architects had a tendency to ignore any claims for delay which were arguably the fault of the architect.) *Id.* at 193.

3. Revision of schedule at “appropriate intervals”
4. That the schedule and any updates shall not exceed time limits current under the contract documents.
5. That the schedule shall provide for “expeditious and practicable execution.” Performance of the work is required to be in accordance with the most recent schedules.

Many owners add even more burdensome schedule requirements, such as requests that the CPM format be used.

This provision needs to be read not only in light of the obligation the general contractor owes to the owner, but also in light of what the subcontractor can reasonably expect to rely on from the general contractor as manager of the construction project.

Unless the general contractor fully intends to prepare an early and properly planned schedule and update it often, unless the general contractor intends to develop acceleration schedules if the owner delays it, but will not give appropriate time extensions, and unless the general contractor intends to modify the schedule if work sequences change during the project, there need to be modifications to this schedule clause.

Of course the main purpose of a construction schedule is to use it as a tool to help manage the construction process. However, it is used for more than that; it has become the weapon of choice in the construction claim arena, both offensively and defensively, both in owner-contractor disputes and in contractor-subcontractor disputes. It is important at the time of contract formation to make sure that you do not put in the agreement a schedule obligation you do not intend to perform.

IV. ENTITLEMENT TO TIME EXTENSIONS

It is interesting that the 201 provision (8.3.1) setting out the grounds for time extensions does not include a statement that adverse weather, even unusual adverse weather, is grounds for a time extension. There is a provision that allows time extensions for “other causes beyond the contractor’s control,” and a statement in the claim sections of the document relating to how to calculate time extension, “if adverse weather conditions are the basis for a claim for additional time.” 4.3.7.2 (You don’t receive an extension unless the weather “could not have been reasonably anticipated”).

It seems fair from the contractor’s standpoint to insist that unusually adverse weather should be affirmatively stated as a ground in 8.3.1, and that a normally inclement weather chart should be included in the contract as a benchmark for the calculation.

V. AVOIDING UNEXPECTED SCOPE OF WORK

Paragraph 1.2.1 (formerly 1.2.3) of the contract attempts to make the contractor responsible for not only what is shown as the contract documents, but also what is “reasonably inferable from them as being necessary to produce the indicated result.”

What do the words mean in the real world? There is a paucity of case law interpreting this standard, even though similar language has been present in the 201 form even prior to the current edition.

- If the specifications include a broad statement that it is the intent of the documents to include a “functional and conditioning system,” is the contractor required to provide a humidity control mechanism as a part of the HVAC system, even if no such system was drawn or specified in the documents?

- If the specifications provided that a Carrier H2-460A compressor unit was to be provided, does that mean that the Carrier Hook-Up Kit H2-400A necessary to electrify compressor must also be provided?

- Is the standard a subjective standard? Does it matter what the contractor thought? What the architect intended, but did not specifically draw?

There is seldom a project where this subject does not rear its head at least once. Normally when the facts are reviewed in light of this nebulous standard, some sense of fairness can emerge as to whether or not a prudent contract should have understood the missing scope item or not. Arriving at a decision is often determined by whether the architect could have done better job of defining the scope, and whether it appears that the owner is receiving a windfall.

Although there are no cases interpreting this AIA 201 provision, contractors might take some comfort from a non-201 case, *Shank-Arukovich v. U.S.*, 13 Ct.Cl. 346 (1987), *aff'd* 848 F.2d 1245 (Fed. Cir. 1988). In *Shank*, the government argued that the contractor should have inferred certain site conditions based on the fact that certain specifications implied huge rocks (*Id.* at 354); the court ruled that the government had been intentionally unclear to take advantage of a differing site condition, as any number of different site conditions were inferable. *Id.* at 355. A case like *Shank* does not even deal with AIA provisions, but shows how courts interpret the reasonability of a contractor’s interpretation, which may be helpful in evaluating what a contractor should be able to reasonably infer.

However, in a jurisdiction such as Texas, with the unfortunate history of being “Home of Lonergan,” (See *Thos. Lonergan & Co. v. San Antonio Loan & Trust Co.*, 106 S.W. 876 (Tex. 1908), it would seem advisable to attempt to either (1) strike this language, or (2) limit it (e.g., “necessarily inferable to produce the clearly indicated result”), or (3) set up a contingency allowance in the contract price against which to charge any omissions.