CONSTRUCTION CLAIMS MONTHLY

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GET UP TO SPEED ON 2007 CHANGES TO AIA A201 GENERAL CONDITIONS

Contributed by Joseph G. Springer, attorney, Fredrikson & Byron P. A.

The American Institute of Architects' (AIA) family of construction contracts are the most commonly used construction contracts in the U.S. The AIA's A201 "General Conditions," last updated in 1997, has undergone a significant revision, with the new version released on November 5, 2007. The A201 General Conditions are incorporated into many AIA construction contracts, including the most commonly used contracts between owners and contractors and between contractors and their subcontractors. The A201 also establishes many of the rights and obligations between the owner and the architect.

Even if you do not typically use the AIA documents, you should know about these changes because clauses and concepts in the AIA documents are commonly found in non-AIA contracts.

1. New "check the box" dispute resolution

The AIA contracts have required that all disputes be decided by binding arbitration since 1888. Many contractors and owners, however, have deleted these provisions requiring binding arbitration. While the A201-2007 still requires mediation before any binding dispute resolution process, the new form allows the parties to literally "check a box" to determine whether disputes will be resolved by arbitration, litigation or "other." If no box is checked, the default is litigation, and not arbitration.

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Consulting Editor: **Gerard W. Ittig,** Ittig & Ittig P.C. (Washington D.C.)

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GOVT.'S DESIGN MISREPRESENTATIONS MEAN $1 MILLION PAY DAY FOR CONTRACTOR

Defective Design — Constructive Change Doctrine
Metric Construction Co., Inc. v. The United States
United States Court of Federal Claims
No. 04-954 C (January 7, 2008)

A federal court found that the U.S. government's construction specifications were defective and misleading and therefore warranted an obligation to repay the contractor for costs sustained while repairing damage caused by the faulty design.

In 1999, the U.S. Army Corps of Engineers (Corps) awarded Metric Construction Company, Inc. (Metric) a contract to construct a warehouse, the roof of which subsequently developed leaks. In response to the Corps' request, Metric repaired water damage, replaced damaged property and installed a new roof. The company sought an equitable adjustment to the contract for the costs of this extra work, totaling more than $2 million.

Allegation: Misrepresentation under the constructive change doctrine

Both the plaintiff and defendant agreed on the cause of the leaks: Joist clips attaching the roof panels allowed insufficient free movement for the natural expansion and contraction of sheet metal and thereby damaged the roof panel endlaps. However, the parties disputed who was liable for the binding of the clips and what caused the clips to bind.

The defendant contended that Metric chose a roofing system incompatible with the Corps' design. The Corps had specified that Metric install a standing seam metal roof (SSMR) system on top of a steel structure. (Metric chose to install a SuperLok SSMR system, which the Corps approved after requesting minor modifications.)

On the other hand, Metric alleged that the Corps' specifications for the steel underlying the roof were to blame; specifically, Metric claimed that the design specification related to the manufacture of joist girders was defective. To prove its case, Metric had to demonstrate that the specification was indeed defective and that reliance on the Corps' misrepresentations (both in its drawings and in communication during the project) led Metric astray.

In deciding the case, the court considered the constructive change doctrine under which the government must compensate a contractor for costs of a change. The court noted the categories of constructive change include: "(I) disputes over contract interpretation during performance; (II) Government interference or failure to cooperate; (III) defective specifications; (IV) misrepresentation and nondisclosure of superior knowledge; and (V) acceleration." *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 678 (1994). Legal standards also hold that a contractor may rely on and consider the government's contract specifications free from error. (The government's warranty of its specifications is voided if the contractor does not follow them, but in this case both parties agreed that Metric had built the steel framework as indicated by the contract.)

First hurdle: Demonstrate defective directive

Metric provided evidence that it installed joist girders fabricated to accommodate the dead loads indicated by the Corps' drawings — dead loads that were too heavy.

In fact, a construction manager testified that the actual dead loads present on the warehouse roof were less than half those indicated on the drawings. Normally, a girder is constructed with enough camber (upward bowing) so that when loads are applied it will remain flat; however, if girders experience loads lighter than expected, they will bow upward excessively — which explains the warehouse roof plane's "roller coaster effect," Metric detailed.

The Corps affirmed that the dead loads in the drawings were less than the actual loads but suggested that it may have elected to "overbuild" the steel structure to be able to accommodate a larger load. Instead, the court found compelling testimony by both Metric's president and a structural engineer that indicated a contractor must be able to rely on construction instructions as to joist girder loads.

The court therefore found the specification for the joist girders defective based on the dead-load information, confirming that "the joist girders were designed and manufactured to respond to dead loads which had been erroneously stated by the Corps in its construction drawings."

Second hurdle: Show good reason for being misled

Despite defective specs, however, a contractor must act reasonably during construction and bring specification inaccuracies and omissions to the government's attention. As such, to successfully claim that it was misled, a contractor must demonstrate that it relied on the defective specification, but that the defect was not so obvious as to make reliance on the instruction unreasonable. (See *E.L. Hamm & Assocs., Inc. v. England*, 379 F.3d 1334, 1339 (Fed. Cir. 2004)).

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Metric succeeded in this second challenge as well by showing that it had no reason to question the drawings' dead-load calculations until the roofing subcontractor inspected the roof plane, before installing the roof, and noticed excessive camber. At that point Metric sought guidance from the Corps as to the feasibility of continuing the project as planned. The roofing subcontractor was concerned that the camber in the joist girders would not flatten after the roof was installed. As such, Metric inquired about the compatibility of the steel framework design and its choice of roofing system.

The court found Metric's actions reasonable in terms of relying on the drawings and in contacting the Corps when a potential problem arose. It did not find convincing the defendant's implication that the SSMR contract specifications "placed all responsibility for the compatibility of the roof system and the underlying steel framework on Metric."

First, the contract did not require Metric to check the Corps' specifications for defects that were not glaring or obvious. Further, no one questioned the compatibility of the steel structure and the SuperLok roof before the girders were erected, and there was nothing in the drawings to indicate to Metric that the girders would not lie flat enough for such a roofing system, the court noted. "In fact, the only party that might have had knowledge of the dead load inaccuracy in the contract drawings, before the steel was actually in place, was the Corps," the court stated.

Make misrepresentation stick with reasonable conduct

The Corps' response to Metric's request for guidance on the incompatibility issue was less than clear. Although the Corps contended at trial that it intended to instruct Metric to make corrections to the roof plane before installing the roof, the communication it sent to the contractor appeared to reassure Metric that the girder would flatten after construction was complete. Metric's president testified that he interpreted the communication as a "conditional go-ahead" to use the selected roofing system as long as the joist girders had been manufactured in accordance with the Steel Joist Institute (SJI). The court found this interpretation reasonable although not unassailable.

The Corps could have informed Metric that it would not investigate the potentially excessive camber issue and suggest that Metric do so, but instead it stated that "joist & joist girders manufactured in accordance with the SJI specification should be at the recommended tolerance level." As a result, the court found that the Corps misrepresented the girders' excessive camber and that Metric reasonably relied on that misrepresentation when it installed the roof, which eventually developed leaks.

In the end, the court awarded Metric an equitable adjustment and held the Corps liable for the portion of Metric's costs that directly related to endlap failure, a total of more than $1.3 million.

Editor's Note: The key action in this case was the roofing contractor's questioning of the design. Had Metric not forwarded these questions to the Corps, it might have accepted the risk. ❖

CONTRACTOR SEEKS ARBITRATION IN VIOLATION OF CONTRACT, WILL HAVE TO PAY

Dispute Resolution — Attorney's Fees — Arbitration
Otay River Constructors v. San Diego Expressway
Court of Appeal of California, Fourth Appellate District, Division One
D049612 (January 7, 2008)

A state court of appeals reversed an order and confirmed that an owner was entitled to its costs and attorney's fees after prevailing in a suit against a contractor who attempted dispute-resolution measures that did not comply with very specific contract language on the matter.

San Diego Expressway (Expressway) entered into two design-build contracts with Otay River Constructors (Otay) as part of two related highway projects in San Diego County. In a third "coordination" agreement the parties acknowledged that the work on both projects — one for a gap/connector and one for a toll road — was independent and that Otay's failure to complete work on the gap/connector project would cost Expressway dearly.

Importantly, each contract included its own dispute-resolution provision. The contract for the gap/connector project (contract 1) dictated that disputes could be resolved by project-level negotiations, a nonbinding dispute-resolution board or, if necessary, litigation. The contract for the toll road (contract 2) required binding arbitration (it did not allow for litigation). Disputes arising out of the coordination contract (contract 3) were to be governed by contract 2's dispute resolution provision: binding arbitration.

Otay initiated two arbitration proceedings against Expressway, alleging that Expressway breached contract 3 by demanding changes to drawings and by refusing to adjust the contract price to reflect necessary retaining walls. Otay admitted that these disputes actually arose out

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of contract 1 but insisted that the claims presented a dispute under contract 3, which is why it had pursued binding arbitration as a course of action. Expressway opposed Otay's petition to compel arbitration based on the fact that these contract 1 disputes were unrelated to contract 3. The court agreed and denied the petition. Expressway then filed for attorney's fees and costs, claiming that it was the prevailing party (which thereby entitled it to such fees and costs under the contract). The court denied the motion, stating that because the parties contemplated additional litigation, Expressway was not a prevailing party. Expressway appealed.

Otay contended that the trial court was correct in its decision because Expressway had obtained only "an interim procedural victory." Unfortunately for Otay, however, it submitted no "persuasive authority" to support this claim, the appeals court found. In fact, "courts have awarded attorney fees to a party obtaining an appealable order or judgment in a discrete legal proceeding even though the underlying litigation on the merits was not final," (see *Christensen, supra*, 33 Cal.3d at pp. 786-787), the court stated.

Further, the appeals court found that the court proceedings to compel arbitration were discrete from Otay's claims under contract 1. "The fact that these parties will probably pursue these claims in another action does not lessen Expressway's victory in this discrete legal proceeding," the judge wrote. As such, the appeals court found that the trial court erred in denying Expressway its attorney's fees.

Editor's Note: Otay obviously wanted arbitration over a court action and may legitimately have been misled as to what procedure to use. Beware: Split disputes procedures create this kind of confusion. ❖

POLISH YOUR GRAMMAR SKILLS: CONTRACTOR BARRED FROM COLLECTING $13M IN DELAY DAMAGES BECAUSE OF A COMMA

Damages — Liability — Contractual Interpretation
Potomac Constructors, LLC v. EFCO Corp.
United States District Court for the District of Maryland
Civil Case No. RWT 06-2918 (January 9, 2008)

Precise contract language — which essentially disavowed all damages not specifically enumerated — saved a supplier from a multi-million-dollar penalty for alleged negligence and tardiness.

General contractor Potomac Constructors, LLC (Potomac) had a $191-million contract with the Maryland State Highway Administration for work on the Woodrow Wilson Bridge replacement project. As part of that contract — which contained a strict timeline and hefty delay penalties — Potomac entered into a $2-million purchase order agreement with EFCO Corp. (EFCO) to engineer and supply steel formwork that would facilitate the casting of concrete supportive structure for the bridge. When the project sustained significant delays, Potomac sought damages of $13 million and blamed EFCO's tardy deliveries and poor workmanship.

The purchase order language (and its grammar) stood squarely in the way of Potomac's claim.

Supplier immune to liability for delays not specifically anticipated

First, the purchase order's "warrant and conditions" section strictly limited EFCO's liability only to damages expressly provided for in the contract. It further stated that EFCO should "use all reasonable means to deliver within the time specified, but assumes no liability for loss or damage arising from delay, or no [sic] fulfillment of contract by reasons of fires, strikes, delays in transportation, regulations of the United States Government, or any cause which is unavoidable or beyond its control." EFCO contended that this clause excluded all damages caused by delays *and* that it also excluded damages for non-fulfillment due to the specific causes listed (i.e., fire, strikes, etc.). Potomac argued that the clause had just one effect when read in the context of the entire agreement: that it excluded damages for delays due to the specific causes listed. The court could not agree with Potomac as a matter of contractual interpretation and grammar.

In particular, the court cited a Maryland case — *Sullivan v. Dixon*, 280 Md. 444, 373 A.2d 1245, 1249 (Md. 1977) — which established that a qualifying clause is confined to the immediately preceding word or phrase especially in the absence of a comma. So regarding this case's purchase order language, the comma that follows the word "delay" creates a separate and distinct clause ("by reasons of fires, strikes, delay in transportation…") that does not modify "delay," the court found. Thus, Potomac could not seek damages for delays.

Damages not specifically listed are off the table, too

Secondly, the purchase order provided for an express warranty against defective workmanship, which was limited

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to "the repair or replacement of any defective property." The agreement language in that paragraph also relieved EFCO of liability for "incidental, indirect, or consequential damages." The court had already noted that the contract relieved EFCO from liability for damages not enumerated in the contract. Here, it pointed out that contract also relieved EFCO from liability for incidental damages beyond the cost of repair. Potomac did not allege that EFCO was unwilling or unable to make repairs; in fact, EFCO did make repairs to the point that the formwork was "usable," Potomac conceded. So, too, on the point of damages due to shoddy workmanship, Potomac was out of luck.

Contractor wins indemnification claim — but not cash

The one aspect of the case that did go Potomac's way had to do with its plea that EFCO indemnify Potomac for claims against it due to EFCO's negligence. The court found that EFCO had a "clear contractual duty" to do so because an attachment to the purchase order demonstrated that EFCO agreed to "indemnify [Potomac] against loss on account of any claim against [Potomac] cause by the negligence of [EFCO] in performance under this contract."

Nevertheless, this finding won't likely save Potomac's pocketbook. Potomac "may not use this contractual language to circumvent the liability exclusions in the Purchase Order and seek reimbursement for the contractual obligations to other parties created by Defendant's delays in delivery," the judge wrote.

Editor's Note: This case underscores the need to consider contract language with care. If you're entering an agreement drafted by a supplier, be sure to review its "acknowledgment of order" forms. The unintended consequences of having a "no incidental damages" clause in the above case are also cause for consideration. Note that the standard AIA A201 "General Conditions" for general contractors has a mutual waiver of consequential and incidental damages between owner and contractor. The full impact of that language may be influenced by cases like this one. ❖

SUBCONTRACTOR ERRS BY FUSSING OVER PAPERWORK WHEN ITS BID WAS BINDING

Promissory Estoppel — Subcontracts — Bids
3D Enterprises Contracting Corp. v. National Electric Co.
United States District Court for the Eastern District of Kentucky, Central Division
Civil Action No. 07-80-JMH (January 18, 2008)

A federal court granted a prime contractor's motion for partial summary judgment when a subcontractor, unhappy with the form of the subcontract it was asked to sign, failed to honor its bid — or to come up with a convincing excuse for having done so.

In late 2006, 3D Enterprises Contracting Corporation (3D) solicited a quote from National Electric Company (NEC) for electrical subcontract work on a wastewater treatment facility project 3D planned to bid on. In discussions, NEC requested an American Institute of Architects (AIA) standard subcontract form, and 3D indicated that it planned to use its own subcontract form for the project. NEC then submitted a bid for the electrical work, and 3D used NEC's bid in its prime bid for the treatment plant project, which it won.

In a letter sent in early 2007, NEC told 3D that it would not enter into a subcontract for the project because of differences in the scope of work and objections to 3D's subcontract. 3D reminded NEC that it had been informed before the bidding process of the subcontract form to be used in the project. In response, NEC sent a second letter confirming its refusal to perform. 3D then found another subcontractor to perform the electrical work, at a cost approximately $570,000 more than NEC's bid, and sought to recover, under the theory of promissory estoppel, that difference in price as well as other costs associated with NEC's refusal.

For legal standards, the court looked to the case of *Harry Harris, Inc. v. Quality Constr. Co.*, 593 S.W.2d 872 (Ky. Ct. App. 1979), in which the general contractor prevailed under the theory of promissory estoppel when the subcontractor, realizing it had made a mistake in preparing its bid, refused to perform. The court in another similar case — *Meade Constr. Co. Inc., v. Mansfield Commercial Elec.*, Inc., 579 S.W.2d 105 (Ky. 1979) — held liable for damages a subcontractor who refused to honor its bid knowing that the general contractor had relied on its bid in preparing its own bid. In deciding the current case, the court had to consider whether 3D acted reasonably in relying on NEC's bid.

NEC argued that because it requested an AIA subcontract prior to its bid, 3D's reliance on its bid was not reasonable considering it planned to use its own subcontract. However, NEC admitted that 3D did not guarantee it would provide an AIA subcontract and that NEC understood at the time it submitted its bid that 3D intended to use its own subcontract. Plus, an NEC representative testified that he opted against including in his bid any mention

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that it was contingent upon use of an AIA standard subcontract. As a result, the court found that 3D acted reasonably in relying on NEC's bid.

The court further found disingenuous NEC's claim that differences in scope of work justified its refusal to perform. First, NEC was unable to point to any work item it excluded from its bid that 3D's subcontract would have required it to perform. Secondly, any differences in scope appeared to be insignificant and were more likely differences in the way the parties described scope, the court noted. Plus, both parties admitted minor differences in scope are common. Finally, NEC opted to submit its bid despite the unresolved differences, and NEC knew that 3D relied upon its bid. Thus, again the court found 3D's reliance on NEC's bid reasonable.

Editor's Note: See "After-Bid Bargaining Prevents Contractor From Recovering Under Estoppel" in the February 2008 issue for details on another case in which a contractor and subcontractor wrangled over the subcontract. The mistake in *APAC-Southeast, Inc., v. Coastal Caisson Corp.*, however, was the contractor's because it tried to issue its own standard subcontract form to get out of specific terms contained in the subcontractor's bid. In doing so the contractor negated its ability to apply the theory of promissory estoppel to hold a subcontractor to its bid. ❖

DECISIONS OF THE BOARDS OF CONTRACT APPEAL

DURESS CLAIM DOESN'T FREE SUBCONTRACTOR FROM DEBT OWED TO THE GOVERNMENT

Duress — Time and Materials Contract
DKW Construction, Inc. v. General Services Admin.
United States Board of Contract Appeals
CBCA No. 438 (December 20, 2007)

A Board of Contract Appeals rejected an appellant's protest that due to government coercion it was not obligated to pay back the General Services Administration (GSA) for overpayment for work performed at a Missouri courthouse.

DKW Construction, Inc. (DKW) was the subcontractor on a GSA courthouse construction project. When GSA terminated the prime contractor's contract for default, it encouraged the subcontractors to submit price proposals for completion of outstanding work on the project and, because time was of the essence, announced that it would issue letter contracts with stated "not-to-exceed" amounts similar to "price-to-be-determined-later" contracts.

Post-award audit causes dispute over costs billed

In its proposal, DKW offered to complete the remaining painting and wall covering work for the lump sum of $2.1 million, but this exceeded GSA's estimate for such work. GSA advised DKW that an audit was necessary for contracts exceeding $500,000. However, the government was anxious to get work underway, so it awarded DKW a time and materials contract with a not-to-exceed ceiling of $500,000 for the time being. Subsequently, GSA increased the cap to $1 million and again reminded DKW that although there was no time for a pre-award audit, its contract would indeed be audited.

A year later, GSA requested from DKW documentation to supplement information it had provided with its billing for specific item costs incurred over the past year. The eventual audit report recommended a downward contract-price adjustment of $303,193, which DWK disputed. The parties negotiated and exchanged additional information on the disputed items: rates of unemployment taxes, a small tool allowance, equipment rental and overhead rates. The parties compromised and finally agreed that DKW was overpaid and therefore owed GSA $128,409.

Subcontractor contests repayment via offsets

A month later, DKW requested permission to pay its debt in monthly installments over 14 months. Preferring speedier repayment, GSA informed DKW it was considering recouping the dept by taking an offset against amounts due under other contracts it had with DKW. DKW protested noting again that paying in one lump sum would cause the company "severe financial hardship." GSA didn't buy it: Financial statements showed that DKW had a cash balance exceeding the amount owed to the agency. Thus, GSA informed DKW that it would seek repayment via offsets. The agency did not issue a demand letter because "GSA had received affirmative assurance that DKW acknowledged and accepted the debt as owning, and had agreed to its repayment," the court documents state. In a telephone conversation, the two parties agreed that partial repayment would be taken in an offset against a recent pay application under another contract. This initial payment amounted to $99,958.33. However, following that, DKW

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submitted no further invoices from which GSA could take an offset for the remaining balance.

Five years later, the contracting officer issued a final decision that DKW still owed a balance amount (finally determined to be $28,756.40). DKW appealed and alleged that it had agreed to the contact and audit results under duress and that the government improperly took offsets for repayment.

Specifically, DKW claimed that the GSA's not-to-exceed cap of $1 million (an amount less than half of DKW's original proposal, it pointed out) provided strong evidence that the government had attempted to get the contract price it wanted through "duress, undue influence, and the exercise of its superior bargaining position." DKW maintained that it could not have afforded to have the government terminate its contract and was therefore forced to accept the contract and to agree to return the money requested.

Use of time and materials contract doesn't equal coercion

A contract is unenforceable due to duress or coercion by the government, according to *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1329-30 (Fed. Cir. 2003), if the party involuntarily accepted the other party's terms and if the other party's coercive acts left the party with no available alternative. On the contrary, the court found no evidence that DKW involuntarily accepted GSA's terms. The record clearly demonstrated that during negotiations with GSA, DKW did not challenge or dispute the audit or the revised overpayment amount and only afterward asked for a monthly installment payment plan. The court didn't find any wrongful behavior on GSA's part either, noting that the government had made clear that the contract would be audited, offered DKW plenty of opportunity to negotiate the results and even revised its report to lower the overpayment amount. The court also rejected DKW's economic-pressure claims on the grounds that "hard bargains" aren't enough to establish coercion.

Notably, the judge pointed out that DKW appeared to have misunderstood the use of the time and materials contract, which is why it belatedly concocted the duress claim. Under its not-to-exceed contract, DKW's obligation was to perform work until it incurred labor and material costs that matched the ceiling amount. After that, DKW would have been entitled to stop performing. *CACI, Inc. - Federal v. General Services Administration*, GSBCA 15588, 03-1 BCA P 32,106 (2002). The GSA contended, and the court agreed, that "it is hard to envision how the award of a contract that shifts to the Government the risk that the contract will not be fully performed for the authorized ceiling amount can constitute duress."

The court also supported GSA's right to collect its debt through offsets despite DKW's contention that the government should not have done so without sending a formal demand letter. Like every creditor, the government can "apply the unappropriated monies of his debtor, in his hands, in extinguishment of the debt due to him" (*United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947)), the court pointed out. The court further noted that DKW could have submitted a claim to the contracting officer disputing the overpayment, but it did not. DKW's appeal was denied.

Editor's Note: Even when time — or money — is tight, be sure you understand the bounds of the contract you're agreeing to. You cannot claim coercion simply because you didn't ask for clarification where you needed it during the contract-signing process. ❖

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If the parties choose binding arbitration, the parties may also choose their own provider of arbitration services. This is a change from the A201-1997 that requires that the arbitration be administered by the American Arbitration Association.

2. Allowing architects to be joined in arbitrations

The A201-1997 expressly prevented a party from joining the architect as a party in any dispute between the owner and the contractor. Many owners objected to these special protections afforded to the architect. To address these concerns, the A201-2007 allows the architect, or any other party "whose presence is required if complete relief is to be accorded in arbitration," to be joined in any dispute between the owner and the contractor that involves a "common question of fact or law."

3. Expanded period for owner to assert claims

The A201-1997 provided that the statute of limitations for claims against the contractor would begin upon substantial completion of the construction project. In contrast, Minnesota, as well as several other states, follows the "discovery rule"— the statute of limitations only commences when the owner discovers or should have discovered the contractor's breach of contract. The A201-2007 has done

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away with the attempted contractual limitation on the owner's rights and instead provides that the statute of limitations will be established by applicable state law.

Despite allowing the "discovery rule," the A201-2007 also includes a 10-year "statute of repose" that provides that any claims against the contractor must be asserted within 10 years after substantial completion.

4. New restrictions on owners' financial disclosures

The A201-1997 required that the owner furnish reasonable evidence to the contractor that the owner could pay the contractor, both as a condition to starting and during the course of the project. Many owners have complained about the obligation to continually provide the same financial information during the course of the project. To address these concerns, the AIA has restricted the owner's obligation to provide financial information during the course of the project. Under the 2007 revisions to the A201, the owner is only obligated to provide evidence of the ability to pay during the course of the project (a) if the owner has failed to make payments to the contractor as required under the contract documents; (b) where changes to the work materially changes the contract sum; or (c) where the contractor has identified in writing a reasonable concern regarding the owner's ability to pay.

5. New provisions regarding concealed conditions

The A201-2007 has added provisions addressing a situation in which a contractor encounters human remains or burial markers, archaeological sites or wetlands that the owner had not previously disclosed to the contractor. A contractor discovering any of these newly added concealed conditions must immediately cease operations and provide notice to the owner and architect. The owner is then obligated to obtain any government approvals required to resume construction, and the contractor may request that the contract time and price be adjusted accordingly.

6. New possibility for an initial decision maker

Under the A201-1997, the architect initially decided any claims or disputes on a construction project. Contractors often allege that architects cannot be impartial since they were hired and are being paid by the owner. For the same reasons, owners may feel betrayed if an architect rules in favor of the contractor.

To address these concerns, the proposed A201-2007 allows the parties to fill in the name of another person to act as the "initial decision maker" for certain disputes. The architect remains the initial decision maker if the parties do not identify a different initial decision maker. If a party does not agree with the decision of the initial decision maker, the party may demand mediation and then dispute resolution in the forum provided under the contract.

7. Additional insurance requirements

The A201-1997 required that the contractor maintain "Project Management Protective Liability Insurance." Few contractors carried this coverage and most owners deleted this requirement. The A201-2007 deletes the requirement for Project Management Protective Liability Insurance and instead requires that the contractor name the owner, architect and the architect's consultants as additional insureds under the contractor's Commercial Liability coverage.

Additionally, the A201-2007 requires that the contractor maintain completed operators coverage.

Takeaway: The 2007 revisions to the AIA "General Conditions" contain many new concepts and provisions. Even if you do not use the actual AIA forms, concepts and provisions from the AIA contracts are often found in non-AIA construction contracts. Consequently, you may see these new concepts and provisions gradually find their way into many non-AIA construction contracts.

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