

Architect's Decision on Claims B Finality Language

AIA Document A201, the General Conditions of the Contract for Construction, contains a little used provision that could save the owner and possibly the contractor substantial costs. & 4.4.6 basically allows the architect to insert finality language in the written decision of the architect that places a severe time limit on the appealability of that decision. If the time limits are not met, the architect's decision becomes final and binding on the parties, without the ability of the parties to continue the dispute to mediation, arbitration or litigation. The language is as follows:

4.4.6 When a written decision of the Architect states that (1) the decision is final but subject to mediation and arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

Under A201, a claim may be made by either the owner or contractor. A claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. A201, & 4.3.1. Generally, claims are made by the contractor and involve an increase in the contract sum, often with a corresponding increase in the contract time. The initial claim must be made within 21 days from the time the claimant knows of the claim, and notice of the claim must be given to the other party and to the architect. A201, & 4.3.2.

The claims procedure is outlined in Section 4.4. The architect is the initial reviewer of the claim. The architect can take one of the actions set forth in & 4.4.2: (1) request additional data from either party, (2) reject all or part of the claim, (3) approve the claim, (4) suggest a compromise, or (5) advise the parties that the architect will not make a decision on the claim. The architect's decision must be in writing and must include an explanation for the decision. & 4.4.5. This decision by the architect to

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reject or approve the claim is final and binding but subject to mediation and arbitration. & 4.4.5.

Once the architect processes the claim, the matter can be taken to mediation and arbitration by the dissatisfied party, possibly followed by court confirmation of the arbitration award. Sometimes appeals are taken, although arbitration awards are only rarely overturned. This process can, of course, be extremely time consuming and expensive. Obviously, if this process ends with the architect's decision, both the owner and contractor will save considerable money, including legal fees, arbitration fees and the time involved to deal with these issues. This is where the finality language in the architect's written decision comes in. Of course, none of this applies if one of the parties demands arbitration within the 30 day period following receipt of the architect's written decision.

Why is this important, since it would seem unlikely that the party losing the decision would not heed the 30-day warning? Experience shows that claims pile up until the end of the job. Relationships between owners and contractors often deteriorate as the job progresses. A claim that may be abandoned in the middle of a job will usually be pursued at the end of the job. Many claimants will be reluctant to go to arbitration while the parties are on good terms, with the effect that the claim is permanently abandoned if the finality language is included in the architect's decision.

There are few court decisions concerning this provision.¹ It appears, however, that courts would be willing to make the architect's decision final and binding and not permit arbitration or litigation if the final language is included. Here is a form that could be used for the decision. It should be modified to suit the particular situation:

ARCHITECT'S DECISION ON CLAIM

Project: _____

to: _____
(Contractor)

_____ (Owner)

Re: Claim initiated by _____ (Claimant)

on _____ (date)

The Architect's decision on the above claim, based on a review of data submitted by the Claimant, is as follows:

[Here state the decision as succinctly as possible and give the change in dollars and/or time that is awarded.]

This decision is final but subject to mediation and arbitration. A de-

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mand for arbitration of the above Claim covered by this Decision must be made within 30 days of receipt of this Decision. Failure to demand arbitration within said 30 days' period shall result in this Decision becoming final and binding upon the Owner and Contractor.

Date: _____
(Architect's signature)

Another consideration is what happens when the arbitration and/or mediation provisions in the documents are stricken. This is not an uncommon occurrence. Even though the mediation and arbitration provisions may be stricken, & 4.4.6 is almost never stricken from A201. In such a situation, the effect of the finality language would be to make the architect's determination final, with the party unhappy with that decision unable to have a court adjudicate the issue unless a petition is filed with the court within that 30 day period. Of course, there may well be litigation over the validity of this process, and the argument may be raised in court that the reference to arbitration in & 4.4.6 (unless that is also stricken) creates an ambiguity. Hopefully the court faced with such a case would recognize that the parties intended that the architect have the power, as the arbiter of the dispute, to render a final decision, much like an arbitration panel, that is actually final and not subject to either arbitration or litigation. The architect can avoid this situation by amending & 4.4.6 in the Supplementary General Conditions to clarify the process by either making the architect's decision final at the moment it is rendered and eliminating litigation, or by making it subject to litigation within a 30 day time period and final if no litigation is started within that time.

A final question is why any architect, when faced with making a decision under this provision, would fail to include the finality language. There are no good answers to this question. In fact, failure to do so may well expose the architect to liability to the owner. Even if the owner ultimately prevails in court or arbitration, the cost of the battle is significant. The owner may want to charge the architect for this cost if the architect has failed to include the finality language that would have avoided that additional cost. If the arbitrators or court ultimately reverse the architect's decision, the cost is even higher, since the finality language would have avoided such a reversal.

The architect should include the finality language found at & 4.4.6 of A201 in every written decision issued by the architect under section 4.4 of A201. Failure to do so is a disservice to the owner and may well subject the architect to liability.

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1. See *Sarnoff v. De Graf Bros.*, 554 N.E.2d 335 (Ill. 1990), *Sue Klau Enters. v. American Fidelity Fire Ins. Co.*, 551 F.2d 882 (1977).

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