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Documents By Kenneth C. Gibbs Viewpoint

Dispute-Resolution Changes Coming

The contract forms issued by the American Institute of Architects (AIA) are certainly the most well-known and widely used contract documents in the construction industry. New versions of the forms, which are revised about once a decade, will be issued in late October. All interested parties should be aware of significant changes regarding how disputes and contract claims will be handled. The new forms provide your organization the opportunity to re-evaluate whether you are using the best dispute-resolution strategy to meet your needs.

The first change involves the role of the architect in the dispute-resolution process. For decades, the AIA documents have designated the architect as the initial arbiter of claims that arise between the owner and contractor. The architect's position as initial arbiter has been based on the presumption that the architect was the "master builder" and designer of the project, and therefore was above the fray and could act as a neutral with regard to disputes between the contractor and owner.

But many parties have questioned whether the architect really ought to be the initial arbiter of disputes, given the rise in claims on projects in recent years and allegations involving design professionals relating to errors and omissions as well as delays in requests for information and shop drawings. Owners don't want their architects making decisions against them; contractors feel that architects cannot act impartially when they are being paid by the owner and when they are rendering decisions that could affect their own liability; and architects are uncomfortable about being caught in the middle.

The revised AIA documents give you choices to pick from for dispute resolution on projects.

The new AIA documents introduce the concept of an outside, third-party initial decision maker (IDM), at the option of the parties. The architect is still the default option and will serve as IDM unless otherwise indicated in the agreement. The IDM will not resolve claims "relating to aesthetic effect," which will remain within the architect's authority. The new AIA documents do not specify who the IDM will be, or how it will be compensated. The parties will have to create those separate agreements.

The second major change involves arbitration of disputes, which has been in the AIA forms since 1888. Many attorneys representing owners and contractors have routinely stricken mandatory arbitration from the forms and many parties feel that they should have the freedom to choose their dispute-resolution forum. Arbitration will be an option, not a requirement, and parties will have boxes to check to choose the dispute-resolution forum.


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Importantly, if no selection is made, the default dispute-resolution forum is "litigation in a court of competent jurisdiction." Parties desiring arbitration will have to affirmatively select that option.

There is a logic to this change in that the determination that disputes should be resolved by binding arbitration is a matter of contractual agreement and parties should not just "fall into arbitration" but should affirmatively determine that arbitration is the process they wish to use. But failing to check a box could send parties unknowingly down the road to costly court proceedings.

The new AIA documents keep

mediation requirements in place, and this makes sense given the success of mediation in the resolution of disputes. The documents also make consolidation and joinder of other parties, such as subcontractors and design professionals, easier should the owner and contractor elect to use arbitration as their dispute-resolution forum.

While there may be differing opinions regarding the changes to these documents, the good news is that an effort has been made to update the documents to reflect some best practices in how the industry resolves disputes. But it is important that parties pay close attention to the changes in order to ensure you are getting what you want.

The revisions provide an opportunity for you to make the process of choosing a third-party neutral and dispute-resolution mechanism more deliberate, efficient and effective. ■

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