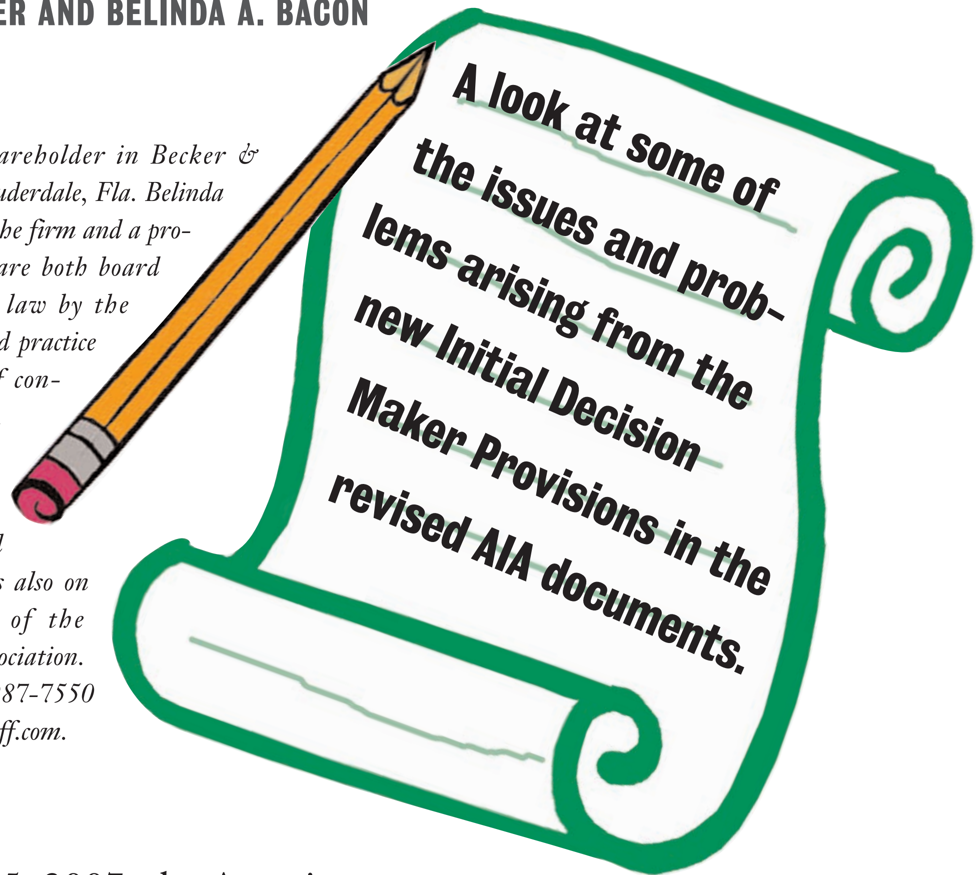
FOR BETTER OR WORSE:

The AIA Introduces the Initial Decision Maker in its Dispute Resolution Provisions

BY STEVEN B. LESSER AND BELINDA A. BACON



Steven B. Lesser is a shareholder in Becker & Poliakoff, P.A., in Fort Lauderdale, Fla. Belinda A. Bacon is an associate at the firm and a professional engineer. They are both board certified in construction law by the Florida Bar Association and practice exclusively in the field of construction law and litigation.

Mr. Lesser serves as special construction litigation counsel to the School Board of Broward County. He is also on the construction panel of the American Arbitration Association. He can be reached at 954-987-7550 or at slesser@becker-poliakoff.com.

On Nov. 5, 2007, the American Institute of Architects (AIA) issued its 2007 version of Standard Form A201, which contains the AIA's General Conditions of the Contract for Construction.[1] This article addresses one of the major changes that the AIA has made to the 2007 version of A201 and explains why it is fraught with controversy and confusion.

That change involves the introduction of the concept of an "initial decision maker" (IDM) who is supposed to make decisions concerning claims that the predecessor version of A201 reserved to the architect.[2] The IDM's decision is subject to later review in mediation, and then in arbitration or litigation if mediation does not resolve the dispute.

Drafters of the 2007 A201 document endorsed the IDM procedure based on feedback by general contractors,[3] who historically viewed the architect as biased because the owner selected and paid for the architect's design and contract administration services. Moreover, many contractors also believed that architects could not impartially decide disputes involving allegations that the design documents were somehow defective, or that the architect failed to timely respond to contractor requests during the project.

With so many questions arising from the introduction of an IDM into the dispute resolution process, A201 will likely foster disputes, making the prospect of future refinements a virtual certainty.

Uncertainty Regarding the IDM's Undertaking

The IDM procedure has the laudable goal of allowing the project to continue without disruption during a dispute, but there is nothing in the 2007 A201 document to explain the nature and scope of the IDM's undertaking. As a result, questions abound. For example,

- What standard of care applies to the IDM?[4]
- Is the IDM required to be a design professional, a general contractor, a lawyer, or a scientist?
- What guidelines exist to provide parties with comfort that the IDM procedure will be productive and unbiased and will not generate confusion?
- What if the parties agree on an IDM and that person becomes unavailable or a conflict of interest exists when a dispute arises?

Absent a thorough agreement to address these issues, the IDM process may fail.

A fundamental issue of concern to the IDM is one of liability because there is no provision in the new A201 document protecting the IDM from liability for decisions made in good faith. The IDM may be reluctant to participate without first acquiring liability protection for its decisions. After all, previous incarnations of the A201 document have always applied this safe harbor to the architect.[5]

Curiously, the B101-2007 Standard Form of Agreement Between Owner and Architect for the first time calls for the architect to obtain insurance,[6] but there is no similar requirement imposed on the IDM.

From the perspective of owners and general contractors, the use of an IDM introduces a new expense. But the A201 document fails to specify the party responsible for paying for the IDM's services. However, when the IDM requires assistance from the architect to make an initial decision, the architect's agreement provides that the owner must pay for the architect time as an "additional service."[7] Yet this seems silly for two reasons. First, it defeats the objective in creating the IDM, which was to remove any financial bias on the part of the party making the initial decision. Second, unlike the 1997 A201 document, where the initial decision-making authority rested solely in the architect, the process called for in the new A201 document conceivably could require the owner to pay two parties to decide a dispute.

Better Coordination Needed

The 2007 A201 document contains a new Article 15, which incorporates most of the claim procedures previously found in Article 4 of the 1997 version. This new article contains the bulk of the IDM provisions and it also says that it remains the architect's responsibility to "interpret and decide matters concerning performance under, and requirements of the Contract Documents…"[8] In addition, it says the architect should prepare change orders and certificates of payment "in accordance with decisions of the Initial Decision Maker."[9]

Under these provisions, it appears that, if an owner seeks damages from a contractor that allegedly breached the contract, or seeks an extension of time due to vague plan details, the architect would interpret what the contract requires, while the IDM would decide how much damages, if any, are owed. If the owner desires to terminate the contractor, then the IDM would decide whether the breach justifies termination.[10]

The problem is, however, that the 2007 A201

document provides no guidance for the IDM on what, if any, deference must be given to decisions made by the architect. Since interpretation of the contract documents is expressly reserved to the architect, how should the IDM arrive at a decision on a claim without considering the architect's interpretation? Will the architect's interpretation bind the IDM unless it seems clearly erroneous or fails to meet some other similar standard?[11]

To illustrate, suppose the architect fails to certify a payment because the contractor failed to install an expansion joint feature that caused the pool deck to leak. Suppose the contractor asserts a claim against the owner and the IDM decides that the leak resulted from the architect's error in failing to properly detail the expansion joint. In this example, the architect and IDM reach inconsistent opinions and there is no mechanism in A201 to resolve the conflict.

More Opportunity for Confusion

Significantly, the IDM's authority is limited to claims that arise prior to the date of final payment.[12] Following final payment, the parties are not obligated to follow the IDM procedure before proceeding to mediation, arbitration, or litigation. But some of the specifics of the early claim process seem arbitrary and introduce the opportunity for confusion.

The new A201 document requires the IDM to issue an initial decision as a condition precedent to mediation.[13] But the document also allows the IDM to avoid rendering a decision. This is because Article 15 provides that prior to rendering its initial written decision, the IDM has 10 days to do one of the following:

(1) request materials from the claimant or a response with supporting data from the other party,

(2) reject the claim in whole or in part,

(3) approve the claim in whole or in part,

(4) suggest a compromise, or

(5) advise the parties that the IDM lacks sufficient information to evaluate the merits of the claim or that the IDM concludes, in his or her sole discretion, that it would be inappropriate to resolve the claim.[14] Allowing the IDM to escape rendering an initial decision would negate the object and purpose of appointing an IDM. It also seems to give the IDM an arbitrary out.

Then there is the question of what recourse the parties have if the IDM decides not to resolve the claim. May they proceed to mediation after the IDM notifies them of this? Has the condition precedent been satisfied by the decision to "punt?" What if the owner refuses to pay the architect or other professional for expertise needed by the IDM to make an initial decision? This could provide the owner with an opportunity to thwart a decision of the IDM.

To protect themselves from these gaps in the new A201 document, at a minimum, the parties should consider specifying the grounds to justify the IDM's decision not to resolve the claim, such as a conflict of interest. Section 15.2.2(2) provides the IDM with authority to "reject the claim in whole or in part."[15] Likewise, similar authority in § 15.2.2 (3) should be provided for the IDM to proactively approve the claim "in whole or in part" with that decision then being subject to mediation.[16]

Another significant change in the new A201 document is that it no longer allows the architect to force the owner and contractor to promptly demand mediation or waive that right.[17] Nor does it allow the IDM to do that. Instead, it provides that within 30 days from an initial decision, either party may file a written request for mediation with the other and that mediation will take place within 60 days from the date of the initial decision.[18] Article 15 is silent as to the consequences if neither party makes a demand for mediation within 30 days of the date of the initial decision. Only if one party requests mediation and the other fails to file for mediation will the failing party be deemed to have waived its right to mediate, leaving both parties to pursue binding dispute resolution proceedings.[19]

Conclusion

With so many questions arising from the introduction of an IDM into the dispute resolution process, the new A201 will likely foster disputes, making the prospect of future refinements a virtual certainty. In the meantime, parties electing to use the new documents would be well-advised to supplement Article 15 with a detailed IDM rider that better defines the IDM's role, including qualifications, payment provisions, and the scope of the IDM's services. That rider should also address and clarify the other potential issues raised in this article. ■

ENDNOTES

[1] All references to AIA A201 in this article refer to the AIA Document A201™-2007, published by the American Institute of Architects.

[2] § 14.2.2, A201 2007. The IDM is also referenced in § 1.1.8, which defines the IDM as the person identified in the contract to do two things. The first function of the IDM is to render initial decisions on claims. Section 15.2 discusses the types of claims that "shall" be referred to the IDM. In general, an initial decision is "a condition precedent to mediation of any claim arising prior to the date final payment is due."

Section 15.2.3 allows but does not require the IDM to consult with experts paid for by the owner, or to seek information from either party before rendering an initial decision.

Section 15.2.5 addresses the form of the initial decision and related matters. For example, it states that the initial decision is final and binding on the parties. Significantly, it makes that decision subject to mediation or binding dispute resolution if the parties fail to resolve their dispute through mediation.

The second function of the IDM is to "certify termination" of the contract. Section 14.2 sets forth the conditions that allow the owner to terminate the contract. When any conditions for contract termination exist, the IDM is supposed to certify that sufficient cause exists to justify termination. Only then may the owner give notice of termination to the contractor and the surety.

[3] Industry comments were solicited from more than a dozen owner, engineer, attorney and contractor groups. See Suzanne Harness, 2007 Revisions to AIA Contract Documents (2007) (unpublished comment, on file with the American Bar Association Forum on the Construction Industry).

[4] The AIA's new B101-2007 Standard Form of Agreement between Owner and Architect includes, for the first time, a standard of care provision in § 2.2.

An interesting question is whether the IDM would qualify as a "professional" based upon the criteria established by *Moransais v. Heathman*, 745 So. 2d 973 (Fla 1999). In that setting, the IDM could be individually liable for a failure to perform with due care and liability would not be barred by the economic loss doctrine. See also, *Indemnity Ins. Co. v. American Aviation Inc.*, 891 So. 2d 532 (Fla 2004).

[5] § 4.2.12 A201 2007.

[6] § 2.5 B101 2007. The parties should be mindful that an IDM who is not a professional (for example, not an attorney, accountant, architect or engineer) will be unable to obtain professional liability insurance. Nevertheless, general liability and workers compensation insurance could be acquired.

[7] § 15.2.3 A201 2007, § 4.3.1.11 B101 2007. B101 says that providing assistance to an IDM who is not the architect "will be an Additional Service to be paid by the Owner."

[8] This provision was previously located at § 4.3.1 of A201 1997 and is now found at § 15.1.1 A201 2007.

[9] § 15.1.3 A201 2007.

[10] § 14.2.2 A201 2007.

[11] The "clearly erroneous" standard was adopted in *Edward J. Seibert, A.I.A., Architect & Planner, P.A. v. Bayport Beach & Tennis Club Ass'n, Inc.*, 573 So. 2d 889 (Fla. 2d Dist. Ct. App. 1990).

[12] § 14.2.2 A201 2007.

[13] § 15.2.1 A201 2007. The condition is waived if 30 days pass after referral of a dispute to the IDM without a decision being rendered. *Id.*

[14] § 15.2.2 A201 2007. This provision also allows the IDM to rely on the expertise of others for assistance at the owner's expense. See § 4.2.1.11 B101 2007.

[15] § 15.2.2(2) A201 2007.

[16] § 15.2.2(3) A201 2007.

[17] § 15.2.1 A201 2007.

[18] § 15.2.6.1 A201 2007.

[19] *Id.*

Reprinted with permission from the *Dispute Resolution Journal*, vol. 63, no. 1 (Feb.-April 2008), a publication of the American Arbitration Association, 1633 Broadway, New York, NY 10019-6708, 212.716.5800, www.adr.org.