

Dispute Resolution Principles for Architects

Construction projects are a breeding ground for disputes, which arise with project variables such as large sums of money changing hands, low profit margins, and risks for all parties over which they have no control. In light of these disputes, the purpose of this article is to introduce resolution principles to architects for responding to claims submitted to the architect under Paragraph 4.4 of American Institute of Architects (AIA) A 201-1997, *General Conditions of the Contract for Construction*.

It is a simple and unfortunate fact most of us have not been taught how to resolve disputes. We are not taught how to empathize with those with whom we disagree, how to apologize and take responsibility, how to remain open-minded while being criticized, how to negotiate to allow everyone's satisfaction, and how to cooperate to resolve minor disputes.¹

For claims arising before final payment is due, Subparagraph 4.4.1 mandates the architect's decision on the claim as a condition precedent to mediation, arbitration, or litigation. A claim is defined in Subparagraph 4.3.1 as "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 Contract," as well as all other disputes between the owner and contractor.

The architect's role in deciding claims under AIA A 201 is unique. No other construction industry contract, including those of the Associated General Contractors (AGC) and the Design-Build Institute of America (DBIA), contemplate the architect's decision as the first step in dispute resolution. The architect's role is also unique because of the multiple, concurrent roles. The architect may function as a mediator, investigator, and fact-finder. Moreover, architects must balance their own interests in the project with their fiduciary relationship with the owner and their professional relationship with the contractor.

Progression of a claim

Pursuant to Subparagraph 4.3.2, claims begin by written notice to the architect and the other party within 21 days of the "occurrence of the event giving rise to such Claim" or 21 days after the claim is recognized, whichever is later. The party bringing the claim has the burden to substantiate it. Subparagraphs 4.3.4 through 4.3.9 specifically contemplate claims for:

- concealed or unknown conditions;
- additional cost or time;
- injury or damage to person or property;
- unit prices; and
- the architect's errors and omissions.

(Claims related to hazardous materials are expressly excluded from the architect's decision.)

The architect must review the claim within 10 days of receipt, after which one of five actions outlined in Subparagraph 4.4.2 must be taken:

1. Take no action due to insufficient information or it being an inappropriate claim for the architect to resolve.
2. Reject the claim in whole or in part.
3. Approve the claim.
4. Request additional information.
5. Suggest a compromise.

The first option presents an appealing escape for the architect. Taking no action will probably avoid greatly upsetting either party. Unfortunately, this is a missed opportunity to end the dispute. The chances the claim will proceed to mediation, arbitration, or litigation without the architect's input are significantly enhanced. Nevertheless, if the dispute is simply unsuited for the architect's decision, it is better he or she take no action and avoid putting the parties in a worse position than they were before a decision.

The second and third options are win/lose outcomes because either the owner or the contractor will be dissatisfied with the architect's decision. Alternatively, if part of the claim is approved and part of it is rejected, the outcome may be lose/lose, with owner and contractor dissatisfied. The fourth and fifth options are the focus of this discussion because they are compatible with proven dispute resolution principles.

Requesting additional information

Requesting additional information from either party is one way the architect can get to the truth of the dispute and seek common ground. As Kenneth Cloke discusses in *Resolving Personal and Organizational Conflict: Stories of Transformation and Forgiveness*, parties in conflict tell 'conflict stories,' which make resolution of disputes more difficult. Conflict stories are not told to resolve conflict; their purpose is for the speaker to save face in light of the dispute. The stories also conceal face-threatening facts, feelings, and identity issues, including actual responsibility and the speaker's contribution to the dispute.

Instead of being factually accurate, these stories are actually caricatures of reality, with the speaker portrayed as victim or hero, and the other party as in the wrong or the cause of the dispute. Conflict stories focus on the past and blame, rather than focusing on the present and problem-solving. This is best shown through finger-pointing and the 'not-my-problem' syndrome plaguing many construction projects. To combat this common situation, the architect can encourage the parties to think beyond the current project and consider how the dispute affects their long-term relationships with the other participants in the project. The dispute is a direct reflection on the parties and can adversely affect their status and reputation in the eyes of colleagues.

In seeking additional information, the architect must shift assumptions from certainty to curiosity to learn the stories of the parties and the essential elements of those stories. Essential elements include the facts of the dispute on which the parties agree and the parties' interests, which must be substantially satisfied for an acceptable resolution. In essence, the architect creates a 'third' story that synthesizes the two conflict stories and creates a truer, fairer, and more detailed version, including the essential elements of both

parties, without victimization or emotion. This third story aids the architect in understanding the true dispute and moving toward the fifth option, suggesting a compromise.

Suggesting a compromise

By suggesting a compromise to a claim, the architect allows the parties to make the final decision and remain in control. A compromise is a win/win solution because it does not impose a decision on the parties; instead, the parties take ownership of the resolution. To reach a compromise, the architect should consider the Seven Building Blocks of Negotiation developed by the Harvard Negotiation Project.²

While the architect's suggestion is not a negotiation, these 'building blocks' affect how the parties receive a suggested compromise. If the suggestion considers the following components, the parties are much more likely to reach acceptance.

Relationship

The parties must deal with each other now and possibly in the future.

Communication

The parties must talk to each other while seeking resolution.

Interests

These are the parties' concerns, objectives, needs, desires, or fears that must be included and satisfied if an agreement will be reached. For example, one party's interest may be money, while the other's is keeping on schedule.

Options

These are the various ways the parties can reach an agreement. For example, the parties can select a different product or change the application of a product. Although the options are varied, each will resolve the dispute.

Legitimacy

These are objective standards and fair procedures used to evaluate and support the options. For example, the legitimacy for a substitute product could be cost and performance data that could be compared to the original product.

Alternatives

These are what the parties can do without an agreement. Under AIA A 201, if no agreement is reached, the alternatives include mediation, arbitration, and litigation.

Commitment

The parties must be able to assent to the agreement, which includes satisfaction of any pre-conditions.

Finality

Regardless of how the architect decides a claim, he or she should issue a written decision with supporting reasoning. An explanation of the decision is essential to making the parties feel their positions have been acknowledged and considered. As simple as it sounds, sometimes parties just want to be heard and understood. When this finally happens, they stop telling the same conflict stories.

It can also be wise to avoid placing responsibility for the dispute in the written decision. Resolution is not always about casting blame. Instead, if the parties feel their positions have been heard, the architect can help them move beyond the dispute by concentrating on the resolution or decision and its implementation or effect on the project. This shifts the focus from the past to shared goals and interests.

Conclusion

Most disputes arise from a lack of communication and not knowing how to react once the dispute emerges. If the architect knows how a dispute grows and is likely resolved, he or she can assist the parties in building a solution to resolve their differences and avoid protracted legal proceedings. The benefit of resolving disputes using the principles discussed here is simple—the parties to a dispute save time, money, and relationships.

The principles of dispute resolution discussed here are not limited to the AIA A 201; these same tenets can successfully resolve other construction disputes and should be considered before disputes grow beyond the parties' control.

Notes

¹ See Kenneth Cloke and Joan Goldsmith's *Resolving Personal and Organizational Conflict: Stories of Transformation and Forgiveness* (Jossey-Bass, 2000).

² See Roger Fisher and Danny Ertel's *Getting Ready to Negotiate* (Penguin, 1995).

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