

Contractor's Duty to Discover Errors Under AIA A201 General Conditions—How Much Risk Are You Really Taking?

By

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Relevant Provisions in AIA A201-1997

3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

3.2.1 Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as to the information furnished by the Owner pursuant to Subparagraph 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, any errors, inconsistencies or omissions discovered by the Contractor shall be reported promptly to the Architect as a request for information in such form as the Architect may require.

3.2.2 Any design errors or omissions by the Contractor- during this review shall be reported promptly to the Architect but it is recognized that the *Contractor's review* is made in *the Contractor's* capacity as a Contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents. The Contractor is not required to ascertain that the Contract Documents are in accordance *with* applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported promptly to the Architect.

3.2.3 If the Contractor believes that additional cost or time is involved because of clarifications or instructions issued by the Architect in response to the Contractor's notices or requests for information pursuant to Subparagraphs 3.2.1 and 3.2.2, the Contractor shall make Claims ... If the Contractor fails to perform the obligations of Subparagraphs 3.2.1 and 3.2.2, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. The Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents unless the Contractor recognized such error, inconsistency, omission or difference and knowingly failed to report it to the Architect.

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What obligations does a contractor have to discover errors or inconsistencies in the plans and specifications? Upon discovery of an error, what should a contractor do?

Paragraph 3.2 of the AIA A201-1997 General Conditions, entitled "Review of Contract Documents and Field Conditions by Contractor," attempts to answer these questions. Specifically, subparagraph 3.2.1 sets forth the following steps a Contractor shall take "before starting each portion of the Work":

- "carefully study and compare" the drawings, other contract documents and any owner-furnished surveys.
- "take field measurements of any existing conditions."
- "observe any conditions at the site" affecting the Work.

The purpose of this review, according to the AIA general conditions, is to facilitate construction rather than to discover errors, omissions or inconsistencies in the Contract Documents. But if any errors, inconsistencies or omissions are discovered during this three-step process, the contractor must report them "promptly" to the Architect.

A Safe Harbor

What this paragraph seeks to accomplish is to provide a "safe harbor" for contractors. If a contractor follows the guidelines in subparagraph 3.2.1 for each portion of the work and reports any discovered errors, then the contractor is free to construct the project in accordance with the contract documents. In other words, the owner retains the primary responsibility for design and the contractor's only obligation is to report problems the contractor actually recognized.

But what happens if a contractor fails to complete each of these steps before starting a portion of the work? For example, what if a contractor does not take field measurements of existing conditions and such measurements would have disclosed an error? Subparagraph 3.2.3 answers this question—if a contractor fails to perform its obligations under subparagraph 3.2.1, the contractor is liable for "such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations." This is the easy case. If the owner shows the contractor did not follow the steps, then the contractor bears the loss.

Potential Disputes Still Lurking

Even if a contractor can prove it performed the three steps, however, an owner will still be able to challenge whether the contractor's study and comparison was "carefully performed;" whether the contractor took the proper field measurements under the circumstances; and whether the contractor's site observation was thoroughly conducted. Thus, while the provision seeks to establish a bright line test—whether the contractor had actual knowledge of the error—the door is still open for parties to dispute the thoroughness of the contractor's investigation.

On a related issue, there also may be disputes over what the contractor actually knew; when the contractor actually made its discovery; and whether the contractor provided "prompt" notice.

To address these issues, one commentator has suggested that "contractors may find it expedient to affirmatively report to the Owner that it has completed its review [under subparagraph 3.2.1] and has only a specific list of field conditions, code violations, or the like to mention." Sink and Petersen, *THE A201 DESKB00K* (1998). By following this advice, the contractor may thwart later owner challenges.

Owners Often Seek to Expand contractor's Obligations

Many owners tinker with the language in paragraph 3.1 to expand the contractor's responsibilities for discovering errors and omissions. The most common owner-requested change is to insert words such as "or that should have been discovered" in the last sentence of both paragraphs 3.2.1 and 3.2.3.

This *minor* insertion *drastically* alters the contractor's obligations. With this language, the standard to evaluate the contractor's duty to discover errors changes from a subjective one (what did the contractor actually know) to an objective one (would an experienced, reasonably prudent contractor have discovered the mistake). Since contractors obviously do not want to assume this added burden, attempts to expand the language should be vigorously resisted.

The Bottom Line

Despite the open issues, paragraph 3.1 is generally a good provision for both contractors and owners. It is clear that a contractor must report errors it finds, but if a contractor follows the steps in paragraph 3.2.1 and promptly reports any problems, then later disputes over what a contractor knew or should have known may be avoided.

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