Edifice Flex:
A/E Liability For Cost Estimating

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Whenever we buy a new car or computer, we start with an advertisement of a base price that bears no relationship to what we end up paying or even what would be reasonable to expect. For the car, the base price may not include anything more than the sheet metal (tax, title, options and documentation fees extra). For the computer, the stores advertise for a base box, no monitor, less memory than anyone can use and then tell you that the price is "after savings," defined to be a series of rebates, eligibility for which depends on your purchase of internet service that you don't want or need. You end up paying three times the advertised price and are convinced that you nevertheless got a good deal because, intuitively, you knew that the price was too good to be true. You also have more car or more computer than was advertised, so you feel that you paid fairly for the upgrades, or that you refused to overpay for the extended warranty, the floor mats or the in-dash DVD/entertainment system. Satisfaction with the price derives from your expectations and your own ability to rationalize.

The psychology of construction cost estimating is not terribly different, but depends greatly on economic factors outside the control of the players. A/e's want to please their clients and build in their own incentive to keep budget estimates low. Client expectations can be managed and a client can be educated to understand that design professionals cannot control the world economy or be clairvoyant. Luck helps, but your choice of contract language and the level of effort expended on client education before pencil gets to paper (or mouse to mousepad) are extremely important. If you promise to design within a budget or your conduct implied that you would do so, you may find yourself unable to collect your fee and still be responsible for some of the cost overrun.

A young couple comes to an architect to design their dream house on inherited land. They tell the architect that they have only $250,000 to spend on the house, but spend the next eleven meetings insisting on substantial quality upgrades in the proposed design. They signed only a letter agreement containing an hourly fee provision. They pay their exhausted architect $10,000 and take the completed plans to obtain bids from three contractors. Each of the three bids exceeded $250,000, but the lowest was only $270,000. They abandon their plans for a dream house and sue the architect to recover the fees they paid. The architect counterclaims for additional design fees, defeats the clients' fee claim and loses on his additional fee claim. He essentially won, but fully expended the $10,000 deductible on his professional liability insurance policy. His insurer incurred defense expenses that might result in increased premium at renewal time.

A public library bases its $20 Million bond referendum on estimates provided by its architect, with input from an independent cost consultant. The $20 Million was intended to cover construction cost, design fees and owner-supplied furniture and fixtures. Bonds are issued and bidding proceeds. The successful bidder comes in at $18.2 Million with a 5% contingency, leaving very little room for error without risking the furniture budget. During construction, the excavator finds human remains that turn out to come from an old, unmarked cemetery. The project is delayed six months and substantial additional costs are incurred by the contractors. In the interim, code revisions take effect requiring additional sprinkler heads throughout the building and half of the board of directors loses an election. The architect invoices the newly constituted board for additional services. In response, the library threatens to sue.

Edifice Lex

The legal theory behind cost estimating liability depends on the a/e's assumption of some duty to design to a budget. Assumption of that duty can come from contract or conduct. A good contract with bad conduct, or a bad contract with good conduct, can each haunt the a/e in different ways. If you promise or imply that your design will result in a building costing no more than the budget, your client may be entitled to rely on that promise. If the client gives you a budget, he or she may assume that you will design to it.

The first question a lawyer asks is "what does your contract say?" The most difficult cases involve incomplete agreements or agreements that were silent on budget issues. A court or jury then must look to conduct and listen to paid experts to decide who should bear the risk of blowing the budget.

Defining the Cost of the Work. The 1987 edition of the American Institute of Architects' B141 made clear that there would not be a "fixed limit of construction cost" unless otherwise agreed in writing (AIA B141 - 1987 Ed., 5.2.2). The AIA's 1997 revisions added responsibilities for budget evaluation, including preparation of and periodic updating of a preliminary estimate. Those updates are to include changes in the work and "general market conditions." (AIA B141 - 1997 Ed. 2.1.7.1). Article 2.1.7 of the current AIA B141 documents states clearly that the cost of the work is at current market rates, and that "a reasonable allowance for contingencies shall be included for market conditions at the time of bidding and for changes in the Work." (AIA B141 - 1997 Ed., 1.3.1.2). The paragraph continues, however, that the estimates constitute a judgment, but that the architect does not guarantee that bids will not be higher. (AIA B141, 1997 Ed., 2.1.7.2).

The balance of Article 2.1.7 also calls for the owner to cooperate with scope, quality or budget adjustments. If the bids come back high, the owner is given only four choices: (i) increase the budget; (ii) rebid; (iii) terminate; or (iv) cooperate and revise the scope or quality of the project. If the Owner chooses the fourth option, the Architect's liability is limited to revisions without additional compensation.

A privately funded group home for handicapped adults retains an architect under an AIA B141 (1987 ed.) agreement. The home advises the architect that the construction budget will be $1.2 Million. The architect acknowledges the budget in a letter to the executive director of the home. The project goes out to bid during an extremely busy construction season, and several larger contractors decline to bid. The lowest

bid is $3 Million. The architect responds that there was no "fixed limit of construction cost" and that the home is out of luck. The architect offers to assist with a redesign and rebid, but the home refuses to proceed or to pay the architect. The architect sues for his fee and the home counterclaims for breaching the implied promise to design within budget. The architect loses the fee claim because of his letter acknowledging the budget, regardless of the contract language.

A municipal client hires an engineer to design public road improvements and prepare state forms for grant funds. The grant funds cover the majority of the construction cost. The engineering services agreement is a state form, incorporating many standard documents by reference, most of which have nothing to do with the project. There was no sense in trying to negotiate because the state agency charged with this work never negotiates. The engineer signs the contract. During construction, the municipality discovers that the engineer underestimated certain quantities, resulting in a large change order. The municipality holds the engineer's last payment to cover the change order. The municipality could have, but did not, supplement its grant application and could have covered the majority of the change order with grant funds. The engineer is forced to sue for its fee, arguing that the client should have sought additional grant funds and that the municipality is being unjustly enriched by a more valuable project. The municipal attorneys file a counterclaim and the engineer is stuck litigating with an important client.

Professional association agreements are good references, even if you intend to use something else. Owner-oriented forms and some new owner-association forms may ask to have the architect guarantee that the design will stay within budget. If you agree to such a thing, make certain that you are entitled to include contingencies for market conditions, that bidding will occur within some limited time and that owner-insisted scope or quality upgrades will result in budget and fee increases. Also be wary of non-standard modifications to standard form agreements. If there is to be a negotiated Guaranteed Maximum Price, will you be involved in those discussions? If the budget is "to be agreed upon" in the future, is your consent required? What if you do not or cannot agree? These issues should all be addressed in your early discussions with the client, and in your agreement.

Edifice Wrecks

If the law imposes a duty to design within budget, whether by contract or conduct, the failure to design within budget will constitute negligence or a breach of contract. That negligence or breach can give your client both defensive and offensive claims. If you breach a contract, your breach may be a defense to your suit for fees. Adding insult to injury, you may also be liable for damages caused by your breach or your negligence. When you call your insurance carrier, you will learn that regardless of your fee claim, you must still fund a deductible and may not recover your fees at all. Your forfeited fees are not insured and present a bit of a conflict for your insurance-appointed attorney. You actually end up with two attorneys, one paid by the insurance company and one that you pay directly. The worst and most expensive of all worlds.

The Edifice Flex Complex

The contract is your first and best opportunity to discuss your role in the budget process. If your client wants you to design to a budget, educate your client about what you do for a living. You are not an economist, but market conditions may change between schematic design and the issuance of bid documents. You are not a mind reader, but if the client has champagne taste, it will take a champagne budget to build the project.

Regardless of your contract terms, your goal should not be to win an eventual lawsuit. Educate your client on the front end, and deal with as many of these issues as possible in your contract. If you agree to a fixed budget, leave yourself some wiggle room and include contingencies for market changes. Define the budget to exclude conditions outside your control - bad soil, timing, market and labor conditions. Make sure that you are entitled to rely on information provided by your client. For unusual projects or scope, recommend that the client retain a cost consultant during the design phases.

If the client intends to proceed with budget-busting changes, let them know that this decision has budget consequences. Send a letter to make sure that you are communicating your concerns and drawing attention to them. The client may not have been focusing on your concerns during the meeting. The meeting minutes will help in a lawsuit, but won't help avoid the problem in the first place.

If you find yourself in a post-bid budget crisis, work with your clients to explain and understand the result. Was it a change in market conditions? Unforeseen site conditions? Look to your contract and make sure that you understand your own obligations and options. Whatever your initial conclusions, never assume that the result was either your fault or the result of your negligence. Before you offer to redraw the entire project for free, talk to your insurer and your lawyer. Your client's own actions or decisions may have resulted in a waiver of any budget limitations, and your client may just be suffering from the effects of an Edifice Flex Complex.

About the Author: Eric L. Singer is with Wildman, Harrold, Allen & Dixon, Lisle, Illinois. His practice concentrates in construction law and in the representation of design professionals in all aspects of construction claims and dispute resolution.
