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Keeping the Owner Advised of Cost Escalations

One source for conflict between the owner and architect involves cost estimates.

Picture this typical scenario: at the outset of the project, the owner and architect discuss the budget. The owner tells the architect that he would like the construction cost to come in at around \$1,300,000. The architect proceeds with programming and preliminary designs and prepares an initial cost estimate based on this design that shows a cost right around the budget. During the course of the design and construction documents phases, the owner and architect make a number of revisions to the design. Some are significant, but many more are relatively minor. When the project is ready to go out for bids, the architect prepares a new estimate that indicates a construction cost of \$1,900,000. During a discussion about this new number between the architect and owner, the owner is left with the impression that this is a conservative number and the actual bids should come in well below this number. When the lowest bid comes in right at the \$1.9 million estimate, the owner is angry about the increased cost and fires the architect. The architect then sues to get paid and the owner defends on the basis that the architect breached his contract by not designing the project within the owner's budget and failed to get the owner's approval for any increases.

Using AIA agreement forms will help, but will not necessarily prevent the type of problem described above. Particularly in an arbitration situation, the contract language designed to protect the architect may have very limited use, since some arbitrators may not follow these provisions of the contract very closely. Architects need to think about and address this situation during the course of the project. Let's start with the owner-architect agreement.

When you negotiate a contract with the owner it is important for both the owner and architect to understand the architect's obligations regarding the cost of construction. Some contracts, such as

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AIA document B141, Standard Form of Agreement Between Owner and Architect, call for the owner's budget to be set forth directly in the contract. The architect is contractually obligated to design within this budget, or to do a free redesign if the bids exceed the stated amount.

Other contracts, such as AIA document B151,¹ give two options. The parties may agree in writing to a "Fixed Limit of Construction Cost." If this is done, the architect is obligated to design to this budget. If there is no such writing, then the bids can come in over the budget and the architect will still be owed his fee. The various AIA documents all try to make clear that the architect cannot guarantee bids of any particular amount. If an oral contract or letter agreement is entered into, a court may find that the architect has guaranteed that the project, when bid, will come in no higher than the owner's budget. This is another good reason to avoid oral contracts and letter agreements.

Make sure the owner understands these concepts and what you can and cannot control. Many owners think that the architect should be able to estimate what bids will be like two years down the road, forgetting about unknown economic conditions, availability of materials, etc. This must be explained and confirmed in writing so there are no misunderstandings.

Even more important — keep the owner informed during the project, right up to bidding, about cost issues. When the owner wants to add a mezzanine, document this in a letter to the owner. If you can place an estimated price on this addition, all the better. If a change will have a significant cost impact, say so. Do it in writing to the owner! At the end of each phase — schematic design, design development, and construction documents, give the owner a written cost estimate, even if the contract does not require it. If you can, get the owner to acknowledge, in writing, receipt of this estimate. If there are a number of small changes, maybe a nicer quality of wood finish for example, document this on a periodic basis. Otherwise, the cost of these accumulated changes could make for an unpleasant surprise at bid time.

The key concept here is to keep the owner informed about the progress of the project while it is being designed. The owner may want marble, but can he afford it? Ask him directly. Put it in writing. As an exercise, every architect should be required to repeat the mantra "put it in writing" at least twenty times each day. Give the owner the information required for a reasoned decision. If the mar-

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ble adds \$10 per square foot, do the math and give it to the owner. Better to be high than low. One of the mistakes architects often make is to think that a high cost will scare the owner into abandoning the project. Even if true, this is much better than being sued by the owner because the bids came in over the budget and now the owner wants all his money back.

Note that B141 requires the architect to keep the owner informed:

2.1.7.1 . . . As the design process progresses through the end of the preparation of the Construction Documents, the Architect shall update and refine the preliminary estimate of the Cost of the Work. The Architect shall advise the Owner of any adjustments to previous estimates of the Cost of the Work indicated by changes in Project requirements or general market conditions. If at any time the Architect's estimate of the Cost of the Work exceeds the Owner's budget, the Architect shall make appropriate recommendations to the Owner to adjust the Project's size, quality or budget, and the Owner shall cooperate with the Architect in making such adjustments.

If you don't know how to estimate these costs, hire someone who does know. You could make an arrangement with a contractor to do some free estimates in return for being allowed to bid on the project. Owners rightfully expect architects to have some idea of the construction costs of what they design. No matter what contract form you use, this is not an unreasonable expectation. If you don't know what something will cost, how can you design to the Owner's budget?

The problem is normally not that the architect does not realize that the cost of the project is increasing, but rather that the owner has not been informed and does not understand this. Proper communication of this on an ongoing basis to the owner is essential to maintaining good relations and avoiding costly litigation.

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1. This is essentially the same document as the old 1987 version of AIA Document B141. If you liked that document, then consider using the B151.

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