

## COST ESTIMATES BY DESIGN PROFESSIONALS

For many years now we have experienced continuously rising costs in real estate improvements. The owners of real estate improvement projects are continuously coping with the need to reconsider the scope of projects as costs increase and in many instances have had to totally abandon project plans.

Design professionals are frequently requested to express opinions regarding probable construction costs. When it comes to contracting for the providing of professional design services, engineers and architects do not usually guaranty that proposals, bids or actual construction costs will not vary from their opinions of probable costs. However, such guarantees may be made when the owner demands it and the design professional agrees to provide such a guaranty. Even in those instances, the design professional will require the contract for professional services to contain specific provisions giving the design professional avenues of release from the obligation.

Article 5 of EJCDC E-500, the Standard Form of Agreement Between Owner and Engineer for Professional Services copyrighted by the National Society of Professional Engineers for EJCDC, expressly states that the engineer's opinion of probable construction costs does not guaranty the construction cost. That Article expressly provides for a construction cost limit that would be binding on the owner and engineer through the use of a separate exhibit known as Exhibit F and entitled "Construction Cost Limit."

Exhibit F to EJCDC E-500 reads as follows:

### Construction Cost Limit

Paragraph 5.02 of the Agreement is amended and supplemented to include the following agreement of the parties:

## F5.02 Designing to Construction Cost Limit

- A. Owner and Engineer hereby agree to a Construction Cost limit in the amount of Dollars (\$ \_\_\_\_\_).
- B. A bidding or negotiating contingency of \_\_\_\_ percent will be added to any Construction Cost limit established.
- C. The acceptance by Owner at any time during Basic Services of a revised opinion of probable Construction Cost in excess of the then established Construction Cost limit will constitute a corresponding increase in the Construction Cost limit.
- D. Engineer will be permitted to determine what types and quality of materials, equipment and component systems are to be included in the Drawings and Specifications. Engineer may make reasonable adjustments in the scope, extent, and character of the Project to the extent consistent with the Project requirements and sound engineering practices, to bring the Project within the Construction Cost limit.
- E. If the Bidding or Negotiating Phase has not commenced within three months after completion of the Final Design Phase, or if industry-wide prices are changed because of unusual or unanticipated events affecting the general level of prices or times of delivery in the construction industry, the established Construction Cost limit will not be binding on Engineer. In such cases, Owner shall consent to an adjustment in the Construction Cost limit commensurate with any applicable change in the general level of prices in the construction industry between the date of completion of the Final Design Phase and the date on which proposals or Bids are sought.
- F. If the lowest bona fide proposal or Bid exceeds the established Construction Cost limit, Owner shall (1) give written approval to increase such Construction Cost limit, or (2) authorize negotiating or rebidding the Project within a reasonable time, or (3) cooperate in revising the Project's scope, extent, or character to the extent consistent with the Project's requirements and with sound engineering practices. In the case of (3), Engineer shall modify the Contract Documents as necessary to bring the Construction Cost within the Construction Cost Limit. Owner shall pay Engineer's cost to provide such modification services, including the costs of the services of Engineer's Consultants, all overhead expenses reasonably related thereto, and Reimbursable Expenses, but without profit to Engineer on account of such services. The providing of such services will be the limit of Engineer's responsibility in this regard and, having done so, Engineer shall be entitled to payment for services and expenses in accordance with this Agreement and will not otherwise be liable for damages attributable to the lowest bona fide proposal or Bid exceeding the established Construction Cost limit.

AIA Document B141-1997 contains similar provisions to those appearing in EJCDC E-500. Under Article 2.1.7.2 of AIA Document B141-1997, a provision states...“the architect cannot and does not warrant or represent that bids or negotiated prices will not vary from the owner’s budget for the project or from any estimate of the cost of work or evaluation prepared or agreed to by the architect.” Although the architect gives the owner estimates of the cost of the work through the end of the preparation of the construction documents, updating and refining the estimates of the cost of the work, when such opinions indicate that the estimates exceed the owner’s budget, the architect is required to make appropriate recommendations to the owner to adjust the project’s size, quality or budget.

Owners continue to rely heavily upon the opinions of design professionals regarding probable project costs, but if owners wish greater assurances than simply the best opinion of the professional designer, the owner should employ an independent cost estimator who is independently contractually obligated to the owner and whose work efforts should be communicated to the professional designer.

There should be no reluctance on the part of design professionals to discuss probable construction costs with the owner before, during and upon the completion of a project, but the time for the design professional to clarify the legal significance of such opinions is in the written contract between the owner and the design professional. Care should be taken by the design professional not to expand the obligations regarding opinions of cost as the project proceeds.