



Ask and You Might Receive: Additional Services Fees

By Joseph W. Cooch, Esq., Lee/Shoemaker PLLC

Architects are often shy about requesting payment for design services outside the scope of their basic services fees. In the contentious construction industry – especially once a project has moved into the construction administration and contractor change orders start to mount – architects typically want to be the problem solver, not the problem. Rather than compound the tension over an issue (which is not the fault of the architect), the architect either declines or defers issuance of a meritorious request for additional services.

Before quietly ignoring entitlement to additional fees, the prudent architect considers the potential consequences of not requesting additional compensation. Most obvious is the fact that providing complimentary services which are not carried in your fee strains resources in the short term and profitability in the long term. Less obvious is the fact that it may impede the ability to achieve resolution of an issue – or worse, potentially create exposure for the architect. What many architects do not recognize is that failing to ask for additional services is “good deed” that rarely goes unpunished.

Ask Early

As a general principal, it is best practice to get written approval of payment from the owner before putting time into Additional Services work, unless your contract provides otherwise. While the law may support entitlement to additional services without written authorization in some circumstances, particularly where the contract is silent on how the contract may be modified, some owners (or, more particularly, owners’ lawyers) look to lack of notice as an opportunity to “justify” non-payment for extra services.

AIA Document B101 Owner-Architect Agreement is specific, providing that “[u]pon recognizing the need to perform the following Additional Services, the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need” and that, for certain types of additional services, “[t]he Architect **shall not proceed** to provide the following Additional Services until the Architect receives the Owner’s written authorization...” AIA B101 §4.2.1. This language is a double-edged sword: it justifies an architect’s refusal to perform additional services without written approval from the owner, but it provides a potential defense to the owner if the architect fails to obtain such approval before proceeding with the extra work.

A “project first” attitude often means that the architect jumps on a problem and starts working toward a solution rather than drafting a request for additional services and waiting for written authorization. This puts the architect in a challenging negotiating position, having already sunk time into the additional services before it asks for payment. If the work product is completed and “out the door,” the architect may have waived its entitlement to payment. If the owner is unreasonable and inequitable, the architect may find it difficult to obtain payment for additional services performed before obtaining written authorization from the owner.

Ask Often

The prudent architect should ask for Additional Services fees whenever they are entitled to them. Many wish to avoid getting the project “off on the wrong foot” or spoil the client relationship and ignore fee entitlement, especially early in the project. Before putting the relationship ahead of the architect’s bottom line, it should consider that each waived fee entitlement builds the expectation on the part of the owner that project challenges



will not cause additional design fees. This encourages undisciplined project management by the owner and the contractor.

Requesting additional services can be accomplished without spoiling the relationship. Straightforward letters with fee proposals should be accepted as professional. The negative impact of such letters can be blunted with reference to the contract – “per section 4.2.1 of the contract, we are required to provide this notice before proceeding...” or language to that effect demonstrates that you are *required* to make the request (often because of a contract provision that the owner required for its own protection).

Ask Even (Especially) When the Project is Challenging

Perhaps the most difficult circumstance arises when a contractor is performing poorly or accusing the design team of errors and omissions. The list of circumstances giving rise to additional services outlined in Sections 4.2.1 and 4.2.2 of the B101 amounts to a check-list of potential owner and contractor failures to meet contractual obligations:

- Owner changes to basis of design and delay in decision making;
- Contractor “rubber stamping” shop drawing review to pass more work to the design team; and
- “[R]esponding to Contractor’s requests for information that are not prepared in accordance with the Contract Documents or where such information is available to the Contractor from a careful study ...” of project records.

Failing to raise entitlement to Additional Services fees when the challenges arise not only strains your finances, some lawyers (who do not appreciate the project-first mindset of most architects) attempt to twist the failure to request an Additional Service into an “admission” that the architect *were never entitled to those fees*. In the context of errors and omissions claims, an architect’s attempt to avoid aggravating the Owner during difficult times could be unfairly “spun” by a creative lawyer as an “admission” that the architect believed it committed error.

Instead of remaining silent on an Additional Service request, identifying your entitlement to additional compensation provides an opportunity to remind the owner of the scope of work they hired you to perform, the requirements of the Contract Documents they hired the contractor to execute, and/or the contingency they are carrying on the project. A professional and logical outline of entitlement-related issues enables the owner to recognize the reasonableness of the architect’s request for Additional Services.

In short, an Additional Services request is not just a fee request; it “papers the file” with the architect’s contemporaneous position related to a challenging situation. In the claims context, this request can be worth far more than the amount of fee requested.

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