

Are You on the Hook for a Busted Budget?

Labor and material shortages make “design to budget” a risk.

BY JOSEPH A. BARRA AND NIEL P. FRANZESE



JOSEPH A. BARRA



NIEL P. FRANZESE

Prior to COVID-19, the term “design to budget” was probably not a scary concept. After all, modern designers always consider the client’s budget when putting our Leroy pens to paper. However, given skyrocketing material costs and the postpandemic challenges of the current labor market, the obligation to design to budget can be an unsuspected and sometimes overlooked source of exposure. In this article, we’ll look at some of the provisions in the standard industry contracts and consider how they can affect designers’ exposure for construction cost overruns.

Inasmuch as engineers often find themselves as subconsultants to architects, the AIA B101 form of Agreement between Owner and Architect provides a good practical starting point for assessing this issue. This form imposes upon the design professional an obligation to prepare a preliminary evaluation of the owner’s program and budget along with other basic project information, “each in terms of the other.” This obligation impliedly requires that the designer appreciate the ingredients that are baked into the owner’s budget as well as a fundamental understanding of how it was prepared, along with probable construction costs.

The engineer’s obligation to consider the owner’s budget follows the project’s evolution as the B101 requires that the designer account for such financial limitations and recommend adjustments to the design to keep the project on financial track. Engineers working under the B101 umbrella are specifically required to prepare estimates of the cost of the work to confirm that designs are constructible within the budget. When the estimated cost of construction exceeds the owner’s budget, the form requires the designer to make appropriate recommendations regarding an adjustment to the proj-

ect’s size, quality, or scope as a part of its cost-estimating activities.

To protect the designer from claims by an owner for breach of warranty as a result of eventual cost overruns, the B101 affirms that the designer has no control over construction costs and does not warrant that bids or negotiated prices will ultimately line up with the owner’s budget or the designer’s estimates. Thus, in circumstances where the cost to construct the engineer’s design ultimately exceeds the owner’s budget, the owner’s remedy is typically limited to requiring the designer to redraw—at its own cost.

The EJCDC’s E-500 templates from 2008 and 2020 treat these concepts similarly. The 2020 edition of the E-500 emphasizes that any opinions of probable construction cost are made “on the basis of Engineer’s experience, qualifications, and general familiarity with the construction industry,” but that they are not guarantees. Similar to the AIA’s B101, the form disclaims control over construction costs or market conditions.

Notably however, the 2008 version of the E-500 treats the engineer’s obligation to design to budget as an optional service, which, if chosen, is described in a separate exhibit. This earlier edition of the E-500 is likewise more protective of the design professional than the AIA’s B101 in that it

empowers the engineer to determine what materials and systems should be included in the project and make reasonable adjustments. Conversely, the B101 merely allows the designer to make recommendations to save costs.

It is worth noting that in the more modern templates for both the AIA and the EJCDC, the value engineering function to design to budget is incorporated as a basic service, rather than an additional or supplemental one. Therefore, managing the potential risk of multiple redesigns and having clear discussions about the designer’s compensation for those activities is essential, as the costs to “make it work” within the designer’s scope of basic services can undoubtedly eat into the designer’s profit margin.

As the volatile construction market continues to impact the predictability of a project’s ultimate construction cost, designers would be best served to encourage owners to retain the services of a qualified cost engineer in order to keep pace with market fluctuations.

Joseph A. Barra is a partner in the Boston office of Robinson & Cole LLP. Niel P. Franzese is associate in the firm’s Hartford office. Both have devoted their professional careers to practicing construction law.

