AIA Best Practices:
Standard of care: Confronting the errors and omissions taboo up front

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Summary

When should the owner pay to fix imperfections in the design process? When should the architect pay? What is the difference between "errors" and "omissions," and how can inconsistencies be resolved?

These age-old questions have a single, deceptively simple answer: it depends on the circumstances, on the contract, and, perhaps most of all, on whether or not the Owner and Architect started out with shared expectations on the seemingly arcane subject of standard of care. Let's see how project expectations can be 'shared' by getting to the root cause of some common confusions, piece by piece.

The standard of care for professional design services is defined by the American Institute of Architects in its AIA Document B101-2017™, Standard Form of Agreement Between Owner and Architect as:

> "§ 2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project."

This traditional definition doesn't provide explicit details, and many clients (as well as some architects) fail to fully understand its implications. That may explain why they often do not discuss with each other—at the very beginning—what the standard means in practical terms relative to their specific project. Even so, differing expectations on such a basic aspect of service can create conflicts that impede project success and needlessly damage the parties' relationship. It is certainly not good practice to wait until the first problem arises during construction for architect and client to begin their initial discussion about mutual expectations.

The taboo

There is a way to stop errors and omissions from being such an unspoken, taboo subject: the owner and their newly-selected architect should sit down at the very beginning of contract negotiations and openly discuss each other's expectations and concerns for the upcoming project. This may sound obvious and easy, but it is seldom done. The reason can be found in the competitive RFP/proposal/interview selection process which compels architects to focus on their firm's superior qualities. Emphasis on exclusively optimistic traits can be appropriate if clients understand the limitations of that context. However, even though the positive

qualifications are true, the proposal process can make it uncomfortable for architects to bring up less-than-positive challenges or to discuss realistic concerns with their new client immediately after being selected.

Key concepts

A candid discussion of the following can prevent the main cause of conflicting expectations.

Product vs. service

Many owners have the misconception that creating a new building is the same as buying a manufactured product like an automobile, and that their building's design should come with a warranty as do windows, roofing, etc. However, design is not a commodity like cars or bricks and mortar. Design is performed by architects as an intangible professional service, just like any other professional service, and is subject to the same human limitations as the practice of medicine, law, aviation or accounting. Moreover, design documents are not products, either. Construction document drawings and specifications are simply instruments of the architect's service, which is defined in law as intangible intellectual property.

Manufactured products are the culmination of repeated modification and refinement, whereas each architectural design is essentially a unique one-of-a-kind, first-time prototype, and thus can never be 100 % perfected in advance of construction. Some amount of mid-course adjustment and design interpretation is always required (especially for renovations, additions or complex project types, and whenever fast-track delivery is involved). Design truly is custom-fit tailoring, not a mass-produced product, and it deserves to be treated accordingly in the owner's mind, in the contract, and in the construction process.

Errors and inconsistencies

Just how perfect is a design required to be? Some owners believe that any change order which is due to an error or inconsistency in the design documents should be paid for by the architect, 100 %, from the first dollar. However, neither the professional standard of care nor the nature of professional service, as discussed above, would suggest that design has to be, or even can be, perfect. Nor does the law require perfection. Logically, then, some degree of human imperfection is to be expected. An allowance for this reality should be provided in the owner's construction budget, while the architect should contractually be required to provide design revisions to correct any errors or inconsistencies in their construction documents without additional compensation.

But, how much 'imperfection' is considered reasonable? Do the construction documents have to be 98% perfect or 88% or...? Again, it depends on factors like project complexity (the same glitch that amounts to 1% of a large project could be 10% of a small one), time and fee constraints, risk vs. reward considerations, etc., all of which must be negotiated between owner and architect to suit the unique circumstances of their mutual undertaking. Generally, greater perfection means more risk, so more design effort, more time, and more fee will likely be required. The key is to have the owner provide funds in their budget to cover a reasonable allowance for inevitable mid course corrections. Any unused funds remain with the owner.

Does this mean architects never have any liability for their own design decisions? No, there definitely is a point, such as if a design decision is proven to be unreasonable or when the cost of errors exceeds a significant percentage of the construction cost, beyond which the architect could be held responsible to pay

for the remedy. Examples of architects' liability can also include violating a law, committing fraud, or exceeding their authority. License laws, contract language and professional liability insurance policies often define actions that can constitute professional negligence.

Omissions

The big difference between an 'error' and an 'omission' is that the owner receives added benefit when something previously omitted is added into their project. By definition, the owner did not originally pay for anything not in the construction documents (on which the construction cost is based) but is later recognized as necessary and thus must be added to the contract. The legal term for this is "betterment," meaning the owner of the property receives something of benefit in return for additional cost-not something for nothing. Legal principles do not allow one party to unjustly benefit at the expense of another.

Although the law does not require design to be 100% perfect or documents to be wholly 'complete', design services do contractually have to be 'sufficient,' meaning the architect should make corrections to drawings or provide details for a necessary-but-omitted item without additional compensation. But if the cost of incorporating the previously omitted item during construction is significantly more than it would have been if known sooner, the architect could be held liable for the incremental increase, depending on the circumstances.

However, it is also important to recognize that the purpose of the architect's construction documents is not to serve as an instruction manual showing the contractor how to assemble a building. Drawings and specifications define project scope and design intent, but the contractor's work plan for the means-and-methods of construction (i.e., their shop drawings, schedules, subcontracts, etc.) must define when and how it will be constructed.

Unknown conditions

During the imperfect process of building construction, a variety of surprises could be called 'unknown conditions', but technically, this term from the AIA Document A201-2017™, General Conditions of the Contract for Construction is reserved for things like previously-undetected underground utilities, soil defects, Acts of God, record-bad weather, etc. None of these conditions are errors or omissions, nor are they covered by contingency funds in a contractor's typical GMP contract. Note that the construction contingency often allows 5-10% of the base cost for the contractor's exclusive use to cover only their own 'surprises.' So, unless there is specific insurance to cover them, any Unknown Conditions become the responsibility of the property owner, and a budget allowance should be provided by the owner in case such events occur.

Conclusion

Owner and Architect need to establish shared expectations before signing a design services contract with a realistic standard of care and mutual agreement on what constitutes a reasonable level of errors and omissions. The Owner should then include a funded Owner's contingency, in an amount appropriate to the nature of their project, to cover potential design imperfections in addition to allowances for their own uses (e.g., for any other contracts they hold, Owner-directed changes, additional services, unknown conditions, etc.), and be prepared for a reasonable number of mid-course corrections that normally arise during construction.

Additional resources

AIA's risk management resources

The standard of care: Should I care? By the AIA Risk Management Program

The standard of care: How is it applied? By the AIA Risk Management Program

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