

**REPORT OF THE AIA FEDERAL
ARCHITECTURE TASK GROUP
ON THE FEDERAL STATUTORY
FEE LIMITATION**

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AIA 2015 Federal Architecture Task Force

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Summary of Recommendations

1. The FATG supports efforts to reform the six-percent statutory fee cap which best utilize and leverage resources to affect change. As such, we feel that options B1, B2, C1, and C2 (further outlined below) present the best cost-benefit ratio and recommend making these priorities for 2016, while continuing to explore and evaluate next steps on the other options.
2. In addition, the FATG supports the following recommendations:
 - a. Launch a thorough and in-depth research initiative that analyzes billings data from firms performing work for federal agencies (Option C3 under Next Steps section). Having actual data on fees paid to architects performing federal work is a critical component in understanding and addressing the impacts of the six-percent fee limitation.
 - b. Convert research findings into effective messaging and advocacy tools to be used by Government Relations staff.
 - c. Determine the best path(s) forward for reforming the statutory fee cap and establish a timeline.
 - d. Further engage AIA members employed at federal agencies on the issue to broaden the organization's understanding of the issue and generate buy-in.
 - e. Explore avenues, existing or otherwise, through which AIA members can be educated about fee negotiations on the federal stage.
 - f. Reinstate the Federal Architecture Task Group (FATG) for 2016 in order to build on the accomplishments and progress made throughout the current calendar year.

Overview

Under long-standing federal statute, design services fees for both civilian and military federal design and construction projects are capped at six percent of total estimated project cost. Subsequent regulations and guidelines establish which services are within the six-percent cap and which are not.

The six-percent cap is a major issue of concern for architects and other design professionals – both for those who perform work for the federal government and those who do not. For architects in the federal sector, the limitation on fees does not reflect the increasing complexity of design projects, the larger number of services that need to be provided to complete a successful 21st century project, and the growing amount of upfront work and extensive management requirements that firms must perform just to compete for a job. In addition, there is a lack of education among both agencies and private sector architects about what is and is not included within the fee limitation; that is, services that do not fall under the cap and which qualify for separate compensation and reimbursements.

Architects who do not perform federal work also are affected by the federal law since many state and local governments – and even some private sector clients – follow federal practices. The six-percent fee cap has the effect of “devaluing” the complexity and scope of work that architects perform.

Historical Background

Fixed Fee

The notion that design fees should be tied to a percentage of total project cost, rather than based on the unique services provided for each individual project, stems from an 1861 lawsuit filed by architect Richard Morris Hunt, who sued a client over their refusal to pay his fee. Throughout the trial several architects testified that their customary charge was five percent of the project's cost; the jury agreed, and

awarded this amount with the justification that it was the “standard accepted minimum compensation.”

Five years later, the AIA issued its first document, a “Schedule of Charges,” which declared that the five percent figure was not merely the minimum compensation, but the “proper charge for architectural services.” The document was the first ever attempt at establishing and promoting a standardized method for calculating compensation, and had the effect of separating architects from other members of the building trades and unions. However, it established a tradition of effectively limiting compensation and at times has proved detrimental to the profession.

Around the same time, a series of parallel events was unfolding which expanded the scope of work and knowledge requirements of architects, despite fee recommendations remaining static. As a general trend, the growing complexity of building technology – which, in the 19th century included taller structures, new building materials, the advent of systems such as electricity, indoor plumbing, and ventilation – vastly increased the daunting range of information that architects have to master.

Courts and legislative bodies over the years have also effectively widened the gulf between architectural work and fair, commensurate fees. For example, in a landmark 1888 case in which an architect argued that his design error should have been caught and corrected by the project’s plumber, the courts ruled that technical knowledge is a reasonable requirement of an architect. Other rulings and laws from the era have led to increased liability taken on by architects; expansion of the amount and detail of construction documents and on-site supervision required of designers; licensing regulations; and a mandate that architects had to possess the “aesthetic sense and capacity to make decisions on the client’s behalf.” Varied as these developments were, the one common theme was that not once was there any mention of compensating architects for their greatly expanded responsibilities, an issue the AIA finally addressed when in 1908 it raised its fee schedule to six percent.

Though fee schedules themselves would ultimately become a vestige of the 20th century – following the Department of Justice’s antitrust lawsuit

and the subsequent 1972 and 1990 consent decrees signed by the AIA – the fee recommendations by this point were deeply entrenched in the profession and remain a part of the industry to this day.

Six-Percent Fee Limitation

Perhaps the most influential and long-lasting statute to emerge from this environment is the subject of this document, the six-percent statutory fee limitation.

The cap was codified into law following the August 7, 1939 passage of S. 2562, which authorized the Secretary of War to engage the services of architects and engineers, and stated that the fee paid shall not exceed “6 percent of the estimated cost...of the project to which such fee is applicable.” The goal was to expedite the timeline of projects which, up until that point, had been handled entirely in-house, as well as expand the military’s construction capabilities to outside the continental United States. Little to no information is available regarding how exactly lawmakers came to the six percent figure, but the recommendation made just a few decades earlier by the AIA regarding fee schedules likely played a significant role.

Vaguely written, the bill was the source of some confusion from the outset. For example, testifying before the Senate on behalf of the War Department prior to the bill’s passage, Colonel Hartman stated:

“The maximum fee is set at 6 percent of the estimated cost of the project. This would be an absolute maximum and is not intended to set a standard. The fees paid for architectural and engineering services on works similar to those contemplated by the War Department vary from 4 to 6 percent. There is no danger that the War Department will pay exorbitant fees for this work as definite standards have been established by the American Institute of Architects...and other reputable professional societies.”

Fortunately, in a 1941 letter the Under Secretary of War questioned this “absolute maximum,” and wrote that it is “self-evident that the fee authorized by Congress to be paid [architects and engineers] was not

intended to include costs and expenses arising in connection with or incident to their work.” This effectively reversed the department’s position and established the standard practice of excluding certain services from the six-percent cap that exists today.

Civilian agencies would soon follow the fee limitation model put forward by their military counterparts with the passage of the Federal Property and Administrative Services Act of 1949. The six-percent statutory cap has been reaffirmed in subsequent legislation five times, most notably as part of the 1972 Brooks Act, which mandated the use of Qualifications Based Selection.

Adverse Impact

To date, no study has been conducted which quantifies the fee limitation’s overall effect on architects. Nevertheless, extensive conversations with members of the AIA’s Large Firm Round Table, the Federal Architecture Task Group, and others have shed light on some of the main consequences of the statutory limit. Outlined below, the unifying theme is that each makes it more difficult for architects to secure a fair fee commensurate with the work performed:

1. *Outdated and Static* – the key flaw of the statutory fee limitation is that, left unchanged for more than seven decades, it has failed to keep up with the vastly expanding role that architects play in construction projects. The start of this trend is outlined earlier in this document, and technological advances and myriad other factors since then have only accelerated it. To be sure, fees have increased over the years; project costs have been steadily rising, and the six-percent figure now represents a larger fee than in the past. But the increases have failed to keep pace with the ever-expanding requirements of architects and are causing firms to reconsider pursuing federal work.
2. *Inconsistency* – the federal government has made clear that the fee limitation does not apply to all aspects of a project, and that certain services (such as environmental studies or energy analyses) are excluded from this cap. The problem, however, is that firms are often

subjected to disparate applications of these standards, not just between different government entities, but at times within the same agency by different contracting officers. This means that the rules are essentially “rewritten” for every new project, with firms left guessing about whether their compensation will even allow them to break even.

3. *Relationships* – because securing fair compensation is so heavily dependent on successful negotiation, firms often find themselves at odds with contracting officers on the other side of the table, who by contrast are tasked with keeping costs as low as possible. AIA members largely report positive relationships with agency employees but the innate, adversarial nature of these negotiations often takes a toll on all parties involved.
4. *Small Firms* – given the direct link between negotiation skills and ability to secure fair compensation, a common trend is for newer firms with less experience on the federal stage to leave “money on the table.” These firms tend to be smaller as well, and are effectively penalized for not having the resources of bigger firms, such as full-time negotiations teams, despite their design qualifications.
 - a. Case studies and anecdotal reports from larger, more experienced firms suggest that the six-percent cap acts instead as a “baseline” or starting point for fee negotiations, and that government officials sometimes use their ability to exclude certain services from the fee cap in an effort to reach a total fee that is amenable to both sides. In these cases, experience in navigating these negotiations would be an even greater asset and would place newer firms at an even greater disadvantage.
5. *Inefficiency* – the inconsistent application of the fee cap requires firm representatives to spend valuable time and energy going through dozens of services and deciding which are included and excluded in the fee cap. As a result, before work can even begin significant resources are needlessly expended.

6. *Dissemination* – the trickle-down effect of federal legislation is perhaps best exemplified by the six-percent fee limitation. First introduced in 1939 for the military, it has since expanded to civilian agencies and their projects. Furthermore, states have decided to follow the model; given the financial pressures which emerged following the recent economic recession, some states have gone a step further and introduced even lower fee limitations or larger scopes of services required under the fee limitation.

7. *Tied to ECC* – as the fee limitation has been further cemented into federal procurement, so too has the standard of tying architect compensation to a portion of Estimated Construction Cost. The Government Accountability Office in 1967 first questioned this practice, calling it “principally unsound” because estimated construction costs “do not necessarily relate to the value of the A-E services rendered,” and can also be inaccurate. Firms have also reported the agency practice of intentionally underestimating costs in order to allow themselves a financial “cushion” or contingency fund. This helps keep costs in line for the government, but ties architecture firms to an artificially repressed fee that is unrepresentative of the actual costs. (Fees can sometimes be raised or otherwise adjusted when the actual fee is determined, but this practice varies by agency.) Tying fees to the ECC also hurts smaller firms: when modifications to the project arise and the services required fall under the fee cap, they are forced to shift valuable resources away from other projects to deal with the changes.

Initiatives

In 2015 alone, the AIA has taken a number of steps to begin to address the adverse impact of the statutory limitation. These include:

1. *Congressional Outreach*: a number of staff and members of Congress from both parties have been briefed on this issue, increasing the level of awareness of key stakeholders. The perspective of architects has received a generally favorable response from lawmakers and other key stakeholders, including Reps. John Mica (R-FL) and Blake Farenthold (R-TX). Rep. Earl Blumenauer, Hon. AIA

(D-OR), an influential House member and longtime ally of the AIA, and his top policy aide, were recently briefed on the issue as well and expressed support.

2. *Federal/Agency Outreach*: through regular interaction with agency representatives the AIA has been able to voice its concerns about the fee cap and the way it is implemented:
 - a. Monthly meetings with the Federal Architecture Task Group (which is made up of AIA members from both the public and private sectors) have advanced the discussion and provided a useful insight into both sides' issues with the fee cap.
 - b. The Six-Percent Task Group convened in January and brought together representatives from the numerous federal agencies¹, as well as numerous design firms who do substantial amounts of federal work.
 - c. In February the AIA hosted a summit similar to the January roundtable. Though the focus was on design-build reform, the issue of the fee limitation was brought up and discussed a number of times.
 - d. Representatives from the Architect of the Capitol visited the AIA in June to share their thoughts and best practices regarding federal procurement. Because the AoC is not governed by the Federal Acquisition Regulation, they operate without a fee limitation. The agency therefore offers a unique case study into the pros and cons of the cap.
 - e. In September, Norman Dong, Commissioner of the GSA Public Buildings Service, as well as Les Shepherd, FAIA, GSA's Chief Architect, met with Elizabeth and members of AIA staff to discuss the unintended consequences of the 6% cap on design firms, and ways to quantify this impact.

¹ U.S. General Services Administration, U.S. Army Corps of Engineers, U.S. Air Force, U.S. Naval Facilities Engineering Command (NAVFAC), U.S. Coast Guard, and Architect of the Capitol

- i. A mutual decision was reached to collect data from both the public and private sectors from similar projects over a span of time. The objective was to focus on projects with similar characteristics so as to minimize variables (e.g. type of building, environmental conditions, size, cost) and therefore demonstrate the expanding scope of work demanded from architects over the years.
- ii. GSA was unable to find relevant data from each decade since enactment of the 6% statute, but they did calculate the “effective fees” paid to design firms on a series of similar, recent projects, which generally fit within a range of 8-12% of total construction cost. Charles Enos, AIA also conducted a similar study using data from projects completed by his firm, EYP, from 1992.
- iii. The data described above revealed an additional concern, which is the number of modifications (i.e. change orders) made to projects, with one federal office building requiring a staggering 121 changes from start to finish.
- iv. Two key conclusions can be drawn based on the data collected:
 1. Though the statutory fee cap has increased as buildings have become more expensive over the years, it is outpaced by the increasing requirements from architects and expanding scope of work. That is, compared to decades ago, architects have more liability, requirements in terms of production of design, costs associated with technology/equipment, etc. The sum total of these factors, and the rate at which they have increased, has risen faster than the

6% cap in the same amount of time, the ultimate effect of which is to devalue the profession and provide wages which are generally not commensurate with the work being performed.

- a. In order to quantify this effect, further research is needed that looks at each of these factors and their impact on compensation (this is outlined below in section C3).
2. The 6% fee cap creates a situation where a firm's ability to negotiate plays a far greater role in determining compensation than talent, ability, and past performance. Commissioner Dong agreed that increased transparency and specificity of the services which are included/excluded from the 6% cap, along with education of both contracting officers and AIA members about these services, would lead to greater consistency in application of the fee limitation and fairness for firms doing federal work.
3. *Research:* AIA staff have explored various avenues through which the impact of the statutory fee limitation can be demonstrated:
 - a. In July a survey was launched which attempted to collect both qualitative and quantitative data. Its goal was to explore the notions that (1) application of the fee limitation is inconsistent, and variations in the services that are included/excluded from the total cap are common; (2) ability to negotiate plays a critical role in a firm's ability to secure fair and commensurate pay for their work; and (3) the actual fee, or effective rate, obtained by architecture firms participating in federal projects is below the six-percent cap.

- i. Since releasing the survey, certain challenges that limit its potential effectiveness have arisen:
 1. The expected participation rate was much too low to generate an accurate data sample, especially given that the results and findings were to be made public.
 2. To collect data with this great of a range, a detailed and lengthy survey was required, and the time commitment was a key factor in driving down the participation rate.
 3. Some firms were hesitant to divulge sensitive, proprietary information regarding fees.
 4. Anecdotal reports and case studies indicate that the average effective rate of the fees collected by firms performing federal work may in fact be higher than six percent (due to the practice of excluding certain services from the cap), and that six percent is often seen as a “baseline” or minimum amount that a firm should receive.
- b. In 1967 the GAO released a report that looked into the fee limitation and largely questioned its effectiveness. That study contained data (below) that showed the number of A-E contracts whose total fees exceeded the six-percent cap. To combat the limited data set provided by this GAO study (namely the fact that it lacks statistics on contracts in which the fee was below six percent of ECC, and therefore does not convey the total data set accurately), staff is working with agencies to share bulk data on estimated project costs, actual costs, and the fees paid to architects.

<u>Department or agency</u>	Number of contracts in which the fee exceeded 6 percent of estimated construction cost				
	<u>Total</u>	<u>6.1-10%</u>	<u>11-15%</u>	<u>16-20%</u>	<u>Over 20%</u>
Air Force	260	236	15	6	3
Army	16	16	-	-	-
Navy	421	372	37	4	8
Agriculture	44 ^a	27	12	5	-
Commerce	3	3	-	-	-
Federal Aviation Agency	2 ^a	2	-	-	-
General Services Administration	218 ^a	215	1	2	-
Health, Education, and Welfare	17	17	-	-	-
Interior	19 ^a	14	4	1	-
National Aeronautics and Space Administration	108	87	15	2	4
Treasury (U.S. Coast Guard)	12	11	1	-	-
Veterans Administration	8	8	-	-	-
Total	<u>1,128</u>	<u>1,008</u>	<u>85</u>	<u>20</u>	<u>15</u>

- c. With guidance from the Federal Architecture Task Group, AIA staff has begun looking into recommending the use of “level of effort” contracts (outlined in FAR 16.207). Use of these contracts, or at least the adoption of certain elements inherent in them, would place a greater focus on the actual hours of work delivered and effort expended by design firms. The practice of taking into account time and effort in contracts is currently being utilized by certain state and local government entities.
 - i. Case studies, interviews, and other in-depth analyses would likely be necessary to determine the real-world pros and cons of these types of contracts.

Next Steps

Going forward, there are numerous strategies the AIA can take to address issues with the six-percent fee cap, ranging from more far-reaching (and complex) to simpler, short-term ones. A detailed assessment, including a table showing potential stakeholders for each proposal, is below:

A. LEGISLATIVE ADVOCACY

Strategy A1: Repeal the Six-Percent Fee Cap. The AIA could lobby Congress to repeal the statute completely.

Impact: There would be no cap on architectural services in the federal sector.

Reaction (positive): Complete repeal of the fee cap could be seen as an important move towards free-market principles, affording businesses a better opportunity to collect fees commensurate with their qualifications and the services provided free of artificial price restrictions.

Reaction (negative): Some would likely argue that, without a statutory cap on fees paid out by the government, agencies would be forced to pay more for design services. The increased cost to taxpayers would not play well with fiscal conservatives (in both parties). This could lead to the elimination of certain cherished provisions, such as QBS, to offset the “increased” cost. (QBS would also be a target because the Brooks Act reaffirmed the fee cap as a way to placate agencies about the shift to qualifications-based selection.) Also, because the fee cap often acts as a “starting point” for negotiations, its absence may cause inexperienced firms difficulty in securing fair compensation for the work performed.

Level of Effort (LOE): This would take a significant effort to educate and advocate to Congress and the Administration to convince them that the fee cap is detrimental to good procurement policy. Furthermore, the cap’s origin is rooted in legislation passed nearly eight decades ago, and it has been reaffirmed in subsequent legislation. This precedent would likely make it difficult to overturn.

Timeline for Success: This could take a significant number of years.

Strategy A2: Change the Six-Percent Fee Cap. The AIA could lobby Congress to change the cap (either by increasing it or specifying that fewer services are within it).

Impact: There would still be a cap, but perhaps a less onerous one, on architectural services in the federal sector.

Reaction (positive): Could be seen as important reforms that allow design firms to collect fees commensurate with the work performed, which has become more difficult as buildings become more complex and design more time-consuming. Modernizing an antiquated statute that has not kept pace with increasingly complex buildings could play well.

Reaction (negative): Dependent upon changes that are made, legislative modifications to the fee cap could engender similar calls for revenue offsets as a complete repeal, and potentially put QBS in jeopardy.

Level of Effort (LOE): It would take a significant effort and resources (studies, etc.) to educate and advocate to Congress and the Administration to convince them that the fee cap as currently in law is detrimental to good procurement policy.

Timeline for Success: This could take a significant number of years.

B. REGULATORY ADVOCACY

Strategy B1: Change federal regulations to clarify what services are within the cap, with the goal of having agencies adopt a uniform list of services that are included/excluded. The AIA could work with the FAR Council (GSA, DoD and NASA) and the Office of Federal Procurement Policy (OFPP) to rewrite the regulations.

Impact: Would keep the six-percent fee in place but ensure that more services are outside its scope

Reaction (positive): Similar reaction that legislative changes to the fee cap may yield

Reaction (negative): Similar reaction that legislative changes to the fee cap may yield

Level of Effort (LOE): This would take a large effort, as getting changes in procurement regulations takes a long time, although easier than passing legislation.

Timeline for Success: Nearly as difficult as legislative changes, and therefore could take a significant number of years.

Strategy B2: Change federal regulations to require better education about the fee cap and provide a better appeals process for situations when there are disagreements between contracting officers and offerors.

Impact: Would not change the current cap but may provide more clarity of existing laws and regulations.

Reaction (positive): A consistent application of the fee cap would result in a smoother, more efficient process and better relationships between the public and private sector, which would likely be viewed positively.

Reaction (negative): Mandate from Congress may not be well-received by federal agencies, especially by employees with significant tenure. Funding for education could also present an issue for certain members of Congress.

Level of Effort (LOE): This would take a large effort, and would likely be similar in difficulty to getting a policy change in the regulations.

Timeline for Success: 2-3 years.

C. EDUCATION

Strategy C1: Develop a program to educate federal contracting officers about what is within and beyond the fee cap, and further convey the importance of its consistent application. Partner with contracting officers association (NCMA, for example) and other outside groups to generate buy-in for the effort.

Impact: Would not change the fee but could provide more clarity and certainty to the process and enable architects who provide services to receive better service from agencies.

Reaction (positive): Engagement with agencies could signal a sincere desire to work collaboratively to improve the procurement system, and to move forward as partners rather than pursuing a mandate from Congress.

Reaction (negative): Could be seen as overstepping or attempting to modify the curriculum or education process for federal employees in a way that disproportionately benefits architects.

Level of Effort (LOE): Depends upon who would “own” such an effort; likely more manageable if the AIA runs it (the more resource intensive route), but would take greater effort and would more difficult to oversee and contribute to if GSA or another agency were to organize.

Timeline for Success: AIA-led: by end of 2016, resource permitting. Agency-led: further analysis (interviews with agency stakeholders, etc.) required.

Strategy C2: Develop a program to educate AIA members about how to best negotiate federal contracts.

Impact: Would not change the fee but could help AIA members know their rights and how to negotiate for the best contract arrangements.

Reaction (positive): Likely well-received by AIA members, especially newer firms who are new to negotiating fees for federal projects.

Reaction (negative): Potential issue may arise given cost of the educational curriculum, and the extent of the outreach.

Level of Effort (LOE): If performed in conjunction with existing AIA platforms, such as AIAU, or managed by knowledge communities or others, this can be achieved fairly easily.

Timeline for Success: By end of 2016, resource permitting.

Strategy C3: Having actual data on fees paid to architects performing federal work is an important first step in understanding and addressing the impacts of the six-percent fee limitation.

Impact: Would not change the fee but could help AIA staff understand the extent of the issue and better shape its response and strategy.

Reaction (positive): Likely well-received by AIA members, especially if data reveals detrimental impact on architecture firms (compared to other industries as well)

Reaction (negative): Potential issue may arise given cost of the research initiative

Level of Effort (LOE): Could be worked into the current Firm Survey questionnaire compiled by the research team on an annual basis.

Timeline for Success: By end of 2016, resource permitting.