



# Demystifying the Six Percent Fee Limitation in Federal Government Work

Course Number TH107

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Learning Units 1



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Questions related to specific products and services may be addressed at the conclusion of this presentation.



# Panelists

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# Session Description

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The AIA and the US Government seek to broaden access to government projects by promoting awareness to firms who may not be pursuing federal government work due to their concerns or misunderstanding of statutory six percent fee limitation.

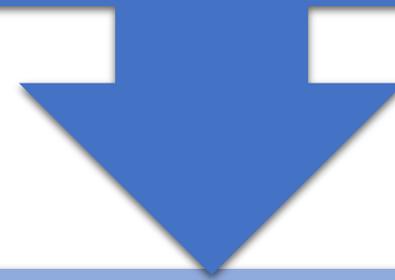
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This presentation will clarify the application of the Brooks Act and the 6% statutory fee limitation for architecture and engineering services.



# Value Statement

Attendees will leave with a better understanding of the statutory six percent fee limitation and understand that it allows for fair and reasonable full-services design fee due to the fact that the six percent fee cap is not all inclusive of all required design services.



There are many exceptions for specific design services that are excluded from the six percent fee cap which will be clearly presented to the attendees.



# Course Learning Objectives

## Understand

what the Brooks Act is

## Understand

which professional services fall  
under the six percent fee  
limitation

## Understand

the principals and practices for fee  
negotiations for A/E services  
covered by the Brooks Act

## Understand

that the federal government  
seeks to award fair and  
reasonable fees, and to expand  
A/E participation in federal  
government project  
opportunities



# Frequently Asked Questions

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What is the Brooks Act?

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What is an Estimated Construction Cost (ECC)?

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Why is the ECC so important?

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Why can't Design Services exceed 6% of the Estimated Construction Cost (ECC)?

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Does the 6% limit apply to modifications?

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Are Post Construction Contract Award Services excluded?

# Regulations

Brooks Act, Public Law 92-582 (Title 40 USC, 1101-1104)

- “When the Brooks Act applies”

10 USC 2306(d), 41 USC 254(b)

- “Statutory Fee Limitation, Certification of proposed pricing and Fee”

Federal Acquisition Regulation (FAR) 15.404

- “Government analysis of proposals”

Federal Acquisition Regulation (FAR) 36.6

- “Procedures for selecting A/E Firms”



# What is the Brooks Act?

The Brooks Act provides the policy and procedures for awarding architect-engineer contracts for the Federal Government.

- Requires a **Qualifications Based Selection (QBS)**, which selects the winning offeror based on demonstrated competence and qualifications (not fee)
- Negotiation with the highest qualified firm
- Negotiation of fair and reasonable prices

# The Brooks Act - FAR Implementation



## GSA PROCESS

1. Public announcement (synopsis)
2. Firms submit **qualifications** (SF 330)
3. Qualifications reviewed by Evaluation Board
4. Firms ranked
5. Interviews are conducted with at least three firms
6. Board recommends firms in order of preference
7. Selection Authority makes selection (listing, in order of preference, of the firms considered **most highly qualified to perform the work**)
8. Contracting Officer issues Request for Proposal
9. Contracting Officer conducts fee negotiations
10. Fair and reasonable priced determined
11. Contract award



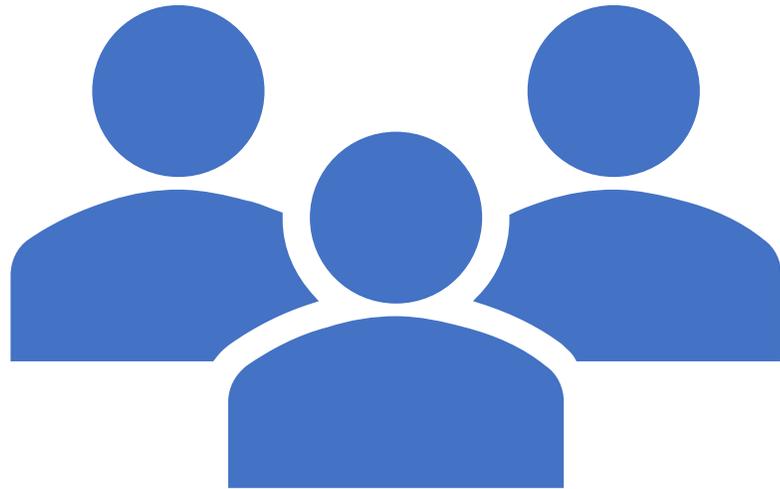
# GSA Process



## Source Selection:

- Announce
- Solicit
- Evaluate
- Negotiate
- Award

# Qualifications Based Selection



## Two-Step Process

### 1. Qualifications (typical)

Licensed Professional Architects  
and Engineers

Past Performance

Specialized Experience and  
Capabilities

Organization, Management and QC

### 2. Rates/fees



# 6% Fee Limitation?



# A Brief History of the Six Percent Limitation

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9th Century: Design and construction services intertwined.

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1893: Congress allows Secretary of the Treasury to seek assistance of design professionals for public works projects.

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1926: Congress requires federal employees to prepare plans and specifications prior to construction, private design professionals may “assist” federal employees.

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1926: Foreign Service Building Act allows State Dept. to hire private A/Es to independently provide design services for diplomatic abroad. Fees cannot exceed “in any case 5 per centum of the cost of construction or remodeling of the properties.”

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1939: Congress authorizes Army and Navy to procure architectural and engineering services from private firms on a cost-plus-fixed-fee basis (as opposed to traditional fixed-fee basis). Laws set A/E fees “at 6 percent of the estimated cost of the project.”

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1949: Federal Property and Administrative Services Act extends 6% limitation to all federal contracts.

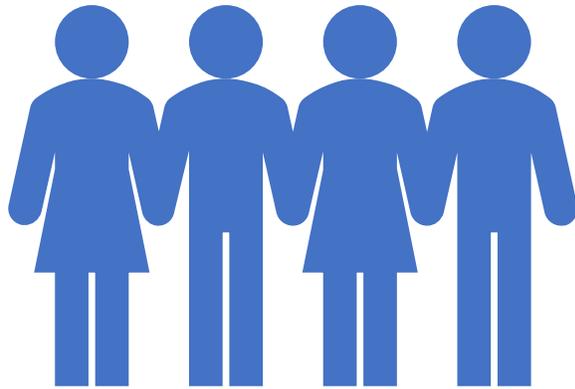
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1967: GAO recommends 6% fee limitation be repealed and competitive pricing applied to A/E contracting.

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1972: Congress passes Brooks Act, which requires QBS and explicitly retains 6% fee limitation.

# 6% Fee - FAR Implementation



## **FAR 36.606 Negotiations.**

(a) Unless otherwise specified by the selection authority, the final selection authorizes the contracting officer to begin negotiations. Negotiations shall be conducted in accordance with [Part 15](#) of this chapter, beginning with the most preferred firm in the final selection ([see 15.404-4\(c\)\(4\)\(i\) on fee limitation](#)).

(b) The contracting officer should ordinarily request a proposal from the firm, ensuring that the solicitation does not inadvertently preclude the firm from proposing the use of modern design methods.

(c) The contracting officer shall inform the firm that no construction contract may be awarded to the firm that designed the project, except as provided in [36.209](#).

\* \* \*

## **FAR 15.404-4 (c)**

\* \* \*

(4)(i) The contracting officer shall not negotiate a price or fee that exceeds the following statutory limitations, imposed by [10 U.S.C. 2306\(d\)](#) and [41 U.S.C. 3905](#):

(A) For experimental, developmental, or research work performed under a cost-plus-fixed-fee contract, the fee shall not exceed 15 percent of the contract's estimated cost, excluding fee.

(B) For architect-engineer services for public works or utilities, the contract price or the estimated cost and fee for production and delivery of designs, plans, drawings, and specifications shall not exceed 6 percent of the estimated cost of construction of the public work or utility, excluding fees.

(C) For other cost-plus-fixed-fee contracts, the fee shall not exceed 10 percent of the contract's estimated cost, excluding fee.

Fee Limited to  
6% of the  
ECC?

Yes, but there  
is more!

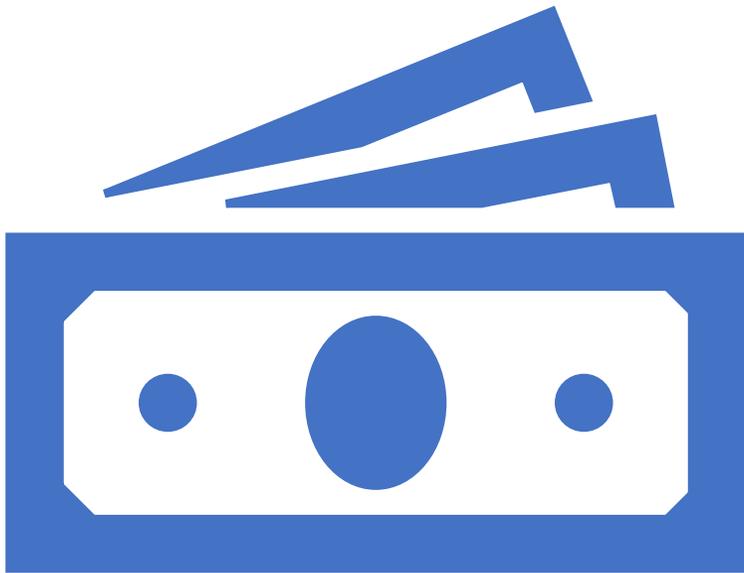
#### FAR 15.404-4

##### Contracting Officer responsibilities

- (4)(i) The contracting officer shall not negotiate a price or fee that exceeds the following statutory limitations, imposed by [10 U.S.C. 2306\(d\)](#) and [41 U.S.C. 254\(b\)](#):
  - (B) For architect-engineer services for public works or utilities, the contract price or the estimated cost and fee for production and delivery of designs, plans, drawings, and specifications shall not exceed 6 percent of the estimated cost of construction of the public work or utility, excluding fees.



# What is Estimated Construction Cost (ECC)?



- Construction cost to produce the new facility or complete the repairs, alterations or improvements; in accordance with the government's program and statement of work for A/E services.
- A/E & government project teams both independently develop & mutually agree on the pre-design ECC prior to negotiating the A/E fee.
- The ECC(A), Estimated Cost of the Construction Contract Award, is used to establish the 6% limitation.

# Why is the ECC so important?



- Basis for establishing the 6% fee limitation for a defined portion of the “included” design services.
- A/E’s are required to accomplish design services so as to permit award of a construction contract at a price that does not exceed the estimated construction contract price (ECCA). (FAR 36.609)
- **FAR 36.609-1(b)** states:
  - The **amount of the construction funding limitation is to be established during negotiations** between the contractor and the Government.
- Scope changes that later require additional design services would justify fee adjustment



What's **Included**  
&  
What's **Excluded**  
In the  
6% Fee Limitation ?



# Services **Included** in the 6% Limitation

<ul style="list-style-type: none"><li>• Calculations (required for design submittals)</li><li>• Cost estimates</li><li>• Designs, plans, drawings and specifications</li><li>• Narratives</li><li>• Preparation of bid packages</li><li>• Interior space design (permanent partitions/walls)</li></ul>	<ul style="list-style-type: none"><li>• Review of local code, permit, and inspection requirements</li><li>• <u>Special consultant services specifically applied to the actual preparation of drawings or specifications</u></li><li>• Changes to drawings / specifications resulting from value engineering, clarifications, unforeseen conditions, post construction contract award changes, etc...</li></ul>
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**Actual production of the designs, plans, drawings, and specifications.**



# Services Excluded from the 6% Limitation

<ul style="list-style-type: none"><li>• Determination of program requirements</li><li>• Preparation of general and development criteria</li><li>• Preparation of general and feature design memoranda</li><li>• Pre-design / architectural programming</li><li>• Preparation / development of measured drawings of existing facility</li><li>• Building Information Modeling (BIM) Services</li><li>• Existing Conditions Surveys ( topographic / boundary / utility</li><li>• Site/soil borings</li><li>• Existing facility investigations</li><li>• Roof Samples and reports</li><li>• Environmental (asbestos, hazardous waste, etc...) investigations, studies, reports, permits</li><li>• Environmental impact assessments, statements, and supporting data</li><li>• Fire Safety studies</li><li>• Renderings, models , exhibits</li><li>• Site slides, photographs</li><li>• Feasibility, functional, economic studies and analyses</li><li>• Flow gauging, model testing</li><li>• Special energy analysis</li><li>• Site selection</li></ul>	<ul style="list-style-type: none"><li>• Historic preservation studies</li><li>• Value engineering consultant services</li><li>• Interior space design, space layout drawings, drapes, free standing partitions</li><li>• Traffic studies</li><li>• Graphic communication services</li><li>• Services related to out-lease space</li><li>• Art-in-architecture services</li><li>• Postage, telephone costs</li><li>• Meetings</li><li>• Travel costs (including labor and per diem)</li><li>• Microfilming services</li><li>• Record documents (as-built drawings and marked specifications)</li><li>• Critical path method / computer scheduling</li><li>• Master planning</li><li>• Post construction contract services (review of shop drawings and sample approval)</li><li>• Compiling operating and maintenance manuals</li><li>• Reproduction costs</li><li>• Post Occupancy Evaluation</li><li>• Design / Build Services</li><li>• Secondary cost estimates</li><li>• Special consultant services <u>NOT specifically applied to the actual preparation of working drawings or specifications</u> of the project for which the services are required</li></ul>
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# All Federal Government Agencies must Comply with the 6% Fee Limitation

But, remember from the History of the 6% Fee Limitation:

None of the legislation created a definitive document that clearly defined which services are covered by the 6% statutory fee limitation and which are not.

Some Federal Agencies have their own 6% fee limitation inclusion / exclusion services list

# Fee Estimates and Forms for Proposal

## Government Estimate

Documentation must show the total, the included and the excluded cost

## Proposal Documents from A-E Contractor

- GSA Forms 2630 and 2631
- Detailed breakdown of included and excluded costs (separate 2630s or any other detailed worksheets)
- Statement that the proposed price is compliant with the 6% fee limitation



**2630 Total Cost**

=

\$ Inc

+

\$ Exc



# Fee Proposal & Negotiation Process

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The A/E's proposal communicates level of effort for the disciplines and work proposed, in response to the government's statement of work for A/E services.

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The proposal includes base hourly rates, overhead and profit, and proposed fee, but negotiations should focus on the work, level of effort and specific services proposed.

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The outcome of negotiations should result in agreement on the level of effort, specific disciplines, and work necessary to perform all services required by the government's scope of work for A/E services.

# Negotiate



- **CONFIRM MUTUAL AGREEMENT ON ECC!!!!**
- FAR 36.609-1(b) states:
  - The amount of the construction funding limitation is to be established during negotiations between the contractor and the Government.
- If AE proposal is below IGE, make sure all aspects of project are understood before accepting



# Negotiate



- Discuss, clarify & agree upon scope of services
- Ask AE to explain their understanding of effort required for those areas where there are wide disparities to ensure mutual understanding of effort required
- Revisions to IGE and A/E's proposal to reflect discussions
- Agree on Scope and Fee
- Reach an agreement that is fair and reasonable and complies with the statute



# Finalize Negotiations



Finalize negotiations / ensure agreement on:

- Scope of Services
- ECC
- Total Fees for Pre-Design, Design, Engineering, and Post Construction Contract Award Services (Construction Administration)
- Completion Schedule



# A/E Fee Proposal Format

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GSA currently uses the GSA 2630 and 2631

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Ensure that all discipline and design phase services that are needed for the project are provided

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Some GSA Regions have prepared form templates for the A/E to use that do have separate identification of services as well as separation of “excluded” and “included” services



# GSA Form 2630 for Architect-Engineer Services

- Captures hours & rates by discipline
- Segregates proposal by design phase
- Segregates Included & Excluded Services

ARCHITECT-ENGINEER COST ESTIMATE						
Basic Included Services (See Instructions)						
ARCHITECT-ENGINEER NAME AND ADDRESS				PROJECT DESCRIPTION		
FIRM		FACILITY NAME		BUILDING NO.		
ADDRESS		PROJECT NO.	CITY	STATE		
CITY	STATE	ZIPCODE	DESIGN PHASE	COMPLETION IN WEEKS		
TELEPHONE	FAX	WEBSITE	Estimated Cost of Construction (Design to cost limit)			
A. DIRECT SALARY COSTS - Basic Services						
SPECIALTIES		JOB TITLES	MAN-HOURS	RATES \$	AMOUNTS \$	TOTALS
PROJECT MANAGEMENT AND COORDINATION					\$ -	
					\$ -	
					\$ -	
					\$ -	\$ -
					\$ -	

ARCHITECT-ENGINEER COST ESTIMATE						
Excluded Services (See Instructions)						
ARCHITECT-ENGINEER NAME AND ADDRESS				PROJECT DESCRIPTION		
FIRM		FACILITY NAME		BUILDING NO.		
ADDRESS		PROJECT NO.	CITY	STATE		
CITY	STATE	ZIPCODE	DESIGN PHASE	COMPLETION IN WEEKS		
TELEPHONE	FAX	WEBSITE	Estimated Cost of Construction (Design to cost limit)			
A. DIRECT SALARY COSTS - Excluded Services						
SPECIALTIES		JOB TITLES	MAN-HOURS	RATES \$	AMOUNTS \$	TOTALS
PROJECT MANAGEMENT AND COORDINATION					\$ -	
					\$ -	
					\$ -	
					\$ -	\$ -
					\$ -	
ARCHITECTURAL					\$ -	
No. of Dwgs. ( )					\$ -	
					\$ -	
					\$ -	\$ -

# GSA Form 2631 Summary

- Summarizes fees by design phase
- Segregates Included & Excluded Services

CURRENT ECC (DESIGN-TO-COST LIMIT)										
SUMMARY COST BY PROJECT PHASE (Dollar Value)										
COST ELEMENTS	PRE-DESIGN		DESIGN CONCEPTS		CONSTRUCTION DOCUMENTS		POST-CONSTRUCTION CONTRACT SERVICES		SUBTOTAL	
	BASIC SERVICE	EXCLUDED SERVICE	BASIC SERVICE	EXCLUDED SERVICE	BASIC SERVICE	EXCLUDED SERVICE	BASIC SERVICE	EXCLUDED SERVICE	BASIC SERVICE	EXCLUDED SERVICE
DIRECT SALARY COSTS		\$ -							\$ -	\$ -
CONSULTANTS		\$ -							\$ -	\$ -
OTHER DIRECT COSTS		\$ -							\$ -	\$ -
OVERHEAD									\$ -	\$ -
POOL									\$ -	\$ -
TITLES									\$ -	\$ -
TOTAL COST TO A-E		\$ -							\$ -	\$ -
PROFIT \$										
TOTAL COST TO GOVERNMENT		\$ -							\$ -	\$ -
REMARKS								SERVICES FEE / DESIGN-TO-COST		#VALUE! %
								Total: \$		-
PREPARED BY (Signature)					APPROVED BY (Signature)				Date	



# Does the 6% limit apply to modifications?

- FAR 36.609-1(b) states:
  - In negotiating the (ECC) amount, the contracting officer should make available to the A/E the information upon which the Government has based its initial construction estimate and any subsequently acquired information that may affect the construction costs.

# Lost Design

Design services that the A-E firm has performed but are no longer of use because of changes to the project. Lost Design provide for equitable adjustment when requirements change after award.

## Project Example

- Project scope is to renovate open floor plan office and build 4 new conference rooms
- After the 50% construction documents submittal, government client changes to 2 conference rooms to be 6 private offices
- The effort expended to date to design the two conference rooms is considered “lost design”

Additional fee for re-design + original fee cannot exceed 6% for “included services.” The fee for the lost design (the deleted conference rooms) is subtracted from the original design fee when calculating the new adjusted fee, thereby increasing the allowance for the re-design fee within the 6% limitation.



# Summary - Qualifications Based Selection

## Contracting Officer's Guidance

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Selection of which A-E to negotiate with is not arbitrary, but based on an objective evaluation of qualifications.

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Reference to submitted SF330's should be made to determine A/E qualifications prior to ranking of firms.

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At least three firms should be ranked and negotiations entered with each firm, one at a time. Simultaneous negotiations are improper.

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The ranking of firms should be documented prior to entering negotiations.



## Summary - Contract Modifications

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The 6% fee limitation applies when adding work related to design.

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“Lost Design” is subtracted from the original design fee for the purpose of calculating the 6% limitation.

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Individual modifications may exceed 6% at the Modification level. However, the total fee for A/E services related to design costs under the contract or order must not exceed 6%.

# Demystifying the Six Percent Fee Limitation in Federal Government Work

- 1 USG is lawfully required to negotiate a fair and reasonable design fee
- 2 The 6% statutory fee limitation does not apply to all tasks related to design
- 3 Each federal agency has their interpretations of what is included and what is excluded
- 4 In general, A/E services included in the 6% limitation are those necessary to produce a set of bid documents, including
  - Drawings, plans, specifications
  - Calculations
  - Cost Estimate
- 5 In general A/E services excluded from the 6% limitation include
  - Pre-design services
  - Site investigation services
  - Construction Administration services
  - Specialty services
- 6 Government A/E procurement policies are increasingly open to more to Small Business A/E's.



# Contact Information

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# Demystifying the Six Percent Fee Limitation in Federal Government Work

## AIA Federal Architecture Task Group (FATG)

- AIA architects from private sector and federal government agencies working to improve access to federal work and promote understanding of current regulations and potential reform
- AIA Past President - Elizabeth Chu Richter, FAIA
  - Major goal: Increase Opportunity for Small Business Architects to pursue government work
- AIA Current President - Carl Elefante, FAIA
- GSA Chief Architect – David Insigna, FAIA
- Charles Enos, AIA, FATG Chairman 2016-2018
  - This AIA Educational Seminar is the one of the continuing steps in educating AIA membership and federal employees regarding 6% fee limitation
  - Continued education among AIA members and Federal employees to assist in consistent interpretation of inclusions/exclusions
  - Are you an advocate? Want to help? Contact me.



Thank you!