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Lender Consents and Certifications: Are They Really That Important

It is not uncommon for a design firm to receive a request from its client owner (Owner) to execute a document required by the Owner's lender. Oftentimes, this is an urgent 'must-do or the world will end' request. The form is known by various names, including Consent to Assignment, Collateral Assignment of Architects/Engineers Contract, Architect/Engineer Certification and Consent, and more. In this article, we shall refer to the document as the 'Lenders' Consent'.

The Owner often excitedly reports that the form must be executed by the A/E, or the closing on the Owner's financing will be in jeopardy. Oftentimes, this may come during the middle or even towards the end of a project. It usually comes after the Owner-A/E Agreement has already been executed. The language of the Lenders' Consent is usually Greek to the average person. That's because it was drafted by zealous lawyers representing the lender. Lawyers representing the lender are not your friend. We suggest you consult with your professional liability broker, professional liability carrier, or your legal counsel to review it on your behalf.

The initial issue that would concern your legal counsel or your insurance risk management adviser is whether your Owner Agreement was appropriately drafted as to this issue. Unless your Owner-A/E Agreement requires you to sign the Lenders' Consent as is, you are usually not obligated to sign it as is. You want to keep the Owner happy, but typically, you can and should modify these forms before executing them as is and sending them back. If your agreement with the Owner is appropriately drafted, just because a lender thumps on the table and states you have to sign it as is, you don't have to.

The AIA, EJCDC, and other associations have suggested language that they feel protects the design firm in these situations. The AIA, for example, in the B103-2017 Standard Form of Agreement Between the Owner and Architect suggests language as follows:

"If the Owner requests the Architect to execute certificates, the proposed language of such certificates shall be submitted to the Architect for review at least 14 days prior to the requested dates of execution. If the Owner requests **the Architect to execute consents reasonably required to facilitate assignment** to a lender, the Architect shall execute all such consents that are consistent with this Agreement, provided the proposed consent is submitted to the Architect for review at least 14 days prior to execution. **The Architect shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of this Agreement.**"

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The language above gives the Architect the ability to avoid signing the Lenders' Consent if you have reasonable objections to it. One can find similar language in the EJCDC documents and other professional agreement forms for designers. In most cases, the execution of the Lenders' Consent, even as is, will not become a problem. But woe be the design firm on a project where the Owner runs into financial problems and the lender declares the Owner in default, moving to enforce the lender's consent. If the design firm has signed a Lender's Consent as is, it will probably be in a world of hurt.

Numerous articles and white papers are available online for free, offering valuable insights into this issue. We highly recommend that every design firm develop at least a working knowledge of the potential dangers associated with these Lenders' Consents to the firm. However, as a general rule, we strongly recommend that you also send these forms to your insurance broker or professional liability carrier for their review and input. AXA XL, one of the largest professional liability insurance carriers for design firms, offers the following tips that may be helpful to the designer being asked to sign such forms:

- Delete any language that obligates you to communicate to the lender all material changes to the project and to receive the lender's approval before making such changes.
- Delete any language that requires you to defend and indemnify the lender.
- Delete any clause that would require you to recognize that the lender's lien is superior to any other, or that would require you to waive your own lien rights.
- Delete any clause that would deprive you of any fees owed for services provided prior to a client's default.
- Delete any language that would extend the schedule for payments to your firm; e.g., a lender might modify a 14-day payment schedule to a 60-day cycle.
- Delete or modify any language that would require ownership of all of your designs to immediately transfer to the lender in the event of a borrower default.
- Delete any provision that would expand your scope of services or obligations.

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- Delete any language that would impart a fiduciary duty on you.
- Delete or modify any clause that would otherwise materially change the terms of your agreement with your client, or modify the risk profile for the project. If your client is adamant about having you sign something that materially changes the existing agreement and, if you really want the job, consider charging an additional fee.
- Delete any language that would give the lender third-party beneficiary status. You can explain that the lender still has recourse. If the lender truly believes that you caused harm, the lender may pursue a negligence-based theory against you.
- Consider adding a mutual termination provision that would allow you to cease providing services in the event that the arrangement with the lender is not working. (This type of provision might be a good fall back in the negotiation if the lender is not agreeing to certain changes.

To summarize, these Lenders' Consents may seem mandatory. They usually aren't if your Owner-A/E agreement is drafted appropriately. They may seem harmless, 'this is never going to happen anyway, so why rock the boat?' These Lenders' Consents may not correlate with a high number of claims, but as stated previously, if the Owner defaults and the Lender enforces the Lenders' Consent, pray you didn't fail to address this appropriately in your Owner-A/E agreement or you didn't push back on 'you must sign as is'.