



## Key Concerns in Consent to Assignments

By Gail S. Kelley, P.E., Esq.

Consent to assignments, often referred to in the banking industry as “will-serve letters,” come in many different forms. However, at its most basic, an engineer’s Consent to Assignment is an agreement under which the engineer acknowledges that the design agreement has been assigned to the owner’s lender. The engineer also agrees that if the owner defaults on its construction loan, the lender can exercise its rights under the assignment and require the engineer to provide its services for the benefit of the lender.

The article *An Overview of Consent to Assignments*, (STRUCTURE, June 2017), discussed the general format of consent agreements. It discussed one of the key concerns with respect to these agreements – whether the lender is obligated to pay outstanding amounts due to the engineer. This article discusses two other concerns – the lender’s right to use the plans and specifications and the engineer’s obligation to provide certifications or other information to the lender.

### Lender’s Use of the Engineer’s Work Product

Consent to assignments typically indicate that the lender has the right to require the engineer to continue providing services if requested to do so by the lender. They generally also give the lender the right to use the plans and specifications (the “Instruments of Service”) without hiring the engineer. In most cases, if the

owner defaults on its construction loan, the engineer will have completed the plans and specifications and is only providing construction administration. The entity that takes over the project may prefer to have a different engineer perform these services. As a result, some version of the following clause is found in almost all consent agreements:

*Lender and Lender’s Successors shall be entitled to use the Plans and Specifications prepared by Engineer for the completion of the contemplated improvements without further cost to Lender or Lender’s Successors.*

Under the AIA and EJCDC standard form agreements, such as AIA B101 and EJCDC E500, the owner only receives a license to use the Instruments of Service; the engineer retains the copyright. However, owners often edit this wording so that the owner receives all rights in the Instruments of Service, including the copyrights.

Regardless of whether the design agreement states that the owner has received a license for the Instruments of Service or ownership, the above clause in the Consent Agreement should be edited as follows:

*...without further cost to Lender or Lender’s Successors, other than payment of all sums owed to Engineer by Borrower.*

Some design agreements stipulate that if the owner terminates the design agreement for convenience or the engineer terminates the agreement because of a prolonged suspension, the owner may use the Instruments of Services to complete the Project upon payment of a licensing fee (see for example § 11.9 of AIA B101). It is a good idea to specifically reference this fee in the Consent Agreement if the engineer wants the right to recover this fee from the lender. An example of such wording might be:

*...other than payment of all sums owed to Engineer by Borrower and the licensing fee stipulated in Article XX of the Design Agreement.*

### Indemnification for the Use of the Engineer’s Work Product

In addition to conditioning the lender’s use of the Instruments of Services on payment of all amounts owed to the engineer, the engineer should require the lender to indemnify the engineer from claims arising from their misuse.

Typical wording for this requirement is:

*Lender agrees to indemnify, defend, and hold the Engineer harmless from any claims arising from changes made to the Instruments of Service by others or use of the Instruments of Service for any purpose other than the purpose they were prepared for under the Design Agreement.*

### Lender’s Requirements for Certifications and Information

Virtually all consent agreements include some requirement for certification of the engineer’s work. Many also require the engineer to provide information to the lender. These requirements range from the completely reasonable to the very unreasonable. An example of a reasonable requirement is:

*Engineer certifies that Engineer’s statements in this letter have been made, and Engineer’s services have been performed, in accordance with the standards of care of Engineer’s profession for building projects of the similar scope and quality.*

The engineer is simply being required to certify that it has complied with the standard of care for its profession, which is the standard of care under the common law.

An example of an unreasonable requirement is:

*Engineer, at no cost to Lender, shall furnish to Lender upon written request any information Engineer may have regarding the Project, including: (a) information regarding defects in workmanship or materials provided for the Project; (b) Engineer’s estimate of the stage of completion of construction of the Project; (c) any known deviations or variations in construction of the Project from the Plans and Specifications; (d) information regarding any defaults by Borrower, Contractor or any Subcontractor under any of the Construction Contracts; (e) information regarding construction practices or conditions in effect at the Project which Engineer regards as unsafe or*

**struware**

Structural Engineering Software

Demos at [www.struware.com](http://www.struware.com)

**Wind, Seismic, Snow, etc.** Struware’s Code Search program calculates these and other loadings for all codes based on the IBC or ASCE7 in just minutes (see online video). Also calculates wind loads on rooftop equipment, signs, walls, chimneys, trussed towers, tanks and more. (\$195.00).

**CMU or Tilt-up Concrete Walls** Analyze solid walls for out of plane loading and panel legs next to or between openings by automatically calculating loads to the wall leg from vertical and horizontal loads at the opening. (\$75.00 ea)

**Floor Vibration** Program to analyze floors with steel beams and/or steel joist. Compare up to 4 systems side by side (\$75.00).

**Concrete beam/slab** Program to provide bending, shear and/or torsional reinforcing. Quick and easy to use (\$45.00).

dangerous; (f) claims of nonpayment by any person in connection with the construction of the Project; and (g) evidence of full payment to Engineer with respect to any work performed by Engineer in connection with the Project.

As written, this provision is obligating the engineer to provide information to the lender even before any default on the construction loan. In other words, the engineer would be agreeing to act as the lender's agent, without compensation. The engineer would also be agreeing to provide the lender with information that may have no relationship to its obligations under the design agreement. If the engineer, in good faith, provides the information required and the information subsequently turns out to be false, the engineer could be liable for claims of negligent misrepresentation or tortious interference with contract. The engineer should generally only agree to provide information with respect to its own contract. Thus, the above clause should be edited to read:

*Engineer, at no cost to Lender, shall furnish to Lender upon written request evidence of full payment to Engineer with respect to any work performed by Engineer in connection with the Project.*

Design agreements often require the engineer to provide "such certifications as reasonably required by the Lender." To clarify this obligation, the engineer can add the following provision to the Consent Agreement:

*The Engineer shall not be required to execute certificates that would require knowledge, services or responsibilities beyond the scope of the Design Agreement. Any such certificate will state that it is based on the best of the Engineer's knowledge, information, and belief.*

## Conclusion

Owners seldom read consent agreements; they typically pass them on to the engineer with the explanation that it is a form required by the lender. Often, the owner will indicate that a delay in returning the agreement could hold up the closing on the construction loan. As evidenced by the clauses cited above, however, a Consent Agreement can impose significant obligations on the engineer. It can also affect the engineer's right to payment for its services. An engineer

should never sign a Consent Agreement unless it has read the agreement carefully. If there are any terms the engineer does not understand, it should ask its legal counsel to review the agreement. ■

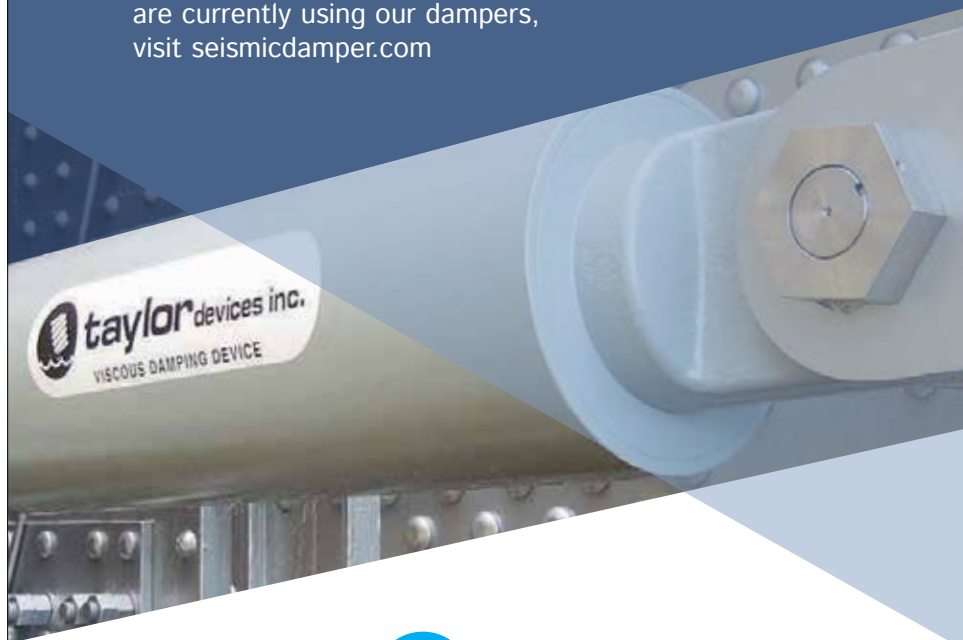
*Disclaimer: The information in this article is for educational purposes only and is not legal advice. Readers should not act or refrain from acting based on this article without seeking appropriate legal or other professional advice as to their particular circumstances.*

*Gail S. Kelley is a LEED AP as well as a professional engineer and licensed attorney in Maryland and the District of Columbia. Her practice focuses on reviewing and negotiating design agreements for architects and engineers. She is the author of "Construction Law: An Introduction for Engineers, Architects, and Contractors," published by Wiley & Sons. Ms. Kelley can be reached at [Gail.Kelley.Esq@gmail.com](mailto:Gail.Kelley.Esq@gmail.com).*

## Life-saving technology. Unparalleled protection.

Taylor Devices' seismic dampers resist dynamic motion and remove energy from a structure during a seismic event, protecting it from harsh input energy. Today, our dampers are used to protect more than 700 buildings, bridges and other structures worldwide.

To learn which applications are currently using our dampers, visit [seismicdamper.com](http://seismicdamper.com)



**taylor devices inc.**

716 694 0800 | [seismicdamper.com](http://seismicdamper.com)