## A Further Look at Consent to Assignment Agreements

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

Consent to Assignment for engineers, also referred to as an Acknowledgement and Consent or a "will-serve letter," is usually drafted by the bank providing construction financing for a project. A typical consent requires the engineer to agree that the bank can exercise the rights it has acquired through an assignment from the owner; among these rights will be the right to assume the design agreement if the owner defaults on the construction loan. Prior articles (June and July 2017, STRUCTURE magazine) looked at key concerns with respect to consent agreements, specifically whether the lender is required to pay outstanding amounts due to the engineer, whether the lender has the right to use the plans and specifications if it does not assume the design agreement, and what information or certifications the lender is entitled to. This article looks at some of the other provisions commonly found in these agreements.

### The Assignment

When the owner is a public or quasi-public entity such as a city or a water district, the document that the engineer is asked to sign may include the actual assignment. In such cases, the form may start with an introductory paragraph such as:

*THIS ASSIGNMENT OF ENGINEER'S CONTRACT AND ENGINEER'S AGREEMENT AND CONSENT TO ASSIGNMENT (this "Assignment") is made as of _____ by and between _____ ("Borrower") and _____ ("Engineer") for the benefit of _____ ("Lender").*

In such cases, the document creates obligations for both the owner (the borrower) and the engineer, so both parties must sign it. Typically, however, if the owner is a private entity, the engineer will not be provided with the assignment; it is simply asked to acknowledge that the assignment must occur before the loan is closed. In most cases, the lender will require that the contractor, the architect, and other key consultants also agree that their contracts can be assigned and may list all of the contracts to be assigned in a single document. The consent may then include wording such as:

*The undersigned, as Engineer under the agreement dated _____ (the "Agreement") between _____ ("Borrower") and the undersigned,* which is one of the contracts referred to in the Assignment of Agreements, Licenses, Permits and Contracts (the "Assignment") between Borrower and _____ ("Lender"), hereby acknowledges and consents to the terms of the Assignment.

If, as is usual, the engineer does not know the terms of the Assignment, it is not reasonable to expect the engineer to sign a document stating that it agrees to the terms. The engineer is agreeing to the assignment of the design agreement; the above provision should be edited as follows:

*hereby acknowledges and consents **to assignment of the design agreement**.*

### Collateral Assignment

Often, the consent will state that the design agreement is being used as collateral for the loan. There may, for example, be a provision stating:

*As a condition to Lender making the Loan to Borrower, Lender has required that Borrower collaterally assign the Contract to Lender pursuant to the Assignment of Contracts made by Borrower for the benefit of Lender (the "Assignment").*

The assignment may, in fact, be called a "Collateral Assignment." This does not create an obligation on the engineer or affect the engineer's rights, however. Even when the assignment is not specifically referred to as a Collateral Assignment, it is likely that the lender is considering the design agreement as collateral. Lenders generally want a security interest in all of the project assets as collateral for the financing; this includes not just the physical assets of the project but also the design agreements, construction contracts, supply agreements, and easements. The Assignment itself will generally contain wording such as:

*FOR VALUE RECEIVED, and as additional security for the Loan, Borrower hereby transfers, assigns and grants a security interest in favor of Lender, in all of the rights of Borrower in its contract with _____ (Engineer) dated _____.*

### Design Agreement

Since each lender has its own form, an engineer is typically not asked to sign a Consent to Assignment until the owner is arranging the construction loan; this may be weeks or even months after the design agreement was signed. However, some design agreements contain a simple, one-paragraph statement of consent, using language such as:

*Engineer agrees that if Developer defaults under the provisions of this Agreement, Engineer shall, if requested, continue to perform its obligations under this Agreement for Lender. Lender shall agree in writing to perform all obligations of Developer after the date Lender succeeds to Developer's rights and obligations.*

As written, the above provision only requires the lender to pay the engineer for services provided after the lender assumes the agreement; the lender has no obligation to pay any outstanding amounts owed to the engineer. At a minimum, the above provision should be edited as follows:

*...Lender shall agree in writing to perform all obligations of Developer **including payment of all outstanding amounts due to Engineer**.*

The language in AIA B101 can also be used as a guide. Before 1987, the AIA owner-architect agreements prohibited assignment of the agreement without the consent of the other party. However, the 1987 and subsequent versions of these agreements have included an exception for assignments to the lender, in recognition of the fact that such assignments are common.

Section 10.3 of AIA B101-2017 states:

*...Neither the Owner nor the Architect shall assign this Agreement without the written consent of the other, except that the Owner may assign this Agreement to a lender providing financing for the Project if the lender agrees to assume the Owner's rights and obligations under this Agreement, including any payments due to the Architect by the Owner prior to the assignment.*

Thus, the owner can assign the agreement to its lender without obtaining the A/E's consent, provided the lender assumes all of the owner's obligations, including outstanding payments. If the lender requires the A/E to execute (sign) a consent agreement, §10.4 of B101 includes the further provision:

*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.*

Section 10.4 makes it clear that the A/E is not required to execute a consent that would require the A/E to do more than what is required under the design agreement.

## Conclusion

A Consent to Assignment will often state that the engineer's consent is a condition to the loan. The typical wording is:

*Engineer acknowledges that Lender is relying on this Consent as a condition of extending the Loan.*

If the owner defaults on the loan, this statement could theoretically allow the lender to argue that it has relied on the consent to its detriment, thus giving it rights against the engineer that it would not otherwise have. However, the language is standard in consent agreements and is generally considered to be just an acknowledgment that the engineer's consent is a condition of the loan. In contrast, the engineer should not agree to provisions that suggest the consent is being signed as an inducement to the lender, as the word "induce" provides the lender a much stronger basis to argue that it has relied on the consent to its detriment. Provisions such as the following should be deleted:

*Engineer is executing this Consent of Engineer to induce Lender to advance funds under the Loan Agreement.*

The consent is being signed as a courtesy to the engineer's client, not as an inducement to the lender.▪

*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.*

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