

Third Party Assurances –Architect’s Certificates Acting for Client and Client’s Lender or Other Third Party

Summary

Many clients arrange Third Party financing for their construction projects with lending institutions, contractor surety companies, and other third parties (collectively, ‘Third Party Lenders’). It is becoming more common for the Third Party Lenders to request a certificate of the status of the project from the architect and the value of the construction completed. Given the conflict of interest that arises, architects are advised not to sign and submit any Third Party Lender forms or to send any information directly to a Third Party Lender. Architects should also consider the addition of appropriate qualifying statements and/or disclaimers to documents provided to their clients, which might be forwarded to a Third Party Lender, with or without the architect’s knowledge or consent.

BACKGROUND

This Practice Bulletin is intended to provide guidance to members and firms with respect to an increasing number of requests by Third Party Lenders, for certification from architects.

A conflict of interest arises if the architect on a project is asked to provide advice to two parties with divergent interests, which in this case is the architect’s client and the Third Party Lender. Therefore, Third Party Lenders should retain their own advisors to serve their separate purposes.

The architect has no contractual relationship with a Third Party Lender. However, the completion of the Third Party Lender’s forms which are addressed directly to them can create a duty of care between the architect and the Third Party Lender.

The Third Party Lender can request copies of the architect’s certificates for payment and general review reports from the client. Standard forms are prepared and recommended by the profession. The wording of such forms is compatible with the standard client/architect contract and the performance standards of the profession. The authorities having jurisdiction, e.g. building department, also accept these recommended forms.

In contrast, many of the forms that are being created by Third Party Lenders for use by architects request that an architect certify

matters over which the architect has no knowledge or control. These forms contain wording which may impose liability upon the architect for the representations made therein by the architect to the Third Party Lender. This constitutes an impossible extension of professional services beyond the client / architect contract; and gives rise to a duty of care owed by the architect to the Third Party Lender which would not otherwise exist at law, and/or a standard of care that is above that of the prevailing design industry (and as such, most likely uninsurable). These forms are often prepared on behalf of the Third Party Lender by individuals who lack an understanding of the architect’s professional services with regard to the design and contract administration of a project.

RECOMMENDED PROCEDURE

1. Ascertain if the client intends to submit the architect’s certificate for payment and site reports to a Third Party Lender and if so, add a disclaimer to the documents. Examples of disclaimers for use by architects include:

“It is understood and agreed that the information contained herein is for the client’s use, without any responsibility or liability of the architect to any lending institution, person or entity (lender) who may rely on the said information in relation to the lender’s financing of the client’s project.”; or



REGULATORY

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“Only [the client] shall be entitled to rely on the documents provided by [the architect] (the “Documents”) in performance of the architect’s services (the “Services”). The Documents relate solely to the Services for which [the architect] has been retained and shall not be used or relied upon by the Client or any third party for a variation or extension of the Services, any other project or any other purpose. Any unpermitted use by the Client or any third party is strictly prohibited.”; or

“This [document] was prepared by [the architect] for the above referenced project. The [document] was prepared based on and in accordance with the information available to the architect at the time of preparation. Any use which a Third Party makes of this [document] or any reliance or decisions to be made based on it are the responsibility of such Third Party. [The Architect] accepts no responsibility for damages, if any, suffered by any Third Party as a result of decisions made or actions based on this [document]. Third Parties wishing to rely upon [this document] do so entirely at their own risk, upon the express understanding that [this document] has not been prepared for their use and that [the architect] will not be liable in any manner, including liability in Contract and in Tort, for any damages whatsoever resulting from such use.”

Note: This is suggested wording only and is not a substitute for involvement of your own legal counsel. You are advised to discuss specific wording and requirements with your own legal counsel and/or insurer.

2. If requested to complete customized forms prepared by the Third Party Lender:
 - Advise the client that in lieu of completing the Third Party Lender’s forms, the information that will be provided, through submission of certificates for payment and general review reports, fulfills the requirements of standard client/architect contracts, construction contracts, e.g. Canadian

Construction Documents Committee (CCDC), and authorities having jurisdiction;

- Advise the client that copies of the above-noted architect’s documentation can be forwarded by the client to the Third Party Lender, provided that a disclaimer similar to that which is outlined in item 1 above is inserted in the document to indicate that information is provided solely for the use of the client without responsibility on the part of the architect to any third parties. The Third Party Lender can then decide whether it is satisfied with the conditions, or wishes to retain an independent consultant to review the work in progress; and
- If the client insists that the Third Party Lender’s customized forms be completed, direct both parties (client and Third Party Lender) to the Association’s website, and a copy of this Practice Bulletin.

3. For greater certainty, an architect may choose to provide services to a lending institution as an independent consultant to the lending institution. It is recommended that the architect discuss the provisions of such services, and the proposed terms of any retainer between the lending institution and the architect, with their own legal counsel and/or insurer.
4. If the client should try to amend the client/architect contract by requiring the architect to complete the Third Party Lender’s forms, do not agree, given the issues relating to both conflict of interest and exposure that exceeds the required standard of care, by law.

NOTE: The MAA does not provide legal, insurance or accounting advice. Readers are advised to consult their own legal, accounting or insurance representatives to obtain suitable professional advice in those regards.

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