



Lender Certifications: Handle With Care

Ever been told by your client at the last minute that you have to sign that document from the lender or the project loan won't close? Before you sign, read on...

It's never a happy occasion. The client calls, tells you that the lender is demanding that you sign a certification. If you don't respond immediately, the client then says, you could delay the funding of the project or even cause the loan to be denied, resulting in irreparable damage to the client.



XL Insurance agents say they see these things all the time with lenders asking for ridiculous warranties and representations of information that the architects couldn't possibly know. One typically onerous approach:

CONSULTANT'S CERTIFICATION

I hereby certify that I am a licensed architect in the State of _____. I further certify that the plans and specifications are in strict compliance with all federal, state and municipal laws, codes, rules, regulations and ordinances.

Many lenders' documents go much further, asking you to guarantee the absence of hazardous materials or asbestos or guarantee that your designs or recommendations will achieve a specified level of quality, output or result. They may call for you to certify that the building complies with the Americans with Disabilities Act (ADA). One lender wanted an architect to certify that a property was legally subdivided.

YOUR CONTRACT: YOUR FIRST LINE OF DEFENSE

Unless your contract says otherwise, your clients' lenders could exert intense pressure on you to hurriedly sign documents without having seen them before and without opportunity or sufficient time to review or negotiate for liability and insurability implications.

That's why you need to protect yourself ahead of time, by ensuring that your contract doesn't require you to "cooperate fully with the client's lender" or "to execute any documents the lender might demand."

If you refuse such contractual requirements, or if your contract is silent on the issues, then you are under no legal obligation to the lender later on. If you can't delete the provision entirely, at least modify it to state you will comply with only those lender requirements that are in your judgment, reasonable, consistent with common law, and your agreement with your client. (Common law doesn't require that you certify or guarantee anything; it's if you indemnify anyone or that you turn over ownership of your documents to anyone.)

Another solution is to insert a clause that exempts you from signing anything that might affect your insurance or increase your contractual or professional liability risk. You can also include a provision that obligates your client "prior to the date of the Agreement to append to the Agreement any document the Consultant will be required to sign during the course of the project." Because a lender probably will not have been selected before your contract negotiations, you then will be free to object and negotiate documents presented to you later if they are unreasonable or inequitable.

An alternative is to require in your contract that you be given sufficient time to review and approve documents lenders present to you for execution. You should also reserve the right to change or negotiate any language that would alter your risks or the cost or availability of insurance.

WHEN IT'S CRUNCH TIME

When your client or a lender thrusts a certification form in front of you for signature, you have the right to modify the form sufficiently to be insurable. Stand your ground and insist on the time you need to review the documents and, if necessary, get advice from your professional liability agent and attorney. Make certain you are not increasing your risk and jeopardizing your insurance coverage.

If the client objects, point to your contract. Then take a deep breath and attack the certification document.

Your job is to purge it of any onerous language. The main question to ask yourself is, What do I, as a design professional, know for a fact? You can certify your name and your professional registration number, that you visited a jobsite on a certain date and that you observed certain conditions during your visit. Your goal is to tie any certifications you make to your actual knowledge. Delete "extreme" words, such as all, any, every, strict,

complete, total. Here's an example of how you might modify our example to accomplish that:

CONSULTANT'S ~~CERTIFICATION~~ OPINION

I hereby certify that I am a licensed architect in the State of _____. ~~I further certify that~~ The plans and specifications have been prepared as part of our professional services in conformance with are in strict compliance with all applicable federal, state and municipal laws, codes, rules, regulations and ordinances.

Some lenders may want you to certify that the site is "free of all toxic materials"—despite the fact that the agreement you negotiated with your client states that you will have no responsibility for the "discovery, presence, handling, removal, or disposal" of hazardous materials at the site. Delete this language. As a fallback position, you could state that "to the best of my knowledge, information, and belief" there are no toxic materials at the site, but bear in mind that in so doing you risk undermining the good contract language you negotiated that relieved you of responsibility for toxic materials.

Some certifications call for you to state that the project will not encroach on any easements or rights-of-way. Typically, you are aware only of easements apparent in the information provided to you by the owner. Again, if you don't know something to be absolutely true, don't say so. Here is how you might modify the language of the certification to reflect your limited knowledge:

I have reviewed the locations of all easements, subsurface rights and rights-of-way in force relating to the Land, and Based on information provided by the Owner, the plans and specifications have been prepared so that the Project will not encroach over, across or upon any easements, subsurface rights or rights-of-way, but only to the extent that the Owner has advised the Consultant that they exist.

GET HELP

Talk with your attorney to be sure your agreement protects you from having to sign any onerous documents your clients' lenders may put in front of you. When such documents are presented, review them carefully with legal counsel and your professional liability insurance specialist. Often design professionals simply cave in to their clients' demands instead of asking for help when lenders' certifications land on their desks. XL Insurance agents are happy to look at lenders' documents for their clients. Given enough time, they can usually make them acceptable.



The information in this article is the product of over 30 years of front-line claims experience and is part of the educational service provided to the design industry by the Design Professional group of the XL Insurance companies. For more information, other loss prevention resources and to find an agent in your area, visit xldp.com or phone 800-227-8533 ext.2102508.

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