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ARCHITECTS & ENGINEERS NEWSLETTER

ASSIGNABILITY OF DESIGNER'S CONTRACTS

By David T. Patterson

ASSIGNMENT OF THE OWNER/ARCHITECT AGREEMENT

Section 10.3 of the AIA B101 – 2007 precludes the owner or the architect from assigning the contract to a third-party without the written consent of the other party to the owner/architect agreement. This provision protects the owner from having to deal with a design firm other than the one that was originally selected for the project. By the same token, it protects the architect from having to deal with a different entity than the entity with whom the architect agreed to provide design services. Without such a provision in the contract, either party could assign their contractual rights and obligations to a third-party who had no involvement in the original planning or designing. When an assignment occurs, the party taking on the assignment (assignee) assumes all the rights and obligations of the assigning party (assignor). The assignee steps into the shoes of the assignor and assumes all of the assignor's contractual obligations and rights. The Restatement Second of Contracts defines an assignment of a right as "a manifestation of the assignors' intention to transfer it by virtue of which the assignors' right to performance by the obligor is extinguished in whole or in part and the assignee acquires the right to such performance." Restatement Second of Contracts, Section 317 provides: (1) an assignor may assign any right unless doing so would materially change the obligation of the obligor, materially burden him, increases risks, or otherwise diminish the value to him of the original contract; (2) statute of public policy forbids assignments; or (3) the contract itself precludes assignment.

The same provision of the AIA B101 allows the owner to assign the contract to a lender providing financing for the project as long as the lender agrees to assume the owner's rights and obligations under the contract. A practical reading of this provision is that the owner can assign the agreement to the lender without the consent of the architect. This assignment would occur in the event of a default by the owner under the terms of his loan agreement. The lending institution would then have the right to step in and finish the project. The architect would have no right to object to the assignment to the lender as long as the lender agrees to assume all the rights and obligations of the owner. In reality, this provision typically fosters assignment consent forms and certification letters prepared by the lending institution.

The assignment agreements come in a variety of forms. The lending institution generates the documents. Some assignment forms are simplistic in that they simply reference a consent by the architect to the assignment to the lender in the event of a default. However, undermining the simplicity of the document is the fact that there is no patent recognition that the lending institution is assuming all rights and obligations of the owner. To avoid any dispute as to the lender's responsibility, the assignment document needs to be clear that the assignment is premised on the lending institution taking all rights and obligations of the owner.

At the other end of the spectrum is the consent agreement that creates additional obligations and responsibilities on the architect that are not contained within the owner/architect agreement. Attorneys for lending institutions attempt to create additional safeguards for their clients by language within the consent agreements. Examples are provisions that require the architect to "certify," "attest," "covenant," or other such words in reference to compliance with all codes, regulations, restrictions, ordinances, and other governmental laws. Other provisions require the architect to verify that the plans and specifications reflect all recommendations contained within the soils report. It is not unusual for the owner to choose not to follow all the recommendations of the soils engineer due to cost constraints. There are also provisions that require the architect to verify that the matters not within the architect's scope have been furnished or are available to the project. An example would be that the utilities are appropriate and in accordance with all laws, regulations, etc., when the civil engineering work is not within the architect's scope.

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Sometimes the consent agreement is followed by a second document which constitutes a "Certification Letter." Often this is a letter prepared by counsel for the lending institution to be signed by the architect to be sent to the lending institution that not only references the fact that the architect has granted consent for the assignment, but requires the architect to "certify" many of the same issues that are addressed above. This "Certification Letter" serves no purpose other than to benefit the lending institution. First, it gives the construction lending institution an additional document to provide to the permanent lending institution to assure the project will meet the criteria the permanent lending institution has set. Second, it can be used against the architect as language that constitutes a guarantee, or claims based on misrepresentation, promissory estoppel, or detrimental reliance.

These documents are presented to the architect long after the architect's contract has been signed with the owner. Often consent and certification documents are thrust upon the architect by the owner at or close to the time of a scheduled closing with a mandate for the architect to sign them so that the owner can proceed with the closing. The owner cares not that the documents created by the lending institution create new obligations and responsibilities and potential liabilities on the architect. However, the only obligations the architect owes to the owner for such an assignment is if, and only if, the lending institution agrees to assume all rights and obligations of the owner, then consent to the assignment is required. Further, Section 10.4 of the AIA B101 requires any such certificates be submitted to the architect for review at least 14 days prior to the requested date of execution. Under Section 10.4, the architect is not required to execute any certificate or consents that would require "knowledge, services, or responsibilities" beyond the scope of the architect's original agreement with the owner.

Finally, the architect does not have to sign consents or certificates if they violate the terms of Section 10.3 or 10.4 of the AIA B101-2007. The architect maintains the right of ownership and copyright in the event the project does not go forward due to an owner default leaving the lending institution with an unfinished project. The architect does have leverage. The lending institution needs the cooperation of the architect in order to finish the project so the consent forms need to be completed to the satisfaction of the architect. The benefit to the architect is the consent agreement should confirm the lending institution's agreement to pay all outstanding architect fees.

ARCHITECT AND CONSULTANT AGREEMENT

Section 10.3 of the AIA C401-2007 precludes the architect and the consultant from assigning their contract without the written consent of the other. This is an important consideration for the consultant if an issue arises as to the violation of the standard of care within the consultant's scope of work. It is in the best interest of the consultant to have the architect as a buffer between the consultant and the owner. There may be issues that arise between the architect and the consultant that address why the consultant designed an element in the project a certain way. Defending the action is much easier with the architect involved as a party to the arbitration or litigation. Consultants need to be mindful that the non-assignability clause of AIA C401-2007 has not been stricken from their contract. ■

THE LOANED-SERVANT DOCTRINE AND DESIGN PROFESSIONALS:

CONTRACTUAL CONSIDERATIONS IN LOANING EMPLOYEES TO ANOTHER DESIGN FIRM

By Frederick T. Bills

Given the present state of the design industry field and the economy, it is not uncommon for architectural and engineering firms to at times loan or lease one or more of their employees to another firm to assist in completing the design of a project. The loaned employee may have expertise that a firm lacks specific to a particular type of design, or a firm may simply require additional staff to complete its scope of work on a project. Whatever the case, it is important for design firms to understand how loaned employees on a project may impact their liability exposure, and the manner in which firms loan employees to another can have a significant impact. In Ohio, the loaned-servant doctrine may affect the loaning firm's liability.

The loaned-servant doctrine generally provides that an employee loaned by one employer (the "general employer") to another employer for the purpose of completing a particular scope of work must be considered an employee of the borrowing employer for all acts completed within that particular scope of work, even though the employee remains employed by the general employer during that period. *Halkias v. Wyckoff Co.* (1943), 141 Ohio St. 139. The doctrine has various applications depending on the posture of a case:

- It may apply to insulate the general employer from liability for torts committed by the employee while loaned to perform work for another, *Sanders v. Mt. Sinai Hosp.* (1985), 21 Ohio App.3d 249;
- It can be invoked to determine whether a specific statutory or common-law immunity springing either from the nature of the general employer or the borrowing employer may apply to bar recovery by a loaned employee injured in the performance of his work, *Vandriest v. Midlem* (1983), 6 Ohio St.3d 183;
- It may be determinative of workers' compensation issues, *Daniels v. MacGregor Co.* (1965), 2 Ohio St.2d 89;
- It may serve to attach vicarious tort liability to an entity other than the general employer of the negligent employee, *Ferguson v. Dyer* (2002), 149 Ohio App.3d 380.

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In applying the loaned-servant doctrine when attempting to assess whether the borrowing employer should be held liable for the torts of the employee, Ohio courts have frequently applied criteria similar to those analyzed in independent-contractor cases. In determining whether the borrowed employee has become a loaned-servant of a party other than his general employer, the courts focus on the **question of control**, that is, whether the general employer has retained direction and control over the employee, or whether, with respect to the particular act or acts resulting in tort liability, the control of the employee has passed to the borrowing employer "with reference not only to the result reached but to the method of reaching it." *Cincinnati Ins. Co. v. Continental Cas. Co.* (Dec. 6, 1995), Hamilton App. No. C-940884, quoting *Halkias, supra*. Courts consider factors such as which entity controls the details and quality of the work of the employee, which entity controls the hours worked by the employee, which entity controls the tools and personnel used for the scope of work, which entity determines the length of service, the type of work in question, the skill required for the work in question, the method of payment, and any pertinent agreements or contracts. *Bostic v. Connor* (1988), 37 Ohio St.3d 144; Restatement 2d § 220 of Agency.

For professional design firms, the loaning firm, or the general employer, should consider executing a contract with the borrowing firm which specifically addresses the factors considered by courts to determine the issue of control. For example, a contract should identify the specific scope of work of the borrowed employee. It should expressly state that, within the defined scope of work, the borrowed employee is in the exclusive control of the borrowing firm and the general employer has relinquished its control over the borrowed employee for the identified scope of work. The contract should acknowledge that the borrowed employee will either use the tools and instrumentalities necessary to complete the scope of work from the borrowing firm, or if not practicable, state that any tools and instrumentalities used by the borrowed employee which are provided by the general employer are to be compensated for by the borrowing firm. A provision should be included stating the parties understand that the borrowed employee provides a unique set of skills particular to the scope of work, and any arrangement for compensation or payment should be defined as the standard salary of the borrowed employee for the time spent on the scope of work plus a specific fee (which may be altered depending on the amount of time the borrowed employee spends to complete the scope of work) to the borrowing firm to be paid to the general employer for compensation of the loaned employee.

If the general employer and the borrowing firm explicitly state their intentions for the purpose of the borrowed employee's work and specifically outline via contract the factors addressed by courts in determining which party controls a borrowed employee for the purposes of liability, then courts should recognize the intent of the parties, and the general employer's liability exposure for the scope of work completed by the borrowed employee for the borrowing firm should be minimized, if not extinguished. ■

THE CLAUSE CORNER

By Frederick T. Bills

When tasked with loaning an employee to another design firm for completion of a particular project, the loaning design firm should specify its agreement with the borrowing firm in the form of a contract. The contract should outline the scope of work to be completed by the borrowed employee and should include language similar to the following:

> In return for good and valuable consideration, the sufficiency of which is acknowledged by the Parties to this Contract, Loaning Design Firm hereby agrees to provide the Employee to Borrowing Design Firm on a limited basis for the completion of Project X. The Loaning Design Firm and Borrowing Design Firm have knowingly entered into this agreement with the understanding that, for the purposes of completing Project X, the Employee will be under **the exclusive control** of the Borrowing Design Firm for completion of the Employee's scope of work related to Project X. The Parties hereto state and acknowledge the following:
>
> 1. The use of the Employee by the Borrowing Design Firm shall be limited to the completion of Project X;
> 2. The Employee offers a unique set of skills particular to the completion of Project X;
> 3. The tools and/or instrumentalities necessary for the Employee to complete his scope of work shall be provided by the Borrowing Design Firm. Any use of tools and/or instrumentalities provided by the Loaning Design Firm by the Employee for the completion of Project X will be compensated for by the Borrowing Design Firm;
> 4. The Borrowing Design Firm agrees to provide professional liability insurance, workers' compensation insurance, workers' compensation coverage, and any other insurance that may be required by law and/or pursuant to the terms of the Project X contract to cover the Employee's scope of work in relationship to Project X;
> 5. The Borrowing Design Firm agrees to defend and indemnify the Loaning Design Firm for any and all claims and/or causes of action which may arise from the Employee's scope of work on Project X;
> 6. The Borrowing Design Firm shall compensate the Loaning Design Firm for use of the Employee for a fee in X amount and at an hourly rate of X. ■

ARE DESIGN FIRMS SUBJECT TO PUBLIC RECORDS REQUEST?

By David T. Patterson

Your design firm has recently completed a project for a local school district and now receives a public records request from the local paper, taxpayer, or disgruntled contractor. Your immediate reaction is that your firm is not a public entity and therefore not subject to a public records request. Your response to the requesting entity is to advise them that you are not subject to the request and therefore do not intend to provide the requested documents. The requesting authority then files a mandamus action in common pleas court asking for the records to be produced, but also requesting court costs, attorneys' fees, and statutory damages.

The Ohio Public Records Act, R.C. 149.43, provides the following:

> "Public Record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the non-profit or for-profit entity operating the alternative school pursuant to Section 3313.533 of the Revised Code."

On the face of the statute, there is nothing to suggest that it pertains to a private entity. In fact, it clearly defines public entities that are subject to the statute. The statute has a number of records and documents that it specifically excludes from the meaning of "public record," but none of those exceptions address records kept by a private entity.

The court reviews both the requestor's arguments as well as the design firm's arguments as to whether or not the latter is subject to a public records request. Courts are mindful that the Act is accorded liberal construction in favor of access to public records. But at the same time, the requesting entity must establish entitlement to a favorable ruling on the mandamus action by clear and convincing evidence. Clear and convincing evidence is a measure of degree of proof which is more than a mere "preponderance of the evidence," but not to the same extent as "beyond a reasonable doubt" required in criminal cases. In order to determine whether or not a private entity is required to produce documents, courts have set forth criteria to provide some guidance. The criteria the courts have created entitle relief to the requesting party in a mandamus action against a private entity if:

1) The private entity prepares records in order to carry out the responsibilities of a public office;
2) The public office is able to monitor the private entity's performance; and
3) The public office has access to the records for the purpose of monitoring the private entity.

In a case involving the construction of Paul Brown Stadium, the football stadium of the Cincinnati Bengals, The Cincinnati Enquirer newspaper submitted a public records request to the contractor and construction manager seeking information on cost overruns. Both the contractor and the construction manager contested the records request pertaining to potential cost overruns. The Ohio Supreme Court reviewing the mandamus action on appeal looked to the contract of the construction manager and noted that the construction manager agreed to "furnish its best skill and judgment in furthering the interest of Owner." Further, the contract referred to a "construction team" consisting of the Hamilton County Board of Commissioners, the contractors, the project architect, and the construction manager. The Ohio Supreme Court, considering the three criteria, determined that all qualifications had been met and ordered the production of the requested documents as well as attorneys' fees in favor of The Cincinnati Enquirer, *Cincinnati Enquirer v Krings* (2001), 93 Ohio St.3d 654.

It is far too simple to assert that the architectural firm or the engineering firm is a private entity and therefore not subject to a public records request. There are exceptions that are clearly spelled out in the Act such as whether the documents constitute a trade secret that need to be analyzed. Therefore, when receiving a public records request under R.C. 149.43 pertaining to a public project, the design firm must carefully scrutinize what documents are being requested and respond within a reasonable period of time. Furthermore, it is imperative to contact the client and advise them that the design firm has received a public records request. By doing so, the client is given a chance to advise you if they believe any of the exceptions apply before documents are produced. ■

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