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Presenting a live 90-minute webinar with interactive Q&A

Construction Loan Funding and Title Insurance: Best Practices in Disbursement and Documentation

Drafting Effective Future Advance, Budgeting and Draw Provisions; Lien Waivers, Title Updates and Endorsements

TUESDAY, SEPTEMBER 12, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:


Euchung Ung, Partner, Kleinberg Kaplan Wolff & Cohen, New York
Sample Cash Management Provision

The Lender shall establish in Borrower’s name and shall maintain at a banking institution a Collateral Account (the “Collateral Account”), which Collateral Account shall be subject to Lender’s control. Lender shall have no obligation (but may in Lender’s sole discretion) to disburse funds from the Collateral Account if an Event of Default has occurred and is continuing. The Collateral Account shall be maintained in the name of Borrower, but subject to the exclusive dominion and control of the Lender (subject to the provisions of this Agreement) and Borrower shall have no right of withdrawal therefrom. Borrower shall, within five (5) days after demand and at the sole cost and expense of Borrower, execute and deliver to Lender such documents, instruments and notices and do such other acts as Lender may reasonably require to implement and maintain the arrangements contemplated herein. If Borrower fails to timely execute and deliver any such documents, instruments and notices, Borrower hereby appoints Lender as its attorney-in-fact, coupled with an interest, with full authority to execute the same. Borrower shall pay for all expenses of opening and maintaining all of the Collateral Account on demand. The Collateral Account shall not constitute a trust fund and may be commingled with other monies held by Lender and/or Lender’s affiliates.

Notwithstanding anything to the contrary contained in this Article 2, from and after the occurrence of an Event of Default, Lender, at its option, may at any time and from time to time withdraw any funds from the Collateral and any other funds of Borrower then in the possession of Lender and apply such funds to the items for which the Collateral Account was established or to the payment of the Debt, in such order, proportion and priority as Lender may determine in its sole discretion. Lender’s right to withdraw and apply any of the foregoing funds shall be in addition to all other rights and remedies provided to Lender under the Loan Documents.

(a) Release of Reserve to pay Taxes. Lender shall apply a portion of the Reserve to the payments of Taxes (as defined in the Mortgage). In making any payment relating to Taxes, Lender may do so according to any bill, statement or estimate procured from the appropriate public office (with respect to Taxes) without inquiry into the accuracy of such bill, statement or estimate or into the validity of any tax, assessment, sale, forfeiture, tax lien or title or claim thereof. Notwithstanding anything to the contrary, Borrower shall deliver or cause to be delivered all tax bills, statements and estimates within three (3) days of receipt thereof (“Borrower’s Tax Bill Obligation”), and Lender shall have no responsibility to make any payment relating to Taxes (to the extent same is required by this Agreement) unless Borrower complies with Borrower’s Tax Bill Obligation. If a payment relating to Taxes is insufficient to pay such Taxes, Borrower hereby agrees to supplement the difference between such payment and the amount of the Taxes, and if Borrower fails to do so, Borrower hereby authorizes Lender to make a protective advance in accordance with Section 23 of the Mortgage in an amount sufficient to make up the deficiency at least ten (10) days prior to the due date for any such Taxes.

(b) Release of Reserve to pay Insurance Premiums. Lender shall apply a portion of the Reserve to the payment of Insurance Premiums (as defined in the Mortgage). In making any payment relating to Insurance Premiums, Lender may do so according to any bill, statement or estimate procured from the insurer or its agent without inquiry into the accuracy of such bill, statement or estimate. Notwithstanding anything to the contrary, Borrower shall deliver or cause
to be delivered all bills, statements and estimates in regards to Insurance Premiums within three (3) days of receipt thereof ("Borrower’s Insurance Bill Obligation"), and Lender shall have no responsibility to make any payment relating to Insurance Premiums (to the extent same is required by this Agreement) unless Borrower complies with Borrower’s Insurance Bill Obligation. If a payment relating to Insurance Premiums is insufficient to pay such Insurance Premiums, Borrower hereby agrees to supplement the difference between such payment and the amount of the Insurance Premiums, and if Borrower fails to do so, Borrower hereby authorizes Lender to make a protective advance in accordance with Section 23 of the Mortgage in an amount sufficient to make up the deficiency at least ten (10) days prior to the due date for any such Insurance Premiums.
Sample Budget Shifting Provision

(a) Subject to the prior approval of Lender, which shall not be unreasonably withheld, the Borrower may revise the Budget from time to time to move amounts available under the Hard Costs Budget line denominated “Contingency” to other Hard Costs Budget line items, and/or to move amounts available under the Soft Costs Budget line item denominated “Contingency” to other Soft Costs Budget line items. Notwithstanding anything to the contrary contained herein, provided no Event of Default shall have occurred and be continuing, Borrower shall have the right to reallocate, without the prior approval of Lender, up to $[insert amount in numbers] of the total amounts available under the Soft Costs Budget line item denominated “Contingency” to other Soft Costs Budget line items.

(b) If there is a savings in a particular Budget line item, and if such savings is substantiated by evidence reasonably satisfactory to Lender, the Borrower shall have the right, upon prior approval of Lender, which approval shall not be unreasonably withheld, to reallocate such savings to another Budget line item with respect to which additional costs have been or may be incurred; provided, however, that, Borrower shall in no event or under any circumstances have the right, without Lender’s approval in Lender’s sole discretion: (i) to reallocate any savings in a Soft Costs Budget line item to other than another Soft Costs Budget line item, (ii) to reallocate any savings in a Hard Costs Budget line item to other than another Hard Costs Budget line item, or (iii) to cause a reallocation to occur that, in Lender’s, its counsel’s or the Title Insurer’s opinion, may be in contravention of the applicable Law governing Liens, or may adversely affect or impair in any manner whatsoever the Lien or the priority of Lien of the Mortgage.

(c) If Borrower becomes aware of any change in Project costs which will increase the costs set forth in one or more line item(s) reflected on the Budget then in effect, Borrower shall promptly notify Lender in writing and promptly thereafter submit to Lender for its approval a revised Budget. Any reallocation of any line item in connection with cost overruns shall be subject to Lender’s approval in Lender’s reasonable discretion except as set forth in clauses (a) and (b) above. Lender shall have no obligation to make any further Advances for Project costs in such line item subject to costs overruns unless and until the revised Budget so submitted by Borrower is approved by Lender as set forth in this Section, and Lender reserves the right to approve or disapprove any revised Budget in its sole discretion (except with respect to reallocations made in accordance with clauses (a) and (b) above).
Sample Draw Request

[BORROWER’S LETTERHEAD]

DRAW REQUEST NO. [insert request number]

TO: [insert name of lender] (“Lender”)
LOAN NO. [insert loan number]
PROJECT [insert project number]
LOCATION [insert location number]

BORROWER [insert borrower name]
[insert borrower address]
[insert borrower address]

FOR PERIOD ENDING [insert date]

In accordance with the Construction Loan Agreement in the amount of $[insert amount in numbers] dated [insert date], between Borrower and Lender, Borrower requests that $[insert amount in numbers] be advanced from Loan proceeds. The proceeds should be credited to the account of [insert account name], Account No. [insert account number], at [insert bank information].

1. CURRENT DRAW REQUEST FOR DIRECT COSTS $[insert amount]
2. CURRENT DRAW REQUEST FOR INDIRECT COSTS $[insert amount]
3. TOTAL DRAW REQUEST $[insert amount]

Very truly yours,

[BORROWER]
IF "" = "1" "Error! Unknown document property name."
### AIA Document G703™ – 1992

**Continuation Sheet**

AIA Document G703™, APPLICATION AND CERTIFICATION FOR PAYMENT, containing Contractor’s signed certification is attached.

In tabulations below, amounts are stated to the nearest dollar.

Use Column I for Contracts where variable retainage for line items may apply.

<table>
<thead>
<tr>
<th>ITEM NO.</th>
<th>DESCRIPTION OF WORK</th>
<th>SCHEDULED VALUE</th>
<th>WORK COMPLETED FROM PREVIOUS APPLICATION (D x E)</th>
<th>THIS PERIOD</th>
<th>MATERIALS PRESENTLY STORED (NOT IN WORK)</th>
<th>TOTAL COMPLETED AND STORED TO DATE (D x E + F)</th>
<th>BALANCE TO FINISH (G - H)</th>
<th>RETAINAGE (IF VARIABLE RATE)</th>
</tr>
</thead>
</table>

**CAUTION:** You should sign an original AIA Contract Document, on which this text appears in red. An original assures that changes will not be obscured.


IF "" = "" ""Error! Unknown document property name.""
Sample Off-Site Materials Clause:

Lenders shall from time to time make Advances in accordance with the terms of this Agreement for the purchase of certain finally assembled, fully fabricated major building materials, which are ready for delivery to the Property but are temporarily stored at off-site locations other than the Property (collectively, “Off-Site Building Materials”), approved by Lender’s Consultant prior to the delivery to the Real Property or incorporation into the Improvements of such Off-Site Building Materials; provided, however, that in the case of each such Advance, the conditions contained in the above paragraph of this Section have been satisfied with respect to the Off-Site Building Materials, and Lender shall have received (A) a written statement from the manufacturer or storer of such Off-Site Building Materials (or a provision in the purchase order therefor to such effect) that Lender, Lender’s Consultant and either of their agents may fully inspect such Off-Site Building Materials at all reasonable times and (B) evidence that the aggregate amount of such Advances for Off-Site Building Materials and which is outstanding at any given time does not exceed $[_________].

Lender may request that Borrower deliver or cause to be delivered to Lender the following documents within five (5) Business Days after the date on which any Advance for Off-Site Building Materials is made: (A) bills of lading, warehouse receipts, delivery receipts or other documents of title with respect to the Off-Site Building Materials for which such advance is made, which shall be in form and substance reasonably satisfactory to Lender in all respects; (B) a Certificate of Borrower in form and substance reasonably satisfactory to Lender in all respects to the effect that such Off-Site Building Materials are either owned or will be owned by Borrower upon payment of the bills and invoices therefor (which payment in full (subject to Retainage) shall occur promptly after disbursement of the Advance for such materials) outright, free and clear of all Liens, other than liens and security interest in favor of Lender, and that Borrower has complied with all of the terms of this paragraph. No Advance for Off-Site Building Materials shall be made unless the Off-Site Building Materials covered thereby are stored at a location, other than the Real Property, acceptable to Lender and Lender’s Consultant, and are (y) stored in a designated and secure area, conspicuously marked to show that they are the subject of a security interest by Lender and said Off-Site Building Materials will not be moved except in connection with their delivery to the Real Property or to another storage location that conforms with the requirements of this paragraph; and (z) effectively segregated (to the extent reasonably possible) from all other materials of whatever kind located at the off-site location in question.
Sample Tenant Improvement Advance Clause:

Lender shall make Advances for tenant improvements that are to be constructed within space subject to approved Leases. Advances for tenant improvements shall not exceed [_______] Dollars ($[____].00) per square foot of net [rentable] area. At Borrower’s option, Lender may make a single Advance for tenant improvements under a specified Lease or Lender may make periodic Advances for tenant improvements as construction progresses, subject to Retainage, but in no event shall Lender make advances of Loan proceeds not frequently than once per month in accordance with Sections [____] and [____] hereof. Lender shall not be obligated to make the final Advance of the Loan for tenant improvements under a given Lease unless the following conditions shall have been satisfied, to the extent required by Lender:

(a) Lender shall have received such evidence as Lender may require that construction has been completed lien-free, in a good and workmanlike manner, in accordance with applicable requirements of all Governmental Authority and substantially in accordance with tenant improvement plans and specifications satisfactory to Lender;

(b) to the extent required by applicable Governmental Authority for the use and occupancy of the tenant improvements, certificates of occupancy and other applicable Permits and releases shall have been issued with respect to the tenant improvements and copies thereof shall have been furnished to Lender;

(c) Lender shall have received a reasonably satisfactory set of as-built plans and specifications for the tenant improvements;

(d) a valid notice of completion shall have been recorded if required by any Governmental Authority;

(e) Lender shall have received, from the tenant accepting the work, a tenant estoppel certificate, subordination agreement or subordination, nondisturbance and attornment agreement, as Lender may require, in form and content satisfactory to Lender in its reasonable discretion; and

(f) Lender shall have received a reasonably satisfactory endorsement to its title insurance policy.