

# **PAYMENT STRATEGIES IN A DOWN ECONOMY: CONSTRUCTION LENDER/GENERAL CONTRACTOR RELATIONSHIP**

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**2<sup>nd</sup> Annual Real Estate &  
Construction Law Seminar**

# Overlooked Strategies

- **Due Diligence**
  - Financial
  - Previous Projects/Litigation
  - Design Team
- **Key Contract Provisions**
  - Right to Stop Work
  - Right to Proof of Financing
  - Right to Hold Owner in Default
  - Owner/Developer Pays for Material Up Front
  - No Retainage on Materials

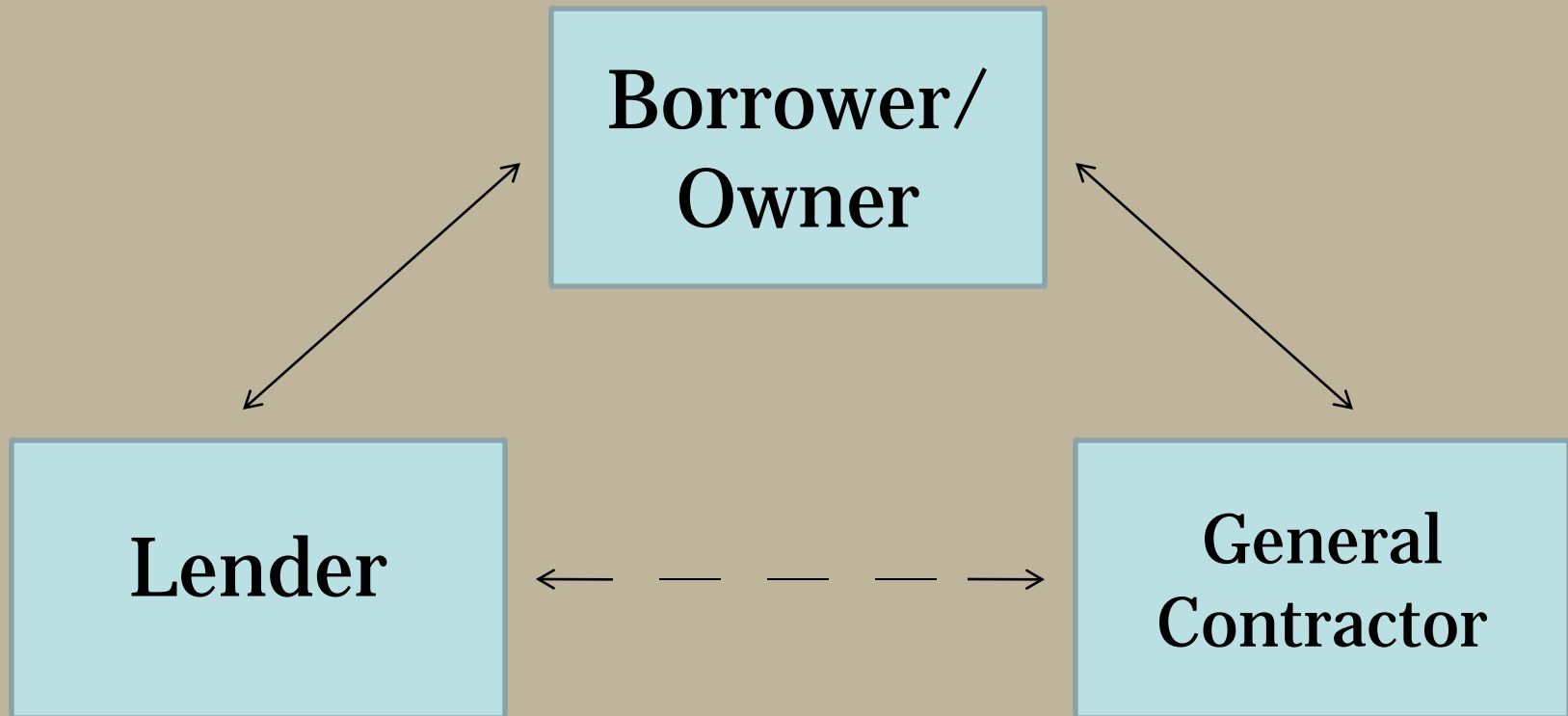


# Overlooked Strategies

- **Innovative Project Management**
  - Extra Precautions in Material Procurement
  - Loan to Owner
  - Investment in Project in Lieu of Payment
  - Deeding of Property in Lieu of Payment
  - Security Interest in Owner's Other Property
  - Disciplinary or Criminal Complaint
- **Lender – General Contractor Relationship**

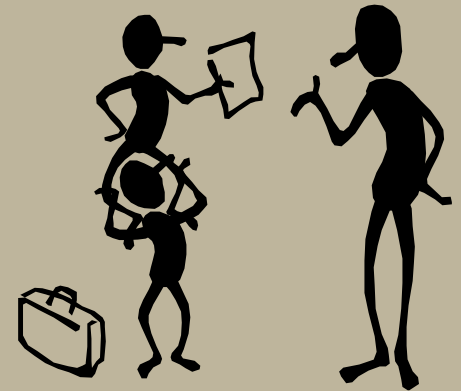


# Overlooked Strategies



# Lender – GC Relationship

- Most often over-looked because there are separate contracts with Lender and GC
- Inception – Lender & GC not in conflict
- Borrower Default – Conflicts may arise between Lender & GC because of differing objectives
- When conflicts arise, the parties must either:
  - Refer to the contractual arrangement or ***consent to assignment*** entered at inception; or
  - If no agreement or assignment exists, rely upon the relevant law.



# Initial Documentation

- At the inception of a project:
  - Lender has vested interest to complete the project with minimal delay or interruption
  - General contractor wants to be paid for work performed under the general contract
- Most common agreement entered between Lender and GC is a consent to the collateral assignment of general contract
- Consent can set forth terms for how the Lender and GC deal with each other both before and after borrower default



# Consent To Assignment

- Important points often covered by consent to assignment:
  - GC agrees to continue work upon default notice
  - GC agrees to give notice & opportunity to cure developer default
    - Is GC obligated to continue work during cure period?
  - No reliance on loan documents
    - Can GC be a 3<sup>rd</sup> party beneficiary of the loan agreement?
  - Modifications and Changes Orders to the general contract
    - Does the GC need the Lender's consent?
    - Consent for all change orders?



# Consent To Assignment

- Most controversial provision will be Lender's payment obligations for work prior to borrower default:
  - Lender reluctance to pay GC monies owed by developer
  - GC wants payment for work which benefits the Lender
  - Lender is focused on reducing payments for costs that developer's responsibility
    - GC does not want to chase an empty pocket
  - Lender does not want to pay twice for same work or materials
    - Is the Lender's written notice of default the payment trigger?
  - Lender & GC may compromise by having Lender liable for payments for work performed during 30-day period prior to developer's default **or** for work performed following developer's default but before the Lender's notice that it will proceed with the general contract.





# Relevant Legal Theories

- If no consent or agreement exists with Lender:
  - Possible fiduciary duty owed by lender to GC
  - Promissory estoppel
  - Unjust enrichment
  - Intended third-party beneficiary of loan



# Conclusion

- Consider nature of relationship at inception
- Agreement setting forth scope and expectations
- Legal theories for payment



# Questions?



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