



XL Group
Insurance



Design Professional

10 'Must-Have' Contract Clauses

Your firm's survival in the marketplace may depend as much on effective risk management as anything else. And a key ingredient in managing risk is having the right professional services contract in place. A strongly worded, legally enforceable, written contract can spell the difference between a great project with a client who's likely to work with you again and a project you wish you had never agreed to take on.

To help you build a better contract, XL Group's Design Professional team has compiled this overview of 10 clauses we consider "must-have" parts of every contract.

Of course, this document, while meant as a quick guide, is in no way intended as a substitute for the full *XL Group Contract eGuide for Design Professionals: A Risk Management Resource for Architects and Engineers*, available exclusively to our customers.

1. BILLING AND PAYMENT

WHAT	Contract language should address issues such as when payment is due, the penalties for late payment (e.g., interest, collection costs) and your rights in the event of non-payment (e.g., suspension or termination of services).
WHY	The more precisely you define and adhere to your payment terms, the more likely it is you'll be paid promptly and avoid fee-related disputes. Such disputes are often disagreeable and can even lead to the loss of future work from the same client.
DON'T ACCEPT	Language that would permit your client to withhold payment of disputed invoices.
DON'T FORGET	One of the most effective payment collection devices is to withhold submission of the client's documents for plan check or permit approval or for use by the client until you are fully paid.

2. CERTIFICATIONS, GUARANTEES AND WARRANTIES

WHAT	Your contract should never promise to assure the total accuracy of something (e.g., a subcontractor's HVAC installation) or confirm absolute compliance with a standard (e.g., ADA compliance).
WHY	By certifying, guaranteeing or warranting something, you are assuming a level of liability well beyond the legally required standard of care. Your professional liability insurance is not intended to cover breach of contract or warranty, the assumption of someone else's liability or a promise to perform to a standard of care higher than legally required. The smallest error, whether caused by you or someone else, could lead to a claim of breach of warranty.
DON'T ACCEPT	Other terms that, in effect, guarantee, such as "all," "every," "insure," "ensure," "assure," "state" or "declare."
DON'T FORGET	<ul style="list-style-type: none">You can substitute contract language that reduces your risk, doesn't jeopardize your professional liability insurance coverage and answers your client's concerns.Certifications, warranties and guarantees may also be found in the fine print of a client's purchase orders.

3. CONSEQUENTIAL DAMAGES

WHAT	Your contract should include a Waiver for Consequential Damages, those indirect expenses (e.g., loss of profit) that are remotely connected to a design professional's failure. This should include a provision that makes it clear that neither you nor your client will be held responsible for consequential damages because of any alleged failures by either party.
WHY	If you are to be held responsible for consequential damages, you could be sued for damages totally out of proportion to your fee or grossly exceeding the cost of repairing the actual damage.
DON'T ACCEPT	Any language in a client-drafted contract that would make you responsible for consequential damages.
DON'T FORGET	<ul style="list-style-type: none">If your contract remains silent about consequential damages, you can still be sued for them.Having a negotiated limit of liability does not take the place of the additional protection against liability for consequential damages. Be sure your Limitation of Liability and Consequential Damages clauses are coordinated with each other.

4. JOBSITE SAFETY

WHAT	Your contract should include a Jobsite Safety provision that makes clear that responsibility for site safety and construction means and methods remains with the contractor, not the design professional.
WHY	Assuming any responsibility for safety programs and safety procedures, either by contract or by your actions, can have serious economic consequences.
DON'T ACCEPT	Any language that calls for your "supervision" on a jobsite, or any extreme contract language that calls for you to "assure strict compliance" with plans and specifications or to provide services beyond the traditional standard of care. Delete any client-provided contract clause that gives you control or charge of the contractor, including the authority to stop work.
DON'T FORGET	<ul style="list-style-type: none">What you say and do during the project could change the terms of the contract.You cannot ignore your duty as a licensed professional to step forward in the face of imminent threats to life or safety about which you are aware, contractual language of exoneration notwithstanding.

5. LIMITATION OF LIABILITY (LOL)

WHAT	Include in your contract a Limitation of Liability clause, an agreement between you and the client to establish the maximum liability you will be responsible for if there is a claim by the client on the project.
WHY	Any professional firm that continually accepts unlimited project risks can eventually expect huge losses and, perhaps, financial disaster. An LoL allocates a project's risk in some reasonable proportion to the profits and other benefits to be derived by each party.
DON'T ACCEPT	As a general rule, any contract without an LoL. (Some exceptions are projects for public entities, which almost never agree to an LoL.) Also, don't use a preprinted liability cap in your agreement, as it may weaken the premise that the clause was negotiated.
DON'T FORGET	<ul style="list-style-type: none">You may have more success in obtaining a Limitation of Liability from your client if you use a preprinted form that contains an LoL provision with a blank space you can use to specify the liability cap.Be sure to select a limit that is meaningful (e.g., an amount tied to your project fees) and takes into account potential damages on a project.

6. MEDIATION

WHAT	Mediation is an approach to dispute resolution, typically voluntary, that helps disputing parties reach agreement among themselves, thus maintaining or reopening their communications. Your contract should include a clause that calls for mediation as the first step in settling disputes.
WHY	Litigation and arbitration proceedings can be both expensive and time consuming, cutting into a firm's billable hours, hurting morale and lowering productivity. These adversarial processes can also destroy client-consultant relationships.
DON'T ACCEPT	A contract that doesn't call for mediation as the first step in dispute resolution. Otherwise, you'll have a difficult time convincing a client to use mediation when the two of you are in the middle of a dispute.
DON'T FORGET	Mediation has a remarkable track record, especially when employed at the appropriate stage of the dispute. The average rate of settlement in mediated cases is nearly 85 percent. ¹

7. SCOPE OF SERVICES

WHAT	The scope of services is a detailed description of those services you will provide to the client, those you can provide for an additional fee and those you will not provide. It should be as precise and complete as possible. It should leave no ambiguity or question as to whether or not some duty or deliverable item is included within your basic fee.
WHY	Unless your scope is carefully defined, you may not be able to differentiate included services from extra services not contemplated in your basic fee. This makes it difficult to charge for any additional services you are required to perform.
DON'T ACCEPT	Any client-drafted clauses that ask you to agree (or even certify) that the scope of services proposed will be "adequate to meet the project needs," that you will "provide any and all professional services necessary for completion of the project" or similar sweeping language.
DON'T FORGET	Detailed checklists of all potential services can help you avoid overlooking scope items. You can use the scope of services lists in the AIA, EJCDC or other professional association agreements.

8. STANDARD OF CARE

WHAT	Your contract should include a clause that affirmatively defines the standard of care to which you will perform. The standard of care for design professionals requires only that you perform your services with the degree of skill and care ordinarily exercised by other members of your profession under similar circumstances, at the same time and in the same or a similar locale.
WHY	Any contract language that seeks to raise your standard of care increases your risk. Your professional liability insurance will not cover you for this increased exposure, since it represents an assumption of additional liability for which you would not otherwise be responsible.
DON'T ACCEPT	A client's contract language that requires you to "perform to the highest standard of practice." Nor should you accept broad or ambiguous language such as "appropriate" or "necessary," or provisions that would have the client making a unilateral determination as to the performance of your services, such as "to the satisfaction of the Client," or "in the Client's sole judgment."
DON'T FORGET	Nowhere in the Standard of Care doctrine or definition is there any mention of "perfection."

¹ A Guide to Mediation and Arbitration for Business People (New York: American Arbitration Association, 2003)

9. TERMINATION

WHAT	Your contract should include a termination clause that defines the circumstances (e.g., nonpayment of fees) under which either party may end its legal relationship and, depending on who initiates the action, specify the rights that each party has when the termination occurs.
WHY	A contract that does not adequately address the subject of termination is an invitation to a dispute. Reasons you may want to terminate include: client's breach of any material condition, inability to reach agreement on additional services, changes in the parties or substantially changed conditions.
DON'T ACCEPT	Language that permits only the client to terminate or that transfers the ownership of documents.
DON'T FORGET	<ul style="list-style-type: none"> Your firm will incur substantial shutdown costs if you are terminated prematurely from a project to which you have heavily committed your resources. You might prefer to have the option to temporarily suspend your services and keep the contract in force until the client cures the breach.

10. THIRD-PARTY BENEFICIARIES

WHAT	Your contract should include a provision that addresses the issue of third-party claims.
WHY	If your negligence damages others who reasonably and foreseeably could have been damaged, you may be liable to them. In most jurisdictions, they would not need a contract with you in order to file a claim and win.
DON'T ACCEPT	A contract that doesn't address the issue, since, in the absence of such a clause, a court may follow what it believes to be precedent or it may make new law based on its predilections.
DON'T FORGET	The legal obligations of design professionals to third parties are difficult to interpret. Parties to a contract can establish many of their own rules to guide judicial interpretation. As with all contract issues, however, be sure to consult with your attorney and insurance agent or broker.

The Work Goes On...

There never seems to be enough time to keep up with all the risk management best practices and industry information that can help you succeed. That's why XL Group's Design Professional team offers you a full menu of online educational resources:

- **Loss Prevention Library:** Documents in PDF format offer invaluable advice on topics ranging from client selection to establishing contract protocols.
- **Professional Liability Education Program:** Core and elective courses that you can self-administer are available online 24/7 from our unique Learning Management System. Topics include contract review, project forms and checklists and improving your negotiation strategies.
- **Contract Training Modules:** Download management training exercises based on content from the *XL Group Contract eGuide for Design Professionals*. Examples include a primer on professional services agreements and a training module on deal makers and deal breakers.
- **Loss Prevention Publications:** Downloadable practice management newsletters, trend alerts and articles that help your firm prevent claims and reduce your cost of loss.

You may also want to learn more about our Small Firm Program, an innovative program geared to the professional liability insurance needs of growing firms. Visit xldp.com to find out how you may be able to take advantage of our expertise while also saving on your premiums.

Here's what one design professional had to say about the power and convenience of our educational resources:

"I don't have the same challenges of large firms; I don't have the same type of need as larger corporations. When I understand where the risks lie, I can monitor the things that my business needs to avoid. I don't have a staff to help manage me manage risk; I only have me and I rely on my agent to deliver the risk management information XL Group provides. Basically for me it's keeping up with the legal aspects of liability concerns. Taking XL Group Loss Prevention courses and attending their loss prevention seminars presented by my agent definitely helps me understand the issues. Then I can figure out how NOT to get into difficulty—I can foresee problems—that helps me avoid them."

—Sukumar B. Patel, SPI Engineering

Contact
Design Professional
 Phone: +1 800 227 8533 x2102508

30 Ragsdale Drive, Suite 201, Monterey, CA 93940

xldp.com

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