



## Design Professional

Your firm's survival in the marketplace may depend on effective risk management as anything else. A key ingredient in managing risk is having the right professional services contract in place. To help you build a better contract, AXA XL's Design Professional team has compiled this overview of 10 clauses we consider "must-have" parts of every contract.

This document is a quick guide. For a broader look, refer to AXA XL's *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 that you will be paid promptly and avoid fee-related disputes.

##### DON'T ACCEPT

Language that would permit your client to withhold payment of disputed invoices.

##### DON'T FORGET

One of the most effective collection practices 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 or LEED Certification).

## WHY

By certifying, guaranteeing or warranting something, you are assuming a level of liability well beyond the legally required standard of care. The smallest error or omission, whether or not caused by you could lead to a claim of breach of warranty.

## DON'T ACCEPT

Other terms that would act as a guarantee, such as “all,” “every,” “ensure,” “assure,” “state” or “declare.”

## DON'T FORGET

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, which are indirect expenses (e.g., loss of profit) that are remotely connected to a design professional's negligence. This provision 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 responsible for damages out of proportion with your fee and exceeds 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

If your contract remains silent about consequential damages, you can still be held responsible.

# 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 is the contractors, not the design professional.

## WHY

Assuming any responsibility for safety programs and safety procedures, either by contract or by your actions, can increase your liability.

## 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. Delete any client-provided contract clause that gives you control or charge of the contractor, including the authority to stop work.

## DON'T FORGET

- 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 safety about which you are aware on the jobsite.

# 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

A Limitation of Liability fairly allocates liability to a reasonable proportion of fees.

## DON'T ACCEPT

Any contract with unlimited liability.

## DON'T FORGET

- You may have more success in obtaining a Limitation of Liability from your client if you use your own contract containing this language.
- 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 a dispute resolution option that helps disputing parties reach agreement among themselves. 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. Attempt to settle claims with a neutral third party.

## 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 you are in the middle of a dispute.

## DON'T FORGET

Mediation has a remarkable track record. The average rate of settlement in mediated cases is nearly 85 percent.<sup>1</sup>

## 7

### Scope of services

#### WHAT

The scope of services is a detailed description of those services that you will provide to the client, including 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

Your scope defines your role and responsibility in the project.

#### DON'T ACCEPT

Any client-drafted clauses that ask you to agree (or certify) to a scope of services that adequately meet the project needs or “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 currently under similar circumstances and in the same or similar locale.

#### WHY

Any contract language that seeks to raise your standard of care increases your risk.

#### 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.”

## 9

### Termination

#### WHAT

Your contract should include a termination clause that defines the circumstances (e.g., nonpayment of fees) under which either party may terminate the contract and 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.

#### DON'T ACCEPT

Language that permits only the client to terminate or does not provide an opportunity to cure any breaches of the contract.

#### DON'T FORGET

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 by non-parties (people that are not part of your contract).

#### WHY

If your negligence damages others who reasonably and foreseeably could have been damaged, you may be liable to them. Some states hold that a professional has no duty of care to a third-party for economic loss when no contract exists between them.

#### DON'T ACCEPT

A contract that doesn't address the issue of third-party claims. In the absence of such a clause, a court may follow what it believes to be precedent or it may make new law.

#### 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.

#### 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 AXA XL provides.*

*Basically for me it's keeping up with the legal aspects of liability concerns. Taking AXA XL's 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

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