



# Understanding Contract Basics: A Monograph

AN EDUCATION COURSE BASED ON  
THE XL INSURANCE CONTRACT GUIDE FOR DESIGN PROFESSIONALS:  
A RISK MANAGEMENT HANDBOOK FOR ARCHITECTS AND ENGINEERS

# Notice to Participants

The Design Professional group of the XL Insurance companies is convinced that professionals who are knowledgeable about liability exposures and who use good loss prevention techniques are in a position to avoid claims or mitigate their exposure. Our professional liability education programs are designed to introduce firms to loss prevention concepts and procedures and to reward, through premium credits, our policyholders who take the time and effort to educate their employees.

*The XL Insurance Contract Guide* was written for the exclusive use of policyholders, agency representatives and panel counsel in its design professional program and is not available for sale to the general public.

*“XL Insurance” is a registered trademark of XL Capital Ltd. XL Insurance is the global brand used by member insurers of the XL Capital Ltd. group of companies.*

*Coverages are underwritten by Greenwich Insurance Company, Indian Harbor Insurance Company, XL Specialty Insurance Company, and XL Insurance Company Limited—Canadian Branch. Certain coverages not available in all jurisdictions.*

---

XL Design Professional is a Registered Provider with The American Institute of Architects Continuing Education Systems. Credit earned on completion of this program will be reported to CES Records for AIA members. Certificates of Completion for non-AIA members are available on request.

This program is registered with the AIA/CES for continuing professional education. As such, it does not include content that may be deemed or construed to be an approval or endorsement by the AIA of any material of construction or any method or manner of handling, using, distributing or dealing in any material or product.



---

**Published by the Design Professional group of the XL Insurance companies**

30 Ragsdale Drive, Suite 201  
Monterey, CA 93940-7811  
800-227-8533  
831-657-2500  
www.xldp.com

in Canada:  
48 Yonge Street, Suite 400  
Toronto, Ontario M5E 1G6  
Canada  
800-820-2721  
416-363-3690

# The Program

The purpose of this program is to assist you in developing professional services agreements that are reasonable and fair to both you and your client, and that minimize your risks or liability exposures.

Your clients understand that it is important to reach an equitable and mutually satisfactory agreement. If you have legitimate reasons for requesting changes in a proposed contract, clients frequently agree to the modifications. You must be able to explain and substantiate your position, however. To do that, you will need to master some basic concepts about contracts.

## LEARNING OBJECTIVES

This program is designed to help you review client-developed agreements and to sharpen your ability to negotiate with your client on contractual matters that affect your professional liability. It is not designed to turn you into a legal expert, nor should it be used as a substitute for consultation with your attorney and professional liability insurance agent or broker.

The test consists of Part 1, true/false questions on Contract Basics, and Part 2, multiple-choice questions on Specific Contract Language.

### Contract Basics

Through the completion of Part 1 of this program, you will:

- Understand the importance of having a written agreement for your professional services.
- Learn concepts to manage risk through your business practices and contract formation.
- Be able to identify the elements of a contract and understand contract terminology.
- Know the basic rules of contracts and the steps to an agreement.

### Specific Contract Language

In Part 2, through a review of sample clauses in key contract areas, you will:

- Be able to recognize onerous language and acceptable provisions.
- Learn to revise clauses to reflect a more equitable allocation of risk.
- Be better prepared to justify these modifications.
- Acquire strategies to provide alternative or additional language to protect yourself.

## GENERAL INSTRUCTIONS

1. Read the detailed instructions at the beginning of each section.
2. Fill in the answer sheet on page 2 as you complete the test.
3. Return **only the answer sheet** to the person in your firm who is responsible for administering the program.

**FOR OFFICE USE:**

Score: \_\_\_\_\_

Key: 0308

# Understanding Contract Basics Answer Sheet

Your Name: \_\_\_\_\_ Firm Name: \_\_\_\_\_

Signature: \_\_\_\_\_ AIA Number: \_\_\_\_\_  
(if applicable)

Fill in your answers below. Keep a photocopy for your records,  
and return ONLY this answer sheet to your firm's contact person.

**PART 1**

- |     | <b>T</b>              | <b>F</b>              |
|-----|-----------------------|-----------------------|
| 1.  | <input type="radio"/> | <input type="radio"/> |
| 2.  | <input type="radio"/> | <input type="radio"/> |
| 3.  | <input type="radio"/> | <input type="radio"/> |
| 4.  | <input type="radio"/> | <input type="radio"/> |
| 5.  | <input type="radio"/> | <input type="radio"/> |
| 6.  | <input type="radio"/> | <input type="radio"/> |
| 7.  | <input type="radio"/> | <input type="radio"/> |
| 8.  | <input type="radio"/> | <input type="radio"/> |
| 9.  | <input type="radio"/> | <input type="radio"/> |
| 10. | <input type="radio"/> | <input type="radio"/> |
| 11. | <input type="radio"/> | <input type="radio"/> |
| 12. | <input type="radio"/> | <input type="radio"/> |
| 13. | <input type="radio"/> | <input type="radio"/> |
| 14. | <input type="radio"/> | <input type="radio"/> |
| 15. | <input type="radio"/> | <input type="radio"/> |
| 16. | <input type="radio"/> | <input type="radio"/> |
| 17. | <input type="radio"/> | <input type="radio"/> |
| 18. | <input type="radio"/> | <input type="radio"/> |
| 19. | <input type="radio"/> | <input type="radio"/> |
| 20. | <input type="radio"/> | <input type="radio"/> |
| 21. | <input type="radio"/> | <input type="radio"/> |
| 22. | <input type="radio"/> | <input type="radio"/> |
| 23. | <input type="radio"/> | <input type="radio"/> |
| 24. | <input type="radio"/> | <input type="radio"/> |
| 25. | <input type="radio"/> | <input type="radio"/> |
| 26. | <input type="radio"/> | <input type="radio"/> |
| 27. | <input type="radio"/> | <input type="radio"/> |
| 28. | <input type="radio"/> | <input type="radio"/> |
| 29. | <input type="radio"/> | <input type="radio"/> |
| 30. | <input type="radio"/> | <input type="radio"/> |

**PART 2**

- |     | <b>A</b>              | <b>B</b>              | <b>C</b>              | <b>D</b>              | <b>E</b>              | <b>A</b> | <b>B</b>              | <b>C</b>              | <b>D</b>              | <b>E</b>              | <b>A</b> | <b>B</b>              | <b>C</b>              | <b>D</b>              | <b>E</b>              |
|-----|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|----------|-----------------------|-----------------------|-----------------------|-----------------------|----------|-----------------------|-----------------------|-----------------------|-----------------------|
| 1.1 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 8.1      | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 15.1     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 1.2 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 8.2      | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 15.2     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 1.3 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 8.3      | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 15.3     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 2.1 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 9.1      | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 16.1     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 2.2 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 9.2      | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 16.2     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 2.3 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 9.3      | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 16.3     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 3.1 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 10.1     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 17.1     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 3.2 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 10.2     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 17.2     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 3.3 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 10.3     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 17.3     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 4.1 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 11.1     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 18.1     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 4.2 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 11.2     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 18.2     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 4.3 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 11.3     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 18.3     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5.1 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 12.1     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 19.1     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5.2 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 12.2     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 19.2     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 5.3 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 12.3     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 19.3     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 6.1 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 13.1     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 20.1     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 6.2 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 13.2     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 20.2     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 6.3 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 13.3     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 20.3     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 7.1 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 14.1     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |          |                       |                       |                       |                       |
| 7.2 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 14.2     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |          |                       |                       |                       |                       |
| 7.3 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | 14.3     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |          |                       |                       |                       |                       |

## General Information About Contracts

### INSTRUCTIONS

Read pages 3-46 of the print version of *The XL Insurance Contract Guide*. If you are using the electronic version, please review the 9 sections listed under the heading “Professional Services Agreements: A Primer,” which you’ll find on the left side of your screen. (For easier reading, you can click on the “Print Version” icon in each section to open a PDF formatted for printing.)

In addition, review Exhibits 1-3 that accompany the sections “How to Review Client-Generated Agreements” and “Deal Makers and Deal Breakers.”

Fill in the appropriate responses to the true/false questions on your answer sheet on page 2.

- |   |   |   |
|---|---|---|
| T | F | 1. A party to a contract who reneges on his or her contractual obligations, without legal justification, may be in breach of contract.  |
| T | F | 2. An unenforceable contract is one that cannot legally be enforced.  |
| T | F | 3. A contract can be called void if either party used fraud as a means to reach agreement.  |
| T | F | 4. Conferring with the client when developing the consultant’s scope of services can increase the consultant’s liability.   |
| T | F | 5. The advantage of standard form agreements developed by the professional associations is that they can be used easily without any modifications.                                    |
| T | F | 6. A purchase order is an appropriate document to use for a professional services agreement.  |
| T | F | 7. Contract negotiation is a process in which the consultant and his or her client should decide on appropriate fees, workscope, schedule, and terms and conditions of the agreement. |
| T | F | 8. The courts apply the patent ambiguity rule when there is a question of ownership of a copyright or patent.   |

- T F 9. Oral agreements are not considered binding.
- T F 10. A consultant and his or her client can agree by contract that the period during which either can initiate a claim is shorter than otherwise required by an applicable statute of repose or limitation.
- T F 11. If a client insists on contractual provisions that would seriously increase a consultant's liability, the consultant should consider declining the project.
- T F 12. Every consultant's contract should include a Liquidated Damages provision.
- T F 13. When entering into contract negotiations, a consultant should have clearly in mind the degree of risk he or she is willing to accept.
- T F 14. Every consultant's contract should include a dispute resolution clause that calls for arbitration as a first step in resolving conflicts.
- T F 15. A consultant and his or her client can agree by contract that neither will sue the other for consequential damages.
- T F 16. A consultant can help minimize risk by offering less comprehensive services.
- T F 17. When an owner accepts a consultant's proposal, it becomes an agreement.
- T F 18. A contract to do something that is illegal is still enforceable in a court of law.
- T F 19. A simple letter agreement gives the consultant the protection necessary for a small project.
- T F 20. It is generally unwise for the consultant to discuss liability risks with owners during the contract development stage—this practice might scare clients away.
- T F 21. When looking at a contract, a court will likely favor handwritten modifications over typewritten ones.
- T F 22. In some jurisdictions, a written contract is required by law for engaging design services.
- T F 23. When a contract does not specify how disputes will be resolved, the law generally imposes a "default" of arbitration.

- T F 24. Injured third parties cannot file a claim against the consultant because the consultant does not have a contract with them.
- T F 25. An express contract is an agreement for fast-track services.
- T F 26. When a contract provision is ambiguous, courts will generally interpret it against the party who drafted the contract.
- T F 27. A conflict between contract documents renders the agreement void.
- T F 28. A consultant can amend a contract after it is signed simply by virtue of his or her conduct.
- T F 29. When standard form agreements are amended, they should be retyped before being returned to the client. Too many revisions can be confusing and look unprofessional.
- T F 30. It is generally most effective to negotiate about interests, not about positions.

## Specific Contract Language

### INSTRUCTIONS

Your client has sent you the following letter and draft agreement for your review and approval. Please read the cover letter. Then read each sample provision of the draft agreement carefully and review the related chapter in *The XL Insurance Contract Guide*. Note that some clauses may have different headings than those found in the *Contract Guide*; you can refer to the *Guide's* index to find the appropriate chapter title or, if you are using the electronic version of the *Guide*, you can use the search function.

Following each sample provision are three questions relating to that provision. The first lists possible revisions you may wish to make to the provision. The second offers possible reasons for those revisions. The last question poses alternative actions you might take or additional clauses you could insert to strengthen the provision. In each of the three questions, **choose the answer that you believe is the best solution of those listed.**

Fill in the appropriate responses to the multiple-choice questions on your answer sheet.

*Keep in mind that the provisions in this sample contract are not, in most cases, examples of appropriate contract language. They have been written to help you think about professional services agreements so that you can develop a better understanding of some of the liability problems that arise out of poorly written contracts. Nor should this sample contract be considered a complete document. Instead, it is a series of clauses that may contain risky language, ambiguous wording and provisions that would expose you to unnecessary liability.*

**Behemoth Corporation**  
567 Eighth Avenue  
New City, Ohio

Mr. Jason Bastian  
Managing Partner  
Professional Associates  
1500 Design Way  
Practice, Ohio

Subject: Contract for new Behemoth Headquarters Building and Processing Plant

Dear Mr. Bastian:

Enclosed is a draft copy of our standard form agreement between Behemoth Corporation and Professional Associates for the design of our new headquarters and processing plant to be located in New City, Ohio.

If the draft meets with your approval, please so advise. We will have our contracting officer prepare the Agreement in final form. If you or your attorney have any revisions, please advise us so that we can set a time to meet to finalize our understanding.

Yours very truly,

Carolyn McCune, Vice President  
Behemoth Corporation

---

## BILLING AND PAYMENT

**The Consultant shall submit to the Client monthly invoices. The Client is entitled to deduct from payments owed to the Consultant any legitimate backcharges or set-offs which may be due.**

---

### 1.1 REVISIONS

- a. Add the phrase “, which are due upon presentation and shall be considered PAST DUE if not paid within (\_\_) calendar days.” to the end of the first sentence.
- b. Delete the second sentence and substitute a clause that prohibits backcharges and set-offs.
- c. Add a sentence that gives you the right to suspend or terminate services if your client fails to make payments when due.
- d. All of the above.
- e. Delete the entire clause.

### 1.2 RATIONALE

- a. It is not necessary to spell out payment terms in your contract. Most clients follow the industry practice of payment within 30 days.
- b. Payment terms need to be specific as to when fees are due and when they become past due.
- c. The total amount of an invoice is payable regardless of any set-offs a client thinks are due him or her.
- d. You need leverage to collect fees when due. Your agreement should include the right to withhold your services or even terminate the agreement if you aren't paid.
- e. b, c and d.

### 1.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Add a provision that calls for your client to make an up-front retainer payment to you.
- b. Insert a clause that states you can charge your client interest at the legal rate on unpaid balances your client owes you.
- c. Add a clause that gives you the right to recover the costs of collecting overdue unpaid balances.
- d. All of the above.
- e. a and c only.

---

### TIME OF PERFORMANCE

**It is agreed by the Consultant that time is of the essence in all matters pertaining to the performance of this Agreement. The Consultant agrees to complete his or her services in strict accordance with the attached time schedule.**

---

#### 2.1 REVISIONS

- a. Delete the first sentence.
- b. Delete the phrase “complete his or her services time...schedule” and insert language wherein you agree to use reasonable diligence in performing your services subject to the requirements of sound professional practice.
- c. a and b.
- d. No revisions necessary.

#### 2.2 RATIONALE

- a. The phrase “time is of the essence” is imprecise and could subject you to claims for delay or breach of contract.
- b. It is difficult to establish accurate time estimates for performing professional services. Your contract clause should be written in general terms that will give you enough flexibility to do a proper, professional job.
- c. a and b.
- d. “Time is of the essence” is a standard legal terminology that is not binding on either party. What's more, it is a good professional practice to establish a strict time schedule so that you will know when you should stop providing services.

#### 2.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Insert a provision in your agreement that absolves you from responsibility for delays caused by circumstances beyond your control.
- b. Add a clause agreeing to liquidated damages if any delays in project completion cause damage to your client.
- c. In any agreed-upon completion date, allow enough leeway to be certain there is sufficient time to perform your services properly.
- d. a and c.
- e. b and c.

---

### PROFESSIONAL LIABILITY INSURANCE

**The Consultant shall maintain professional liability insurance at its sole expense for a period of \_\_ ( ) years after occupancy of the project. Such insurance shall provide limits of \$\_\_ per claim and shall be written on an occurrence basis. The policy shall include the Client and the General Contractor as Additional Insureds.**

---

#### 3.1 REVISIONS

- a. In the first sentence, insert the words “attempt to” before the word “maintain”. Change the word “occupancy” to “substantial completion” and add “so long as it is reasonably available” at the end of the sentence.
- b. Insert the words “and \$\_\_ in the annual aggregate” after the word “claim”.
- c. Delete the words “an occurrence” and replace with the phrase “a claims-made”.
- d. Delete the last sentence in its entirety.
- e. All of the above.

#### 3.2 RATIONALE

- a. Professional liability insurance will always be affordable and readily available.
- b. Professional liability policies are written with an aggregate limit—i.e., a maximum amount the insurer is obligated to pay per policy year.
- c. Professional liability coverage can be obtained on either an “occurrence” or a “claims-made” basis, at your discretion.
- d. For your own protection, it is important that clients, their agents and contractors be added to your professional liability policy as Additional Insureds.
- e. None of the above.

#### 3.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. If your client sets unattainable insurance requirements, offer your own insurance schedule indicating coverages you will carry.
- b. Explore obtaining Specific Job Excess or Specific Client Excess endorsements to your practice policy as a way of increasing the limits of coverage for a particular project or client.
- c. Before you agree to provide client-specified coverages, endorsements or certificates, consult with a qualified professional liability insurance agent or broker.
- d. All of the above.
- e. None of the above. You cannot be held responsible if you promise to carry certain coverages that you later learn are unobtainable. If you agree to such client-written insurance requirements, contract law will excuse you if they are impossible to attain.

---

### DISPUTE RESOLUTION

**Any dispute arising out of this Agreement or the services to be performed hereunder shall be resolved by binding arbitration in accordance with the Construction Industry Rules of the American Arbitration Association then pertaining, unless the parties mutually agree otherwise.**

---

#### 4.1 REVISIONS

- a. Delete the text of the entire paragraph and substitute a clause that calls for mediation as the first step in resolving any dispute.
- b. Delete the word “shall” and substitute the phrase, “may, with the consent of both parties”. Delete the final phrase “unless...otherwise” and make the choice of arbitrators and rules mutual.
- c. a or, failing that, b.
- d. No changes required.

#### 4.2 RATIONALE

- a. Arbitration is the quickest, least expensive and most satisfactory means of resolving disputes.
- b. Mediation has been proven to be a more successful, cost-effective means of resolving construction disputes than either arbitration or litigation.
- c. If your client insists on an arbitration clause, it should be made optional so you cannot be forced to arbitrate a matter where it would be inappropriate.
- d. b and c.
- e. None of the above.

#### 4.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Insert a clause that requires all disputes be litigated in a court of competent jurisdiction as the primary tool of dispute resolution.
- b. Provide for arbitration of simple two-party or “small dollar value” disputes only.
- c. Avoid any mention of other alternative dispute resolution techniques, such as rent-a-judge, mini-trials and project review panels prior to entering into full blown litigation.
- d. Because construction industry disputes are best settled at dawn with dueling pistols, insert a clause in your contract that allows you to choose another consultant in your discipline to act as your second.

---

### CONSTRUCTION OBSERVATION

**The Consultant shall visit the jobsite at periodic intervals during construction to inspect the work in progress in order to assure complete conformance with the contract documents.**

---

#### 5.1 REVISIONS

- a. Delete the word “periodic” and substitute the word “appropriate”.
- b. Delete the word “inspect” and substitute the word “observe”.
- c. Delete the words “assure complete conformance...documents.” State instead that the purpose of the observation is to “determine if the Work is proceeding in general accordance with the plans and specifications.”
- d. a, b and c.
- e. Delete the entire clause.

#### 5.2 RATIONALE

- a. To “inspect” means to examine each and every detail and to uncover every error, unsafe condition and code violation. This is beyond the intention of the normal scope of construction observation.
- b. To agree “to assure complete conformance with the contract documents” could be construed as a warranty to the client.
- c. a and b.
- d. The dictionary defines “periodic” to mean “at random intervals.”
- e. By agreeing to provide construction observation services, you increase your exposure to liability because you will probably be blamed for anything that goes wrong at the jobsite.

#### 5.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Offer to perform, for appropriate compensation, expanded construction phase services that include full-time on-site project field representative services.
- b. Require your subconsultants to observe their portions of the project.
- c. Develop a field manual and assign qualified field personnel who are trained and equipped to do the job.
- d. Educate your client on the merits of contracting for full construction observation on all projects and the dangers of any imprecise contract language.
- e. All of the above.

---

### PERMITS AND APPROVALS

**The Consultant shall, within six (6) months of the date of this Agreement, obtain all necessary licenses, permits and approvals from all applicable agencies having jurisdiction over the project.**

---

#### 6.1 REVISIONS

- a. Delete the words “within six months...Agreement,”.
- b. Delete the word “obtain” and substitute the phrase “assist the client in applying for”
- c. Delete the words “all necessary” and “from all applicable...project”; and after the word “approvals” insert the phrase “typically required by law for similar projects”.
- d. All of the above.
- e. b and c.

#### 6.2 RATIONALE

- a. Six months is sufficient time for a public agency to act upon any approval or permit application.
- b. It is the owner’s responsibility to obtain permits and approvals; you should only assist in this task.
- c. If you commit to obtaining permits from every public agency that could conceivably have approval authority, you may be agreeing to an impossible requirement.
- d. You cannot guarantee how quickly a public agency will or will not act in granting permits, licenses or approvals.
- e. b, c and d.

#### 6.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Add a provision that specifies those permits you will help your client obtain and those your client will procure.
- b. Offer other services—such as special research—to help your client obtain permits and approvals, and list them as Additional Services.
- c. Offer to make your fees contingent upon the issuance of the necessary permits and approvals for the project.
- d. a and b.
- e. All of the above.

---

### JOBSITE SAFETY

**In performing his or her construction observation visits to the jobsite, the Consultant shall have neither control over nor responsibility for the Contractor's means, methods, sequence, techniques or procedures in performing the Work. These are solely the responsibilities of the Contractor, who is also responsible for complying with all health and safety precautions as required by any regulatory agencies.**

---

#### 7.1 REVISIONS

- a. No changes required.
- b. Delete the entire clause.
- c. In the first sentence, insert the words "to assure strict compliance with the contract documents" after the words "visits to the jobsite".
- d. In the second sentence, revise the language to give the consultant responsibility for monitoring compliance with health and safety precautions.
- e. b, or failing that, c and d.

#### 7.2 RATIONALE

- a. A jobsite safety clause is unnecessary; those responsibilities are clearly spelled out in the federal regulations of OSHA, NESHAP and Abednego.
- b. Jobsite safety should remain the responsibility of the general contractor, who has control over the construction employees and the jobsite.
- c. You, as a licensed professional, are more knowledgeable and better equipped than the contractor to assure that all required precautions are met.
- d. The purpose of your construction observation is to assure strict compliance with your plans and specifications by the contractor.

#### 7.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Require the contractor to indemnify the client, you and your subconsultants from any claims involving the work of the contractor and subcontractors.
- b. Require the contractor to have the client, you and your subconsultants named as Additional Insureds on the contractor's general liability insurance policy.
- c. Carefully define your construction phase services in your Scope of Services to avoid inadvertently assuming responsibility for jobsite safety.
- d. Train your field personnel and ensure they use appropriate manuals and procedures. Make certain they avoid assuming—by their words or actions in the field—unintended liability.
- e. All of the above.

---

### STOP WORK AUTHORITY

**In performing construction observation, the Consultant shall have the right to reject any portion of the Contractor's Work that is not, in the professional judgment of the Consultant, in accordance with the construction documents. If the Contractor does not promptly correct work rejected, the Consultant shall have the right to issue a Stop Work Notice.**

---

#### 8.1 REVISIONS

- a. Delete the entire paragraph.
- b. Delete the second sentence.
- c. Change the word "right" in both sentences to "duty".
- d. Insert language in the General Conditions that makes it clear to the contractor that the consultant has the authority to stop the work.
- e. None of the above.

#### 8.2 RATIONALE

- a. A consultant should never assume the duty of rejecting portions of the work.
- b. Issuing a Stop Work Notice can have immense economic implications (and can create a huge liability for a consultant who takes on that responsibility).
- c. Having a *right* to stop or reject work is less risky than having the *duty* to do so.
- d. Just knowing you have the authority to stop the work will cause the contractor to correct defects promptly.
- e. c and d.

#### 8.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Add a sentence to your agreement that absolves you from liability for exercising your good faith judgment in rejecting work.
- b. In your contract, add an indemnity from your client for the consequences of your rejection of work.
- c. Rewrite the clause so that you have only the authority to recommend to your client that he or she reject defective work.
- d. a, b and c.
- e. a and b only.

---

**CERTIFICATIONS OF THE CONSULTANT**

**The Consultant shall review all Contractor Applications for Payment and shall certify the accuracy of the claimed proportion of Work completed.**

**Upon completion of the Construction Phase, the Consultant shall state in writing to the Client that the project as constructed is in strict accordance with the contract documents and complies with all laws, ordinances, codes and regulations.**

---

**9.1 REVISIONS**

- a. In the first sentence, delete the word “certify” and substitute “render his or her professional opinion as to”.
- b. In the second sentence, delete the word “state” and substitute “render his/her professional opinion”.
- c. In the second sentence, delete the words “strict” and “all” and substitute “general” and “applicable”, respectively.
- d. a, b and c.
- e. a and c only.

**9.2 RATIONALE**

- a. You should only certify those things you know to be absolutely true.
- b. Extreme words create problems because they raise the standards you are agreeing to meet.
- c. Even the words “declare” or “state” may be interpreted as a guarantee or warranty.
- d. All of the above.
- e. a and b.

**9.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES**

- a. Delete the entire provision.
- b. Add a clause to your agreement that prohibits your client—or anyone—from requiring certifications from you.
- c. Add a provision that prevents your client from requesting any action that would jeopardize your professional liability insurance coverage.
- d. Define the word “certify” (and related words) in the Definitions section of your agreement to mean that something is true to the best of your information, knowledge and belief.
- e. All of the above.

---

### GOVERNING LAW

**All questions as to the interpretation or enforceability of this Agreement shall be governed in accordance with the laws of the state of domicile of the Consultant. In the event of any litigation involving this Agreement or the performance by the parties thereto, such actions shall be brought in a court of competent jurisdiction in that same state.**

---

#### 10.1 REVISIONS

- a. No changes required.
- b. Delete the entire clause.
- c. Delete the second sentence only.
- d. If you and your client are headquartered in different states, revise the wording to specify a state in which neither of you has operations.

#### 10.2 RATIONALE

- a. It is not necessary to specify by contract which state's laws will apply; federal law requires that it is always the state in which the project is located.
- b. Because laws differ from state to state, it is good business practice to specify which laws will govern a contract and in which state legal actions may be brought.
- c. A neutral state in which neither you nor your client have business interests will probably be a more favorable jurisdiction for you.
- d. The venue for litigation under a contract is the same as the state under whose laws a contract is interpreted.

#### 10.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Check with a knowledgeable attorney for recommendations on which jurisdictions will be most favorable or fair to you.
- b. Let your client choose the venue and governing law; he or she will keep your interests in mind.
- c. If the project is situated outside the United States, consult with your professional liability insurer as well as a knowledgeable attorney regarding an acceptable jurisdiction and choice of law.
- d. a and c.
- e. State laws and legal precedents are virtually uniform on tort liability issues, so the choice of jurisdiction is unimportant.

---

### COST ESTIMATES

**The Consultant shall prepare and submit to the Client at the conclusion of each phase of the project a complete estimate of the construction costs of the project.**

---

#### 11.1 REVISIONS

- a. Delete the entire clause.
- b. Delete the words “a complete estimate of the” and substitute “an opinion of probable” and add a disclaimer describing the limitations of your opinion.
- c. Change the title of the clause to “Estimates of Probable Construction Costs”.
- d. a, or failing that, b and c.
- e. No changes required.

#### 11.2 RATIONALE

- a. This is standard contract language found in most agreements for design services.
- b. Rendering cost estimates may be best left to professional cost estimators retained by the project owner.
- c. The term “cost estimates” is well understood to mean “just a guess,” so it isn’t necessary to resort to euphemisms or to define the term in your agreement.
- d. Titles or contract clauses are unimportant as long as the language of the clause is properly worded.

#### 11.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Define the term “cost estimates” in the Definitions section of your agreement.
- b. Involve the contractor early in the planning stage of the project, if possible, so he or she can provide cost data input.
- c. When you submit an estimate of probable construction costs, attach a cover letter that reminds your client that you make no warranty as to its accuracy.
- d. If you do provide estimates, consider offering in your contract to perform a redesign as the sole remedy in the event the bids exceed your estimates by more than a predetermined percentage.
- e. All of the above.

---

### OWNERSHIP OF DOCUMENTS

**All documents, reports, plans and specifications prepared by the Consultant under this Agreement shall become the property of the Client.**

---

#### 12.1 REVISIONS

- a. Change the clause to provide that the documents will remain your property.
- b. Insert language that recognizes the documents to be instruments of your service.
- c. Insert the word “final” after the word “All”.
- d. Incorporate an indemnity clause that protects you in the event of unauthorized reuse of the documents.
- e. a and b, or failing that, b, c and d.

#### 12.2 RATIONALE

- a. Retaining ownership of your documents can help prevent unauthorized changes or reuse of those designs.
- b. To lessen the possibility that your plans and specifications could be considered products, you should affirm in your agreement that they are merely instruments of your professional service.
- c. Referring to “all documents” is too far-reaching, as it could conceivably include all your notes, sketches, field reports and other preliminary data.
- d. Unauthorized reuse of your plans can expose you to extensive liability and high defense costs. Indemnification by your client would help protect you from these claims.
- e. All of the above.

#### 12.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Include reference to documents on CADD or other electronic media under your definition of “instruments of service.”
- b. Copyright your documents.
- c. Add a provision that transfers ownership of the instruments of service to your client only upon receipt of payment of all fees that are due you.
- d. If you do transfer ownership of your documents to your client, incorporate language wherein he or she agrees to not make any unauthorized changes in the documents or to reuse them without your prior written approval.
- e. All of the above.

---

### ASSIGNMENT

**The Client may sell or assign his or her rights under this Agreement at any time upon \_\_\_(\_\_\_) calendar days' notice to the Consultant. The Consultant may not assign his or her rights under this Agreement without the prior written consent of the Client.**

---

#### 13.1 REVISIONS

- a. Delete the second sentence and revise the first to give both parties the freedom to assign their rights under the agreement.
- b. Delete the first sentence and reword the second sentence to make it a mutual prohibition against assignment by either party without the prior consent of the other.
- c. No revisions are necessary.
- d. Delete the entire clause.

#### 13.2 RATIONALE

- a. It is better to be silent on assignment in your agreement—you might give your client the idea that he or she can sell your services.
- b. It is reasonable that your client has the right to assign his or her rights to anyone, while being protected from your assigning the agreement to another party.
- c. Each party should be protected from having the other party assign his or her rights to an unknown third party.
- d. Both parties to an agreement should be able to assign away their rights under the agreement at will.

#### 13.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Add a clause to your agreement that gives you the right to retain any necessary subconsultants and that states that this business practice should not be considered an assignment.
- b. Add a clause protecting you from having to sign non-negotiated lenders' documents.
- c. a and b.
- d. Substitute a clause that permits your client to assign your agreement upon payment of a nominal fee.
- e. All of the above.

---

### THIRD-PARTY BENEFICIARIES

**Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Client or the Consultant. The Consultant's services under this Agreement are being performed solely for the Client's benefit and no other party or entity shall have any claims against the Consultant because of this Agreement or the performance or nonperformance of services hereunder.**

---

#### 14.1 REVISIONS

- a. No changes necessary.
- b. Delete the second sentence.
- c. Delete entire clause.
- d. Add additional language that requires you and the client to include a similar Third-Party provision in all agreements with other parties to the project.
- e. None of the above.

#### 14.2 RATIONALE

- a. The concept of *privity of contract* has been extended by some court decisions to anyone who foreseeably could be harmed by the actions of the consultant even if no contract exists.
- b. The consultant's services are for the benefit of the public at large, not just the client.
- c. Parties to a contract are prohibited by law from establishing their own rules to guide judicial interpretation.
- d. Including a similar provision in all contracts on the project is much more protective.
- e. a and d only.

#### 14.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Your contract should stay silent on the matter of third-party beneficiaries; courts have already established clear precedent.
- b. If you agree to include such a clause in your agreements with your subconsultants, you must take care to do so.
- c. Add a clause that establishes that third parties are entitled to consequential damages if your negligence deprives them of a profit.
- d. All of the above.
- e. None of the above.

---

### INDEMNITY

**The Consultant agrees to indemnify, defend and hold harmless the Client, its officers, employees and agents from any and all allegations and claims arising in whole or in part out of the acts, errors or omissions of the Consultant, except for those caused by the sole negligence of the Client.**

---

#### 15.1 REVISIONS

- a. Delete the words “defend” and “agents”.
- b. Delete the phrase “any and all allegations and claims” and substitute “damages, liabilities and costs”.
- c. Insert the word “negligent” before the word “acts”.
- d. Delete the terms “in whole or in part” and “except for those...Client”.
- e. All of the above.

#### 15.2 RATIONALE

- a. Agreeing by contract to defend your client means you could be forced to hire a lawyer for him or her—even if you have acted non-negligently.
- b. You do not owe your client’s agents the same obligations that you owe your client.
- c. Indemnifying someone against “any and all allegations and claims” is overly broad language. Anyone can make an allegation or claim against you that is without basis.
- d. If you indemnify your client for anything other than your own negligence, you are accepting liability beyond that required by law, and it may not be insurable.
- e. All of the above.

#### 15.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Delete the entire clause.
- b. Offer your client a mutual indemnity wherein each party indemnifies the other, but only for his or her own negligence.
- c. Insert indemnities in your favor in key clauses in your agreement where you need specific protections.
- d. If your client refuses to delete or modify an onerous indemnity, consider refusing the assignment.
- e. All of the above.

---

### HAZARDOUS MATERIALS

**If any hazardous materials are discovered by anyone on or about the project site, or if it becomes known that such materials may be present at or adjacent to the project site, the existence of which may affect the performance of the services under this Agreement, the Consultant shall have the option, and without any liability, to suspend the performance of his or her services until the Client or the Client's contractors remove such hazardous materials and certify that the project site is in complete compliance with all applicable laws and regulations.**

---

#### 16.1 REVISION

- a. No revisions are necessary.
- b. Add an indemnity provision in favor of your client.
- c. Delete the words, "shall have the option" and insert "may, by mutual agreement with the Client".
- d. Delete the word "certify" and substitute the word "declare".
- e. b and c.

#### 16.2 RATIONALE

- a. Unless hazardous materials are known or suspected on the project site, such a clause is anticipatory and not legally enforceable.
- b. If your client did not cause or place the hazardous materials on the site, he or she should be indemnified.
- c. Your client is entitled to participate in any decision to suspend your services.
- d. The word "certify" as it is used in the above clause is risky and may not be insurable.
- e. None of the above.

#### 16.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Include a definition of "hazardous materials" either in the Definitions section of your agreement or in the contractual provision dealing with hazardous materials.
- b. Add a specific hold harmless provision to your agreement in which your client indemnifies you for any claims involving hazardous materials.
- c. If you cannot obtain proper contractual protection for the risk of encountering hazardous materials, consider turning down the project.
- d. All of the above.
- e. None of the above.

---

### AS-BUILT DRAWINGS

**At the completion of the Work, the Consultant shall prepare a set of as-built drawings that shows changes made during construction. These as-built drawings shall be based on the Consultant's jobsite observation and may be relied upon by the Client for the operation, maintenance and/or future remodeling of the facility.**

---

#### 17.1 REVISIONS

- a. Delete the entire clause.
- b. Delete the words "as-built drawings" wherever they appear, including the title, and substitute the words "Record Documents".
- c. In the first sentence, insert the word "significant" before the word "changes"; then, after the word "construction", add the phrase "based upon the marked-up Record Drawings, addenda, change orders and other data furnished by the Contractor".
- d. Delete the second sentence and replace with "Because these Record Documents are based on unverified information provided by other parties, which the Consultant shall assume will be reliable, the Consultant cannot and does not warrant their accuracy."
- e. a, or failing that, b, c and d.

#### 17.2 RATIONALE

- a. Drawings depicting the completed construction ought to be prepared by the contractor.
- b. It should be made clear that such drawings are based on the information that is reported to you by the contractor.
- c. Lay persons generally understand that "as-built" drawings may be based on somewhat inaccurate or unreliable data.
- d. Since you observe the work in progress, you can prepare "as-built" drawings with reasonable accuracy that can be relied upon by your client.
- e. a and b.

#### 17.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Stamp each sheet of drawings with a disclaimer as to the accuracy and completeness of the information therein.
- b. Add a "Record Documents" entry to the Definitions section of your agreement that explains the potential for deficiencies in these drawings.
- c. Add an indemnity clause in your favor.
- d. Add a provision to your agreement regarding Information Provided by Others and include a reference to Record Documents.
- e. All of the above.

---

### DELIVERY OF ELECTRONIC FILES

**At the conclusion of the project, the Consultant shall deliver to the Client copies of all final construction documents on computer disks in a format specified by the Client. It is agreed that all such drawings and data are the instruments of service of the Consultant, who shall be named the author, and who shall retain all common law, statutory and other rights, including copyrights. The Client agrees not to use these drawings and data or permit any reuse or modification to be made to them without the prior written consent of the Consultant. The transfer of the electronic files for use by the Client shall not be deemed a sale and the Consultant makes no warranty, either express or implied, of merchantability or fitness for any particular purpose.**

---

#### 18.1 REVISIONS

- a. No changes required.
- b. In the first sentence, delete the phrase “by the client” and reference an attached exhibit that contains mutually agreed-upon hardware and software specifications.
- c. Delete the second and third sentences.
- d. Delete the last sentence.
- e. None of the above.

#### 18.2 RATIONALE

- a. You should protect yourself against the misuse or reuse of your design information on disk by having an appropriate Electronic Files clause in your contract.
- b. It is unnecessary to specify the hardware or software format you will use, as modern computer technology readily allows reformatting from one system to another.
- c. It is pointless to retain CADD/electronic file copyright and reuse prohibitions in a professional services contract. Data stored on electronic media cannot be copyrighted.
- d. Warranties of merchantability are usually found printed on computer disk packaging and apply to the disk and its contents.

#### 18.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. To protect yourself from the deterioration or modification of the data on disks, provide for a brief acceptance period of your electronic files by the client.
- b. Add a waiver and indemnity to protect you from unauthorized reuse or changes to the electronic files.
- c. Specify in your contract precisely what will constitute your deliverable, in terms of content, date and type of media (either the hard-copy drawings or an electronic version).
- d. All of the above.

---

### STANDARD OF CARE

**The Consultant will at all times during the term of this Agreement exercise his or her best judgment and skill in carrying out his or her duties in accordance with the highest standards of the profession. The Consultant agrees that the construction documents shall be free from any defects and, if any defects are reported to the Consultant, they shall be corrected at no additional cost to the Client.**

---

#### 19.1 REVISIONS

- a. In the first sentence, delete the word “best” and substitute the word “professional”.
- b. In the first sentence, delete the word “highest”.
- c. In the second sentence, delete the words “the construction documents...defects and,”.
- d. a, b and c.
- e. No changes are required.

#### 19.2 RATIONALE

- a. Agreeing by contract that your plans and specifications will be free from defects is a form of warranty or guarantee of perfection.
- b. Words like “best” that denote the ultimate in performance may create a type of warranty or guarantee.
- c. Absolute words such as “highest” may change the standard of practice to which you are agreeing to perform.
- d. a, b and c.
- e. Licensed professionals are expected to perform services to the very highest standards of care and competence to the best of their abilities.

#### 19.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. Add a Contingency Fund clause to your agreement.
- b. In the General Conditions of the owner-contractor contract, have the owner insert a clause that explains that the construction documents may contain errors or omissions.
- c. Review your brochures, proposals and firm literature and purge them of words that set unreasonable expectations.
- d. Add language that states you make no warranty as to your professional services.
- e. All of the above.

---

### TERMINATION OF SERVICES

**The Client may terminate this Agreement at any time with or without cause upon giving the Consultant seven calendar days' prior written notice. The Consultant may not terminate this Agreement with or without cause. The Client shall, within 10 calendar days of termination, pay the Consultant for all services rendered up to the date of termination.**

---

#### 20.1 REVISIONS

- a. No changes required.
- b. In the first sentence delete the words “or without”.
- c. Delete the second sentence and replace with language that would allow either party, upon notice, to terminate for specified causes.
- d. Delete the entire clause.
- e. Delete the last sentence.

#### 20.2 RATIONALE

- a. The clause, as written, properly defines the appropriate rights of each party.
- b. It is against public policy and, in most states, against the law for either party to terminate a written contract “without cause.”
- c. You need the right, upon appropriate notice, to terminate a contract if unsolvable conflicts arise, for breach by the client or if there is a change to the conditions surrounding the agreement.
- d. A Termination clause is unnecessary in a contract, as the 13th Amendment to the U.S. Constitution prohibits involuntary servitude. Neither party can be forced to perform for the benefit of the other party should he or she desire to terminate their relationship.
- e. Once notice of termination is given, the client is under no obligation to make further payment to you.

#### 20.3 ALTERNATIVE ACTIONS AND ADDITIONAL CLAUSES

- a. For further protection in the event you and your client disagree, add termination provisions to the clauses over which conflict is most likely—such as Billing and Payment, Hazardous Materials or Changed Conditions.
- b. Include a Suspension of Services clause in your agreement.
- c. Add a provision requiring the client to pay for your costs associated with shutting down the project, should the client terminate your services.
- d. Have the client indemnify you for claims resulting from unauthorized changes to your plans if you are terminated.
- e. All of the above.