



## Beyond 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.

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# The Program

In the program “Understanding Contract Basics,” you mastered some fundamental contract concepts and learned that when you have legitimate reasons for requesting changes in a proposed contract, clients frequently agree to the modifications.

Building on this knowledge, “Beyond Contract Basics” explores a number of important contractual and loss prevention issues to further sharpen your ability to negotiate with your clients on matters that affect your professional liability.

## LEARNING OBJECTIVES

This program is designed to help you review client-developed agreements and to improve your contract negotiation skills. 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; Part 2, multiple-choice questions; and Part 3, multiple-choice questions on client-drafted provisions.

Through the completion of Parts 1 and 2 of this program, you will:

- Understand the general purpose of 25 different types of contract clauses or issues.
- Learn the risks commonly associated with them.
- Be able to identify contract and negotiation solutions to these risks.

In Part 3, through a review of sample client-drafted clauses in 15 key contract areas, you will:

- Be able to recognize clauses that contain onerous language and those with acceptable wording.
- 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.

# Beyond Contract Basics Answer Sheet

**FOR OFFICE USE:**

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

Key: 0508

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**

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**PART 2**

- |     | <b>A</b>              | <b>B</b>              | <b>C</b>              | <b>D</b>              | <b>E</b>              |
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**PART 3**

- |     | <b>A</b>              | <b>B</b>              | <b>C</b>              | <b>D</b>              | <b>E</b>              |
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## Part 1: True or False

### INSTRUCTIONS

Below are some questions based on topics in *The XL Insurance Contract Guide*. The **bold, italicized** words indicate the chapter title or, in some instances, the listing in the Index where you can locate the related text in the *Guide*. We suggest you review each chapter and then fill in the response on Part 1 of your answer sheet.

- T F 1. To minimize consequences of minor design errors or omissions, an appropriate **Defects in Service** clause requires the client to promptly report any defects or suspected defects in the consultant's plans, specifications or other documents. The client will be required to place a similar notification requirement on all contractors.
- T F 2. It may be possible for prime design consultants to extend indemnity or limitation of liability protection to their subconsultants by including an **Extension of Protection** clause in their client-consultant agreements.
- T F 3. A properly written **Information Provided by Others** clause should provide that materials furnished by the client, such as data, records, surveys, old plans, as-builts, and location of utilities, will be verified by the consultant as part of the consultant's services.
- T F 4. A suitable **Interpretation** provision makes it clear that any protective clauses the consultant and client have agreed upon—such as indemnities or limits on consequential damages—apply to claims of negligence as well as any other cause of action, except gross negligence or willful misconduct.
- T F 5. U.S. courts are unanimous: potential **Third-Party Beneficiaries** cannot sue a design consultant for economic loss if the consultant's negligence didn't cause bodily injury or property damage as well.
- T F 6. Federal law requires that businesses provide **Corporate Protection** by indemnifying and protecting their employees from claims arising from the normal scope of their employment.

- T F 7. **Project Partnering** should only be used in large, complex, multidisciplinary construction projects.
- T F 8. A properly drafted **Public Responsibility** clause clarifies that a consultant's primary duty is owed to the client in the event the client's actions are in conflict with the consultant's duty to protect public health and safety.
- T F 9. In a suitable **Confidential Communications** clause, the client agrees to protect the consultant from libel or slander actions brought against the consultant by parties about whose qualifications, performance or reputation the consultant is required to render an opinion.
- T F 10. **Contractual Reference to the Consultant** as "Contractor" could confuse a judge or jury as to the application of case law or statutes; a court might decide to hold the consultant responsible for jobsite safety or construction means or methods.
- T F 11. **Definitions** of construction industry terms, acronyms and jargon are well established and have been extensively tested by the courts. Thus, it is unnecessary—and could even cause misunderstandings—to include definitions of terms in professional services agreements.
- T F 12. An appropriate **Integration** clause serves to incorporate and make part of the final agreement all prior understandings, oral statements, correspondence and marketing materials within the "four corners of the contract."
- T F 13. With a properly written **Severability** clause, if any provision in an agreement is found to be invalid, the rest of the contract would remain in force.
- T F 14. In the event of the death of one of the parties to a contract, a **Survival** clause serves to establish the rights and duties of the surviving party.
- T F 15. Contract clause **Titles** that are incomplete, ambiguous or inconsistent with the text of the clause could be considered by a court to be deliberately misleading.

## Part 2: Multiple Choice

### INSTRUCTIONS

Below are multiple-choice questions based on some important topics in *The XL Insurance Contract Guide*. The titles of the questions indicate either the chapter title or the listing in the Index where you can locate the related text in the *Guide*. Please review the discussion in the *Guide* and, choosing the answer you believe is the best of those offered, fill in the appropriate response on Part 2 of your answer sheet.

#### 1. EXCLUDED SERVICES

It's recommended you include a list of Excluded Services in your client-consultant agreements because:

- a. it can help the client make an informed decision about what services may be necessary for the project.
- b. it eliminates confusion concerning what scope items are excluded from your services.
- c. it may identify which excluded services the client chooses to have performed by the client's own consultants.
- d. it can help avoid disputes involving fees for additional services.
- e. All of the above.

#### 2. RETAINAGE

A Retainage clause in a client-consultant agreement:

- a. is inappropriate and should be deleted.
- b. is desirable since it enables you to receive a deposit before performing your services.
- c. is appropriate because it allows the client to offset the costs of your faulty performance against your fees.
- d. is normally set between 5% and 10% of the total design fee.
- e. can be used in lieu of a performance bond.

**3. CONTINGENCY FUND**

A properly worded Contingency Fund clause inserted in your client-consultant agreement:

- a. specifies the amount of money you are willing to pay for any errors you make on the project.
- b. will set aside funds to pay for costs due to errors and omissions in your services within a defined percentage of project costs.
- c. is unnecessary, since your errors are paid for out of the client-contractor contingency fund.
- d. provides funds to pay for major items the client wants to add.
- e. does not prohibit the client from making claims against you for increased costs within the contingency due to errors in your services.

**4. BETTERMENT**

An appropriate Betterment clause in your client-consultant contract:

- a. may promote a discussion with your client on the legal principle of unjust enrichment.
- b. merely restates how the courts will generally apportion damages if you omit an element from your design.
- c. could be undermined if you give any guarantee to the client that your plans and specifications are complete and correct.
- d. provides for the possibility that there may be omissions in the original designs and helps the client form realistic expectations of what you are responsible for.
- e. All of the above.

**5. STATUTE OF REPOSE**

By inserting the recommended Statute of Repose clause in your client-consultant agreement:

- a. you are attempting to overturn existing state law and may risk an injunction (*a nolo interfere* action) by a state court.
- b. you may be able to lengthen the time period for filing an appeal if you should lose a lawsuit.
- c. you may be able to set the date from which an existing state statute of repose begins to run.
- d. you and your client are agreeing that all actions, including third-party actions, will be barred after the time set in your contract.
- e. you have become confused; you should have inserted a Statute of Levitation clause.

**6. RETAINING SUBCONSULTANTS**

Which of the following is recommended regarding retaining subconsultants?

- a. Delete restrictive clauses requiring the client's consent to your selection of subconsultants.
- b. Give yourself the right to retain any subconsultant of your choosing.
- c. Prohibit your client from requiring you to use subconsultants chosen by the client.
- d. If you are required to hire client-chosen subconsultants, obtain an indemnity from your client for errors and omissions attributed to such subconsultants.
- e. All of the above.

**7. LIMITATION OF LIABILITY**

A Limitation of Liability clause in your agreement with your client should:

- a. shift all risk of professional errors onto the client.
- b. allocate some of the project risks in proportion to the rewards.
- c. be avoided. Such language is not available for use with AIA or EJCDC standard form agreements.
- d. discourage discussion between you and your client regarding the allocation of project risks.
- e. should not be included for high-risk projects or clients.

**8. UNAUTHORIZED CHANGES**

It is unnecessary to include an Unauthorized Changes provision in your client-consultant agreement because:

- a. if you are terminated and replaced by another consultant, you cannot be sued in most jurisdictions for damages caused by changes made to your completed documents without your consent.
- b. state laws prohibit contractors, owners and building officials from making changes to your reports or plans without your written consent.
- c. unauthorized field changes made by the contractor or subcontractors of any tier are easy to detect and are clearly their responsibility.
- d. the Client-Contractor General Conditions already prohibit such unauthorized changes.
- e. None of the above.

**9. CHANGED CONDITIONS**

If there is a material change in a significant condition or assumption upon which you and your client entered into your agreement, an appropriate

Changed Conditions provision:

- a. will automatically terminate the agreement and require you to renegotiate a new one based on the changed conditions.
- b. allows your client to hold you to your original scope of services and fee in spite of the changed conditions encountered.
- c. is important. It is simply not possible for you and your client to anticipate in your contract every possible change in conditions that may arise.
- d. is unnecessary; the law requires equitable relief if there is a new condition that causes an increase in your schedule, fee or risk.
- e. is unnecessary; contractors' contracts usually contain clauses dealing with differing site conditions.

**10. CONSEQUENTIAL DAMAGES**

Consequential damages include costs arising indirectly from your errors or omissions and damages incurred indirectly by your client. Such consequential damages:

- a. are mutually waived by the client and consultant in recent AIA and EJCDC standard form agreements.
- b. are often too remote to be foreseeable and may exceed the actual cost to repair the damage to the project.
- c. should be coordinated with any Limitation of Liability provision in your agreement.
- d. may be specifically required of you in some client-written agreements.
- e. All of the above.

## Part 3: Client-Drafted Provisions

### INSTRUCTIONS

The following is a series of clauses that a client (or the client's attorney) has drafted for your review and approval. The provisions are not, in most cases, examples of appropriate contract language. In fact, they may resemble the most onerous language you are likely to encounter. They have been written to help you develop a better understanding of some of the liability problems that arise out of poorly written contracts.

Please read each sample provision carefully, and then review the related chapter in the *Contract Guide*. You may need to refer to the Index or the Table of Contents to locate the chapter. Following each sample provision are five statements. Choose the answer that you believe is the best of those offered, and fill in the appropriate response on Part 3 of your answer sheet.

### 1. SCOPE OF SERVICES

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**Consultant will provide all professional services needed for the completion of the Project, including programming, schematic design, design development, construction documents, bidding phase services and full construction administration. Consultant's services will include all services normally provided by other competent consultants of the same discipline on similar projects under similar circumstances.**

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- a. No changes required. You and other consultants of your discipline know what services are normal and necessary in order to fulfill your professional obligations.
- b. Delete "all" from the first and second sentences. Simply listing the phases of services you will provide is a precise and objective way to delineate your scope of services.
- c. Replace the entire clause. If your scope does not carefully define included, excluded and additional services, you may be liable for providing a broader scope of services than intended.
- d. In the first sentence, delete everything after the word "project". In addition, in the second sentence, delete the word "competent".
- e. If you and your client cannot agree to an equitable adjustment to your schedule and fees for performing additional or extra services requested by the client, you are entitled under common law to terminate the contract.

## 2. QUALITY CONTROL STANDARDS

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**Consultant shall provide its services in accordance with Client's "Standards of Quality for Designers," as established and published by Client and as updated from time to time.**

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- a. No changes required; you'll want to comply with the client's quality standards anyway.
- b. Delete the entire clause. A client's quality standards are subject to change and may exceed your professional standard of care.
- c. Modify the above clause to state you'll maintain your own quality standards that you'll apply to the extent practicable in accordance with the professional standard of care.
- d. Advise the client if your firm has participated in the ACEC, AIA or other peer review program.
- e. b, or failing that, c and d.

## 3. RIGHT OF ENTRY

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**Consultant will obtain all entry permits and authorizations necessary to enter onto the site and any adjacent properties in order to perform Consultant's services. Consultant will restore such properties to their original condition after such entry. In the event any hazardous or toxic materials are discovered on the site, the Client will pay for all testing and site cleanup as needed.**

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- a. No changes required.
- b. Revise. The cost and difficulty of obtaining entry permits is more properly borne by the client.
- c. Obtaining entry permits and permission from adjacent property owners is usually a simple matter and not worth the effort of negotiating a protective contract clause.
- d. Restoring a damaged site is required of the consultant under CERCLA and WWF regulations.
- e. There should be no need to enter any adjacent properties.

#### 4. LIQUIDATED DAMAGES

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**If, due to the fault of Consultant, the Project is delayed, the damages that Client may recover from Consultant shall be limited to the sum of \$1,000 per day. Such sum is agreed to between the parties due to the difficulty and uncertainty in calculating the actual damages caused to Client.**

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- a. No changes required. When agreeing to a project schedule, you have control over meeting the completion date by providing full construction administration services.
- b. Actual damages resulting from delays caused by professional consultants are usually calculable.
- c. Liquidated damages are often used to quantify in advance damage to property and injury to construction workers.
- d. When agreeing to a liquidated damages provision, advise your professional liability insurer, since they favor the use of such contract clauses and may issue you a premium credit.
- e. Liquidated damages provisions in a professional services agreement are inappropriate, usually uninsurable and, therefore, unacceptable.

## 5. CODE COMPLIANCE

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**All services and instruments of service provided by Consultant will comply with all codes, laws, statutes, regulations or enactments of any governmental body having jurisdiction over the Project. In the event of an interpretation of a code or regulation by a public agency or official that is not consistent with reasonable assumptions made by Consultant, Client agrees to cooperate in resolving such inconsistencies. Client understands that Consultant shall be required to comply with the final decision by any public agency or official.**

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- a. Public agency officials can be held accountable for their incorrect interpretations of codes.
- b. When laws or codes of two or more governmental agencies conflict with each other, the most senior level of government always prevails over the junior level of government (i.e., federal over state, state over city).
- c. Delete the words “all” from the first sentence of the above provision.  
If you agree to comply with *all* codes and regulations, a claim for your failure to design to code may be based on breach of contract and negligence.
- d. Failure to design in compliance with newly enacted code provisions constitutes gross negligence per se. You may, however, be absolved of this by pleading that you were not aware of the code changes.
- e. Code officials can be counted on to discover noncompliant design details, assist you in developing a compliant solution and perhaps pre-approve your design changes.

## 6. LENDERS' REQUIREMENTS

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**Consultant agrees to fully cooperate with Client's Lender so as to not delay or impede Client's application for Project funding. Consultant's cooperation shall include executing all standard documents required by Lender and delivering such documents promptly to Lender as required.**

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- a. No changes required. Such clauses are standard to most professional services agreements and are not problematic for consultants.
- b. Because banks and savings institutions are federally regulated, their standard loan documents are all required by Federal law and cannot be modified.
- c. Any indemnity, non-assignability, limitations of liability or other contractual protections already negotiated between you and your client will automatically extend to any lender-required documents.
- d. All of the above.
- e. None of the above.

## 7. COPYRIGHTS

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**Consultant shall file all required documents with and pay all necessary fees to appropriate federal agencies in order to protect and maintain its statutory and common law copyright interest in the final construction documents and other instruments of service prepared by Consultant for this Project.**

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- a. No changes required. The above clause contemplates you will retain the copyright.
- b. To avoid liability, the clause should be changed to transfer your common law rights and copyrights to the client.
- c. The only way to protect your copyright interests is to file an application along with a copy of the documents to be protected not less than 90 days or more than 5 years from the date of substantial completion of the project.
- d. All structures built from your designs, including houses, churches, highways, overpasses, warehouses and water treatment plants are covered by the Architectural Works Copyright Protection Act of 1990.
- e. Unless you hire your employees on a "work for hire" basis, any designs they produce automatically become the property of your firm—you paid their salary and you own the output of their mental efforts.

## 8. CONFIDENTIALITY

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**Due to the highly confidential nature of all Project information, including information provided by Client, information previously developed by Consultant, and information that becomes available during the design and construction phases, Consultant agrees not to disclose any such information to any individual, firm or public entity without the prior written consent of Client.**

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- a. The clause is appropriate as written—you owe no less a duty to all your clients.
- b. The clause could restrict your ability to notify public officials if toxic materials are discovered on site, but since that is legally the contractor's sole responsibility, it should not be a problem.
- c. The clause as written might prevent you from providing necessary information to your employees, subconsultants and attorney.
- d. You should delete the clause in its entirety and replace it with a *subpoena duces tecum* clause.
- e. None of the above.

## 9. NON-NEGLIGENT SERVICES

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**Consultant shall perform its services on the Project and as described in this Contract in a non-negligent manner and in complete accordance with the applicable professional standard of care.**

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- a. No changes required.
- b. This clause should be deleted in its entirety and replaced with a Standard of Care provision.
- c. The clause could give rise to a suit for breach of contract and extend the statute of limitation.
- d. The clause could be construed as a warranty and create an insurability problem.
- e. All of the above, except a.

## 10. DELAYS

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**Consultant's services shall be performed in accordance with the schedule agreed to between the parties as contained in this Agreement. Consultant shall not exceed this schedule for any reason except for strikes, riots, civil disturbances or natural disasters outside the control of Consultant.**

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- a. No changes necessary. This clause gives you protection against delay claims caused by any man-made or natural disturbances.
- b. As written, this clause entitles you to additional time to perform your services should the contractor inundate you with unanticipated RFIs, change orders and requests for substitution.
- c. Additional reasons for delay in completion of your services should be added to the provision.
- d. You are legally entitled to adjustment of your schedule if changes must be made to your plans or specifications in order to comply with changes to applicable codes or laws.
- e. If your client does not make required decisions in a timely manner, this clause entitles you to an equitable adjustment of schedule.

## 11. REQUESTS FOR INFORMATION

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**Consultant shall review and respond to appropriate Contractor's requests for information not shown on or reasonably inferable from a careful review of the Contract Documents and field conditions. Consultant's responses shall be timely made so as to cause no delay of Contractor's orderly performance of the Work.**

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- a. The clause is acceptable as written—it addresses the need for your involvement in the interpretation of your plans and specifications.
- b. Contractors should be discouraged from asking for additional information. The plans and specifications contain all the details they need to construct the project.
- c. Additional language should be added to provide for additional fees if you must deal with vague, incomplete or unnecessary RFIs.
- d. Remove the word “timely”, and insert the word “unreasonable” between the words “no” and “delay”.
- e. c and d.

## 12. HOLD HARMLESS

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**Consultant agrees to hold harmless and defend Client and Client's officers, employees, contractors and lenders from any claims or costs that result from or are in any way connected with the Consultant's services on this Project. This indemnity shall include all negligent, intentional and wrongful acts of Consultant and any claims caused by Consultant's breach of any warranty or breach of this Agreement.**

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- a. Delete the entire clause.
- b. Delete the words "and defend", "contractors and lenders" and "or are in any way connected with".
- c. Replace the second sentence with "This indemnity shall only apply to the extent of Consultant's negligence, on a comparative basis of fault as between Client and Consultant."
- d. a, or failing that, b and c.
- e. None of the above.

### 13. SUBMITTALS

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**Consultant shall review and approve or take other appropriate action on submittals from the Contractor, such as shop drawings, material samples and product data, to determine in general if they are in conformance with the design concepts and other information shown in the Construction Documents. Consultant's review shall be performed with reasonable promptness; sufficient time should be allowed to perform an adequate professional review. Consultant's approval of submittals shall not constitute an approval of Contractor's means, methods, techniques, sequences or procedures nor of Contractor's safety precautions.**

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- a. The General Conditions of the Owner-Contractor contract should contain a requirement that the contractor must provide written notice to you of deviations in the submittals from the requirements of the contract documents.
- b. You should keep accurate records, even if not required by contract, of all submittals received, reviewed and returned to the contractor, including a log and records of dates, who reviewed submittals and actions taken.
- c. You should specify to the contractor which submittals you wish to review and require the contractor to provide a submittal schedule.
- d. You should refuse to accept required submittals directly from subcontractors that have not been first reviewed and approved by the contractor, even if it would cause a delay.
- e. All the answers above are correct, and the above clause is adequately worded.

## 14. SUBSTITUTIONS

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**Consultant shall review and make appropriate recommendations to Client regarding substitutions of materials, products or equipment proposed by Contractor during construction. If an approved substitution necessitates changes to the Construction Documents, Consultant shall be entitled to equitable adjustment in compensation for making such changes.**

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- a. The clause is unnecessary. Under no circumstances should a substitution be considered during construction.
- b. Substitutions are proposed by the contractor to improve the overall quality and maintainability of the project or to make it easier to design.
- c. Since many materials and products are equal in quality, durability and operating efficiency, it is not necessary to specify performance criteria when you call out a specific item “or equal”.
- d. A substitution proposed by the contractor during construction should be accompanied by appropriate manufacturers’ test data, independent laboratory reports and information on the cost and schedule impact.
- e. Use of a Substitution Approval Request Form or similar document is not encouraged—there’s already too much paperwork during the construction phase.

## 15. SUSPENSION

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**Client may, at any time during the Project, order Consultant to suspend its services for up to 30 days. Upon notice from Client, Consultant shall immediately resume its services. Consultant shall be entitled to an adjustment in its schedule equal to the number of days of the suspension.**

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- a. This clause is standard in most professional services agreements; no changes required.
- b. The clause should be modified to provide for reimbursement for the costs of interrupting and resuming your services. Additionally, provide for your own right to suspend services under certain circumstances.
- c. Incorporate the Suspension provision into the Termination clause of your agreement.
- d. The clause as written clearly permits the client to suspend only once and therefore would not permit repeated stops and starts.
- e. Under this clause, you could suspend your services if the client failed to pay your fees, because such failure is a material breach of contract.