



# “10 ‘must-have’ contract clauses for design professionals

Your firm’s survival in the marketplace may depend as much 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 Guide for Design Professionals*.

## 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, 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 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 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 liable for consequential damages because of any alleged failures by either party.

### **WHY**

If you are to be held liable for consequential damages, you could be responsible for damages out of proportion with your fee that exceed 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. Dispute resolution: Mediation**

### **WHAT**

Mediation is a dispute resolution option through which a neutral third party helps disputants 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.

### **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, and gives the parties control over the outcome.

## **5. Indemnity**

### **WHAT**

An indemnity clause is an agreement to assume a specific liability in the event of a loss. It typically involves a shifting of risk from one party to another, ensuring that risks are managed and allocated appropriately.

### **WHY**

Risk should be in the hands of the party who is the best position to control it. Counter any one-sided indemnity provision that allocates risk to you that you cannot control, including a duty to defend, with language that limits your indemnity obligation to damages caused by your negligence in performing professional services.

### **DON'T ACCEPT**

An onerous or uninsurable indemnity provision.

### **DON'T FORGET**

There are significant disparities in the anti-indemnity statutes and court decisions from state to state, and there's no guarantee as to how a particular jurisdiction will enforce an indemnity clause. Seek legal advice to help interpret the laws of your jurisdiction.

## **6. Jobsite safety**

### **WHAT**

Your contract should include a jobsite safety provision that makes clear that responsibility for site safety and construction means and methods belongs to the contractor, 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 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.

## **7. 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 the benefits to be derived by the parties to the contract and their responsibilities.

### **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 reasonable, takes into account potential damages on a project, and complies with any controlling laws.

## 8. Scope of services

### WHAT

The scope of services is a detailed description of the services 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, and leave no ambiguity or question as to whether 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 to (or certify) 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.

## 9. 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 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 mention of “perfection.”

## 10. 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 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.

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