



Establishing Contract Protocols

The way you manage the contract process can make a big difference in the success of your design business. Here, adapted from *The XL Insurance Contract Guide for Design Professionals: A Risk Management Handbook for Architects and Engineers* and the *Contract Management* workshop offered by the Design Professional group of the XL Insurance companies, are some suggestions to help you develop your own methodology.



Does your firm have a system in place to ensure that each contract has all of the provisions needed to protect you and none that harm you? Is every contract reviewed and approved by the right people and signed before you begin work? The way you manage the contract process is critical.

Research conducted by the Design Professional group of the XL Insurance companies shows that nearly 15 percent of the claims traced to contract issues can be attributed to breakdowns in contract protocols.

By establishing in-house protocols for negotiating, drafting, reviewing and executing each and every agreement, the formation of your professional services agreements isn't left to chance.

Here are some suggestions to consider when developing your policies and procedures:

- Establish and follow the same procedures for every contract.
- Select the right people to handle your contract negotiations and review.

- Begin negotiations with your own agreement.
- Use a checklist for review.
- Obtain a signed agreement for every project.
- Follow the same procedures for every contract.

When it comes to contract formation, it's important to do it the same way each and every time. That means you'll establish and use the same process for all contracts—big or small, new or existing clients. No deviations, no excuses.

It may be tempting to forgo a contract for a small project, to use a simple letter of agreement or to just sign on the dotted line of a regular client's agreement. But small projects aren't immune to claims, and verbal or letter agreements don't address all the necessary issues. Even if you've worked with the same client dozens of times, remember that their contracts aren't written in stone. Clauses may change from one project to the next, and you may find yourself agreeing to something you shouldn't.

SELECT THE RIGHT PEOPLE FOR THE JOB

Make sure that the right people are handling your contract negotiations and review processes, and that they have the appropriate training and support. Not everyone is good at developing contracts. Many design professionals have a "can-do" attitude and are very service-oriented. But when it comes to the contract process, it's essential that you don't let these attitudes interfere with appropriate risk allocation. This happens all too often when the wrong person reviews the contract and accepts the client's terms in an effort to please the client and keep the process moving.

It also makes sense to involve the project manager (PM) in the process. That way, the PM has a stake in the project from the very beginning and can work with senior management to develop a reasonable scope of services that he or she can effectively deliver.

In addition, make sure that your contracts get the appropriate review by legal counsel, your insurance agent or broker and, if you're unfamiliar with the contract or aren't yet comfortable with contract review, your firm's senior management.

BEGIN WITH YOUR AGREEMENT

It's a good idea to have a standard agreement prepared that contains all of your "deal-maker" clauses and none of the "deal-breakers." (You can use a standard professional association form tailored to your specific project or your firm's own "approved" contract.)

When the negotiations begin, try to use your contract as a starting point. This allows you to get issues that are important to you on the table. Your client might not accept your contract, but it could serve as a framework for negotiation.

Even if you receive a copy of the client's contract, you can respond by sending back a copy of your contract with a brief cover letter that says, in effect: Here is a copy of our standard form contract. We've found this format most practical for developing a professional services agreement. We look forward to discussing its terms and conditions with you in detail.

If a client insists on using his or her own agreement, then be prepared for a thorough review and strict adherence to your firm's review procedures.

DEVELOP A CHECKLIST

Every contract should undergo careful review. Even if you're using your own standard contract, you need to assess it in light of the particular project. And if you're forced to use a client's contract form, it requires even closer scrutiny.

We recommend developing—and using—a review checklist. Your checklist should detail the process of the review, as well as critical deal-maker and deal-breaker provisions. As a starting point to creating your own checklist, read the "How to Review Client-Generated Agreements" chapter in *Professional Services Agreements: A Primer* (available at xldp.com/primer), which addresses the contract review process and provides a sample checklist.

To begin your review, you'll want to quickly read the entire document to get a general sense of what it contains and the client's overall approach. Ask yourself if the language is specific and the risk properly allocated. Can you meet the requirements and expectations expressed in the document?

Next, using your checklist, look for certain clauses that may or may not be there:

- Are there indemnity provisions?
- Are they one-way, against you?
- Are you asked to provide any certifications or warranties?
- Are you protected from liability for environmental or health hazards?
- Who will be responsible for jobsite safety or construction means and methods?
- Who will own the documents?
- Are you being asked to assume risks not normally assumed by the design professional?
- Are there provisions that will allow you to collect your fees in a timely manner?
- How are any special risks associated with the project handled?
- Is there a dispute resolution procedure, or do disputes default to the civil courts?



NO SHOW, NO GO

Finally, your contract protocols should include a “no signed contract, no work” policy. Don’t begin work until the agreement is signed. Period. In some jurisdictions, your license could be revoked if you’re working without a contract. And if you don’t have a contract, you may not be entitled to payment. This varies from jurisdiction to jurisdiction, so you’ll want to learn the particular requirement in your area. The bottom line is: professional service firms that want to manage risk can’t afford to do business on the basis of a verbal agreement.

Remember, contract management plays an important role in your risk management strategy as well as in the success of your business.

YOUR CONTRACT

When reviewing and negotiating agreements for professional services, keep these points in mind:

- Your agreement should be written clearly and carefully spell out the duties and obligations of both you and your client.
- Your agreement should be consistent throughout in its use of terms. Ambiguous terms should be defined.
- Your agreement should be complete and integrated with all supporting exhibits and addenda.
- Your agreement should contain a well-defined, mutually developed work scope that spells out the services you will, and will not, provide.
- Your fee should be adequate to perform all of the contemplated services in a competent and professional manner.

- Your agreement should be purged of overreaching and unfair provisions that increase your liability and jeopardize your insurance. If you cannot delete unfair provisions, at least modify them so that they are acceptable.
- Your agreement should specify how and when you will get paid and what happens if you are not paid on time or at all.
- Your liability should be limited to an amount that is fair and acceptable to both you and your client.
- Your agreement should state that you and your client will disfavor litigation and use mediation and/or other dispute resolution techniques if you cannot resolve disputes on your own.
- Both you and your client should have the right to terminate the agreement if necessary.

The information in this article is the product of over 30 years of front-line claims experience and is part of the educational service provided to the design industry by the Design Professional group of the XL Insurance companies. For more information, other loss prevention resources and to find an agent in your area, visit xldp.com or phone 800-227-8533 ext.2102508.

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