



The XL Insurance Contract Guide for Design Professionals

AN AUTHORITATIVE GUIDE
TO ISSUES AND TRENDS IN CONTRACTS,
CLAIMS AND PRACTICE MANAGEMENT

We've been working on the *Contract Guide* to make sure it works for you...

The Design Professional group of the XL Insurance companies has gathered the best and the brightest from every corner of the design, legal and insurance professions to develop the *Contract Guide*. We've interviewed experts on topics from accessibility to mediation to value engineering, researched current literature and studied survey results, all in an effort to bring you a relevant, authoritative and, most of all, helpful resource you can use to guide your business practices.

MORE THAN 30 YEARS OF FRONTLINE CLAIMS EXPERIENCE CONTAINED IN ONE EASY-TO-READ MANUAL.

The information and advice contained in the *Contract Guide* is based on more than three decades of our experience in preventing, litigating, mediating and settling claims. Whether you want to know the most effective limitation of liability language or how to avoid claims related to the use of electronic documents, the *Contract Guide* has the answers you need, presented in an easily digestible style. Each section defines a topic, spells out the issues involved and offers realistic advice for preventing claims.

BEHIND EVERY CONTRACT IS A WORKING DESIGN FIRM.

The way your firm manages key aspects of running a design business, such as project selection, client communication, billing and payment policies, contract negotiation and identifying and allocating risk can all play a role in determining the success—and profitability—of your projects. The *Contract Guide* takes you beyond the contract to examine day-to-day business strategies that help build strong, stable firms.

FOR YOUR EYES ONLY.

You're entitled to receive this spectacular *Contract Guide* free of charge because you're an XL Design Professional insurance policyholder. The *Contract Guide* is simply not available, at any price, to anyone other than our policyholders. Not only do we appreciate your business, we have a stake in seeing you succeed. The *Contract Guide* is the centerpiece of our efforts to educate design professionals on the issues and practices that can result in claims. When our insureds avoid claims, everyone wins.



AVAILABLE IN HARD COPY AND ON CD.

The hard copy version of the *Contract Guide* provides an overview of professional services agreements, followed by alphabetized sections. It also includes a comprehensive index to help you quickly find what you need.

The CD version's user-friendly features take you to the right info in a click:

- **PC & Mac compatible.** The CD uses an Internet browser-based platform that can be accessed by both PCs and Macs.
- **Searchable.** A search engine helps you find your topic or clause quickly.
- **Print features.** Print the section(s) you need. Trying to explain to a client why his or her indemnity clause is unacceptable? Hand the client a copy of the "Indemnities" section and let the *Contract Guide* do the explaining.
- **Reliable editing features.** Easily copy and paste clauses directly into your contracts, e-mail or other documents.

Topics to help you navigate the future of design...

While we haven't yet been able to predict the future, we have been able to pinpoint the trends and issues that are likely to create new types of liability for design professionals. You'll no doubt find the following sections of the *Contract Guide* particularly illuminating:

BUILDING COMMISSIONING

The commissioning process is quickly gaining acceptance throughout the construction industry. Until the claim environment develops for this relatively new process, however, design professionals should approach commissioning with extreme caution. The *Contract Guide* offers contractual and risk management guidance for A/Es who offer commissioning services as well as for those who work on projects adopting the process.

SUSTAINABILITY AND GREEN DESIGN

As sustainable design and construction goes mainstream, architects and engineers have the opportunity to offer expanded services. But consider the potential issues. Will the A/E be held responsible when the owner's building doesn't deliver the energy savings expected? Could a design firm's marketing of its "green" expertise come back to haunt it? The *Contract Guide* looks ahead to possible liability issues and, of course, provides advice about protecting yourself against green project claims.

OFFSHORE OUTSOURCING

It's only a matter of time before design firms outsource a significant percentage of their work. But anyone tallying the potential savings also needs to consider the risks. For instance, the usual problems that plague any subcontracted work—project coordination issues, communication missteps, lack of quality control on design changes—can be greatly magnified in cross-cultural situations. The *Contract Guide* has plenty of advice for those firms that can't resist the siren song of promised savings.

OWNER REPRESENTATIVE

As architects and engineers are called to work with "ORs," A/Es often find that reps make it difficult to communicate directly with the owner, may often second guess the design decisions and may not even be qualified to act on an owner's behalf. The *Contract Guide* walks you through the steps you can take to make your experience with an owner representative a productive one.

PRO BONO SERVICES

Our files are replete with claims that have resulted from the actions of an architect or engineer in the course of "helping out" a friend, a client or an organization. All too often, those seemingly innocent actions are later defined or judged as official responsibilities and the A/Es find themselves officially involved. The *Contract Guide* provides solid advice on how to avoid these uncomfortable situations and samples of short-form contracts to use with pro bono projects.

SELECTED TOPICS

PRIMER

Why Have a Written Agreement?

Dealing With Risk

Contract Basics

Types of Agreements You'll Encounter

Professional Association Standard

Contracts

How to Review Client-Generated

Agreements

Resources for Contract Review

Negotiating a Contract

Deal Makers and Deal Breakers

CHAPTERS

Accessibility

Assignment

Attorneys' Fees

Authorized Representatives

Betterment

Billing and Payment

Building Commissioning

Certificate of Merit

Certifications, Guarantees and Warranties

Changed Conditions

Claims Arbitrator Service

Code Compliance

Condominiums

Confidential Communications

Confidentiality

Consequential Damages

Construction Management

Construction Observation

Contingency Fund

Contractual Reference to the Consultant

Copyrights

Corporate Protection

Defects in Service

Definitions

Delays

Design Without Construction

Phase Services

Design-Build

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BUILDING INFORMATION MODELING

Many design firms already use “BIM” to enhance design quality, speed up the construction process and improve post-construction maintenance. However BIM presents significant challenges such as fundamental changes to process and workflow and a steep implementation and learning curve. The *Contract Guide* explores these and other challenges and outlines key steps you should take to make a smooth transition to BIM.

INNOVATIVE DESIGN AND TECHNOLOGIES

Owners increasingly expect design professionals to find new ways of building projects better, faster and cheaper while holding them professionally and financially responsible if their innovations do not meet the owners' expectations. The *Contract Guide* offers advice for educating your client about the inherent risks in innovative design and amending your contract to limit your liability.

You don't speak legalese?
Don't worry, we have plenty of contract
language you can copy and paste!

It's one thing to know what's missing from your contract;
it's another to know how to provide it. Here's a preview of
how the *Contract Guide* can help...

TOPIC: CORPORATE PROTECTION

In most states, architects and engineers can be held personally liable for their professional actions. But you can include a contract clause to provide that, in the event of a claim, your client would sue only your firm and would not name any individual employee, officer or director.

Sample Contract Clause:

It is intended by the parties to this Agreement that the Consultant's services in connection with the Project shall not subject the Consultant's individual employees, officers or directors to any personal legal exposure for the risks associated with this Project...

Chapters, continued

Dispute Resolution
Mediation
Arbitration
Project Partnering
Jobsite Dispute Resolution
Other Dispute Resolution Methods
Electronic Information
Electronic Files
Building Information Modeling
Project Websites
Emergency Services
Entire Agreement
Estimates of Probable Construction Costs
Excluded Services
Extension of Protection
Fast Track Projects
Governing Law and Jurisdiction
Hazardous Materials
Incorporation by Reference
Indemnities
Information Provided by Others
Innovative Design and Technologies
Inspection
Insurance
International Projects
Interpretation
Jobsite Safety
Lenders' Requirements
Limitation of Liability
Liquidated Damages
Mold
Multiple-Prime Design Contracts
Non-Negligent Services
Notices
Offshore Outsourcing
Owner Representative
Ownership of Instruments of Service
Pay-When-Paid
Performance Bonds

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TOPIC: JOBSITE SAFETY

Even though jobsite safety is normally the responsibility of the general contractor, workers compensation laws usually prohibit injured workers from suing their employers. As a result, they often sue the third party they figure can afford the largest payment. You can use your contract to protect yourself from having to pay for jobsite injury claims.

Sample Contract Clause:

...shall impose any duty on the Consultant, nor relieve the General Contractor of its obligations, duties and responsibilities including, but not limited to, construction means, methods, sequence, techniques or procedures necessary for performing, superintending and coordinating the Work in accordance with the contract documents and any health or safety precautions required by any regulatory agencies...

TOPIC: LENDER’S REQUIREMENTS

Client-drawn agreements sometimes call for the design professional to cooperate “in every respect” with the client’s lender and to execute whatever documents the lender might demand. Such an open-ended provision can lead to tremendous liability problems. Amending the proposed agreement can prevent such problems.

Sample Contract Clause:

The Consultant shall not be required to execute any documents subsequent to the signing of this Agreement that in any way might, in the sole judgment of the Consultant, increase the Consultant’s contractual or legal obligations or risks, or adversely affect the availability or cost of its professional or general liability insurance.

TOPIC: REQUESTS FOR INFORMATION

Sometimes design professionals find themselves working with contractors who intentionally generate unnecessary requests for information (RFIs) in order to pave the way for claims for extras and delays. To protect yourself against these attempts to bury you in paper, you can add a provision that penalizes the contractor for submitting RFIs without first having thoroughly reviewed the construction documents and field conditions.

Sample Contract Clause:

...However, if the information requested by the Contractor is apparent from field observations, is contained in the Contract Documents or is reasonably inferable from them, the Contractor shall be responsible to the Client for all reasonable costs charged by the Consultant to the Client for the Additional Services required to provide such information.

- Permits and Approvals
- Pro Bono Services
- Prototype Designs
- Public Responsibility
- Quality Control Standards
- Record Documents
- Renovation and Remodeling
- Replacing Another Consultant
- Requests for Information
- Retainage
- Retainers
- Retaining Subconsultants
- Right of Entry
- Scope of Services
- Severability and Survival
- Shop Drawing Review
- Specification of Materials
- Standard of Care
- Statutes of Repose and Limitation
- Stop Work Authority
- Subconsultants
- Substitutions
- Suspension of Services
- Sustainability and Green Design
- Termination
- Testing Laboratories
- Third-Party Beneficiaries
- Timeliness of Performance
- Titles
- Unauthorized Changes to Plans
- Underground Improvements
- Value Engineering
- Appendix 1 – Emergency
- Professional Services Agreement
- Appendix 2 – Teamwork Ethic

The information contained herein is intended for informational purposes only and does not constitute legal advice. For legal advice, seek the services of a competent attorney. Any descriptions of insurance provisions are general overviews only.

"XL Insurance" is the global brand used by XL Group plc's (NYSE: XL) insurance companies. Coverages underwritten by Greenwich Insurance Company, Indian Harbor Insurance Company, XL Specialty Insurance Company, and XL Insurance Company Limited—Canadian Branch. Coverages not available in all jurisdictions.

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