



ProNet Practice Notes

Owner-Drafted Contracts: Gaps, Chasms, Black Holes, and Good Backfill You Can Use

© 1990 by [David W. Lakamp](#)*

PREFACE

You can anticipate that agreements drafted by attorneys for your clients will be one-sided. That is how the game is played. Your role is to field your own list of desired benefits. According to the rules, the ensuing negotiations are expected to produce a mutually satisfactory meeting of the minds. You will be more successful in your efforts to strike a reasonable balance if you master those rules, and the narrative on the pages which follow is preparation for that.

Under most circumstances, reviewing the writings of your client's attorney is not your greatest challenge. Overreaching is generally obvious, and modifications for the purpose of negotiating key points can be easily drafted. Far less obvious are the missing elements--provisions which would afford you important protections, but for the fact that they have been omitted. Your need for those protections can easily be overlooked, in no small part because your attention has been neatly diverted to salvaging something workable from what is written there.

Your first task is to seek out the missing elements and the misdirected concerns. Appendix A, "A Checklist for Reviewing Client Contracts, " is designed to help you identify reasonable limitations on risk and responsibility frequently discarded by owners and their attorneys. You might use this checklist as a guide to the initial review of agreements drafted by them.

"Some Suggested Modifications to Owner-Drafted Forms, " included here as Appendix B, are referenced in each of the items on the checklist. The reference is intended to direct you to alternative language which might protect your interests. Some of these provisions overreach. There is not necessarily anything wrong with this. All are negotiable, and you need to be in a position to make reasonable concessions.

A word of caution about use of the suggested language: It is, of necessity, generic. Laws differ from one state to the next, and your needs will be governed by the unique circumstances surrounding each of the projects you undertake. We urge you to seek the advice of counsel. The provisions suggested here are not a substitute for that advice, but they just may assist you in taking important first steps toward a genuine meeting of the minds.

Finally a word of thanks to three attorneys and friends whose thoughtful comments and encouragement made completion of this document possible. They are: George J. Vogler, President of Reserved Resource Insurance in Oklahoma City, Oklahoma, Eugene L. Bass, a practicing attorney in Redwood City, California, and George DeWalt, Vice President of Professional Practice Insurance Brokers, Riverside, California. All bring to their work not only their professional skills and training, but years of experience in applying the law to the complexities of the construction industry. Their assistance is greatly appreciated.



TABLE OF CONTENTS

UNDERSTANDING THE RULES OF THE NEGOTIATING GAME

How the Game is Played
Your Perspective on the Game
You are Expected to Play
Starting Relatively Even
Digging in at the Plate
Getting to First Base
Keys to a Satisfactory Outcome
Lessons from Successful Negotiators

Appendix A: [A CHECKLIST FOR REVIEWING CLIENT CONTRACTS](#)

Protecting Your Fee
Estimates of Construction Costs
Construction Phase Services
Miscellaneous Provisions

Appendix B: SOME SUGGESTED MODIFICATIONS TO OWNER-DRAFTED FORMS *1.0 Payment of Professional Fees*

2.0 Additional Services
3.0 Opinions of Probable Construction Costs
4.0 Responsibility for Construction Costs
5.0 Job-site Safety and Construction Responsibilities
6.0 Review of Contractor Submittals
7.0 Record Drawings
8.0 Ownership of Documents
9.0 Ownership of Documents (Alt.)
10.0 Use of Electronic Media
11.0 Incomplete Services
12.0 Hazardous Materials
13.0 No Benefit for Third Parties
14.0 Property Insurance for the Project
15.0 Agency Status of Architect/Engineer
16.0 Contractor's Indemnification and Insurance
17.0 Standard of Care
18.0 Project Schedule
19.0 Indemnification
20.0 Applicable Law
21.0 Mediation
22.0 Limitation of Liability

UNDERSTANDING THE RULES OF THE NEGOTIATING GAME

It arrives in the morning mail. It is a contract drafted by an attorney for one of your clients. What follows can be a nettlesome experience. Few architects or engineers are enthusiastic about struggling through the arcane language; even fewer relish the prospect of haggling over it.

For most professionals, there is a natural tendency to make a comforting assumption. It goes like this: Since the newly-formed relationship with the client is one of harmony and goodwill, the client's contract proposal can be reasonably expected to incorporate an appropriate element of fairness. As long as the fee is adequate, it may not be prudent to risk the harmony that exists by raising sticky issues over "boiler-plate " the owner is unlikely to modify in any event. The rationale may be reassuring. The consequences could be unfortunate.

In the world of industry and commerce, negotiation is something of a great game. From your perspective, it may be a game with a strange set of rules. This is not surprising, for the rules are written and refereed by players whose values, goals, and motivations are often very different from your own.

A professional services agreement drafted by an attorney for one of your clients is an invitation to you to join the game. As foreign as the rules may seem and as unappealing as the prospect of joining in may be, the invitation is one you can hardly turn down. Careful negotiation of your contracts can be critical, not only to the ultimate success of the project you are about to undertake, but to financial health of your firm, as well. The key is to master the rules first.

How the Game is Played

The underlying assumption is that a contract is the product of negotiations conducted in good faith by parties of equal bargaining power. Never mind, for a moment, that your client may be the largest industrial complex in the western world. At the outset, everything is negotiable.

According to the rules, the game is set in motion when two parties identify a common objective. An offer is made, it is accepted in principle, and one of the parties undertakes to draft a written understanding of how and under what terms and conditions the objective is to be accomplished.

Experienced players know that the first party to the table with a draft agreement has a decided advantage. That draft defines the framework for the discussions which follow. It places the initiators in a position to identify all of the benefits they would like to have and to present them in the form of a set of demands. They may even take the preposterous stance that their demands are non-negotiable (knowing, even as they do, that this is nonsense).

Their goal is to win. Their strategy is to seize the advantage from the outset and maintain that advantage as the process unfolds. The further off balance and out of position the party on the other side of the table is placed, the more likely it is that desired benefits can be preserved.

Your Perspective on the Game

Enter the Architect/Engineer, who by nature, training, and experience wants more than anything else to avoid conflict and get on with the work. Reading the contract is burden enough; the idea of taking exception to it can be problematic, at best. Nevertheless, that is precisely what you are expected to do.

Your goal is not so much to conquer as it is to create realistic expectations. You know how difficult it can be to bring a complex project to a successful conclusion, even under the best of circumstances. If the basis for your relationship with your client is one of adversarial posturing going in, the odds are already working against you both.

This need not be the case, for your contract negotiations can serve you well as a communications resource. If you are prepared to discuss the issues knowledgeably and with candor, your efforts can go a long way toward fostering realistic expectations about the limitations on your ability to help your clients control the risks of construction.

What you need more than anything else is a clear understanding of your respective obligations and an agreement which reflects that understanding equitably. To get there, you are going to have to hold your client's attorney at bay long enough for you to work through important issues of risk and responsibility directly with your client.

You are Expected to Play

Most owners understand only too well that negotiation is a process of give and take. The rules of the game are such that a proposed contract is assumed to contain provisions disproportionately advantageous to the party who drafts it. It is also assumed that a certain balance will be struck through the negotiation process.

Owners generally expect you to exercise the same care, judgment, and attention to detail in your business affairs as you apply to the professional aspects of your work. They know contracts can allocate risks and responsibilities in ways that are fair and in ways that are not, and they anticipate that you will raise questions on issues you believe to be important.

The reality is, careful negotiation on your part can strengthen your client's confidence in you. You are, after all, being entrusted with much of the responsibility for an undertaking of great complexity and substantial cost. Your caution with your contract can communicate a great deal about how you are likely to approach design decisions affecting the owner's significant business and financial interests in the project. The time to begin to play by the rules is at the very outset.

Starting Relatively Even

If you do not already have your own standard forms of agreement, you might start with those published by the American Institute of Architects or those available through the engineering organizations which participate in the Engineers' Joint Contract Documents Committee. You can not play well without bringing your own equipment to the game.



ProNet Practice Notes

Work with your attorney to adapt these documents to the unique needs of your practice. Make certain you understand the issues they raise and their relative importance to you. Then, within 30 to 50 seconds after you learn of the award of a new project, forward a copy to your client suggesting that it serve as the basis for your negotiations. Here is a letter you might use to do so:

Dear New Client:

We are pleased to have been selected to design your new inter-national headquarters complex at Spirit Lake. We are excited about the project, and we look forward to what promises to be an interesting challenge.

A copy of our standard professional services agreement is enclosed for your review and information. This document is the product of extensive efforts over many years, efforts which have engaged owners, architects, engineers, and contractors in the development of fair and equitable contract documents. It addresses issues of great importance, both to us and to you. It also represents the assumptions underlying our estimates of professional time and cost.

The terms and conditions of this agreement, of course, require discussion. The purpose is to arrive at a clear, mutual understanding as to our respective roles and responsibilities on the project and the extent to which our services might reasonably be expected to reduce your risks in construction.

Please take the time to review the agreement carefully. We are prepared to answer any questions you might have and to explain the reasoning behind the provisions it contains. I plan to give you a call in a week or so to see if we might set up an early meeting to finalize our understanding.

Yours truly,

What good does this do? It gives you a reasonable point of reference and departure. Even if your client ignores your request, you have established your own framework for the give and take expected to follow. You have taken a position you believe to be fair, and you have made clear that whatever your client may wish to extract in addition is likely to be subject to negotiation. It puts your gear on the playing field. This is very different from being forced to inquire politely as to whether anything of consequence might somehow be salvaged from your client's draft.

The idea is to strike a balance. For everything you concede, it is reasonable for you to expect some concession in return. In the course of the negotiation, you have a one-time opportunity to educate your client about the risks involved and a one-time opportunity to discuss the limitations on your ability as a professional to help to mitigate those risks. But, what happens if all you get in return is a deaf ear? There are ways to deal with this.

Digging in at the Plate

It may be a restatement of the obvious, but it can be difficult, at times, to keep even the most obvious in mind: Your client did not select you to design a multi-million dollar international headquarters complex by tossing darts. Nor were you chosen on the basis of your listing in the Yellow Pages. The problem is, this

clear reality has a way of paling in the light of uncertainty when it comes to negotiating the terms and conditions of your contract.

There are dozens of issues of risk and responsibility in a typical professional services agreement. Focusing on these issues often requires that you overcome an apparent unwillingness on the part of your client to deal with them at all. If so, your first challenge is to convince your client to take your efforts to negotiate seriously. You have to make clear that your intention to discuss issues of great importance to both of you can not be casually brushed aside.

What are some of the indicators that your client is simply not listening? Here are some familiar responses: 1) This is our standard contract. It is not negotiable. 2) Our attorneys have worked for years to perfect the language of this agreement. They would never allow us to change it now. 3) No architect or engineer in the known universe has ever questioned our terms and conditions. Why should you? 4) If we have to go back to the General Counsel's office for review, it will delay us beyond any possibility of going forward. You could kill the project. 5) There are other professionals waiting anxiously in the wings. If you make this process difficult enough, we just may have to bring them on in your place.

Getting to First Base

In most cases, these arguments are sheer nonsense: At worst they pitch you the high, inside duster. All players get brushed back, but they return squarely to the batter's box. You earned a place there. So what can you do to get on with meaningful negotiations? You might start by keeping the following principles firmly in mind:

1. Everything is negotiable. The most carefully crafted standard contract in existence is no substitute for a clear, mutual understanding. Successful business people recognize that an agreement is expected to be the product of give and take between the parties. They know it is not in their interest to force you to proceed under terms and conditions no professional in full possession of common sense would accept, and they will not be surprised when you insist on carefully negotiating those terms and conditions. Every one of them is an open issue at the outset.

2. There are black hats on both sides. Your client may truly believe that the General Counsel will never approve changes to your agreement. You can be equally adamant in your polite insistence that your partners will never approve the agreement either, at least not in its present form. In the end, this leaves you at a standoff which can only be resolved through meaningful negotiations. Since this is your objective in the first place, you might suggest that you simply get on with it.

3. You are not responsible for the business practices of others. What some architects or engineers might agree to accept has absolutely nothing to do with you. You have an obligation to your client, to your firm, and to your staff to manage your affairs in a prudent, businesslike fashion. There may be professionals around and about who, for whatever reason, choose to do otherwise. Even if this is so, it is irrelevant. You might ask your client if he or she would seriously consider entrusting decisions about the expenditure of millions of dollars to those with no more business sense than to sign anything placed in front of them. It is not likely. It is equally unlikely that you will be the first to object to pitches being thrown at you instead of the plate.

4. Your message needs to be carried to the decision-maker. If your concerns have to be referred to the General Counsel's office for review, ask for a meeting. You need to convey your point of view to those who both understand the implications of the issues you wish to raise and have the authority to deal with them in the context of the project and the institutional environment in which it is being planned. The threat of delay may or may not be real. In any event, it is your client's decision, not yours. What you might do to help ease the burden is suggest that you be authorized to proceed with the pre-design phase of your work on a time and materials basis while the details of your agreement are being finalized. If you get this authorization in writing, it will add to your leverage with every day of delay. If you do not, payment may be doubtful, and most of your leverage will slowly disappear.

5. Replacing you is not the ready option it might seem. By the time you arrive at the negotiating table, your client has already invested a good deal of valuable time and energy in the project and in you. The selection process did not take place overnight. Having resolved the problem of finding the best design team available for the task at hand, your client is as anxious as you are to get on with the job. He or she may also have invested a healthy amount of personal credibility in the institutional decision to bring you in, and the project is probably already behind schedule. Having come this far, no one, least of all your client, wants to throw in the towel and start over again.

6. Your fee is contingent upon issues as yet unresolved. You made certain assumptions about the degree of risk and the level of responsibility you expected to assume when you estimated your fee in the first place. It makes no sense to make concessions about either without at least calling into question the validity of your fee proposal. Your client is likely to respond that these concessions represent business decisions you simply have to be prepared to accept. Perhaps so, but is it fair that they were hidden until now, and how many can you grant before the potential cost exceeds any possible return you might realize by taking on the work? In theory, there is a point at which you would be better off writing a check for the difference and walking away from the job. This is a concept your client understands only too well. You might want to make clear that it is an understanding you share.

Keys to a Satisfactory Outcome

You can negotiate more equitable agreements, on terms your clients will understand and accept, but only if you are prepared to explain your point of view and if you are able to do so without losing sight of the fact that your client's perspective is likely to be very different from your own. Here are some ideas on how you might improve your results without compromising either the integrity of the project or the goodwill of your client:

1. Keep your attorneys in reserve. You and your client are the ones who will have to fulfill the promises you make, not your lawyers. Your attorneys can be of great value after you reach an understanding, but they can not make the decisions needed to arrive at that understanding. Their proper role is to advise you on the legal implications and pitfalls of the language you use, not to strike an agreement on your behalf.

2. Know your priorities. Some issues are more important than others, and you may not prevail on each and every one. You need to have a clear understanding, going in, of the relative importance of the issues you wish to raise. In this sense, you might find it helpful to organize the issues into a hierarchy of objectives. You might, for example, assign the highest priority to provisions affecting your compensation. Then, you might rank issues involving inordinate risk (such as most forms of indemnification), followed by

leverage issues (such as applicable law) and throwaways (such as client approval of any change in project managers).

3. Prepare carefully. Your client can not be expected to respond to your concerns unless you articulate them clearly within a frame of reference with which he or she can identify. This requires that you develop a rather detailed knowledge of the implications of important issues and that you be prepared to express your point of view in such a way as to accommodate your client's interests to the extent equity might dictate. It also requires that you enter your negotiations prepared to enlighten. Your client may not have a clue about the limitations on the role you play in the design and construction process, and you need to be candid about what those limitations are.

4. Develop fall-back positions. You may not be able to secure all of the protections you might like, but that does not mean you have to give away the franchise. There are many ways to deal with important issues, and it will make your negotiation efforts far simpler if you are prepared to make concessions which, nevertheless, incorporate most of the safeguards you need. Very often, your client's attorney will be so enamored of the legal craftsmanship reflected in the owner's draft that minor changes in wording which represent major changes in meaning will be acceptable--even though your proposed contract form is rejected out of hand.

5. Deflect the blame. You do have to protect your relationship with your client, and it makes no sense at all to be the source of bad news. Take a partner to your negotiations, one not involved in the project. That way you can be as accommodating as you like, but unable to move beyond the restrictions your partner has set. You can also blame others not present for the stance you take--your banker, for example, who might not permit you to accept a contract without provision for monthly progress payments, or your insurance advisor, who has made it clear that no coverage is available for certain of the risks your client would have you assume.

6. Get expert help when you need it. After you have arrived at an understanding with your client, have your attorney and insurance counsel review your agreements to make certain that legal requirements are met and that your insurance protection is not being jeopardized. Insurance brokers who specialize in serving architects and engineers in private practice review contracts for their clients on a regular basis. They have seen nearly every issue, heard every argument, and offered every counter-argument dozens of times over. They cannot practice law on your behalf, but they are frequently in a position to help you identify opportunities to strengthen protections against unwarranted risk.

You have more bargaining strength than you might realize, and there is generally more room for negotiation than you might think. You can maintain your professionalism and balance throughout if you communicate to your client going in that the issues you wish to discuss are of great importance to you both and if you deal with those issues firmly, but fairly, as you go along.

Lessons from Successful Negotiators

There are measurable differences between skilled and average players in the negotiating game. Skilled negotiators are consistently successful, and they tend to be considered effective by all who participate in the negotiation process. They produce agreements which hold together, rather than fall apart when the chips are down.

Given the vital importance of the issues of risk and responsibility raised in your professional service agreements, and given that the very best of those agreements are the ones that never have to be tested in court, your skills at the negotiating table can be one of the most effective loss prevention resources you have. You can sharpen those skills by taking your cues from negotiators who have proven to be very good at what they do.

The objective of the negotiating game is a fair and equitable outcome. But, while you might readily agree to focus on the objective instead of the game, those with whom you negotiate may not be so forthcoming. If not, their goal is likely to be to persuade you to agree cheerfully to concessions not in your best interests. Your goal is to persuade them to be reasonable. Successful negotiators are successful persuaders. Here are some of the elements of successful persuasion:

1. Maintaining Composure. Skilled negotiators avoid the use of verbal gymnastics which antagonize without persuasive effect. Direct attacks on the integrity or the moral fiber of the other side are obviously counter-productive, and they are seldom used. Less obviously disruptive are words and phrases with positive value content which, nevertheless, cause irritation: "A most generous offer, " for example, or "more than fair, " when used to describe one's own position, come across as self-serving. They are irritating because they imply that the other side is being greedy and unfair. Skilled negotiators know that gratuitously favorable statements about themselves are harmful, at worst, and valueless, at best. They do not use them. Average negotiators, on the other hand, frequently communicate positive value judgments about themselves and the position they are seeking to advance.

2. Disagreeing with style. When most of us are presented with an unacceptable argument, our natural reaction is, first, to conclude that we disagree and, second, to formulate a rationale in support of that conclusion. Because this is how we think, it is common, under stress, to respond in precisely the same way--to blurt out our disagreement and support it with a string of compelling arguments. In doing so, we heighten tension and invite a defensive response. Skilled negotiators avoid signaling their intention to disagree. They begin, instead, by articulating their reasons. Then, by way of explanation, they lead carefully to an alternate conclusion. This has the effect of deferring a defensive response long enough to allow the explanation to be considered in an atmosphere of relative neutrality. It enhances the likelihood of consensus.

3. Asking Questions. It is tempting, and usually a mistake, to respond to a proposal with a counter-proposal. Such a response introduces new options at a point at which the other party is least likely to be receptive. It is often viewed as a thinly-veiled blocking tactic, and if it does nothing else, it tends to complicate and confuse issues in a situation in which the need for clarity is paramount. Successful negotiators generally avoid counter-proposal responses. They prefer to raise open-ended questions in the hopes of learning more about the other party's position and to buy time to formulate a reasoned reply. Questions give the questioner a certain amount of control over the flow of communications, and they often serve as an effective alternative to outright disagreement. "Let me understand your position " is an opening which allows you to probe with questions and open the discussion to other possibilities. They are not rejections; they are encouragement toward a mutual understanding.

4. Testing Understanding. Average negotiators typically seek (what they perceive to be) safety in ambiguity. By leaving issues unclear, the risk of undesired disagreement is reduced and the short-term objective of quickly concluding the negotiation is enhanced. Skilled negotiators, on the other hand, demonstrate a far greater concern with clarity of understanding. The ultimate viability of the agreement

depends upon it, and they are not willing to jeopardize that viability by leaving ambiguities unresolved. They will restate information to test for misconceptions and misunderstandings, and they will periodically summarize progress in a concise recapitulation of the points that have been made. Their objective is a clear, common understanding that will withstand the tests of time. They frequently stop to ask, "What will be accomplished by this? "

5. Persuading with Precision. For reasons not entirely clear, something in our chemistry leads us to believe that quantity has a direct bearing on outcome when it comes to supporting an argument with rationale. Thus, if we can invent seven ingenious reasons to support our position and you can think of only two in support of yours, ipso facto, we win. In practice, this is generally not so. A very strong argument tends to be diluted in direct proportion to the number of incidental points introduced to support it. This occurs because the discussion is likely to be focused (and to turn) on the weakest reason on the list. Skilled negotiators know that if they advance single reasons with patience and persistence, they are far more likely to persuade in the end than if they let loose a barrage. The option of shifting to subsidiary arguments is not foreclosed by this approach, and that option can always be exercised if the principal argument appears to be losing ground.

6. Building Trust. The Do Holiday image of the negotiator--poker player par excellence, cards close to the vest--is inconsistent with the behavior of those who are most successful at the negotiating table. Skilled negotiators talk about the internal feelings they have about the process as it moves along; average negotiators are more likely to deal with their emotions in stony silence. "I'm uncomfortable with the direction we're taking, but if I understood more about what you're trying to accomplish, it might help us both, " is likely to be far more effective than, "I have to insist we stay on point. " Expressions of internal feelings build trust and facilitate agreement because they reveal (or at least appear to reveal) what is going on behind the mask and, in the process, communicate motives that are genuine and above-board. Stony silence fosters deep suspicions.

There is good news here. The principal advantages enjoyed by very successful persuaders reflect a pattern of behavior remarkably consistent with the natural inclinations of most architects and engineers. You can be every bit as successful a persuader at the negotiating table as you are in your design review meetings. All you need is the will to put your inherent skills to the test and the confidence that, in the end, everyone will benefit from your efforts.

Appendix A

A CHECKLIST FOR REVIEWING CLIENT CONTRACTS

The checklist presented below provides a series of benchmarks against which you might test contracts drafted by others. In this limited application, it may prove valuable to you in your efforts to negotiate fair and equitable agreements.

The contractual issues raised by each of the items on the checklist are addressed in the form of suggested modifications for review with counsel in Appendix B. Consider these suggestions, review them with your attorney, revise them to meet your own unique requirements, and use them where you find them to be appropriate.



ProNet Practice Notes

Protecting Your Fee

____ Are you protected against unreasonable withholding of your fees? (See Suggested [Modification 1.1](#)).

____ What recourse do you have if you are not promptly paid amounts due? Are you entitled to collect interest on aging accounts receivable? (See Suggested [Modification 1.2](#)).

____ Does your agreement give you the right to stop work without liability for damages in the event your fees are unreasonably withheld? (See Suggested [Modification 1.3](#)).

____ Does your agreement provide for an equitable adjustment of fees in the event the project is suspended by the owner and later resumed? Does it provide for close down costs and/or compensation for premature termination? (See Suggested [Modifications 1.4 and 1.5](#)).

____ Is your scope of work clear? Does your agreement distinguish between Basic and Additional Services? Is the list delineating Additional Services as complete as you can reasonably make it? (See Suggested [Modification 2.0](#)).

____ Has your client shifted responsibilities you would normally treat as Additional Services into Basic Services? Have you included the associated costs in your fee? (See Suggested [Modification 2.0](#)).

____ Does your agreement include provisions which will enable you to control substitutions and changes? Does it limit the time you will be expected to spend evaluating and accommodating substitution and change requests to some reasonable amount? (See Suggested [Modification 2.0](#)).

Estimates of Construction Costs

____ Are the limitations on your ability to predict probable construction costs clearly delineated? Do they include mutual recognition that you have no control over the costs of labor, materials, or equipment, over future market conditions, or over the contractor's bidding methods? Does the language make clear that your estimates can not be guaranteed; that you are not representing that the actual costs of construction will not vary from your estimates or from the owner's budget? (See Suggested [Modification 3.0](#)).

____ Is your client seeking greater assurances about construction costs than you can reasonably deliver? Can you provide, instead, that the owner retain an independent cost estimator as a means of securing those additional assurances? (See Suggested [Modification 3.0](#)).

____ If your agreement calls for a fixed limit on construction costs, does it allow you to include contingencies, to make minor adjustments in the scope or the quality of the project, to control the selection of materials, equipment, systems, and types of construction? Does it provide for alternate bid items which can be easily deleted, as necessary, to reduce costs? (See Suggested [Modifications 4.1 and 4.2](#)).

____ What happens if the fixed limit is exceeded by the bids? Is your responsibility for the consequences limited in some reasonable way--to an obligation to redesign, for example? Is the owner required to

cooperate in revising the project scope and quality as may be necessary to bring costs into line? (See Suggested [Modification 4.3](#)).

Construction Phase Services

_____ Does the agreement contain an unequivocal statement of non-responsibility for the means, methods, sequences, techniques, and procedures of construction? (See Suggested [Modification 5.1](#)).

_____ Does the agreement make clear that you neither control nor supervise the work on the site; that you have no responsibility for the contractor's safety precautions in connection with the work; that you are not responsible for errors and omissions of the contractor, nor for a failure to keep the work on schedule or carry it out in accordance with the contract documents? (See Suggested [Modification 5.2](#)).

_____ Does your agreement disclaim any responsibility for temporary shoring, bracing, and scaffolding? (See Suggested [Modification 5.3](#)).

_____ Is your responsibility for reviewing shop drawings, samples, and other contractor submittals limited to those items required by the construction contract? Does the language make clear that your review will be for the limited purpose of ascertaining that the submittals are consistent with your design concept? (See Suggested [Modification 6.0](#)).

_____ Does the agreement call for the preparation of record drawings? If so, does the language make clear that those drawings will be prepared based on information furnished by others--information which you will not be in a position to verify and for which you cannot and will not be responsible? (See Suggested [Modification 7.0](#)).

Miscellaneous Provisions

_____ Does your agreement provide for the transfer of ownership of your documents? If so, does it include adequate protections against the consequences of misinterpretation, modification, or misuse by others in the completion of the project; against reuse on other projects? (See Suggested [Modifications 8.0](#) and [9.0](#)).

_____ Is the owner insisting on the delivery of data in machine-readable form? If so, does your agreement protect you against the foreseeable consequences of manipulation of that data by others? (See Suggested [Modification 10.0](#)).

_____ Are you adequately protected against premature termination of your services and the risk that your documents will be modified, misinterpreted, or misused by others to complete the project (See Suggested [Modification 11.0](#)).

_____ Does the agreement contain a disclaimer of responsibility for the discovery, presence, handling, removal, or disposal of (or the exposure of persons to) hazardous or toxic materials at the site? (See Suggested [Modification 12.0](#)).



ProNet Practice Notes

_____ Is there a clear statement in the agreement that it is for the exclusive benefit of the parties; that it does not create a contractual relationship with or exist for the benefit of any third party--including contractors, subcontractors, and their sureties? (See Suggested [Modification 13.0](#)).

_____ Does your agreement contain a mutual waiver of subrogation for damages covered by property insurance? Does it call for that waiver to be extended to your consultants and subconsultants? To contractors and their subcontractors? (See Suggested [Modification 14.1](#)).

_____ Are your interests protected under any builder's risk policy or course of construction insurance purchased to protect work in progress? (See Suggested [Modification 14.2](#)).

_____ Does your agreement afford you agency status where you are being asked to assume a role customarily performed by a public entity? (See Suggested [Modification 15.0](#)).

_____ Have you secured the owner's agreement to require the contractor's indemnification of you and your consultants against the consequences of the contractor's negligence or willful misconduct? (See Suggested [Modification 16.1](#)).

_____ Are your interests protected under the contractor's general liability policy or any owner's and contractor's protective policy which may be purchased for the project? (See Suggested [Modification 16.2](#)).

_____ Has your client demanded performance against an unreasonable standard of care? If so, are you prepared to respond with language which articulates an acceptable and insurable standard? (See Suggested [Modification 17.1](#)).

_____ Does your agreement limit your obligations to respond to demands for certification by lenders and others to those you can reasonably meet? (See Suggested [Modification 17.2](#)).

_____ Does your agreement contain a disclaimer of responsibility for delays beyond your reasonable control? (See Suggested [Modification 18.0](#)).

_____ Are you are being required to indemnify your client? If so, is your obligation restricted to the consequences of your negligence? (See Suggested [Modification 19.0](#)).

_____ Will your agreement be governed by the laws of the state in which your office is located? (See Suggested [Modification 20.0](#)).

_____ Is mediation identified as the dispute resolution mechanism of first resort? (See Suggested [Modification 21.0](#)).

_____ If the project you are being asked to take on entails risks which are disproportionate to any possible gain you can expect to realize, does your agreement limit your liability to your client to some reasonable dollar amount? (See Suggested [Modification 22.0](#)).

Appendix B



SOME SUGGESTED MODIFICATIONS TO OWNER-DRAFTED FORMS

For Review with Counsel

1.0 Payment of Professional Fees

1.1 No deductions shall be made from the Architect/Engineer's compensation on account of penalties, liquidated damages, or other sums withheld from payments to contractors, or on account of the cost of changes in construction other than those for which the Architect/Engineer has been found legally liable.

1.2 As long as the Architect/Engineer is not in default under this Agreement and such default is not declared by the Owner in writing to the Architect/Engineer, the Owner agrees to pay the Architect/Engineer within thirty (30) days of the date of the Architect/Engineer's invoices for services performed and reimbursable expenses incurred under this Agreement. If the Owner has reason to question or contest any portion of any such invoice, amounts questioned or contested shall be identified and the reasons given, in writing to the Architect/Engineer, within fifteen (15) days of the date of the invoice in question or contested. Any portion of any invoice not so questioned or contested by the Owner shall be deemed to be accepted and approved for payment and shall be paid to the Architect/Engineer within thirty (30) days of the date of the invoice. The Owner agrees to cooperate with the Architect/Engineer in a mutual effort to resolve promptly any questioned or contested portions of the Architect/Engineer's invoices.

1.3 In the event that any unquestioned or uncontested portions of any invoice submitted by the Architect/Engineer are not paid by the Owner within thirty days of the date of the Architect/Engineer's invoice, or in the event that questioned or contested amounts are not resolved and paid within forty five (45) days of the date of the Architect/Engineer's invoice, daily interest on unpaid amounts shall accrue at a rate of ___% per month for each day thereafter, the Owner shall be deemed to be in material breach of this Agreement, and the Architect/Engineer shall have the unilateral and unequivocal right to suspend performance of services under this Agreement and withhold its instruments of service without liability for delay or for consequential or other damages which may result therefrom.*

* Note: Paragraph 1.2 asks the owner for reasonable cooperation. Here you may need to be prepared to demonstrate reasonableness in return. You can do so if you are prepared with a fallback position which would modify this Paragraph 1.3 to include procedures for the initiation (and rescission) of your decision to exercise your rights to suspend services. This will help to communicate that it is not your intention to do so arbitrarily, but that you do expect to be paid promptly and in full for the services you render.

1.4 In the event the services of the Architect/Engineer are suspended by the Owner, the Architect/Engineer shall be entitled to compensation, as Additional Services under this Agreement, for reasonable costs incurred by the Architect/Engineer and the Architect/Engineer's consultants in closing down the project and reassigning project staff (including, but not limited to unavoidable down time and any termination expenses incurred where staff reassignment is not reasonably possible) and in organizing project files, records, and work in progress for suspension and later resumption of the Architect/Engineer's services.* If the period of suspension exceeds _____ days, the Architect/Engineer's fee shall be subject to renegotiation to reflect intervening changes in the Architect/Engineer's fee schedule and any other increases in the cost of completing the project which would not have been incurred but for the delay imposed by the Owner.



* Note: These costs are included by way of example only. They are not necessarily applicable to every project you might undertake, and they need to be identified, articulated, and negotiated within the context of the specific circumstances at hand.

1.5 In the event the Architect/Engineer's services on this project are terminated by the Owner and provided the Architect/Engineer is not found to be in default under this Agreement by a court or forum of competent jurisdiction, the Architect/Engineer shall be entitled to full recovery of all reasonable costs and expenses associated with such termination, including but not limited to: 1) all costs and expenses incurred to the effective date of termination, plus all costs and expenses incurred to assemble and close project files and records; 2) unavoidable down time in the reassignment of project staff; 3) termination expenses where reassignment is not reasonably possible; and 4) any termination penalties or expenses incurred as a result of the termination of agreements with consultants, independent contractors, vendors, or suppliers entered into to meet the Architect/Engineer's obligations under this Agreement. In addition, the Owner shall pay to the Architect/Engineer a termination amount of 15% of that portion of the total compensation provided for hereunder which remains after all recoverable costs, including termination costs, have been deducted therefrom. This sum is specifically intended to compensate the Architect/Engineer for lost profits, damages, and opportunity costs incurred as a result of the Owner's premature termination, which lost profits, damages, and opportunity costs can not otherwise be accurately calculated.

2.0 Additional Services

2.1 The services set forth in this Paragraph 2.0 are not included within the Basic Services to be provided under this Agreement, and they shall be paid for as Additional Services over and above the basic compensation provided for herein. If, in the performance of Basic Services hereunder, the Architect/Engineer determines that Discretionary Additional Services set forth under Paragraph 2.2 are required, the Architect/Engineer shall notify Owner in writing prior to commencing such services. If the Owner deems that such services are not required of the Architect/Engineer, the Owner shall give prompt written notice to the Architect/Engineer giving the reasons therefore, and the Architect/Engineer shall have no obligation to provide those services. The Optional Additional Services set forth in Paragraph 2.3 below shall only be performed if authorized or confirmed in writing by the Owner.

2.2 Discretionary Additional Services

2.2.1. Making revisions in the plans, specifications, or other documents when such revisions are: 1) inconsistent with approvals or instructions previously given by the Owner, including revisions made necessary by adjustments in the Owner's program or project budget; 2) required by enactment, revision, or revised interpretation of codes, laws, ordinances, regulations, policies, procedures, or requirements subsequent to the preparation of such documents; 3) required as a result of changed field or other conditions subsequent to the preparation of such documents; or 4) due to changes required as a result of the Owner's failure to render decisions in a timely manner.

2.2.2 Restaking required because staking is destroyed, damaged, or disturbed by an act of God or parties other than the Architect/Engineer or preparation, examination, or filing of any Record of Survey as may be required by applicable law, if surveying and staking services are included within the scope of services hereunder.



ProNet Practice Notes

2.2.3 Preparing plans, drawings, specifications, and other documents and supporting data, evaluating the Contractor's proposals, and providing other services in connection with change orders and change directives.

2.2.4 Evaluating substitutions proposed by the Contractor and making subsequent revisions to plans, drawings, specifications and other documents resulting therefrom.

2.2.5 Providing consultation concerning construction work damaged by fire or other cause during construction and furnishing services in connection with the replacement of such work.

2.2.6 Providing services made necessary by the default of the Contractor, by defects and deficiencies in the work of the Contractor, by failure of performance of either the Owner or the Contractor under the Construction Contract, or by claims submitted by the Contractor or others in connection with the work.

2.2.7 Providing services in connection with any public hearing not specifically identified herein or services in connection with any arbitration or legal proceeding, except where the Architect/Engineer is a party thereto.

2.2.8 Preparing documents for alternate, separate, or sequential bids or providing services in connection with bidding, negotiation, or construction prior to completion of the construction documents.

2.3 Optional Additional Services

2.3.1 Providing financial feasibility evaluations, environmental impact reports or studies, planning surveys, site evaluations, comparative studies of prospective sites, or other studies not specifically included in the scope of work hereunder.

2.3.2 Providing services relative to future facilities, systems, or equipment, services to verify the accuracy of drawings or other information furnished by the Owner, or services related to existing conditions, unless such services are specifically incorporated in this Agreement.

2.3.3 Making precise determinations of the area of the site or of portions thereof or making detailed measurements of areas in existing facilities, unless such services are specifically provided for herein.

2.3.4 Providing services in connection with the work of a construction manager or separate consultants retained by the Owner.

2.3.5 Providing coordination of construction performed by separate contractors or by the Owner.

2.3.6 Preparing record drawings showing significant changes made during construction based on marked up prints and other data furnished by the Contractor to the Architect/Engineer.

2.3.7 Providing assistance in: 1) the utilization of equipment or systems, such as testing, adjusting, and balancing; 2) preparation of operation and maintenance manuals; 3) training personnel for operation and maintenance, 4) consultation during operation; or 5) providing any other services after the issuance of a



ProNet Practice Notes

certificate for final payment to the Contractor or, in the absence of such certificate, more than 60 days following substantial completion of the construction.

2.3.8 Providing any services not otherwise specifically included in this Agreement.

3.0 Opinions of Probable Construction Costs

(where cost estimating is included in the scope of work, but no protections are afforded as respects your level of responsibility for your estimates).

3.1 The Architect/Engineer's evaluations of the Owner's project budget and its opinions of construction costs as provided for herein will be made on the basis of the Architect/Engineer's experience and qualifications and will represent Architect/Engineer's best judgment as a qualified design professional familiar with the construction industry. Because, however, the Architect/Engineer has no control over the cost of labor, materials, equipment, or services furnished by others, or over the Contractor's methods of determining prices, or over the competitive bidding process or future market conditions, the Architect/Engineer can not and does not guarantee or represent that proposals, bids, negotiated prices, or actual construction costs will not vary from the opinions of probable construction costs prepared or agreed upon by the Architect/Engineer.*

* Note: Depending upon the extent to which you are prepared to offer and to accept responsibility for cost estimating services, you may want to add the following sentence to the end of this Paragraph 3.1: "If the Owner wishes greater assurance as to construction costs, the Owner shall employ an independent cost estimator."

4.0 Responsibility for Construction Costs

(where agreement to design against a fixed limit on construction costs can not be avoided).

4.1 The Architect/Engineer shall be entitled to determine the types of materials, equipment, and component systems to be included in the Construction Contract, to make reasonable adjustments in the general scope, extent, and character of the project, to include contingencies for price escalation, and to include in the Construction Contract alternate bids to allow for pre-award changes to adjust construction costs to the fixed limit established herein. The fixed limit shall be increased by any increase in construction costs occurring after the award of the Construction Contract.

4.2 If the award of the Construction Contract is not made within three months after completion of working drawings by the Architect/Engineer, the fixed limit on construction costs shall be adjusted to reflect any change in the general level of prices within the construction industry between the date working drawings are completed and the date on which proposals or bids are sought.

4.3 If the lowest bona fide proposal or bid exceeds the fixed limit on construction costs, the Owner shall 1) give written approval to increase the fixed limit, 2) authorize rebidding or renegotiation within a reasonable period of time, or 3) cooperate with the Architect/Engineer in revising the scope and quality of the project within the constraints of usual and customary professional practice. In the case of 3) above, the Architect/Engineer shall modify the plans and specifications to adjust construction costs to the fixed



limit. As compensation for making such modifications, the Owner shall pay all costs and reimbursable expenses incurred by the Architect/Engineer on account of such services, but without profit to the Architect/Engineer. The providing of such services shall be the limit of the Architect/Engineer's responsibility arising from the establishment of the fixed limit on construction costs, and the Architect/Engineer shall be entitled to payment for all services performed in accordance with this Agreement whether or not the Construction Contract is awarded or construction is commenced.

5.0 Job-Site Safety and Construction Responsibilities

5.1 The Architect/Engineer's presence on the job-site from time to time shall be for the limited purposes of becoming generally familiar with the progress and quality of completed construction and determining whether, in general, the work is being performed in a manner which indicates that the work, when completed, will be consistent with the intent of the Architect/Engineer's plans and specifications. The Architect/Engineer shall not be responsible for making exhaustive or continuous on-site inspections to check the quality or quantity of construction, nor shall the Architect/Engineer be responsible for the Contractor's failure to carry out the work in accordance with the Construction Contract. On the basis of such on-site observations in the capacity of a design professional, the Architect/Engineer shall endeavor to keep the Owner informed as to the progress and quality of the construction.

5.2 The Architect/Engineer shall have no control over or charge of and shall not be responsible for construction means, methods, techniques, sequences, or procedures, or for safety precautions and programs in connection with the construction of the project, these being solely the responsibility of the Contractor under the Construction Contract. The Architect/Engineer shall not be responsible for the Contractor's schedules or failure to complete the construction of the project in accordance with the Construction Contract, and the Architect/Engineer shall not have control over or charge of acts or omissions of the Contractor, any subcontractors, the officers, employees, or agents of any of them, or any other persons performing portions of the construction work.

5.3 The Architect/Engineer's obligation to observe the construction shall not create any duty on the part of the Architect/Engineer to the Owner, the Contractor, subcontractors, the officers, employees, or agents of any of them, or any other third party with regard to temporary shoring or bracing, scaffolding, or partially completed construction. Any requirement for submission of plans, specifications, or other documentation for temporary shoring, bracing, or scaffolding as may be set forth in the Construction Contract shall be for the sole purpose of verification by the Owner that said plans, specifications, and documentation have been prepared by a licensed engineer. No review of any such plans, specifications, or documentation will be conducted by the Architect/Engineer, and responsibility for their accuracy, adequacy, and completeness, for safety on the site, and for construction means, methods, techniques, sequences, and procedures shall remain solely with the Contractor.

6.0 Review of Contractor Submittals

(given the legal uncertainty of the extent to which you may be held responsible for errors contained in the contractor's submittals--by virtue of the fact that you review them at all--your interests, as well as those of everyone else involved in the project, may be better served by a more detailed review and acceptance of greater responsibility than is provided for here. Subject to the advice of your attorney, you might consider strongly recommending them to your client. If you do so you, will want to revise this Suggested Modification accordingly. If your recommendation is rejected, the provision suggested here

could serve as a fallback position, and the record of your negotiations may be of some value to you if the nature of your responsibility for contractor submittals is later called into question).

6.1 The Architect/Engineer shall review and approve or take appropriate action with respect to shop drawings, product data, samples, and other submittals required under the Construction Contract to be submitted by the Contractor for review by the Architect/Engineer. The Architect/Engineer's review shall be only for the limited purpose of ascertaining general compliance with the design concept for the project and the information given in the Construction Contract. The Architect/Engineer's action shall be taken with reasonable promptness consistent, in the professional judgment of the Architect/Engineer, with the Architect/Engineer's need for sufficient time for review. The Architect/Engineer shall not be required to review and shall not be responsible for any deviations from the Construction Contract not clearly noted by the Contractor, nor shall the Architect/Engineer be required to review partial submissions or those for which submissions for co-related items have not been received.

6.2 Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of details such as dimensions, quantities, weights, gauges, or fabrication processes, nor for substantiating instructions for installation or performance of systems designed by the Contractor, nor for coordination with the work of other trades. The Architect/Engineer's review shall not constitute approval of safety precautions or of the means, methods, techniques, sequences, or procedures of construction. Review of a specific item shall not indicate acceptance of an assembly of which the item is a component. When professional certification of performance characteristics of materials, systems, or equipment is required by the Construction Contract, the Architect/Engineer shall be entitled to rely upon such certification as verification that the materials, systems, or equipment will meet the performance criteria set forth in the Construction Contract.

7.0 Record Drawings

(a record set of plans and specifications showing significant changes made during the construction of the project is most appropriately compiled by the party who is in a position to control the accuracy and completeness of the information necessary for its preparation--the general contractor. Where you can avoid this responsibility, it is probably best that you do. Where you can not, consider incorporating the following protections into your agreement).

7.1 Upon substantial completion of construction, the Architect/Engineer shall obtain from the Contractor a marked up set of plans and specifications showing significant changes in the location and character of the work made by the Contractor during the construction of the project. As an accommodation to the Owner, the Architect/Engineer shall incorporate this information into a set of record documents which shall be delivered to the Owner within a reasonable period after substantial completion.

7.2 The Owner understands and acknowledges that the Architect/Engineer is not in a position to evaluate or verify the accuracy or completeness of any such information furnished by the Contractor, and, accordingly, the Architect/Engineer shall not be responsible, for any inaccuracies, errors, omissions, ambiguities, or conflicts which may be introduced into the record documents as a result of the Architect/Engineer's reliance on such information.

7.3 In consideration of the foregoing, the Owner agrees to hold harmless and indemnify the Architect/Engineer, its officers, employees, agents and consultants from and against any and all claims,



suits, demands, demands, liabilities, losses, and costs (hereinafter "Losses "), including but not limited to reasonable attorney's fees and other costs of defense, accruing or resulting to any and all persons, firms, or any other legal entity, whether attributable to bodily injury, including death, property damage, or economic or other loss, arising out errors, omissions, conflicts, or ambiguities in information supplied by the Contractor and incorporated into the record documents by the Architect/Engineer.

8.0 Ownership of Documents

(where ownership of the documents is demanded by your client but is not tied to a right to prematurely terminate the agreement).

8.1 It is understood and agreed that the plans and specifications prepared by the Architect/Engineer under this Agreement are instruments of professional service intended for one-time use on this project only. Nevertheless, the plans and specifications shall become the property of the Owner upon completion of all services and receipt by the Architect/Engineer of all professional fees and reimbursements provided for hereunder.

8.2 In consideration thereof, the Owner shall hold harmless and indemnify the Architect/Engineer from and against any and all claims, suits, demands, damages, liabilities, losses, and costs (hereinafter "Losses "), including but not limited to reasonable attorney's fees and other costs of defense, whether attributable to bodily injury, including death, property damage, or economic or other loss, accruing or resulting to any and all persons, firms, or any other legal entity, arising out of or in any way connected with the use of the plans and specifications 1) on any project other than the project which is the subject of this Agreement or 2) for modifications to this project not specifically authorized by the Architect/Engineer in writing, excepting only those Losses for which the Architect/Engineer is found solely liable by a court or forum of competent jurisdiction.

9.0 Ownership of Documents

(Alt.) (where ownership of the documents is demanded by your client and includes an unrestricted right to prematurely terminate the agreement).

9.1 It is understood and agreed that the plans and specifications prepared by the Architect/Engineer under this Agreement are instruments of professional service intended for one-time use on this project only. It is further understood and agreed that, in the event the Architect/Engineer is precluded from completing all services provided for hereunder, including all construction phase services, and the Owner elects to have the project completed by others, there is a significant risk of misinterpretation and misuse of the Architect/Engineer's partially completed instruments of service. Nevertheless, all such plans and specifications shall become the property of the Owner in accordance with the terms and conditions of this Agreement.

9.2 In consideration thereof, the Owner shall hold harmless and indemnify the Architect/Engineer from and against any and all claims, suits, demands, damages, liabilities, losses, and costs (hereinafter "Losses "), including but not limited to reasonable attorney's fees and other costs of defense, whether attributable to bodily injury, including death, property damage, or economic or other loss, accruing or resulting to any and all persons, firms, or any other legal entity, arising out of or in any way connected with the use of the



plans and specifications by the Owner or any third party 1) for completion of the design of this project by others, 2) for the construction of this project without participation of the Architect/Engineer, or 3) on any project other than the project which is the subject of this Agreement, excepting only those Losses for which the Architect/Engineer is found solely liable by a court or forum of competent jurisdiction.

10.0 Use of Electronic Media

(for use where instruments of service are demanded in machine-readable form and, then, only where prepared in record document form; if instruments of service are demanded in other than record document form, appropriate modifications to Paragraph 10.1 are required).

10.1 All drawings, specifications, and other instruments of professional service furnished at the Owner's request on electronic media, disk, tape, or cartridge are record documents to be used for the sole purpose of maintenance of the original facility for which they were prepared, and in no case shall they be used for future construction, including but not limited to renovations or additions to the original facility.

10.2 Due to the risk of damage, anomalies in transcription, and modification during use, whether intended or otherwise, it is agreed that the Architect/Engineer shall archive a copy of the electronic media transferred to the Owner, the contents of which it is expressly agreed shall be conclusive proof in all disputes over the content of electronic media furnished to the Owner.

10.3 Hard paper copies of the information contained on the electronic media are available, and their use is recommended. Use of the electronic media at the Owner's election shall be at the sole risk of the Owner and without liability or legal exposure to the Architect/Engineer, and the Owner shall, to the fullest extent permitted by law, indemnify and hold harmless the Architect/Engineer and the Architect/Engineer's officers, employees, agents, and consultants from and against any and all claims, suits, demands, damages, liabilities, losses, and costs, including but not limited to reasonable attorneys' fees and other costs of defense, arising out of or resulting from any use, misuse, alteration, or modification of the Architect/Engineer's instruments of professional service delivered to the Owner in electronic media form.

11.0 Incomplete Services

(for use where the owner rejects construction phase services or where there is a risk of premature termination of the agreement).

11.1 The Owner acknowledges and agrees that the design services performed pursuant to this Agreement will be based on field and other conditions existing at the time the services are performed, that these conditions may change by the time the construction work occurs on the project, and that clarification, adjustment, and modification of the Architect/Engineer's plans and specifications may be required to reflect these changes. The Owner further acknowledges and agrees that the design of the project can not and will not be complete, nor can unavoidable design errors, omissions, ambiguities, and conflicts be identified and resolved, until all services provided for hereunder, including construction phase services, have been performed in full by the Architect/Engineer.

11.2 The Owner understands that the risk of loss resulting, among other things, from misinterpretation, inappropriate modification, and misuse of the plans and specifications and miscommunication in their

implementation is significantly higher when the Architect/Engineer is not retained or is otherwise deprived of its ability to refine the design by conducting on-site construction review, observing the work in progress, and interpreting, modifying, and correcting the plans and specifications as construction progresses.

11.3 In consideration of the foregoing, if, after careful deliberation, the Owner elects not to retain the Architect/Engineer to provide such construction phase services or any of them, the Owner shall indemnify and hold harmless the Architect/Engineer from and against any and all claims, suits, demands, damages, liabilities, losses, and costs (hereinafter "Losses"), including but not limited to reasonable attorney's fees and other costs of defense, accruing or resulting to all persons, firms, and any other legal entity, whether attributable to bodily injury, including death, property damage, or economic or other loss, arising out of errors, omissions, conflicts, or ambiguities in the plans and specifications and/or arising out of or in any way connected with the modification, misinterpretation, or misuse of the plans and specifications by the Owner or others, excepting only those Losses for which the Architect/Engineer is found solely liable by a court or forum of competent jurisdiction.

12.0 Hazardous Materials

(where the presence of asbestos or pollution on the site is suspected or unknown or where specification of asbestos-containing products may be required by the owner. If this Paragraph 12.0 is used, it should be accompanied by Suggested Modification 13.0).

12.1 The Architect/Engineer and the Architect/Engineer's consultants shall have no responsibility for the discovery, presence, handling, removal, or disposal of or exposure of persons to asbestos or hazardous or toxic substances in any form at the project site. Professional services related to or in any way connected with the investigation, detection, abatement, replacement, use, specification, or removal of products, materials, or processes containing asbestos or hazardous or toxic materials are beyond the scope of this Agreement.

12.2 In the event the Architect/Engineer encounters asbestos or hazardous or toxic materials at the job-site, or should it become known to the Architect/Engineer that such materials may be present at the job-site, the Architect/Engineer may, at its option and without liability for consequential or other damages which may be attributable to the Architect/Engineer's action, suspend the performance of services on the project until such time as the Owner retains a specialist consultant or contractor to identify, classify, abate and/or remove the asbestos and/or hazardous or toxic materials and warrant that the job-site is free from any hazard which may result from the existence of such materials.

12.3 In consideration of the foregoing, the Owner agrees that the Architect/Engineer and the Architect/Engineer's consultants shall not be responsible for and that Owner shall bring no claim against the Architect/Engineer, its officers, employees, agents, or consultants if such claim would in any way involve the investigation, detection, abatement, replacement, use, specification, or removal of products, materials, or processes containing asbestos or hazardous or toxic substances. Owner further agrees to indemnify and hold harmless the Architect/Engineer, its officers employees, agents, and consultants from and against any and all third party claims, suits, demands, liabilities, losses, or costs (hereinafter "Losses"), including reasonable attorneys' fees and other costs incurred in the defense thereof, accruing or



ProNet Practice Notes

resulting to any and all persons, firms, or any other legal entity, arising out of or in any way connected with asbestos or hazardous or toxic substances, products, materials, or processes, excepting only those Losses for which the Architect/Engineer is found solely liable by a court or forum of competent jurisdiction.

13.0 No Benefit for Third Parties

13.1 The services to be performed by the Architect/Engineer pursuant to this Agreement with the Owner are intended solely for the benefit of the Owner, and no benefit is conferred hereby, nor is any contractual relationship established herewith, upon or with any person or entity not a party to this Agreement. No such person or entity shall be entitled to rely on the Architect/Engineer's performance of its services hereunder, and no right to assert a claim against the Architect/Engineer, its officers, employees, agents, or consultants shall accrue to the Contractor or to any subcontractor, sub-subcontractor, independently retained professional consultant, supplier, fabricator, manufacturer, lender, tenant, insurer, surety, or any other third party as a result of this Agreement or the performance or non-performance of the Architect/Engineer's services hereunder.

14.0 Property Insurance for the Project

(for use on projects involving structures to be insured under builder's risk, course of construction, or other property insurance policies).

14.1 The Owner and the Architect/Engineer waive all rights of subrogation against each other and against the contractors, consultants, officers, agents, and employees of the other for damages covered by property insurance during or after construction, except such rights as they may have to the proceeds of such insurance. The Owner and the Architect/Engineer each shall require similar waivers from their contractors, consultants, and agents.

14.2 The Owner agrees to name or require the Contractor to name the Architect/Engineer, its officers, partners, employees, agents, and consultants as additional insureds as their interests may appear on any Course of Construction, Builder's Risk, or other property insurance purchased by the Owner or the Contractor to protect work in progress or any materials, supplies, or equipment purchased for installation therein.

15.0 Agency Status of Architect/Engineer

(where the services to be rendered involve stepping into the shoes of a public client--plan checking for local governments, for example, or performance of project management or inspection services in place of a public employee's customary role on the site--it may well be appropriate to insist on agency status. A word of extreme caution: You will want to seek competent legal assistance before you set out to do so. Agency status is a highly uncertain area of the law, and state and local laws, codes, and ordinances can impose constraints which could significantly affect your decision and your approach).

15.1 The Architect/Engineer and the Architect/Engineer's consultants shall perform their services under this Agreement as agents of the Owner, it being the express intent of the parties hereto that any protection afforded the Owner under the Doctrine of Sovereign Immunity and any insurance and



indemnification protection likewise afforded the Owner under the Construction Contract be extended to the Architect/Engineer, its officers, employees, agents, and consultants.

16.0 Contractor's Indemnification and Insurance

16.1 The Owner agrees to require the Contractor to indemnify and hold harmless the Architect/Engineer, its officers, employees, agents, and consultants against claims, suits, demands, liabilities, losses, damages, and costs, including reasonable attorneys' fees and all other costs of defense, arising out of the negligence, breach of contract, or willful misconduct of the Contractor, its subcontractors, and the officers, employees, agents, and subcontractors of any of them. In the event such provision is not included in the Construction Contract, the Owner shall indemnify and hold harmless the Architect/Engineer, its officers, employees, agents and consultants from and against any and all claims or actions and any and all expenses which should and would have been indemnified by the Contractor had such provision been included.

16.2 The Owner further agrees to furnish to the Architect/Engineer Certificates of Insurance evidencing that the Architect/Engineer, its officers, employees, agents, and consultants are named as additional insureds on the policies of comprehensive or commercial general liability insurance applicable to the project maintained by the Contractor and on any policy of owner's and contractor's protective insurance which may be written for the project. Such coverage shall be primary and non-contributing with any such insurance carried by the Architect/Engineer and the Architect/Engineer's consultants and shall provide that the Architect/Engineer be given thirty days' unqualified written notice prior to any cancellation thereof.

17.0 Standard of Care

17.1 The Architect/Engineer shall perform its services under this Agreement in accordance with usual and customary professional care and with generally accepted architectural/engineering practices in effect at the time the services are rendered. The Architect/Engineer makes no representation, warranty, or guarantee, express or implied, as to its findings, recommendations, plans, specifications, drawings, or professional judgment or advice other than the representation contained in this Paragraph 17.1.*

* Note: Some attorneys prefer to let the law speak for itself. They advise use of the foregoing provision only where necessary to respond to an unreasonable standard in the owner's draft.

17.2 Proposed language for any certificates or certifications requested of the Architect/Engineer shall be submitted to the Architect/Engineer for review and approval at least 15 days prior to the date on which they are needed by the Owner or due to be submitted to others. The Owner shall not request and the Architect/Engineer shall not be required to execute certificates or certifications which would require knowledge or services beyond the scope of this Agreement or which would impose on the Architect/Engineer obligations which exceed the standard of care set forth in Paragraph 17.1 above.

18.0 Project Schedule

18.1 The Architect/Engineer acknowledges the importance to the Owner of the Owner's project schedule and agrees to put forth its best professional efforts to perform its services under this Agreement in a

manner consistent with that schedule. The Owner understands, however, that the Architect/Engineer's performance must be governed by sound professional practices.

18.2 The Architect/Engineer shall not be responsible for delay caused by circumstances beyond its reasonable control, including, but not limited to delays by reason of 1) strikes, lockouts, work slowdowns or stoppages, or accidents, 2) acts of God, 3) failure of the Owner to furnish timely information or to approve or disapprove the Architect/Engineer's instruments of service promptly, and 4) faulty performance or non-performance by the Owner, the Owner's independent consultants or contractors, or governmental agencies; nor shall the Architect/Engineer be responsible for delays occasioned by actions taken by the Architect/Engineer which, in the sole judgment of the Architect/Engineer, are required by sound architectural/engineering practice. The Architect/Engineer shall not be liable for damages arising out of any such delay, nor shall the Architect/Engineer be deemed to be in default of this Agreement as a result thereof.

19.0 Indemnification

(for use as a reasonably acceptable and generally insurable substitute for the owner's indemnification provision where indemnification of the owner can not be avoided entirely).

19.1 The Architect/Engineer shall hold harmless and indemnify the Owner, its officers, and its employees from and against losses, liabilities, damages, and costs arising out of the negligent acts, errors, or omissions of the Architect/Engineer or those for whom the Architect/Engineer is legally liable as a result of the performance of services under this Agreement.

20.0 Applicable Law

20.1 This Agreement shall be governed by the laws of the state in which the principal offices of the Architect/Engineer are located.

21.0 Mediation

21.1 All claims, disputes, and controversies arising out of or in relation to the performance, interpretation, application, or enforcement of this Agreement, including but not limited to breach thereof, shall be referred for mediation under the then current Construction Industry Mediation Rules of the American Arbitration Association prior to any recourse to arbitration or to a judicial forum.

21.2 The Owner and the Architect/Engineer agree to include the foregoing provision in any and all agreements with independent contractors and consultants retained for the project and to require all independent contractors and consultants to likewise include said provision in any and all agreements with subcontractors, subconsultants, suppliers, or fabricators so retained.

22.0 Limitation of Liability

(for use where risks are disproportionate to the profit which might be realized from the project, but where general indemnification by the owner is not feasible. Note, however, that unlike indemnification, limitation of liability does not protect against third party claims).



ProNet Practice Notes

22.1 To the fullest extent permitted by law, the total liability, in the aggregate, of the Architect/Engineer, the Architect/Engineer's officers, employees, agents, and independent professional associates and consultants, and any of them, to the Owner and anyone claiming by, through, or under the Owner, for any and all injuries, claims, losses, expenses, or damages whatsoever arising out of or in any way related to the Architect/Engineer's services, the project, or this Agreement, including but not limited to the tort liability or breach of contract or warranty, if any, of the Architect/Engineer, the Architect/Engineer's officers, partners, directors, employees, agents, and independent professional associates and consultants, or any of them, shall not exceed the total compensation received by the Architect/Engineer under this Agreement or the total amount of \$_____, whichever is greater.

* David W. Lakamp is President of Professional Practice Insurance Brokers, Inc. and a founding member and former President of a/e ProNet. He has specialized in professional liability insurance and risk management for the design professions for the past fourteen years. He writes from his office in Redwood City, California.