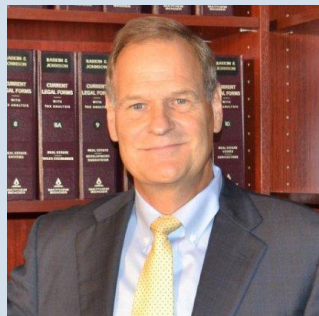


# ProNetwork News

Risk Management Tools for the Design Professional



**Kent Holland, J.D.**

J. Kent Holland is a construction lawyer with Construction Risk Counsel, PLLC, located in Virginia, representing design professionals, contractors and project owners. He is founder and president of [ConstructionRisk, LLC](#), which provides consulting services to owners, design professionals, contractors and attorneys on construction projects; risk management advice concerning insurance coverage; and guidance to those procuring insurance. Mr. Holland publishes an online construction risk management library ([ConstructionRisk.com](#)) and a risk management/legal newsletter ([ConstructionRisk Report](#)). He is a frequent speaker for groups such as the American Bar Association and the International Risk Management Institute. He has also written several books, including two published with a/e ProNet: [Risk Management for Design Professionals in a World of Change \(2010\)](#) and [Risk Management & Contract Guide for Design Professionals \(2006\)](#).

Phone: (703) 992-9480  
[kent@constructionrisk.com](mailto:kent@constructionrisk.com)



a/e ProNet

Dave Johnston, Executive Director

[info@aepronet.org](mailto:info@aepronet.org)

[www.aepronet.org](http://www.aepronet.org)

## Template of Reasonable Contract Clauses for Design Professionals

*by Kent Holland*

Key risk allocation clauses in design professional contracts that routinely require editing to make the risk more manageable or insurable include those presented in this template. The language set forth below is suggested as reasonable compromise language to onerous terms and conditions. This is not legal advice, and before adopting contract language for any specific situation, consultations with legal counsel is recommended. Enforceability of contract language varies from state to state.

### Sample Template Clauses include:

1. Certifications
2. Compliance with Law
3. Copyright of Documents
4. Cost Estimates Exceeded – Redesign Services Required
5. Incorporation by Reference and Flow Down
6. Indemnification
7. Limitation of Liability
8. Payment Provisions
9. Prevailing Party Attorneys fees
10. Site Visits/Inspection
11. Standard of Care
12. Suspension of Services
13. Time of Performance
14. Waiver of Consequential Damages
15. Withholding Fees
16. Warranties

*This information is provided as a service of a/e ProNet, an international association of independent insurance brokers dedicated to serving the design profession since 1988. We are dedicated to representing the best interests of our design clients as a trusted and impartial source of information on professional liability insurance, risk management, loss prevention and continuing education. Please visit our website [www.aepronet.org](http://www.aepronet.org) for additional information*



# ProNetwork News

## Risk Management Tools for the Design Professional

### 1. Certifications

Do not agree by contract to execute all certifications that may later be required by the client or a lender or other party. Certificates should be signed “to the best of our knowledge, information and belief.” Do not grant warranties and guarantees by an overly broad certification. The following article can help avoid having to sign onerous certifications:

*Consultant shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of this Agreement, and shall not be required to sign any documents that would result in Consultant having to certify the existence of conditions whose existence the Consultant cannot ascertain. Any certificate will state that it is based on the best of the Consultant’s knowledge, information and belief.*

### 2. Compliance with Laws

Don’t guarantee compliance with all laws. Such warranties and guarantees are uninsurable. Revise such clauses to read more like the following:

*(1) Consultant shall exercise the reasonable standard of care to comply with requirements of all applicable codes, regulations, and current written interpretation thereof published and in effect during the Consultant’s services. In the event of changes in such codes, regulations or interpretations during the course of the Project that were not and could not have been reasonably anticipated by the Consultant and which result in a substantive change to the construction documents, the Consultant shall not be held responsible for the resulting additional costs, fees or time, and shall be entitled to reasonable additional compensation for the time and expense of responding to such changes.*

If it seems like a contract contains onerous requirements concerning compliance with laws and codes, consider adding the following:

*(2) The client acknowledges that the requirements of federal, state, and local laws, rules, codes, ordinances, and regulations, including the Americans with Disabilities Act, are subject to various and possible contradictory interpretations. The Consultant will use reasonable professional efforts and judgment to correctly interpret and apply such requirements. Consultant, however, cannot and does not warrant or guarantee that the work will comply with the interpretation of such requirements by others.*

### 3. Copyright of Documents

If Client requires DP grant client copyright of documents, add the following to the ownership and copyright article of the contract:

*(1) If the client reuses or makes any modification to Consultant’s designs, documents or work product without the prior written authorization of Consultant, or uses the*

# ProNetwork News

## Risk Management Tools for the Design Professional

*documents without retaining Consultant, the client agrees, to the fullest extent permitted by law, to release Consultant, its officers, directors, employees and subconsultants from all claims and causes of action arising from such uses, and shall indemnify and hold them harmless from all costs and expenses, including the cost of defense, related to claims and causes of action to the extent such costs and expenses arise from the Client's modification or reuse of the documents.*

If the grant of the copyright to the client is so broad that it might require giving away the DP's own design detail library, add the following clause:

*(2) Client expressly acknowledges and agrees that the documents and data to be provided by Consultant under the Agreement may contain certain design details, features and concepts from Consultant's own practice detail library, which collectively may form portions of the design for the Project, but which separately, are, and shall remain, the sole and exclusive property of Consultant. Nothing herein shall be construed as a limitation on Consultant's right to re-use such component design details, features and concepts on other projects, in other contexts or for other clients.*

#### **4. Cost Estimates being Exceeded – Redesign Services Required**

When the contract states that the design professional is responsible for redesigning the project with no additional compensation if the construction bids come in over budget or if change orders bump the cost over budget, revise the relevant paragraphs to insert that the services are only to be without compensation if the overrun was due to the consultant's negligence. Where the a contract has several places where it requires free re-design services due to cost estimates being exceeded, consider adding the following:

*(1) Notwithstanding any other term of this Agreement, if Consultant has any duty to design the Project within a Construction Budget, its duty shall be limited to responsibilities that are reasonably within its direct control, thereby excluding matters that are beyond the control of Consultant including, but not limited to, unanticipated rises in the cost of labor, materials or equipment, changes in market or negotiating conditions, and errors or omissions in cost estimates prepared by others. Therefore, any such redesign effort required of Consultant necessary to maintain the project within the Construction Budget that is not due specifically to the negligent act error, omission, or willful misconduct on the part of Consultant shall require an increase to the compensation of Consultant.*

The following can also be useful:

*(2) It is recognized that neither the Consultant nor its client has control over the cost of labor, materials or equipment, over the Contractor's methods of determining bid prices, or over competitive bidding, market or negotiating conditions. Accordingly, Consultant cannot and does not warrant or represent that bids or negotiated prices to construct the part of the project for which it has provided services will not vary from*

# ProNetwork News

## Risk Management Tools for the Design Professional

*the Owner's budget for the Project or from an estimate of the Cost of the Work or evaluation prepared or agreed to by Consultant.*

### 5. Incorporation by Reference and Flow Down Provision

How this clause will read is dependent upon the negotiating power and positions of the prime consultant and subconsultant. The prime consultant will probably want to include a clause like the following so that it imposes on the subcontractor the most detailed and strict provisions that are applicable to the prime contractor itself:

**Conflicts/Inconsistencies.** *In the event of any inconsistencies within or between any parts or provisions of this subcontract, the primed contract, any Schedule, Exhibit or Attachment to this Contract, any Task Order or any applicable standards, codes or ordinances, the Consultant will (1) provide the better quality or greater quantity of services or (2) comply with the more stringent requirement; either or both in accordance with the client's interpretation.*

The subcontractor will likely want to include different language, or at a minimum, stating that certain provisions of the prime contract will not override terms and conditions that have been negotiated for the subcontract. For example, a subcontractor may want to include a provision to specifically state the limits on its standard of care and indemnity, such as the following:

**Standard of Care and Indemnification.** *Notwithstanding any clause in this Agreement to the contrary, it is agreed that Consultant expressly disclaims all express or implied warranties and guarantees with respect to the performance of professional services, and it is agreed that the quality of such services shall be judged solely as to whether Consultant performed its services consistent with the professional skill and care ordinarily provided by firms practicing in the same or similar locality under the same or similar circumstances (hereinafter the "Standard of Care"), and it is further agreed that Consultant shall not defend an Indemnitee against any professional liability claim and shall not be required to indemnify any Indemnitee for anything other than liabilities and damages arising out of third party claims to the extent caused by the Consultant's willful misconduct or negligence.*

### 6. Indemnification.

In the examples provided below, some include an obligation to indemnify a client for reasonable attorneys fees and defense costs. To the extent the a/e is required to pay attorneys fees for its client only because it obligated itself to do so by the indemnification clause (i.e., attorneys fees would not be imposed on the a/e by a court under common or law or statute), then these costs will not be covered by insurance. The contractual liability exclusion will bar their recovery.

# ProNetwork News

## Risk Management Tools for the Design Professional

### Sample 1:

*Consultant shall indemnify and hold harmless the Client, its officers, directors, employees, from and against those liabilities, damages and costs that Client is legally obligated to pay as a result of the **death or bodily injury to any person or the destruction or damage to any property**, to the extent caused by the willful misconduct, negligent act, error or omission of the Consultant or anyone for whom the Consultant is legally responsible, subject to any limitations of liability contained in this Agreement. Consultant will reimburse Client for reasonable defense costs for claims arising out of Consultant's professional negligence based on the percentage of Consultant's liability.*

### Sample 2: For California contracts must add that there is no duty to defend:

*Consultant shall indemnify and hold harmless (**but not defend**) the Client, its officers, directors, employees, from and against those liabilities, damages and costs that Client is legally obligated to pay as a result of the death or bodily injury to any person or the destruction or damage to any property, to the extent caused by the willful misconduct, negligent act, error or omission of the Consultant or anyone for whom the Consultant is legally responsible, subject to any limitations of liability contained in this Agreement. Consultant will reimburse Client for reasonable defense costs for claims arising out of Consultant's professional negligence based on the percentage of Consultant's liability.*

### Sample 3: Instead of referencing BI and PD, reference "third party claims"

*Consultant shall indemnify and hold harmless the Client, its officers, directors, employees, from and against those liabilities, damages and costs **arising out of third party claims** to the extent caused by the willful misconduct, negligent act, error or omission of the Consultant or anyone for whom the Consultant is legally responsible, subject to any limitations of liability contained in this Agreement. Consultant will reimburse Client for reasonable defense costs for claims arising out of Consultant's professional negligence based on the percentage of Consultant's liability.*

### Sample 4: Include a duty to defend in the main text for CGL type claims but add sentence at conclusion to carve out professional liability claims.

*Consultant shall indemnify, **defend** and hold harmless the Client, its officers, directors, employees, from and against those liabilities, damages and costs arising out of third party claims to the extent caused by the willful misconduct, negligent act, error or omission of the Consultant or anyone for whom the Consultant is legally responsible, subject to any limitations of liability contained in this Agreement. Consultant will reimburse Client for reasonable defense costs for claims arising out of Consultant's professional negligence based on the percentage of Consultant's liability. **The duty to defend shall not apply to professional liability claims.***

# ProNetwork News

## Risk Management Tools for the Design Professional

**Sample 5:** A different way to address defense obligations:

*The foregoing defend, hold harmless and indemnity obligations of this paragraph shall apply solely to any such causes of action, damages, costs, expenses or defense obligations covered by Consultant's Insurance specified in this Agreement.*

**Sample 6:** Instead of agreeing to indemnify for all damages, including reasonable attorneys fees, strike out the attorneys fees in the body of the indemnity clause and use the simple one sentence shown in the above examples for attorneys fees or use the following:

*Consultant agrees to reimburse Client for reasonable defense costs, provided however that such obligation is limited to the portion of such costs equal to the percentage of Consultant's liability as ultimately determined to be caused by the willful misconduct or negligence of Consultant using principles of comparative fault.*

### 7. Limitation of Liability

*To the fullest extent permitted by law, the total liability, in the aggregate, of Consultant, Consultant's officers, directors, partners, employees, agents, and subconsultants, to Client, and anyone claiming by, through, or under Client for any claims, losses, costs, or damages whatsoever arising out of, resulting from or in any way related to this Project or Agreement from any cause or causes, including but not limited to negligence, professional errors and omissions, strict liability, breach of contract, or breach of warranty, shall not exceed the total compensation received by Consultant or \$50,000 whichever is greater.*

### 8. Payment Provisions

In order to protect against having to continue to work on a project when the client is failing to pay, include the following:

#### *Suspension for Non Payment*

*A. Suspension by Consultant. If client fails to make payments of the consultant's Fee or reimburse expenses when due, other than in connection with a good faith dispute of the amount owing or by reason of the breach of this Agreement by Consultant, Consultant may suspend performance of services hereunder if such failure to pay continues for fifteen (15) days following notice to client of such breach.*

### 9. Prevailing Party Attorneys clause

Add a definition:

# ProNetwork News

## Risk Management Tools for the Design Professional

Many contracts include a clause in the disputes provision of the agreement stating that the “prevailing party” shall be entitled to recover its attorneys fees from the other party. The problem is twofold. Of utmost importance is the fact that professional liability policies do not cover attorneys fees that an insured design professional is required to pay only as the result of a contractual liability clause such as the prevailing party attorneys fees clause.

The second problem is that the term “prevailing party” is undefined and ambiguous in its meaning. Courts can interpret it to mean anything they deem appropriate. It is even possible for a party to recover less than 10 percent of its claim and be awarded 100 percent of its attorneys fees as the “prevailing party.”

Since the prevailing party attorneys fees clause may create uninsurable losses, the preferred course of action is to strike this clause from design professional contracts. But if the project owner refuses to strike it, and the design professional is willing to assume the risk of these uninsurable attorneys fees, then at a minimum, the term “prevailing party” needs to be carefully defined.

In order to avoid confusion, never agree to a prevailing parties attorneys fee unless you add a definition such as the the one below. Note that there are numerous ways to draft a definition and different percentages can be used at the option of the parties. The important thing is that there be some definition of what this important term means.

*“Prevailing party” shall be defined (1) as a claimant that is awarded net 51 percent of its affirmative claim, after any offsets for claims or counterclaims by the other party, and (2) as a defendant/respondent against whom a net award of 50 percent or less of a claimant’s claim is granted. In claims for money damages, the total amount of recoverable attorney’s fees and costs shall not exceed the net monetary award of the Prevailing Party.*

### 10. Site Visits – Inspections

Do not agree to inspect the contractor’s work for the purpose of guarding the client against defects. Delete such language and replace with the following:

*On the basis of the site visits, the Consultant shall keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies observed in the Work.*

### 11. Standard of Care

*Consultant shall perform its services consistent with the professional skill and care ordinarily provided by firms practicing in the same or similar locality under the same or similar circumstances (hereinafter the “Standard of Care”).*

# ProNetwork News

## Risk Management Tools for the Design Professional

If the contract seems to contain language in various clauses that suggest any warranties or guarantees, or words like “ensure” or “assure,” consider adding the following:

*“Notwithstanding any clause in this Agreement to the contrary, Consultant expressly disclaims all express or implied warranties and guarantees with respect to the performance of professional services.”*

If the project owner is insisting on warranties, consider adding the following:

*“Warranty of non-professional services. Consultant warrants and guarantees that all Materials and equipment furnished under the Contract Documents shall be new unless otherwise specified, and that all Work will be of the specified quality, free from faults or defects in Materials or workmanship, and in accordance with requirements of the Contract Documents.”*

### 12. Suspending Services for Non-Payment

Another protection that can be added so that the client cannot arbitrarily withhold payment and expect the design professional to continue to perform is the following:

*If the client, other than as allowed by the Contract or other than due to the fault of the consultant, fails to pay the consultant undisputed amounts due within thirty (30) days after the time that such amounts are due to be paid, the consultant may, upon seven (7) additional days’ written notice to the client, stop the Work until payment of such undisputed amount is paid. The Contract Time and Contract Sum shall be extended appropriately to reflect the Contract’s reasonable costs of shut-down, delay and start-up.*

### 13. Time for Performance

Do not agree to “time of the essence.” This is only appropriate for construction contractors. It potentially creates an uninsurable warranty if a design firm agrees to time of the essence. Use a clause like the following:

*Consultant shall perform its services to meet the schedule as expeditiously as is consistent with the exercise of professional skill and care and the orderly progress of the Project.*

**Alternative idea:** If unable to replace the time of essence clause, add the following to the end of the clause:

*Notwithstanding the foregoing, in no event will Consultant be responsible for damages due to delays beyond Consultant’s reasonable control.*



# ProNetwork News

## Risk Management Tools for the Design Professional

### 14. Waiver of Consequential Damages (Mutual)

The use of a waiver of consequential damages clause can be great value to avoid surprise or unknown damages that were not foreseeable or contemplated by the parties – particularly for the fees charged by the design firm under the contract. You can add waiver clause such as that found in AIA B101, or you can add a longer version that defines what is included in the term “consequential damages” which is otherwise ill-defined word.

*Notwithstanding anything in this Agreement to the Contrary, it is agreed that neither party shall be liable in any event for any special or consequential damages suffered by the client arising out of the services hereunder. Special or consequential damages as used herein shall include, but not be limited to, loss of capital, loss of product, loss of use on any system, or other property, or any other indirect, special or consequential damage, whether arising in contract, tort (including negligence), warranty or strict liability.*

### 15. Withholding Fees

Don't agree to allow the client to withhold fees in its sole discretion to set off against what it believes will be claims against the design professional. If there is a withholding clause, add the following:

*The client shall not withhold amounts from the consultant's compensation to impose a penalty or liquidated damages on the consultant, or to offset sums requested by or paid to contractors for the cost of changes in the Work unless the consultant agrees or has been found liable for the amounts in a binding dispute resolution proceeding.*

Another protection that can be added so that the client cannot arbitrarily withhold payment and expect the design professional to continue to perform is the following:

*If the client, other than as allowed by the Contract or other than due to the fault of the consultant, fails to pay the consultant undisputed amounts due within thirty (30) days after the time that such amounts are due to be paid, the consultant may, upon seven (7) additional days' written notice to the client, stop the Work until payment of such undisputed amount is paid. The Contract Time and Contract Sum shall be extended appropriately to reflect the Contract's reasonable costs of shut-down, delay and start-up.*

### 16. Warranties

If the contract seems to contain numerous or even disguised references to an elevated standard of care, or expectations of design professional perfection, or guarantees or warranties, avoid all such warranties by adding a catch all disclaimer provision to the contract such as the following:

*Notwithstanding any clause in this Agreement to the contrary, Consultant expressly disclaims all express or implied warranties and guarantees with respect to the performance of professional services.*

# ProNetwork News

## Risk Management Tools for the Design Professional

## Broker's Notes:

Visit [the a/e ProNet website](http://www.aepronet.org) today for more excellent resources:

### [ProNet Practice Notes](#)

#### The Keys to Keeping a Project on Track



In 1985, after five years prosecuting criminals as an assistant US attorney, I became deputy general counsel of The American Institute of Architects. On my very first day, I was introduced to civil law. In his gravelly voice, the general counsel explained to me that the key to success in my new position was to "think liability". I understood, as the traditional casebooks teach in law school, that appellate decisions in commercial cases tend to focus on determining where something went wrong and deciding who should be blamed. Liability was the proverbial 'hot potato', something to be avoided at all cost. As a result, lawyers teach and are trained to concentrate on anticipating potential liability and finding ways to avoid or transfer it so their clients are not caught in its web. The general counsel wanted me to think the same.

### [Guest Essays](#)

#### Benefits of a Succession Plan for your Business



You've worked hard to establish your business and plan to stay actively involved in its future success. So, why would you plan your exit from it now? Because, as the saying goes, if you fail to plan, plan to fail. You won't lead your company forever, and statistics show most businesses don't make it past the second generation of ownership due to the lack of a proper and thorough succession plan.

### [The ProNet Blog](#)

#### Federal Trade Commission Releases How-To Cybersecurity Guide



Design firms may not seem like prime targets for hackers, many of whom are after sensitive, personal information, etc., but this assumption can be dangerous for architects and engineers. Intellectual property must be kept secure, and the threat can come from outside hackers, as well as from employees. As detailed in Schinnerer's most recent issue of *Constructive Comments*, the "(t)he Federal Trade Commission (FTC) has developed cybersecurity principles in its Start with Security: A Guide for Business."

## Permissions:

Printed with permission from J. Kent Holland and ConstructionRisk, LLC.

Note: Nothing contained within this article should be considered legal advice. Anyone who reads this article should consult with an attorney before acting on anything contained in this or any other article on legal matters, as facts and circumstances will vary from case to case.