Purchase Orders as Contracts –
What is the Design Professional to Do?

Berkley Design Professional
a Berkley Company
Better By Design®

It is not unusual for an architect, engineer, or other design professional to be presented with an owner's purchase order form (PO) or, for engineering or other design services requested by a contractor (including design-build), with a contractor's construction subcontract. In general, these forms are not appropriate for design or other professional services and SHOULD NOT BE USED EXCEPT FOR LIMITED SCOPE PROJECTS with proper revision of key terms and conditions. If you chose to proceed with such a form of agreement, there are eight CLAUSES YOU SHOULD ADD to help reduce risk and properly address professional liability exposure.

In the example language provided in this document, the term "Consultant" is intended to represent the design professional in contract with the "Client." You should adapt the language to reflect the defined titles of the parties in your agreement.

1. Standard of Care

POs and construction subcontracts are intended for use with product vendors and contractors that operate under a warranty standard—they can guarantee their work product. In contrast, architects and engineers perform design services under a professional Standard of Care (SOC) and carry professional liability insurance (PLI) to cover related errors and/or omissions—perfection is not expected. Therefore, you should establish the SOC as an initial clause in a PO or construction subcontract, with an express disclaimer of warranty and fiduciary relationships.

Standard of Care

[DESIGN FIRM NAME] *is a consultant providing professional design services on the Project ("Consultant"). Consultant shall perform its services consistent with the professional skill and care ordinarily provided by consultants practicing in the same or similar locality under the same or similar circumstances ("Standard of Care"). Consultant shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project. Notwithstanding any other representations made elsewhere in this Agreement or in the execution of the Project, this Standard of Care shall not be modified. No warrantees or guarantees are expressed or implied under this Agreement or otherwise in connection with Consultant's services.*

Consultant shall act as an independent contractor at all times during the performance of its services, and no term of this Agreement, either expressed or implied, shall create an agency or fiduciary relationship.

2. Schedule

Your schedule of services should be written in the context of the SOC and a mutually agreeable project schedule subject to revision as the project proceeds. It is important to delete the term "Time is of the Essence," as it creates an uninsurable guarantee of schedule performance, which can change a flexible, milestone-based schedule that can be equitably adjusted when appropriate as the project develops into an absolute requirement that can be the basis for claims if a deadline is missed.

Project Schedule

Consultant shall provide its services in accordance with the project schedule and schedule for performance of Consultant's design services, which schedules may be modified periodically with the mutual agreement of Client and Consultant and for factors beyond the control of Consultant. In the event Consultant is hindered, delayed, or prevented from performing its obligations under this Agreement as a result of any cause beyond its reasonable control, including but not limited to delays due to power or data system outages, acts of nature, public health emergencies including but not limited to infectious disease outbreaks and pandemics, governmental orders, or directives, failure of any governmental or other regulatory authority to act in a timely manner, failure of Client to furnish timely information or approve or review Consultant's services or design documents, delays caused by faulty performance by Client's contractors or consultants, or other unforeseen conditions, the time for completion of Consultant's services shall be extended by the period of resulting delay and compensation equitably adjusted. Client agrees that Consultant shall not be responsible for damages, nor shall Consultant be deemed in default of this Agreement due to such delays.

3. Disclaimer of Construction Responsibility and Indemnification by Contractor

In order to avoid or at least minimize potential severe liability exposure for construction activities, which are not covered by PLI, disclaim responsibility for all aspects of construction. It is also important to be named as an additional insured on the contractor's CGL insurance policy.

Disclaimer of Construction Responsibility

Consultant has no control over, charge of, or responsibility for construction. Client (owner) shall retain a qualified contractor(s), licensed in the jurisdiction of the project ("Contractor"), to implement the construction of the project ("Work"). Contractor shall coordinate, supervise and direct all portions of the Work and shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures, safety, and security.

Client-Contractor Insurance and Indemnification Requirements

Client agrees to require the General Contractor or Construction Manager ("Contractor") and its subcontractors to provide Client and Consultant with Commercial General Liability Insurance which names Client, Consultant, and Consultant's employees and subconsultants as additional insureds for their interests on the Project as they may exist. Said insurance shall be primary to any other insurance offering the same or similar coverage and this shall be reflected on the certificate of insurance. Proof of such insurance in the form of a standard Accord certificate shall be sent to Client and Consultant prior to Contractor's commencement of construction. Client also agrees to require Contractor to indemnify, hold harmless, and defend Client, Consultant, and Consultant's employees and subconsultants from and against any and all claims, damages, losses, and expenses ("Claims") including but not limited to reasonable attorneys' fees and economic or consequential damages, arising in whole or in part out of any act or omission of Contractor, any subcontractor, or anyone directly or indirectly employed by any of them.

4. Document Ownership

Clients and contractors often desire ownership rights in the documents (instruments of service) you prepare, rather than the preferred method of granting of a limited license for use of your documents. When your client insists on transfer of document ownership, you should do so only upon full payment for your services, limit use to the particular project, carve out your firm's standard details, schedules, and specifications (so that you will be able to continue to use them), and include an indemnification from the client for its unauthorized use of the instruments of service.

Document Assignment

All documents and digital files prepared or furnished by Consultant are instruments of Consultant's professional service. Consultant assigns ownership of instruments of service prepared specifically for this Project including copyright to the Client upon payment for services rendered and expenses incurred, except Consultant retains copyright in its standard systems, sections, details, specifications, and other information, data (including source codes), and intellectual property prepared or owned by Consultant prior to or not specific to the Project (collectively "Consultant's Proprietary Material"). Consultant grants Client a license to use Consultant's Proprietary Material but only for this Project. Use of the instruments of service including Consultant's Proprietary Material for any other purpose or without engagement of the Consultant by Client shall be at Client's sole risk, and Client agrees to indemnify, defend, and hold Consultant harmless from all claims, damages, and expenses, including attorneys' fees, arising out of such use by Client or by others acting through Client.

5. Indemnification

For limited scope projects, we advise against inclusion of any design professional indemnity obligations. Again, these clauses are common in POs and construction subcontracts but are usually written in manner that is overly broad and includes uninsurable obligations for a design professional. If your client insists on an indemnification clause, it must be one that disclaims the duty to defend, fairly allocates risk on a proportionate basis, and uses a narrow list of indemnitees so it will be covered by PLI.

Indemnification

Consultant shall indemnify and hold Client and Client's officers and employees harmless, but not defend, from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of Consultant, its employees, and its subconsultants in the performance of professional services under this Agreement. Consultant has no obligation to pay for any of the indemnitees' costs prior to a final determination of liability or to pay any amount that exceeds Consultant's finally determined percentage of liability based upon the comparative fault of Consultant, its employees, and its subconsultants.

6. Third-Party Exposure

Third-party exposure occurs when there is an implied or express duty in your contract to benefit another party aside from the client. Granting third-party rights increases the number of people and entities who may sue you and thereby increases exposure to potential claims you might face, some of which may be uninsurable. To minimize potential third-party exposure, your contracts should include a disclaimer.

Third-Party Exposure

Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either Client or Consultant.

7. Limitation of Liability

Since your services are limited in scope, a limitation of liability equal to your fee or a reasonable multiplier of that fee is recommended.

> ***Limitation of Liability (Lump Sum)***
>
> *Neither Consultant, Consultant's subconsultants, nor their agents or employees shall be jointly, severally, or individually liable to Client in excess of the compensation to be paid pursuant to this Agreement or _____ Dollars ($_____), whichever is greater, by reason of any act or omission, in tort or contract, including breach of contract, breach of warranty, or negligence.*

8. Waiver of Consequential Damages

When a contract is breached, the recognized remedy for the client is recovery of direct damages, such as the cost to repair or complete the work in accordance with corrected Contract Documents. Consequential damages include loss of the client's profit or revenue.

Consequential damages create multiple potential exposures, and the design professional is often blamed, culpable or not, by the contractor for construction-related delays. Because consequential damages can be so out of proportion with the reward of a typical design contract, they should be waived or limited.

> ***Waiver of Consequential Damages***
>
> *Consultant and Client waive consequential damages (such as lost profits, lost revenues, loss of use, loss of financing, and loss of reputation) for claims, disputes, or other matters in question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages whether arising in contract, warranty, tort (including negligence), strict liability, or equity, or that might arise out of the parties' indemnification obligations.*

If consequential damages are not waived or limited, the design professional should thoroughly document known causes of delay during construction to mitigate the potential of unfairly becoming a scapegoat for a contractor's failure to perform its duties and responsibilities.

We encourage you to use industry standard professional services agreements, such as those published by AIA or EJCDC (or your firm's own short-form agreement prepared with the advice of qualified legal counsel) as these agreements more thoroughly define the relationship and obligations of the parties to a design and construction project. The use of POs and construction subcontracts should be avoided. However, if you are forced to use a PO or subcontract form FOR LIMITED SCOPE PROJECTS, inclusion of the clauses above will help mitigate many of the risks inherent in these forms.

Modifying a Client-Supplied Form

For limited-scope projects, here is some sample wording you can insert at the beginning of a PO or construction subcontract's terms and conditions:

If you are working on a direct contract or PO:

"Consultant is providing professional services as specifically defined as the Consultant's scope of services in this Agreement and is not a construction contractor or subcontractor nor a provider of goods and materials. Notwithstanding the terms and conditions in this Agreement, the following clauses apply to Consultant's professional services for the scope of services defined in this Agreement.

[INSERT THE 8 CLAUSES NOTED ABOVE.]

If there are discrepancies in terms and conditions of this Agreement with the above-listed clauses, the above-listed clauses take precedence with regard to Consultant's duties and obligations in its performance of professional services."

If you are working under a contract in which a Prime Agreement is referenced or incorporated:

"Consultant is providing professional services as specifically defined as the Consultant's scope of services in this Agreement and is not a construction contractor or subcontractor nor a provider of goods and materials. Notwithstanding the terms and conditions in this Agreement, nor any other terms and conditions in the Prime Agreement, the following clauses apply to Consultant's professional services for the scope of services defined in this Agreement.

[INSERT THE 8 CLAUSES NOTED ABOVE.]

The above-listed terms are incorporated into this Agreement. If there are discrepancies in terms and conditions of this Agreement with the Prime Agreement, this Agreement and the above-listed clauses take precedence with regard to Consultant's duties and obligations in its performance of professional services."

About Berkley Design Professional

At Berkley Design Professional, we are Better by Design®. We transform uncertainty into opportunity so our clients can confidently build a better tomorrow. We provide design firms with innovative and comprehensive Architects & Engineers Professional Liability Insurance. We offer state-of-the-art, award-winning risk and practice management guidance and resources that help our policyholders manage their exposures and improve their businesses. Our in-house claims professionals provide fair, results-oriented claims management. Our mission is to relentlessly protect our clients' work, reputation and dreams.

Berkley Design Professional is a division of Berkley Alliance Managers, a member of W. R. Berkley Corporation, whose insurance company subsidiaries are rated A+ (Superior) by A.M. Best. berkleydp.com

BDP Risk® is Berkley DP's state-of-the-art Learning Management System, which provides online access to relevant risk and practice management content, courses, learning plans, and activity tracking and reporting. Over the past six years, BDP Risk® has won seven coveted Brandon Hall Group Excellence Awards. These include learning and development awards for "Best Advance in Custom Content," "Best Advance in Creating an Extended Enterprise Learning Program," and "Best Customer Training Program," all of which recognize Berkley DP's significant efforts and successes in developing resources to help our clients enhance business performance and mitigate risk.

For more information, contact:

Andrew D. Mendelson, FAIA
Executive Vice President,
Chief Risk Management Officer
amendelson@berkleydp.com

Diane P. Mika
Senior Vice President,
Risk Management Officer
dmika@berkleydp.com

Berkley Design Professional
a Berkley Company
Better By Design®