



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

It is not unusual for an architect, engineer, or other design professional to be presented with an owner's purchase order form (PO) or, in the case of design-build, with a contractor's subcontract agreement for the provision of professional services. In general, these forms are not appropriate for design or other professional services and **SHOULD NOT BE USED EXCEPT FOR LIMITED SCOPE PROJECTS**. In that event, there are some **CLAUSES YOU SHOULD ADD** to help reduce risk and properly address professional liability exposure.

## 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 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. Include the following clause:

### *Standard of Care*

*The 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"). The 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 warranties or guarantees are expressed or implied under this Agreement or otherwise in connection with Consultant's services.*

*The 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—not as a "Time is of the Essence" requirement, which would expose your firm to uninsured strict liability as a performance guarantee. Utilize the following clause.

### *Project Schedule*

*The Consultant shall provide its services in accordance with the project schedule, which schedule may be modified periodically with the mutual agreement of the Client and Consultant and for factors beyond the control of the Consultant. Consultant shall perform its services expeditiously in accordance with the project schedule, the Standard of Care, and the orderly progress of the Project.*

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### 3. Disclaimer of Construction Responsibility

In order to avoid potentially severe liability exposure related to construction activities, especially in limited scope of services projects, you must disclaim responsibility for all aspects of construction and be named as an additional insured on the contractor's CGL insurance policy. We recommend inserting the following clause:

#### *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"). The 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. To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Client, Consultant, Consultant's subconsultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work. Contractor shall provide insurance and name the Client, Consultant, Consultant's subconsultants as additional insured on Contractor's Commercial General Liability insurance policies.*

### 4. Document Ownership

Clients and contractors often desire ownership rights in the documents 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 include protective language with regard to payment requirements and allowable use of your documents as follows:

#### *Document Ownership*

*All documents prepared or furnished by Consultant are instruments of Consultant's professional service. Consultant assigns ownership including copyright to the Client upon payment for services rendered except Consultant retains copyright in its standard systems, sections, details, and specifications. Consultant grants Client a license to use Consultant's standard systems,*

*sections, details, and specifications but only for this Project. Use of the instruments of service 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. If your client insists on an indemnification clause, it must be one that fairly allocates risk on a proportionate basis and will be covered by your professional liability insurance. Use the following clause:

#### *Indemnification*

*The Consultant shall indemnify and hold the Client and the 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 the Consultant, its employees and its consultants in the performance of professional services under this Agreement. The 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 the Consultant's finally determined percentage of liability based upon the comparative fault of the Consultant, its employees and its consultants.*



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.

# About Berkley Design Professional

**Berkley Design Professional** was started in 2013 by a team of people with deep roots in underwriting, loss prevention and claims handling for the Design Professional community. The genesis of Berkley DP was the combination of our team's passion for bringing fresh ideas to the products and services Design Professionals need together with W. R. Berkley Corporation's desire to commit its superior financial strength and A+ rated paper to this industry segment. Berkley DP's motto is: "Better by Design." By this we mean that our policyholders are better businesses because we've designed comprehensive coverage and current risk management solutions that make their practice less susceptible to loss.

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Practice management recommendations should be carefully reviewed and adapted for the particular project requirements, firm standards and protocols established by the design professional.

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