

# BORDA LORENZ PC

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## What exactly is my contract?

Most commercial buyers use purchase orders as their basic contract for the purchase of goods. Almost all purchase orders have a few elements in common--they identify the seller, the buyer, the ship-to location, the product to be purchased, the payment terms, and the price. Many purchase orders are blanket purchase orders, which means that they are issued once to define the seller and the buyer and the payment terms and price, and then the parties rely on individual releases or shipping notifications to define the quantity of goods being ordered and the particular ship-to location.

But there are other documents that are traded between purchasers and suppliers, such as cost breakdown forms, letters of intent, target agreements, statements of work, technology agreements, license agreements, confidentiality agreements, global terms and conditions, and supplemental terms and conditions, etc.

Which of these documents are part of your contract, and which ones are not?

The answer is that they can all be part of your contract. Many companies think that their contract is limited to the pre-printed purchase order, but many times, the contract actually includes a number of other documents (whether or not they are physically attached to the purchase order).

The reason why is because U.S. law permits commercial parties to incorporate other documents by reference. An incorporation by reference brings other documents that are published elsewhere into your agreement. Documents that have been referenced properly become part of the overall contract just as if they were fully recited in the basic agreement.

Here is what a general incorporation by reference looks like:

“This Order includes all attachments, exhibits, supplements or other terms of [the purchaser] specifically referenced therein.”

The law requires that the reference be clear, but that is the only requirement. The law does not require that all of the documents that are part of a contract be attached to one another, or be grouped together in the same place. And it is not necessary that printed copies of all of those documents have to be supplied to each party, if they are readily available through other means. Many companies incorporate documents that can only be found on their web site.

An example of how this would look in a contract is as follows:

“Buyers Supplemental Terms and Conditions contain specific requirements to address special product or local market requirements, including legal matters specific to the country where the

Buyer or the Seller is located and can be read and downloaded on Buyer's website at [URL], and are binding on the Seller and the Buyer.”

Naturally, it is important that you understand all of the documents that are part of your contract. Generally, the company that is doing the buying controls the form of the contract in typical commercial sales, and if that is the case with your agreement, your role as the buyer includes an obligation to protect your company by controlling what documents are made part of your contract and what documents are excluded. This should be easy to accomplish with respect to the documents your company provides, such as product specifications—all you have to do is use the above clause in your terms and then reference each document properly. But it requires a little more effort with respect to the documents that your suppliers may want to become part of the contract that governs their supply obligation.

Purchasing customers regularly take advantage of a legal concept called merger and exclusion to control the incorporation of documents prepared by their suppliers.

Here is what it looks like, in contract form:

“Any different or additional terms and conditions contained in documents furnished by [the seller] are hereby rejected by [the purchaser] and are not part of the agreement between the parties in the absence of [the purchaser's] written agreement.”

Your supplier is, presumably, an expert on its product and how it conforms to your requirements. Your supplier therefore has an interest in making sure that the terms of your overall contract—particularly the specifications—are suited for sale transaction that the contract contemplates. But suppliers sometimes want to use other documents, such as responses to RFQ's, to bring about changes to your company's purchasing terms and conditions. Using this type of clause is one way to protect your company by bringing only those documents and terms that you agree to accept into the overall contract.

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