Welcome to the 2013 EJCDC Construction Documents

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February 27, 2013
Today’s Agenda

• EJCDC Overview
• EJCDC Construction Series
• 2013 Changes
EJCDC Overview

• Three Sponsoring Organizations
  • ACEC
  • ASCE
  • NSPE

• Numerous Participating Organizations
  • APWA
  • USDA/RUS
  • AGC
  • NUCA
  • CSI and others
EJCDC Overview

• Primary Purpose – Publish standard contract documents for engineer-designed construction

• Content Objectives
  • Logical risk allocation
  • Clear and thorough
  • Consistent with current practice and laws
  • Responsive to user needs
EJCDC Document Families

• Engineering (Owner-Engineer, Master Agreement, Short Form, Engineer-Subconsultant, Teaming Agreement/Joint Venture, others)
• Construction (Owner-Contractor)
• Design/Build
• Environmental Remediation
• Procurement (Buyer-Seller; for major equipment purchases, etc.)
2013 C-Series Highlights

• Revisions, enhancements, and coordination of all 24 C-series documents

• Added three new documents:
  • C-111, Advertisement for Bids
  • C-451, Qualifications Statement
  • C-521, Subcontract

• Focus and substantive changes to:
  • C-200, Instructions to Bidders
  • C-410, Bid Form
  • C-700, General Conditions
  • C-800, Supplementary Conditions

• More robust Commentary, C-001
EJCDC Construction Series

- C-050 Bidding Procedures and Construction Contract Documents
- C-051 Engineer’s Letter re Bonds and Insurance
- C-052 Owner’s Instruction re Bonds and Insurance
- **NEW** C-111 Advertisement
- C-200 Instructions to Bidders
- C-410 Bid Form
- C-430 Bid Bond
- C-435 Bid Bond Damages
- **NEW** C-451 Qualification Statement
- C-510 Notice of Award
- C-520 Agreement Owner and Contractor (Stip. Sum)
The Basic Relationships Among the Various Documents

Procurement Documents

Construction Documents

Typical Project Manual

Contract Requirements

Procurement Requirements:
- Solicitation
- Instructions for Procurement
- Available Information
- Procurement Forms & Supplements

Contract Forms:
- Agreement

Project Forms:
- Performance Bond
- Payment Bond
- Certificates

Conditions of the Contract:
- General Conditions
- Supplementary Conditions

Specifications:
- Division 01 – General Requirements
- Divisions 02 - 49

Drawings

Addenda (Pre-Contract Revisions)

Contract Modifications

When Owner-Contractor Agreement is signed, these become:

Contract Documents
EJCDC Construction Series

- **NEW** C-521 Subcontract
- C-525 Agreement Owner and Contractor (Cost-Plus)
- C-550 Notice to Proceed
- C-610 Performance Bond
- C-615 Payment Bond
- C-620 Contractor’s Application for Payment
- C-625 Certification of Substantial Completion
- C-700 Standard General Conditions
- C-800 Guide to Prep. Of Supplementary Conditions
- C-940 Work Change Directive
- C-941 Change Order
- C-942 Field Order
EJCDC Construction Series

- C-430 Bid Bond – Penal Sum 2007-2012
- C-435 Bid Bond – Damages Form 2007-2012
- C-610 Performance Bond 2010
- C-615 Payment Bond 2010
- C-620 Application for Payment 2010
EJCDC Preliminary Documents

C-050 Bidding Procedures and Construction Contract Documents
C-051 Engineer’s Letter re Bonds and Insurance
C-052 Owner’s Instruction re Bonds and Insurance
  • Organization and language improvements
  • Added NTUs
  • Coordination with related documents
  • Revised in accordance with insurance provision revisions of C-800
  • Added provisions for alternative types of insurance (pollution liability, excess/umbrella liability, installation floater, etc.)
C-111, Advertisement

• New EJCDC document
• Includes discussion on use and topics covered in an advertisement or invitation to bid
• Includes template-style model language for Advertisement for Bids with NTUs, including alternative provisions for printed Bidding Documents and electronic Bidding Documents
C-200, Instructions to Bidders

- Moved time and location of pre-Bid conference to Advertisement, C-111
- New note concerning digital documents
- Additional alternative language and notes on Bidder qualification and reference to C-451, Qualifications Statement
- Expanded language on Site Visit and Testing by Bidders
C-200, Instructions to Bidders

- Added Cost Plus Bids to Basis of Bid
- Added specific language and notes on Price-Plus-Time Bids to Basis of Bid and Evaluation of Bids
- Revised language to coordinate with C-700 and/or Agreement, including:
  - Technical Data
  - Bidder’s Representations
  - Substitute and “Or-Equal” items
  - Subcontractors and Suppliers
C-410, Bid Form

- Added Price-Plus-Time bidding option
- Addressed bidding procedures for cost-plus contracts
- Improvements to format and Notes to Users
C-451, Qualification Statement

- New EJCDC document
- Compilation of info from several examples of similar documents provided by users throughout the nation
- Intended to be edited (added to or subtracted from) based upon local needs/requirements/Laws & Regulations
- Intended for use as a bidder’s qualification statement or for a more general prequalification
Notices

C-510, Notice of Award
C-550, Notice to Proceed
C-625, Certificate for Substantial Completion

- General modifications to make editing easier.
- Language modifications to match other documents.
- Deleted references to “tentative” and “definitive” to match General Conditions wording.
C-520 and C-525, Agreement Between Owner and Contractor

- Designation of both Designer and Construction Phase Owner’s Representative in case they are not the same
- Inclusion of Bonus Clause in Liquidated Damages section
- Special Damages Clause in Liquidated Damages section to cover increased construction observation/inspection/construction admin costs
- Provisions for Milestones instead of just Substantial Completion
- Refinement of list of Contract Documents
C-521, Subcontract

• First edition of the Subcontract
• Coordinated and meant to be used with C-700 and EJCDC, but not dependent on it for definitions etc.
• Combination of “Agreement” and general terms/conditions

Key terms:
• Prime Contract is incorporated by reference
• No contractual relationship or privity with Owner
• Sub not a third party beneficiary of Prime Contract
• Flow down of obligations
• Tied to Contractor’s progress schedule
C-521, Subcontract

- Payment: due ten days after Contractor’s receipt of $$ from Owner (“pay when paid”—ultimately if no $$ received from Owner, Contractor would be obligated to pay Sub)
- Contractor has final authority regarding conflicts and coordination problems between Subs
- Safety duties to Sub’s own workforce, and to other persons and property at the Site
- Duty to report accidents and near misses to Contractor
C-521, Subcontract

- If change in Sub’s work resulted from change to Prime Contract, increased compensation is limited to share of proceeds from Owner
- Insurance and Indemnification provisions track C-700
- Bonds—required only if expressly stated
- Dispute resolution independent of Prime Contract, but Contractor can pull Sub into arbitration with Owner
- Sub’s representations track C-series
C-700 Standard General Conditions of the Construction Contract

- General Reorganization
- Improvements to Changes to the Contract and Claims
- Updated Insurance Provisions
- Differing Site Conditions
General Reorganization

• Article 1 – Definitions and Terminology
• Article 2 – Preliminary Matters
• Article 3 – Contract Documents: Intent, Amending, Requirements, Reuse
• Article 4 - Commencement and Progress of the Work
• Article 5 – Availability of Lands; Subsurface and Physical Conditions; Hazardous Environmental Conditions; Reference Points
• Article 6 – Bonds and Insurance
General Reorganization

- Article 7 – Contractor’s Responsibilities
- Article 8 – Other Work at the Site
- Article 9 – Owner’s Responsibilities
- Article 10 – Engineer’s Status During Construction
- Article 11 – Amending the Contract Document Documents; Changes in the Work; Claims
- Article 12 – Change of Contract Price; Change of Contract Times, Claims
General Reorganization

• Article 13 – Cost of the Work; Allowances; Unit Price Work
• Article 14 – Tests and Inspections; Correction; Removal or Acceptance of Defective Work
• Article 15 – Payments to Contractor and Completion
• Article 16 – Suspension of Work and Termination
• Article 17 – Dispute Final Resolution of Disputes
• Article 18 - Miscellaneous
Changes to the Contract & Claims

- Historically all issues referred to Engineer for a “Final Decision”
  - A condition precedent to filing a Claim
- Similar to AIA
  - Initial Decision Maker
Changes in the Work

- Changes in scope typically initiated by Owner
- Contractor free to suggest changes in scope on an informal basis
  - Contract could provide for cost-sharing of savings (not a standard EJCDC provision)
- For equipment and materials, Contractor may suggest a substitution
Amending the Contract

• Change Order
  • Commonly used change mechanism
  • Changes in scope, price, time to complete
  • Signed by both Owner and Contractor
  • Engineer’s recommendation needed

• Work Change Directive
  • Proceed with scope change; price/time TBD

• Field Order: minor changes
Amending the Contract

C-940, Change Order
C-941, Work Change Directive
C-942, Field Order

• General modifications to make editing easier.
• Modifications to make Work Change Directive, Change Order, and Field Order more consistent in appearance.
Non-Technical Change Orders

• As before, changes to the Work involving the design (Drawings, Specs) or other technical matters must be supported by the Engineer’s recommendation. This will be accomplished through Engineer’s signature on the Change Order form, as before.

• Owner and Contractor may enter into contract changes that are non-technical (for example, a change to an insurance or indemnification provision) without Engineer’s input, recommendation, or signature.
Claim (2007)

A demand or assertion by Owner or Contractor seeking an adjustment of Contract Price or Contract Times, or both, or other relief with respect to the terms of the Contract. A demand for money or services by a third party is not a Claim.
Claim (2013)

(a) A demand or assertion by Owner directly to Contractor, ....: seeking an adjustment of Contract Price or Contract Times, or both; contesting an initial decision by Engineer concerning the requirements of the Contract Documents or the acceptability of Work under the Contract Documents; contesting Engineer’s decision regarding a Contractor’s Change Proposal; seeking resolution of a contractual issue that Engineer has declined to address; or seeking other relief with respect to the terms of the Contract,
Claim (2013)

or (b) a demand or assertion by Contractor directly to Owner, ...., contesting Engineer’s decision regarding a Contractor’s Change Proposal; or seeking resolution of a contractual issue that Engineer has declined to address. A demand for money or services by a third party is not a Claim.
First-Level Contract Issues

- What do the Drawings and Specs require?
- Are actual conditions a DSC?
- Is the Work as constructed acceptable?
- Is Owner justified in levying a set-off against payments due?
- How much extra compensation owed for extra work?
- What is impact of a delay?
First-Level Contract Issues: New Approach

• 2007 and prior: All first-level issues fed directly into “Claims”
  • Formal, often hostile process; not well suited to garden variety issues
• 2013: Contractor allowed to make “Change Proposals”
  • New mechanism to resolve first-level issues
  • Engineer makes decision
  • Process commonly used, under a variety of names
Changes to the Contract and Claims

Engineer will, with reasonable promptness, render a written clarification, interpretation, or decision on the issue submitted, or initiate an amendment or supplement to the Contract Documents. Engineer’s written clarification, interpretation, or decision will be **final and binding on Contractor, unless it appeals by submitting a Change Proposal, and on Owner, unless it appeals by filing a Claim.**
Change Proposal

A written request by Contractor, ... seeking an adjustment in Contract Price or Contract Times, or both; contesting an initial decision by Engineer concerning the requirements of the Contract Documents or the acceptability of Work under the Contract Documents; challenging a set-off against payments due; or seeking other relief with respect to the terms of the Contract Documents.
Second-Level Contract Issues

- Classic “Claims”— serious step to take
- Currently lumped together with other issues
- Historically decided by Engineer
- 2013:
  - Label these as “Claims”
  - Direct between Owner and Contractor
  - Negotiation and mediation encouraged
- Includes appeal of Change Proposal decisions
Bonds and Insurance

- Core requirements are performance and payment bonds, CGL, Builder’s Risk
- 2011-12: Heavy scrutiny of precise terms and requirements
  - From insurance and surety professionals on the Committee (EJCDC)
  - From national industry experts
- Expanded level of detail, reorganized
- Separated bond requirements from insurance requirements
Performance and Payment Bonds

• Continued reliance on Treasury Department list for surety qualifications
• Bonds (EJCDC C-610, C-615) revised extensively by EJCDC, AIA, other stakeholders in 2010
• Added provision in GCs authorizing Owner to provide copies of payment bond to subs and suppliers who request it
  • Consistent with Miller Act and Little Miller Acts
• Review and input from SFAA, NASBP
Bonds

• Expressly stated: If Contractor fails to provide bonds, Owner has right to exclude Contractor from Site, and terminate Contract

• New clause: Upon request, Owner shall provide copy of Payment bond to any sub or supplier claiming to have furnished labor or materials
Liability Insurance

- Contractor’s CGL
  - Important risk management tool
  - Requirements consolidated and stated with more specificity
Insurance Highlights

• Insurance companies must have AM Best rating of A-VII or better

• Owner and Contractor must provide copies of required policies and endorsements upon the other’s, or any additional insured’s, request

• **Added** Contactor’s pollution liability requirement, covering contamination caused or worsened by Contractor

• **Added** Contractor’s Professional Liability insurance
Insurance Highlights

- In general, Contractor’s insurance policies shall: contain a provision or endorsement that the coverage afforded will not be canceled, materially changed or renewal refused until at least 10 days prior written notice has been given to Contractor. Within three days of receipt of any such written notice, Contractor shall provide a copy of the notice to Owner, Engineer, and each other additional insured...
Insurance Highlights

Commercial General Liability (CGL)

- Completed operations remain in effect for 3 years
- Specific form endorsements required for Additional Insureds—Owner, Engineer
- Various CGL provisions relocated from Supplementary Conditions to Insurance section of GCs (Article 6)
- **Deleted** “eliminate the exclusion for property under Contractor’s care, custody, control” (impossible to get, and no longer needed)
- In SCs, deleted separate coverage limits for Contractual Liability (always is the same as general CGL coverage)
Builder’s Risk Insurance

• Property insurance on the Work under construction
• Notable feature is waiver of insurance company’s subrogation rights
• 2013 edition: revised list of causal events to be covered by the Builder’s Risk insurance
• Changed default from Owner purchase of Builder’s Risk to Contractor purchase (SCs include “flip” of purchase duty)
Insurance Highlights

Builder’s Risk

• Flood coverage required. “If it’s a risk, why not insure against it?”
• Option for providing flood coverage through separate policy
• Specified exception to standard workmanship, design, materials exclusions: must cover “ensuing losses” from these causes
Insurance Highlights

More Builder’s Risk

- Conformed policy duration—until Work is completed. Typical BR policies will not extend “until final payment is made” (old wording)
- “loss payees” term replaced with “named insureds”
- Owner, Contractor, Subs are named insureds
- Engineer, Suppliers, and all “employees, agents, etc.” are not named insureds
- Waiver of subrogation continues to protect Engineer, Owner, Contractor, and others, from claims by Builder’s Risk insurer
Insurance Highlights

More Builder’s Risk

- Purchaser of BR insurance pays deductibles
- Purchaser of BR is fiduciary for settlement of claims against the policy
- BR insurer may pay claims by joint check to named insureds
Insurance Highlights

More Builder’s Risk

• Installation Floater is presented in the SCs as a possible alternative to Builder’s Risk insurance
• Installation Floater is purchased by Contractor. Provides insurance against loss while items to be installed are in transit or stored at Site. Intended for projects where the risk of loss is low once a portion of the Work is installed (e.g., a pipe installation project)
• Includes waiver of subrogation
Site Safety

- EJCDC documents draw a “bright line” between Contractor/Subs and Owner/Engineer
- This risk allocation is efficient and protects the workforce and the Work under construction
- New clause

Contractor’s duties and responsibilities for safety and protection shall resume whenever Contractor or any Subcontractor or Supplier returns to the Site to fulfill warranty or Correction Period obligations, or to conduct other tasks arising from the Contract Documents.
Differing Site Conditions
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- Owner must disclose available site information
  - Consistent with court rulings
- Bidders (Contractor) may rely on accuracy of “technical data” identified as reliable in Contract Documents
- No reliance on geotechnical information other than identified “technical data”
- No reliance on extrapolations and interpretations
Differing Site Conditions

- Proposed new clause provides default definition of Technical Data
  - Data contained in boring logs
  - Water level data
  - Other factual, objective information in geotechnical report

- Default definition applies only if Owner and Engineer fail to identify specific Technical Data in the SCs

- Default only applies to reports prepared for the Project
Differing Site Conditions

• Supplementary Condition alternative language gives Owner the option of furnishing bidders a Geotechnical Baseline Report (GBR)
  • Sets out assumed conditions for pricing purposes
Differing Site Conditions

• Clarifications of Differing Site Condition procedures
  • Notice of possible DSC by Contractor
  • Review/recommendations by Engineer
  • Written statement by Owner
    • Resumption of work
    • Design changes to be made in reaction to conditions
    • DSC or not
• Appeal rights of Contractor
Hazardous Environmental Conditions at the Site

• Responsibility for pre-existing pollution at the Site has always belonged to Owner
• Assumption: Clean-up tasks not in scope of contract
• Contractor responsible for any hazardous environmental condition it causes
• 2013 revision acknowledges that Contractor may bring potentially hazardous substances to the Site if such are “controlled, contained, removed”
“Or-equals”

- Or-equal provisions assume a Specification that requires name brand(s) “or equal”
- Ideally or-equal status would be determined pre-bid. EJCDC’s Instructions to Bidders allow for that; but often not practical
- Typically, bid prices should assume that Contractor will furnish one of the name brands
- No price change if or-equal product is approved
  - Contractor takes savings
- Engineer’s decision not appealable
Substitutions

• Proposal by Contractor to substitute a different item to achieve design goal
• Approval of substitution may result in change in Contract Price or Contract Times
• Contractor reimburses Owner for Engineer’s efforts in reviewing
• Engineer’s decision not appealable
Assigned Contracts

- EJCDC documents facilitate purchases of materials and equipment, and assignments of those purchase contracts to the GC
- Owners sometimes initiate purchases
  - Long lead time equipment orders
  - Multi-project purchases
- Warranties—Proposed new clause would clarify that the assigned contract’s specific warranties would govern over the General Conditions of the prime contract
Other Work at the Site

- Work by owner’s own employees
- Work by other prime contractors
- Work by utilities
- Owner coordinates other work with “Work”
- Owner responsible to Contractor for delays, damage caused by others
- Owner may impose set-off for harm to others caused by Contractor; and may assign rights to others
Payment Provisions

- Clarified owner’s right to impose set-offs for pending or incurred costs attributable to Contractor
  - Recognition of common practice
- Owner must explain set-offs, and pay uncontested amounts
- 2013 allows for progress payments during extended punch list completion period
C-800, Guide to the Preparation of Supplementary Conditions

- Added “conformed Contract Documents” option
- Allows for details and expansion regarding working hours
- Addresses possible use of construction-phase representative other than Engineer
- Provisions limiting mark-ups on Subcontractor work under cost of work clause (27% limit) moved to General Conditions
- Added optional “prevailing party pays attorneys fees” clause
C-800, Guide to the Preparation of Supplementary Conditions

• Mandatory Supplementary Conditions
  • Information available – 5.03
  • HEC information available – 5.06
  • Insurance limits – Article 6
C-800, Guide to the Preparation of Supplementary Conditions

New SC: Geotechnical Baseline Report
- Owner and geotech establish baselines of subsurface conditions, by interpreting best available data
- If actual site conditions vary from baseline, there is a differing site condition, Contractor entitled to change in price, times
- Intended to induce better bids, simplify DSC administration
- Geotechnical Baseline Report and related data collection are Contract Documents
- Elements of typical EJCDC DSC clause are retained to deal with conditions that are not addressed in GBR
EJCDC Construction Series

Available mid-March
EJCDC.org
ACEC.org
Questions – Speaker Contact Info

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