

The EJCDC 2013/2014
Engineering and Construction Documents



Presented to the

USDA Rural Utility Service

State Engineers

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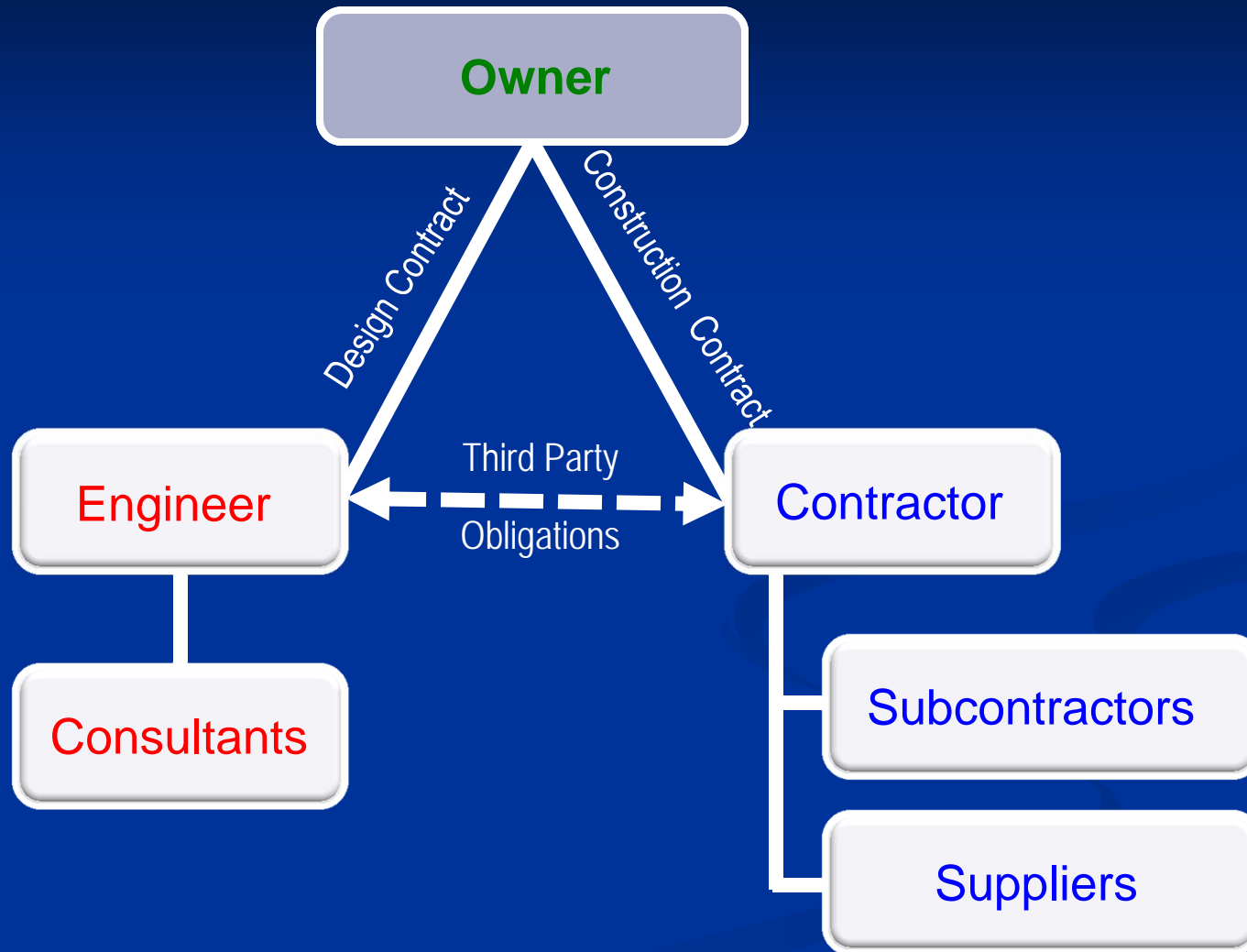
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Agenda

- Benefits of Standard Documents
- EJCDC's 2014 Owner-Engineer Agreement
- EJCDC's 2013 Construction Series
 - Focus: C-700, Standard General Conditions of the Construction Contract

Contractual Relationships



Alternatives to Standard Contract Documents

- Custom-drafted single purpose contract documents (“manuscript contracts”)
 - Expensive
 - Good fit for mega-projects
- Owner’s in-house “standard” contract documents
 - Standard only to a narrow group of A/Es and contractors
 - Tend to have many redundancies and contradictions
 - Rarely updated

Standard Contract Documents: Summary of Benefits

1. Expertise of drafters
2. Comprehensive content
3. Efficient risk allocation
4. Promotion of good contracting practices
5. Attention to legal developments
6. Steady consensus approach
7. Consistent terminology

Standard Construction Contract Documents: Summary of Benefits

8. Coordination among documents
9. CSI organization, compliance
10. Predictability
11. Procedural standardization

Benefits of Standard Documents to Public Owners

- Owner, Engineer can focus drafting efforts on technical and project-specific contract content
- Contractors, insurers, sureties already understand terms and risk allocations of published documents
- Accepted as fair
- Bidding-related documents coordinated with front-end Contract Documents

Contractual Risk Allocation

- Basic principle: Assign risk to party best able to control and manage the risk
 - Example: Site safety
- Use available insurance tools, such as Builder's Risk with mutual waivers of subrogation
- Share risks when appropriate
 - Example: Delays caused by external forces

Standard Documents: Benefits during Contract Administration

- ◆ Carefully designed, time-tested procedures and forms for routine events—commencement and completion, change orders, substitutions
- ◆ “Safety net” clauses for exceptional events such as termination, encountering hazardous waste, injuries, or property damage incidents

Prime Objectives of EJCDC's Update of E-500, Owner- Engineer Agreement

- ◆ Recognize and incorporate common industry practices and trends into core language
- ◆ Better notes to user and guidance
- ◆ Clarify and improve select clauses
- ◆ Maintain standard clauses
- ◆ Coordinate with 2013 C-Series changes

EJCDC® E-500 (2014), Agreement Between Owner and Engineer for Professional Services

- ◆ Subcommittee work 2012-13
- ◆ **New Edition Issued January 2014**
- ◆ Change must be balanced with the stability and long-standing acceptance of E-500
- ◆ Retains general format and organization of prior versions
- Organized into two sections:
 - Main Agreement – 22 Pages
 - 10 Exhibits (RUS Projects)

Terms of Use: Modifications

- ◆ EJCDC documents provided in Microsoft Word
- ◆ E-500 is designed to be modified - particularly:
 - ◆ Exhibit A (Engineer's Services) - Scope
 - ◆ Exhibit B (Owner's Responsibilities)
 - ◆ Exhibit C (Payments to Engineer)
 - ◆ Exhibit G (Insurance)
- ◆ Includes fields (fill in the blanks, notes to user) to be addressed during drafting process ([])

Basic Contract Formation Process

1. The E-500 document as published is the baseline for the contract.
2. Either Owner or Engineer may take the lead in drafting.
3. Insert necessary information and make any proposed changes (subject to RUS rules).
4. Redline/~~strikeout~~ changes to the text.
5. Negotiate terms between Owner/Engineer.
6. When agreement is reached: accept changes, remove all notes, and execute.

Coping with Exhibit C, Payments to Engineer

1. As published, 6 options (compensation packets) for Basic Services, 5 for Resident Project Representative, 3 for Additional Services.
2. RUS rules narrow the options.
3. Drafter should discard all compensation packets that do not apply, based on rules and on preliminary understanding as to compensation.
4. No need to show the discarded packets as ~~strikeouts~~.

Highlights of 2014 Edition of E-500

- Added an opportunity for Owner and Engineer to revisit adequacy of the scope of services at the start of each phase of services, based on prior phase findings.
- Expressly stated expectation of a site visit by Engineer during each phase of services.
- Update of Insurance provisions including clarification of Additional Insured requirements and Builder's Risk policy relative to Engineer.

Modest Innovations

- Provide means for consideration of BIM, civil info modeling, geotechnical baselining, innovative design and contracting, sustainability, etc.
- Introduced concept of “Constructor” to more clearly define the Engineer’s relationship to Owner’s Contractor and other contractors on the project

New Rules, New Resources

- Defined Engineer's services to not be a "Municipal Advisor" under SEC and Dodd-Frank Wall Street Reform and Consumer Protection Act (2010)
 - Engineer should monitor its performance so as not to trigger Dodd-Frank registration requirements under pending rules
- Use ASCE 38 "Standard Guideline for the Collection and Depiction of Existing Subsurface Utility Data" as a resource

Indemnification: No Duty to Defend

- EJCDC's indemnification clause has never included defense of Owner:

“Indemnification by Engineer: To the fullest extent permitted by Laws and Regulations, Engineer shall indemnify and hold harmless Owner....”

Indemnification: Reimbursement of Costs

- The indemnification clause does commit to reimbursement of Owner's defense costs:

...indemnify...from losses, damages, and judgments (including reasonable consultants' and attorneys' fees and expenses) arising from third-party claims or actions...

No Duty to Defend, 2014

- A few recent court cases, primarily in California, held that a duty to defend is **implied** in every indemnification clause—unless stated otherwise
- In response to these decisions, E-500 2014 explicitly “states otherwise” by expressly excluding defense obligation— 6.11.D
- Defense costs when Engineer is blameless?
- Addresses important point that professional liability policies will not provide a defense except to the insured engineering firm—unlike CGI

Definition of Defective Work

Construction General Conditions C-700 (2013 and earlier):

The word “defective,” when modifying the word “Work,” refers to Work that is unsatisfactory, faulty, or deficient in that it:

- does not conform to the Contract Documents; or
- does not meet the requirements of any applicable inspection, reference standard, test, or approval referred to in the Contract Documents; or
- has been damaged prior to Engineer’s recommendation of final payment....

Rejection of Work

C-700 2007 and earlier:

“Engineer will have authority to reject Work which Engineer believes to be defective, or that Engineer believes will not produce a completed Project that conforms to the Contract Documents or that will prejudice the integrity of the design concept of the completed Project as a functioning whole as indicated by the Contract Documents.”

Design Concept Incompatibility: Duty to Owner

E-500 (2014):

“If Engineer has express knowledge that a specific part of the Work that is not defective under the terms and standards set forth in the Construction Contract Documents is nonetheless not compatible with the design concept of the completed Project as a functioning whole, then inform Owner of such incompatibility, and provide recommendations for addressing such Work.”

2013 EJCDC Construction Series

- 24 construction documents issued April 2013
- Main contract documents are General Conditions, Supplementary Conditions, and Owner-Contractor Agreement.
- Full suite of competitive bidding documents
 - Advertisement to Bid
 - Instructions to Bidders
 - Bid form and bid bonds
- Construction administration forms
- Tools for information gathering by Engineer

EJCDC[®] C-700: Standard General Conditions of the Construction Contract

- 2013 Highlights
 - Subject matter reorganization
 - Improvements to procedures for changes to the contract, and for claims
 - Updated insurance provisions
 - Enhancements to Differing Site Conditions clauses

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

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

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

Issues during Construction

- Engineer continues to be initial reviewer of all technical (engineering/construction) issues
- Non-technical issues (examples: insurance, indemnity, tax issues) are processed without Engineer
- Many issues involving schedule, scope, and compensation are relatively routine. New mechanism of “Change Proposal” is meant to encourage more informal and less adversarial approach than “Claims.”

Claims

- Concept of “Claim” is retained, but is reserved for a narrower, more serious level of dispute:
 - Contractor-initiated issues that are not resolved at the “Change Proposal” level
 - Owner demands for money from Contractor
 - Owner dissatisfied with Engineer’s ruling on technical issue (rare)
- “Claims” under the new 2013 edition are directly between the two contracting parties, without Engineer as decision-maker
 - In many cases Engineer will be assisting Owner with defending or pursuing the Claim

Level 0: Requirements of the Contract Documents

- What do the Drawings and Specs require?
- Is the Work as constructed acceptable?
 - General Conditions, Paragraph 3.04
 - Often styled as requests for information or requests for interpretation—RFIs
- Engineer decides
- Binding unless:
 - Contractor submits Change Proposal
 - Owner pursues Claim

Level 1: Change Proposals

- Contractor entitled to Engineer's review of:
 - Initial (RFI) determination regarding Drawings and Specs, acceptability of constructed Work
 - DSC-related determinations
 - Impact of delay event
 - Compensation for extra work
 - Unit price determinations
 - Owner's set-off against payments
- Opportunity to submit full documentation, more extensive explanation of position
- Usually involves change in schedule or \$\$\$

Level 2: Claims

- Categories:
 - Appeals of Engineer's Change Proposal decisions
 - Owner demands for time change, \$\$\$
 - Unresolved non-technical disputes
- Contractual procedures are in Article 12
- Recipient of Claim responds—accepts, denies
- Negotiation, mediation prior to response are encouraged

Level 3: Final Dispute Resolution

- Appeals of denied or unresolved Claims
- Disputes arising after contract close-out (usually involving defects in the Work, or injuries)
- Default resolution procedure is litigation (court)

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

Bonds and Insurance

- Owner must be involved (assisted by attorneys or risk managers). Engineers lack expertise.
- Performance and payment bond forms were developed by EJCDC and others in 2010—strong industry consensus
- Wide range of possible specifications for CGL and Builder's Risk (especially) insurance. EJCDC insurance requirements are solid and reasonable, but revisions and amendment are not unusual.

Differing Site Conditions

- 2013 General Conditions provide default definition of Technical Data (entitled to Bidder/Contractor reliance)
 - 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 definition only applies to content of reports prepared for the Project, not archived reports

Clarification of DSC procedures

- Notice of possible DSC by Contractor
- Review/recommendations by Engineer
- Written statement by Owner
 - Expectation that Owner will adopt E's report
- Written statement should address:
 - Resumption of Work in DSC area
 - Design changes to be made in reaction to conditions
 - DSC or not
- Appeal rights of Contractor—DSC, time, \$\$\$

Owner's right to set-offs

- 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
- Contractor may contest the set-off via submittal of Change Proposal

EJCDC Overview

- Three Sponsoring Organizations
 - ACEC
 - ASCE
 - NSPE
- Numerous Participating Organizations
 - APWA
 - USDA/RUS
 - AGC
 - NUCA
 - CSI and others

EJCDC Objectives

- Primary Purpose – Publish standard contract documents for engineer-designed construction
- Objectives
 - Logical risk allocation
 - Clear and thorough
 - Fair to all parties
 - Consistent with current practice and laws
 - Responsive to user needs
- Regular update/review cycles (Target at 5 years)

EJCDC Document Series

- Construction (Owner-Contractor)
- Engineering (Owner-Engineer, Engineer-Subconsultant, Teaming Agreement/Joint Venture, Task Order, others)
- Design/Build
- Environmental Remediation
- Procurement (Buyer-Seller; for major equipment purchases, etc.)

Current EJCDC Initiatives

- “P3”— Public Private Partnerships
 - August 2014
- Construction Management
 - In collaboration with CM experts
- Standard purchase order

Obtaining Documents

- Available by direct on-line order/download at any Sponsor
 - NSPE
 - ACEC
 - ASCE
 - EJCDC.org
- Discounted pricing normally available for Sponsor members when ordered through that organization

Thank You!

- Questions: Hugh Anderson

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