



Post for EJCDC blog

Understanding how to Specify Alternates

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This blog post is regarding one of the most commonly-used and often-misunderstood concepts in construction documents: alternates.

Alternates are a means for the Owner to defer certain decisions on the scope of the Project until after pricing is obtained from prospective contractors, and to ensure the Project can be constructed with the funds available.

An alternate is a defined portion of the Work that is priced separately and thus provides an option for the Owner in determining the final scope of the Project. Alternates provide the Owner with a choice between different products or can define the addition or deletion of a portion of the Work. On **design-bid-build projects**—the focus of this post—alternates allow the Owner to adjust the extent of the Work, after the Project is bid (but usually before the Contract Documents are executed), based on the alternates bid and the Owner's priorities.

Using alternates successfully with minimal risk to all parties can be quite challenging; many owners, engineers, and architects may not fully appreciate the extent of the risks. Despite this, many owners, engineers, and architects frequently resort to using alternates to obtain pricing for Work or products that the Owner may or may not wish to award. The process of successfully incorporating alternates into Bidding Documents with minimal associated risk often becomes complicated because of Owner or engineer/architect desire to use alternates "for maximum flexibility in awarding the Contract"; what such "flexibility" often engenders, however, is significant risk of a bid protest.

Using an excessive number of alternates should be avoided, because it unnecessarily complicates the bidding process.

Alternates may be additive or to deductions from the base bid. To simplify the procedure for objectively determining the apparent Successful Bidder (to whom the Contract is awarded), EJCDC recommend that alternates on a Project be either all-additive or all-deductive. It is much more difficult to objectively determine the apparent Successful Bidder on projects with multiple alternate bid items when some alternates are additive and some deductive; such projects will often have increased vulnerability to bid protests.

When used, alternates must be coordinated in the following places in the Bidding Documents:

1. **Instructions to Bidders (ITB)** – The ITB should include language that sets forth a method of evaluating alternates to objectively determine the apparent low Bidder (to whom the Contract will be awarded). Example language is provided in EJCDC® C-200, Suggested Instructions to Bidders for Construction Contracts (2013), Paragraphs 14.01 (second version) and 19.03; the applicable language of Paragraph 19.03 is copied below; Note that the language is predicated on all alternates being additive:

19.03 Evaluation of Bids

- A. In evaluating Bids, Owner will consider whether or not the Bids comply with the prescribed requirements, and such alternates, unit prices, and other data, as may be requested in the Bid Form or prior to the Notice of Award.
- B. In the comparison of Bids, alternates will be applied in the same order of priority as listed in the Bid Form. To determine the Bid prices for purposes of comparison, Owner shall announce to all bidders a “Base Bid plus alternates” budget after receiving all Bids, but prior to opening them. For comparison purposes alternates will be accepted, following the order of priority established in the Bid Form, until doing so would cause the budget to be exceeded. After determination of the Successful Bidder based on this comparative process and on the responsiveness, responsibility, and other factors set forth in these Instructions, the award may be made to said Successful Bidder on its base Bid and any combination of its additive alternate Bids for which Owner determines funds will be available at the time of award.

Note carefully the language of EJCDC® C-200 (2013), Paragraph 19.03.B, above, as well as Paragraph 14.01 (second) of EJCDC® C-200 (2013), both of which state that alternates will be considered in the **order of priority** listed on the Bid Form. This means that the first or “A” alternate is the one most desired by the Owner and that the remaining alternates each have an incrementally lower priority. When written for deductive alternates, the order of priority changes and the first or “A” alternate would be the alternate least-desired by the Owner.

The provisions presented above for determining the apparent low Bidder for a base bid with alternates is used by several federal agencies and has been challenged before and upheld by several boards of contract appeals. It represents the fairest method of determining the apparent low Bidder that has been reviewed by EJCDC. When followed precisely—including the Owner’s announcement of the funds available for the Work (usually just prior to the opening of Bids)—any Bidder will have little basis to challenge an award with a claim that the Owner manipulated the order of the Bidders by a post-bid selection of specific alternates or a post-bid determination of the order in which the alternates are selected.

The American Institute of Architects (AIA) Document AIA® A701™ (1997) covers alternates at Sections 1.6 and 5.3.2. However, because AIA documents are typically used for privately-funded construction where the Owner can award the Contract as the Owner sees fit, the provisions of AIA® A701™ on evaluating alternate bid items is very short and essentially allows the Owner to award the Contract at the Owner sees fit. Use of such a provision on a publicly-funded project is likely to increase the potential for a bid protest.

2. **Bid Form** – EJCDC® C-410, Bid Form for Construction Contracts (2013), includes sample language for, among other things, projects with a base bid plus additive alternates. The itemization in the Bid Form should be clearly identifiable and carefully follow the presentation of alternates in the Division 01 Specifications. (AIA does not currently offer a suggested bid form document.)
3. **Owner-Contractor Agreement** (when completing the Agreement’s provisions on the Contract Price, and possibly other provisions in the Agreement) – In the case of a base bid with alternates (and certain other types of Bids) and in the case of the non-public Owner who engages in price negotiations with the Successful Bidder prior to executing the Contract, there can be a significant difference between the Bid submitted by the Successful Bidder and the basis for the Contract Price that is intended to represent the final and complete understanding between the Owner and the Contractor. In such cases, it is almost always necessary to copy the basis for the Contract Price on the Bid Form, or in another format as appropriate, and attach said document as an exhibit to the Agreement. Ultimately, regardless of whether the Bid Form is included as an exhibit

to the Agreement, the final Agreement executed by the parties needs to clearly and unambiguously indicate the alternate items that are included in the Contract.

4. **Specifications Section 01 23 00, Alternates** – Alternates should be described in this Section, together with applicable administrative and procedural requirements associated with them.
5. **Specifications Section 01 22 00, Unit Prices** – This Section should be coordinated with alternates if any of the alternates are unit price items.
6. **Specification Section(s) in Divisions 02-49 Where Alternates are Specified** – See CSI *SectionFormat* for the location in Part “1 – General” where alternates are to be described.

For more on alternates, see the Construction Specifications Institute’s (CSI) *Project Delivery Practice Guide* (2011), Section 8.14 (“Controlling Variables”) and Chapter 12 (“Procurement”); and CSI’s *Construction Specifications Practice Guide* (2011), Section 7.7 (“Specifying Alternates”).