

Exploring Below the Surface: The 2018 EJCDC Construction Series Documents

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- Design Build Institute of America
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Liaisons—Insurance and Bonding

- Surety and Fidelity Association of America
- National Association of Surety Bond Producers
- Victor O. Schinnerer Company (CNA)
- AXA XL
- Hanover Insurance

Content Objectives for EJCDC Documents

- Logical risk allocation
- Clear and thorough
- Consistent with current practice and laws
- Responsive to user needs

EJCDC Contract Documents

EJCDC has complete series of Contract Documents for:

- Engineering (Professional Services)
- Construction
- Procurement (Owner-purchase of equipment, systems)
- Traditional Design-Build/Progressive Design-Build
- Public Private Partnerships
- In draft: CM as Advisor; CM at Risk; Program Management

EJCDC Contract Documents

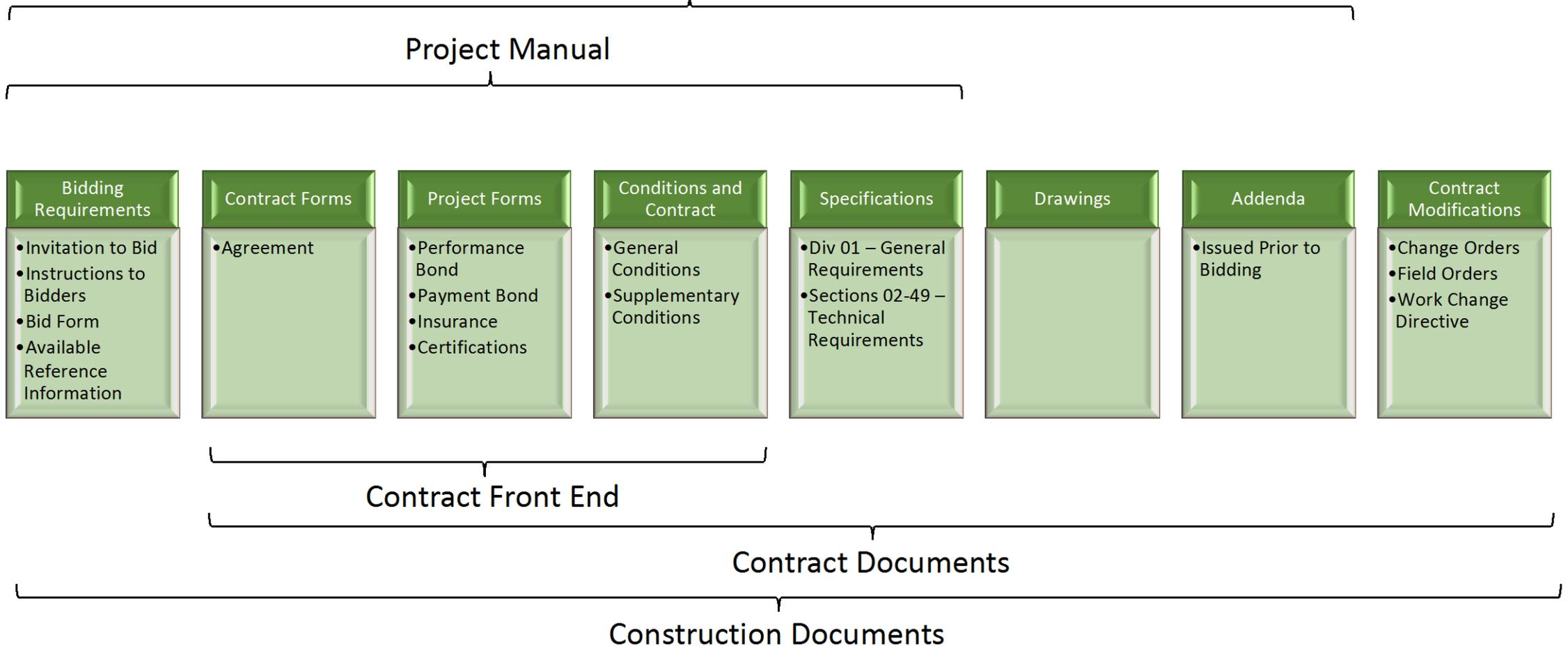
- Each series includes a Commentary regarding use of the documents
- Most documents include:
 - Guidelines for Use
 - In-line Guidance Notes
 - Notes to Users

EJCDC Construction Series (C-Series)

- Approximately 5-year cycle
- Current edition is 2018
- Format: Microsoft[®] Word [Pay App: Excel]

Structure of Contract Documents

Bidding/Procurement Documents



C-Series: Preparing Bidding Documents and Contract Documents

- C-001, Commentary on 2018 EJCDC Construction Documents
- C-050, Owner's Instructions — Bidding and Contract Documents
- C-051, Engineer's Letter to Owner Concerning Bonds and Insurance
- C-052, Owner's Instructions to Engineer — Bonds and Insurance

C-Series: Bidding Requirements

- C-111, Advertisement
- C-200, Instructions to Bidders
- C-410, Bid Form
- C-430, Bid Bond (Penal Sum)
- C-435, Bid Bond (Damages Form)
- C-451, Qualifications Statement

C-Series: Core Contract Documents

- C-520, Agreement Between Owner and Contractor—
Stipulated Sum
- C-525, Agreement Between Owner and Contractor—
Cost-Plus-Fee
- C-700, Standard General Conditions of the Construction
Contract
- C-800, Supplementary Conditions of the Construction
Contract

C-Series: Contract Bonds

- C-610, Performance Bond
- C-615, Payment Bond
- C-612, Warranty Bond (New Document)

C-Series: Administrative Forms

- C-510, Notice of Award
- C-550, Notice to Proceed
- C-620, Contractor's Application for Payment
- C-625, Certificate of Substantial Completion
- C-626, Notice of Acceptability of the Work (new document)
- C-940, Work Change Directive
- C-941, Change Order
- C-942, Field Order

C-Series: Special Purpose Documents

- C-522, Contract for Construction of a Small Project
- C-523, Construction Subcontract
- C-524, Purchase Order (first edition currently in development)

2018: General Changes in C-Series

- New document format for clarity and uniformity
- Enhanced use of Styles in Microsoft® Word for better editing
- Standardized signature blocks
- Recognition of use of electronic documents throughout series
 - Electronic Documents Protocol in SCs
- Eliminates notarized signatures and corporate seals
- Some re-organization to improve flow of the documents

Key General Conditions Clauses: General Warranty and Correction Period

- Contractor provides a general warranty of the Work in C-700, Paragraph 7.17. This warranty endures after completion, and is not limited in duration except by statute of limitations. Owner can pursue Contractor for cost of defective Work.
- C-700 also establishes a 1-year correction period. Paragraph 15.08.
 - Contractor must return to site and fix defective Work—specific performance
 - Owner's rights under correction period are buttressed by standard Performance Bond, which is generally in effect during the 1-year period.

New Clauses: Notice of Defective Work

New in C-700 2018

After construction, under either general warranty or correction period clauses:

- Owner must give Contractor notice within 60 days of discovery that a portion of the Work is defective
- No sitting on knowledge of defect
- Notice after end of correction period clause is deemed a general warranty clause notice

Extending the Correction Period

- New Supplementary Condition, SC-15.08, allows Owner to extend the correction period, for example to 2 years after Substantial Completion
- Often such an extension will be supported by requiring a Warranty Bond (sometimes referred to as “maintenance bond”) that protects Owner during the extended correction period
 - Buying separate warranty bond is easier than lengthening Performance Bond
 - Warranty bond form (EJCDC C-612) provides that bond period begins 364 days after Substantial Completion
 - C-612 provisions expressly linked to EJCDC GCs/SCs

C-612, Warranty Bond

- EJCDC C-612, Warranty Bond, drafted with input from national surety organizations.
- To avoid conflicts between Performance Bond and Warranty Bond sureties, same surety must furnish both bonds
- Correction period work typically is limited in cost compared with total Contract Price. Guidance Notes in C-800 state that typical Warranty Bond amount is 10-15% of Contract Price.
- Bonding more than an additional one or two years is expensive and impractical—C-612 guides user to those shorter durations

Liquidated Damages

- EJCDC documents have long provided users the opportunity to establish Liquidated Damages for Contractor failure to complete project on time
- EJCDC C-Series does not contain a mutual or unilateral waiver of consequential damages
- To emphasize the depth and breadth of impact of liquidating damages, EJCDC in 2018 added clause expressly stating that Liquidated Damages are **“Owner’s sole and exclusive remedy for [Contractor’s] delay, and Owner is precluded from recovering any other damages, whether actual, direct, excess, or consequential, for such delay....”**

Other 2018 Changes of Interest

- Added requirements for substantiating delay claims
- Improvements to insurance requirements, based on input from insurance experts
- Added more insurance coverage options such as clause for Railroad Protective Liability policy
- Refined provisions regarding delegation of portion of design to Contractor

Weather Delays

- C-700, Paragraph 4.05.C, allows the Contractor to make a claim for an adjustment to the Contract Time arising from certain force majeure events of delay.
- One of the identified force majeure events is “abnormal weather conditions” (C-700, Paragraph 4.05.C.2)
- Although the standard of “abnormal weather conditions” has been generally used in the industry for many years, without further guidance on its meaning, this broad and subjective standard may lead to significant disputes between the parties.
- In some localities there may be well established and widely accepted procedures for monitoring and evaluating the weather impacts on a construction project, such as the procedures set forth in municipal or state department of transportation standard specifications.
- Under C-800, EJCDC has provided alternative language based upon more objective standards that may be used in lieu of C-700, Paragraph 4.05.C.2

Weather Delays (Slide 2)

- The alternative language contained in C-800, allows the parties to establish for “bad weather days”:
 - Total precipitation for each day that, when exceeded, would equate to a bad weather day;
 - Outdoor air temperature minimums and maximums that, when exceeded, would equate to a bad weather day;
 - Establishment of the entity and location from which the weather data will be based upon (i.e. National Weather Service weather monitoring station located in Topeka, Kansas); and
 - Establish the number of bad weather days for each month of the Project that have already been included in the Project’s schedule

Weather Delays (Slide 3)

- When used, the alternative language contained in C-800, replaces the subjective standard of “abnormal weather conditions” with “bad weather days” based upon empirical data for precipitation and temperature ranges mutually agreed to by the parties while also recognizing that a certain number of bad weather days are already including in the schedule.
- More importantly, the alternative language can be adjusted to provide for site and/or activity specific concerns such as high winds, precipitation during a specific period of time in the day, etc. while still maintaining a readily calculable number of delay days due to bad weather.

Site Information

- General EJCDC policy is to require Owners to disclose available site information to prospective Contractors
- Policy is driven by equitable principles, and by the results of court cases that disfavor withholding site information
- Some site information is worthy of reliance—advantageous to Contractor and Owner for Contractor to rely on it in planning and pricing the Work
- EJCDC defined term for this reliable information: Technical Data
- Example: Boring logs in recent geotechnical report

Site Information (Slide 2)

- Engineer typically determines and specifies which site information is reliable Technical Data
- 2018 contractual requirement is that Owner identifies in the SCs any report, test, or drawing that contains Technical Data. C-700, Paragraph 5.03.A. Will often be a short list.
- Contractor can rely upon the accuracy of the Technical Data, even if the relevant document is not included in the Contract Documents. C-700, Paragraph 5.03.C.
- 2018 documents require that all other site-related documents be furnished to bidders, during the bidding process and **not** under the SCs. Example: A document regarding site conditions from Owner's archives, of unknown origin and worth.
- Goal of changes is to create categorical separation between reliable and unreliable site information

Site Information (slide 3)

- Disclosure of site information that does not include Technical Data (“other Site related documents”) is addressed in C-200, Instructions to Bidders
- C-700, Paragraph 5.03.D, specifies that Contractor may not rely on the “other” site-related information
- Neither the bidding documents nor C-700 require bidders (Contractor) to be responsible for the contents of the “other” site-related information—provided for Contractor’s benefit, not intended as a trap

Site Information (slide 4)

- EJCDC C-410 (Bid Form) provides an acknowledgment that bidder has:
 - Visited and examined the Site and has become familiar with the Site conditions;
 - Become familiar with all applicable laws and regulations;
 - Carefully studied all drawings of physical conditions relating to existing surface and subsurface structures as well as reports of explorations and tests of subsurface conditions with attention to Technical Data

Differing Site Conditions

- EJCDC considers Differing Site Conditions (DSC) provisions to be critically important to engineered construction
- Basic provisions of C-700 2013 remain intact
- C-700, Paragraph 5.04.A, provides for 4 types of DSC which include subsurface or physical conditions:
 - Of a nature as to establish that any Technical Data on which Contractor is entitled to rely is materially inaccurate;
 - of such a nature as to require a change in the Drawings or Specifications;
 - differs materially from that shown or indicated in the Contract Documents;
 - of an unusual nature, and differs materially from conditions ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract Documents

Differing Site Conditions (Slide 2)

- C-700 gives Owner, Contractor, Engineer comprehensive road map for responding to a DSC and its impacts
 - Notice by Contract and stoppage of relevant Work (Paragraph 5.04.A)
 - Engineer's evaluation and written findings, conclusions and recommendations to Owner (Paragraph 5.04.B)
 - Owner's Statement to Contractor regarding determination DSC (Paragraph 5.04.C)
- C-700 2018 adds a clause that allows Engineer to authorize an early resumption of work in DSC area, before full analysis and resolution is completed. Paragraph 5.04.D. Mitigates costs and losses.

Differing Site Conditions (Slide 3)

- C-700, Paragraph 5.04.F, provides the Contractor with an equitable adjustment to the Contract Price and Contract Time for impacts arising from Differing Site Conditions except when:
 - Contractor knew of the existence of the DSC at the time of bid submission or execution of the Contract;
 - The existence of the DSC reasonably could have been discovered or revealed as a result of any examination, investigation, exploration, test or study of the Site required to be performed by Contractor prior to commitment.
 - Contractor failed to give required written notice of DSC.
- Underground Facilities and Hazardous Environmental Conditions are expressly excluded from the Differing Site Condition provisions and are addressing individually in C-700, Paragraph 5.05 for Underground Facilities and C-700, Paragraph 5.06 for Hazardous Environmental Conditions.

Underground Facilities

- Underground Facilities (UF) is a defined term in C-700
- Subsurface pipelines, conduits, cables, transmission lines
- Special treatment because of need to protect and preserve
- Intent is that UF be shown on the Contract Drawings
- Contractor entitled to equitable adjustment in the Contract Time or Contract Price, if UF not shown in Contract Drawings, or not shown accurately

Underground Facilities (Slide 2)

- 2018: Scope of remedy limited to contract provisions (to avoid negligence or misrepresentation claims). C-700, Paragraph 5.05.F.4
- C-700 2018 provides additional clarity about Contractor's duties regarding Underground Facilities:
 - Compliance with state and local utility damage prevention laws (one-call)
 - Field verification of actual location, by exposure
- 2018: Specific reference to ASCE 38—guidelines for depiction of subsurface utility data

Hazardous Environmental Conditions

- In the Supplementary Conditions, Owner is required to disclose all reports and drawings known to Owner relating to Hazardous Environmental Conditions that have been identified at or adjacent to the Site; and
- Identify Technical Data contained in such reports and drawings.

Hazardous Environmental Conditions (Slide 2)

- Contractor may rely upon the accuracy of the Technical Data expressly identified in the Supplementary Conditions. (C-700, Paragraph 5.05.B)
- Contractor may NOT rely upon or make claims with respect to:
 - Completeness of reports and drawings relating to Hazardous Environmental Conditions;
 - Other data, interpretations, opinions and information contained in such reports or shown in such drawings; or
 - Any Contractor interpretation of or conclusion drawn from any Technical Data.

Hazardous Environmental Conditions (Slide 3)

- C-700 defines a Hazardous Environmental Condition as the presence at the Site of “Constituents of Concern” in such quantities or circumstances that may present a danger to persons or property if exposed thereto; except for:
 - Presence of Constituents of Concern required for the performance of the Work that are controlled and contained as required by the Contract Documents;
 - Presence of Constituents of Concern that are to be abated as part of the Work; or
 - Presence of Constituents of Concern as part of the routine, anticipated, and obvious working conditions at the Site

Hazardous Environmental Conditions (Slide 4)

- C-700 defines Constituents of Concern as Asbestos, petroleum, radioactive materials, polychlorinated biphenyls (PCBs), lead-based paint (as defined by the HUD/EPA standard), hazardous waste, and any substance, product, waste, or other material of any nature whatsoever that is or becomes listed, regulated, or addressed pursuant to Laws and Regulations regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic, or dangerous waste, substance, or material.

Hazardous Environmental Conditions (Slide 5)

- Except as expressly required by the Contract Documents, Contractor has no duty to abate any pre-existing Hazardous Environmental Condition at the Site(C-700, Paragraph 5.06.C)
- Contractor is responsible for Constituents of Concern that it brings to the Site and the abatement of any Hazardous Environmental Condition arising from the use of such Constituents of Concern at the Site(C-700, Paragraph 5.06.D)

Hazardous Environmental Conditions (Slide 6)

- C-700 gives Owner, Contractor, Engineer comprehensive road map for responding to a Hazardous Environmental Condition including notification and stoppage of work by the Contractor, evaluation of the condition by Owner, Engineer, and possibly an expert, abatement of the condition, and securing of required permits for resumption of work and written “clean letter”. (C-700, Paragraph 5.06.E)
- C-700 also provides the process for determining adjustments to the Contract Time or Contract Sum arising from the Hazardous Environmental Condition as well as the Owner’s ability to delete work scope that may be disputed due to special conditions arising from Hazardous Environmental Condition.
- Separate Indemnification provisions are provided for Hazardous Environmental Conditions:
 - Owner indemnification arising out of Pre-existing Hazardous Environmental Conditions.
 - Contractor indemnification arising out of Constituents of Concern brought to the Site.

Questions / Comments?

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