

Avoiding Gray Areas

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In the tripartite relationship between owners, contractors, and engineers in utility contracts, standard general conditions are key to keeping things clear.

Standard General Conditions in Utility Contracts

The EJCDC General Conditions Overview

Throughout America, political subdivisions are seeking to improve their infrastructure in some form or fashion. This could mean replacing a sewer system or a water system. These projects are typically expensive, complicated, and funded by taxpayer dollars. With money supplied by COVID-19 relief funds and the Bipartisan Infrastructure Bill, additional money should be available to fund more projects. As always, because of the use of public funds, it is important that these large utility projects are done correctly and in accordance with plans and specifications.

In the tripartite relationship between owners, contractors, and engineers, where the engineer plays the role of both design professional and construction manager, there are normally a set of general conditions that control the course of the project. Conditions are part of the contract between the owner and contractor but are administered by the engineer as project manager. In the 1970s, the Engineers Joint Contract Documents Committee (EJCDC) promulgated its first set of Standard General Conditions of the Construction Contract. These conditions are published jointly by the American Council of Engineering Companies, the Associated General Contrac-

tors of America, the American Society of Civil Engineers, and the National Society of Professional Engineers. The purpose of the EJCDC General Conditions is to provide a uniform agreement that establishes the basic contractual relationship between the project's owner and the contractor completing the project. It was developed as the best way to have fair, objective contractual relations and reduce conflict among all parties involved in a construction project. These documents have been tested over decades of use and interpreted by courts of various jurisdictions.

The EJCDC General Conditions is a document signed by the contractor and the project owner and integrated into the construction contract, providing a role for the project engineer to impartially administer the contract documents between the parties. A copy of the EJCDC General Conditions is traditionally included in a project's bid documents, but an experienced public utility contractor should be familiar with its requirements. In other words, the terms, provisions, definitions, and requirements of the EJCDC General Conditions are known to the project owner, the contractor, and the project engineer well in advance of the contractor bidding on the project.

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At the heart of the EJCDC General Conditions is the concept that the project owner, the project engineer, and the contractor have distinct but equally important roles in the construction process, even though the engineer is not a party to the contract. Each role has authority and limitations on said authority, with the engineer acting as the adjudicator of disputes between the other two. Under Article 6 of the EJCDC General Conditions, it is the contractor's role to supervise, inspect, and direct the work competently and efficiently. This includes removing debris and cleaning the site after work to comply with all environmental regulations. Notably, the contractor is the sole entity responsible for the means, methods,

techniques, sequences, and procedures of the construction. Furthermore, the contractor is responsible for scheduling and coordinating the work performed by all subcontractors and material suppliers.

Conversely, Article 8 outlines the responsibilities of the project owner. The project owner's responsibility is to pay the contractor when due, execute change orders as needed, and furnish the site to the contractor with all easements required to complete the work. Importantly, the project owner must not control or seek to control the means and methods of the contractor in performing the work. In the normal relationship, the owner's communication with the contractor flows through the engineer.

Finally, the project engineer's responsibilities are laid out in Article 9. The project engineer's chief responsibility is to be the project owner's representative during the construction period, visit the site to observe the quality of the contractor's work, and, depending on the scope of the engineer's contract with the owner, verify the quantities for payment. Again, however, the project engineer is not permitted to control, have authority over, or be responsible for the contractor's means, methods, techniques, sequences, or procedures. Rather, it is the project engineer's general responsibility to ensure that the contractor is performing work in accordance with contract plans and specifica-



tions and to authorize minor variations in the work that do not involve an adjustment in contract price or contract times. In that same vein, the project engineer has the authority to reject work that they believe in good faith to be defective or that they believe will not produce a completed project that conforms with the contract documents.

Perhaps the more important aspect of the project engineer's role, which often leads to conflict, is their role in decisions of the requirements of contract documents and the acceptability of the contractor's work, as outlined in Article 9.08. All matters between the project owner and the contractor arising prior to the date of final payment relating to the acceptability of the work, the interpretation of the requirements for the work, and disputes as to extensions in contract price or contract times are to be adjudicated by the project engineer, as will be explained below. Importantly, the project engineer is not to show partiality to the project owner or the contractor in acting as an interpreter or judge.

Course of Construction as Contemplated in the EJCDC General Conditions

The EJCDC General Conditions seek to outline the responsibilities of the project owner and the contractor in terms of events that may occur during the project that are difficult or outright impossible to predict. For example, it is the owner's responsibility to furnish the project site to the contractor and obtain the necessary easements for completion under Article 4.01. Under Article 4.03, if the contractor believes that there are differing site conditions that were unknown and/or unforeseen that materially affect his time or cost and which would potentially require a change order, then the contractor must notify the owner and engineer in writing to view the differing site condition. They can then review and make a determination. Upon receipt of the project engineer's findings and conclusions as to the unforeseen site conditions, the project owner and the contractor must attempt to agree upon an acceptable extension in the contract time or price. If no agreement can be reached as to the entitlement or amount of adjustment, either party may file a claim with the project engineer for

resolution in the process outlined below in Article 10. Further, if either the contractor or the owner believes that there should be a change in contract time or price either because of extra work that was required and not contemplated in the contract, or work that is removed from the contract as unnecessary to the project, the parties should attempt to negotiate a change to the contract time or price to have a change order executed. If there is no agreement, either party may file a claim with the engineer as outlined in Article 10.

The Claims Process

Generally, if one of the parties to the contract sees an event or something that would require a change in contract time or price, that party can discuss it with the other party, and they can agree to a change. The owner's communication with the contractor flows through the engineer in a normal relationship. When the parties agree, the project engineer drafts a change order to reflect the new agreement. If no agreement can be reached, then either party to the contract can make a claim under Article 10 and submit it to the engineer. Article 10 provides a clear process for the resolution of disputes where either the project owner or the contractor requests a modification in the contract price or contract time. This is done by submitting a "Claim," which the EJCDC General Conditions defines as a demand or assertion by owner or contractor seeking an adjustment of contract price or contract time, or both, or other relief with respect to the terms of the contract.

The claims process itself is simple. In writing, the party seeking the change makes a claim, which outlines the change and reason and provides it to the project engineer, who is tasked with acting as an impartial third-party in adjudicating the claim. The party making a claim must also substantiate that claim and the price or time, in writing, to the project engineer. A decision by the project engineer is required for the claim to be resolved and is a condition precedent to any exercise by the owner or contractor of any rights or remedies either may otherwise have under the contract documents or by laws and regulations. To begin the claims process, Article 10.05(B) of the EJCDC General Conditions mandates that claims must be submitted,

in writing, to the project engineer within thirty (30) days of the event giving rise to the claims. After the notice of claim has been provided to the project engineer, the party initiating the claim has thirty (30) days from the date the notice was submitted to substantiate its claim. The party making a claim is tasked with initiating the claims process and submitting written substantiation of that claim. Importantly, the EJCDC General Conditions clearly states that no claim for an adjustment in contract price or contract time will be valid if not substantiated in accordance with this Article 10.05.

Put simply, the process to file a claim for the modification of contract time or contract price is as follows: (1) an event occurs that necessitates a party needing to file a claim to modify the contract time or contract price to address said event; (2) within thirty (30) days of this event, the party needs to file the written notice of its claim to the project engineer; and (3) within thirty (30) days of filing this written notice of its claim, the party making a claim must provide substantiation for its claim. The process allows extensions of time in that the party making a claim can ask for an extension of time to submit the claim or substantiation.

Practical Application

Of course, it is one thing to write requirements for parties in a construction agreement and another to apply them in the field. The construction process rarely goes as planned, and it is not uncommon for unplanned events to increase the contract price or extend the contract time. If a change order is not agreed to, ideally, the party seeking more money or time will comply with the claims process by submitting its notice of claim and its substantiation in a timely fashion. In all circumstances, the burden rests with the party making a claim to follow the procedures set forth in the EJCDC General Conditions. It is not the responsibility of the project engineer to notice events that may cause a claim and then file a claim on behalf of the appropriate party, as this would take the engineer out of its role as a neutral adjudicator.

However, while parties are typically held to the terms of the claims process, the parties are still expected to be reasonable in their decision-making.

However, while parties are typically held to the terms of the claims process, the parties are still expected to be reasonable in their decision-making. Put simply, if a party caused an issue, then a party should be expected to remedy that issue. While a contractor is not entitled to an adjustment in contract price or contract time for delays within control of the contractor, a contractor may be entitled to such adjustments if a delay in the performance or progress of the work is caused by the project owner, the project engineer, or anyone for whom the project owner or project engineer is responsible. Suppose it can be shown that either the project owner or project engineer controlled the means and methods of the contractor in a way that caused delay or an increase in expense for the contractor. In that case, it is possible that the project engineer or project owner could be liable for that amount of expense.

A party seeking to recover costs on the project that did not follow the claims process provisions may try to rely on a waiver or abrogation argument where the party seeking adjustment argues that the formal requirements of the provisions have been waived by the course of conduct of the parties. Some courts have held that the formal claims procedure may not be necessary if it can be shown that the party is not making a claim or the project engineer has actual knowledge of the event giving rise to the claim. While this argument may take many forms, the most common is that the party seeking a change in contract time or contract price is entitled to such adjustment even if it did not follow the EJCDC General Conditions because the other party or the project engineer was made aware of the events necessitating the adjustment through informal means—either orally or by witnessing the event.

However, this waiver and abrogation argument is more difficult to make in

practice. An informal, oral agreement that changes the terms of a written contract must be so specific and direct that it leaves no doubt that the parties intended to change what they previously agreed to in the EJCDC General Conditions. An express oral agreement is needed to deviate from the terms of the EJCDC General Conditions, not simply “constructive notice” of events that could possibly give rise to a claim. Furthermore, when such an express oral agreement has been proven, all other provisions of the EJCDC General Conditions are to remain intact. For example, a contractor cannot prevail on an argument that a project engineer waived the requirement that the notice of claim be submitted in writing because the project engineer entered into an express oral agreement extending the timeframe for a contractor to report unmarked underground facilities. A party cannot orally waive all the requirements of the EJCDC General Conditions simply by waiving a specific requirement.

In sum, most jurisdictions hold as a tenant of contract law that a party that signs a written contract is presumed to know the contents of the documents they signed. The EJCDC General Conditions are provided to each party during the bidding process, and their execution is required for the project to proceed. At the outset of the construction project, the contractor, project owner, and project engineer should all be aware of their roles under the EJCDC General Conditions and given ample opportunity to effectuate any change in writing beforehand. While it is possible to show that parties to the EJCDC General Conditions have waived the more formal requirements of the claims process, for example, that can only come with an express, provable oral agreement that deals with the specific provision sought to be waived. That is a heavy burden for the party seeking to buck the formal requirements of the EJCDC General Conditions.

Advising Clients on Minimizing Liability Under the EJCDC General Conditions

The best way to minimize liability under the EJCDC General Conditions is to require all parties to comply with them. It must be kept in mind that these documents were drafted with each party to the construction contract working together. It is meant

to provide for industry-acceptable risk distribution among project participants. In theory, if each party reads, understands, and follows the EJCDC General Conditions, then there is no cause for concern.

However not all parties to a construction contract follow the agreements they sign or are intimately familiar with the claims process. To protect itself from liability, a party should keep meticulous documentation on every aspect of construction. During project meetings, there should be time set aside to discuss if any party has a potential claim that they would like to submit. Further, in the field, if the contractor has an issue that they believe should give rise to a change in the contract time or price, and the engineer either witnesses the event or is notified orally, that engineer should document the issue. They should also note that they informed the contractor that if the contractor felt it gave rise to a claim, they should initiate the claims process. Finally, each party should constantly be reminded in writing as to the requirements of the EJCDC General Conditions in requesting an adjustment in contract time or contract price.

Additionally, while waiver is typically an argument under the EJCDC General Conditions, a party should head off potential liability by not engaging in any conduct that could be construed as waiver in subsequent litigation. A party should not deviate from the provisions of the EJCDC General Conditions, because that sets an expectation that could be argued to have waived or otherwise ratified later behavior that is in contravention to the General Conditions.

Another way to head off a potential “waiver or abrogation” argument is to ensure that oral conversations with other parties to the project be followed up with or documented in writing—either by letter or email—confirming the conversation’s content. A party looking to shed the formal requirements of the EJCDC General Conditions will use any grey area of ambiguity in the conversations between parties to make the argument that an express oral agreement to waive formal provisions took place. It is imperative that each conversation is documented so that no party can point to informal meetings as evidence of an express oral agreement to waive the requirements of the EJCDC General Conditions.