

## **EJCDC PUBLISHES 2008 EDITION OF OWNER – ENGINEER AGREEMENT**

The Engineers Joint Contract Documents Committee (EJCDC) has issued the 2008 edition of its standard professional services contract, EJCDC E-500, Agreement between Owner and Engineer for Professional Services. The new document replaces the 2002 edition of E-500 and is now available for purchase.

EJCDC publishes standard contract documents that are used for the design and construction of public and private infrastructure projects throughout the United States. The four EJCDC sponsoring organizations are the American Council of Engineering Companies (ACEC), the American Society of Civil Engineers (ASCE), the Associated General Contractors of America (AGC), and the National Society of Professional Engineers (NSPE). The EJCDC documents are drafted with the active participation of representatives of the four sponsoring organizations (engineers and contractors), together with public owners; risk managers; professional liability insurers; surety and insurance experts; construction lawyers; various professional societies; and construction managers. The EJCDC documents are principally intended for use on public and private infrastructure projects designed by engineers, including water and wastewater treatment and conveyance facilities; utility work; solid waste handling and disposal facilities; highway, bridge, and other transit projects; production, power, and processing facilities; site development work; environmental remediation projects; street, curb, and gutter work; tunneling and excavating projects; and similar applications.

The 2008 edition of EJCDC E-500 maintains the solid base of terms and conditions found in prior editions of this flagship document, while making carefully considered changes that enhance clarity and reflect current design and construction-phase engineering practices. Highlights of the 2008 EJCDC E-500 are the following:

- *Safety*: EJCDC has revised the Agreement to provide that the Owner must inform Engineer of specific safety requirements that Engineer must follow at the project site. In most cases Engineer's compliance with Owner's and construction contractor's safety rules will be a basic included service. If a safety requirement is added after the effective date of the Agreement, and is more extensive than typically required, then compliance will be treated as an additional service.
- *Owner's Policies and Procedures*: The new E-500 clarifies that to the extent that the Owner has policies or procedures that apply to the professional services to be rendered by Engineer (for example, required procedures for drafting and organizing specifications, or for reviewing contractor payment applications), such policies and procedures are to be provided to Engineer prior to entry into the Agreement. This will allow the parties to account in the pricing of Engineer's services for any costs associated with compliance with the policies and procedures. E-500 also notes that Engineer is required to comply with such policies and

procedures only to the extent that doing so is not contrary to professional practice requirements.

- *Insurance:* Because most design engineers do not provide insurance advice as part of their professional practices, the EJCDC documents provide that as between the Owner and Engineer, the Owner (presumably through its risk managers, attorneys, brokers, and other insurance advisers) must take responsibility for making insurance decisions such as setting required policy limits—see EJCDC C-051, Engineer's Letter to Owner Requesting Instructions Concerning Bonds and Insurance. EJCDC has therefore added a provision to E-500 emphasizing that Engineer's services do not include providing insurance or bonding advice to Owner, or enforcing insurance-related requirements of the Owner's construction contract. Also, the new edition lists the insurance coverages that Owner must require from the construction contractor (workers' comp, commercial general liability, property damage, and motor vehicle damage), rather than merely cross-referencing the requirements set out in the EJCDC standard construction general conditions (EJCDC C-700).
- *Indemnification:* Project owners typically require that engineers contractually indemnify the owner with respect to negligence that results in personal injury or damage to the property of others. It is less common for owners to provide the same indemnification to the engineer, often for public or corporate policy reasons, or based on the position that an owner's less active role in the design and construction reduces the call for such an indemnification. To be consistent with common practice, EJCDC has structured its indemnification provisions such that the Engineer's indemnification of Owner is a standard clause, and the Owner's indemnification of Engineer is an option that may be selected when appropriate for a particular project.
- *Definitions:* The previous edition of E-500 incorporated many standard definitions from the EJCDC construction general conditions (EJCDC C-700) by reference. The 2008 edition contains the actual definitions, so the user does not need to refer to a second document to confirm a definition.
- *Certification against Corrupt and Collusive Practices:* As part of an international initiative to improve procurement practices, the 2008 E-500 requires Engineer to certify that it has not engaged in corrupt, fraudulent, collusive, or coercive practices with respect to obtaining the contract. Other EJCDC documents contain similar requirements with respect to construction procurement.
- *Contested Invoices:* The new document requires that if Owner contests an invoice from Engineer and withholds payment of all or a portion of the

invoiced amount, then Owner promptly must inform Engineer of the specific basis for doing so.

- *Review of Substitution Requests and Submittals:* The Engineer's basic services are expanded to include the review of routine substitution and "or equal" requests made during the bidding process, if such requests are allowed by the instructions to bidders. The 2008 E-500 further provides that if it is necessary for Engineer to conduct an excessive number of substitution or "or-equal" requests (whether submitted during the contractor selection process, or during the construction process), or review a shop drawing submittal more than three times, then the excess reviews will be treated as an additional engineering service.
- *Rejection of Defective Work:* The previous edition of E-500 required the Engineer to identify defective work and recommend to the Owner that Owner reject the defective work. Recognizing common construction practice, as described in current and past EJCDC standard general conditions, and the common expectation of the Owner that the Engineer is the party best positioned to identify and administer the rejection of defective work, the 2008 edition provides the Engineer with the authority to reject defective work directly, and further clarifies the standards under which work would be deemed defective.
- *Mediation:* If a dispute between Owner and Engineer is mediated, the mediation process is expressly noted to be confidential, and must be conducted within 120 days.
- *Additional Services:* Reorganization of the scope of services sections to clarify which services are basic included responsibilities and which are additional services and thus entitled to compensation under the specific provisions for additional services. The modifications should allow for better pricing and budgeting for all parties.
- *Estimated Engineering Costs:* Expanded discussion of Owner's options when compensation for engineering services is estimated, not fixed, and costs approach the estimate prior to completion of services.

Beginning in 2009 EJCDC will also issue revised editions of its other professional services documents, including the standard master agreement (EJCDC E-505, Agreement between Owner and Engineer for Professional Services, Task Order Edition), the short form (EJCDC E-520), and various professional services subagreements, as well as a narrative guide to using the EJCDC Engineering Series documents.