

Commentary on the Terms and Conditions of the AOD Standard Form of Agreement between Owner and Contractor

Issue	AOD	EJCDC	Comments on AOD FORM
General Comments	Associated Owners and Developers (AOD) Standard Form of Agreement Between Owner and Contractor, AOD – 2002 GC	Engineers Joint Contract Documents Committee 2002 Standard General Conditions – C-700, and related agreement forms.	
Approach to risk	Provisions tend to be slanted in favor of Owner, placing risks on Contractor.	Risks are borne evenly, consistent with progressive industry practices, so that risks are allocated to the party best able to control and bear them.	Standard form frequently offers two options, one distinctly favoring Owner and the other closer to industry practice of fairly allocating risk.
Tone	Language often patronizing and adversarial toward Contractor.	Businesslike, professional, and even-handed.	Frequent use of prescriptive and admonishing language directed at Contractor such as “provide undivided attention,” “prompt, attentive and diligent” suggests that Contractor is the inferior contract party. Provisions frequently are exhaustive and very detailed in spelling out Contractor obligations and limitations on Contractors rights. Obligations and rights of Owner are not similarly detailed.
Architect/ Engineer’s role	Standard form provides no construction phase role for A/E.	Follows traditional industry practice, with Engineer providing contract administration services.	The advantages of the design professional continuing to be involved through the completion of construction are lost under the AOD approach. The integrity of the design may be compromised, and there is no A/E “buffer” to reduce typical frictions between Owner and Contractor.
Specific Comments	AOD Form 2002 GC – the references below cite the paragraph numbers in the 2002 GC form for Fixed or Lump Sum Agreements. AOD has also produced a similar Standard Form Agreement for Cost Plus Fee with a Guaranteed Maximum Price.	References are to the following standard Owner-Contractor forms: EJCDC C-520 (lump sum price); C-525 (cost plus); and C-700 (general conditions).	

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Integration	Single form combines specific agreement terms and general conditions.	The agreement forms (C-520 – lump sum; C-525 – cost plus) are separate and distinct from the general conditions (C-700).	AOD form requires parties to fill in blanks sprinkled throughout document for information such as Substantial Completion Date, Price, retention rate, etc. In addition, the AOD form includes numerous options to be selected throughout. The EJCDC forms follows familiar structure with two agreement forms: one for lump sum and the other for cost plus contracts, with a separate set of general conditions. This allows all of the “blanks” to be filled in to be located on the shorter agreement forms, and the general conditions do not <i>require</i> interlineations. Thus, completing the AOD document is more demanding and perhaps more prone to confusion and mistake. However, the AOD approach has the virtue of potentially including all terms and conditions in a single document.
Contract price	¶6.1.1 – Form allows parties 2 options: (1) to identify price on a page dedicated to “Key Terms”, or (2) to state the price in a blank space in the body of the agreement.	A lump sum price is to be stated on Form C-520. If contract is on a cost-plus basis, Form C-525 is used.	AOD Form’s “Key Terms” page is intended to allow the parties to use a “tear-out sheet” so that the more confidential business terms may be removed before providing copies to third parties. This may be an attractive feature in some subcontracting or permit/funding application contexts.
Owner-furnished information	¶2.4 – includes a list of various types of information that the Owner may provide, using a “check-the-box” format for the parties to indicate what types of information are being provided.	No similar listing in the body of the Standard General Conditions (C-700). ¶4.02.A provides that reports and drawings regarding existing conditions at the site are to be identified in the Supplementary Conditions.	Both approaches can be effective. The goal should be to prompt the drafter to consider which specific items are available and should be furnished by Owner on the specific project. In some cases it may be sufficient to have a checklist of common options, as AOD provides. In recognition of the wide variety of types of documentation that owners might provide, the EJCDC approach allows the parties flexibility in tailoring the list to the specifics of the project.

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Contractor's right to rely on information provided by Owner	¶2.4.2 - Contactor may rely on accuracy of Owner furnished information "only to the extent the information is complete, in final form, and consistent with all other information known or reasonably available." Contractor is not entitled to rely on "any opinion, presumption or extrapolation contained in any such document. . . ."	¶4.04.B – Contractor entitled to rely only on "technical data" in reports and drawings identified in Supplementary Conditions, but such reports and drawings are not contract documents. Contractor cannot rely on any other information in such documents as basis for a claim, nor can Contractor rely upon its interpretation or conclusion drawn from any "technical data."	AOD approach may be unrealistic in that Contractor usually has limited time to prepare its bid and may not be able to determine whether Owner furnished information is complete and in final form. Moreover, time may not permit bidders to identify other available information. The Owner is in a better position to identify other information sources, and can spell out more precisely what Contractor may rely upon. These same points arise under EJCDC and other standard owner-contractor agreements.
Review of plans and specifications	¶¶5.3.1 – 5.3.3 – Contractor required to review the Contract Documents, submittals, laws and field measurements, and to request written clarification from Owner of any error, omission, conflict, or ambiguity between or among them. ▶ Contractor waives any claims arising out of or relating to any error, etc. that Contractor either recognized or should have recognized, and failed to clarify.	¶3.03.A - Contractor required to review Contract Documents and to report to Engineer any conflict, error, ambiguity, or discrepancy which Contractor actually discovered.	Read in conjunction with §5.3.4 (discussed below), AOD approach is "over-kill." It is enough to provide that Contractor is liable for what it "recognized or should have recognized." Also having a waiver of claims provision is redundant and unnecessary.
Contractor liability relating to review of Contract Documents	¶5.3.4 - Form identifies 2 options for liability of Contractor for costs resulting from errors, etc. in Contract Documents: (1) for errors the Contractor recognized; or (2) for errors the Contractor recognized or should have recognized.	¶3.03.C - Contractor liable for failure to report errors, etc. in Contract Documents only if Contractor knew or should have known thereof.	See discussion above.

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Electronic documents	<p>¶2.7 – The AOD Form includes an option for the parties to adopt a secure internet-based electronic document system for the project. The provisions identify a wide range of project documentation to be shared and available electronically. ¶2.7.6 requires the parties to choose between 2 options as to the effect of notices, change orders and change directives transmitted through the electronic system:</p> <ul style="list-style-type: none"> ▶ not effective for any purpose, or ▶ effective only if confirmed in writing within 3 days. 	No similar provisions.	The AOD approach is forward-looking, reflecting the rapid progress in commerce towards electronic document exchange and sharing. <i>Many</i> unresolved questions and problems remain, such as formatting, software selection, hardware compatibility, and the cost of procuring the necessary tools for access by all of the players in the project (including Owner, Contractor, subcontractors, suppliers, design professionals, consultants, etc.). In addition, the concerns for integrity and control underpinning the limitations on the effectiveness of electronic communications imposed by ¶2.7.6 at the same time tend to undermine a key purpose of adoption of the electronic document system, which is to take advantage of the immediacy of electronic communications. Electronic verification of communications should be permitted.
Correction of defective work	<p>¶5.8.1 – Contractor must commence correction of defective work within 7 days of written notification from Owner.</p> <ul style="list-style-type: none"> ▶ If Contractor fails to do so, Owner may make corrections and charge Contractor for any cost incurred as a result. 	<p>¶13.06 of C-700 – Promptly after receiving notice, Contractor must correct all defective work.</p> <ul style="list-style-type: none"> ▶ Contractor is responsible for all claims arising from corrective work (including attorney’s fees and dispute resolution costs). 	Comparable terms to those of C-700.
Correction period after completion	<p>¶5.14.1 – Contractor must repair or replace any portion of the work in which a defect or failure to conform to the Contract Documents appears within 1 year of substantial completion.</p>	<p>¶13.07 – If any work is found defective within 1 year of substantial completion, Contractor must repair or replace defective work at no cost to Owner.</p>	Comparable terms to those of C-700.

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Property insurance	No apparent requirements. ¶3.10 allows the parties the <i>option</i> to require that the Owner obtain builder's risk insurance.	¶5.06 – follows industry norms in requiring the Owner to obtain property insurance. EJCDC C-800 (Guide to the Preparation of Supplementary Conditions) provides the option to substitute a requirement that the Contractor obtain property insurance rather than the Owner.	The AOD Form avoids placing any insurance obligation on the Owner (except for the option to have the Owner obtain builder's risk coverage). This approach is non-standard, and is inconsistent with the way the most projects are completed. Owners normally participate in insuring the project consistent with the risks they face. The AOD approach probably is designed to give the Owner flexibility.
Contractor's insurance	<p>¶¶3.1 – 3.10 – Form includes extensive and detailed treatment of Contractor's obligations with respect to insurance, including specifying insurance limits and coverages.</p> <ul style="list-style-type: none"> ▶ commercial general liability with specified minimum limits, aggregates and coverages ▶ automobile liability with minimum limits and coverages ▶ workers' compensation with minimum limits ▶ umbrella/excess liability with specified minimum limits and coverages ▶ builder's risk, with option for either Contractor or Owner to provide, with minimum limits and coverages 	<p>¶5.04 – Contractor is required to obtain liability insurance in amounts (limits) as specified in supplementary conditions. Required coverages include:</p> <ul style="list-style-type: none"> ▶ workers' compensation, disability, and similar employee benefits ▶ damages for bodily injury, occupational sickness, death, etc. for Contractor's employees and others ▶ damages because of injury to property, including loss of use, other than the work itself ▶ damages for bodily injury or death arising from motor vehicles <p>EJCDC C-800 (Guide to the Preparation of Supplementary Conditions) includes sample language for detailing insurance requirements such as limits, aggregates, etc.</p>	AOD form focuses entirely on the Contractor's obligation to obtain insurance. In contrast, very little is said about any requirements for the Owner to obtain property or other insurance. AOD Form does not expressly provide that Contractor's insurance must cover its contractual indemnification liability.

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Waiver of subrogation	¶3.1.7 – Contractor and Subcontractor insurance policies must waive any right of insurer to recovery from Owner, Designer, or Separate Contractor.	¶5.08 A – Owner’s property insurance policies must waive any right to recovery against any of the insureds or additional insureds (which includes Owner, Contractor, and Subcontractors).	AOD approach is non-standard in the industry, and only protects the Owner. The application of the subrogation waiver to insurance policies other than property insurance is unusual. In part, this provision is a reflection of the AOD Form’s sole focus on the Contractor’s insurance obligations. In contrast, the EJCDC approach to waiver of subrogation is fair, consistent with industry practice, and protects the interests of both parties.
Indemnification	¶¶11.3.1 and 11.3.3 - Parties must choose between two options for the principal indemnification. To maximum extent allowed by law, Contractor indemnifies Owner for all claims for personal injury, death or property damage arising from or relating to any act of Contractor or Subcontractor either: (1) in proportion to the Contractor’s fault, or (2) for <i>all</i> claims except to the extent caused by Owner’s <i>sole</i> negligence. Contractor also indemnifies Owner for all claims arising from: failure to comply with any law, hazardous materials brought on site, infringement upon intellectual property rights, liens or payment claims of Subcontractors, and claims of Owner’s Separate Contractors based on any act or omission of Contractor or Subcontractor.	¶6.20.A – Contractor indemnifies Owner for personal injury or property damage to the extent caused by Contractor’s or Subcontractor’s negligence. Owner indemnifies Contractor for pre-existing Hazardous Environmental Conditions not shown on Contract Documents and not created by Contractor. Contractor indemnifies Owner for Hazardous Environmental Conditions created by Contractor.	AOD provisions are slanted in favor of Owner and against Contractor. By offering the two options on the principal indemnification standard form fails to endorse a fair approach. Similarly, hazardous conditions indemnification only provides protection for Owner but ignores need to protect Contractor for pre-existing hazards.

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Disbursement of payments	<p>¶6.9.2 – Payments made to Contractor for work performed by Subcontractors are held in trust for the Subcontractors, and the parties must choose one of the following 2 options:</p> <ul style="list-style-type: none"> ▶ the funds may be commingled with other funds of the Contractor, or ▶ the funds may not be commingled with any other funds of the Contractor. 	No similar provision.	<p>Imposing a trust fund on such payments makes the Contractor a fiduciary of its Subcontractors, and may impose legal risks and obligations that Contractors do not understand. While some states have statutes establishing such a “trust fund” relationship, many others do not. Moreover, the second option of the AOD Form presents significant problems and is unnecessary. It would appear to require a separate bank account for each Subcontractor, which would be impractical and burdensome.</p>
Owner’s right to withhold payment	<p>¶6.5.2 – Form identifies 12 different bases for Owner to withhold part or all of any progress payment, including:</p> <ul style="list-style-type: none"> ▶ material misrepresentation in the application for payment ▶ claims, setoffs, credits ▶ unsatisfactory progress ▶ failure to promptly remedy defective or nonconforming work ▶ work in dispute ▶ unreleased liens or claims ▶ failure to satisfy any payment obligation ▶ damage caused to any Designer or Separate Contractor ▶ reason to believe Contractor cannot complete the work for the unpaid contract balance ▶ reason to believe Contractor cannot complete within the Contract Time ▶ repeated failure to carry out work in accordance with Contract Documents ▶ failure to submit accurate and complete applications for payment. 	<p>¶14.02.D – Owner may withhold payment based on:</p> <ul style="list-style-type: none"> ▶ claims made against Owner on account of Contractor’s work ▶ liens filed in connection with Contractor’s work unless bonded off ▶ items entitling Owner to a setoff ▶ defective or damaged work ▶ Contract Price has been reduced by Change Order ▶ Owner has had to correct defective work or complete work ▶ any event that would constitute a proper basis for termination for default. 	<p>AOD Form seems overly exhaustive and somewhat redundant. More general language could be used to capture several of the separate items.</p>

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Final payment	<p>¶5.12.8 – Contractor’s acceptance of final payment constitutes a waiver of all claims not asserted as required by the contract and expressly reserved in the Certificate of Final Completion.</p> <p>¶5.12.9 – Upon Contractor’s acceptance of final payment, Owner waives all claims except claims:</p> <ul style="list-style-type: none"> ▶ for contractor’s failure to satisfy payment obligations ▶ asserted as required by the contract ▶ under any warranty or guarantee ▶ for any indemnity right ▶ under remaining insurance. 	<p>¶14.09 – acceptance of final payment constitutes:</p> <ul style="list-style-type: none"> ▶ a waiver of all Contractor claims other than those made by Contractor in accordance with the contract and expressly acknowledged by the Owner as unsettled ▶ a waiver of all claims by the Owner of all claims except unsettled liens, defective work appearing after final inspection, failure to comply with Contract Documents or any special guarantees, or from Contractor’s continuing obligations under the Contract Documents. 	<p>AOD language could be improved by providing that on acceptance of final payment, the Owner waives claims for defective work that it knew about at time of final payment. This modification would provide a higher degree of “finality” without sacrificing any important rights. Perhaps inadvertently AOD 5.12.9 may relieve Contractor of liability for latent construction errors and defects that are not covered by warranties or guarantees.</p>
Project schedule	<p>¶4.4 – Contractor must use CPM or other method approved by Owner, showing logical relationships among activities, duration, early/late start/finish dates, and float for each activity. Owner may require resource loading.</p> <p>Float belongs to neither party and shall be allocated as needed. Difference between an early completion date in schedule and Substantial Completion Date is float. Monthly updates required. Contractor bears all costs of acceleration costs for inexcusable delay and where Contractor fails to give timely notice of delay.</p>	<p>¶¶2.05 and 2.07 – Provisions address <i>process</i> for establishing schedule rather than detailed requirements. “The Progress Schedule will be acceptable to Engineer if it provides an orderly progression of the work”</p>	<p>Terms are somewhat adversarial and emphasize burdens on Contractor, e.g., repeating that Contractor is liable for any costs of necessary acceleration except where delay is excusable, specifying that Contractor cannot benefit from planning to complete project early, etc.</p>

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<p>Contractor recovery of delay damages</p>	<p>¶8.4.3 – The parties must choose among 5 different options for the measure of recoverable damages for suspension, delay and disruption:</p> <p>(1) any damage or cost may be recoverable, except that consequential damages are home and field office overhead are limited to a percentage to be identified by the parties;</p> <p>(2) recovery allowed <i>only</i> for excusable delay or disruption (a) caused by the Designer or Separate Contractor to the extent the Designer or Separate Contractor pays the Owner, and (b) caused by the Owner, if the delay, etc. exceeds 30 days per occurrence or 60 days in the aggregate;</p> <p>(3) caused by the designer or separate contractor to the extent the designer or separate contractor pays the Owner, and (b) caused by the Owner, subject to an aggregate dollar cap to be identified by the parties;</p> <p>(4) recovery allowed <i>only</i> for excusable delay or disruption caused by the Designer or Separate Contractor to the extent the Designer or Separate Contractor pays the Owner; or</p> <p>(5) recovery of liquidated damages in a daily amount to be identified by the parties.</p>	<p>No similar provisions limiting the Contractor’s right to recover delay damages. ¶12.03.C provides that for delays caused by fire, flood, acts of God and other events not in the control of the Owner and Contractor, the Contractor’s sole remedy is an extension of the Contract Time.</p>	<p>The 5-option menu set forth in the agreement seems to be excessive and is somewhat confusing. Moreover, three of the options would severely limit the Contractor’s right to recover delay damages. In many states, courts have developed exceptions to the enforceability of no damage for delay clauses. These courts may superimpose the exceptions on the options set forth in the AOD Form which would most severely limit the Contractor’s right to recover delay damages. The fifth option, liquidated damages levied against the Owner, is an unusual and interesting provision.</p>

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Waiver of consequential and other damages	¶8.6.1 – The parties must choose between two options: (1) a unilateral waiver whereby only the Contractor waives the right to recover “special, indirect or consequential damages” and (2) a mutual waiver whereby both parties waive the right to recover such damages.	No similar waiver.	The AOD approach in option 1 is not balanced, and shifts the risk solely onto the Contractor. Since the AOD Form’s policy is that the first option is the default option if the parties fail to make an election, this unbalanced approach appears to be AOD’s “preferred approach.” On the subject of availability of consequential damages, parity and mutuality is the industry trend, and it may be preferable to have no waiver at all rather than one that favors only one of the parties. AGC and AIA contract forms both provide a mutual waiver of consequential damages.
Disputes			
Negotiation and mediation	¶8.7 – The parties must choose among 4 options: ▶ mandatory mediation ▶ non-mandatory mediation ▶ project neutral or dispute review board (“DRB”) to be identified within 30 days of execution of agreement. If the parties do not identify the neutral or DRB, then mandatory mediation ▶ none of the above.	¶16.01 of EJCDC C-700 – either party may request mediation of any claim submitted to the Engineer for decision. Mediation must be concluded within 60 days of the request. If claim is not resolved by mediation, or the Engineer’s decision has not otherwise become binding, the claiming party may: ▶ elect to invoke dispute resolution process as provided in the Supplementary Conditions (see below) ▶ agree with the other party to submit the claim to another dispute resolution process ▶ give notice to the other party of intention to pursue litigation.	AOD range of options for “pre-dispute” proceedings offers parties wide flexibility to tailor process to their needs.

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Dispute resolution	<p>¶8.8 – The parties must choose among 6 options:</p> <ul style="list-style-type: none"> ▶ litigation with a jury option ▶ litigation without a jury ▶ binding arbitration at Owner’s sole option ▶ binding arbitration subject to an aggregate maximum, and above that level, by litigation without a jury ▶ binding arbitration of all claims ▶ Other process to be identified by the parties. 	<p>SC-16 of the EJCDC C-800, Guide to Preparation of Supplementary Conditions, also provides a menu of dispute resolution options:</p> <ul style="list-style-type: none"> ▶ mediation followed by litigation ▶ mediation followed by arbitration ▶ meet, confer and negotiate, followed by litigation ▶ meet, confer and negotiate, followed by arbitration ▶ third-party neutral followed by litigation ▶ third-party neutral followed by arbitration 	<p>In AOD as well as EJCDC the array of options allows the parties great control over choosing the process for resolving claims. Some users may find it difficult to analyze the options and make an educated choice.</p>
Discovery	<p>¶8.8.7 – Parties are required to produce all non-privileged documents relating to issues raised in claims. The parties must choose among 5 additional options with respect to additional discovery:</p> <ul style="list-style-type: none"> ▶ depositions limited to a number to be identified by the parties ▶ at discretion of the arbitrators ▶ pursuant to the rules of civil procedure of the state where the Project is located ▶ pursuant to Federal Rules of Civil Procedure. 	<p>No similar provisions.</p>	<p>At inception of project, parties rarely focus on this level of detail with respect to disputes. Considering these issues can, however, avoid arguments later on as to what information must be exchanged in the event of an unresolved dispute.</p>