

COMMENTARY ON THE 2016 EJCDC DESIGN-BUILD DOCUMENTS

Prepared by



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National Society of Professional Engineers
1420 King Street, Alexandria, VA 22314-2794
(703) 684-2882
www.nspe.org

American Council of Engineering Companies
1015 15th Street N.W., Washington, DC 20005
(202) 347-7474
www.acec.org

American Society of Civil Engineers
1801 Alexander Bell Drive, Reston, VA 20191-4400
(800) 548-2723
www.asce.org

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1.0 INTRODUCTION TO THE EJCDC DESIGN-BUILD DOCUMENTS

1.1 *Scope of this Commentary on the EJCDC Design-Build Documents*

The EJCDC Design-Build Series (D-Series) is comprised of 18 documents, including this Commentary, for use in establishing and administering the contract between a project owner and a design-builder, and for related subcontracts with design professionals, constructors, and advisors. This Commentary contains:

- A. A summary of the content and use of each of the D-Series documents (see *Exhibit A, Descriptions of the EJCDC Design-Build Documents*);
- B. Discussion of key preliminary steps on a design-build project (Section 2.0), such as the preparation of Conceptual Documents (Paragraph 2.2), the project owner's use of a consultant for advisory, conceptual design, and design-builder selection services (Paragraph 2.6), and issuing requests for qualifications and proposals (Paragraph 2.7);
- C. An introduction to D-512, EJCDC's new Agreement between Owner and Design-Builder for Progressive Design-Build (Section 3.0); and
- D. Commentary regarding noteworthy provisions of the 2016 Standard General Conditions and Supplementary Conditions of the Owner—Design-Builder contract (Section 4.0).

1.2 *Engineers Joint Contract Documents Committee*

The Engineers Joint Contract Documents Committee (EJCDC) develops, publishes, and updates standard contract documents for the design and construction of engineered projects. The members of EJCDC represent a major cross-section of the professional design and construction community. As of 2017, EJCDC is administered and supported in equal measure by the following national sponsoring organizations:

- A. American Council of Engineering Companies (ACEC)
- B. American Society of Civil Engineers (ASCE)
- C. National Society of Professional Engineers (NSPE)

1.3 *The EJCDC Design-Build Series*

In 1995, EJCDC issued its first design-build documents in response to a need expressed by the construction industry for a coordinated set of standard documents for use on projects in which a single entity (design-builder) would take responsibility for both design and construction. The documents were prepared with the intent of providing fair, unbiased, practical, and balanced provisions for all parties. EJCDC revised and updated the D-Series in 2002 and 2009.

In 2013 EJCDC began a three-year process of reshaping its design-build documents, based on advances in design-build contracting practices, changes in the industry, analysis of risk allocations, case law developments, and comments received from users (including owners, engineers, and constructors), seminar attendees, insurers, and attorneys. As a result of this process, EJCDC published the new Design-Build series in July 2016.

The 2016 EJCDC D-Series consists of the following documents (common name in parentheses):

- A. *EJCDC® D-001, Commentary on the 2016 EJCDC Design-Build Documents (Commentary)* (publication date 2017);
- B. *EJCDC® D-110, Request for Qualifications—Design-Build Project (RFQ)*;
- C. *EJCDC® D-111, Request for Proposals—Design-Build Project (RFP)*;

- D. *EJCDC® D-425, Price Proposal Form—Design-Build Project* (Price Proposal);
- E. *EJCDC® D-500, Agreement Between Owner and Owner’s Consultant for Professional Services—Design-Build Project* (Owner—Owner’s Consultant Agreement);
- F. *EJCDC® D-505, Agreement Between Design-Builder and Engineer for Professional Services* (Design-Builder—Engineer Agreement);
- G. *EJCDC® D-512, Agreement Between Owner and Design-Builder for Progressive Design-Build* (Progressive Design-Build Agreement);
- H. *EJCDC® D-520, Agreement Between Owner and Design-Builder on the Basis of a Stipulated Price* (Owner—Design-Builder Agreement: Stipulated Price);
- I. *EJCDC® D-523, Construction Subcontract for Design-Build Project* (Construction Subcontract);
- J. *EJCDC® D-525, Agreement Between Owner and Design-Builder on the Basis of Cost Plus* (Owner—Design-Builder Agreement: Cost Plus);
- K. *EJCDC® D-580, Teaming Agreement to Pursue Joint Business Opportunity for Design-Build Project* (Teaming Agreement) (publication date 2015);
- L. *EJCDC® D-610, Design-Build Performance Bond*;
- M. *EJCDC® D-615, Design-Build Payment Bond*;
- N. *EJCDC® D-620, Design-Builder’s Application for Payment*;
- O. *EJCDC® D-700, Standard General Conditions of the Contract Between Owner and Design-Builder* (General Conditions);
- P. *EJCDC® D-800, Guide to the Preparation of Supplementary Conditions of the Contract Between Owner and Design-Builder* (Supplementary Conditions);
- Q. *EJCDC® D-940, Work Change Directive*; and
- R. *EJCDC® D-941, Change Order*.

A brief description of the use of each of these documents is included in this Commentary’s *Exhibit A, Descriptions of the EJCDC Design-Build Documents*. The provisions of the EJCDC Design-Build documents are interrelated, and a change in one may necessitate a change in others.

1.4 *Discontinued Documents*

Upon publication of the 2016 D-Series documents, EJCDC discontinued the following documents:

- A. *EJCDC® D-510, Agreement between Owner and Design/Builder for Preliminary Services*. The primary purpose served by this document is now accomplished by D-512, Progressive Design-Build Agreement.
- B. *EJCDC® D-521, Subagreement between Design/Builder and Subcontractor on the Basis of Stipulated Price*, and *EJCDC® D-526, Subagreement between Design/Builder and Subcontract on the Basis of Cost-Plus*. These two documents were superseded by D-523, Construction Subcontract, which accommodates the two compensation options (stipulated price, including stipulated unit prices, and cost-plus) in a single document.
- C. *EJCDC® D-750, Standard General Conditions of the Subcontract between Design-Builder and Subcontractor*. This document was discontinued and its provisions were incorporated into D-523, Construction Subcontract.

1.5 *Defined Terms*

Terms with initial capital letters in this Commentary are defined terms from the definitions section of D-700, General Conditions.

1.6 *Project Participants*

- A. *Owner and Design-Builder.* EJCDC uses standard industry terms for the two principal parties on a design-build project: “Owner” and “Design-Builder.”
- B. *Owner’s Consultant.* At the outset of a design-build project the Owner typically contracts with an individual or entity (“Owner’s Consultant”) that assists Owner in preparing the Conceptual Documents and selecting a Design-Builder.
- C. *Construction Subcontractor.* In most cases the Design-Builder will subcontract at least a portion of the actual construction work; EJCDC refers to the subcontractors (and their sub-subcontractors) as “Construction Subcontractors.” Construction companies that typically function as general contractors are included in the scope of “Construction Subcontractors” if they are under contract to the Design-Builder, as are trade contractors that perform traditional “subcontract” work (electrical, mechanical, plumbing, landscaping).
- D. *Project Design Professionals.* In design-build the design services may be performed by a variety of individuals and entities. Design services are sometimes provided in-house by employees of the Design-Builder. On most projects, at least some of the design duties are delegated to a third-party entity, such as an engineering firm. Design-Builders will sometimes retain multiple professional services firms, such as an engineering firm for treatment facilities design and an architecture firm for a related office building. In addition, some design work may be done by employees of Construction Subcontractors, or by design firms or individuals under contract to a Construction Subcontractor. EJCDC uses the broad term “Project Design Professionals” to refer to all employees, entities, and individuals that provide design services in fulfillment of Design-Builder’s obligations. Note that an Owner’s Consultant is not a Project Design Professional.
- E. *Engineer.* In the typical case in which the Design-Builder contracts with a third party to provide some or all engineering services, the EJCDC Design-Build documents refer to that Project Design Professional as “Engineer.”
- F. *Owner’s Site Representative.* If the Owner chooses to have a representative at the Site during Construction (“Owner’s Site Representative”), the Supplementary Conditions should describe the duties, responsibilities, and limitations of authority of such representative.

1.7 *Design Professional Services; Construction*

The defined term Work refers to the full scope of labor, services, materials, equipment, start-up, and testing that Design-Builder is required to provide. The two primary components of the Work are Design Professional Services and Construction, as defined in the General Conditions.

1.8 *Design-Builder Entities*

A Design-Builder may be any one of the following:

- A. A single entity capable of providing both Design Professional Services and Construction with its own forces;
- B. A joint venture of an engineering firm and a construction contractor;

- C. An engineering firm that provides the core Design Professional Services, while subcontracting other services and Construction through appropriate subagreements;
- D. A construction contractor that performs substantial portions of the Construction, while subcontracting Design Professional Services and some of the Construction; or
- E. A construction manager, developer, or entrepreneur that subcontracts both Design Professional Services and Construction.

Thus, depending on the resources and capabilities of the Design-Builder organization, either the design, construction, or both may be obtained in whole or in part by subcontract.

1.9 Contractual Relationships

The EJCDC Design-Build documents define the following relationships, which are illustrated in *Exhibit B, The 2016 EJCDC Design-Build Documents*:

- A. Owner and Owner's Consultant
- B. Owner and Design-Builder
- C. Design-Builder and Construction Subcontractor
- D. Design-Builder and Engineer

2.0 PREPARING FOR A DESIGN-BUILD PROJECT; SELECTING THE DESIGN-BUILDER

2.1 Prerequisites to Using the Design-Build Delivery Method

Under the design-build delivery method the Owner secures a completed project through a single contract. Like any project delivery method, design-build has advantages and disadvantages. Owners contemplating the use of design-build need to evaluate project objectives and resources to determine if design-build is the best option. There are many excellent treatises, articles, manuals, and books regarding the design-build delivery system available as reference materials.

The notion of "single point responsibility"—in essence, that the Design-Builder is responsible for both design and construction—is a genuine advantage of design-build, though there are limits to the concept. The Owner retains significant responsibilities under design-build: it must obtain the necessary expertise to develop the Conceptual Documents, establish suitable and enforceable milestones and performance requirements, conduct a Design-Builder selection process, and in general carry out its contractual obligations, including those set forth in Article 10 and other parts of the General Conditions.

Effective and successful use of design-build requires that the Owner define the scope of the project. This is done in a number of ways, for example with performance specifications, project specific guidelines, and design concepts and criteria. The EJCDC Design-Build documents contemplate that the Owner defines the scope by preparing Conceptual Documents and issuing them with the design-builder selection documents such as the RFQ and RFP. Conceptual Documents define the Owner's needs, usually without detailed drawings and specifications. Conceptual Documents may include such items as design objectives, performance requirements, building footprints, and outline specifications. It is critically important that the Owner devote sufficient expertise and resources to preparation of the Conceptual Documents. In doing so, the Owner should be mindful of the benefits of allowing the Design-Builder sufficient latitude to bring its own creativity and experience to the project.

Anticipating that many Owners do not have the expertise in-house to prepare Conceptual Documents, to review drawings, specifications, and other submittals prepared by the Design-Builder, and to observe the

Construction for compliance with the Contract Documents and with applicable laws and codes, EJCDC has prepared D-500, Agreement Between Owner and Owner’s Consultant for Professional Services— Design-Build Project, for use by the Owner in obtaining such services from an engineering firm or individual that acts as a consultant to the Owner.

Before entering into a design-build contract, it is recommended that the parties identify applicable laws and regulations and determine whether they prohibit or require alterations in the contemplated contractual arrangements and the assignments of responsibilities for a design-build project. Such laws and regulations vary widely from state to state, and the consequences for non-compliance can be severe, particularly if public funds are involved. At a minimum, prospective participants should determine the existence and applicability of laws governing:

- A. Licenses and certificates of authority required to provide professional services;
- B. Contractor licensing and bonding;
- C. Qualification-based selection for design professionals; and
- D. Competitive bidding for public construction.

2.2 *Conceptual Documents*

- A. Define the Scope of the Design-Builder’s Work

The scope of the Work to be provided by the Design-Builder is initially defined by the Conceptual Documents. They are prepared by (or for) the Owner and are included with the solicitation documents (such as an RFQ or RFP) issued by the Owner. The solicitation documents are not considered part of the Contract Documents because their substance pertains to the relationships and procedures prior to award of the contract. The content has little effect or relevance after the contract is signed and effective. However, the Conceptual Documents themselves do survive as Contract Documents. They are listed as such and are specifically identified as Contract Documents in the Owner—Design-Builder Agreement.

The format, context, and extent of the Conceptual Documents will vary widely from project to project. They may range from narratives of the Owner’s requirements to preliminary drawings and outline specifications. The Conceptual Documents should be appropriate for the extent of control the Owner desires for the project. In some circumstances, such as progressive design-build, the Conceptual Documents likely will be very basic with little detail. In other cases, particularly where the Owner is seeking final, binding prices from Proposers, the Conceptual Documents likely will be more detailed. In practice, Owners prepare Conceptual Documents for design-build projects that range anywhere from “one percent complete” to upwards of 50 percent complete. The EJCDC Design-Build documents are usable regardless of the level of “design completion” of the Conceptual Documents.

The Conceptual Documents typically include outline specifications. Such requirements need not be prescriptive, but rather are often performance based, and may not resemble traditional construction specifications in format or organization. Additionally, the Conceptual Documents will often include some sort of quality standard against which the completed Work will be judged to determine compliance with the contract. For example, on a design-build transportation project the required quality standard may be pavement smoothness, allowable grade, or expected service life. Or, quality standards could be established by referring to the quality already attained in a completed project of a similar type.

The acceptance criteria for the project should be reduced to contract language. For example, acceptance criteria for a water treatment system may be a performance guarantee measured in terms of throughput, capacity, pollutant removal, or effluent quality.

The Conceptual Documents, along with documents required to be provided by the Design-Builder, including the accepted technical elements of the Design-Builder's proposal, establish the scope of the Work and will be of assistance in addressing scope issues during contract performance.

The Conceptual Documents will be used by the proposers in preparing technical and price elements of their proposals. It is therefore extremely important in the design-build process for the Owner to prepare Conceptual Documents with enough definition and precision to facilitate fair, competitive proposals and to provide for a completed project that will meet the Owner's identified needs.

Prior to engaging the Design-Builder, the Owner (or a consultant retained by the Owner) commonly has conducted the necessary study and report phase or programming services. If such study and report services have not yet been conducted, then the Contract Documents should include a specific requirement that Design-Builder provide the services as part of the Work. Because of the extreme difficulty in setting a price or a time for completion before the study and report phase has been conducted, the Owner and Design-Builder may want to use the progressive design-build contract path in this situation. A discussion of services and project delivery under progressive design-build is presented in Section 3.0.

B. Content of Conceptual Documents

The Conceptual Documents need to address the allocation of responsibility between the Design-Builder and the Owner for a variety of project parameters. For example, for an engineered project the definition of the Design-Builder's scope (the Work), and design and construction constraints, might include the following subjects:

1. Overview;
2. Site information (subsurface conditions, topographic mapping, boundary surveys, easements, utilities);
3. Site analysis (existing features and uses; access; visual and noise considerations; storm water control; flood plains and floodway considerations; cultural, historical, and archeological features; environmental conditions);
4. Environmental reviews required by law;
5. Earthwork and foundations;
6. Site improvements (paving, fencing, utilities, infrastructure);
7. Aesthetic requirements and preferences of Owner;
8. Sustainability considerations and ratings;
9. Building footprint (location, size, layout);
10. Structural systems;
11. Plan views and elevations;

12. Sections (potentially showing the implemented structural systems, basic dimensions, and desired/required/permitted interior and exterior finishes);
13. Description of plumbing systems;
14. Description of fire safety/fire suppression systems;
15. Description of HVAC systems;
16. Description of facility electrical, communications, security, and management and control systems;
17. Process requirements, including associated monitoring and controls; and
18. Performance guarantees.

These topics represent a classic decision challenge and trade-off in the design-build process. Minimal requirements on the part of the Owner accord the Design-Builder broad latitude, which can lead to cost-effective and innovative results. However, the outcome may be something other than what the Owner envisioned. A more extensive definition of requirements and parameters by the Owner increases the Owner's preliminary time and expense, and limits possible innovation on the part of proposers and the selected Design-Builder. The ideal balance of requirements and latitude will vary by owner and by project.

Certain topics are routinely addressed in the Conceptual Documents. Other elements may or may not be present (and may be present in varying degrees of completeness depending upon the individual project and Owner). Some of these elements are listed in this Commentary's *Exhibit D, Content of Conceptual Documents*.

2.3 *Alternative Designs*

One of the distinct advantages of design-build is its encouragement of design innovation. To capitalize on this benefit, the Owner should consider specifically stating in the RFP that alternative designs are requested, or will be considered; and at the same time setting forth specific required elements and prohibitions. The proposed Contract Documents can also be crafted to encourage or allow innovation after the Design-Builder has been selected and is under contract, and even after a design has been developed and is being implemented—for example, see the discussion below in Paragraph 4.8 regarding Paragraph 8.02 of the General Conditions.

One of the fundamental underpinnings of a successful design-build process is flexibility. As more constraints are imposed on the Design-Builder, the opportunities for innovation in design and construction are reduced.

2.4 *Budget Parameters*

The cost to the Owner of the Design-Builder's Work is frequently an important factor in the evaluation and selection process. The Owner may also wish to consider anticipated life cycle costs in the evaluation. If so, the computational methodology and weighting factors should be clearly stated in the RFP.

In some situations, allowances and contingencies will be important cost considerations. These topics are discussed in a note at Article 12 of D-800, Supplementary Conditions.

2.5 *Insurance and Bonds*

Insurance is an integral component of risk management in design and construction. The design-build project delivery structure presents a number of notable risks. Accordingly, one must proceed with special care to ensure that allocated contractual risks that are intended to be managed by insurance can indeed be covered by commercially-available insurance policies and endorsements. Owners, design-builders, and design professionals participating in design-build projects need to work closely with their insurance advisors and brokers to ensure that the requisite coverage is obtainable, and then duly obtained.

2.6 *Owner's Consultant*

In the traditional design-bid-build delivery system, with its basic three-way division of authority and responsibility among owner, engineer, and contractor, the owner retains an engineer who advises and assists the owner from the project's inception through design, bidding, construction, and start-up, and generally acts as owner's representative. During the design and bidding (or negotiation) phases, the engineer performs study and report phase services, preliminary and final design phase services, prepares bidding documents, and assists owner in soliciting bids, negotiating contract terms and conditions, and awarding construction contracts. During construction under the traditional system, the engineer provides numerous contract administration services such as observing the work and rejecting defective work, responding to contractor requests for information or contract interpretation, recommending payment of the contractor, approving shop drawings and other submittals, reviewing certificates of inspections and tests, and inspecting the work at substantial completion.

On a design-build project, the Owner has chosen to have one party, the Design-Builder, both prepare the design and perform the construction. As a result, the design engineer is not performing services directly for the Owner as in a traditional design-bid-build project. Although EJCDC anticipates that many Owners will retain an Owner's Consultant (D-500, Owner—Owner's Consultant Agreement), the EJCDC Design-Build contract documents are usable as written regardless of whether the Owner retains an Owner's Consultant to assist in performing some of the Owner's duties under the contract, or instead provides these services with Owner's own staff. The General Conditions do not assign duties, responsibilities, or a role to "Owner's Consultant," and the role of an "Owner's Site Representative," if any, is to be tailored to each individual project and indicated in the Supplementary Conditions; model language for this purpose is included in D-800, Supplementary Conditions.

Responsibility for services typically provided by the design engineer in the design-bid-build system have been assigned either to the Owner or to the Design-Builder in the EJCDC Owner—Design-Builder documents. Most obviously, design obligations are assigned to Design-Builder. Submittal review, inspection, and payment application duties belong directly to Owner. It is important that Owner either be able to perform these types of services with its own personnel, or retain an Owner's Consultant or other representative to provide them on the Owner's behalf.

2.7 *Request for Qualifications; Request for Proposals*

Selection of a Design-Builder is often accomplished through a competitive process based on the qualifications and proposals submitted to Owner by prospective Design-Builders. EJCDC publishes three documents that can be used in the selection process: D-110, Request for Qualifications—Design-Build Project (RFQ); D-111, Request for Proposals—Design-Build Project (RFP); and D-425, Price Proposal Form—Design-Build Project (Price Proposal). Because of the wide variety of design-build projects, qualifications sought, and proposals, each of these documents as published serves as only a guide or starting point for drafting the actual forms that will be used in a specific design-build selection process. The RFQ and RFP contain introductions that provide guidance regarding the Design-Builder selection

process, and all three documents contain numerous notes and comments regarding preparation of the project-specific document.

During the proposal stages of a design-build project it is common for the Owner to require proposers to enhance or elaborate on the Conceptual Documents by preparing technical exhibits; identifying proposed suppliers of major equipment and major subcontractors; describing anticipated strategies for construction; and in some cases, providing binding price commitments.

The cost of preparing a proposal is a significant investment by design-builders, often with little or no return on investment unless selected. The proposer must not only estimate construction costs, as in a design-bid-build competitive bidding context, but typically must also first perform some design services to meet the requirements of the RFP and to provide itself with enough information so that construction costs can be estimated. Thus, the costs of preparing a design-build proposal usually will exceed the costs in bidding a more traditional design-bid-build project.

To reduce the expense to proposers, reduce the amount of wasted effort, and increase competitive interest, the Owner may wish to establish a multi-step process of qualification and proposal submittal. The first step would be to prequalify potential Design-Builders based on qualifications, experience, financial strength, equipment, and organizational ability to provide the specified design and construction. (D-110, RFQ.) The second step would be to issue an RFP requiring either all qualified proposers, or a “short list” of qualified proposers, to submit a technical proposal consisting of specified substantive documents indicating how the proposer intends to achieve the Owner’s project goals as set forth in the Conceptual Documents included with the RFP. The final step (often required at the same time as the technical proposal) would be to submit the proposers’ price for the design-build work as required by the RFP. (D-111, RFP, and D-425, Price Proposal Form.)

Owners should also give the proposers assurance that the project will go forward and one of the proposers will receive an award of contract. Otherwise, qualified firms may decline to prepare proposals.

It is not uncommon for Owners to incentivize participation by partially compensating a specified number of proposers for some of the substantial effort involved in preparing a proposal, or to commit to partially compensating the “successful” proposer if the project does not go forward.

2.8 *Outline of Suggested Approach*

An outline of typical steps in launching a design-build project, from initial concept to award of the design-build contract, is presented in *Exhibit C, Suggested Approach to Design-Build Contracting*.

3.0 **INTRODUCTION TO D-512, PROGRESSIVE DESIGN-BUILD AGREEMENT**

3.1 *Progressive Design-Build*

Progressive design-build is a flexible contracting method that allows the Owner and Design-Builder to maximize the benefits of design-build. In a typical application of progressive design-build, the Owner selects the Design-Builder primarily based on qualifications, rather than price or other criteria, and the parties enter into the contract early in the design stage, allowing the Design-Builder to take the lead in the design, and opening up opportunities for innovation. Integration of design and construction is enhanced by Design-Builder’s early involvement, and the determination of the final contract price (in particular, the cost of Construction) is deferred until a point when the design is well developed and both parties have sufficient information to establish a fair final price (Completion Stage Price)—whether a stipulated lump sum amount or a Guaranteed Maximum Price.

Progressive design-build contracting has increased in popularity for many reasons, including:

- A. Simple, inexpensive, and quick procurement process for selecting the design-builder, usually qualifications based, and without an extensive proposal process or premature price commitments.
- B. Advantageous delivery method where the project lacks initial definition.
- C. The parties are not constrained by a predetermined scope or definition of the project, which may be incomplete or not ideal for the project.
- D. Provides for a high level of collaboration during the planning and design process by the Owner, Design-Builder, and Design-Builder's engineering and other design professionals.
- E. Allows the Owner to participate in selecting key equipment suppliers and subcontractors, which may promote use of regional firms and Owner-preferred vendors.
- F. Reduces unilateral, pre-set constraints on innovation, solutions, and scope.
- G. Provides the Owner with progressive open-book cost estimates throughout the design process, developed by the Design-Builder to support informed decision-making on project scope and budget.
- H. Provides lower risk of construction-phase changes due to direct involvement of Design-Builder with the Owner in developing the project definition and design prior to establishing the Completion Stage Price.
- I. Provides an off-ramp whereby Owner can reject the Design-Builder's proposed Completion Stage Price and competitively bid the completion of the project (primarily Construction) without significant delays to the project schedule.
- J. Flexible procurement, contracting, and project delivery approach customizable to the Owner's specific needs and regulatory constraints.

Progressive design-build contracting should be considered when an Owner places a priority on the qualifications of the Design-Builder; wishes to have a single contract arrangement with a Design-Builder; wants the Design-Builder to take primary responsibility for all aspects of the design from an early point on the schedule, but desires to have a high level of involvement in the design process with the Design-Builder; and is willing to defer the final project pricing until later in the design process, versus establishing the final price at the outset of the contract.

3.2 General Note Regarding the Progressive Design-Build Agreement

A progressive design-build contract must be prepared with care, and must clearly set forth the Owner's objectives for the project, including schedule requirements or constraints, performance criteria, design obligations, and the transition to a final Contract Price. Work under a progressive design-build contract generally commences with the Owner, Design-Builder, and Design-Builder's Engineer (and other Project Design Professionals, if applicable) working collaboratively to develop a design that fulfills the Owner's project requirements, with the Design-Builder providing progressive cost estimates at specified intervals as the design is developed to ensure that the anticipated project cost meets the Owner's budget expectations.

The provisions of D-512 are intended to provide the general structure of the Agreement between the Owner and Design-Builder entering into a progressive design-build contract arrangement, providing the Owner with a number of options with regard to establishing the Contract Times and Contract Price structure. D-512 is a unique Owner—Design-Builder agreement form that is longer and more complex than either of the other two agreement forms, D-520, Stipulated Sum or D-525, Cost of the Work Plus a

Fee. A significant amount of customization will be needed to draft the document and develop the exhibits to meet the Owner's specific requirements for the project.

3.3 *Stages of Work in EJCDC's Progressive Design-Build Agreement*

Under D-512 there are two distinct stages of Work, each with its own schedule and pricing terms:

- A. *Preliminary Stage:* The Preliminary Stage generally includes traditional project study and design related activities, including permitting, conceptual design, property acquisition, geotechnical investigations, detailed design, and construction planning, and may include material and/or equipment procurement or other project-specific activities at the Owner's discretion. The Preliminary Stage concludes with the establishment of the Completion Stage Price, generally after the design reaches a pre-determined level of completion.

The scope of the Design-Builder's Preliminary Stage Work is set forth in an exhibit to the Agreement. D-512 includes model language for the scope of the planning and design services. Alternatively, if the detailed scope for these services is already set out in a Proposal or other document, that document could be attached and incorporated by reference.

Upon receipt of the proposed Completion Stage Price for completion of the project, the Owner has the option of accepting the proposal and proceeding to the Completion Stage or taking an off-ramp and terminating the contract for convenience. Because of the collaborative and transparent scope and cost development process during the Preliminary Stage, there is a strong expectation that the parties will be able to move forward to completion together. However, the Owner does have the option of rejecting the proposal, terminating the design-build contract for convenience, and competitively bidding the remainder of the project using the Preliminary Stage documents provided by the Design-Builder as the basis for a set of biddable Construction Documents.

- B. *Completion Stage:* The Completion Stage includes design completion as well as the Construction activities needed to take the project to final completion and acceptance by the Owner, as well as any services after Construction.
- C. *Establishment of Completion Stage Price:* The Owner in developing the Preliminary Stage scope of services has flexibility in determining the timing of the establishment of the Completion Stage Price as it relates to the general completion state of the project. It is typical for the Completion Stage Price to be established when the design has progressed to a design completion state between 60 and 100 percent, depending on the Owner's expectation for amount of control or influence over the design development and/or preferences regarding risk allocation related to design related construction changes. The Preliminary Stage scope of services is developed to include efforts and activities necessary to progress the design to the relative completion state reflective of the Owner's desire for time of establishment of Completion Stage Price.

Once the Completion Stage Price is established and is agreeable to Owner and Design-Builder either through initial acceptance or negotiations, the Completion Stage Price is memorialized between the parties either through execution of a Change Order or by re-execution of the original contract as modified to include the Completion Stage Price, Completion Stage Contract Times, and any other modifications necessary to reflect the Agreement between the Owner and Design-Builder for the Completion Stage Work.

- D. *Project Schedule:* The Progressive Design-Build Agreement contemplates that the parties will commit to a schedule for the Preliminary Stage Work, including submittals to the Owner

followed by comments and approvals by Owner, in an iterative process. As to overall schedule including completion of Construction, the Agreement allows for this to be set from the outset, or to be determined as part of the Preliminary Stage Work. The schedule agreed upon at the outset of the project for the Preliminary Stage Work and overall completion shall be reflective of required milestones necessary to meet any regulatory or other mandatory completion dates. If the overall schedule is not set at the outset and is determined during the Preliminary Stage Work, it will be finalized during the Completion Stage Price development and memorialized with the Completion Stage Price at the conclusion of the Preliminary Stage.

- E. *Compensation:* The Preliminary Stage Work consists primarily of professional services, such as planning, design, and management, and hence for this stage the Progressive Design-Build Agreement proposes the use of compensation methods and formats that are typically used for professional services agreements, such as Standard Hourly Rates, and Direct Labor Times a Factor (D-512, Exhibit B, Compensation, Parts B-1 through B-5).

The Completion Stage Work is predominantly Construction and Construction-related services. For this stage, the Progressive Design-Build Agreement provides for compensation based either on a lump sum (D-512, Exhibit B, Part B-7), or on the Cost of the Completion of the Work Plus a Fee, Subject to a Guaranteed Maximum Price (D-512, Exhibit B, Part B-6).

- F. *Owner's Contingency:* When the Progressive Design-Build Agreement is executed, the primary focus is on the Preliminary Stage Work, and it is too early to establish a final price for the Work as a whole. Even at this early point, however, the Owner may wish to set a flexible, temporary project price by including a large contingency amount for later use in funding the Completion Stage Work.
- G. *Competitive Bidding of Construction Work:* It may be advantageous or sound policy to require that the Design-Builder competitively bid portions of the Construction. State or local statutory requirements may also dictate requirements for competitively bidding all or portions of the Construction portion of the Work. Competitive bidding would typically occur at the trade contract level (concrete work, or excavation, for example), or possibly in the selection of a "general contractor" type constructor responsible for a broad array of construction duties. In the exhibits for Completion Stage Compensation (D-512, Exhibit B, Part B-6, Completion Stage—Cost of the Completion of the Work Plus a Fee; and D-512, Exhibit B, Part B-7, Completion Stage Price—Stipulated Price), the Progressive Design-Build Agreement provides for such competitive bidding, as an option for determining or adjusting the Completion Stage Price.
- H. *Bonds:* The Contract's Performance Bond and Payment Bond, when required, are not obtained until the Completion Stage Price is formalized.

4.0 NOTEWORTHY PROVISIONS OF EJCDC'S 2016 DESIGN-BUILD STANDARD GENERAL CONDITIONS AND SUPPLEMENTARY CONDITIONS

Two core documents in the 2016 EJCDC Design-Build series are D-700, Standard General Conditions of the Contract between Owner and Design-Builder (abbreviated as "General Conditions" or "GC") and the closely related D-800, Guide to the Preparation of the Supplementary Conditions of the Contract between Owner and Design-Builder (abbreviated as "Supplementary Conditions" or "SC"). Several noteworthy features of these two documents are discussed in this section.

4.1 *The Contract Documents—Resolving Discrepancies*

In the three standard EJCDC Design-Build Agreement documents (D-512, D-520, D-525), EJCDC indicates that the Contract Documents include (among various other specified items) (1) the Conceptual Documents issued by the Owner, (2) the Proposal submitted by the Design-Builder during the Design-Builder selection process, and (3) the Proposal Amendment that documents changes to the Proposal that are negotiated and agreed to by Owner and Design-Builder as part of the selection process. In the General Conditions, the Owner and Design-Builder agree that if there is a discrepancy between the Conceptual Documents and the Proposal, then the Proposal will control; and if there is a discrepancy between the Conceptual Documents or Proposal, on the one hand, and the Proposal Amendment, on the other, then the Proposal Amendment will control (GC-3.03.A, B). The concept is that in the linear process of Conceptual Documents—Proposal—Proposal Amendment, the last document in time represents the most current understanding and should govern.

During performance of its design-build obligations, the Design-Builder is required to prepare and submit for Owner’s review and approval Construction Drawings and Construction Specifications. Design-Builder will use these design documents to construct the subject facilities. By definition, the Construction Drawings and Construction Specifications are not Contract Documents (GC-1.01.A.10, 11). If there is a discrepancy between the Contract Documents and the Construction Drawings or Construction Specifications, the Contract Documents will prevail, unless the Design-Builder called out the deviation when submitting the Construction Documents to Owner, and Owner accepted the change, (GC-3.03.C). Example: Design-Builder’s Proposal indicated that Design-Builder would design and construct 12-inch sewer mains. Later, the Construction Drawings show 8-inch sewers in certain locations. These exceptions are not brought to the Owner’s attention during the Submittal process. The commitment in the Proposal will govern, such that Owner may insist on 12-inch pipe throughout the project.

4.2 *Design Responsibility*

One advantage of the design-build delivery method is that it creates a “single point of responsibility”—meaning that both design responsibility and construction responsibility fall on the Design-Builder’s shoulders. One potential exception to the rule is the Owner’s responsibility for design errors in the Conceptual Documents, especially if the Owner has taken the design to a significant percentage of completion before hand-off to a Design-Builder. As of the 2016 edition of the General Conditions, EJCDC clarifies that it is Design-Builder’s obligation during the design process to identify design errors, conflicts, ambiguities, and discrepancies embedded in the Conceptual Documents. The Design-Builder is contractually required to report these to the Owner in writing. In response, the Owner may either furnish a clarification or interpretation, or direct the Design-Builder to correct the design error or other deficiency, in return for an equitable adjustment in compensation and time for completion.

As it proceeds with the work, Design-Builder takes responsibility for any element of the Conceptual Documents that it relies on, and is fundamentally “responsible to Owner for the quality and soundness of the Design Professional Services,” (GC-2.03.C). The purpose is to align as closely as possible to the “single point of responsibility” concept.

The responsibility allocated to Design-Builder in GC-2.03.C does not relieve an Owner’s Consultant from responsibility to the Owner for errors in Owner’s Consultant’s services. (D-500, Owner—Owner’s Consultant Agreement, Paragraph 1.05.D).

4.3 *Standard of Care and Warranty*

The Standard General Conditions expressly state the standard of care that courts have applied over the years to professional services (including design): the professional services must be furnished with the care

and skill ordinarily used by members of the profession under similar circumstances, (GC-7.01.B). This standard of care is readily insurable under professional liability insurance policies. EJCDC concluded that assuring such insurability was an overriding objective, benefitting the project, the Owner, and the Design-Builder, as well as the design professional. Consistent with this objective, the broad general warranty and guarantee in GC-7.18 applies specifically to Construction, not to the design-build services as a whole; and D-505, Design-Builder—Engineer Subcontract, contains the same professional services standard of care.

EJCDC recognizes that some design-build projects are focused on requiring the Design-Builder to meet specified performance standards. The paramount importance of meeting these performance standards may be a project objective that supersedes other considerations such as assuring access at all tiers to professional liability insurance. In the Supplementary Conditions EJCDC provides an optional clause that may be used in performance-standard situations (SC-7.01.B). The optional clause states that as to design services relating to meeting performances standards, the Design-Builder must meet the performance standard regardless of the professional standard of care.

4.4 *Ownership of Design Documents*

The General Conditions provide that Design-Builder owns the “instruments of service”—the drawings and specifications—that it prepares (GC-3.04.A.1). Similarly, D-505, Design-Builder—Engineer contract provides that Engineer owns the instruments of service that it prepares. These are traditional ownership concepts.

EJCDC recognizes that some owners prefer to take full ownership of the instruments of service. An optional clause for that purpose is set out in the Supplementary Conditions at SC-3.04.A. The optional clause gives design ownership to Owner, but stipulates that design elements that were prepared outside the scope of the project, such as a design feature developed by Engineer on a previous project or the Engineer’s own standard specifications, do not belong to Owner. The optional clause also grants the Design-Builder a license to use the design on other projects, provided that doing so would not conflict with Owner’s interests.

4.5 *Site Conditions and Underground Facilities*

Because of the importance of site conditions to most projects that use the EJCDC documents as the basis of their contract, the General Conditions provisions relating to differing site conditions and Underground Facilities (existing utilities) are comprehensive, and contain responsibility allocations that are consistent with the roles and resources of the parties. These differ somewhat from the allocations in design-bid-build construction. For example, in design-build, the Design-Builder has more involvement and responsibility with respect to investigating site conditions than does the contractor under design-bid-build, and Design-Builder is able to tailor the design to anticipated conditions (GC-5.04, 5.05; and SC-5.04). The net result is that the Design-Builder has more responsibility for site conditions and Underground Facilities, because it is in a better position to control the risks associated with the site.

The 2016 General Conditions contain new standards, terminology, and requirements with respect to Underground Facilities. The General Conditions require the Design-Builder to use a technical document published by the American Society of Civil Engineers (ASCE 38, Standard Guideline for the Collection and Depiction of Existing Subsurface Utility Data) to establish and execute a project-specific “Underground Facilities Procedure” for identifying and mapping Underground Facilities. The General Conditions provisions specifically address the consequences of identifying Underground Facilities that were not shown in data furnished by the Owner, whether found during the investigation stage (GC-5.05.C) or during

Construction (GC-5.05.D), and of Design-Builder's inadequate establishment or execution of the Underground Facilities Procedure (GC-5.05.E).

4.6 *Insurance*

- A. The provisions of the General Conditions and Supplementary Conditions relating to insurance were updated in 2016 with input and advice from insurance law attorneys and industry professionals. See generally GC-Article 6, and SC-Article 6.
- B. The General Conditions state that Design-Builder will furnish the builder's risk insurance. The Supplementary Conditions include an optional clause that reverses this requirement when the Owner prefers to obtain the builder's risk insurance. Another related option is a clause for installation floater insurance, for projects in which this form of property insurance is adequate protection for the parties because there are no buildings or structures involved (GC-6.05, and SC-6.05).

4.7 *Submittals*

"Submittal" is a defined term in the General Conditions. A Submittal is any written or graphic document that the Contract Documents require the Design-Builder to submit to the Owner (GC-1.01.A.45). These include Design Submittals (a defined sub-category (GC-1.01.A.21) and Construction-phase documentation. All Submittals that involve technical or engineering matters must be approved by the appropriate Project Design Professional before being submitted to Owner (GC-8.01.B). The General Conditions emphasize that in reviewing and approving Submittals, the Owner does not take on any responsibilities for the means and methods of construction, or for the design (GC-8.02.D and G).

It is important for the Owner to list all required Submittals in the Conceptual Documents or Supplementary Conditions. In design-build contracting it is expected that there will not be as many shop drawing and sample submittals to Owner as in the conventional design-bid-build delivery system; many conventional submittals will be made and reviewed only at a lower tier, in exchanges between and among the Construction Subcontractors, Design-Builder, and Engineer.

4.8 *Changes*

Design-build at its best is a fluid process that allows for continual feedback and adaptation between design and construction. The 2016 EJCDC General Conditions encourage such flexibility by providing that even after Construction Drawings and Construction Specifications have been reviewed and approved by Owner and Construction is in progress, the Design-Builder is entitled to make modifications to its design (GC-8.02.H). The extent of this entitlement is limited by the magnitude of the proposed change and factors such as whether the Owner has already relied on the approved design (for example, by building an access road based on the design's footprint of the new facility).

4.9 *Delays*

The General Conditions address various types of delays in Design-Builder's progress, and Design-Builder's related entitlement (if any) to additional time to complete the work, or to additional compensation (GC-4.04). One of the factors that will justify an extension of time is "abnormal weather conditions" (GC-4.04.C.2). In the Supplementary Conditions (SC-4.04), EJCDC offers an optional provision that allows the user to craft a detailed project-specific definition of what constitutes "abnormal weather conditions" with respect to two primary weather elements, precipitation and temperature. The guidance and notes to user (SC-4.04) are extensive and alert the user to various considerations relative to drafting such a provision.

EXHIBIT A DESCRIPTIONS OF THE EJCDC DESIGN-BUILD DOCUMENTS

A1. COMMENTARY

A1.1 *D-001, Commentary on the EJCDC Design-Build Documents*

Provides descriptions of the 2016 editions of the EJCDC D-Series documents, and discussion regarding select topics such as the preparation of the Conceptual Documents and use of Progressive Design-Build.

A2. LAUNCHING A DESIGN-BUILD PROJECT WITH THE ASSISTANCE OF A CONSULTANT

A2.1 *D-500, Agreement Between Owner and Owner's Consultant for Professional Services—Design-Build Project*

Many project owners choose to retain a consultant to provide initial planning and study services, and assist in preparing Conceptual Documents and requests for qualifications and proposals. This document is used to establish the contractual relationship between Owner and such a consultant. The scope of Owner's Consultant's services under this contract may also include assisting Owner in selection of the Design-Builder; review of Design-Builder's proposed drawings, specifications, samples, and other submittals; and construction administration services. D-500 addresses the Owner's Consultant's compensation, and the Owner's Consultant's continued responsibility for the content of the Conceptual Documents that are furnished to the Design-Builder. See additional discussion regarding Owner's Consultant in Paragraph 2.6 of this Commentary.

A3. DESIGN-BUILDER SELECTION DOCUMENTS

A3.1 *D-110, Request for Qualifications—Design-Build Project*

D-110 features model language and document structure for the preparation of requests for qualifications (RFQ) to be issued by a project owner to candidates for selection as the Design-Builder. The template-style format includes notes to guide the drafter in preparing a project-specific RFQ document. D-110 may be used for procuring a Design-Builder based primarily on qualifications in a one-step process, or as the first step, prequalification, of a two-step procurement process in which the second step is a request for proposals.

A3.2 *D-111, Request for Proposals—Design-Build Project*

D-111 provides the basis for preparing a project-specific request for proposals (RFP). Owners typically issue an RFP to a field of qualified candidates, often determined through a request for qualifications process (see description of D-110, Request for Qualifications). D-111 prompts the drafter to address RFP issues such as the requirements for a technical proposal, submittal of a price proposal, express evaluation and ranking criteria, interviews of proposers, selection of the successful proposer, and entry into a design-build contract.

A3.3 *D-425, Price Proposal Form—Design-Build Project*

D-425 is a template-style document for use by design-build project owners in preparing a price proposal form to be transmitted to prospective proposers, usually as an accompaniment or

exhibit to a Request for Proposals (RFP). Requiring proposers to use a uniformly-formatted price proposal form will facilitate the orderly, efficient review of proposed prices.

A3.4 *D-580, Teaming Agreement to Pursue Joint Business Opportunity for Design-Build Project*

This document allows for a collaborative relationship between a prospective Design-Builder and an engineering firm. The Teaming Agreement is appropriate for use when the Design-Builder will need the assistance of the engineering firm in competing for an award of a specific design-build contract, typically in an RFQ/RFP process, and in performing the engineering design services once the design-build contract is awarded and the project is underway.

D-580 enumerates the respective duties of each team member in the pursuit of the award of contract; specifies the contractual relationship that the Design-Builder and Engineer will enter into if the contract is awarded to the Design-Builder (for example, D-505, Agreement between Design-Builder and Engineer for Professional Services—see description below); addresses the responsibility for costs incurred in pursuit of the work; requires confidentiality and assigns ownership rights with respect to documents prepared during the teaming arrangement; and specifies rules for exiting from the team.

A4. THREE VERSIONS OF THE AGREEMENT BETWEEN OWNER AND DESIGN-BUILDER

A4.1 *D-512, Agreement Between Owner and Design-Builder for Progressive Design-Build*

This document is intended for use when flexibility is needed. As typically used, the Owner makes an early selection of the Design-Builder, with an emphasis on the candidates' qualifications, and the Design-Builder moves forward with the design while receiving cost and budget input from Owner. Final pricing is locked in at a point when the design is well developed. See discussion of Progressive Design-Build and D-512 in Section 3.0.

Like the other two standard Owner—Design-Builder agreement forms (D-520 and D-525), D-512 is intended to be used together with the D-700, Design-Build General Conditions and D-800, Supplementary Conditions. Together the three documents (Agreement, General Conditions, Supplementary Conditions) form the legal terms and conditions of the design-build contract.

A4.2 *D-520, Agreement between Owner and Design-Builder on the Basis of a Stipulated Price*

This document is a standard Owner—Design-Builder contract form that identifies the contracting parties and Contract Documents, sets the schedule for completion of Design-Builder's work, establishes liquidated damages for unexcused late completion, and stipulates the monetary amount (lump sum or unit prices, or a combination of both) that Owner will pay for the work. This document also contains express representations by Design-Builder and provisions relating to payment and the interest rate on late payment.

Like the other two standard Owner—Design-Builder Agreement forms (D-512 and D-525), D-520 is intended to be used together with D-700, Design-Build General Conditions and D-800, Supplementary Conditions. Together the three documents (Agreement, General Conditions, Supplementary Conditions) form the legal terms and conditions of the design-build contract.

A4.3 *D-525, Agreement Between Owner and Design-Builder on the Basis of Cost-Plus*

This document is similar to D-520 except that the compensation basis is the cost of the work plus a fee, with a provision for a guaranteed maximum price. See description of D-520 above.

A5. GENERAL CONDITIONS AND SUPPLEMENTARY CONDITIONS

A5.1 *D-700, Standard General Conditions of the Contract between Owner and Design-Builder*

The General Conditions set forth the basic duties and responsibilities of the Owner and Design-Builder and are to be used with D-800, Supplementary Conditions, and one of the three Agreement forms: either D-520, D-525, or D-512.

A5.2 *D-800, Guide to the Preparation of the Supplementary Conditions of the Contract Between Owner and Design-Builder*

This document supplements D-700 and includes further documentation of the duties and responsibilities of Owner and Design-Builder.

A6. BONDS

A6.1 *D-610, Design-Build Performance Bond, and D-615, Design-Build Payment Bond*

The Design-Build Performance Bond and Design-Build Payment Bond closely follow the standard provisions of the corresponding EJCDC Construction Series bonds, C-610 and C-615. The bonds apply to the full scope of the design-build contract, including both design and construction. The underlying provisions of the bonds were developed in a collaborative effort by and between EJCDC and other stakeholders in design, construction, and suretyship.

A7. CONTRACT ADMINISTRATION

A7.1 *D-620, Design-Builder's Application for Payment*

D-620 is a new document for Design-Builder's use in applying for progress payments. The document is published in a user-friendly Microsoft Excel format, and includes integrated worksheets for the payment summary, lump sum work, unit price work, and stored materials. This document is similar C-620 (for design-bid-build) but is specific to design-build project delivery.

A7.2 *D-940, Work Change Directive, and D-941, Change Order*

The Work Change Directive and Change Order are the two standard methods of changing the design-build Contract Times, Contract Price, and Work (D-700, General Conditions, Paragraph 11.01.A). These two forms provide a standard format for implementing changes.

A8. DESIGN-BUILDER'S SUBCONTRACTS

A8.1 *D-505, Agreement Between Design-Builder and Engineer for Professional Services*

This document is intended for use when the Design-Builder contracts with an engineering firm to provide Design Professional Services, rather than performing such services in-house. D-505 is a comprehensive professional services agreement, comparable in many respects to EJCDC® E-500, Agreement between Owner and Engineer for Professional Services, and addresses schedule, compensation, indemnification, and other key issues.

D-505 contains a specific provision regarding the Engineer's obligation to locate and address errors, ambiguities, and conflicts in the Conceptual Documents furnished by the Owner, and to take full responsibility for any design elements that are based on the Conceptual Documents.

These provisions are coordinated with and mirrored in the obligations allocated to the Design-Builder in D-700, General Conditions.

D-505 also provides that the Design-Builder will take the lead in estimating construction costs arising from the Project's design documents, and provide the Engineer with feedback regarding cost concerns.

The starting point for the Engineer's scope of services as set forth in D-505 is coordinated with the professional services required of the Design-Builder under the Owner—Design-Builder Contract, and presumes that the Engineer will perform all the Design-Builder's design professional services and prepare all the Design Submittals. The Design-Builder and the Engineer should customize the Engineer's scope of services for the project, and coordinate this document's scope of services with the scope of services that will be performed by others, such as the Design-Builder's in-house personnel and third-party Project Design Professionals (for example an architect, geologist, or geotechnical engineer) retained under separate contract to the Design-Builder.

D-505 does not include a wholesale flow-down of all terms and conditions of the Owner—Design-Builder Contract, because many of those provisions relate to the Construction, or are otherwise not relevant to the Engineer's role and responsibilities. The scope exhibit provided in D-505 presents a prompt to the user to flow down applicable clauses as needed.

Extensive notes to the user throughout D-505 provide guidance regarding specific issues. For example, a note explains the need to customize the scope of the Engineer's construction-phase duties, such as construction observation, inspections and testing, and review of payment applications; the scope of such construction phase duties in design-build delivery is typically much less extensive than that undertaken by an engineering firm working for an owner on a design-bid-build project.

A8.2 *D-523, Construction Subcontract for Design-Build Project*

Although many Design-Builders have construction capabilities, in nearly every case the Design-Builder will subcontract at least a portion of the Construction portion of the Work. In some cases, the Design-Builder is at its core a developer, or an engineering firm, and will subcontract all the on-site Construction, either in multiple trade contract packages, or in a single subcontract to a general contractor or construction manager type entity. D-523 is designed to be used for any degree of Construction subcontracting by Design-Builder.

D-523 is structured to combine an agreement form with legal terms and conditions and exhibits addressing the scope of the Construction Subcontractor's work, insurance requirements, and if applicable the cost of the subcontract work. The document requires the user to choose between two compensation options, either stipulated price (lump sum or unit prices, or a combination of both) or compensation based on cost of the subcontract work and a fee, subject to a guaranteed maximum price.

The legal terms and conditions of D-523 are intended to mesh with the terms applicable to Design-Builder's construction-related duties under the Owner—Design-Builder contract. Whenever appropriate the construction subcontract provisions use wording that is the same as or very similar to corresponding provisions of EJCDC's industry-standard construction contracts, most notably C-700, Standard General Conditions of the Construction Contract.

EJCDC Design-Build Documents

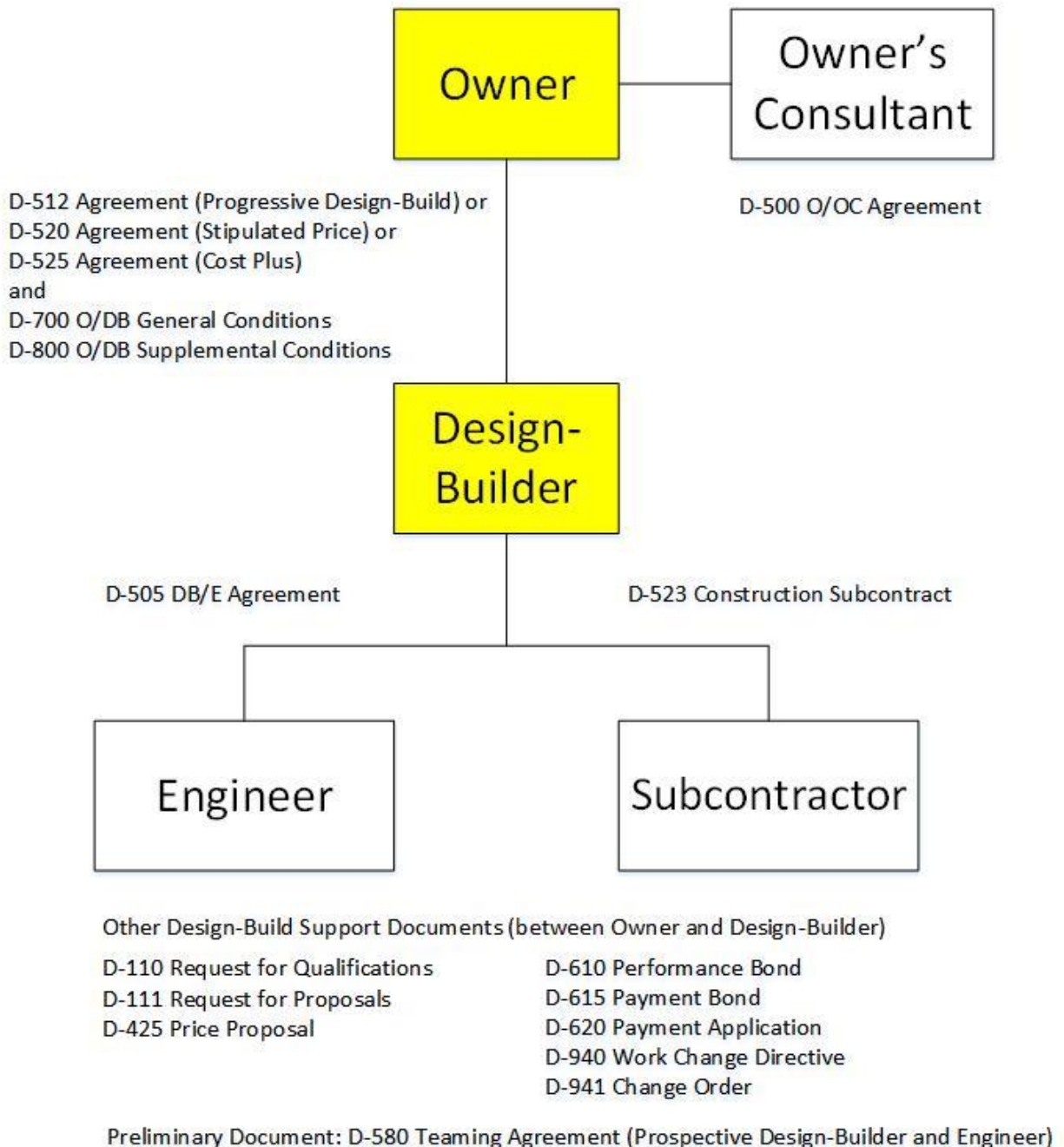


EXHIBIT C SUGGESTED APPROACH TO DESIGN-BUILD CONTRACTING

The checklist that follows presents typical steps that an Owner might take in deciding to use design-build for a project, putting together a design-build contract, and selecting a Design-Builder. The suggestions here are discussed in more detail in Section 2.0 of this Commentary.

- A. Evaluate the design-build delivery method, including applicable laws and regulations; consider other possible delivery systems.
- B. Evaluate the professional capabilities of Owner's in-house personnel. If necessary, retain the services of an Owner's Consultant.
- C. Determine the approximate, appropriate level to which the project design, as embodied in the Conceptual Documents, should be advanced before contracting with a Design-Builder.
- D. Identify, evaluate, and determine the level of detail to be included in the Conceptual Documents.
- E. Outline the performance parameters that define Design-Builder's obligations, including:
 - 1. Time;
 - 2. Performance guarantees;
 - 3. Other parameters; and
 - 4. Cost.
- F. Confirm that EJCDC Design-Build documents are appropriate for the project.
- G. Consider early selection of Design-Builder and use of progressive design-build.
- H. Develop necessary Conceptual Documents.
- I. Develop Owner—Design-Builder “front end” contract documents. Review standard General Conditions and prepare appropriate Supplementary Conditions. Obtain advice from legal counsel.
- J. Develop Design-Builder selection criteria. Determine whether a one-step process or two-step process will be used for selection. One Step: Selection based largely on submitted qualifications (commonly used for progressive design-build). Two Step: Initial prequalification based on responses to the Owner-issued request for qualifications (RFQ), followed by a separate RFP issued by the Owner only to prequalified, prospective Proposers. (Items that follow assume a two-step process.)
- K. Develop RFQ.
- L. Develop RFP.
- M. Develop Price Proposal Form.
- N. Issue RFQ and prequalify Proposers.
- O. Issue RFP.
- P. Evaluate Proposals.
- Q. Negotiate with select proposer or proposers, and agree to Proposal Amendment.

Exhibit C—Suggested Approach to Using the EJCDC Design-Build Documents.

EJCDC® D-001, Commentary on the EJCDC Design-Build Documents.

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R. Award design-build contract.

EXHIBIT D CONTENT OF CONCEPTUAL DOCUMENTS

Conceptual Documents are prepared by or for the Owner to describe the work to be performed by Design-Builder. As indicated in Paragraph 2.2 of this Commentary, the following is a list of items commonly included in the Conceptual Documents (or in some cases in concurrently-issued proposed Contract Documents, such as the Owner—Design-Builder Agreement or the Supplementary Conditions):

1. Project objectives and constraints; space, capacity, and performance requirements; flexibility and expandability, and any other requirement of the Owner which shows or describes the character and scope of, or relates to the Work to be performed and furnished by the Design-Builder.
2. Completion schedule and milestones requirements.
3. Submittal requirements, including Design Submittals, construction phase administrative Submittals, and Submittals regarding materials and equipment to be incorporated into the Construction.
4. Procedures for preparation, submittal, and review/approval of Submittals.
5. Other provisions that expand on or augment the procedures in the General Conditions and that would, on a design-bid-build project, typically be specified in “Division 01” construction specifications. Such requirements may include detailed procedures and requirements concerning payments; restrictions on the use of the Site; requirements concerning temporary utilities and temporary facilities; general administrative and procedural requirements concerning materials and equipment to be incorporated into the Construction; requirements for recordkeeping at the site; and procedures and requirements for training of the facility’s operations and maintenance personnel.
6. Quality control procedures and requirements.
7. Descriptions of lands and easements for Construction to be provided by Owner.
8. Related Work at the site by other contractors or by Owner.
9. Identification of specific permits to be obtained by Owner and Design-Builder respectively.
10. Other Documents that may be included:
 - a. Drawings, sketches, or other graphic material defining the scope and Owner’s requirements for the project which may include drawings prepared by or for Owner with varying degrees of completion.
 - b. Draft specifications or other written materials and criteria applicable to the project including equipment and materials specifications, if defined by Owner.
 - c. Site security requirements.
 - d. Process descriptions including flows, capacities, temperatures, pressures, and other criteria.
 - e. Hazardous waste, PCBs, radioactive material, asbestos, or petroleum known to exist at the site, as they relate to performance of the Work.
 - f. Requirements for coordinating the Work with Owner’s use of its existing facilities and its ongoing operations.