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National Society of Professional Engineers
1420 King Street
Alexandria, VA 22314

Phone: (703) 684-2845
Fax: (703) 836-4875
e-mail: aschwartz@nspe.org

You acknowledge that you have read this agreement, understand it and agree to be bound by its terms and conditions. You further agree that it is the complete and exclusive statement of the agreement between us which supersedes any proposal or prior agreement, oral or written, and any other communications between us relating to the subject matter of this agreement.

This document has important legal consequences; consultation with an attorney is encouraged with respect to its use or modification. This document should be adapted to the particular circumstances of the contemplated Project and the Controlling Law.

GUIDE TO THE PREPARATION OF SUPPLEMENTARY CONDITIONS

Prepared by

ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

and

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This document has been approved and endorsed by

The Associated General Contractors of America



Knowledge for Creating
and Sustaining
the Built Environment

This Guide to the Preparation of Supplementary Conditions has been prepared for use with the Standard General Conditions of the Construction Contract (No. C-700, 2002 Edition). Their provisions are interrelated and a change in one may necessitate a

change in the other. The suggested language contained in the Guide to the Preparation of Instructions to Bidders (No. C-200, 2002 Edition) is also carefully integrated with the suggested language of this document. Comments concerning their usage are contained in EJCDC guidance documents.

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I. INTRODUCTION

A. General

Forms for use as construction contract documents have been prepared by the Engineers Joint Contract Documents Committee (EJCDC) the principal forms are listed in Table 1. EJCDC has also prepared other documents that may be useful in preparing construction contract documents. Some of the principal ones are listed in Table 2.

EJCDC publications may be obtained from:

National Society of Professional Engineers
Alexandria, VA
703-684-2800
www.NSPE.org

American Council of Engineering Companies
Washington, DC
202-347-7474
www.ACEC.org

American Society of Civil Engineers
Reston, VA
703-295-6000
www.ASCE.org

No two projects are the same. Different public owners may have different purchasing statutes, and legal requirements vary by locality. These requirements must be carefully considered when preparing Contract Documents and the standard documents amended accordingly.

B. Relationship of Supplementary Conditions to Other Contract Documents

The Supplementary Conditions is one of the Contract Documents.

Where the amending or supplementing language should best appear in the Contract Documents is discussed in the Uniform Location of Subject Matter (No. N-122) jointly issued by EJCDC, the American Institute of Architects (AIA), and the Construction Specifications Institute (CSI). It is the purpose of this Guide to the Preparation of Supplementary Conditions to discuss and provide suggestions for the preparation of Supplementary Conditions following the concepts of the Locator Guide.

This Guide and the other Construction Related Documents prepared and issued by EJCDC assume use of the CSI Project Manual concept, which provides for an organizational format for location of all bound documentary information for a construction project --

Bidding Requirements, contract forms (Agreement, Bonds, and certificates), contract conditions, and Specifications. The last grouping, Specifications, is divided into 16 Divisions, the first of which, Division 1, is entitled "General Requirements." The Project Manual concept is further explained in the CSI Manual of Practice.

The Bidding Requirements are not considered part of the Contract Documents because much of their substance pertains to the relationships prior to the award of the Contract and should have little effect or impact thereafter and because many Contracts are awarded after negotiation and without going through the bidding process.

(In some cases, however, the actual Bid may be attached as an exhibit to the Agreement to avoid extensive retyping.)

On the other hand, the Contract Documents (which are included in the Bidding Documents) relate to the performance of the Work, and will govern the performance of the Work and completion of the Project. Note that the term "Bidding Documents" includes both the Bidding Requirements and the proposed Contract Documents.

The fundamental provisions affecting the rights and duties of the parties which are typical of most projects should appear in the General Conditions. Language to modify the fundamental relationships between the parties, or to supplement the framework set forth in the General Conditions, or to change the language of the General Conditions, should appear in the Supplementary Conditions. Examples of this are a change in the payment provisions and supplemental language dealing with the details of insurance coverages.

The substance of the General Requirements falls generally into three categories: (i) administrative requirements, such as summary of work, allowances, coordination, alternatives (materials, equipment, or price), product options, project meetings and project close-out; (ii) work-related provisions, such as temporary facilities, field testing and start-up; and (iii) general provisions applicable to more than one section in Divisions 2 through 16.

**TABLE 1: PRINCIPAL EJCDC STANDARD FORMS AND RELATED GUIDES
FOR CONSTRUCTION CONTRACTS**

Name	Number	Edition	Short Title/Abbreviation
Suggested Instructions to Bidders for Construction Contracts	C-200	2002	Instructions/I
Suggested Bid Form for Construction Contracts	C-410	2002	Bid Form/BF
Suggested Form of Agreement between Owner and Contractor on the Basis of a Stipulated Price	C-520	2002	Stipulated Price Agreement/A
Suggested Form of Agreement between Owner and Contractor on the Basis of Cost-Plus	C-525	2002	Cost-Plus Agreement/A
Standard General Conditions of the Construction Contract	C-700	2002	General Conditions/GC
Guide to the Preparation of Supplementary Conditions	C-800	2002	Supplementary Conditions/SC

C. Arrangement of Subject Matter

preparer of the Contract Documents. In either case, the

**TABLE 2: PRINCIPAL EJCDC DOCUMENTS RELATING
TO PREPARATION OF CONSTRUCTION DOCUMENTS**

Name	Number	Edition	Short Title
Recommended Competitive Bidding Procedures for Construction Projects	N-119	1987	Bidding Procedures
Uniform Location of Subject Matter	N-122	1995	Locator Guide
Engineer's Letter to Owner Requesting Instructions Concerning Bonds and Insurance Regarding Construction	C-051	2001	Engineer's Letter to Owner Re: Bonds and Insurance
Owner's Instructions to Engineer Concerning Bonds and Insurance Regarding Construction	C-052	2001	Owner's Instructions Re: Bonds and Insurance

This Guide is arranged in the same order as the paragraphs in the 2001 edition of the General Conditions, and the paragraphs herein bear comparable addresses to those of the General Conditions but with the prefix "SC." Where the matter to be discussed pertains to a topic covered in the Instructions, the Bid Form, or the Agreement, reference will be made to the appropriate paragraph numbers of the 2001 editions of those documents as well as the pertinent paragraph of the General Conditions. Some topics mentioned below are not dealt with in the General or Supplementary Conditions; these are mentioned at the end of this Guide. In addition, this Guide will point out the most common places where modification or expansion of the General Conditions is to be handled in the General Requirements rather than the Supplementary Conditions. In such cases no references are required in the Supplementary Conditions.

D. Use of this Guide

There appears below, in bold type, suggested language for some of the paragraphs of the Supplementary Conditions, but for the most part the topics to be considered are discussed and the drafting of specific language is left to the

drafter should bear in mind that most contractual provisions have important legal consequences. Consultation with legal counsel before finalization of any amendment or supplement is recommended.

Many sets of supplementary conditions examined by EJCDC contain typical or "boilerplate" language that has accumulated like moss over the years, appear to have no practical significance for the particular project, and may produce unintended and surprising legal consequences. Such language is usually there because someone saw comparable language in other contract documents and it "sounded good." Selecting language in that manner is not recommended. Provisions of the Supplementary Conditions should address a particular point in the other Contract Documents or cover a particular topic. The Supplementary Conditions should not be a repository for general language of vague meaning for which another location cannot be readily found.

This Guide assumes a general familiarity with the other Contract Documents prepared by EJCDC and, when drafting language, specific attention to them is encouraged. Standard documents or prescribed forms of governmental bodies and other owners may differ materially from the

documents of EJCDC so that careful correlation of any amending or supplementing language is essential. The loose practice of stating that any provision in one document that is inconsistent with another is superseded, or that one document always takes precedence over another in the event of a conflict in language or requirements, is discouraged. The resulting legal consequences of such provisions are frequently difficult to decipher and may be quite different from what was anticipated.

The General Conditions use carefully chosen language and set forth the basic responsibilities of the parties with respect to fundamental matters and legal consequences. Their provisions should be altered only where mandated by the specific requirements of a given project and the consequences of any modification are thoroughly understood.

Caution should be exercised when making any change(s) in the standard documents. They have been carefully prepared, terms are used uniformly throughout and are consistent with the terms in other EJCDC documents. Their provisions have been carefully integrated, and are quite dependent on one another. A change in one document may necessitate a change in another, and a change in one paragraph may necessitate a change in other language of the same document. No change should be made until its full effect on the rest of the General Conditions and other Contract Documents has been considered.

Lastly, remember that an Engineer is neither qualified nor licensed to give advice to others on the legal consequences of contracts. All of the Contract Documents have important legal consequences. Owners should be encouraged to seek the advice of an attorney before accepting any modification of the printed forms, before the documents are sent out for bidding, and most assuredly before signing any agreement.

II. STANDARD PREFATORY LANGUAGE AND TRADITIONAL FORMAT FOR SUPPLEMENTARY CONDITIONS

Suggested format and wording conventions for Supplementary Conditions appear below.

A. Table of Contents

The inclusion of a table of contents will benefit the user of the Supplementary Conditions, especially if additional articles (beyond the 17 Articles of the General Conditions) are added for the purpose of including mandated or other provisions.

B. Pagination

The CSI MasterFormat (Master List of Titles and Numbers for the Construction Industry), October 1995, assigns Document Number 00800 to Supplementary Conditions. Pages should be numbered 00800-1, 00800-2, 00800-n.

C. Caption and Introductory Statements

The following is a suggestion for use at the beginning of the Supplementary Conditions:

Supplementary Conditions

These Supplementary Conditions amend or supplement the Standard General Conditions of the Construction Contract (No. C-700, 2001 Edition) and other provisions of the Contract Documents as indicated below. All provisions which are not so amended or supplemented remain in full force and effect.

The terms used in these Supplementary Conditions have the meanings stated in the General Conditions. Additional terms used in these Supplementary Conditions have the meanings stated below, which are applicable to both the singular and plural thereof.

D. Format for Complete Paragraph Change

When completely superseding a paragraph of the General Conditions, the following language may be used:

SC-5.09.B Delete Paragraph 5.09.B in its entirety and insert the following in its place:

E. Format for Change within a Paragraph

When changing language within a paragraph of the General Conditions, the following language may be used:

SC-6.21.A Amend the second sentence of Paragraph 6.21.A (to read as follows) [or] (by striking out the following words):

F. Format for Additional Language

When adding language to an existing paragraph of the General Conditions, the idea may be expressed as follows:

SC-9.03 Add the following language at the end of the second sentence of Paragraph 9.03:

G. Format for Additional Paragraph

If it is desired to add a new paragraph to the General Conditions, the thought may be expressed as follows:

SC-8.06 Add the following new paragraph immediately after Paragraph 8.06.B:

III. ALTERNATE FORMAT FOR SUPPLEMENTARY CONDITIONS

With the increased use of electronic files for storage of the text of standard documents, some practitioners integrate the text of desired Supplementary Conditions into the General Conditions. Most word processing programs have line out and highlighting features which accurately show deletions, changes and additions. Users of EJCDC's electronic format version of the General Conditions are contractually obligated to clearly delineate all changes made to the standard text. It would be misleading to users to imply or represent that the General Conditions use EJCDC General Conditions if changes are not properly and clearly identified.

IV. SPECIFIC COMMENTS

Following is a series of comments for guidance in preparing Supplementary Conditions. These comments relate to the comparable paragraph numbers of the General Conditions. Note that there is not a comment corresponding to each paragraph of the General Conditions. There likely will be points to be considered in each particular project that are not addressed herein.

SC-1.01 Defined Terms

The terms used in the Supplementary Conditions which are defined in the General Conditions should be used with exactly the same meanings. This is true for all of the Contract Documents.

When using defined terms, it is essential to use initial capitals, as indicated in the General Conditions.

The modification of terms defined in Article 1 or the addition of more defined terms for general use in the Contract Documents should be accomplished in SC-1.01. Such definitions might include "Construction Coordinator," "Construction Manager," "Project Manager" and "Owner's Site Representative." The addition of any of these terms may necessitate changes throughout the General Conditions.

Note that although not specifically defined, certain terms are frequently used in EJCDC construction related documents, always with precisely the same meaning. It is important for the preparers of Supplementary Conditions, notes and comments on Drawings, Specifications, and other Contract Documents to adhere to this usage and practice. An example is "materials and equipment," which is intended to include all that the Contractor furnishes and provides other than labor and services. It should not be necessary to refer to "products," "supplies," and the like; and, in fact, by doing so, the intended meaning of the term "materials and equipment" may be prejudiced.

SC-1.01.A.9 Change Order

The term "Change Order" is defined to require the recommendation of Engineer and is to be signed by both Owner and Contractor. EJCDC's suggested form for Change Order (No.C-941, 2001 Edition), indicates that the recommendations should also be in writing. The Work Change Directive (No. C-940, 2001 Edition) does not require Contractor's signature. This practice may differ from that of some owners in which case a change of these definitions should be made in SC-1.01.A. Before doing so, however, a careful review should be made of numerous contexts in which the terms "Change Order" and "Work Change Directive" are used in the Contract Documents. Care should also be taken that when those terms are used in the General Requirements or Divisions 2-16 they are used as defined.

SC-1.01.A.19 Engineer

The General Conditions are drafted assuming that there will be an independent engineer; e.g., a consulting engineer performing Engineer's services and duties as set forth throughout the General Conditions. As will be explained below, EJCDC does not recommend a structure without an independent engineer.

However, it also acknowledges that some or all of the tasks and services that the General Conditions contemplate being performed by an independent engineer may in fact be performed by the Owner's staff. Adapting the EJCDC documents for such an arrangement is a substantial task. Dozens of SC's will be required. For example, Engineer has rights and responsibilities separate and distinct from Owner in Articles 3-16. Articles 9-12 in particular will require very extensive changes.

SC-1.01.A.22 Hazardous Environmental Condition

This definition has been adopted to facilitate the use of or revision to GC-4.06. This definition includes dangerous quantities of or circumstances involving Asbestos, PCB's, Petroleum, Hazardous Waste, and Radioactive Material, each of which are also defined. If other conditions are to be considered "Hazardous Environmental Conditions," they should be included in SC-1.01.A.22. An additional definition should be added in SC-1.01 to define the other condition(s).

Note that these construction documents do not contemplate that the Work includes significant remediation. For a major remediation project the EJCDC Environmental Remediation documents should be used.

SC-1.01.A.23 Hazardous Waste

"Hazardous Waste" as defined in GC-1.01.A.23 has the same meaning as the term is given in the Federal Solid Waste Disposal Act (42 USC Section 6903). The intent is to refer to hazardous waste appearing on Owner's property and not hazardous substances contained in materials used in Contractor's Work or by Owner to which workers might also be exposed (e.g. lead-based paint, cleaning solvents). The parties may wish to change the definition of Hazardous Waste by defining the term themselves or by referencing the definitions in other federal or applicable state environmental laws. Care should be taken in drafting because of the substantial risks associated with Hazardous Waste.

SC-1.01.A.27 Notice of Award and

SC-1.01.A.28 Notice to Proceed

It may be that the parties do not contemplate giving a Notice of Award or a Notice to Proceed and wish to eliminate reference to these terms in the General Conditions. Such changes may be accomplished in SC-1.01.A.27 and SC-1.01.A.28. However, in any such case, all references to the particular defined term appearing elsewhere in the General Conditions should be eliminated. The term "Notice to Proceed" is used primarily in GC-2.03, and any change with respect to it should be accomplished in SC-2.03. The term "Notice of Award" is used primarily in the Instructions, Bid form, and Agreement, and any required corresponding changes should be made directly in those documents.

SC-1.01.A.42 Site

The definition of "Site" has significant legal ramifications, particularly with regard to GC-4.01.A. Any changes in the lands or areas furnished for Contractor's use should be made at this location.

SC-1.01.A.44 Subcontractor and

SC-1.01.A.48 Supplier

The term "Subcontractor" is defined to include only those individuals or entities performing part of the Work at the Site and includes various tiers of Subcontractors so long as they are working at the Site. The term "Supplier" is defined as a manufacturer, fabricator, supplier, distributor, materialman, or vendor, and thus includes one having a contract to fabricate or manufacture materials or equipment at Supplier's own plant, and is intended to exclude anyone performing Work at the Site (except for incidental on-Site services such as advice to Contractor's forces during installation and initial start up). Note that some standard forms of General Conditions define "Subcontractor" to include only individuals or entities having a direct contract with the prime Contractor to perform Work at the Site and thus excludes sub-subcontractors and others working at the Site. Before any change is made in EJCDC's definitions, a careful review should be made of the various contexts in which the terms "Subcontractor" and "Supplier" are used in the General Conditions.

SC-1.01.A.45 Substantial Completion

If the definition of Substantial Completion is to be amended, the change should be made in SC-1.01.A.45; an example would be when some party in addition to Engineer will be required to sign the definitive Certificate of Substantial Completion. (Note: This might necessitate further amendments of the General Conditions, for instance

GC-14.04, which would be accomplished under SC-14.04.) It is frequently desirable to expand the definition of Substantial Completion to add specific requirements in this regard for a given project or to add more details to clarify the words “can be utilized for the purpose for which it is intended.” If it is necessary to expand the definition of Substantial Completion, the additional language should appear in SC-1.01.A.45. Changes in the administrative procedures concerning Substantial Completion should appear in the General Requirements. See comments at SC-14.04.

SC-1.02 Terminology

Paragraph GC-1.02, Terminology centralizes the locations and terms used throughout the Bidding Documents and Contract Documents but not otherwise defined. Other terms used repeatedly in the Supplementary Conditions may be referenced in SC-1.02.

Note that GC-1.02.C provides that the word “day” means a calendar day. A change to “working” day has ramifications throughout the documents.

SC-2.01 Delivery of Bonds and Evidence of Insurance

If Contractor will not be required to furnish a performance or payment bond, it may be desirable to modify GC-2.01, delete GC-5.01, and modify GC-5.02. Such changes should be accomplished in SC-2.01, SC-5.01, and SC-5.02, and further changes may be required in GC-10.04 and GC-14.07 where reference is made to the surety. In addition, corresponding changes may be required in other Bidding Documents.

Paragraph GC-2.01 may require modification if the insurance requirements of Article 5 are changed. Its provisions relate also to those of GC-5.09.A. Note the importance of listing the additional insureds.

SC-2.02 Copies of Documents

As electronic documents become more widely used, electronic copies of contract documents are often made available in lieu of multiple sets of hard copy. If electronic documents are to be made available, the following may be used:

SC 2.02 Delete Paragraph 2.02.A in its entirety and insert the following in its place:

A. Owner shall furnish to Contractor up to _____ printed or hard copies of the Drawings and Project Manual and one set in electronic format. Additional copies will be furnished upon request at the cost of reproduction.

SC-2.03 Commencement of Contract Times; Notice to Proceed

The Instructions, Bid Form, Agreement, and General Conditions establish a timetable of events from the opening of Bids to the day when the Contract Times must start to run.

The events contemplated, based on a 60-day period for Bids to remain subject to acceptance, may be summarized as follows:

Day 1: Bid Opening

Day 6: Successful Bidder submits to Owner a list of all Subcontractors, Suppliers and others who must be identified for acceptance by Owner and Engineer prior to Notice of Award as indicated in I-12.01. (The listing of those to be identified would appear in SC-6.06.) Within 5 days of a request therefor each Bidder must submit to Owner written evidence of Bidder’s Qualifications as provided in I-3.

Day 36: Notice of Award should be given to Successful Bidder by this date in order to complete the two subsequent events within the time specified and not exceed the 60-day period for Bids to remain open. Notice of Award must be accompanied by the Agreement in form for signing and with all exhibits attached (see I-21.01).

Day 51: By this date (or within 15 days of delivery of Notice of Award, whichever occurs first), Successful Bidder must return the signed Agreement and other data to Owner (see I-21.01). Failure to do so will permit Owner to declare forfeiture of Bid security under I-8.02.

Day 61: By this date (or within 10 days of receipt of signed Agreement and other data from Successful Bidder, whichever occurs first) Owner must sign and deliver to Contractor one signed counterpart of Agreement with all Exhibits attached (see I-21.01). Note that upon Owner signing the Agreement a contract exists and thus the Successful Bidder becomes Contractor. This is usually the Effective Date of the Agreement

The Contract Times must start running no later than Day 61 (or 30 days after the Effective Date of the Agreement if that is earlier). By use of a Notice to Proceed, as contemplated by GC-2.03, Contract Times may start running earlier than that once the Agreement has been signed by both parties and has become effective.

The dates for the release of Bid security are spelled out in I-8.02. Also note that if the Successful Bidder is declared in default on or prior to the 51st day, there probably will not be sufficient time to proceed through each of the required steps with the next lowest responsible and responsive

Bidder prior to the date when that Bidder's Bid expires. In such a case, Owner should obtain written acknowledgment from that Bidder (and others if appropriate) of an extension of the Bid acceptance period. It is also recommended that consent of surety be obtained for any such extension.

When Milestones (defined in GC-1.01.A.26) are to be specified, this should be done in the General Requirements. As in certain cases with respect to Contract Times, the possibility of Contractor's failure to reach a Milestone on time may be of such consequence to Owner as to justify a provision for the assessment of liquidated damages. In such cases appropriate language should be added in Article 4 of the Agreement. When Milestones are used, precise language with respect to time and Work encompassed must be used. Milestones should only cover principal events of major importance to the completion of the Project and should not encroach or impinge on Contractor's right to freely schedule performance within the Milestone dates.

Any change in this carefully integrated timetable will probably necessitate changes in all of the documents. In many publicly-funded projects it is customary to give a tentative Notice of Award, and the actual award may be issued some time later. Amendments of GC-2.03 should be accomplished in SC-2.03. Changes in the suggested language of the Instructions, Bid form, and the Agreement should be accomplished directly in those documents.

The above discussion is based on a 60-day bid acceptance period. This should be reviewed for conflict with any local statutes, and may vary, particularly if funding agency approvals are required.

Refer to Bidding Procedures for a discussion about the scheduling of events during the bidding period.

SC-2.05 Preliminary Schedules

Supplemental information with respect to the matters covered in this paragraph is considered administrative in nature or work-related and should be covered in the General Requirements. If any of the schedules called for or the time of submitting a schedule for review is to be changed, it should be done in SC-2.05.

SC-3.01 Intent

Some specifiers prefer to list the various Contract Documents in the order in which they are to be given precedence in case there is a conflict between documents. EJCDC does not consider such language desirable but, if used, language to this effect may be added at SC-3.01.A.

SC-3.02 Reference Standards

The words "except as may be otherwise specifically stated in the Contract Documents," which appear at the end of GC-3.02.A.1), customarily refer to a change or supplement to be added in the Specifications rather than in the Supplementary Conditions.

Frequently, the Specifications make reference to standards, specifications, manuals, or codes of technical societies, organizations, or associations. These references are intended to amplify the descriptions of materials, equipment, construction systems, standards, and workmanship; however, as indicated in paragraph GC-3.02.A.2, they are not intended to revise or supersede the provisions of the General Conditions or Supplementary Conditions. In special circumstances, the Specifications should clearly indicate the extent to which the provisions of the General Conditions or Supplementary Conditions are to be superseded by the referenced provisions.

SC-4.01 Availability of Lands

Other than an explanation of special circumstances such as a delay in the acquisition of lands because of condemnation or for some other reason, no statement on this subject is contemplated in the Supplementary Conditions.

SC-4.02 Subsurface and Physical Conditions,

SC-4.03 Differing Subsurface or Physical Conditions, and

SC-4.04 Underground Facilities

The practices with regard to subsurface and physical conditions and Underground Facilities vary by type of construction and locality of Site as well as Owner's preference. Many Owners are unwilling to guarantee the accuracy of the data identified or referred to in the Contract Documents, while Contractors believe it unfair and uneconomical to require them to assume full responsibility for the unknown. On the other hand, it is the practice of certain Owners in heavily built up urban areas, usually in contracts for pipeline and related construction, to assume the full risk of differing underground conditions and to allow price and time adjustments to the extent justified by a subsurface surprise which Contractor could not have been expected to foresee regardless of what was or was not disclosed in the Contract Documents.

If the provisions for sharing of responsibility for unforeseen subsurface and physical conditions or Underground Facilities are to be changed from those set forth in the GC-4.02 or 4.03, this should be accomplished in SC-4.02 and SC-4.03. Any such change should be carefully considered and worded and the responsibilities for protection, repair, and safety of the Work pending completion of corrective measures specifically addressed (see GC-6.13).

A summary of the current EJCDC approach may be helpful to an understanding of the complex provisions on this subject matter and serve as background should it be desirable to revise any of the provisions (which should be accomplished in the Supplementary Conditions).

First, a distinction is drawn between subsurface conditions, physical conditions, and Underground Facilities (the last term being specifically defined in Article I of the General Conditions and separately dealt with in GC-4.04).

EJCDC recommends strongly that Bidders be advised (in the Supplementary Conditions) of the identity of all reports of tests and explorations of subsurface conditions at or contiguous to the Site and the drawings of physical conditions in or related to existing surface or subsurface structures (other than Underground Facilities discussed below). This should include the extent to which Engineer has utilized any such reports or drawings in the preparation of the Contract Documents (see GC-4.02.A).

In GC-4.02.B Contractor is entitled to rely on the general accuracy of the "technical data" contained in the documents so identified but not on non-technical data, interpretations, or opinions contained therein. Also, Contractor may not assume that such documents are complete or sufficiently all-inclusive to provide Contractor with all the information Contractor needs for its construction purposes, particularly with respect to the particular means and methods and unique procedures of construction that it intends employing to do the Work. Any conclusion or interpretation the Contractor draws from such documents is at its own risk.

Because such documents will most likely include data, the accuracy of which Owner and Engineer are not willing to assume responsibility for and on which they are unwilling to permit Contractor to rely, those documents are specifically indicated as "not Contract Documents" in order to overcome any possible claim that by implication such data was made available for reliance by the Contractor when in fact it was only made available to overcome any claim that information had been withheld (see also I-4). Stating that such documents are specifically "not Contract Documents" will not, however, prejudice or defeat Contractor's basic right to rely on "technical data" to the extent provided in GC-4.02.B.

Since the meaning and application of the term "technical data" will vary by project, it is important for Engineer to determine and establish those portions of the reports of tests and explorations of subsurface conditions and those parts of the drawings of physical conditions which Owner and Engineer consider to be "technical data" on which Contractor will be entitled to rely as permitted by GC-4.02.B. Examples of what might properly be considered "technical data" in such reports are: the boring method, plan and logs, level of subsurface water, laboratory test

methods and results, and similar factual data, all as of the dates made. As a general rule, all the factual information contained in drawings of physical conditions in or related to existing surface or subsurface structures (other than Underground Facilities) which are at or contiguous to the Site will usually qualify as "technical data" on which Contractor should be entitled to rely. However, if reliance on such drawings is to be limited, Engineer should clearly identify in the Supplementary Conditions the information or data (such as comments or opinions) contained in or part of such drawings on which Contractor may not rely. It should be understood that severely limiting the scope of information on which Contractor may rely may require the Contractor to assume additional risks which may in turn be reflected by a higher bid.

Thus, the term "technical data" has not been defined specifically in the General Conditions because of its different application in varying circumstances. Where practical, the "technical data" contained in such documents should be separated from other data and possibly be included in the Bidding Documents. Frequently, it is not feasible to include only the "technical data" in the Bidding Documents or to separate it from other information. In such circumstances, language similar to the following may be used for identification of "technical data:"

SC-4.02 Add the following new paragraph(s) immediately after Paragraph 4.02.B:

C. In the preparation of Drawings and Specifications, Engineer relied upon the following reports of explorations and tests of subsurface conditions at the Site:

1. Report dated May 21, 2000, prepared by Aye and Bea, Consulting Engineers, Philadelphia, Pa., entitled: "Results of Investigation of Subsoil Conditions and Professional Recommendations for Foundations of Iron Foundry at South and Front Streets, Pembrig, NJ", consisting of 42 pages. The "technical data" contained in such report upon which Contractor may rely is

2. Report dated May 2, 2000, prepared by Ecks, Wye and Tsze, Inc., Baltimore, Md., entitled: "Tests of Water Quality in Mixer River at Pembrig, NJ", consisting of 26 pages. The "technical data" contained in such report upon which Contractor may rely is

D. In the preparation of Drawings and Specifications, Engineer relied upon the following

drawings of physical conditions in or relating to existing surface and subsurface structures (except Underground Facilities) which are at or contiguous to the Site:

1. Drawings dated March 2, 2000, of Route 24A Overpass Abutment, prepared by Dea & Associates, Inc., Wilmington, Del., entitled: "Record Drawings: Route No. 24A Overpass Abutment", consisting of 12 sheets numbered to _____, inclusive. All of the information in such drawings constitutes "technical data" on which Contractor may rely, except for _____ appearing on Drawing No. _____ and _____ appearing on Drawing No. _____.

E. Copies of reports and drawings itemized in SC-4.02.C and SC-4.02.D that are not included with Bidding Documents may be examined at _____ (insert location) during regular business hours. These reports and drawings are not part of the Contract Documents, but the "technical data" contained therein upon which Contractor may rely as identified and established above are incorporated therein by reference. Contractor is not entitled to rely upon other information and data utilized by Engineer in the preparation of Drawings and Specifications.

Contractor is also required to visit the Site to become familiar with and satisfied as to the general, local, and Site conditions that may affect cost, progress, performance, and furnishing of the Work. This is to involve an alert, heads-up, eyes-open, reasonable examination of the area and the conditions under which the Work is to be performed (see GC-4.03.C.2.b). It is expected that any special requirements for such examination will be set forth in the Instructions (see I-4 and related Notes to User) or elsewhere in the Contract Documents if the Contract is to be awarded on the basis of negotiation rather than after receipt of Bids. The extent of such an examination will depend to a great extent on the peculiarities of the job and the Site as well as Owner's preference. EJCDC believes, however, that the requirements for any such pre-Bid Site examination should be realistic and clearly stated and that detailed Site and subsurface investigations should ordinarily not be required because of their cost, the constraints of time and other practical considerations.

Note that GC-4.02 and the above discussion are based on the premise that some subsurface information exists. If this is not the case, the following language may be used:

SC-4.02 Delete Paragraphs 4.02.A and 4.02.B in their entirety and insert the following:

A. No reports of explorations or tests of subsurface conditions at or contiguous to the Site are known to the Owner or Engineer.

Paragraphs GC-4.03.A and GC-4.03.B provide that when a surprise arises in the subsurface or physical conditions, Contractor is to notify Engineer if the revealed or discovered condition is of such a nature as to indicate that "technical data" on which reliance was permitted is inaccurate, or that a change in the Contract Documents is required, or that the condition differs materially from that shown or indicated in the Contract Documents, or that it is of an unusual nature and differs materially from conditions ordinarily encountered and generally recognized as inherent in Work of the character provided for in the Contract Documents. The Work is then to stop. Engineer is to evaluate the situation and decide if a change in the Contract Documents is necessary to adapt to the actual conditions as discovered or revealed.

Under GC-4.03.C, the rights of Contractor and Owner to an adjustment in price or time because of the differing conditions are set out with the result that Owner or Contractor is entitled to relief similar in most situations to that provided in Federal Acquisition Regulations.

Another approach to the division of responsibility with respect to unknown subsurface and physical conditions is to place full responsibility for the unknown on the Contractor. EJCDC does not recommend this approach which often requires Bidders to conduct site investigations within an unrealistic period of time. This approach typically results in higher bids and, despite language to the contrary, often results in disputes.

The language of I-4 is closely coordinated with that of GC-4.02 and GC-4.03. Also, in the Suggested Bid form language and the Owner-Contractor Agreements (see Article 8 of the Stipulated Price Agreement and Article 12 of the Cost-Plus Agreement), Contractor is required to represent that such investigations, explorations, studies, etc. with respect to subsurface and physical conditions at or contiguous to the Site have been made (in addition to those identified in the Contract Documents) to the extent necessary to enable Contractor to do the Work at the Contract Price, within the Contract Times and in accordance with the other terms and conditions of the Contract Documents. Thus, a change in GC-4.02 or GC-4.03 may well require change in these other documents.

SC-4.05 Reference Points

At times Owner will not to provide the engineering surveys to establish reference points, in which case GC-4.05 should be amended by language in SC-4.05.

SC-4.06 Hazardous Environmental Condition

“Hazardous Environmental Condition” is a defined term adopted to facilitate the use of or revisions to GC-4.06. The primary purpose of GC-4.06 is to assign responsibility for and to define actions to be taken when a Hazardous Environmental Condition is created or encountered at the Site. That responsibility is assigned in GC-4.06.C and provides that the Contractor shall not be responsible for such a condition uncovered or revealed at the Site which was not shown or indicated in Drawings or Specifications or indicated in the Contract Documents to be within the scope of the Work. However, the Contractor is responsible for a Hazardous Environmental Condition it creates at the Site.

EJCDC recommends strongly that bidders be advised in the Supplementary Conditions of the identity of all reports and drawings relating to a Hazardous Environmental Condition identified at the Site, if any, that have been utilized by the Engineer in the preparation of the Contract Documents. This is provided for in GC-4.06.A.

In GC-4.06.B Contractor is entitled to rely on the general accuracy of the “technical data” contained in the documents so identified but not on non-technical data, interpretations, or opinions contained therein. Also, Contractor may not assume that such documents are complete or sufficiently inclusive to provide Contractor with all the information Contractor needs for its construction purposes, particularly in respect of the particular means and methods and unique procedures of construction that it intends employing to do the Work. Any conclusion or interpretation drawn from such documents is at Contractor’s own risk.

Because such documents will most likely include data, the accuracy of which Owner and Engineer are not willing to assume responsibility and on which they are unwilling to permit Contractor to rely, those documents are specifically “not Contract Documents” in order to overcome any possible claim that by implication such data was made available for reliance by the Contractor when in fact it was only made available to overcome any claim that information had been withheld (see also I-4). Stating that such documents are specifically “not Contract Documents” will not, however, prejudice or defeat Contractor’s basic right to rely on “technical data” to the extent provided in GC-4.06.B.

Since the meaning and application of the term “technical data” will vary by project, it is important for Engineer to determine and establish those portions of the reports of tests and explorations of subsurface conditions and those parts of the drawings of physical conditions which Owner and Engineer consider to be “technical data” on which Contractor will be entitled to rely as permitted by GC-4.06.B. Examples of what might properly be considered

“technical data” in such reports are listed in the discussion accompanying SC 4.02-4.04.

As also noted in this discussion, frequently it is not feasible to include only the “technical data” in the Bidding Documents or to separate it from other information. In such circumstances, language similar to that shown at SC-4.02.C could be used with editing as required to replace the phrase “reports of exploration and tests and subsurface conditions” with “Hazardous Environmental Condition.” The address for this paragraph would be SC-4.06.A.1, and the address(es) for the description(s) of the report(s) would begin with SC-4.06.A.1.a.

In a like fashion, language similar to that shown at SC-4.02.D could be used to identify the drawings related to a Hazardous Environmental Condition at the Site. The language of SC-4.02.D would be edited to reflect the fact that said drawings relate to a Hazardous Environmental Condition. The address of the introductory paragraph would be SC-4.06.A.2, and the address(es) for the description(s) of the drawing(s) would begin with SC-4.06.A.2.a.

Language similar to that shown at SC-4.02.E, edited to reflect the addresses used for the descriptions of the reports and drawings, could be used to define how and where Bidders may obtain or have access to said reports and drawings.

As discussed above in SC-4.02-4.04, Contractor is also required to visit the Site prior to submitting a Bid and executing the Agreement. Again, Owner should not expect a potential Bidder to perform a complete investigation of the Site under this requirement. Because of the significant risks to Owner, if the Contractor uncovers or reveals a Hazardous Environmental Condition which was not shown or indicated in the Drawings or Specifications or identified in the Contract Documents to be within the scope of Work, Owner should reduce that risk by having an environmental investigation prepared by properly trained and experienced professionals prior to seeking a contract for the Work. Thus, it is not anticipated that any special requirements will be required for Contractor’s examination of the Site. In rare cases where there are, said requirements will be set forth in the Instructions (see I-4 and related Notes to User) or elsewhere in the Contract Documents if the Contract is to be awarded on the basis of negotiation rather than after receipt of Bids. The extent of such an examination will depend to a great extent on the peculiarities of the job and the Site as well as Owner’s preference. The EJCDC believes, however, that the requirements for any such pre-Bid Site examination should be realistic and clearly stated and that detailed environmental investigation should ordinarily not be required because of the constraints of time and other practical considerations.

Note that GC-4.06.D provides for actions to be taken if Contractor encounters a previously unknown Hazardous Environmental Condition or if Contractor creates a Hazardous Environmental Condition. Owner, after obtaining qualified expert advice, will determine the corrective action, if any, to be taken, and who will take that corrective action.

Under GC-4.06, unless Contractor agrees, Contractor cannot be required by Owner either to remedy the hazardous condition or work in the area under special working conditions not contemplated by the Agreement. Similarly, if Contractor creates the Hazardous Environmental Condition, Owner has the right to designate another party to remedy said condition. If Owner and Contractor agree that Contractor will remove or clean up a Hazardous Environmental Condition, it is advisable that language that deals with the special considerations and unique conditions involved in a hazardous materials remediation project should be included in a change order. See the EJCDC Environmental Remediation documents for additional discussion or suggested language.

If the indemnification provisions of GC-4.06.G or GC-4.06.H are to be modified, changes should be made in SC-4.06.G or SC-4.06.H.

Note that the provisions of GC-4.02 through GC-4.04 do not apply to a Hazardous Environmental Condition.

Paragraph GC.4.06.A and B and the above discussion are based on the premise that information exists with respect to Hazardous Environmental Conditions at the Site. If this is not the case, the following language may be used:

SC-4.06 Delete Paragraphs 4.06.A and 4.06.B in their entirety and insert the following:

A. No reports on drawings related to Hazardous Environmental Conditions are known to Owner or Engineer.

B. Not Used.

SC-5.01 Performance, Payment and Other Bonds

If Contractor will not be required to furnish performance or payment bonds, it will be necessary to delete GC-2.01 and GC-5.01 and modify GC-5.02. This may also require further changes in GC-10.04 and GC-14.07.A where reference is made to the surety. Corresponding changes may be required in other Contract Documents as well. Paragraph I-8.01 refers to GC-5.01 and GC-5.02, where certain requirements for surety companies are set forth. If these requirements are to be changed or if Contractor will be required to furnish bonds other than those prescribed in GC-5.01 or if the form of any bond is to be prescribed (see

EJCDC Performance Bond (No. C-610) and Payment Bond (No. C-615) Forms), or if the time when any bond is to remain effective is to be altered (see especially discussion under SC-14.05), this information should appear in SC-5.01. Note that the time periods provided in other bond forms may differ from those required by GC-5.01.

SC-5.02 Licensed Sureties and Insurers

If additional requirements and qualifications for sureties and insurers are to be imposed, they should have a reasonable relationship to Owner's needs and project requirements and appear in SC-5.02.

If sureties or insurers are to be prequalified, the procedure involved and the consequences to Bidder of failing to designate an acceptable surety or insurer and Owner's rights as a result should be explained in I-20. Owner's retention of the absolute right to accept or reject a surety or insurer without objective criteria may have serious drawbacks.

SC-5.03 Certificates of Insurance

When responsibilities for providing insurance under GC-5.04, 5.06, and 5.07 are changed, GC-5.03 may also require changes, which should be made at SC-5.03.

Should Owner fail to demand the certificates of insurance required under GC-5.03.A, additional protection may be afforded by the following:

SC-5.03 Add the following new paragraphs immediately after Paragraph 5.03.B:

C. Failure of Owner to demand such certificates or other evidence of full compliance with these insurance requirements or failure of Owner to identify a deficiency from evidence provided shall not be construed as a waiver of Contractor's obligation to maintain such insurance.

D. By requiring such insurance and insurance limits herein, Owner does not represent that coverage and limits will necessarily be adequate to protect Contractor, and such coverage and limits shall not be deemed as a limitation on Contractor's liability under the indemnities granted to Owner in the Contract Documents.

SC-5.04 Contractor's Liability Insurance

As indicated in GC-5.04, Contractor's liability insurance is to include the specific coverages and be written for not less than the limits of liability (including any aggregate limits) and coverages provided in the Supplementary Conditions or required by Laws or Regulations, whichever is greater. Thus, SC-5.04 is essential to make the insurance

requirements operative. Few Engineers are competent to act as insurance counselors, and providing insurance advice is specifically excluded from coverage under many professional liability insurance policies for Engineers. Before completing the paragraphs of the Supplementary Conditions dealing with insurance, it is very important for Engineer to request Owner to obtain the advice of a competent insurance counselor. Particular projects may require special types of coverage, such as railroad or airport protective liability coverage. Engineer must, therefore, obtain from Owner (or Owner's insurance counselor) information as to coverages and amounts to enable Engineer to set forth in SC-5.04 the minimum requirements for liability insurance.

In GC-5.04.B.1 it is provided that parties in addition to Owner and Engineer must be listed as "additional insureds" on Contractor's liability insurance policies if they are specifically identified and listed in the Supplementary Conditions. The identification of those parties who are to be so listed should be by name (not genre). The listing required by GC-5.04.B.1 is separate from that required by GC-5.06.B; as each paragraph has its own separate function and legal consequence. While there may be many common names on each list, separate listings are considered good practice. Careful attention to the listing and understanding of the consequences of failing to include a person or entity on the list is important.

EJCDC has prepared a prototype letter from Engineer to Owner requesting instructions as to coverages and amounts of insurance to be provided by Owner and Contractor. See Engineer's Letter to Owner Requesting Instructions concerning Bonds and Insurance for Construction (No. C-051, 2001 Edition). In addition, Owner's Instructions to Engineer concerning Bonds and Insurance for Construction, (No. C-052, 2001 Edition), may prove to be a helpful guide to Owner and his insurance counselor. AIA's Certificate of Insurance, No. G705, is also a useful document.

The following is suggested language that may be used in preparing SC-5.04 after Owner's requirements have been determined. The suggested language relates directly to the provisions of GC-5.04.

SC-5.04 Add the following new paragraph immediately after Paragraph 5.04.B:

C. The limits of liability for the insurance required by Paragraph 5.04 of the General Conditions shall provide coverage for not less than the following amounts or greater where required by Laws and Regulations:

1. Workers' Compensation, and related coverages under Paragraphs 5.04.A.1 and A.2 of the General Conditions:

- a. State: Statutory
- b. Applicable Federal (e.g., Longshoreman's): Statutory
- c. Employer's Liability: \$ _____

2. Contractor's General Liability under Paragraphs 5.04.A.3 through A.6 of the General Conditions which shall include completed operations and product liability coverages and eliminate the exclusion with respect to property under the care, custody and control of Contractor:

- a. General Aggregate \$ _____
- b. Products - Completed Operations Aggregate \$ _____
- c. Personal and Advertising Injury \$ _____
- d. Each Occurrence (Bodily Injury and Property Damage) \$ _____
- e. Property Damage liability insurance will provide Explosion, Collapse, and Under-ground coverages where applicable.
- f. Excess or Umbrella Liability
 - 1) General Aggregate \$ _____
 - 2) Each Occurrence \$ _____

3. Automobile Liability under Paragraph 5.04.A.6 of the General Conditions:

- a. Bodily Injury:
 - Each person \$ _____
 - Each Accident \$ _____
- b. Property Damage:
 - Each Accident \$ _____
- c. Combined Single Limit of \$ _____

4. The Contractual Liability coverage required by Paragraph 5.04.B.4 of the General

Conditions shall provide coverage for not less than the following amounts:

- a. Bodily Injury:**
 - Each Accident** \$ _____
 - Annual Aggregate** \$ _____

- b. Property Damage:**
 - Each Accident** \$ _____
 - Annual Aggregate** \$ _____

5. [Here list additional types and amounts of insurance that may be required by Owner.]

6. [Here list by name (not genre) other persons or entities to be included on policy as additional insureds.]

The reference to a “combined single limit” for bodily injury and property damage will normally permit the insurance broker to negotiate the most advantageous arrangement for the insureds, and either alternative should be acceptable although the coverages provided may not be identical. Other variations are available.

SC-5.04.B.7 Duration of Certain Coverages

The provision in GC-5.04.B.7 for maintenance of completed operations insurance and any insurance written on a claims made basis for two years after final payment may not be appropriate in all cases and may be changed by amending language in SC-5.04.B.7.

SC-5.05 Owner’s Liability Insurance

GC-5.05 indicates that if Owner wishes to purchase liability coverage to protect Owner’s interests in addition to that required to be maintained by Contractor under GC-5.04, Owner, of course, may do so. Whether or not Owner wishes to purchase such coverage, Owner is required to be listed as an additional insured under Contractor’s general liability policy as provided in GC-5.04.B.1. Broader coverage will most likely be available if Owner obtains protective liability coverage in Owner’s name. It may be desirable to list Engineer and others as additional insureds on the Owner’s liability policy. However, their listing as additional insureds (as required by GC-5.04.B.1) on Contractor’s liability policy by blanket or special endorsement may also provide adequate protection. Satisfactory protection for Owner and Engineer may also be provided under a separate protective liability policy. After the arrangements have been clarified, appropriate language should be included as part of SC-5.05.

SC-5.06 Property Insurance

What has been said above about the necessity of the Owner obtaining the advice of an expert insurance counsel applies to property insurance as well as liability insurance, and the comments concerning the risks to Engineer of professing insurance expertise or providing insurance advice are equally applicable.

The General Conditions contemplate that the liability insurance will be provided by Contractor since, for the most part, Contractor is in control of the activities at the Site that might give rise to liability. In contrast, the property insurance is to be provided by Owner since, in most cases, Owner gets title to all of the Work as it is accomplished. There are two variations of this arrangement: one in which Owner purchases and maintains both liability and property insurance for the Project. The other (which is relatively common) is just the opposite -- Contractor is obligated to purchase and maintain both liability and property insurance.

The latter arises most frequently when the Work is done on property not owned by Owner (such as a pipeline), or where Contractor has complete control of a construction site that is physically removed from Owner’s other activities, or where the project is funded in whole or part by governmental grant or aid. These variations are quite complicated and must be studied carefully before being implemented. Any language to modify the standard language of the General Conditions should appear in the Supplementary Conditions and must be prepared with understanding and precision.

Assuming, however, that the customary arrangement for property insurance will apply, it is desirable for Owner to advise Contractor of the extent of the property insurance Owner will provide during construction and, in fact, in GC-2.01.B and 5.03, the parties are required to exchange information about the coverages obtained. Accordingly, Engineer’s request to Owner for instructions concerning required liability insurance coverages should also elicit the necessary information about the property insurance that Owner will provide. Once obtained, that information should be set forth in SC-5.04. The amount of insurance is established as the full replacement cost of the Work (subject to deductibles) which is usually different from the Contract Price, but Owner’s insurance counsel should make this determination.

The form of property insurance for construction is called “Builder’s Risk” and can be obtained on either a “completed value” or “reporting” form. The determination of which form is to be used and the perils to be covered should be made by Owner, and the decision reflected in SC-5.06. Builder’s Risk on the “all-risk” or open peril or special causes of loss policy form is required under GC-5.06.A.2, but it is well to bear in mind that despite their names such coverages do not extend to all types of risks. Therefore any special perils to be covered should be listed in SC-5.06.A.2. It should also be noted that an EJDC

survey found that unlike liability insurance, for which there is essentially one basic and truly “standard” policy, there are perhaps several dozen different policy forms for Builder’s Risk insurance. Owner’s insurance counsel should review the particular policy for application to the particular project, and Contractor (and its Subcontractors) should be advised in the Contract Documents of the extent of the exclusions so that they may obtain their own insurance protection against losses or risks not covered.

In certain manuscript type policies, coverage for damages resulting from faulty Work or design error may be available. This usually does not provide coverage for the cost of correction of the faulty Work or the design error.

Note that GC-5.06.A provides that the interests of Engineer (and possibly others) are to be included as additional insureds. Therefore, it will be necessary to specifically identify them (by name and not genre) in SC-5.06.A.1. Note that a listing of additional insureds under SC-5.06.A.1 is to be separate from and not confused with any listing under SC-5.04.B.1. Note also that since the listing of Engineer (and possibly others) as additional insureds is primarily aimed at eliminating possible subrogation rights of the insurers, such listing should not be considered by Engineer as a substitute for carrying adequate property insurance on its own property at the Site.

It is most important to include in the information furnished to Contractor and its Subcontractors the amount of any deductible provision to be included in Owner’s property insurance since GC-5.06.D states that they and not Owner will be responsible for all of their own losses within the deductible amount. If Owner is to be responsible for any loss suffered by Contractor or any Subcontractor within the deductible amount, the change should be accomplished in SC-5.06.D. On cost-plus and guaranteed maximum price contracts, the manner in which losses within the deductible amount are to be charged should be covered in SC-5.06.D if not covered elsewhere in the Contract Documents. If Contractor is to provide the property insurance, the different consequences to Owner and Contractor of any deductible provision should be analyzed and language to accomplish a pertinent change in GC-5.06.D should appear in SC-5.06.D as well as SC-11.01.A.5.f.

If Owner wants Contractor to provide the property insurance, a major revision of GC-5.06 will be required, and it will also be necessary to modify several other related paragraphs. The advisability of selecting this method for property insurance coverage is, of course, within Owner’s prerogative. If that approach is selected and if there are several prime contractors involved in the Project, the Supplementary Conditions must clearly indicate which of the several contractors is to maintain the property insurance and that the interests of each other contractor and its subcontractors are to be included. Under certain

circumstances, Builder’s Risk on the “all-risk” form of insurance may not be available for this sort of an arrangement. An alternative (possibly more costly) would be for each prime contractor to provide property insurance for the full replacement cost of its part of the Project.

If Contractor is to provide the property insurance and there are no other extenuating circumstances, the following language may be included to amend GC-5.06.A in its entirety:

SC-5.06.A. Delete Paragraph 5.06.A in its entirety and insert the following in its place:

A. Contractor shall purchase and maintain property insurance upon the Work at the Site in the amount of the full replacement cost thereof.

1. This insurance shall:

a. include the interests of Owner, Contractor, Subcontractors, Engineer and any other individuals or entities identified herein, and the officers, directors, partners, employees, agents and other consultants and subcontractors of any of them each of whom is deemed to have an insurable interest and shall be listed as an insured or additional insured;

b. in addition to the individuals and entities specified, include as additional insureds, the following:

1) [Here list by name (not genre) other persons or entities to be included on policy as additional insureds];

c. be written on a Builder’s Risk “all-risk” or open peril or special causes of loss policy form that shall at least include insurance for physical loss and damage to the Work, temporary buildings, falsework, and materials and equipment in transit and shall insure against at least the following perils or causes of loss: fire, lightning, extended coverage, theft, vandalism and malicious mischief, earthquake, collapse, debris removal, demolition occasioned by enforcement of Laws and Regulations, water damage (other than that caused by flood), and such other perils or causes of loss as may be specifically required by the Supplementary Conditions;

d. include expenses incurred in the repair or replacement of any insured

property (including but not limited to fees and charges of engineers and architects);

e. cover materials and equipment stored at the Site or at another location that was agreed to in writing by Owner prior to being incorporated in the Work, provided that such materials and equipment have been included in an Application for Payment recommended by Engineer;

f. allow for partial utilization of the Work by Owner;

g. include testing and startup; and

h. be maintained in effect until final payment is made unless otherwise agreed to in writing by Owner, Contractor and Engineer with 30 days written notice to each other additional insured to whom a certificate of insurance has been issued.

2. Contractor shall be responsible for any deductible or self-insured retention.

3. The policies of insurance required to be purchased and maintained by Contractor in accordance with this Paragraph SC-5.06.A shall comply with the requirements of paragraph 5.06.C of the General Conditions.

When SC-5.06.A is used, GC-5.06.E should be deleted.

In all cases, however, advice of Owner's insurance counsel is essential before finalizing the wording of any such changes. When Contractor is to provide the property insurance and GC-5.06.A is so amended, GC-5.06.B also may have to be amended correspondingly to indicate that such boiler and machinery insurance as is to be provided will be obtained by Contractor. In addition, changes may be necessary in GC-5.08 which provides that Owner may adjust property insurance losses and may receive and hold in trust amounts paid on account of losses. Changes may also be necessary in GC-5.07 and 5.09.

SC-5.06.B. Boiler, Machinery and Other Property Insurance

Note that GC-5.06.B provides that Owner will purchase and maintain any contractually or legally required boiler, machinery and other property insurance. Each such coverage should be listed in SC-5.06.B along with the additional insureds.

SC-5.07 Waiver of Rights

When an insurance carrier that has issued property insurance under GC-5.06 pays a claim for a loss that may have been caused by an entity other than the insured, it is possible that the insurer may wish to be subrogated to the rights of the party that suffered the loss. This means that the insurer "stands in the shoes" of the insured and may have the right to bring suit against a negligent party who may have caused the loss. It is the intent of GC-5.07 to preclude any such subrogation and suit by the property insurer against Owner, Contractor, Subcontractors, and any other parties indicated in the Supplementary Conditions (SC-5.06.A.1) as well as Engineer. It is believed that those parties are all involved in one way or another in the Work and such claims among them should be discouraged if for no other reason than the difficulty of identifying responsibility for errors. In addition, the insurer has in theory been paid a fair premium for the risks it insured. Depending upon the terms of each policy and the practice of each insurer, it may be necessary for each Subcontractor as well as others specifically listed as additional insureds in the project who are not parties to the Contract to sign formal written waivers. GC-6.06.G requires each subcontract to contain a waiver similar to that in the third sentence of GC-5.07.A. Once the exact manner in which these matters are to be handled has been resolved after consultation with Owner and its insurance counselor, detailed or supplemental requirements should appear in SC-5.07. Some insurance policies do not permit any waiver of rights and others permit it only by special endorsement to the insurer's prescribed form. In fact, under some Builder's Risk property insurance policies, the automatic waiver of rights contained in GC-5.07 may void the entire coverage. This is a particularly vexatious aspect of insurance coverage that had best be left to Owner's insurance counselor and must be addressed by specific endorsement on the policy.

Under GC-5.07.B Owner (and others) will have waived rights in respect of business interruption insurance so that if Owner wishes such coverage, separate coverage should be obtained by him.

Note that under GC-5.07.B.1 Owner is also required to waive rights in respect of property insurance on the Project maintained after final payment.

SC-5.08 Receipt and Application of Proceeds

If Contractor is to purchase the property insurance (see discussion and alternate language under SC-5.06), Owner's right to adjust insured losses and receive insurance moneys under GC-5.08 may not be appropriate. It would require separate negotiation with the insurance carrier. Any modification of GC-5.08 should be made in SC-5.08.

SC-5.09 Acceptance of Bonds and Insurance; Option to Replace

Attention is directed to the complementary provisions of GC-2.01.B, GC-5.03, and GC-5.09, which require Owner and Contractor each to furnish to the other and certain third parties appropriate evidence that the insurance each is required to purchase and maintain is in fact in effect. Any modification of this arrangement will require a change in GC-2.01.B as well as GC-5.09.

SC-5.10 Partial Utilization Acknowledgment of Property Insurer

Where it is anticipated that Owner will require temporary access to some parts of the Work prior to Substantial Completion for some special purpose (such as placing a part of the Work in operation before reaching Substantial Completion of the entire Work), appropriate arrangements must be made for endorsements on the property insurance policies (which normally do not permit split coverage) so that the interests of all parties are protected. If this is anticipated before start of construction, a provision to that effect should be included in SC-5.10 or SC-14.05.A.2, which are complementary. If Owner requires or the actual policy issued provides that the property insurance policy involved does not require a special endorsement in the event of Partial Utilization, an amendment of GC-5.10 and GC-14.05.A.2 should be made.

SC-6.03.A Services, Materials, and Equipment

The guidance of SC-6.02 also applies to GC-6.03. If there is to be any variation in or supplement to the requirements of this paragraph, it will probably be work-related and thus should be covered in the Specifications. The words “except as otherwise provided in the Contract Documents,” which appear twice in this paragraph, refer to information shown on the Drawings or requirements appearing in the Specifications. Note that a change in the last sentence of GC-6.03.C may necessitate a change in GC-3.03.A.2, where reference is made to Supplier’s instructions.

SC-6.05 Substitutes and “Or-Equals”

A distinction has been drawn between “or-equal” items and substitutes, both of which are permitted by GC-6.05 but under differing circumstances. In some projects, Contractor will only be allowed to propose “or-equal” items, and the more complex procedures for substitutions will be eliminated. This change should be accomplished in SC-6.05.

Attention is directed to Paragraph I-11, which states that the presumptive practice is that substitute or “or-equal” items will not be considered until both parties have signed the Agreement. If this concept is to be modified, the change

should be made in the Instructions with any required new language for GC-6.05 appearing in SC-6.05.

Procedures for submission, evaluation, and acceptance of “or-equal” or substitute materials or equipment beyond those of GC-6.05 should appear in the General Requirements.

SC-6.06 Concerning Subcontractors, Suppliers, and Others

While it is generally recognized that contractors should be entitled to employ individuals or entities of their own choosing, it is at times desirable for Owner and Engineer to retain a degree of control over Contractor’s selection of certain Subcontractors, Suppliers, and other individuals or entities (including those who are to furnish principal items of material and equipment) whom the Contractor proposes to employ for the Work. Paragraph GC-6.06 gives Owner and Engineer certain rights after the Effective Date of the Agreement to require Contractor to substitute acceptable Subcontractors, Suppliers, and others when those proposed or being used by Contractor are not acceptable to Owner and Engineer. If the acceptability of a Subcontractor, Supplier, or other individual or entity becomes an issue after the Effective Date of the Agreement, an adjustment in the Contract Price or Times may be appropriate to the extent attributable to any such change as provided in GC-6.06. These matters are discussed in I-12, in Bidding Procedures, and in EJCDC guidance documents.

Some Owners prefer to require that Bidders must qualify certain Subcontractors, Suppliers, and others prior to submission of Bids. This approach may not be available in public works projects and requires great care in drafting pertinent language, which should appear in I-12 (with possible supporting language in I-3 and I-19.04). Because there are many difficulties associated with prequalification within a limited time, such procedures should be accomplished well before Bids are solicited.

The more customary approach, which EJCDC endorses (see I-12), contemplates that prior to the opening of Bids there will be no acceptance of those Subcontractors, Suppliers, and others whose identity has been required by the Supplementary Conditions. However, within five days of the Bid opening and before the Notice of Award, the apparent Successful Bidder is required to identify certain Subcontractors, Suppliers, and others if such identification is required by the Supplementary Conditions. Paragraph SC-6.06 is the place where that requirement should appear, and all types of Work as to which such acceptance will be required should be listed there.

It is believed that the right to disapprove or reject Subcontractors, Suppliers or others proposed by Bidders is exercised infrequently and it should be exercised with appropriate supporting data, circumspectly, and cautiously.

On the other hand, there are many occasions when because of the peculiarities of a given project it will be important for Owner and Engineer to require the apparent Successful Bidder to so identify and for Owner and Engineer to have the right to reject any party so identified. Those Subcontractors, Suppliers, and others as to whom this right will apply must be listed in SC-6.06. Otherwise, the right will not exist, and the right to reject or to require employment of an acceptable Subcontractor, Supplier, or other organization may only be exercised after the Effective Date of the Agreement. Requiring the apparent Successful Bidder (or Contractor) to provide an acceptable substitute Subcontractor, Supplier, or other party may have an effect on the initial Bid or the Contract Price or Times depending upon the provisions of the Instructions and the General Conditions. Paragraph I-12 provides alternate approaches to the resolution of this problem. It is recognized that other approaches may be preferable for given projects. If the contract is to be negotiated rather than bid, the date by which acceptance of the listed Subcontractors, Suppliers, and other parties is to be obtained should be indicated in SC-6.06 and other changes made where necessary.

Any change in GC-6.06 should be made in SC-6.06; this might include language to detail under GC-6.06 the consequences of requiring a substitute for any Subcontractor, Supplier, or other party whose identity is not required by SC-6.06. I-12 is the location in which to deal with all rules and requirements in this regard that are applicable during the period prior to the Notice of Award. In cases where there will be clearance and approval both before and after the Notice of Award, it may be desirable to set forth all applicable rules and requirements in one place to avoid duplication; that place would be SC-6.06.

In some projects Owner may wish to limit the amount of Work that Contractor may subcontract to others. If there is to be such a restriction, it should appear in SC-6.06. Because multi-tiering of subcontracts may affect total Contract Price in cost-plus contracts, Owner may wish a restriction in that respect which would also appear in SC-6.06, but must be coordinated with language of SC-12.01.C.2.b.

Bear in mind the meaning assigned to the words "Subcontractor" and "Supplier" in GC-1 and see comment under SC-1 above.

Earlier editions of the General Conditions specifically permitted Owner or Engineer to furnish to Subcontractors, Suppliers or others information as to the amounts paid by Owner on account of Work done. If it is anticipated that Owner or Engineer may want to or in fact will furnish such information, it would be wise to supplement GC-6.06.C through GC-6.06.E by the addition of a subparagraph that might read as follows:

SC-6.06 Add a new paragraph immediately after Paragraph 6.06.G:

H. Owner or Engineer may furnish to any Subcontractor or Supplier, to the extent practicable, information about amounts paid to Contractor on account of Work performed for Contractor by a particular Subcontractor or Supplier.

The requirement in respect of waivers contained in GC-6.06.G relates to the subject matter considered under GC-5.07 and SC-5.07. A change in GC-5.07 may also necessitate a change in GC-6.06.G, which should be accomplished in SC-6.06.G.

SC-6.08 Permits

Paragraph GC-6.08 refers specifically to the inclusion in the Supplementary Conditions of possible additional information about obtaining permits and licenses. Use SC-6.08 to modify GC-6.08 when Owner prefers or is required to obtain these permits and to list information known to Owner about permits that will be required. Where there is more than one prime Contractor, the responsibility under GC-6.08 should specifically be assigned to one or more Contractors. All such provisions should be included in SC-6.08.

SC-6.09 Laws and Regulations

Frequently, when there is governmental funding of a project, the granting or lending agency requires that the Contract Documents contain actual language from or reference to certain legal or regulatory requirements applicable to the conditions or performance of the Work. It is unwise to include specific reference to a particular Law or Regulation when that is not required since such reference creates an implication that the requirement to "comply with all Laws and Regulations applicable to the performance of the Work" means less than it says. Thus, a specific requirement to comply with a particular Law or Regulation is not desirable unless there is a provision in the Law or Regulation mandating inclusion of specific language in the Contract Documents.

Although mandated legal provisions are occasionally added as appendices to the Supplementary Conditions, it is considered better practice (and consistent with the CSI Project Manual format) to include the required language in a separately numbered article of the Supplementary Conditions. These may be reproductions of the prescribed language. The types of information to which these comments apply include:

- Certification of Equal Employment Opportunity
- Labor Standards Provisions
- Minimum Wage Rates

Certification of Non-Segregated Facilities
Minority Business Enterprises
Women's Business Enterprises
Disadvantaged Business Enterprises
Affirmative Action Contract Compliance
Requirements
Value Engineering Incentives
Statutory Declarations

Assistance in identifying the applicable provisions should be obtained from Owner's attorney.

There are times when Engineer will agree to monitor Contractor's compliance with certain Laws or Regulations. This arises most frequently with respect to compliance with local building codes, the Davis-Bacon Act (on Federally-assisted construction), equivalent state prevailing wage rates, or safety regulations applicable to performance of the Work where Engineer possesses special expertise qualifying Engineer for the assignment. Such an undertaking would require an amendment of O-E Exhibit A because this is not a responsibility customarily assumed by Engineers. It would also require an amendment of the General Conditions which should appear at SC-9, where matters pertaining to Engineer's status are dealt with. If the monitoring activities pertain to compliance with safety regulations, GC-6.13 will have to be amended in SC-6.13 and, depending on the nature of the undertaking, other provisions of the General Conditions may need changing. If the monitoring activities pertain to financial matters, provisions of GC-14 will probably require changes which should appear in SC-14. If such monitoring duties are to be performed for Owner by a party other than Engineer (such as Owner's Site representative, a construction manager, a special safety engineer, or a party with responsibility to coordinate the Work and activities of the various prime Contractors), comparable changes would be required in GC-6.09 and probably other provisions of the General Conditions (especially GC-8, and also GC-9 to explain the interrelationships between that party and Engineer). These should appear in the Supplementary Conditions with comparable changes in the Owner-Engineer Agreement.

SC-6.10 Taxes

If Owner qualifies for a state or local sales tax exemption in the purchase of certain materials and equipment, appropriate language in this respect should be prepared by Owner's attorney and included in SC-6.10. There should also be a cross reference to SC-6.10 in the Instructions or the suggested language of the Instructions should be supplemented as indicated in I-22. Suggested language for SC-6.10 is:

SC-6.10 Add a new paragraph immediately after Paragraph 6.10.A:

B. Owner is exempt from payment of sales and compensating use taxes of the [State] and of cities and counties thereof on all materials to be incorporated into the Work.

1. Owner will furnish the required certificates of tax exemption to Contractor for use in the purchase of supplies and materials to be incorporated into the Work.

2. Owner's exemption does not apply to construction tools, machinery, equipment, or other property purchased by or leased by Contractor, or to supplies or materials not incorporated into the Work.

SC-6.13 Safety and Protection

Where the Work is to be performed on a multi-prime construction contract basis, the responsibility for coordinating the safety programs of the various Contractors and Subcontractors must be clearly delineated as indicated in SC-7.02 See also comments at SC-6.09, last paragraph.

SC-6.15 Hazard Communication Programs

Any change or addition to the provisions of GC-6.15 which is responsive to Laws or Regulations should appear in SC-6.15.

SC-6.17 Shop Drawings and Samples

The provisions of GC-6.17 set forth the fundamental relationships between the parties as to review and approval of Shop Drawing and Sample submittals. They are so basic to the duties and responsibilities of those involved that the printed language should be changed rarely, and if changed at all, it should be done with the advice of counsel. Any such change should be made in the Supplementary Conditions. There are, however, many strictly procedural aspects of the Shop Drawing and Sample submittal, review, and approval process that require further amplification (viz., number of copies, address where submittals are to be sent); all language to that effect should appear in the General Requirements.

At times a review may by agreement be for a narrower purpose than indicated in GC-6.17 (Also see GC-6.21). In addition, some firms, regardless of the extent of the review, are reluctant to "approve" Shop Drawing and Sample submittals (see discussion in the EJCDC User's Guide and Focus on Shop Drawings, (No. 1910-9C, 1985 Edition). If any wording other than that contained in GC-6.17 is to be used to describe Engineer's responsibility with respect to Shop Drawing and Sample submittals, it should appear in SC-6.17 as an amendment of GC-6.17 (also see GC-6.21). The language of GC-6.17 is closely coordinated with the

description of Engineer's duties in EJCDC's Owner-Engineer Agreement, and a change in one will probably necessitate a change in the other.

Reviews of multiple resubmissions of shop drawings and other submittals may use an inordinate amount of Engineer's budget. To mitigate this, the following language may be used:

SC-6.17 Add the following new paragraphs immediately after Paragraph 6.17.E:

F. Contractor shall furnish required submittals with sufficient information and accuracy in order to obtain required approval of an item with no more than three submittals. Engineer will record Engineer's time for reviewing subsequent submittals of Shop Drawings, samples or other items requiring approval and Contractor shall reimburse Owner for Engineer's charges for such time.

G. In the event that Contractor requests a substitution for a previously approved item, Contractor shall reimburse Owner for Engineer's charges for such time unless the need for such substitution is beyond the control of Contractor.

SC-6.20 Indemnification

If the language of the General Conditions with respect to indemnification is to be changed, the change should be made by SC-6.20. The laws of many states apply to these provisions, and consultation with an attorney is important before any modification is undertaken.

SC-6.2 Delegation of Professional Design Services

The purpose of new GC-6.21 is to clarify the duties and responsibilities of the parties to the Contract and their respective representatives when a portion of the professional design services for a project is delegated by Owner and Engineer to Contractor. Although controversial, design delegation has been around for decades, it is constantly occurring in practice (increasingly so with the increasing use of the design/build project delivery system) and EJCDC believes that it is time to deal with that reality.

In seeking an acceptable approach to the issue of delegation of design services, the New York State Education Department's Board of Requests, in 1996, adopted a rule to the effect that design professionals will not be considered to be engaged in "unprofessional conduct" if they delegate work involving the performance of a design function requiring a professional license. Under this rule, a design professional can delegate such design functions through an intermediate entity (a contractor) that is not licensed to provide design services. However, said delegated design

functions must be performed by a licensed design professional either retained by, or employed by, the Contractor. Simultaneously with the adoption of the above rule, the State Education Department formed an industry advisory council to include all parties having an interest in the implementation of the rule, including licensed design professionals, contractors and subcontractors. The output of the advisory council was a guidance document for use by all parties to effectively implement the aforementioned rule. Paragraph GC-6.21 essentially follows the intent of the New York State guidance document.

EJCDC believes that the procedures specified in GC-6.21 fairly allocate the duties and responsibilities of the parties and their respective representatives with regard to design delegation but cautions that a review of local licensing requirements should be made. Changes, if any, in those duties and responsibilities would be made in SC-6.21.

SC-7.01 Related Work at Site

Frequently, Work at the Site is to be performed by more than one prime Contractor or by Owner or a utility company. This fact should be specifically noted in the Contract Documents so that when submitting a price quotation, each Bidder can take into consideration the problems of relating to others at the site. SC-7.01 is an appropriate place to provide such information; if it is to appear elsewhere, I-4.06 would have to be changed. If the contractual arrangements between Owner and the separate prime Contractors will not be basically similar, this should also be noted. The importance of such similarity is illustrated by the last sentence of GC-7.01.B, which is discussed in SC-7.03 below.

SC-7.02 Coordination

Coordination of the Site activities of the various prime Contractors is a most complicated matter and one fraught with legal exposure. At times, Owner will undertake this responsibility either with Owner's own personnel or by employing a construction manager or construction coordinator. Frequently, the assignment of construction coordinator is given to one of the prime Contractors (but this may be prohibited by law in some states) or to a separate party with construction expertise. GC-7.02 requires a statement in SC-7.02 identifying the construction coordinator; otherwise, the necessary authority and all associated responsibilities will rest solely with Owner. It is suggested that the designated party be referred to and defined as the "construction coordinator," which is the practice followed in this Guide. The extent of the construction coordinator's authority and responsibility (whether it be Owner or some other party) must be explained with precision so that the various parties affected thereby and who may place reliance thereon will be fully advised.

The extent to which the construction coordinator is to have control over the construction process should be addressed since the right to control leads to broad legal responsibilities for the controlled activities. Very few construction coordination or construction management arrangements are the same, but the Supplementary Conditions should address in detail the authority and responsibility of the construction coordinator in respect of safety precautions and procedures at the Site (GC-6.13 and 6.16), obtaining permits (GC-6.08), monitoring compliance with Laws and Regulations applicable to the performance of the Work (GC-6.09), establishing quality control procedures and rejecting defective Work (GC-9.05), monitoring compliance with various schedules applicable to performance of the Work (GC-2.05, GC-2.07, and GC-6.04), review and approval of submittals (GC-6.05 and GC-6.17), property insurance (GC-5.06), keeping the Site clean during construction (GC-6.11), coordinating tests and inspections (GC-13.03), review of Applications for Payment (GC-14), use of temporary construction facilities (GC-6.11), scheduling purchase and delivery times (GC-2), scheduling and coordinating the activities of the various Contractors at the Site (GC-7), and any number of other matters usually included as Contractor's responsibilities under the General Requirements, as well as the General Conditions.

SC-7.03 Legal Relationships

The purpose of GC-7.03 is to clarify the status of utility owners not under control of Owner. An additional purpose is to make each contractor that has a direct contract with the Owner a third party beneficiary of every other contractor having direct contract with Owner.

SC-7.04 Claims Between Contractors

When several prime contractors are working at the Site, claims often arise among them. Contractors are required to work together for the benefit of the completed Project (see GC-7.01). GC-7.01 states that this obligation to cooperate is expressly made by each contractor for the benefit of the other contractors. Accordingly, if one contractor has a claim against another, it is appropriate that they settle it between themselves and not include Owner or Engineer in the dispute because neither Owner (except where Owner performs the coordinating functions) nor Engineer has direct involvement with the construction process or authority or control over the construction activities and might have had nothing to do with the cause of the dispute. Many jurisdictions do not allow such a suit by one contractor against another because there is no contract between them (i.e., a lack of privity). To overcome this, the last sentence of GC-7.01.B expressly states that the obligation to cooperate is made for the benefit of other contractors who are similarly situated. Under such

circumstances, the contractors involved will have access to the courts to settle the differences between them, and it will no longer be necessary to bring suit against Owner or Engineer in order to get at or reach another contractor. In these situations and as a complement to the last sentence of GC-7.01.B it has proven helpful to include a provision precluding suit by one prime contractor against the Owner or Engineer because of the action or inaction of another contractor. Where an independent construction coordinator may be considered a "professional" construction manager who has no financial involvement in or control over the construction or activities and is merely functioning as Owner's administrative coordinator, the same would apply.

Because the construction coordinator's functions are frequently more in the nature of scheduling, coordination, and general construction activities as contrasted with giving Owner greater confidence that the completed project will conform to the overall design, these coordinating activities will most likely be provided by one with construction experience. That party will probably have a financial commitment or exposure vis-a-vis the Contract Price and such a degree of responsibility at the Site or participation in the construction process as to be considered as having control over the activities of various other contractors. Under such circumstances, it would not be appropriate to preclude suit against the construction coordinator in which case all reference to the construction coordinator should be stricken from the suggested language. Where the coordinating functions are undertaken by Owner, much of the suggested language would be inappropriate, and extensive revision of the paragraph would be needed.

Language for this purpose may be included as SC-7.04. Suggested language for SC-7.04 is:

SC-7.04 Add the following new paragraph immediately after paragraph GC-7.03:

SC-7.04 Claims Between Contractors

A. Should Contractor cause damage to the work or property of any other contractor at the Site, or should any claim arising out of Contractor's performance of the Work at the Site be made by any other contractor against Contractor, Owner, Engineer, or the construction coordinator, Contractor shall promptly attempt to settle with such other contractor by agreement, or to otherwise resolve the dispute by arbitration or at law.

B. Contractor shall, to the fullest extent permitted by Laws and Regulations, indemnify and hold harmless Owner, Engineer, the construction coordinator and the officers, directors, partners, employees, agents and other consultants and subcontractors of each and any of them from and

against all claims, costs, losses and damages (including, but not limited to, fees and charges of engineers, architects, attorneys, and other professionals and court and arbitration costs) arising directly, indirectly or consequentially out of any action, legal or equitable, brought by any other contractor against Owner, Engineer, Engineer's Consultants, or the construction coordinator to the extent said claim is based on or arises out of Contractor's performance of the Work. Should another contractor cause damage to the Work or property of Contractor or should the performance of work by any other contractor at the Site give rise to any other Claim, Contractor shall not institute any action, legal or equitable, against Owner, Engineer, or the construction coordinator or permit any action against any of them to be maintained and continued in its name or for its benefit in any court or before any arbiter which seeks to impose liability on or to recover damages from Owner, Engineer, or the construction coordinator on account of any such damage or Claim.

C. If Contractor is delayed at any time in performing or furnishing Work by any act or neglect of another contractor, and Owner and Contractor are unable to agree as to the extent of any adjustment in Contract Times attributable thereto, Contractor may make a Claim for an extension of times in accordance with Article 12. An extension of the Contract Times shall be Contractor's exclusive remedy with respect to Owner, Engineer, and construction coordinator for any delay, disruption, interference, or hindrance caused by any other contractor. This paragraph does not prevent recovery from Owner, Engineer, or construction coordinator for activities that are their respective responsibilities.

SC-8 Owner's Responsibilities

Note that much of GC-8 involves cross referencing to other paragraphs of the General Conditions. If a referenced paragraph is changed, a change in GC-8 will be required and should be accomplished in SC-8. If Owner undertakes responsibilities customarily assigned to Engineer or employs its own site representative or a special inspector to monitor compliance with safety regulations or an accountant to audit applications for payment, these would be addressed by supplemental language in SC-8.

Whenever Owner's responsibilities are changed from those normally undertaken, it is important to review and probably make complementary modifications in Engineer's responsibilities, especially the various specific paragraphs of GC-9 and related paragraphs wherein Engineer's functions are described, such as GC-6.16, GC-6.17, GC-6.21, GC-8.01, GC-8.02, GC-13.04, GC-14.02, GC-14.04, and GC-14.07. The necessity of corresponding changes in the Owner-Engineer Agreement should also be considered.

If Owner functions as construction coordinator of the activities of several prime contractors (see GC-7.02), the language of GC-8.09 will have to be amended.

SC-8.11 Evidence of Financial Arrangements

Any requirements for furnishing financial data that Owner will be required to provide are to be set forth in SC-8.11 as indicated in GC-8.11. If the requirement is to apply after the Effective Date of the Agreement, general language similar to the following might be used:

SC-8.11 Add the following new paragraph immediately after Paragraph 8.11.A:

B. On request of Contractor prior to the execution of any Change Order involving a significant increase in the Contract Price, Owner shall furnish to Contractor reasonable evidence that adequate financial arrangements have been made by Owner to enable Owner to fulfill the increased financial obligations to be undertaken by Owner as a result of such Change Order.

SC-9 Engineer's Status During Construction

At times, Owner will not wish Engineer to perform the customary services during construction, and this will usually be reflected in the Owner-Engineer Agreement. The terms and conditions of GC-9 follow very closely those of the Standard Form of Agreement between Owner and Engineer for Professional Services, (No. E500, 1999 Edition). Accordingly, a change in one would necessitate a change in the other. Such a change in the General Conditions should be made in the Supplementary Conditions. It may be that Engineer's duties during construction are expanded (viz. by inclusion of certain types of services listed as additional services in the Owner-Engineer Agreement or for reasons discussed under SC-6.09, SC-7.02, and SC-8 above); here again the supplementing language should appear in the Supplementary Conditions.

If Engineer is not engaged by Owner to perform customary construction phase services as contemplated by EJCDC documents, certain changes in the customary three-party relationship between Owner, Contractor, and Engineer will arise. This will be particularly true when a construction coordinator or construction manager is employed to provide coordination services under GC-7.02. Legal counsel should be consulted before finalizing any language to modify either the Owner-Engineer Agreement or any provisions of the General Conditions in this regard. See also comments at SC-7.02.

SC-9.03 Project Representative

Provisions concerning representation at the Site, whether by Owner's employee (sometimes called the Owner's Site representative), or by Engineer's employee (usually referred to as the Resident Project Representative), or by a construction coordinator or construction manager are to appear in the Supplementary Conditions. It is important to set forth clearly the extent of the responsibilities and authority of the persons at the Site as well as any limitations thereon, not only as they affect Engineer and Contractor but also as between themselves if more than one is to be involved. This information should be included in SC-9.03. EJCDC has prepared a form entitled "Duties, Responsibilities, and Limitations of Authority of Resident Project Representative" (No. E500, 1999 Edition Exhibit D)), which may be used as a guide in preparing the Resident Project Representative's instructions. Responsibilities and instructions of the Owner's Site representative or a construction coordinator or construction manager are to appear in other paragraphs of the Supplementary Conditions as discussed above (see especially SC-7 and 8), and all provisions of GC-9 should be carefully coordinated with those supplementing paragraphs.

Note that the EJCDC Owner-Engineer Agreement presumptively provides that a Resident Project Representative will be furnished by Engineer (and paid for by Owner) as part of Basic Services. Owner-Engineer agreements also should define whether the Resident Project Representative will be on the Site full or part time. Where a Resident Project Representative is to be provided, GC-9.03 should be clarified by SC-9.03 with a description of the Resident Project Representative's duties and responsibilities and whether presence will be full or part-time.

If an independent contracting party is hired by Engineer to serve as a Resident Project Representative, it will be necessary to include that party as an additional insured on Contractor's general liability insurance policy (see SC-5.04.C.5) and Owner's property insurance policy (see GC-5.05.A.1).

SC-10 Changes in the Work; Claims

The difference between "Claim" and "claim" must be recognized and care taken as to their proper use. The term "Claim," as defined in GC-1.01.A.10, establishes the word as a noun denoting an actual demand or assertion (made by Owner or Contractor), whereas "claim" (which would encompass any demands for money or services asserted by third parties) should be used as a verb implying action taken.

Note that in all matters that are submitted to Engineer for decision under GC-9.07 and GC-9.08, Engineer's decision becomes final and binding under GC-10.05 unless Owner

or Contractor invoke the dispute resolution procedure set forth in Article 16 within 30 days of Engineer's decision. These provisions do not apply to Claims and disputes that are not to be first submitted to Engineer for a written decision.

If it is desired to change the time limitations with respect to filing and supporting Claims, this should be accomplished in SC-10.05.

SC-11.01 Cost of the Work

If there are changes in the method of determining the Cost of the Work, such changes should be made in SC-11.01. If there are changes in GC-12.01.C., the amount of Contractor's fee as well as the percentage to be used for progress payments will appear in the Agreement (see Articles 7 and 10 of EJCDC Cost Plus Agreement (No. C-525, 2001 Edition) and in GC-12, and should not be included in the Supplementary Conditions.

Rental costs often raise problems and can lead to disagreements, particularly with respect to Contractor owned equipment. If the Project includes the use of a significant amount of equipment, language similar to the following should be considered:

SC-11.01.A.5.c, Delete Paragraph 11.01.A.5.c in its entirety and insert the following in its place:

c. Construction Equipment and Machinery:

1. Rentals of all construction equipment and machinery, and the parts thereof in accordance with rental agreements approved by Owner with the advice of Engineer, and the costs of transportation, loading, unloading, assembly, dismantling, and removal thereof. All such costs shall be in accordance with the terms of said rental agreements. The rental of any such equipment, machinery, or parts shall cease when the use thereof is no longer necessary for the Work.

2. Costs for equipment and machinery owned by Contractor will be paid at a rate shown for such equipment in the [Use rate book appropriate for the Project]. An hourly rate will be computed by dividing the monthly rates by 176. These computed rates will include all operating costs. Costs will include the time the equipment or machinery is in use on the changed Work and the costs of transportation, loading, unloading, assembly, dismantling, and removal when directly attributable to the changed Work. The cost of any such equipment or machinery, or parts thereof, shall cease to accrue when the use thereof is no

longer necessary for the changed Work. Equipment or machinery with a value of less than \$1,000 will be considered small tools.

SC-11.02 Allowances

Paragraph GC-11.02 has been expanded to also include provisions for an Owner's contingency allowance that would be shown on the Bid Form and included as a part of the Contract Price. Usually it is not necessary to modify the provisions of GC-11.02, but a schedule of the cash allowances with particular reference to the applicable sections of the Specifications should appear in the General Requirements, and the specific allowances should be set forth in the applicable sections of the Specifications. Details as to Bid pricing requirements on base Bid alternatives, cash allowances, unit prices, and acceptable combinations should be set forth in I-14.

SC-11.03 Unit Price Work

Unit prices provide an effective and equitable tool for dealing with the matter of quantities of certain Work that cannot be determined in advance of its performance. Unit prices can be used as additional items on a lump sum contract (such as a fixed or biddable unit price for each cubic yard of rock excavated), in which case the total Contract Price would be dependent on the lump sum and the finally determined unit prices. Frequently, the entire Contract will be composed of unit price items, which is common practice for utility and highway projects. The same principles are applicable in either case. Bid forms frequently contain estimated quantities for each unit price item. See EJCDC Suggested Bid Form for Construction Contracts (No. C-410, 2001 Edition). These estimated quantities serve two purposes: 1) to give all Bidders a uniform basis for planning their work, and 2) to provide a uniform basis for the comparison of Bids. Variations between the estimated and the actual quantities encountered during the Work can be expected and are unavoidable. GC-11.03.D provides for adjustment in unit prices when the actual quantity of the Work performed "differs materially and significantly from the estimated quantity." This paragraph recognizes that engineering judgment must be used in administering the construction contract. In some cases, an overrun or underrun in the quantity of a unit price item can have a significant impact on the Contractor.

Because of the difficulty in reaching agreement after the fact on what may be "material and significant," some Engineers and Owners prefer to provide in the Contract Documents that reevaluation of a unit price will be made if the quantity actually encountered varies by more than a fixed percentage (usually somewhere between 15 and 25 percent) from the estimate. Some Engineers and Owners also prefer to limit the reevaluation of unit prices to items that have a significant value in relation to the total Contract

Price (such values may range from 5 to 10 percent). To provide for such reevaluations, the following paragraph may be used:

SC-11.03.D Delete Paragraph 11.03.D in its entirety and insert the following in its place:

C. The unit price of an item of Unit Price Work shall be subject to reevaluation and adjustment under the following conditions:

- 1. if the Bid price of a particular item of Unit Price Work amounts to _____ percent or more of the Contract Price and the variation in the quantity of that particular item of Unit Price Work performed by Contractor differs by more than _____ percent from the estimated quantity of such item indicated in the Agreement; and**
- 2. if there is no corresponding adjustment with respect to any other item of Work; and**
- 3. if Contractor believes that Contractor has incurred additional expense as a result thereof or if Owner believes that the quantity variation entitles Owner to an adjustment in the unit price, either Owner or Contractor may make a Claim for an adjustment in the Contract Price in accordance with Article 10 if the parties are unable to agree as to the effect of any such variations in the quantity of Unit Price Work performed.**

SC-12 Change of Contract Price; Change of Contract Times

If it is desired to change the time limitations with respect to filing and supporting claims for a change in the Contract Price or the Contract Times, this should be accomplished in SC-10.05. See comments at SC-2.03HOLD concerning completion time for Milestone events.

SC-12.01 Change of Contract Price

Changes should be made by SC-12.01 if it is desired to change the provisions for determination of Contractor's fee for cost-plus or Change Order work, or the amount allowable to Contractor or Subcontractor for overhead and profit on cost-plus Work, or the precedence of methods for determination of an adjustment in the Contract Price. The procedure in GC-12.01.C.2 establishing Contractor's fee for overhead and profit when there are several tiers of Subcontractors allows a 15 percent fee to the party actually performing the Work involved and a five percent fee to Contractor and each Subcontractor in the tiers above the one actually performing the Work. The five percent fee should be calculated on all amounts paid for Cost of the

Work and overhead and profit of all Subcontractors in lower tiers.

An example of how the procedure works is:

Cost of Work Performed or Furnished by Sub-Subcontractor	\$10,000.00
Sub-Subcontractor's Fee (15%)	<u>\$ 1,500.00</u>
Total Cost Paid by Subcontractor to Sub-Subcontractor	\$11,500.00
Subcontractor's Fee (5%)	<u>575.00</u>
Total Cost Paid by Contractor to Subcontractor	\$12,075.00
Contractor's Fee (5%)	<u>603.75</u>
Total Cost of Work Plus Fee	\$12,678.75

Any change in this procedure or any restriction on tiering of subcontracts because of the effect of GC-12.01.C.2 should appear in SC-12.01.C.2 and be coordinated with language in SC-6.06.

It should be noted that in certain circumstances the specified fee may not be applicable, in which case special provisions in respect of such Work should be added in SC-12.01.C.2 to address the special situation.

SC-13.03 Tests and Inspections

If the arrangements in GC-13.03.B with respect to inspections, tests, and payment therefore are to be changed, the change should appear in the Supplementary Conditions. Detailed requirements as to any test should be included in the appropriate Specification. The tests referred to in GC-13.03.B are acceptance and similar tests of items furnished by Contractor, Subcontractors, and Suppliers and are customarily called for in Divisions 2-16 of the Specifications.

If Owner requires Engineer to certify as to compliance with any test or inspection standard before acceptance of any Work, changes should be made in SC-13.03 and in SC-9 as to Engineer's duties. The additional specific condition for payment should appear in the General Requirements. Customary conditions precedent to payment appear in GC-14.02.B.5 (see discussion below).

If inspectors or testing laboratories are also to be acceptable to Engineer, this should be provided in SC-13.03.C.

SC-13.07 Correction Period

Any change in the language of GC-13.07 should be made in the Supplementary Conditions. On the other hand, a requirement that Contractor furnish special guarantees of materials or equipment is to appear in the General Requirements or in an appropriate section of the Specifications. Note the language of GC-6.03.B about special warranties and guarantees running for the benefit of Owner. Legally effective warranties and guarantees are difficult to draft; the advice of Owner's attorney is suggested. It is well to bear in mind that GC-13.07 does not contain a guarantee. Contractor's general warranties and guarantees appear in GC-6.19 and GC-14.03 as supplemented by remedies provided by Laws and Regulations. Special guarantees are usually provided in response to GC-6.05.D or are specified in Divisions 2-16 of the Specifications. Also, GC-13.07 is not a limitation of Contractor's liability, rather it provides an additional remedy available to Owner; this is explained in GC-17.03. GC-17.04 explains that this remedy survives final payment, completion, and acceptance of the Work, or termination or completion of the Contract or termination of the Contractor's services.

SC-14 Payment to Contractor and Completion

The terms of the understanding between Owner and Contractor as to Contract Price or Times, the basic provisions as to payment, provisions as to guaranteed maximum price, sharing of cost savings or incentive compensation, provisions for liquidated damages, and provisions as to retainage (including changes thereof upon partial satisfactory completion, federal, state or local requirements in respect thereof and other arrangements in lieu of retainage), all belong in the Agreement (see Suggested Forms of Agreement between Owner and Contractor (Nos. C-520 and C-525, 2001 Editions) and not in the Supplementary Conditions. If the terms of GC-14 are to be changed, the change should be made in the Supplementary Conditions. Language to further expand what is set forth in GC-14 to include additional details for the processing of applications for payment or the contents thereof should appear in the General Requirements. (See generally the Locator Guide (No.1910-16, 1995 Edition).

SC-14.01 Schedule of Values

Any change in requirements with respect to the schedules of values should appear in SC-2.05 and 2.07 or in the General Requirements. Note that GC-2.07 provides that the schedule of values must be finalized before submission of the first Application of Payment.

SC-14.02.A Applications for Payments

Paragraph GC-14.02.A requires that Contractor's Applications for Payments be supported by "such documentation as is required by the Contract Documents."

Some forms of General Conditions currently in use add the requirement “and also as Engineer may reasonably require,” as did earlier editions of EJCDC’s General Conditions. Owners frequently expect the Applications for Payments will be accompanied by various supporting data while Engineers and Contractors have other ideas. It is important to clarify for all three parties what supporting documents will be required. Language for this purpose may appear in SC-14.02 or in the General Requirements. (See also comment at SC-14.07.A). Note also that EJCDC provides in A.1.05.14.b of Exhibit A of the Owner-Engineer Agreement that it is not a customary responsibility of Engineer to furnish auditing services to give Owner assurance as to how or for what purpose Contractor has used monies paid on account of Work performed.

SC-14.02.B Review of Applications

GC-14.02.B provides that Contractor’s Applications for Payments will be acted upon by Engineer within ten days, and GC-14.02.C provides that within ten days after presentation of the Application and Engineer’s recommendation to Owner, the recommended amount will become due and payable. Any change in the time period required for Owner’s review and action on the Application should be made in SC-14.02.C. Provisions for the payment of interest on monies not paid when due are included in the Agreement (see Paragraph 7.01 of C-520 and Paragraph 11.02 of C-525). If these provisions are to be changed, the changes should be made in the Agreement and not in the Supplementary Conditions or the General Requirements.

The usual conditions precedent with which Contractor must comply before being entitled to payment or, to put it another way, the reasons justifying withholding a requested payment from Contractor are itemized in GC-14.02.B.5. Although not recommended by EJCDC, many Owners and Engineers include as one of these conditions or reasons Contractor’s “failure to make payment to Subcontractors or Suppliers or for labor.” (See also discussion under SC-6.06). Another condition frequently included is a provision permitting withholding of payment in an amount equal to any additional compensation Owner is required to pay Engineer because of Contractor delays or rejection of defective Work. At times it is provided that payments may be withheld because of Contractor’s failure to make acceptable submittals in accordance with the accepted schedules (see GC-2.07).

SC-14.04 Substantial Completion

For some projects, it may help to avoid disputes between Owner and Contractor if it is stated that certain specific items of the Work must be, or need not be, fully completed at the time of Substantial Completion. This may be accomplished in SC-14.04 by adding language to expand

GC-14.04.A to list certain principal items that must be ready for continuous service by Owner, or to list such items as fencing, landscaping, or signage, the completion of which may not be a requirement for Substantial Completion (See comments under SC-1.01.A.45 above concerning definition of “Substantial Completion” and also comments at SC-6.12.)

SC-14.05 Partial Utilization

Provisions are made in GC-14.05 for Owner to utilize a substantially completed part of the Work, which has been specifically identified in the Contract Documents, prior to Substantial Completion of all the Work. The description or limits of the Work to be so utilized should be set forth in the General Requirements with supplementary work-related details covered in the Specifications. When the early acceptance of a substantially completed part of the Work is accomplished in this matter, EJCDC recommends that consideration be given to starting the correction period (see GC-13.07) for that part of the Work at the time of Substantial Completion of that Work. In such a case, Owner may wish the correction period to run for more than the customary one year. Similarly, the time period of any special guarantee applicable to that part of the Work might commence to run on the date of Substantial Completion of that part of the Work. Also to be considered is the period of time after Substantial Completion of a finished part of the Work during which any Performance Bond will be applicable to that part of the Work. If the understanding is clear at the time when the Agreement is signed, the change with respect to the correction period should appear in SC-13.07 or in the portion of the Contract Documents where the part of the Work that may be so utilized is identified (with a cross reference in SC-13.07). Otherwise, it can be negotiated and accomplished by agreement at the time of Substantial Completion of the finished part of the Work.

SC-14.07 Final Payment

Paragraph GC-14.07.A.2, like GC-14.02.A.1, requires that Contractor’s final Application for Payment “be accompanied by all documentation called for in the Contract Documents.”(See discussion at SC-14.02.A It is important that Owner, Contractor, and Engineer know in advance what will be required and that all the documentation that Owner will require be listed in advance in the Contract Documents. Language for this purpose should appear in SC-14.07 or in the General Requirements.

SC-16 Dispute Resolution

On occasion, Owner or Contractor may disagree with Engineer’s decision on a Claim. GC-16 provides one path for further review and resolution -- Mediation. If mediation does not resolve the Claim, Engineer’s decision or denial becomes final in 30 days unless Owner or Contractor elects

to use any Supplementary Condition procedure, or agrees with the other party to use another procedure, or gives notice of intent to sue.

In recent years, a number of dispute resolution processes and procedures have evolved and have been used successfully in the resolution of construction contract disputes. Collectively these are termed Alternative Dispute Resolution “ADR” methods. Among the more widely used are:

Mediation
Third-Party Neutral Evaluation
Step Negotiations
Mini-Trial
Disputes Review Board
Advisory Arbitration

All of the above methods are non-binding. As compared to binding arbitration or litigation, these methods are more economical, relatively informal, and require less time. Also, they have a high resolution rate.

There are two forms of binding dispute resolution that have long been used. Litigation of course is the “default” if no method is selected. However, mandatory and binding arbitration has also been widely used for construction disputes. From the above list, it can be seen that there could be a host of combinations or sequences of dispute resolution. The suggested Supplementary Conditions that follow were drafted to include one non-binding method of resolution followed by a binding method. The underlying philosophy is to channel the Claim or dispute through a non-binding method, any one of which can be expected to offer a substantial likelihood of resolution. That failing, the parties may take what is a big step (in terms of time, cost, and commitment) to one of the two binding methods. Of course, contract drafters may elect to use other methods or variations. The three methods of non-binding ADR included in the Supplementary Conditions are described briefly below.

In mediation each party presents the basis for its position on a Claim to a neutral mediator, either selected by the parties or appointed by a dispute resolution service such as the American Arbitration Association. In most mediation scenarios, the mediator will hold private sessions with Owner and Contractor on a sequential basis attempting to find areas of agreement and facilitating a settlement that is acceptable to both parties.

The “Meet, Confer and Negotiate” method does not involve a third party. Rather it is a contractual commitment of the parties to meet, confer, and negotiate in good faith prior to referring the Claim to a third-party for resolution. One version of this includes step negotiations. That is, if representatives of Owner and Contractor at one level are

unable to negotiate a resolution, then the Claim will be considered and negotiated by a higher tier of management for both Owner and Contractor.

Neutral evaluation is a system in which Owner and Contractor jointly select a knowledgeable and neutral third party to evaluate their respective positions on the Claim and provide a written non-binding decision, essentially a recommendation for settlement.

Special considerations for selecting or using the six options provided below include:

Option A - Mediation Followed by Litigation. This option relies on the mediation provisions of GC16.01, but modifies the language of GC-16.01.C and adds SC-16.01.D. The purpose of the latter clause is to limit the time in which any court action must be started to appeal an Engineer action or denial. SC-16.01.D is not intended to affect the rights of either Owner or Contractor for other claims.

Option B - Mediation Followed by Arbitration. This option pairs final and binding arbitration with mediation. A discussion of the pros and cons of the arbitration process (and there are many advocates on either side) is beyond the scope of this Guide. Consultation with the Owner’s legal counsel is highly recommended. Users should also note that they will need to insert the name of an arbitration agency, such as the American Arbitration Association, in SC-16.02.A.

Option C - Meet, Confer, and Negotiate Followed by Litigation. Users electing to use the Meet, Confer, and Negotiate method may wish to consider specifically identifying the level of Owner and Contractor representatives for the second step in these negotiations. Note that it is not anticipated that the Engineer will participate in these negotiations.

Option D - Meet, Confer, and Negotiate Followed by Arbitration. The comments relative to arbitration discussed above in connection with Option B are equally applicable here.

Option E - Third-Party Neutral Followed by Litigation. It may be preferable to select and designate the third-party neutral early during the performance of the Contract so that delays will be minimized if and when the neutral is asked to consider a Claim and issue a recommendation.

Option F - Third-Party Neutral Followed by Arbitration. The comments relative to arbitration in the discussion of Option B above are equally applicable here.

Suggested language for each of the options is as follows:

Dispute Resolution Option A

Step 1: Mediation. Step 2: Litigation.

SC-16.01 Delete Paragraph 16.01.C in its entirety and insert the following in its place:

C. If the Claim is not resolved by mediation, Engineer's action under Paragraph 10.05.C or a denial pursuant to Paragraphs 10.05.C.3 or 10.05.D shall become final and binding 30 days after termination of the mediation unless, within that time period, Owner or Contractor:

1. gives to the other party written notice of intent to submit the Claim to a court of competent jurisdiction, or
2. agrees with the other party to submit the Claim to another dispute resolution process.

SC-16.01.D Add the following new paragraph immediately after Paragraph SC-16.01.C.

D. Notwithstanding any applicable statute of limitations, a party giving notice under Paragraph SC-16.01.C.1 shall commence an action on the Claim within one year of giving such notice. Failure to do so shall result in the Claim being time-barred and Engineer's action or denial shall become final and binding.

Dispute Resolution Option B

Step 1: Mediation. Step 2: Arbitration.

SC-16.01 Delete Paragraph 16.01.C in its entirety and insert the following in its place:

C. If the Claim is not resolved by mediation, Engineer's action under Paragraph 10.05.C or a denial pursuant to Paragraphs 10.05.C.3 or 10.05.D shall become final and binding 30 days after termination of the mediation unless, within that time period, Owner or Contractor:

1. elects in writing to demand arbitration of the Claim, pursuant to Paragraph SC-16.02, or
2. agrees with the other party to submit the Claim to another dispute resolution process.

SC-16.02 Add the following new paragraph immediately after Paragraph 16.01.

SC-16.02 Arbitration

A. All Claims or counterclaims, disputes, or other matters in question between Owner and

Contractor arising out of or relating to the Contract Documents or the breach thereof (except for Claims which have been waived by the making or acceptance of final payment as provided by Paragraph 14.09) including but not limited to those not resolved under the provisions of Paragraphs SC-16.01A and 16.01.B will be decided by arbitration in accordance with the _____, subject to the conditions and limitations of this Paragraph SC-16.02. This agreement to arbitrate and any other agreement or consent to arbitrate entered into will be specifically enforceable under the prevailing law of any court having jurisdiction.

B. The demand for arbitration will be filed in writing with the other party to the Contract and with the selected arbitrator or arbitration provider, and a copy will be sent to Engineer for information. The demand for arbitration will be made within the 30 day period specified in Paragraph SC-16.01.C, and in all other cases within a reasonable time after the Claim or counterclaim, dispute, or other matter in question has arisen, and in no event shall any such demand be made after the date when institution of legal or equitable proceedings based on such Claim or other dispute or matter in question would be barred by the applicable statute of limitations.

C. No arbitration arising out of or relating to the Contract Documents shall include by consolidation, joinder, or in any other manner any other individual or entity (including Engineer, and Engineer's consultants and the officers, directors, partners, agents, employees or consultants of any of them) who is not a party to this Contract unless:

1. the inclusion of such other individual or entity is necessary if complete relief is to be afforded among those who are already parties to the arbitration; and
2. such other individual or entity is substantially involved in a question of law or fact which is common to those who are already parties to the arbitration and which will arise in such proceedings.

D. The award rendered by the arbitrator(s) shall be consistent with the agreement of the parties, in writing, and include: (i) a concise breakdown of the award; (ii) a written explanation of the award specifically citing the Contract Document provisions deemed applicable and relied on in making the award.

E. The award will be final. Judgment may be entered upon it in any court having jurisdiction thereof, and it will not be subject to modification or

appeal, subject to provisions of the Controlling Law relating to vacating or modifying an arbitral award.

F. The fees and expenses of the arbitrators and any arbitration service shall be shared equally by Owner and Contractor.

Dispute Resolution Option C

Step 1. Meet, Confer and Negotiate.

Step 2. Litigation.

SC-16.01 Delete Paragraph 16.01 in its entirety and insert the following in its place:

SC-16.01 Meet to Confer and Negotiate

A. Engineer's action under Paragraph 10.05.C or a denial pursuant to Paragraphs 10.05.C.3 or 10.05.D shall become final and binding 30 days after receipt of written notice of Engineer's action or decision unless, within that time period, Owner or Contractor gives to the other party written notice of intent to submit the Claim to a process of bilateral negotiations as set forth below.

B. Within 30 days of the delivery of such notice, Owner and Contractor shall meet and confer regarding the Claim. A good-faith effort to negotiate resolution shall be made by both parties.

C. If the negotiations contemplated by Paragraph SC-16.01.B are unsuccessful, management representatives of Owner and Contractor at least one tier above the individuals who met under SC-16.01.B shall meet, confer, and negotiate within 30 days of the closure of the unsuccessful negotiations.

D. If the Claim is not resolved by negotiation, Engineer's action under Paragraph 10.05.C or a denial pursuant to Paragraphs 10.05.C.3 or 10.05.D shall become final and binding 30 days after termination of the negotiations unless, within that time period, Owner or Contractor:

1. gives to the other party written notice of intent to submit the Claim to a court of competent jurisdiction, or
2. agrees with the other party to submit the Claim to another dispute resolution process.

E. Notwithstanding any applicable statute of limitations, a party giving notice under Paragraph SC-16.01.D.1 shall commence an action on the Claim within one year of giving such notice. Failure to do so shall result in the Claim being time-

barred and Engineer's action or denial shall become final and binding.

Dispute Resolution Option D

Step 1. Meet, Confer and Negotiate.

Step 2. Arbitration.

SC-16.01 Delete Paragraph 16.01 in its entirety and insert the following in its place:

SC-16.01 Meet to Confer and Negotiate

A. Engineer's action under Paragraph 10.05.C or a denial pursuant to Paragraphs 10.05.C.3 or 10.05.D shall become final and binding 30 days after receipt of written notice of Engineer's action or decision unless, within that time period, Owner or Contractor gives to the other party written notice of intent to submit the Claim to a process of bilateral negotiations as set forth below.

B. Within 30 days of the delivery of such notice, Owner and Contractor shall meet and confer regarding the Claim. A good-faith effort to negotiate resolution shall be made by both parties.

C. If the negotiations contemplated by Paragraph SC-16.01.B are unsuccessful, management representatives of Owner and Contractor at least one tier above the individuals who met under SC-16.01.B shall meet, confer, and negotiate within 30 days of the closure of the unsuccessful negotiations.

D. If the Claim is not resolved by negotiation, Engineer's action under Paragraph 10.05.C or a denial pursuant to Paragraphs 10.05.C.3 or 10.05.D shall become final and binding 30 days after termination of the negotiations unless, within that time period, Owner or Contractor:

1. elects in writing to demand arbitration of the Claim, pursuant to Paragraph SC-16.02, or
2. agrees with the other party to submit the Claim to another dispute resolution process.

SC-16.02 Add the following new paragraph immediately after Paragraph 16.01.

SC-16.02 Arbitration

A. All Claims or counterclaims, disputes, or other matters in question between Owner and Contractor arising out of or relating to the Contract Documents or the breach thereof (except for Claims which have been waived by the making or acceptance

of final payment as provided by Paragraph 14.09) including but not limited to those not resolved under the provisions of Paragraph SC-16.01 will be decided by arbitration in accordance with the____, subject to the conditions and limitations of this Paragraph SC-16.02. This agreement to arbitrate and any other agreement or consent to arbitrate entered into will be specifically enforceable under the prevailing law of any court having jurisdiction.

B. The demand for arbitration will be filed in writing with the other party to the Contract and with the selected arbitrator or arbitration provider, and a copy will be sent to Engineer for information. The demand for arbitration will be made within the 30 day period specified in Paragraph SC-16.01.C, and in all other cases within a reasonable time after the Claim or counterclaim, dispute, or other matter in question has arisen, and in no event shall any such demand be made after the date when institution of legal or equitable proceedings based on such Claim or other dispute or matter in question would be barred by the applicable statute of limitations.

C. No arbitration arising out of or relating to the Contract Documents shall include by consolidation, joinder, or in any other manner any other individual or entity (including Engineer, and Engineer's consultants and the officers, directors, partners, agents, employees or consultants of any of them) who is not a party to this Contract unless:

1. the inclusion of such other individual or entity is necessary if complete relief is to be afforded among those who are already parties to the arbitration; and

2. such other individual or entity is substantially involved in a question of law or fact which is common to those who are already parties to the arbitration and which will arise in such proceedings.

D. The award rendered by the arbitrator(s) shall be consistent with the agreement of the parties, in writing, and include: (i) a concise breakdown of the award; (ii) a written explanation of the award specifically citing the Contract Document provisions deemed applicable and relied on in making the award.

E. The award will be final. Judgment may be entered upon it in any court having jurisdiction thereof, and it will not be subject to modification or appeal, subject to provisions of the Controlling Law relating to vacating or modifying an arbitral award.

F. The fees and expenses of the arbitrators and any arbitration service shall be shared equally by Owner and Contractor.

Dispute Resolution Option E

Step 1: Third-Party Neutral Evaluation.

Step 2: Litigation.

SC-16.01 Delete Paragraph 16.01 in its entirety and insert the following in its place:

SC-16.01 Third-Party Neutral Evaluation

A. Engineer's action under Paragraph 10.05.C or a denial pursuant to Paragraphs 10.05.C.3 or 10.05.D shall become final and binding 30 days after receipt of written notice of Engineer's action or decision unless, within that time period, Owner or Contractor gives to the other party written notice of intent to submit the Claim to a third-party neutral as set forth below.

B. Within 30 days of delivery of the written notice described in Paragraph SC-16.01.A, Owner and Contractor shall meet and agree on a qualified neutral individual to evaluate the Claim and make a non-binding recommendation for its resolution. In the event the parties cannot so agree within this 30-day period, either party may request that the American Arbitration Association appoint a qualified third-party neutral.

C. Within 30 days of the appointment of the third-party neutral, Owner, Contractor, and the neutral shall attend a meeting to discuss the Claim and provide the neutral with information and documentation for evaluation of the Claim.

D. Within 30 days of the conclusion of the meeting described in SC-16.01.C, the neutral shall issue a non-binding recommendation for settlement, including a statement of the rationale and Contract provisions relied upon.

E. The fees and expenses of the American Arbitration Association and the neutral shall be shared equally by Owner and Contractor.

F. If the Claim is not resolved by the third-party neutral evaluation, Engineer's action under Paragraph 10.05.C or a denial pursuant to

Paragraphs 10.05.C.3 or 10.05.D shall become final and binding 30 days after receipt of the neutral's recommendation unless, within that time period, Owner or Contractor:

1. gives to the other party written notice of intent to submit the Claim to a court of competent jurisdiction, or

2. agrees with the other party to submit the Claim to another dispute resolution process.

G. Notwithstanding any applicable statute of limitations, a party giving notice under Paragraph SC-16.01.F.1 shall commence an action on the Claim within one year of giving such notice. Failure to do so shall result in the Claim being time-barred and Engineer's action or denial shall become final and binding.

Dispute Resolution Option F

Step 1: Third-Party Neutral Evaluation.

Step 2: Arbitration.

SC-16.01 Delete Paragraph 16.01 in its entirety and insert the following in its place:

SC-16.01 Third-Party Neutral Evaluation

A. Engineer's action under Paragraph 10.05.C or a denial pursuant to Paragraphs 10.05.C.3 or 10.05.D shall become final and binding 30 days after receipt of written notice of Engineer's action or decision unless, within that time period, Owner or Contractor gives to the other party written notice of intent to submit the Claim to a third-party neutral as set forth below.

B. Within 30 days of delivery of the written notice described in Paragraph SC-16.01.A, Owner and Contractor shall meet and agree on a qualified neutral individual to evaluate the Claim and make a non-binding recommendation for its resolution. In the event the parties cannot so agree within this 30-day period, either party may request that the American Arbitration Association appoint a qualified third-party neutral.

C. Within 30 days of the appointment of the third-party neutral, Owner, Contractor, and the neutral shall attend a meeting to discuss the Claim and provide the neutral with information and documentation for evaluation of the Claim.

D. Within 30 days of the conclusion of the meeting described in SC-16.01.C, the neutral shall issue a non-binding recommendation for settlement,

including a statement of the rationale and Contract Document provisions relied upon.

E. The fees and expenses of the American Arbitration Association (if any) and the neutral shall be shared equally by Owner and Contractor.

F. If the Claim is not resolved by the third-party neutral evaluation, Engineer's action under Paragraph 10.05.C or a denial pursuant to Paragraphs 10.05.C.3 or 10.05.D shall become final and binding 30 days after receipt of the written recommendation unless, within that time period, Owner or Contractor:

1. elects in writing to demand arbitration of the Claim, pursuant to Paragraph SC-16.02, or

2. agrees with the other party to submit the Claim to another dispute resolution process.

SC-16.02 Add the following new paragraph immediately after Paragraph 16.01.

SC-16.02 Arbitration

A. All Claims or counterclaims, disputes, or other matters in question between Owner and Contractor arising out of or relating to the Contract Documents or the breach thereof (except for Claims which have been waived by the making or acceptance of final payment as provided by Paragraph 14.09) including but not limited to those not resolved under the provisions of Paragraph SC-16.01 will be decided by arbitration in accordance with the____, subject to the conditions and limitations of this Paragraph SC-16.02. This agreement to arbitrate and any other agreement or consent to arbitrate entered into will be specifically enforceable under the prevailing law of any court having jurisdiction.

B. The demand for arbitration will be filed in writing with the other party to the Contract and with the selected arbitrator or arbitration provider, and a copy will be sent to Engineer for information. The demand for arbitration will be made within the 30 day period specified in Paragraph SC-16.01.C, and in all other cases within a reasonable time after the Claim or counterclaim, dispute, or other matter in question has arisen, and in no event shall any such demand be made after the date when institution of legal or equitable proceedings based on such Claim or other dispute or matter in question would be barred by the applicable statute of limitations.

C. No arbitration arising out of or relating to the Contract Documents shall include by consolidation, joinder, or in any other manner any other individual or entity (including Engineer, and Engineer's consultants and the officers, directors, partners, agents, employees or consultants of any of them) who is not a party to this Contract unless:

1. the inclusion of such other individual or entity is necessary if complete relief is to be afforded among those who are already parties to the arbitration; and

2. such other individual or entity is substantially involved in a question of law or fact which is common to those who are already parties to the arbitration and which will arise in such proceedings.

D. The award rendered by the arbitrator(s) shall be consistent with the agreement of the parties, in writing, and include: (i) a concise breakdown of the award; (ii) a written explanation of the award specifically citing the Contract Document provisions deemed applicable and relied on in making the award.

E. The award will be final. Judgment may be entered upon it in any court having jurisdiction thereof, and it will not be subject to modification or appeal, subject to provisions of the Controlling Law relating to vacating or modifying an arbitral award.

F. The fees and expenses of the arbitrators and any arbitration service shall be shared equally by Owner and Contractor.

V. ADDITIONAL COMMENTS

A. Language amplifying the bid security requirements should be included in the Instructions since such requirements will have no legal effect as to Contractor after the Agreement is signed.

B. Any requirement with respect to liquidated damages should appear in the Agreement (see paragraph 4.03 of Document Nos. C-520 and C-525) although it may be desirable to include in the Instructions a cross reference to any such provisions. The inclusion of liquidated damages provisions in the Supplementary Conditions is inconsistent with the purpose of this document.