

# COMMENTARY ON THE 2019 EJCDC PROCUREMENT DOCUMENTS

Prepared by



**Editors' Note**

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(703) 684-2882  
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(202) 347-7474  
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## 1.0 INTRODUCTION

### 1.1 Purpose of the EJCDC Procurement Documents

#### A. *Basic Purpose*

The EJCDC Procurement Documents (EJCDC P-Series) are standard contract documents intended for use when a project owner, as “Buyer,” purchases engineered materials or equipment directly from a Seller, for use on an engineer-designed Project. The scope of the P-Series contract documents includes the delivery of the purchased items, and testing and startup, but does not include the installation of the purchased items. The P-Series documents do include optional provisions under which the project owner can assign the procurement contract to a construction contractor responsible for installation.

The P-Series standard documents give project owners a viable alternative to accepting purchase orders, purchase acceptance forms, and purchase contract terms and conditions drafted by manufacturers and suppliers. The Engineers Joint Contract Documents Committee (EJCDC) has drafted the 2019 P-Series Documents with clear, fair, complete, and detailed provisions governing the rights, responsibilities, and procedures for procurement contracts for engineered equipment and materials.

The 2019 P-Series Documents are well-suited to a wide variety of purchase transactions, especially those where the materials or equipment are of a complex or critical nature. The EJCDC documents are comprehensive in their coverage of relevant purchase (procurement) topics and issues.

The 2019 P-Series Documents as published are intended strictly for “furnish and deliver” contracts and are not intended for use when the manufacturer or supplier furnishing the materials or equipment is also required to physically install the Goods or to perform other construction at the Project site. Incidental onsite services, such as those typically furnished by a manufacturer’s technical representative, are addressed in the P-Series Documents, which defines them as “Special Services.” The P-Series Documents are predicated on the Buyer (or typically a construction contractor retained by the Buyer) receiving, unloading, perhaps storing, and finally installing the materials or equipment furnished by the Seller under the Procurement Contract.

#### B. *Project Delivery Method*

EJCDC’s P-Series Documents are written for use in design-bid-furnish or design-negotiate-furnish purchases. Such purchases may be in conjunction with a design-bid-build or design-negotiate-build construction project, or with “owner-build” project delivery.

The P-Series may, with some modification of the bidding or proposal-related documents, and of the Procurement Contract, be suitable for use when a construction manager—whether as advisor to the owner (“CMA”) or as a construction manager-at-risk (“CMAR”)—is involved in the Project. The P-Series may also be used as the basis for developing procurement documents for equipment and materials purchases by the project owner or the design-builder in a design-build context.

#### C. *Engineered Materials and Equipment*

A basic assumption of a transaction using the EJCDC P-Series Documents is that the equipment or materials to be purchased have been identified, described, or otherwise specified by a design professional (“Engineer”). EJCDC’s P-Series Documents typically would not be used to purchase routine commodities, such as routine spare parts, regular deliveries of chemicals or other



consumables, and other common supplies or materials. For such transactions, the owner's (or construction contractor's) normal purchasing process and associated purchase order documents may be more appropriate.

Most commonly the Engineer will have a continuing role in administering the Procurement Contract; the ongoing responsibilities of the Engineer include reviewing Shop Drawings and other Submittals, interpreting and clarifying the Procurement Contract Documents, processing the Seller's Applications for Payment, and other duties. The Engineer's role will change substantially if the Procurement Contract is assigned to a construction contractor; see the Procurement Agreement, P-520 5.01.

#### **D. *Prime Contract***

EJCDC's P-Series Documents are intended to be used to establish a "prime contract" between the Buyer (typically the Project Owner) and Seller. In other words, the Procurement Contract is intended as a stand-alone contract that does not exist under the umbrella of a higher-level contract. (A limited exception occurs if the Procurement Contract is assigned to a construction contractor, at which time it becomes a second-tier purchase order or subcontract).

In contrast, where engineered equipment or materials will be purchased by an entity such as a construction contractor, construction subcontractor, CM, developer, or design-builder—in other words, where the purchase is subject to the terms and conditions of an overlying prime contract (for example, an owner-contractor contract for construction, or an owner–design-builder contract)—the P-Series documents as published are not directly applicable to the intended purpose; the documents can, however, serve as a useful resource, or as a starting point for development of an appropriate purchase contract in these situations. In 2021 EJCDC is scheduled to begin the process of developing a purchase order form for procurement of engineered equipment, systems, or materials by contractors, CM/DBs, and subcontractors.

#### **E. *When Construction is Included in the Seller's Scope***

EJCDC's P-Series Documents are intended for use in a "furnish and deliver" procurement of materials or equipment, with the Seller's "Special Services" at the location where the Goods are or will be installed being very limited. The Special Services typically include assisting the installing entity—which is not the Seller—with checkout, startup, training of the facility's operations and maintenance personnel, and similar on-site services. Where the contemplated scope of the contract will include installation, or any work at the installation site that involves construction (as opposed to "Special Services"—where "construction" means work that improves the Project Owner's property or facility—then the EJCDC P-Series Documents, as published, are not sufficient model documents for Division 00. When such is the case, the user should either supplement the P-Series documents with appropriate installation/construction terms and conditions (perhaps excerpted from the EJCDC Construction Series documents), or use the Construction Series as the starting point and add appropriate purchase terms and conditions from the P-Series. The need for such a hybridized approach exists regardless of whether the extent of construction is relatively small compared with the probable cost of the purchase of materials or equipment.

## 1.2 The 2019 EJCDC Procurement Documents

The 2019 EJCDC P-Series is comprised of 10 documents, plus this Commentary; a list of the documents follows. For brevity, this Commentary sometimes refers to the P-Series Documents by number (for example, P-200) or by abbreviated title.

- EJCDC® P-001, *Commentary on the 2019 EJCDC Procurement Documents* (“Commentary”)
- EJCDC® P-050, *Project Owner’s Instructions Regarding Procurement Documents* (“Project Owner’s Instructions”)
- EJCDC® P-200, *Instructions to Bidders for Procurement Contract* (“Procurement Instructions to Bidders”)
- EJCDC® P-400, *Bid Form for Procurement Contract* (“Procurement Bid Form”)
- EJCDC® P-520, *Agreement Between Buyer and Seller for Procurement Contract* (“Procurement Agreement”)
- EJCDC® P-610, *Performance Bond for Procurement Contract* (“Procurement Performance Bond”)
- EJCDC® P-615, *Payment Bond for Procurement Contract* (“Procurement Payment Bond”)
- EJCDC® P-625, *Buyer’s Acknowledgement of Receipt of Goods*
- EJCDC® P-626, *Buyer’s Notice Regarding Conformity of Goods and Special Services*
- EJCDC® P-700, *Standard General Conditions of the Procurement Contract* (“Procurement General Conditions”)
- EJCDC® P-800, *Supplementary Conditions of the Procurement Contract* (“Procurement Supplementary Conditions”)

Where this Commentary refers to similarly-titled documents for other forms of project delivery or other contracts, clear indication is provided; for example, “construction contract’s general conditions,” or “EJCDC® C-700, Standard General Conditions of the Construction Contract.”

The Procurement Instructions to Bidders (P-200), Procurement Bid Form (P-400), Procurement Agreement (P-520), and Procurement Supplementary Conditions (P-800) are in a format that contains both model language and explanatory guidance notes and notes to the user regarding preparation of project-specific versions of the documents. The explanatory guidance notes and notes to users should be read and considered with due care. Suggested language contained in P-200, P-400, P-520, and P-800 is consistent with the language in the Procurement General Conditions (P-700). The guidance notes, notes to users, brackets, and alternative provisions not required for the Project, together with introductory guidance to users at the beginning of each P-Series document) are to be deleted before the documents are finalized for use on a project.

The Project Owner’s Instructions (P-050) are intended as a “checklist” and convenient means for the Project Owner (Buyer) to document the Project Owner/Buyer’s instructions to the preparer of the Procurement Contract’s Division 00 documents. P-050 is intended to prompt discussions and foster educated decision-making during the preparation of the Procurement Contract’s Division 00 documents. The Project Owner’s Instructions are not intended to be included in the Project’s procurement project manual or anywhere else in the proposed Procurement Contract Documents.

The Buyer's Acknowledgement of Receipt of Goods (P-625) and Buyer's Notice Regarding Conformity of Goods and Special Services (P-626) are administrative forms to assist the Buyer and, possibly, the Engineer in administering to the Procurement Contract and in fulfilling the Buyer's obligations to the Seller upon delivery of the Goods and upon proper completion of the Seller's furnishing of all Goods and Special Services. P-625 and P-626 need not be bound into the proposed Procurement Contract Documents but can be so bound without detriment, should the Buyer desire.

### **1.3 Purpose of this Commentary**

Overall, this Commentary is intended to provide users of the EJCDC Procurement (P-Series) documents with additional background information that will facilitate the effective use of the EJCDC P-Series on projects. The Commentary provides users with an explanation of the P-Series' intended uses, presents an overview of issues pertinent to implementing a procurement contract, and highlights and explains key provisions of various P-Series documents.

Because the EJCDC P-Series Documents contain some provisions that are derived from or related to the terms of the Uniform Commercial Code (UCC), and because the UCC generally applies to equipment and materials purchase transactions in the United States, a portion of this Commentary presents a discussion of key provisions of Article 2 of the UCC.

This Commentary is specific to the unique aspects of procurement contracts, as compared with conventional construction contracts. Readers desiring further detail on matters that are common to both equipment procurement contracts and construction contracts—such as a general discussion on liability insurance and indemnification obligations, or general bidding procedures—should refer to the parallel provisions of EJCDC® C-001—2018, *Commentary on the 2018 EJCDC Construction Documents*, which includes thorough presentations of such topics, which are not repeated in this Commentary.

### **1.4 Principal Entities**

The following principal entities participate in a procurement contract for materials or equipment implemented using the EJCDC P-Series Documents:

- Buyer: A party to the Procurement Contract. The Buyer is typically the Project Owner, but the term "Buyer" is used in the EJCDC P-Series because: (1) it is consistent with terminology for the purchaser used in the Uniform Commercial Code (UCC); and (2) when the Procurement Contract is assigned to a third party such as a construction contractor, the Contractor/Assignee becomes the Buyer when the assignment is effective. Where required for clarity, the EJCDC P-Series Documents include the defined term "Project Owner." ("Owner" is a term used in various other EJCDC document series, such as the Construction Series, but is not a stand-alone term in the P-Series, where the complete defined term is "Project Owner.")
- Seller: A party to the Procurement Contract. The Seller may be a manufacturer, wholesaler, retailer, manufacturer's independent representative, or other entity. The term "Seller" is used for consistency with the UCC. In carrying out its duties under the Procurement Contract, the Seller may retain one or more subcontractors or lower-tier suppliers.

- Engineer: The design professional responsible for the design of the Project of which the procurement of the Goods is a part. Under EJCDC’s P-Series Documents, the Engineer has responsibilities during the design and procurement phases, and after the Buyer and Seller have signed the Procurement Agreement that is part of the Procurement Contract Documents. The Engineer is typically retained by and represents the Project Owner.
- The construction contractor: EJCDC’s P-Series Documents include provisions for the Project Owner (as the initial Buyer) to assign the Procurement Contract to a third party, which EJCDC presumes will be a construction contractor whose scope of work includes (or will be expanded to include) installation of the purchased Goods. When the Procurement Contract is assigned to the contractor, the P-Series includes the defined term, “Contractor/Assignee.” When the Procurement Contract is not assigned, however, the term “contractor” or “construction contractor” should be used without an initial capital letter within the Procurement documents.

### **1.5 Reasons for Using a Procurement Contract**

Project owners make direct purchases of engineered goods for a variety of reasons. Often, major process equipment or other specialized equipment must be ordered long before a construction contractor has been selected. Reasons for entering into a procurement contract before the construction contractor is retained include: (1) allowing the Project’s associated design to be tailored to the specific equipment or item purchased under the procurement contract, or (2) to meet the Project’s completion deadlines (particularly when key, required materials or equipment have very long times required for fabrication, shop testing, and delivery). As to point (1), in many cases the major equipment or system being purchased is the core element of the Project, such that it is logical for the design of associated structures or supporting facilities to follow the procurement of the equipment/system.

In other cases, purchase by the Project Owner may be advantageous for tax reasons (for example, in some states in the United States, a public owner may be exempt from paying sales tax whereas the construction contractors retained by the public owner may not be tax-exempt), or as part of a corporate financial expenditure strategy. In other cases, a project owner may need to procure equipment (for example, standardized pumps or fittings) or materials that will be used on several related projects, and it is advantageous to make a single purchase rather than multiple acquisitions. Finally, in some situations, it may be important to the project owner to maintain tight control over a procurement for security reasons.

EJCDC’s P-Series Documents will serve any and all such purposes where the Project Owner is the initial Buyer in the procurement.

As described in Section 1.6 of this Commentary, however, there are circumstances in which a procurement contract may be unnecessary or perhaps even detrimental. The decision to implement a procurement contract should be carefully considered in recognition of the limitations, drawbacks, and costs associated with procurement contracts.

## **1.6 Deciding to Use a Procurement Contract**

The decision to use a procurement contract to purchase engineered equipment or materials should be made early in the Project's lifecycle, preferably during the feasibility study-report phase, and prior to starting the preliminary design phase. On many projects that include one or more procurement contracts, the procurement contract's bidding documents are issued for bidding prior to the start of the overall project's final design phase, although each project's scheduling needs are unique.

The timing of the decision on whether a procurement contract is desirable should be consistent with the reason why a procurement contract is used. For example, when the reason for using a procurement contract is to allow the construction drawings and specifications to be tailored to the specific equipment to be procured using the procurement contract, it will often be necessary to draft the procurement contract's bidding documents, issue them to prospective bidders, receive bids, award the procurement contract, and obtain the Seller's shop drawings before the final design of the construction contract is started and, in some cases, before preliminary design of the construction contract is completed. To maximize the benefits of using a procurement contract, it is often very important for either the Project Owner or Engineer to prepare an overall schedule for the entire project as early as possible, and to maintain and comply with that schedule.

The decision to use a procurement contract should be made in full recognition of the limitations, drawbacks, and costs of procurement contracts, including:

### ***A. Effect on Overall Project Costs***

Procurement contracts do not typically reduce the overall cost of a project. In fact, the extra engineering and administrative effort associated with a separate prime contract for the purchase often entails significant additional cost, compared with delegating the purchase of the equipment or materials to a construction contractor.

Risk allocations in procurement contracts drafted by a Project Owner or its engineering consultant also have strong potential to increase the pricing bid by prospective sellers, compared with sellers' prices for using their own contractual terms and conditions. EJCDC is aware of a public owner's procurement where the manufacturer that submitted the apparent low bid advised that it was prepared to reduce its bid price by \$1,000,000 (on an \$8,000,000 procurement contract) if the owner would allow the Seller to use its own insurance in lieu of the insurance requirements in the procurement contract documents. Thus, contractual risk allocations may have a substantial associated cost.

Other obligations of the procurement contract, such as requiring the Seller to furnish performance and payment bonds (if any), are unusual in typical contractor-seller purchase orders and will also affect the pricing bid to the Buyer.

Often, price proposals or price quotations submitted to Project Owners and Engineers, prior to the development of the procurement contract and the associated procurement specifications, will be based in part on the quoting entity's own preferred commercial terms and conditions of its sales. Such terms and conditions are frequently more-advantageous to the Seller than the terms and conditions of the EJCDC P-Series Documents. Because the transfer of risk often has an associated cost, using the EJCDC P-Series Documents will often result in higher pricing than is the case when a Buyer agrees to the Seller's own preferred commercial terms and conditions.

## **B. Competition Requirements**

By using a procurement contract, public owners, as well as private owners with procurement policies requiring competitive bidding, do not obtain any increased control over the outcome of the procurement, compared with the “traditional” approach of procuring the goods through a construction contractor. Procurement contracts implemented by a public owner (as Buyer) are typically subject to the same requirements for advertising, bidding, competition, and award as construction contracts.

## **C. Closed-Proprietary Specifying and Sole-Sourcing**

The decision to implement a procurement contract with limited competition, or sole-sourcing to one prospective Seller, should be discussed with and accepted by the Buyer’s legal counsel and procurement department (if any) prior to performing extensive engineering evaluations of alternative types of goods, and evaluating alternative manufacturers and suppliers. Public owners, in particular, are often required by statute to obtain bids via a publicly-advertised, open, competitive bidding process. The rationale for limiting competition, including the rationale for selecting a certain type of equipment or materials over others, should be clearly documented in the project’s basis-of-design report, typically prepared by the Engineer as part of the preliminary design phase services.

A public buyer’s decision to sole-source the procurement contract to a single, prospective Seller should, EJCDC believes, be made by the public buyer’s governing board (e.g., city council, county board, utility district board, etc.) via a public vote, with an associated, written resolution documenting the decision and the reasons why sole-sourcing is in the public’s interest.

## **D. Applicability of Laws, Regulations, and Purchasing Constraints**

Where public buyers are subject to laws, policies, and regulations that regulate or constrain purchasing—for example, a requirement to buy domestic products, or to procure materials and equipment that are fabricated using domestically-produced steel—using a procurement contract does not eliminate, relieve, or limit such obligations. Such constraints should be considered when evaluating alternative equipment, materials, and manufacturers during the preliminary design phase and preparation of the procurement contract’s bidding documents. Only entities that can comply with such laws, regulations, and constraints should be short-listed or specified in the Procurement Specifications and Procurement Drawings.

## **E. Basis for Award—Price Only vs. “Best Value”**

In the often-intense competition among competing manufacturers, suppliers, and vendors leading up to the issuance of a procurement contract’s bidding documents, some prospective sellers may advocate that the evaluation of the bids be based, in whole or in part, on non-price competition, such as physical features of the equipment or materials being purchased. Regardless of whether such arguments have merit relative to the specific equipment or materials being purchased, use of non-price criteria tends to reduce objectivity in the evaluation of bids, and thus could increase the potential for bid protests.

Public buyers who desire to evaluate bids from prospective sellers on the basis of non-price criteria, or on a combination of price and other criteria, should consult with their legal counsel and procurement department personnel to verify that the intended approach for evaluating the bids and awarding the procurement contract is consistent with laws, regulations, and other applicable constraints.

Sometimes, a buyer or its engineer desires to evaluate bids on the basis of a combination of purchase price and selected criteria that will be converted to a monetary amount, such as the present worth value of electricity use during a specified period, or chemical consumption of the purchased item over its anticipated service life. Such evaluations are often termed “best value” evaluations. While such evaluations may have considerable merit, laws and regulations governing the use of “best value” bidding vary considerably from one jurisdiction to the next. Buyers and engineers should consult with the buyer’s legal counsel and procurement department personnel prior to settling on using a “best value” approach for evaluating bids and awarding the procurement contract.

#### **F. *Bids with Exceptions or Conditions***

It is rare for bidders on traditional public construction contracts to submit a bid with conditions or exceptions; prospective contractors know that such conditions/exceptions usually result in the bid being rejected as non-responsive. In contrast, it is relatively common—regardless of whether the buyer is public or private—for bids on procurement contracts to be submitted with conditions or exceptions, whether regarding technical aspects of the procurement specifications or exceptions to contractual terms and conditions.

In preparing procurement contract bidding documents, it is relatively common for the project owner (Buyer) and its engineer to short-list only two or three acceptable manufacturers. This can create problems when all, or all but one, submit bids with conditions or exceptions. The Buyer faces an increased potential for bid protests, and often must decide whether to accept a higher-priced bid as the result of disqualifying lower-priced bids that contain conditions or exceptions. The governing board or the legal counsel of some public owners (Buyers) may be uncomfortable with awarding the procurement contract in such situations, thus prompting potentially difficult decisions, including rejecting all the bids, revisiting the contractual terms and conditions, and rebidding the procurement contract—with associated effects on schedule and administrative and engineering costs.

It is often wise for the buyer and its engineer to anticipate potential conditions or exceptions in the bids and to: (1) prepare the procurement contract’s bidding documents accordingly; (2) have planned “fallback” positions, if necessary, so that important decisions can be made quickly during the bidding or award phase, when necessary; (3) endeavor to actively encourage as much competition as possible (including specifying multiple acceptable manufacturers); and (4) actively discourage prospective bidders from submitting bids with conditions or exceptions. It is also, obviously, advisable for buyers and their engineers to discuss the contractual terms and conditions with prospective bidders, prior to finalizing and issuing the procurement contract’s bidding documents, so that prospective bidders’ concerns and probable reactions are known in advance. It may also be advisable to be prepared to issue appropriate addenda during the bidding phase, when potential issues are brought to the Buyer’s attention.

Information on contractual terms and conditions that are of significant importance to prospective sellers, and hence that are often grounds for conditions or exceptions, are discussed in Section 3.2 of this Commentary.

Because EJCDC’s P-Series Documents are often used for public projects, where submittal of bids with conditions or exceptions is typically problematic, the model language of EJCDC® P-200—2019, *Instructions to Bidders for Procurement Contract*, and EJCDC® P-400—2019, *Bid Form for Procurement Contract*, expressly disallows submittal of bids with conditions or exceptions and provides for the rejection or disqualification of such bids.

## **G. Coordination of Separate Prime Contracts**

A procurement contract is a separate prime contract that requires significant coordination with any associated construction contract, under which the goods purchased via the purchase contract will be installed at the project owner's site or facility. Properly coordinating the purchase contract with one or more associated construction contracts is essential. Construction phase consequences of not providing the necessary coordination during the design phase can include changes, claims, and disputes from the seller, the construction contractor, or both, and possibly other project participants.

Thus, a project owner's decision to obtain equipment or materials through a procurement contract, as opposed to obtaining the goods as part of an associated construction contract, should be made with open eyes and a full recognition of the costs, benefits, limitations, risks, and constraints of implementing a procurement contract.

### **1.7 Other EJCDC Documents of Interest Relative to Procurement Contracts**

The following EJCDC documents are not EJCDC P-Series Documents; they are separately available from [www.ejcdc.org](http://www.ejcdc.org) and EJCDC's respective sponsoring organizations (NSPE, ASCE, and ACEC). These documents may be useful in preparing and administering a procurement contract:

- *EJCDC® C-111, Advertisement for Bids for Construction Contract*—May be adapted for use with a procurement contract by appropriately editing terminology and coordinating with the Procurement Instructions to Bidders and the Procurement Bid Form.
- *EJCDC® C-430, Bid Bond (Penal Sum Form)*—May be adapted for use on a procurement contract by changing the term "Owner" to "Buyer."
- *EJCDC® C-435, Bid Bond (Damages Form)*—May be adapted for use on a procurement contract by changing the term "Owner" to "Buyer."
- *EJCDC® C-451, Qualifications Statement*—May be adapted for use with a procurement contract by appropriately editing terminology and making other revisions. However: In practice qualifications statements are rare on procurement contracts. Typically a prequalification process based on the Project Owner/Buyer's and Engineer's evaluations of alternative equipment and manufacturers renders use of a qualifications statement form unnecessary or superfluous on procurement contracts.
- *EJCDC® C-510, Notice of Award*—May be adapted for use with a procurement contract by appropriate editing of terminology.
- *EJCDC® C-612, Warranty Bond*—May be used when the Seller is required to furnish a performance bond and the contractually-required correction period is longer than the typical one-year period. Refer to EJCDC® C-001, Commentary on the 2018 EJCDC Construction Documents (or its successor) for additional discussion on C-612.
- *EJCDC® C-620, Contractor's Application for Payment*—May be adapted for use with a procurement contract by appropriately editing terminology (changing



“Owner” to “Buyer”, “Contractor” to “Seller”, and “Work” to “Goods and Special Services”).

- *EJCDC® C-940, Work Change Directive*—May be adapted for use with a procurement contract by appropriately editing the terminology and retitling the document as simply, “Change Directive” to be consistent with the terminology used in the P-Series Documents.
- *EJCDC® C-941, Change Order*—May be adapted for use with a procurement contract by appropriately editing the terminology.
- *EJCDC® C-942, Field Order*—May be adapted for use with a procurement contract by appropriately editing the terminology.

Some EJCDC C-Series Documents are not appropriate for use on a procurement contract. EJCDC’s P-Series Documents do not provide for use of a notice to proceed, and procurement contracts likewise have no certification of substantial completion. EJCDC® P-626, *Buyer’s Notice of Conformity of the Goods and Special Services*, is similar to but includes several notable differences from EJCDC® C-626, *Notice of Acceptability of Work*; thus, on a procurement contract, P-626 should be used.

## **1.8 Relationship of the Procurement Documents to EJCDC's Construction Series Documents**

When the Project will include both a procurement contract and an associated construction contract, significant coordination between the two, separate prime contracts is necessary. EJCDC’s P-Series and C-Series Documents are well coordinated with each other, and EJCDC recommends, where the P-Series will be used, that the C-Series also be the basis for the associated construction contract. This recommendation assumes even-greater importance when the procurement contract will be assigned to the construction contractor; in such circumstances, it is important for the terminology, clauses, and risk allocations of the purchase contract and construction contract to be consistent with each other.

When the Project’s Procurement Contract is to be assigned to the Project’s installing construction Contractor/Assignee, it is necessary to include appropriate language to implement the assignment in both the Procurement Contract and the associated construction contract. Model language for this purpose is included at the end of P-200, Procurement Instructions to Bidders; the model language needs to be copied from P-200 to the construction contract’s instructions to bidders, bid form, and the supplementary conditions. Starting with its 2013 edition, EJCDC® C-001, *Commentary on the EJCDC Construction Documents*, includes detailed commentary on this topic. Furthermore, also starting with the 2013 edition of the EJCDC C-Series, EJCDC® C-200, *Instructions to Bidders for Construction Contract*, EJCDC® C-410, *Bid Form for Construction Contract*, and EJCDC® C-800, *Supplementary Conditions of the Construction Contract*<sup>1</sup>, include guidance notes to prompt the user on where to insert the model language on assignment. The construction contract should also include, as part of the construction contract documents, the complete Procurement Contract, including the signed Procurement Agreement and its Exhibits A and B.

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<sup>1</sup> In the 2013 C-Series, provisions on assignment (as a general topic) were in the Owner-Contractor Agreements (C-520 and C-525). Starting with the 2018 C-Series, the general provision on assignment was moved to the General Conditions (C-700 2018, Paragraph 18.08) and, hence, provisions addressing assignment of a procurement contract should be included in the construction contract’s supplementary conditions—see C-800 2018, SC-18.08.

## 1.9 Document Coordination

Like EJCDC's Construction ("C-Series"), Construction Manager as Advisor ("CMA-Series"), and Design-Build ("D-Series") documents, the EJCDC Procurement ("P-Series") documents are closely integrated with each other. A change in any one of these documents may well require a change in others. In preparing the EJCDC P-Series Documents, EJCDC gave close attention to the suggested locations of subject matter as set forth in EJCDC® N-122/AIA® A521™ Uniform Location of Subject Matter. EJCDC's 2019 P-Series Documents were drafted to parallel as much as possible EJCDC's 2018 C-Series Documents.

## 1.10 Who Prepares Division 00 for a Procurement Project?

"Division 00 documents" are the written elements of a set of procurement documents or construction documents generally comprised of introductory information (such as seals and certifications and a table of contents), bidding or proposal-related documents (such as the Advertisement or invitation to bid, Instructions to Bidders, Bid Form, Bid Bond form, and any supplements to the Bid Form), "front-end" contract documents (such as the Agreement, Performance Bond, Payment Bond, other contract bonds (if any), General Conditions, Supplementary Conditions, and related documents), and Addenda. The term "Division 00" is from the Construction Specifications Institute's (CSI) *MasterFormat*® document. Many of EJCDC's P-Series documents are used as source documents for preparing a Procurement Contract's Division 00 documents. Division 00 excludes the Specifications (Divisions 01-49, when the documents are organized in accordance with *MasterFormat*).

Because design professionals, such as engineers, geologists, and architects, typically prepare the specifications and drawings that comprise the significant majority of a Project's construction documents, tradition has evolved that the design professional typically also prepares, or perhaps assembles or organizes, the Project's Division 00 documents. However, it is not mandatory that the design professional have a role in preparing the Project's Division 00 documents. In many cases, the Project Owner's employees or representatives, such as a procurement officer, risk manager, or attorney, prepare the Division 00 documents; elsewhere, a Project Owner-hired third-party program manager may prepare the Division 00 documents.

Another entity that may prepare, or assist in preparing, the Project's Division 00 documents is a Project Owner-hired construction manager. There are two forms of construction management project delivery: (1) construction manager as advisor ("CMA"), and (2) construction manager at risk (CMAR). Because EJCDC's P-Series documents do not include or address the role of a third-party construction manager, the P-Series should be used for CMA or CMAR projects only with close attention to terminology and possible need for revisions to address the construction manager's role and responsibilities.

Regardless of which entity or individual prepares all or part of the Project's Division 00 documents, it is very important that the documents of Division 00 be well coordinated among each other and with the other proposed Procurement Contract Documents, such as the Procurement Drawings and Procurement Specifications that have been prepared, sealed, and signed by the Engineer (and the Engineer's design professional(s) in responsible charge). When the Engineer does not prepare the Project's Division 00 documents, it is important for the Engineer to receive drafts of the Procurement Contract's Division 00 documents as early as possible so that the Procurement Specifications and Procurement Drawings can be appropriately coordinated with Division 00. P-700 3.01 ("Intent") indicates that all the Procurement Contract Documents are complementary and together comprise the Procurement Contract; it is highly recommended that, in the preparation of the procurement documents, conflicting requirements be avoided to the greatest extent possible, to reduce the potential for changes, Claims, and disputes.

When the Engineer prepares the Procurement Contract's Division 00 documents, it is important for the Engineer to not undertake practicing outside its profession, licensure, and areas of expertise and experience, and to remain within the limits of its professional liability insurance coverage. Division 00 documents address many subjects that are outside the expertise and experience of engineers and other design professionals, including insurance, bonds, indemnification, and risk management matters. Therefore, it is important that the Engineer not undertake to present legal, insurance, bond, or risk management advice to the Project Owner/Buyer or others. When drafting the Procurement Contract's Division 00 documents, it is highly advisable for the Engineer to transmit the draft Division 00 documents to the Project Owner/Buyer for review, comment, and direction, together with a recommendation that the Project Owner/Buyer have the documents reviewed by qualified legal counsel experienced with procurement contracts, construction contracts, procurement of a seller, and contracting practices applicable to the Project Owner/Buyer. Indeed, the provisions of EJCDC E-500—2020, Agreement between Owner and Engineer for Professional Services, and EJCDC's other professional services agreement forms (including E-505, E-520, E-525, D-500, D-505, and others) expressly require the entity retaining the design professional to furnish services such as accounting, bond, and financial advisory services; legal services; insurance advice; and auditing services, and indicate that the Engineer does not furnish such services.

To assist the Engineer in practicing within its areas of expertise and experience during preparation of Division 00 and other procurement documents, the second and third parts of EJCDC® P-050, Project Owner's Instructions Regarding Procurement Documents are useful at the outset of the preparation of the Procurement Contract's project manual, including Division 00 documents and Procurement Specifications. P-050 is discussed in this Commentary's Section 5.1.

### **1.11 Use of Defined Terms and Citations**

Throughout this Commentary, terms indicated with initial capital letters are terms defined in P-700, Procurement General Conditions, or in P-200, Procurement Instructions to Bidders. When generic references are made in this Commentary, lower-case letters are used; for example, "When a project owner purchases..." as opposed to, "The rights of the Project Owner under the Procurement Contract..."

Occasional references are made in this Commentary to combinations of defined terms such as "Project Owner/Buyer." These combinations are generally the result of the dual roles served by project participants, are for convenience only, and are not formal defined terms.

### **1.12 Cross-References and Abbreviations**

For brevity in the text of this Commentary and the text of the guidance notes and notes to users in the P-Series Documents, the short titles indicated in Section 1.2 of this Commentary are typically used. Also, the EJCDC document number is frequently used, especially for the larger and better-known P-Series documents, such as the Procurement Instructions to Bidders (P-200), Procurement Agreement (P-520), Procurement General Conditions (P-700), and Procurement Supplementary Conditions (P-800).

This Commentary includes numerous cross-references to specific provisions of various P-Series documents and cross-references to other parts of the Commentary itself. For brevity, a shorthand approach is used for such cross-references, comprised of the EJCDC document number and the paragraph number within that document, without "EJCDC" or the word "Paragraph." Where an entire article is cross-referenced, the word "Article" is included. For example, Paragraph 7.05 ("Taxes") of the Procurement General Conditions may be cited as "P-700 7.05." A reference to Section 1.5 of this Commentary would,

for example, be “P-001 1.5.” References to provisions of the Procurement Supplementary Conditions include as part of the paragraph designation a prefix of “SC-”, thus, a reference to Paragraph SC-5.02 of EJCDC’s model language for Procurement Supplementary Conditions would be “P-800 SC-5.02.”

Occasionally, this Commentary includes references to certain provisions in documents in other EJCDC document families. In such cases, the full EJCDC document number and title will typically be indicated. Where the follow-on text includes repeated citations to provisions of that document, a shorthand system similar to that indicated above is used. Thus, a reference to Paragraph 6.01.E of EJCDC® E-500—2020, Agreement between Owner and Engineer for Professional Services, may be abbreviated as “E-500 6.01.E.” References to the Construction General Conditions, C-700, are rendered in similar fashion, and are common: for example, “C-700 2.01.B.”

- All references to C-Series Documents, including C-700, are to the 2018 edition.
- References to C-001, *Commentary on the 2018 EJCDC Construction Documents*, are abbreviated as “C-001, Construction Commentary.”

## **2.0 UNIFORM COMMERCIAL CODE PROVISIONS GOVERNING THE SALE OF GOODS**

### **2.1 Introduction**

Given the broad applicability of the Uniform Commercial Code (UCC) to contracts for the purchase of materials and equipment in the United States, it is helpful for users of EJCDC's Procurement ("P-Series") documents to have some understanding of the UCC.

The UCC is a body of model laws originally developed in the 1940s to simplify, clarify, harmonize, and modernize state laws relating to common business transactions by making such laws consistent with accepted commercial practices, and endeavoring to make them uniform from state to state. The UCC is not itself the law, but rather is only a recommendation of model language. Nearly all states and U.S. territories have adopted some or all of the basic text of the UCC. This standardization of commercial rules is a boon to the national economy and is considered to be one of the great accomplishments of American law.

In all, the UCC has 11 articles, totaling over 800 pages. Article 1, General Provisions, contains definitions and rules for interpreting the UCC. Article 2, Sales, establishes rules governing contracts for the sale of goods (e.g., contracts for materials, equipment, and supplies), as opposed to construction and other service- or task-oriented contracts. The balance of this Section 2 of this Commentary addresses UCC Article 2, which is relevant to the procurement of engineered equipment and materials.

UCC Article 2 has been adopted by all states (except Louisiana) plus the District of Columbia and the US Virgin Islands.

### **2.2 Applicability and Relevance of UCC Article 2 to Procurement Contracts**

UCC Article 2 applies to transactions in goods, which are defined as "all things which are movable at the time of identification to the contract for sale." Goods are defined to include things attached to realty which can be severed from the realty without material harm. Article 2 of the UCC can be a significant element in determining the rights and liabilities of owners, contractors, subcontractors, and suppliers involved in the sale or purchase of materials, equipment, and supplies, particularly in disagreements concerning nonconforming or defective goods, or regarding the meaning or existence of contractual terms. Of course, the UCC's Article 2 applies to more than merely goods used in construction but, for this Commentary, discussion is limited to its applicability to the procurement of materials and equipment for incorporation in construction (capital improvement) projects.

As a general rule, construction contracts are considered mixed contracts for services and goods, rather than sales contracts covered by the UCC. In contrast, purchases of materials, equipment, or supplies by project owners, contractors, and subcontractors (as "buyers") are clearly sales transactions covered by the UCC.

However, if the seller also provides a substantial extent of design and installation services with the sale, the transaction may not be covered by the UCC, and an appropriate form of construction contract, such as the EJCDC C-Series or CMA-Series documents, should be used as the basis for the associated contract. For example, a contract to design, fabricate, furnish, and erect structural steel would not be governed by the UCC. However, the UCC would apply to a procurement limited to the fabrication and delivery of the structural steel.

The UCC has the greatest relevance to sales (purchase) transactions that are not accompanied by comprehensive written terms and conditions; in fact, one of the original purposes of the UCC was to

reduce the need for complex purchase contracts governing ordinary sales transactions. When the sales transaction does not include terms and conditions of the sale, the UCC provides the terms and conditions of the transaction. For example, if goods are sold without specifying the place for delivery of the goods, the UCC provides that the place for delivery is the seller's place of business.

In many cases, however, the parties to a sales transaction, especially for complex and/or expensive goods, will prefer to use terms and conditions that are tailored to the specific transaction and that expressly address critical elements of the purchase. The UCC expressly indicates that parties generally are free to agree to departures from the standard UCC provisions. Thus, the specific terms of a procurement contract will typically govern over the general commercial terms in a state statute adapted from the model language of the UCC.

EJCDC's general philosophy in drafting and revising the P-Series Documents has been to establish express terms that are consistent with industry practice for the procurement of engineered equipment and materials, and that fairly allocate risks. For the most part the terminology and conditions of EJCDC's P-Series Documents are consistent with the UCC's terms and conditions; the P-Series Documents mainly supplement and customize the UCC's model terms and conditions, rather than supplanting them.

Even when a comprehensive written contract contains the primary governing terms and conditions of a transaction, the UCC remains relevant. The UCC will be a resource for definitions and terms that are not addressed in the specific contract. The UCC will also provide a framework for interpreting and applying the terms and conditions of the procurement contract, in the same way that the common law (case decisions having precedential impact) provides a framework for interpreting and applying the terms and conditions of construction contracts.

## **2.3 Key UCC Concepts**

The UCC includes several important concepts such as:

### ***A. Course of Dealing and Usage of Trade***

This commercial term provides that a contract whose terms and conditions are uncertain must be interpreted in light of the parties' prior dealings with each other and against the background of generalized usages of trade in the industry.

1. A Usage of Trade is a practice or method of dealing that is regularly performed or observed so as to justify the expectation that it will be observed in the transaction in question.
2. A Course of Dealing is a sequence of previous conduct between the parties which is reasonably regarded as establishing a common basis for understanding. The Course of Performance of the contract at issue may also be used in interpretation of rights and responsibilities.
3. Unconscionability, which provides: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of the clause as to avoid any unconscionable result."
4. Commercial Impracticability, which provides that the party seeking to invoke the defense of impossibility of performance (i.e., a party arguing that its obligations under the contract could not be performed within the realm of feasible actions) need not show that the

performance was impossible but was simply so costly that it became practically impossible.

The UCC provides that the sales contract is interpreted based on the language of the contracting parties and by their actions in the context of commercial practices and other surrounding circumstances. In other words, a meaning arising out of a commercial context will control over classic rules of contract interpretation that would be applicable to a construction contract. The UCC is based on the assumption that the seller and buyer knew the nature of their prior dealings and usages of trade when the sales contract was prepared.

In interpreting a sales contract, express written terms and conditions, course of performance, course of dealing, and usage of trade are to be construed together whenever reasonably consistent with each other. If that is not possible, the order of priority is:

1. Express terms (such as those in a purchase contract developed from the EJCDC P-Series Documents);
2. Course of performance;
3. Course of dealing; and
4. Usage of trade.

## **B. Warranties**

### *1. Introduction to Warranties*

A warranty is an assurance or commitment that a manufacturer, seller, or similar party makes regarding the condition of its product. It also refers to the terms and situations in which repairs or replacements will be made in the event that the product does not function as originally described or intended. Warranties are often grouped into two, broad categories: (1) express warranties, and (2) implied warranties.

An express warranty is an expressly-stated or written warranty. In contrast, an implied warranty is one that is not expressly written or spoken as part of the sales transaction, but rather is created by the applicable laws and regulations in effect where the sales transaction takes place (most notably from the UCC, in most United States jurisdictions).

The applicable warranties are of particular importance with regard to the availability of remedies available to the buyer for a breach of warranty when materials or equipment, procured through a given sales transaction, fail to perform as represented by the seller's express or implied warranties. Warranties are enforceable against a seller without regard to the seller's negligence, knowledge, or fault; the buyer need only prove that the item is non-conforming or defective.

Brief discussions of express and implied warranties are presented below. Discussion of project owners'/buyers' and sellers' (often opposing) viewpoints on warranties is presented in Section 3.2.D of this Commentary.

The term "**warranty**" is generally defined immediately above at the start of this Section 2.3.B.1. "**Guarantee**" is a similar, closely related term. A guarantee is essentially a subset of "warranty," and is often considered as a legally-enforceable affirmation of fact or promise in a contract. "Warranty" and "guarantee" may be used almost interchangeably, and are closely related to each other. In contrast, the term "**guaranty**" is a narrower term usually used to

mean a device or written instrument intended to secure performance; “guaranty” is not used in the EJCDC Procurement documents.

## 2. *Express Warranties*

An express warranty is a powerful tool to assure the buyer that the associated goods will perform as warranted by the seller.

Sales transactions or sales contracts typically include express warranties. (stated, written) warranties. Often, express warranties address responsibilities for nonconforming goods, such as defects in materials and workmanship. Sometimes an express warranty or requirements of a procurement contract will also make the seller liable for performance failures in the goods.

EJCDC’s Procurement General Conditions document (P-700) includes clauses that are express warranties for: (1) the Seller’s correction period (P-700 9.04); (2) the Seller’s general warranties and guarantees (P-700 9.01.B through E); and (3) the Seller’s warranty of title (P-700 9.01.A). Other provisions of P-700 and other P-Series Documents, and of the Procurement Specifications, may also constitute or function as warranties. A manufacturer’s general (standard) warranty (e.g., the manufacturer’s standard, published warranty for that item) is also an express, written warranty.

Procurement contracts for engineered equipment and materials sometimes require a manufacturer’s special or extended warranty. A special or extended warranty is an express warranty written to satisfy the requirements of the specific sales transaction, and that typically is more encompassing, or remains in effect for a longer duration, than the seller’s general (standard) warranty. Requirements for manufacturers’ special or extended warranties, when required at all, are typically indicated in the Procurement Specifications.

Any contractual requirements for an express, written warranty, other than the manufacturer’s general (standard) warranty, often comes with an associated cost; such costs may be substantial and should be considered by the Project Owner/Buyer and Engineer in the preparation of the Procurement Contract Documents and, indeed, during preparation of any construction contract.

Not all express warranties are written. The UCC states that a seller may create express warranties with:

- Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain. The seller thereby warrants that the goods shall conform to the seller’s affirmation or promise. Such affirmation or promise may be written or oral.
- Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. Such materials may include a seller’s product marketing brochures or assertions in a proposal or offer for a sales transaction.
- Any sample or model which is made part of the bargain.

To create an express warranty, it is not necessary for the seller to use formal words such as "warrant" or "guarantee" or for the seller to have a specific intention to make a warranty. However, there are practical limits; for example, a mere affirmation of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create an express warranty.



The UCC also indicates that a description of the goods, such as Procurement Specifications, Procurement Drawings, and the like, form an exact description and, if made part of the basis of the bargain (as they usually are by being designated as part of the Procurement Contract Documents), the goods must comply with them.

The standard language of the express warranties created for the Buyer's benefit in EJCDC's P-Series Documents are discussed in Section 5.7 of this Commentary, with respect to P-700 Article 9.

### 3. *Implied Warranties*

In common law jurisdictions, an implied warranty is a contract-law term for certain assurances presumed to be made in the sale of goods, due to the circumstances of the sale. The UCC establishes significant implied warranties of: (1) merchantability, (2) fitness for a particular purpose, and (3) title to the goods. These are briefly discussed below.

#### a. *Implied Warranty of Merchantability*

The UCC's implied warranty of merchantability is useful when purchased materials or equipment are not specially ordered for the sales transaction, or may be used on a number of projects. The merchantability warranty affords protection that: (1) the goods are acceptable in the trade; (2) the goods are uniformity (meaning that two items that are supposed to be identical are, in fact, identical); (3) the packaging of the goods is proper; and (4) the labeling of the goods is truthful.

To be merchantable, the goods must conform to an ordinary buyer's expectations. Terms of purchase such as "as-is" or "with all faults" disclaim (negate) an implied warranty of merchantability.

An implied warranty of merchantability arises in sales transactions where the seller is a merchant (a seller who regularly deals with the goods in the normal course of business), and may generally be excluded from such sales transactions only by contract language which specifically mentions merchantability.

#### b. *Implied Warranty of Fitness for a Particular Purpose*

Implied warranties of fitness-for-purpose arise where the seller, at the time of the sales transaction, has reason to know: (1) the particular purpose for which the goods are required; and (2) that the buyer is relying on the seller's skill and judgment in selecting goods appropriate for the intended use or purpose. A "particular purpose" may differ from the ordinary purpose for which the goods are used, in that that a specific intended use by a buyer may be peculiar to the nature of the buyer's business.

Under the UCC, if the prospective buyer of an equipment item advises the seller at the time of purchase that the intended application is installation in a corrosive environment, without further specifying the desired materials, and the sale goes forward, then the seller has impliedly warranted that the equipment is fit for the corrosive environment in which it will be installed. However, engineered equipment and materials are usually specified by the engineer via detailed, descriptive and/or proprietary specifications for a certain application ("purpose") selected by the engineer or buyer. (According to the Construction Specifications Institute's (CSI) *Project Delivery Practice Guide*, and its *Construction Specifications Practice Guide*, "descriptive specifying" is using detailed descriptive requirements, such as a certain

type of stainless steel material; “proprietary specifying,” per CSI’s *Practice Guides*, is the use of specifications indicating names of acceptable manufacturers and, sometimes, product models, regardless of whether “or equal” is included.)

Because of the detailed nature of typical Procurement Specifications and expectations regarding the technical skill and ability brought to the project by the engineer, sellers understandably often seek to disclaim implied warranties of fitness-for-purpose.

Most US state laws developed from the UCC’s model language include the following wording regarding fitness-for-purpose:

“Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is, unless excluded or modified an implied warranty that the goods shall be fit for such purpose.”

Thus, an implied warranty of fitness-for-purpose arises if the buyer has made known to the seller the particular purpose for which the goods are required, as well as the buyer’s reliance on the seller’s judgment, experience, and advice. Again, the existence of detailed, descriptive and/or proprietary Procurement Specifications (prepared by the Buyer or its Engineer) for the Goods being purchased may negate or mitigate the implied warranty of fitness-for-purpose. The creation of an implied warranty of fitness for a particular purpose depends on whether the buyer relied on the seller’s expertise in specifying or selecting the item.

If a buyer specifies its needs by providing detailed specifications and possibly drawings, as in the typical procurements contemplated for EJCDC’s P-Series documents, then an implied warranty of fitness-for-purpose may not arise, because the buyer is apparently not relying on the seller’s skill and judgment; rather, the buyer instead typically relies on the skill and judgment of the engineer that developed the specifications and drawings included in the procurement contract.

This issue is not necessarily clear in every case. An engineer may subsequently take the position—perhaps with substantial merit—that the engineer relied on the prospective seller’s skill, judgment, and advice to the engineer during the engineer’s preparation of the specifications. The engineer is typically not the buyer, but in some respects is representing the buyer. As a licensed design professional, the engineer is expected to possess proper skill, experience, and judgment in the performance of its duties for the project owner/buyer and in the practice of its profession: the extent to which an engineer or other design professional is entitled to rely on a seller’s published product literature and claims performance may turn on factors such as the standing and experience of the seller in the specific field.

The buyer’s use of proprietary specifying (i.e., specifications indicating acceptable manufacturer(s) and perhaps “or-equal”) may sometimes relieve the seller of liability—for example, proprietary specifying using equipment model numbers or specific item designations may be so specific as to potentially disclaim an implied warranty of fitness-for-purpose. In other cases, proprietary specifying may not relieve the seller of all liability under the implied warranty of fitness-for-purpose, for example

if the goods were not suitable for the intended application and the buyer had delegated responsibility for final selection to the seller.

c. *Implied Warranty of Title*

The implied warranty of title assures the buyer that the seller has the right to sell the goods, and that such goods are not otherwise subject to patents held by others, or other intellectual property rights that might infringe on the buyer's right to purchase.

EJCDC's Procurement General Conditions include at P-700 9.01.A a provision that creates an express warranty of title.

d. *Implied Warranties – General*

A buyer waives an implied warranty by making an examination of the goods with respect to defects, where such examination would or should have revealed the defects to the buyer. However, an examination does not waive a warranty when the true condition of the goods could not be reasonably discovered by the examination.

EJCDC's Procurement General Conditions require at P-700 9.02.B that the parties to the Procurement Contract and the Engineer visually inspect the Goods upon delivery to the Point of Destination, but state that such inspection is not final and does not constitute receipt of nonconforming Goods.

The parties to a purchase contract may elect to specifically exclude implied warranties (particularly the implied warranty of fitness-for-purpose); the reasons for explicitly excluding certain implied warranties may arise as a result of negotiation between the Buyer and Seller. Conversely, when the Project Owner/Buyer and Engineer desire that the standard implied warranties will apply fully, the best practice is to expressly state them in the contract—making them express warranties.

4. *Cumulative Effect and Precedence of Warranties*

All warranties—express and implied—are typically construed as consistent with each other and as cumulative in effect (P-700 15.04, "Cumulative Remedies"). If such an interpretation is unreasonable in the case of a particular warranty in a certain sales transaction, the intent of the parties will determine which warranty is dominant.

In ascertaining such intent, the following rules normally apply:

- a. Exact, descriptive specifications govern over both: (1) an inconsistent sample or model and (2) general language of description;
- b. A sample from an existing lot governs over inconsistent general language or description; and
- c. Express warranties govern over inconsistent implied warranties, other than implied warranties of fitness for particular purpose.

Rejection of goods must be within a reasonable time after delivery and the reason(s) for the rejection must be set forth in a written notice to the seller (P-700 9.02.B).

## 3.0 CONTRACTUAL TERMS OF INTEREST TO SELLERS

### 3.1 General Considerations

Construction contractors are accustomed to accepting risks over which they do not have full control. The duration, complexity, and challenges of the typical project force such acceptance. In contrast, manufacturers of materials and equipment tend to view themselves as sellers of commodities—in straightforward transactions—and are not comfortable with accepting risks over which they do not have full control.<sup>2</sup> Sellers view with suspicion any contractual term that allocates risk to them. In short, sellers do not view risk in the same manner as do construction contractors. This important difference should be understood by personnel and entities drafting procurement contracts, including engineers who have substantial experience specifying materials and equipment to be procured by a contractor under a construction contract, and relatively little experience with direct purchases from sellers through a procurement contract.

Drafters of any contract, including procurement contracts, should also understand that transferring risk via a contract has a price, and when one party to a contract is not prepared to accept such risk, the intended transfer of risk may either result in a failure to agree on contractual terms and conditions, or in pricing that could be unacceptable to the project owner/buyer.

Given the potentially contentious nature of contractual risk allocations in procurement, it may be advisable for project owners/buyers and engineers to consider holding frank discussions with short-listed manufacturers or suppliers regarding the contemplated contractual terms and conditions prior to the formal issuance of the procurement contract's bidding documents. The parties should discuss for each contractual provision that is a point of disagreement:

1. Whether the prospective seller will or can agree to the buyer's preferred conditions.
2. If yes, the cost of the seller's acceptance of the associated risk transfer.
3. If not, whether such disagreement would be a deal-breaker.
4. If not, whether the prospective parties can agree on a compromise.

Such discussions may play out over several weeks or longer, and sufficient time should be allowed in the project owner/buyer's project schedule.

Buyers and engineers should consider that, for the types of engineered equipment and materials for which the EJCDC Procurement ("P-Series") Documents are intended, there may be a relatively limited number of prospective sellers. Thus, dogged adherence to terms and conditions that benefit only the buyer may result in fewer-than-desired bids or proposals for the procurement contract. Prospective buyers are strongly encouraged to consult with qualified and experienced legal counsel and risk advisors in such discussions; such advisors should, optimally, be familiar with, among other things, commercial transactions; insurance, bonding, and indemnification; warranty law; assessment of damages; schedules and delays; assignment of contracts; and matters related to changes, claims, and disputes under procurement contracts for materials and equipment.

Negotiating key procurement contract terms may be a task to which buyers—particularly a public buyer—and their engineering consultants are unaccustomed, whereas many prospective sellers and their in-house legal counsels are very experienced in such negotiations.

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<sup>2</sup> EJCDC's approach to contract drafting and risk allocation is to assign risk to the party best able to control that risk. Some risks, however, are inherently uncontrollable.

Buyers and their engineers should also understand that the prospective seller's project representatives may have specific limits of authority relative to accepting certain contractual terms or conditions. Certain matters of significant importance, such as accepting uncapped exposure to liability (or exposure to liability of more than two times the procurement contract price, as an example), may need to be referred to the prospective seller's corporate board of directors for approval, with associated time impacts.

### **3.2 Summary of Contractual Terms and Conditions of Interest to Sellers**

Presented below is a summary of the contractual terms and conditions that, based on experience with both public and private procurement contracts, and a review of prior literature prepared on the topic, that are of significant interest to equipment manufacturers and suppliers.

#### **A. Limitations of Liability**

Sellers entering into procurement contracts frequently seek a cap on their total liability for all prospective losses, claims, and damages under the contract ("limitation of liability"). Many sellers' preferred limit of liability is the procurement contract price, whereas project owners/buyers prefer either no cap at all or a higher cap. Given many sellers' strong preference for contractual limitations of liability, project owners/buyers and engineers preparing bidding documents for a procurement contract should discuss the topic and give thoughtful consideration to whether a limitation of liability should be included in the procurement contract that is presented to prospective bidders. Failure to include such a provision may result in reduced competition, high bid prices, or in extreme cases no bids.

In evaluating whether to include a limitation of liability clause, the project owner/buyer may consider preparing (with an engineer's assistance, if appropriate) an opinion of probable costs (damages) that could reasonably arise from a significant failure by the seller's goods following installation. Such an estimate will often be key to determining whether or not a limitation of liability is desirable and, if so, the amount of the cap.

P-800 SC-9.05 is an optional limitation of liability for the Seller. The drafter of the Procurement Supplementary Conditions is encouraged to read the associated guidance notes at this provision and discuss the matter with the Project Owner/Buyer, in conjunction with the Buyer's legal counsel.

Ultimately, in deciding whether to include a limitation of liability clause, a project owner/buyer will need to balance considerations such as (1) the cost of risk transfer, (2) potential for significant monetary damages resulting from a failure of the goods following installation, (3) the desired number of bids or proposals for the procurement contract compared with the number of acceptable manufacturers, (4) the importance that the acceptable manufacturers attach to a limitation of liability clause, and (5) other relevant factors.

#### **B. Liquidated Damages**

A specified, predetermined amount-per-day for late performance is common in construction contracts, and is included in many procurement contracts as well, specifically for late delivery of the goods (model liquidated damages language is included in P-520 2.04). However, many sellers are reluctant to accept liquidated damages provisions. When required to accept liquidated damages provisions, some sellers seek a cap on their liquidated damages liability equal to 10 percent of the procurement contract price—this specific limitation is also part of the optional limitation of liability provision discussed immediately above in Section 3.2.A.

Presumably the reason for sellers’ concerns about meeting delivery deadlines (and incurring associated liquidated damages) is that the sellers consider various factors to be beyond their control, including the availability of raw materials, competing production schedules on the factory floor, shop testing facility availability, delays in shipping (including clearing customs in international shipments), and other variables. From the buyer’s perspective, the basic reason for including liquidated damages in a procurement contract is to protect the buyer from costs it is likely to incur if the goods are delivered late (or when the seller is unavailable to furnish its onsite “special services” in accordance within the procurement contract times). The delivery and special services schedules are often closely coordinated with the installing contractor’s construction progress schedule; thus, a delay in the seller’s performance of its delivery or special services is likely to affect the construction contractor’s ability to achieve its own contract time for substantial completion).

**C. Payment Terms**

Prior to the 2019 edition of the P-Series Documents, P-520, P-700, and P-800 suggested Procurement Contract progress payments of: (1) 10 percent of the Procurement Contract Price upon approval of Shop Drawings; (2) a further 80 percent upon delivery of the Goods in acceptable quantity, quality, and condition (thus bringing total payments to 90 percent of the Procurement Contract Price); and (3) the final 10 percent upon completion of all Special Services. The 2019 P-Series suggests a similar but somewhat more detailed payment structure—see P-520 4.02.A (“Progress Payments; Final Payment”):

Payment Line Item (Lump Sum)	Percentage of Lump Sum
1. [Receipt of Approval of Shop Drawings and Samples]	[10]
2. [Completion of acceptable factory testing (if any)]	[5]
3. [Delivery of Goods to Point of Destination in accordance with the Procurement Contract Documents]	[70]
4. [Completion of Special Services in accordance with Procurement Contract Documents]	[10]
5. Final Payment: [Correction of non-conformities, provision of final Operations and Maintenance manuals, submittal of warranties and other final documentation required by the Procurement Contract Documents]	[5]
Total Procurement Contract Price (Lump Sum)	100

As the Notes to User for P-520 4.02.A emphasize, both the line items and the percentages in P-520 are merely suggestions; the user may choose other events to trigger progress payments, and other percentages. P-520 4.02 allows flexibility for the drafter of the Procurement Agreement to set forth a schedule of progress payments that is appropriate for the Goods and Special Services to be procured, and is adapted to the unique scheduling needs of each project.

Many sellers prefer terms that result in receipt of more “cash up front.” For example, many manufacturers’ proposed payment terms include 10 or 20 percent of the procurement contract price due upon signing the procurement contract, additional amounts due upon commencement of preparation of shop drawings, and sometimes up to a total of 50 percent of the procurement contract price due before fabrication of the goods commences. Often, a total of 90 percent or more of the procurement contract price is preferred by sellers when the goods are “ready to ship” (as opposed to actually being delivered at the Point of Destination in good condition, quality, and

quantity). While it is understandable that sellers prefer accelerated payment schedules, many buyers perceive the need to incentivize completion and delivery, and therefore want to retain greater amounts until the goods are received at the delivery location. Defining an appropriate, fair schedule of progress payments is in the interest of both parties. Communication and research regarding the manufacturing schedule, cash flow concerns, and any special costs and risks, is usually beneficial.

Sometimes, a procurement contract will include extended special services, such as onsite monitoring and field quality control to verify performance of equipment whose operation is seasonally-dependent. In such cases, it may be appropriate to structure the procurement contract's progress payments to compensate the seller for all other special services performed in accordance with the procurement contract documents, with a later (possibly final) payment for the subsequent, seasonally-dependent special services. The amount of each progress payment should be appropriate for the circumstances.

As a final comment regarding payment terms, as a general matter sellers are uncomfortable with "pay-when-paid" provisions, and may outright refuse to accept "pay-if-paid" clauses (where such clauses are enforceable). Such considerations apply when a procurement contract is assigned to the installing contractor (Contractor/Assignee), and at any time when the procurement is under the umbrella of a higher-level prime contract. Manufacturers may find "pay-when-paid" clauses more acceptable when a "sunset" provision is included, providing that the buyer must pay the seller all undisputed amounts within 60 days (or 90 days, or other established number of days) regardless of whether the buyer has been paid by the owner.

#### **D. Limited Warranties**

The desires of buyers and sellers are often diametrically opposed regarding warranties. Buyers usually prefer a "full" warranty, covering materials, parts, labor, and all corrections, for all nonconformities or defects (excluding misuse and normal wear and tear), for not less than one year after the goods are placed into continuous, successful operation and all required field testing is successfully completed. Sellers, on the other hand, typically prefer to be governed only by their own standard warranties, which often cover only parts and typically end on the earlier of 12 months after the equipment is first started up or 18 months after shipment from the factory; the latter sometimes results in manufacturers' warranties expiring before the goods are placed into service.

Some sellers will seek warranty terms that limit their warranty obligations to the greatest extent possible. In some cases Sellers may also be reluctant to accept requirements for guaranteeing the performance of their goods at the installation site, due to site constraints and operational variability.

P-700 9.01 establishes the Seller's general warranty and guarantee that the Goods and Special Services will comply with the Procurement Contract Documents and will not be defective or nonconforming; the duration of the general warranty and guarantee set forth in P-700 9.01 is limited only by applicable statutes of limitations and statutes of repose. In addition, P-700 9.04 sets forth a correction period, running for one year from the date of the Buyer's final inspection and acceptance of the Goods for use (following installation, checkout, startup, field quality control activities, training of operations and maintenance personnel, and other Special Services). During the correction period, the Seller is obligated to correct any defects—a "specific performance" remedy.

The warranty provisions and the correction period commitment provide significant protection for the Buyer, but undoubtedly come with an associated cost.

The terms of P-700's correction period (P-700 9.04) and the Seller's general warranties and guarantee (P-700 9.01) may be changed by the contract drafter via appropriate clauses in the Procurement Supplementary Conditions. When a manufacturer's special or extended warranty is required, it would normally be specified in the associated Procurement Specifications for the equipment or materials. Before specifying special or extended warranties from the manufacturer, it is usually appropriate for the specifier to verify from prospective Sellers whether the desired special or extended warranty is available and, if yes, its cost, which may be significant.

#### **E. *Waiver of Consequential Damages***

P-520 9.01 is a limited mutual waiver of consequential damages. Sellers seek a waiver of consequential damages out of concern about being held responsible for unknown or remote secondary impacts of defects in the Seller's equipment or materials. As the Guidance Notes preceding P-520 9.01 explain, some Buyers will not be willing to surrender potential rights in this category, and therefore will elect to delete the waiver of consequential damages from the specific Agreement; this should be done only with careful consideration of the possible adverse impacts on prospective Sellers' interest in the procurement, and on prices. Buyers should take into consideration the balanced content of P-520 9.01, which contains express exceptions that preserve Buyer's rights regarding liquidated damages, indemnification, performance bond, and injury claims.

It is the stated intent of P-520 9.01 that if the Procurement Contract is assigned to a construction contractor, the mutual waiver of consequential damages will be binding on the contractor; as a result, the Contractor/Assignee's remedies against the Seller with respect to consequential damages will be limited, to the same extent as the original Buyer's remedies are limited. See also P-520 5.01.A.3.d ("any limitations on Seller's liability in this Procurement Contract will continue to bind the original Buyer (assignor) after assignment").

#### **F. *Indemnification***

P-700 7.07 requires the Seller to indemnify the Buyer, Project Owner, and Engineer with respect to injury and property damage claims, to the extent of Seller's negligence. Some prospective Sellers may reflexively have concerns about this obligation, but because of the clause's narrow scope most prospective Sellers will ultimately not be deterred from bidding and will accept this limited indemnification duty.

#### **G. *Changes in the Contract; Pricing of Changes***

P-700 Article 11 allows the Buyer to modify the Procurement design. This is a traditional right that is not controversial in construction contracts. However, some sellers are reluctant to accept the possibility of changes in the scope of their goods or special services, and when changes do occur in the procurement setting, it can be a thorny challenge to arrive at an equitable adjustment to the Contract Price. There is no way around this—project owners/buyers (and their engineers) know from experience that it is necessary to have the ability to modify the Procurement Drawings and Procurement Specifications, and other contract elements; indeed, this right is expressed at P-700 11.05 and should generally not be relinquished by project owners/buyers.

When there is a design change and the parties reach an impasse on the change in the procurement contract price, P-700 11.08.B sets forth procedures for arriving at a fair price. If the parties do not otherwise agree to a price, then P-700 11.08.B.3 indicates that the change in price will be "on the



basis of documented costs plus a Seller's fee for overhead and profit of 15%." For conventional construction, such methodology is routine, but in the manufacturing setting it is a challenge, because most sellers' internal cost accounting systems are not set up to track costs on a per-unit basis, making cost documentation difficult. Because of this, the P-Series Documents do not include any provision similar to C-700 13.01 ("Cost of the Work"). The net result is that the parties will find it mutually beneficial to agree to a lump sum amount if at all possible, rather than attempting to navigate the cost-plus method.

A possible way of making the cost-plus method more viable would be for the parties to establish the Seller's billable labor rates, both for in-factory work and for onsite Special Services, at the outset of the Procurement Contract, and incorporate them into an exhibit attached to the Procurement Agreement. (This suggestion is not addressed in P-520, P-700, or P-800). Rates for travel time, in-factory work, and onsite time may differ from each other. Basic requirements for the Seller's other costs, including travel expenses, and the cost of raw materials and lower-tier suppliers and subcontractors, could potentially be incorporated into such an exhibit to the Procurement Agreement. Such rates and terms would be used for compensating the Seller for changes ordered via a Change Directive. While many sellers can and do track time for travel and onsite time and associated travel expenses, obtaining or estimating fair rates for in-factory changes may be problematic.

#### **H. Taxes, Duties, and Similar Costs**

P-700 7.05 addresses taxes by requiring the Seller to pay all taxes and duties arising from furnishing the Goods and Special Service, and states that the Procurement Contract Price will include all taxes and duties, except for those specifically indicated otherwise in the Procurement Supplementary Conditions. This allocation of tax payment obligations to the Seller is intended to establish a clear division of responsibility. It is also usually the case that the Seller—typically an entity with expertise and extensive experience in the sale of the goods it produces—will be in the best position to research the scope of taxation and assign an accurate price to it.

In negotiating procurement contracts, sellers may endeavor to exclude from their procurement contract price sales taxes and other "local" taxes, based on the contention that they cannot be expected to know the tax rules in all jurisdictions. However, the drafter of a project's procurement contract also may not be knowledgeable about the applicability of local taxes to the sale of engineered equipment and materials, and likely is also unfamiliar with duties, tariffs, and import/export fees, as well as possible taxation at the manufacturing site.

If the Project Owner/Buyer elects to relieve the Seller of some or all of tax responsibilities associated with furnishing the Goods, an appropriate Paragraph SC-7.05 would be necessary in the Project's Procurement Supplementary Conditions. EJCDC P-800 does not present model language for this because the permutations of how such matters could be handled are nearly endless. In cases where the Buyer shifts tax duties to itself, it may be wise to establish in the procurement contract an obligation by the Seller to submit to the Buyer documentation of the taxes, duties, and similar fees for direct payment by the buyer.

Alternatively, another means of alleviating prospective sellers' concerns about payment of sales and use taxes, duties, and similar fees, would be to establish a Project Owner's contingency allowance in the Procurement Contract Price for such taxes, duties, and fees. This approach would continue to make the Seller responsible for payment of such costs, but removes from the Seller the risk of precisely estimating such costs in the Bid. If the aggregate total of taxes, duties, and fees exceeds the Project Owner's contingency allowance amount, a Change Order would be

necessary for the difference. In properly drafting such a provision—for which model language is not included in the P-Series Documents—it may be appropriate for the drafter and/or the Project Owner to research the taxes and probable duties and import/export fees involved in furnishing the Goods and to stipulate which costs are eligible for compensation under such an allowance.

Some sellers may also attempt to negotiate responsibility for other costs over which, similar to taxes, duties, and similar fees, they contend they have no control, such as shipping/freight costs. The ability to properly predict such costs (as well as taxes, duties, and similar fees) decreases when the procurement contract time(s) for delivery of the goods is long. Some sellers recognize that the project owner/buyer likewise has no control over such costs, but contend that the project owner/buyer should be responsible for them, perhaps via either a stipulated, Project Owner's contingency allowance in the Procurement Contract Price or by direct payment of such costs. While sellers' concerns are perhaps understandable, sellers are in a much better position to understand the rules, procedures, and costs of shipments than are typical project owners/buyers and their engineers.

P-700 7.05 obligates the Seller to pay all duties associated with furnishing the Goods and Special Services. P-700 8.01.A requires the Seller to pay all costs of packaging, shipping, and transportation, and P-700 8.02.A requires that the Goods be delivered "FOB" at the Point of Destination. The acronym FOB stands for "free on board" (sometimes also interpreted as "freight on board") and is a shipping term used in sales transactions to indicate which party is responsible for paying transportation charges. The FOB location is the location where ownership of the goods transfers from the seller to the buyer. In contrast to FOB Point of Destination, an FOB location of the seller's factory or production facility would mean that the buyer would be responsible for shipping and risk-of-loss in transit.

Owner/buyers are naturally wary about agreeing to directly pay such shipping costs, duties, or import/export fees, and reluctant to take the risk of "guessing" at the amount of a stipulated, Project Owner's contingency allowance and having to subsequently pay more to receive the same goods. On the other hand, the more risk the project owner/buyer is willing to assume, the lower the procurement contract price will be—initially, at least. If that price, in isolation, is of primary importance, then accepting such costs and fees may be worth the owner's consideration.

## 4.0 ASSIGNMENT OF A PROCUREMENT CONTRACT

### 4.1 Assignment—General

An assignment of a contract occurs when one party to an existing contract (the "assignor") hands off that party's contract obligations and benefits to a third party (the "assignee"). Ideally, the assignor wants the assignee to step into the assignor's shoes and assume all of the assignor's contractual obligations and rights. The concept and implementation of assigning a contract can appear to be complex; if assignment is properly addressed in the original contract, it can be implemented smoothly and efficiently in practice.

EJCDC expects that a common use of the P-Series Documents will be for sales transactions in which the Procurement Contract initially will be entered into by the Project Owner as the initial Buyer, and which the Project Owner will then assign at a later date to a construction contractor—the Contractor/Assignee. The typical effective date of assignment will be the effective date of the construction contract between the Project Owner and the Contractor/Assignee. After the assignment is effective, the Contractor/Assignee will become the Buyer, and the Seller will become a "supplier" directly under contract to the Contractor/Assignee. When the Seller delivers the Goods to the Contractor/Assignee, the Contractor/Assignee (or a subcontractor) will install the Goods, as part of the Contractor/Assignee's scope of work under the construction contract.

Assignment is addressed in this Commentary, as well as in various P-Series Documents and in selected C-Series and CMA-Series Documents, including the 2018 Construction Commentary, C-001. The model language of EJCDC's P-Series, C-Series, and CMA-Series documents, together with this Commentary and C-001, should provide sufficient guidance to enable inexperienced personnel to prepare effective assignment provisions in both the procurement contract and in the associated construction contract. As discussed in this section, guidance and advice of the Project Owner's legal counsel is always necessary.

The assignment of a procurement contract is made and becomes effective in a document establishing the assignment, which typically bears the signatures of the Assignor (the original Buyer, presumably the Project Owner), the Contractor/Assignee (the construction contractor that accepts the assignment and takes over as Buyer), and the Seller. When the Seller has furnished a performance or payment bond on the assigned contract, it is also necessary for the Seller's surety to furnish written consent to the assignment. EJCDC's Procurement ("P-Series") Documents provide forms to establish such an assignment (P-520 Exhibit A) and record the consent of the Seller's surety (P-520 Exhibit B).

P-520 5.01.A is the Procurement Contract's principal provision governing assignment and should be read and clearly understood by the Project Owner and its legal counsel, and the Engineer, during the drafting of the Procurement Contract's bidding documents. The changes in the general responsibilities of the Project Owner, Engineer, Contractor/Assignee, and Seller upon the effective date of the assignment are set forth in P-520 5.01.A.3.

When an assignment occurs, the Engineer's direct third-party obligations under the Procurement Contract cease, as discussed further in the remainder of this Section 4.0. However, the Engineer typically will continue to serve its traditional administrative functions under the construction contract, resulting in continuing indirect involvement with the procurement, which will, by reason of the assignment, fall within the scope of the Contractor/Assignee's construction contract work.

## 4.2 Pros and Cons of Assigning a Procurement Contract

### A. Advantages of Assignment

Indicated below are some of the advantages of assigning a procurement contract to the installing construction contractor:

1. *Reduced Construction Phase Coordination for Project Owner and Engineer:* By essentially eliminating one prime contract, assignment reduces the construction phase coordination required of the Engineer and Project Owner. Without the assignment of the Procurement Contract to the construction contractor, responsibility for coordination of the procurement with the construction contract will almost always devolve on the Engineer or Project Owner; this coordination effort can be significant. Such coordination can include scheduling and temporary storage; ensuring that the contractor has the proper hoisting equipment and personnel onsite on the day the goods are delivered; ensuring that the Engineer's interpretations and clarifications are properly communicated to all involved entities; coordinating the Seller's visits to the installed equipment for checkout, start-up, field quality control activities, training of operations and maintenance personnel, and other Special Services by the Seller; and other responsibilities. Such activities lie squarely within the experience and expertise of the construction contractor; by assigning the Procurement Contract, control is given to the party best able to manage the activities. When the Procurement Contract is not assigned, failure to ensure proper coordination and prompt communications among the principal entities can result in increased potential for changes, claims, and disputes from both the contractor and the Seller. The consequences of any failure in the required coordination may be significant. The substantial advantage gained by assigning the Procurement Contract should not be underestimated.
2. *Reduced Engineering Fees:* Because of the reduced construction phase coordination required of the Engineer and Project Owner, typically the Project Owner will benefit from reduced engineering fees when the Procurement Contract is assigned.
3. *Contract Enforcement:* Construction contractors routinely enforce the subcontractual obligations of suppliers of materials and equipment, and of subcontractors, using a variety of administrative and payment-related techniques. Assignment to the Contractor/Assignee allows the Procurement Contract to be efficiently enforced in the same manner as other subcontracts and purchase orders.

### B. Disadvantages of Assignment

There are some perceived drawbacks to assignment, as follows:

1. *Potential Contractor Markup for Risk:* By accepting the assignment of the Procurement Contract, the Contractor/Assignee is also accepting its risks—such as the risks of delayed or substandard performance by the Seller. Acceptance of risk is usually accompanied by a reward for accepting the risk and, thus, bidders will often include in their bid prices a markup on the amount of an assigned Procurement Contract, sufficient to account for the risks. The amount of such a markup will depend on the risks posed by the Procurement Contract, competition for the construction contract, the bidder's business climate, the assurance provided by the assignment of a performance bond from the Seller, and other factors that preclude establishment of any typical markup for accepting such assignment.

2. *Increased Project Management and Administrative Costs for the Contractor/Assignee:* The added project management time and administrative costs imposed by accepting assignment of a (often large and complex) procurement contract will tend to cause bidders on the construction contract to include such anticipated costs in their bid price. The extent and amount of such costs will vary by procurement contract, bidder, and the bidder's experience with the Seller and with installing similar equipment or materials elsewhere.
3. *Bonding Costs:* When a procurement contract is assigned, the amount of the Procurement Contract Price not yet paid to the Seller typically becomes part of the construction contract price, thus resulting in the Contractor/Assignee including the assigned amount of the Procurement Contract Price in its performance and payment bonds, which has an associated cost that is ultimately paid by the Project Owner. However, public procurement contracts (and some private procurement contracts) typically require the Seller to furnish performance and payment bonds to the Buyer. Thus, in assignment the Procurement Contract could be considered to be "double-bonded," with an associated latent cost to the project.
4. *Unfamiliarity with Assignment:* Many project owners, engineers, and even sellers involved in a procurement contract are unfamiliar with and inexperienced with the concept of assignment, which can result in incorrect administration of a procurement contract and construction contract, and other potential drawbacks.
5. *Seller Concerns:* Many sellers are understandably concerned about having the Procurement Contract assigned to a Contractor/Assignee—an entity that is typically not yet identified at the time the Seller enters into the Procurement Contract with the Project Owner, and that may have an unattractive credit history. Regarding assignment, some sellers may attempt to obtain some type of authority over whether they will truly "accept" the assignment depending on the identity of the construction contractor/assignee. Obviously, project owners typically would not want to be at the mercy of a seller's potential rejection of an assignment. To attempt to address both parties' potential concerns, P-520 5.01.A expressly allows the Project Owner to assign the Procurement Contract, and requires the Seller to accept such assignment, but stipulates that the Project Owner make such assignment "only to a person or entity with sufficient apparent ability to satisfy all of Buyer's obligations under this Procurement Contract."

Although there are cost and administrative complexities associated with assigning a procurement contract, typically the advantages gained through essentially eliminating a prime contract and significantly improving the coordination of the Procurement Contract with the construction contract outweigh the drawbacks. In most circumstances, assigning a procurement contract to the construction contractor is advisable and, ultimately, advantageous for the project.

### **4.3 Drafting Assignment Provisions**

#### **A. Provisions on Assignment in the Procurement Documents**

EJCDC's Procurement Series, Construction Series, and Construction Manager as Advisor (CMA) Series documents were carefully written so that the drafter (typically the Project Owner, the Engineer, or a construction manager) can set up contracts that properly provide for a subsequent assignment of the Procurement Contract to the construction contractor (Contractor/Assignee). In

the P-Series itself, this entails modifying the Procurement Instructions to Bidders (P-200) and the Procurement Agreement (P-520), as set forth in the model language, guidelines, guidance notes, and notes to users in the two documents. These include:

1. P-200 Article 21 (*“Procurement Contract to be Assigned”*)—Include Article 21 and specifically P-200 21.01 in the Project’s Procurement Instructions to alert prospective bidders that the Procurement Contract will be assigned.
2. P-520 Article 5 (*“Assignment of Procurement Contract”*)—This is the principal contractual provision governing assignment. If the Procurement Contract will not be assigned, the drafter of the Procurement Agreement should delete P-520 5.01.A and edit P-520 5.01.B in accordance with the guidance notes. When the contract will be assigned, retain Paragraph 5.01.A and make appropriate, Project-specific revisions to its model language, in accordance with the associated guidance notes.
3. P-520 Exhibits A and B—As discussed below, these exhibits document the consent of the parties (Buyer and Seller), and of the Seller’s surety, to the assignment and must be included for effective assignment. When the Procurement Contract will not be assigned, omit Exhibits A and B from the Procurement Agreement.

#### **B. Provisions on Assignment in the Associated Construction Contract**

If the Procurement Contract will be assigned to the construction contractor (Contractor/Assignee), and assuming that the construction contract’s Division 00 documents are developed from EJCDC’s C-Series Documents or EJCDC’s CMA-Series Documents, the drafter of the construction documents should:

1. Indicate in the construction contract’s Instructions to Bidders that Owner will assign the Procurement Contract to the Contractor. See, for example, C-200—2018, *Instructions to Bidders for Construction Contract*, Article 22, “Contracts to be Assigned.”)
2. Include in the construction contract’s bid form: (a) the Bidder’s acknowledgement of the assignment, and (b) a lump sum bid item for the stipulated amount of the Procurement Contract Price that will be assigned to the Contractor. C-410—2018, *Bid Form for Construction Contract*, includes Guidance Note 4 at C-410 7.01 prompting the drafter regarding the proper location at which to insert EJCDC’s model language regarding assignment. (This model language is itself presented in a Guidance Note at P-200 21.01.) Suggested language for the recommended lump sum item in the construction bid form’s pricing schedule is included in C-410 3.01 (at Guidance Notes 12 through 18).
3. In the construction agreement document to be signed by Owner and Contractor:
  - a. Indicate the pay item setting forth the amount of the assigned Procurement Contract, in Article 5 of C-520—2018, *Agreement between Owner and Contractor for Construction Contract (Stipulated Price)* or in the equivalent location in CMA-520, *Agreement between Owner and Contractor for Construction Contract (Stipulated Price)*—*Construction Manager as Advisor Series*. When C-525—2018, *Agreement between Owner and Contractor for Construction Contract (Cost-Plus-Fee)*, or CMA-525, *Agreement between Owner and Contractor for Construction Contract (Cost-Plus-Fee)*—*Construction Manager as Advisor Series*, is used, the assigned amount of the Procurement Contract must be indicated as a cost and included in the amount of any guaranteed maximum price, and the Contractor’s (Contractor/Assignee’s) fee for

overhead and profit for the assigned Procurement Contract amount should be expressly indicated.

- b. Include the assigned Procurement Contract (which, in turn, includes the Project Owner's, Contractor/Assignee's, and Seller's consent to the assignment as P-520 Exhibit A; and the Seller's surety's (if any) consent to the assignment at P-520 Exhibit B) in the Agreement's listing of the construction Contract Documents. A note to user to prompt the drafter on this matter is included in each of the four construction agreement forms: for example, at C-520 7.01.A.9 (at note to user 4).
- c. When preparing the final construction contract documents, ensure that the signed Procurement Contract Documents are bound with the construction contract documents, including all duly authorized and issued Procurement Contract Change Orders, Change Directives, and Field Orders issued prior to the effective date of the assignment. Exhibit A to the Procurement Agreement must be signed by the Contractor/Assignee. (Both the Project Owner/Buyer and Seller should have signed P-520 Exhibit A at the time the Procurement Agreement was signed by the parties.)

EJCDC® C-522—2018, *Construction Contract for Small Projects*, does not include any provisions concerning assignment of a procurement contract.

4. In the construction contract's supplementary conditions, include language that expressly identifies the Procurement Contract that is assigned to the Contractor (Contractor/Assignee). Because both C-700, *Standard General Conditions of the Construction Contract*, and CMA-700, *Standard General Conditions of the Construction Contract—Construction Manager as Advisor Series*, include provisions (for example, C-700 18.08) that generally prohibit the assignment of the construction contract, EJCDC recommends that the language identifying the assigned procurement contract be included in the construction supplementary conditions; for example, at C-800 SC-18.08.B. Guidance prompting the drafter of the construction supplementary conditions is included at C-800 SC-18.08, and in CMA-800. As previously noted, EJCDC's model language for this provision is presented in a note to user at P-200 21.01.

#### **4.4 Documenting the Assignment**

The Procurement Agreement, P-520, includes two exhibits:

1. Exhibit A, "Assignment of Contract; Consent to Assignment; Acceptance of Assignment": In this exhibit the Project Owner (as the initial Buyer), the Seller, and the Contractor/Assignee formally document the assignment. The Project Owner and Seller should sign Exhibit A at the time the Procurement Agreement is signed, typically well before the construction contractor selection process begins. Later, after the award of the construction contract, the Contractor/Assignee will also sign Exhibit A, at the same time that the Contractor/Assignee, as Contractor, signs the construction agreement (either C-520, C-525, CMA-520, or CMA-525).
2. Exhibit B, "Consent to Assignment by Seller's Surety": This exhibit documents the Seller's surety's consent to the assignment. This form should be signed by the Seller's surety at the same time the Seller signs the Procurement Agreement and Exhibit A. After the assignment is effective, the Seller's surety's obligations run to the benefit of the Contractor/Assignee (which, as the result of accepting the assignment, has become the Buyer, taking the place of

the Project Owner). If a specific Procurement Contract does not require the Seller to furnish a performance bond and payment bond, then Exhibit B is not required.

The two exhibits indicated above are part of the Procurement Contract Documents in accordance with P-520 6.01.A.8; the two exhibits apply, and should be used (attached), only if the Procurement Contract will be assigned, and reference to them should be deleted from the Procurement Agreement when the Procurement Contract will not be assigned. There should be a sufficient number of originals of the Procurement Contracts (including the signed Procurement Agreement, signed Exhibits A and B, and copies of duly-authorized Procurement Contract Change Orders, Change Directives, and Field Orders issued up through the effective date of the assignment) for the Project Owner, Seller, and Contractor/Assignee, and for any other entity that requires an original for its records.

As set forth in the four standard Owner-Contractor construction agreements (C-520, C-525, CMA-520, and CMA-525; see, for example, C-520 7.01.A.9), the entire signed Procurement Contract should be an exhibit to the construction agreement when the Procurement Contract is being assigned. This includes all the Procurement Contract Documents set forth in Paragraph 6.01.A of the Procurement Agreement.

The Project Owner should determine—perhaps with prompting from the Engineer or other entity drafting the Procurement Contract Documents—whether signed originals of the Procurement Agreement are needed only for the two original parties to the Procurement Contract, or whether additional signed originals—as opposed to copies—of the Procurement Agreement will also be required to be included as exhibits to the multiple originals of the construction agreement. Logistically, the Project Owner or Engineer will likely be the entity that retains any “extra” signed originals of the Procurement Agreement (and the remainder of the Procurement Contract) for later use when the construction contract is awarded and formalized.

When an assignment occurs the Contractor/Assignee will sign Exhibit A (accepting the assignment) at the same time the construction agreement (C-520 or other) is signed. Care must be taken to ensure that originals or verified copies of Exhibit A are distributed to all the parties involved in the assignment.

#### **4.5 Communications with Seller After Assignment**

Prior to the effective date of the assignment, the Project Owner (as the initial Buyer) and the Engineer (as the Project Owner’s representative) can communicate directly with the Seller. After the assignment is effective, however, the Seller becomes a “supplier” to the Contractor/Assignee and, therefore, any subsequent communications from the Project Owner or Engineer regarding the Goods and Special Services should be addressed to and routed through the Contractor/Assignee.

- It is important for Project Owners and Engineers to remember and enforce compliance with this principle; such compliance may be challenging, because, by the time the assignment is effective, the Project Owner and Engineer may have become accustomed to months or perhaps years of direct communications with the Seller.
- After the assignment is effective, the Project Owner and Engineer should treat the Seller the same as any other supplier or subcontractor under subcontract to the Contractor/Assignee.
- Similarly, after assignment the Seller’s personnel should direct all communications to the Contractor/Assignee and coordinate the delivery of the Goods and performance of the Special Services through the Contractor/Assignee.
- At the construction contract’s preconstruction conference, it is important that the ramifications of the Contractor/Assignee’s acceptance of the assignment be discussed, and the appropriate



protocols for communications regarding the Goods and Special Services should be made clear to all participants in the Project.

#### **4.6 Payments to the Seller After Assignment**

If the Procurement Contract has not been assigned, the Seller's Applications for Payment are to be submitted to and reviewed by the Engineer (acting on behalf of the original Buyer—the Project Owner), in accordance with P-700 13.01.A and P-700 13.02. This procedure prevails up until the effective date of the assignment (if any). In the typical case, the original Buyer (Project Owner) will make one or perhaps even two relatively modest progress payments directly to the Seller, prior to the effective date of the assignment. For example, the terms of the Procurement often provide that the Seller is eligible for a specific progress payment upon approval of the Shop Drawings; and, depending on the Procurement Contract, perhaps also for the purchase of raw materials.

After the assignment is effective (and the initial progress payments described above have been made):

- the balance of the Procurement Contract Price will be paid to the Seller by the Contractor/ Assignee in its role as Buyer;
- the Seller will submit its Applications for Payment to the Contractor/Assignee (P-520 5.01.A.3.f), and the Engineer has no further role in processing or reviewing the Seller's Applications for Payment;
- the Contractor/Assignee will subsequently submit to the Engineer, under the construction contract, one or more applications for payment that seek compensation for partial or full furnishing of the Goods and Special Services (this Work having been accomplished by the Seller, as Contractor/Assignee's supplier);
- In its standard role as the initial reviewer of the construction contract payment applications, the Engineer will determine whether the Goods and Special Services identified in the payment applications have indeed been furnished, and are thus eligible for payment from Project Owner (as Owner under the construction contract) to Contractor/Assignee (as Contractor);
- Upon the Project Owner's issuance of a construction contract payment to the Contractor/Assignee, the Contractor/Assignee will issue payment to the Seller in accordance with the Procurement Contract's payment terms and applicable prompt payment statutes.

The amount of the Procurement Contract assigned to the Contractor/Assignee is typically less than the full Procurement Contract Price (as discussed in the Guidance Notes in C-410 and CMA-410). If, for example, the Procurement Contract's payment terms are 10 percent of the Procurement Contract Price is eligible for payment upon the Engineer's approval of the Shop Drawings; an additional 80 percent is eligible upon delivery of the Goods to the Point of Destination in the required quality, quantity, and condition; and the final 10 percent is eligible for payment upon completion of the Seller's Special Services and other obligations (except those obligations that continue after final payment), then a common payment scenario would be:

- Project Owner directly pays the Seller 10 percent of the Procurement Contract Price upon the Engineer's approval of the Seller's Shop Drawings.

- Payment for the balance (90 percent) of the Procurement Contract Price goes through the Contractor/Assignee, and is therefore the amount of the Procurement Contract Price assigned to the Contractor/Assignee.

The drafter of the construction contract should bear the foregoing in mind when determining the amount to indicate in the construction bid form and in the Project Owner-Contractor/Assignee agreement for the amount of the assigned Procurement Contract. In the above example, the amount to be assigned would be 90 percent of the Procurement Contract Price, because the Project Owner would already have paid the initial 10 percent directly to the Seller.

EJCDC is aware of some project owners that wanted to assign their procurement contracts but desired to continue to issue all payments directly to the Seller after the assignment was effective. Such action is inconsistent with EJCDC's recommended contractual practice. When the Contractor/Assignee accepts the assignment and thus incurs all the risk associated with the Procurement Contract, the Contractor/Assignee needs to have control of the cash flow to the Seller. Project owners that are unable to relinquish issuance of payment to the Seller, typically for internal procedural reasons, should refrain from assigning their procurement contracts.

#### **4.7 Responsibilities of the Parties and the Engineer After Assignment**

A key provision of the P-Series addressing this topic is P-520 5.01.A.3.

##### ***A. Project Owner's Responsibilities After Assignment***

After the assignment is effective, the Project Owner ceases to be the Buyer and assigns all its Procurement Contract responsibilities to the Contractor/Assignee. However, the Project Owner continues to have the indirect responsibility to pay for the Goods and Special Services furnished under the Procurement Contract, to the extent they are duly included as pay items under the construction contract's applications for payment, as described in the previous section.

As an exception to the rule, the Procurement Specifications may require the Project Owner or facility manager (if other than the Project Owner) to perform certain activities following assignment, such as participating in training in the operation and maintenance of the Goods and being present during the startup and initial operation of the Goods following installation.

The Project Owner's responsibilities upon substantial completion of the work under the associated construction contract are set forth in the construction contract documents.

##### ***B. Seller's Responsibilities After Assignment***

After the effective date of the assignment, the Seller's responsibilities remain as set forth in the Procurement Contract Documents, and are owed to the Contractor/Assignee, as Buyer.

##### ***C. Contractor/Assignee's Responsibilities After Assignment***

Upon the effective date of the assignment of the Procurement Contract, the Contractor/Assignee becomes the Buyer and takes on all of the Buyer's rights, responsibilities, and risks under the Procurement Contract. The Contractor/Assignee is bound by the terms, conditions, and obligations of the Procurement Contract, which is incorporated as part of the construction contract between the Project Owner and Contractor/Assignee. By the express terms of the Procurement Agreement, upon assignment of the Procurement Contract the Procurement Drawings and Procurement Specifications, and any modifying Addenda, become "Contract Documents" under the construction contract. P-520 5.01.A.3.a.

The Contractor/Assignee is responsible for the Seller, including the Seller's furnishing of the Goods and Special Services, to the same extent as for any other supplier retained by the Contractor/Assignee to furnish materials or equipment under the construction contract. The terms of the construction contract will typically indicate the contractor's responsibilities for coordinating and controlling its suppliers and subcontractors (see C-700 7.07).

#### **D. Engineer's Responsibilities After Assignment**

EJCDC's P-Series Documents allocate to the Engineer certain responsibilities and third-party obligations under the Procurement Contract (P-700 Article 10). If the Procurement Contract is assigned, it becomes a subagreement between the construction contractor (Contractor/Assignee) and a supplier (Seller), and as with any other construction subcontract or purchase order, the Engineer has no direct role or duties. As stated in the Procurement Agreement, upon assignment:

All rights, duties, and obligations of Engineer to Contractor/Assignee and Seller under this Procurement Contract will cease.

However, the Engineer does continue to have rights, duties, and obligations (1) under its professional services contract with the Project Owner, and most pertinently (2) under the construction contract that overarches the procurement scope of work. As a result, the Engineer will continue to have an impact on the procurement, albeit an impact that is indirect and filtered through the prime construction contract. In particular, following an assignment the Engineer will:

1. Interpret the construction contract's Contract Documents, which by the terms of the assignment will now include the Procurement Drawings and Procurement Specifications.
2. Prepare revisions that modify the construction contract's Contract Documents, which by the terms of the assignment will now include the Procurement Drawings and Procurement Specifications. Construction contract modifications that apply to the Procurement Drawings and Procurement Specifications will, by the terms of the assignment, be documented at the Procurement Contract (Contractor/Assignee–Seller) level by a corresponding change order or similar document. P-520 5.01.A.3.b.
3. Review and take appropriate action on submittals that originated with the Seller, including results of source quality control activities/factory testing and field quality control activities, operations and maintenance manuals, and others, to the extent that Contractor/Assignee submits such documents to Engineer under the requirements of the construction contract. As with any construction contract submittal originating with a supplier or subcontractor, such submittals must be reviewed and approved by the Contractor/Assignee prior to the Contractor/Assignee transmitting them to the Engineer for review.
4. Continue to evaluate the eligibility of Goods and Special Services for payment, but only to the extent that Contractor/Assignee, as construction contractor, has incorporated such items into payment applications that Engineer reviews under the construction contract. (Note that in construction manager as advisor projects, the construction manager, and not the engineer, typically has responsibility for processing the contractor's applications for payment.) After assignment, the Engineer has no further or ongoing responsibility or authority to receive and review the Seller's Applications for Payment or to recommend payment to the Seller—after assignment Seller submits its Applications for Payment directly to the Contractor/Assignee (which is at that point the Buyer).

5. Inspect the construction contractor's (Contractor/Assignee's) work for substantial completion (C-700 15.03 and 15.04) and final inspection (C-700 15.05) both of which, obviously, include inspecting the installed Goods.

Prior to the effective date of the assignment, the Engineer is the entity that initially determines entitlement in Claims between the Buyer (at that point the Project Owner) and the Seller (P-700 12.01). After the assignment is effective, in accordance with P-520 5.01.A.3.h, the Contractor/Assignee (Buyer) and Seller no longer submit Claims to the Engineer. If the Contractor/Assignee elevates a Claim by the Seller under the Procurement Contract to the status of a change proposal or claim under the construction contract, the pertinent change/claim provisions of C-700 or CMA-700, as applicable, will control the resolution process.

In accordance with P-700 9.02.B and P-700 9.02.C, the Buyer is the only entity that is obligated to inspect the Goods upon delivery to the Point of Destination and to perform a final inspection of the Goods. Whether the Project Owner has retained the Engineer to participate in such inspections, on Owner's behalf, whether or not the Procurement Contract is assigned, is addressed in the Project Owner–Engineer professional services agreement.

#### **E. Warranty Obligations After Assignment**

The Procurement Contract contains warranty commitments by the Seller; the EJCDC Construction Series General Conditions, C-700, likewise contains warranty commitments by the Contractor. When the Procurement Contract is assigned to a Contractor/Assignee, there is the potential for inconsistency between the prime contract's warranty commitments and those made in the Procurement Contract—most commonly, the commitments in the Procurement Contract may more limited than those in the construction contract. To impose consistency, C-700 7.17.E states that:

If the Contract requires the Contractor to accept the assignment of a contract entered into by Owner **[for example, a Procurement Contract]**, then the specific warranties, guarantees, and correction obligations contained in the assigned contract will govern with respect to Contractor's performance obligations to Owner for the Work described in the assigned contract.

## 5.0 DISCUSSION OF SPECIFIC PROVISIONS OF THE EJCDC PROCUREMENT DOCUMENTS

### 5.1 Document for Initiating the Procurement Drafting Process

EJCDC® P-050, *Project Owner's Instructions Regarding Procurement Documents*, is used by the Engineer to gather from the Project Owner critical information needed to carry out the process of selecting the Seller (including the Project Owner's instructions regarding advertisements for bids, instructions to bidders, requests for proposals, or other bidding requirements, as applicable), and to prepare or assemble drafts of the various components of the Procurement Contract Documents.

1. P-050 serves to identify the source documents to be used in preparing the Procurement Contract's bidding and contract documents (for example, the EJCDC P-Series, or the Project Owner's custom forms, or other documents); also, whether the design engineer's own standard specifications or other documents will be the source for developing the Procurement Specifications, and how the bidding and contract documents will be organized—most commonly, in accordance with the Construction Specifications Institute's (CSI) *MasterFormat*®.
2. P-050 should prompt discussions between the Project Owner and the Engineer regarding topics of critical importance in drafting procurement contracts: whether the Procurement Contract will be assigned; whether it will include a limitation of the Seller's liability; payment terms; liquidated damages; and other issues of significant interest to manufacturers of equipment, systems, and materials.
3. It is important that the Project Owner and Engineer agree that specific bidding (or other Seller selection) procedures be followed; and that they identify the entity that will serve in the role of the "issuing office" (defined in P-200 1.01) during bidding.
4. P-050 includes provisions to document the Project Owner's instructions concerning bond and insurance requirements to be included in the Procurement Contract. Because engineers usually lack expertise in insurance and risk management (and may not be insured to render advice regarding insurance or risk management), the bond and insurance provisions of P-050 are important in establishing the primary role of the Project Owner with respect to insurance and risk management.
5. P-050 incorporates provisions analogous to those of C-050, C-051, and C-052.
6. When the design engineer's services under the Project Owner–Engineer agreement do not already include the full range of Procurement-specific engineering services, P-050 also will prompt the Project Owner and design engineer to discuss the design engineer's role with respect to the Procurement. Clarity regarding the scope of the engineer's involvement in the project during fabrication, delivery, and installation of the Goods is also critical for the development of complete, correct, and coordinated procurement contract documents, as well as the contents of the associated construction contract's documents.

P-050 should be completed by the Project Owner and returned to the Engineer, or completed based on the Project Owner's directions in meetings or other communications with the Engineer, prior to commencing the preparation of the Procurement Contract's bidding and contract documents. In many cases, it may be necessary for P-050 to be completed over a period of time, as the Project Owner's preferences in preparing the Procurement Contract's Division 00 documents are clarified and refined. When this is the case, EJCDC recommends that the project document adapted from P-050 be updated as

revisions are directed, and copies of the updated form and its attachments saved in the files of both the Project Owner and the Engineer.

Naturally, the degree of involvement in the Seller selection and Procurement Contract documents drafting processes of the Project Owner and the Engineer will vary depending on the size and capability of the Project Owner's staff, possible Project Owner retention of a program manager or construction manager, and the assignment undertaken by the Engineer under the Project Owner–Engineer professional services agreement. Typically, the Procurement Contract's bidding and contract documents will be drafted by the Engineer. In other cases, however, the majority of the Seller selection process and preparation of contracts (other than the Engineer's preparation or furnishing of the Procurement Drawings, Procurement Specifications, and other design and technical documents) will be done by the Project Owner, the Project Owner's procurement department or legal counsel, or a construction manager or consultant, with minimal help from the design engineer. When such is the case, the use or scope of the Project-specific document developed from P-050 should be modified to fit the requirements of the Project.

When preparing bidding and contract documents for a public Project Owner/Buyer, it is very important that the Project Owner/Buyer's legal counsel be consulted with respect to applicable statutory requirements and the Project Owner/Buyer's unique procurement practices.

In every case, whether the Project's source of funds is private or public, review by the Project Owner/Buyer's legal counsel is a very basic, prudent measure that is strongly recommended by EJCDC.

## **5.2 Procurement Bidding Requirements**

### **A. EJCDC® P-200, *Instructions to Bidders for Procurement Contract***

P-200 presents model language for the Procurement Instructions to Bidders, and sets forth the requirements and procedures for the bidding phase of the equipment procurement and for awarding and signing the Procurement Contract.

The Procurement Instructions to Bidders govern activities by the Buyer, prospective Bidders, the Successful Bidder (to which the Procurement Contract is awarded), and the Engineer up through, but not after, the Effective Date of the Procurement Contract. As soon as the Procurement Contract is in effect, the Instructions to Bidders are not relevant, and thus the Instructions are not Procurement Contract Documents.

P-200 presents alternative provisions for various Buyer preferences in the Seller selection process, and is intended to be tailored to the needs of the Project and the Procurement Contract.

In general, P-200's provisions are similar to those of EJCDC® C-200—2018, *Instructions to Bidders for Construction Contract*, except that unlike C-200, P-200 does not include provisions (1) for the prospective Sellers (Bidders) to perform site investigations or (2) for price-plus-time bidding, sectional bids, or bidding on the basis of cost-plus-a-fee. For a detailed discussion of the various articles of P-200 that are parallel to those of C-200, refer to C-001, Construction Commentary, and its discussion of C-200—2018.

C-001 also presents discussion on the use of EJCDC® C-111—2018, *Advertisement for Bids for Construction Contract*, which can be used as the basis for drafting an advertisement for bids for the Procurement Contract. Such as advertisement, or an invitation to select bidders, should, of course, be closely coordinated with the Procurement Instructions to Bidders and Procurement Bid Form.

**Substitution requests during bidding.** There are no provisions for review or approval of a Bidder’s proposal for a substitution during the bidding process in the Procurement Instructions to Bidders. (Substitution requests have a place in the broad scope of work of a construction contract, but are not compatible with the more focused purpose of an equipment/system procurement; thus P-700 also excludes the proposal of substitutes under the Procurement Contract.) P-200 Article 10 does allow the user the option of including an “or equal” procedure as part of the bidding process, though the presumptive practice is that no requests for approval of or-equals will be entertained during the bidding phase.

**Conditional Bids.** When drafting P-200—2019, EJCDC considered and ultimately rejected the inclusion of a standard provision allowing Bidders to bid on both (1) the proposed Procurement Contract as issued by the Project Owner/Buyer and (2) the proposed Procurement Contract as altered by Seller’s desired conditions, exclusions, or exceptions. EJCDC considered this approach because of the propensity of some prospective Sellers to submit bids with such conditions, exclusions, or exceptions (“conditional bids”), even in the face of instructions that forbade (or did not expressly allow) such bids.

After significant conversation and a thorough evaluation of the alternatives, EJCDC rejected allowing conditional Bids. Thus, P-200 17.01 contains the usual language, similar to that of C-200 18.01, stating that the Buyer reserves the right to reject conditional Bids. EJCDC’s rationale for this was that, in procurements for public buyers, accepting any Bid with conditions or exceptions will have significant potential for a bid protest or other controversy. Although the language of P-200 17.01 stops short of unequivocally requiring the rejection of any Bid with conditions or exceptions, EJCDC believes that, for public buyers, accepting conditional bids, or considering an award of contract to a Bidder that submitted a conditional Bid, is not in the Buyer’s interest.

As preventive measures, to avoid the receipt and consequent rejection of conditional bids, and to encourage responsive competitive bids, it is advisable for Project Owner/Buyers and their Engineers to (1) actively work with prospective Sellers prior to the buyer’s issuance of the bidding documents to identify contractual terms and conditions that are of concern, and to identify appropriate solutions consistent with the Buyer’s goals for healthy price competition and reasonable risk allocation; (2) to communicate clearly and at appropriate times to prospective Bidders that bids with conditions or exceptions are unacceptable and are likely to be rejected; and (3) to promote a reputation for consistent enforcement of compliance with the Procurement Instructions, as a general matter and specifically by following through and rejecting conditional bids.

**Bidders’ submittal of non-price information.** EJCDC is aware of some buyers and engineers requiring the submittal of non-price information—for example, preliminary Shop Drawings and other such documents—with bids for a procurement contract. Drafters of the Procurement Instructions to Bidders, and of the other bidding-related Procurement documents for public Buyers, are cautioned to give due consideration to the significant drawbacks associated with requiring such extraneous submittals as part of a Bid.

- The best practice is to select the Successful Bidder (per P-700 1.01.A.38, this is the Bidder that is awarded the Procurement Contract) based on objective criteria, usually the bid price, most commonly in the form of express numeric prices; or in appropriate cases, where statutes allow the use of “best value” bidding, through Bidder-submitted information that can be readily and rationally converted to

generate price data, or a score for best value, such as a 20-year present worth cost of electricity used by the equipment being purchased, or chemical consumption over a specific period.

- Soliciting the submittal of extraneous documents, such as preliminary Shop Drawings, increases the potential of introducing subjectivity into the process of selecting the Seller. Increased subjectivity in the award of a public contract correspondingly increases the potential for bid protests.
- Consultation with the public Project Owner/Buyer's legal counsel is advisable. For additional information on this topic, refer to this Commentary's discussion, below, on P-400 4.01 ("Attachments to this Bid").

**Confidentiality.** As discussed immediately above, there are drawbacks to asking prospective Sellers to submit non-price information as part of their bids. If such submittals are required in specific situations, then P-200 Article 9 ("Confidentiality of Bid Information") may be relevant. The clause may also apply if the Bids themselves (the prices) are highly confidential.

There is no parallel bid confidentiality provision in C-200. EJCDC included Article 9 in P-200 because many prospective Sellers of complex equipment, materials, and systems have expressed concerns about proprietary information, which may include trade secrets, falling into the hands of their competitors. Thus, is it much more common for Bidders on a procurement contract to label some or all of their Bid—in particular, technical information submitted with their Bid—as confidential. While a private Project Owner/Buyer is fully within its rights to keep all information submitted with a Bid confidential and private, the same may not apply to Bids for public procurements, where bids may be categorized as public records, subject to review upon request.

P-200 Article 9 indicates the Project Owner/Buyer's commitment to retain as confidential any and all information so marked in the Bid, to the extent that the Project Owner/Buyer is allowed to do so by Laws or Regulations. P-200 Article 9 parallels the clauses of P-520 Article 8 ("Confidentiality"), and a change in one will likely prompt a corresponding change in the other. When the Project Owner/Buyer will not or cannot commit to keeping information submitted with the Bid confidential, EJCDC recommends deleting Article 9 of the Procurement Instructions and replacing it with "Reserved" to preserve the article and paragraph numbering within the Procurement Instructions.

**Evaluating Bids and awarding the Procurement Contract.** Owners are well served by establishing objective criteria for the evaluation of bids and award of the contract. This is especially true in the public bidding context, where the integrity of the owner's bidding practices is extremely important, and bid protests are a significant concern. Bid protests, whether formal (that is, submitted in accordance with established bid protest procedures, sometimes through a court of competent jurisdiction) or informal, may appear in different forms, and statutes governing who may submit a formal (legal challenge) bid protest on public contracts vary significantly by jurisdiction. A successful bid protest can result in the overturning of a project owner's decision to award the contract, embarrassment from media attention, and cost and project schedule impacts.

P-200 Article 17 presents model language for the comparison of Bids and the basis for awarding the Procurement Contract. The Project Owner/Buyer's rights concerning rejecting Bids or waiving informalities are indicated in P-200 17.01. For public bidding, P-200 Article 17 should be modified as needed to comply with Laws and Regulations governing public procurements.



The core provision for award of the Procurement Contract is P-200 17.04: "...such award will be to the responsible Bidder submitting the lowest responsive Bid." Unlike EJCDC® C-200—2018, P-200 Article 17 does not include model language for either sectional bids or price-plus-time bidding, which are occasionally used in awarding a construction contract, but are extremely rare in the procurement of goods and special services. However, the preparer of the Procurement Instructions should determine, with the full knowledge, consent, and direction of the Project Owner/Buyer, whether evaluation factors other than the lowest-priced responsive Bid by a responsible Bidder are (1) of importance to the Project Owner/Buyer and (2) for a public procurement, statutorily allowed in the jurisdiction of the Project, and accordingly edit Article 17 of the Procurement Instructions. Presented below is a discussion of the most common alternative approaches for evaluating bids on procurement contracts:

1. *Evaluation Factors*: As indicated above, the Project Owner/Buyer may choose to request information that can be objectively converted to a price to be used in the Bid evaluation process. Possible evaluation factors might include the Bidder's equipment efficiencies; the chemical or energy consumption of process equipment; life-cycle costs; and other items. Often, such information included with the Bid will be converted into a present-worth value, based on a stipulated (assumed) equipment or system service life, and the resulting present worth is often added to the pricing indicated on the Bid Form, as a basis for determining the overall low Bid. On other procurements, especially on non-public or quasi-public procurements, certain evaluation factors will be converted to a score, using methodology clearly set forth in the Procurement Instructions, with the Procurement Contract thus being awarded to the Bidder submitting a responsive Bid with the best score.

When such procedures are used in evaluating the Bids, the drafter of the Procurement Instructions must clearly specify such criteria in Article 17. In many cases, it will be advisable to include sample calculations, to clarify the procedures and reduce the potential for bid protests and disagreements. Such criteria should also be coordinated with P-200 Article 11 ("Preparation of Bid") and the Procurement Bid Form.

2. *Best Value Awarding*: Some jurisdictions allow the award of public contracts based on "best value," which may include consideration of factors in addition to price. In some jurisdictions, subjective criteria may be used, on a weighted-scale basis, in ranking the Bids to determine which Bid constitutes the "best value" for the Project. When the award is based on "best value" criteria, significant changes to the model language of P-200 Article 17 will be necessary. P-200 does not include any model language for such evaluations, because of the wide range of criteria and evaluations that are possible. For public procurements, EJCDC strongly recommends that such "best value" provisions, when used, be thoroughly vetted by the Project Owner/Buyer's legal counsel before the Procurement Contract is advertised for Bids.
3. *Base Bid Plus Alternates*: When using "base Bid with alternates" EJCDC recommends that the alternate items on the Procurement Bid Form be either all additive or all deductive. This will assist in reducing the potential for Bidder error in completing the Procurement Bid Form and will simplify evaluating the Bids. The text of P-200 12.03 and P-200 17.03 for "base Bid with alternates," and the corresponding provisions in P-400, have been developed only for additive alternates. The same format, with revisions, also could be used with deductive alternates (i.e., alternates that reduce the scope or cost from the base bid).

For a base Bid with alternates, P-200 12.03.C states that alternates will be considered in the order of priority listed on the Procurement Bid Form. Assuming that the alternates are all additive, this means that the first alternate listed is the one most-desired by the Project Owner/Buyer and that each succeeding alternate has an incrementally lower priority. When written for deductive alternates, the order of priority changes and the first alternate would be that least-desired by the Project Owner/Buyer.

Some project owners/buyers have been known to use alternates to manipulate the selection of the Successful Bidder, by asking for Bids on numerous alternates and then, after the bid opening, selecting those alternates that result in either award to a favored Bidder or elimination of a disfavored Bidder. EJCDC's model provisions for determining the apparent low Bidder under "base Bid with alternates" are similar to those used by several United States federal government agencies and, when challenged, have been upheld by several boards of contract appeals. It represents the fairest method of determining the apparent low Bidder in the context of multiple alternates, based on EJCDC's review of possible approaches. When followed precisely, including the Project Owner/Buyer's announcement of the "budget" available for the Goods and Special Services (usually just prior to opening the Bids), the determination of the low Bidder should be impartial, and an aggrieved entity will have little basis to challenge an award with a claim that the Project Owner/Buyer manipulated the order of the Bids by a post-bid selection of certain alternate items or a post-bid determination of the order in which the alternates are selected.

**Bidder responsibility.** Most competitively-bid contracts, including equipment, materials, and systems procurement contracts, are awarded to the responsible Bidder that submits the lowest-priced, responsive Bid. The owner should disqualify any Bidder that is deemed to be not responsible. The evaluation of a Bidder's responsibility should always be based on factual data and reliable information, but nevertheless may be, to a partial extent, subjective. Disqualifying a Bidder on a public procurement because of insufficient responsibility is a serious matter that is the duty of the Project Owner/Buyer itself; disqualification decisions should not be taken unilaterally by the Engineer, and should also include prior consultation with the Project Owner/Buyer's legal counsel.

Because most Procurement Contracts involve highly specialized and complex equipment, materials, and systems, sold by only a limited number of manufacturers, typically the Project Owner/Buyer and its Engineer will have conducted a significant degree of due diligence of the prospective sellers during the preparation of the Specifications, and will have sufficiently established the qualifications and responsibility of the shortlisted manufacturers, often indicated by name in the Procurement Specifications, before the procurement bid solicitation is issued.

In some cases it may nonetheless be necessary to obtain some qualifications information at the time of bidding, especially if intermediate entities such as supply firms or brokers bid on the contract. For construction projects, EJCDC publishes EJCDC® C-451, *Qualifications Statement*; a complete discussion of C-451 is presented in C-001, Construction Commentary. It may be appropriate to use a modified version of C-451 to obtain from prospective Sellers uniform information to establish their qualifications and responsibility, if not already known to the Engineer and Project Owner/Buyer.

A Bidder's ability to obtain bonds—bid bonds, performance bonds, and payment bonds—is a significant factor in confirming responsible bidder status. The sureties that issue such bonds have

substantial expertise in obtaining and analyzing a company's financial and performance data, and sureties are strongly motivated to minimize the surety's own risk by issuing bonds only on behalf of responsible entities. Bid bonds are addressed at P-200 Article 6; P-200 18.01 advises the Successful Bidder that performance and payment bonds are required, in accordance with P-700 2.01 and P-700 5.01 and associated Procurement Supplementary Conditions. It will be necessary to revise the Procurement Instructions to Bidders when the Buyer will either require or accept forms of procurement contract security (such as letters of credit) other than performance and payment bonds. Provisions on acceptable forms of procurement contract security, if any, other than performance and payment bonds should be indicated in the Procurement Supplementary Conditions at Paragraphs P-800 SC-2.01 and SC-5.01. For a brief discussion on this topic, refer to this Commentary's Section 5.7, concerning P-700 5.01.

P-200 11.04.D requires that the Bidder "[p]rovide evidence of the Bidder's authority and qualification to do business in the locality of the Project..." A discussion of these matters is presented below (Section 5.2.B), regarding P-400 4.01. Appropriate edits to Paragraph 11.04.D of the procurement Instructions will be necessary in certain cases, such as where a Bidder's qualifications statement is not required with the Bids.

See also the discussion at the end of the following section, regarding P-400 4.01.D.

#### **B. EJCDC® P-400, Bid Form for Procurement Contract**

P-400 is intended to be customized for the specific Procurement bid letting by the Project Owner/Buyer (often through the services of the Engineer); distributed to the prospective Bidders; and filled out and submitted back to the Project Owner/Buyer by the Bidders. The Procurement Bid Form is structured to allow the Project Owner/Buyer to receive Bids based on uniformly-worded, express terms, including price commitments, representations, and acknowledgements that are stated in the form.

In general, the provisions of P-400 are similar to those of EJCDC® C-410—2018, *Bid Form for Construction Contract*. Because P-400 is generally quite similar to C-410, a complete discussion of P-410 is not presented in this Commentary. For a detailed discussion of C-410, refer to C-001, Construction Commentary. One notable distinction between the document series is that the Bidders on a Procurement Contract are not required to make representations of the Bidder's understanding of site conditions, other than the Bidder's representation that the Bidder is familiar with conditions at the Point of Destination that will or may affect the delivery of the Goods.

The Bidder's standard representations in P-400 are consistent with the Seller's corresponding standard representations in the Procurement Agreement (P-520 Article 7).

P-400 4.01 is the only location in the procurement bidding requirements where the documents that are to be attached to the completed Procurement Bid Form and submitted to the Buyer as part of the Bid are listed. Most of the model language of P-400 4.01 is similar to the parallel language of C-410 for a construction contract and are addressed in both the guidance notes at P 400 4.01 and in C-001's commentary on C-410. The following are three of the standard attachments to a Bid for a Procurement Contract listed in P-400 4.01:

1. P-400 4.01.B requires that the Bid be accompanied by "Evidence of authority to do business in the state of the Project; or a written covenant to obtain such authority within the time for acceptance of Bids." In procurement contracts, there is strong potential for the prospective Seller to be from one state, while the location where the Goods will be installed (often, the Point of Destination) is in another state and, in some cases, the

Project Owner’s main office may be in yet another jurisdiction. The evidence of authority should be for the location where the Goods will be installed, unless directed otherwise by the Project Owner/Buyer or its legal counsel—if the Project Owner/Buyer is concerned that the standard wording could be misunderstood by some bidders, then the specific state should be specified in 4.01.B before distributing the Procurement Bid Form to prospective Bidders.

2. P-400 4.01.C is an optional provision that asks for submittal of equipment data sheets; such documents and information may, on occasion, amount to “preliminary Shop Drawings.” EJCDC discourages requiring Bidders to submit such items: as discussed above in this Commentary with respect to P-200 Article 13 and P-700 17.01, requiring or even accepting (when not specifically required by the procurement bidding documents) information that is not directly relevant to the bid pricing or other criteria necessary for an objective evaluation of the Bids increases the potential for subjectivity and bid protests, either formal or informal.

Furthermore, prospective sellers sometimes attempt to label equipment data sheets and similar information as confidential (see P-200 Article 9) whereas, for public bids, documents furnished with the Bids will typically be part of the public record and subject to disclosure via freedom-of-information requests. Often, furnishing equipment data sheets with the Bid is unnecessary because, typically, the Engineer has previously obtained equipment data sheets and similar information from each shortlisted manufacturer as part of due diligence during the Procurement Contract design phase. P-200 10.01 (EJCDC’s suggested default language concerning proposal of “or-equals” during bidding) prohibits proposing or basing the Bid on an “or-equal”, and the P-Series Documents do not allow the proposal of substitutes on a procurement contract—both of which further reduce the need for requiring equipment data sheets with the Bid.

3. P-400 4.01.D is an optional provision that may be used to require Bidders to submit a Bidder Qualification Statement. While this may be required and appropriate on some procurement contracts, a Bidder’s qualifications statement is usually not necessary on a procurement contract. As discussed above at the end of the section on P-200, with respect to determining whether a Bidder is “responsible,” this is because the Engineer and Project Owner/Buyer, in the process of evaluating types of equipment, systems, and materials, and the manufacturers available for the selected type of equipment, systems, and materials, have usually performed necessary evaluations of the qualifications, experience, performance record, financial strength, service support capability, and other matters of interest to the Project Owner before deciding whether to indicate a given manufacturer in the Procurement Specifications. Even where proprietary specifying (meaning, indicating in the Procurement Specifications certain acceptable manufacturers and perhaps equipment or material models or trade names) is not used (which, for public procurements, may be either prohibited or strongly discouraged in certain US jurisdictions), presumably the Engineer, possibly with Project Owner involvement, has evaluated such matters for the likely prospective Sellers, thus obviating the need for a Bidder’s Qualifications Statement for most procurement contracts. Requiring a Bidder’s Qualifications Statement may, however, be advisable when there is real potential for one or more Bidders to be other than manufacturers or authorized representatives of the manufacturers indicated in the Procurement Specifications.

## 5.3 The Procurement Agreement

### A. Overview of the Procurement Agreement

EJCDC® P-520, *Agreement between Buyer and Seller for Procurement Contract*, is a relatively brief document that sets forth the most fundamental terms of the specific Procurement Contract:

1. identification of the parties to the Procurement Contract (Buyer and Seller) and the Engineer;
2. a short description of the Project and of the general nature of the Goods and Special Services;
3. the Effective Date of the Procurement Contract, the Procurement Contract Times, and the consequences (if any) of Seller's non-compliance with the Procurement Contract Times;
4. the Procurement Contract Price;
5. basic terms of payment to the Seller, including the schedule of progress payments, provisions on retainage (if any), and other basic payment terms that are specific to the contract;
6. terms governing the assignment of the Procurement Contract;
7. a list of the Procurement Contract Documents;
8. the Seller's representations, certifications, and stipulations to the Buyer;
9. provisions on confidentiality of specified information;
10. a limited mutual waiver of consequential damages; and
11. forms for documenting the assignment of the Procurement Contract.

The Procurement Agreement concludes with a formal signature page for execution by the Buyer and Seller.

Other matters of significant contractual importance—for example, contractual warranties, insurance, and indemnification obligations—are addressed in the Procurement General Conditions and the Procurement Supplementary Conditions.

This section of the Commentary discusses the elements of P-520 that are unique to procurement contracts, and P-520's use in developing Project-specific Procurement Agreements. Many of the provisions of P-520 are very similar to the corresponding provisions of EJCDC® C-520—2018, *Agreement between Owner and Contractor for Construction Contract (Stipulated Price)*. For a more detailed discussion of the P-520 provisions that parallel those of C-520, the user may wish to refer to C-001, Construction Commentary.

EJCDC intends that the Procurement Agreement be edited to suit the needs of each individual procurement contract developed from P-520.

### B. Stipulated Price Compensation

The method of compensation under the Procurement Agreement is stipulated price (types of which are discussed below). Cost-plus-fee compensation is very rare in procurement contracts and many sellers' accounting and administrative systems are not set up to track costs in the manner typically required in cost-plus-fee construction or professional services agreements.

Types of stipulated prices contemplated in P-520 include lump sums and unit prices. P-520 and other P-Series Documents also include provisions for a stipulated Project Owner's contingency allowance, which is essentially a special type of lump sum item. Although lump sums are the most-common type of compensation in procurement contracts, unit prices are also used, particularly for the purchase of spare parts and extra materials, or where the Buyer is initially uncertain of the quantity of units to be procured under the Procurement Contract. Unit prices may also be useful for indeterminate obligations, such as a unit price per day, week, or month for storing the Goods prior to delivery to the Point of Destination.

### **C. Procurement Contract Times**

The Procurement Contract Times are addressed in P-520 Article 2. Construction contracts typically include contract times for (a) "substantial completion" and (b) completion of all the work and readiness for final payment; procurement contracts, by contrast, do not include these completion concepts in their definition of the Procurement Contract Times. Rather, the Procurement Contract Times are typically focused on the number of days or specific dates for delivery of the Goods. Other deadlines are also commonly included in the Procurement Contract Times, including the time in which Seller must submit Shop Drawings, and the time for Seller's completion of any required Special Services.

In a procurement contract, the Seller does not install the Goods or have control over when the installed Goods are placed into operation. For this reason, it is not practical or reasonable to base the Procurement Contract Times on the date when the Goods are installed or begin productive operations.

Discussion of the standard Procurement Contract Times stated in P-520 follows (a discussion of the consequences of failing to comply with the Procurement Contract Times is presented below in Section 5.3.D of this Commentary):

#### **1. Seller's Furnishing of Shop Drawings**

This is a Procurement Contract Time not only because the submittal of Shop Drawings demonstrates the Seller's progress, but also because one of the most common reasons for a Project Owner to use a procurement contract is to allow the Project's overall design to be tailored to the detailed dimensions and configurations of the major equipment, as it will actually be furnished. For the Engineer to move the Project's design beyond the preliminary design phase, a complete set of Shop Drawings for the Goods is often essential. Thus, delays in the Seller's submittal of complete Shop Drawings required for fabrication of the Goods has the potential to adversely affect the Project's overall schedule, including the design schedule and the associated construction contract schedule. These schedule impacts may in turn circle back and adversely impact the Procurement Contract Times for delivering the Goods and furnishing the Special Services.

Many procurement contracts typically have only one major Shop Drawing (in addition to other Submittals such as source quality control (shop test) results, operation and maintenance manuals, and other Submittals). Often this is a large and complex Shop Drawing. The Seller's ability to comply with the remaining Procurement Contract Times may be affected by the time required for the Engineer's review and action on the Shop Drawing. Therefore, P-520 2.03.B includes a provision for indicating the time by which the Engineer's response on the Shop Drawing will be presented to the Seller. The time

indicated should be sufficient for the Engineer to review and comment on a Shop Drawing of the scope that Engineer anticipates.

There are no corresponding clauses in EJCDC's C-Series or CMA-Series Agreement documents because construction contracts typically involve many shop drawings and other pre-fabrication submittals, and therefore the times for the construction contractor's submittals, and the time allowed for the Engineer's review and response to these submittals, will be established after the construction contract is in progress, and will be set forth in a schedule of submittals (including the various construction Shop Drawings) required by C-700 2.03 and 2.05. (A schedule of the Seller's Submittals is also required in P-700 2.04, Preliminary Schedules; this schedule will of course include the primary Shop Drawing submittal and review deadlines already established in Article 2 of the Procurement Agreement.)

## 2. *Delivery of the Goods*

The reason why the delivery of the Goods is a Procurement Contract Time is obvious: delivery of the Goods is the most significant event in the Seller's performance of its responsibilities under the Procurement Contract.

Delivery of the Goods is also a very important coordination milestone, because the construction contractor, and any other entity (such as a subcontractor) involved in receiving, unloading, handling, and installing the Goods, has to know with certainty when the Goods will arrive at the Point of Destination, so that appropriate preparations can be made, including providing necessary hoisting and handling equipment and personnel at the required time. The Seller's failure to deliver the Goods in accordance with this associated Procurement Contract Time can have a significant effect on the Project, including delay claims by the construction contractor. When the Procurement Contract is assigned, any claims for delayed delivery would be between the Contractor/Assignee and the Seller. When the Procurement Contract is not assigned, such delay claims would likely be submitted by the construction contractor to the Project Owner, and subsequently by the Project Owner (as Buyer) to the Seller.

Sometimes, when the Goods are numerous or have complex requirements for sequencing and installation, it may be appropriate to specify multiple Procurement Contract Times for delivery of specific items. This needs to be carefully coordinated with the installation requirements under the associated construction contract. Similar considerations may apply to Goods to be installed into existing facilities, due to the need to properly sequence deliveries and installation to allow the existing facility to remain in operation during installation.

The Procurement Contract Time(s) for delivery of the Goods needs to allow sufficient time before the deadline for preparation and review of the Shop Drawings; the Seller's procurement of raw materials; fabrication; source quality control activities (such as factory testing, where applicable); packaging; and shipment of the Goods to the Point of Destination. Where international shipments are possible, the Procurement Contract Time for delivery should also account for a reasonable estimate of time for customs inspections and uncertainties in international shipping. Overseas shipments may be subject to force majeure events such as tropical storms, embargoes, geopolitical crises, and other uncertainties—all of which are much less likely when the Goods are fabricated and

shipped domestically. Provisions governing delays in the Seller's performance, including force majeure events, are addressed in P-700 4.04 ("Delays").

### 3. *Start and Completion of Special Services*

In general, these Procurement Contract Times concern performance of the Seller's typical Special Services rendered at the location where the Goods are installed. These might include checkout, startup, field quality control activities (such as field testing and troubleshooting), and training of operations and maintenance personnel. Failure of the Seller to start and complete such Special Services in accordance with the associated Procurement Contract Times has strong potential to affect the installing construction contractor's ability to comply with its own contract deadlines and thus has associated potential for delay claims by the contractor. When the Procurement Contract is assigned, such claims will be between the Contractor/Assignee (as Buyer) and the Seller. When the Procurement Contract is not assigned, such claims by the construction contractor would likely be against the Project Owner, which in turn would likely submit a claim, as Buyer, against the Seller.

In specifying the Procurement Contract Times for starting and completing the Special Services, the drafter of the Procurement Agreement should consider the typical duration normally required by sellers of similar goods installed at other sites, and the specific requirements of the Project.

Frequently, the Seller is required by the Procurement Contract to have a qualified representative at the Point of Destination to advise the contractor in unloading and handling the Goods. It is worth noting that the Seller's onsite services associated with delivery of the Goods, when required, are separate from the Special Services referred to in the Procurement Contract Times for Special Services, as contemplated in P-520 2.02. (While P-700 9.02.B requires only the Buyer to visually inspect the Goods upon delivery, it is common for the specific Procurement Contract, perhaps via a delivery-related Procurement Specification, to also expressly require the Seller to participate in the visual inspection upon delivery. The Seller's familiarity with the Goods is often essential in the proper performance of such visual inspection.)

### 4. *Coordination of Procurement Contract Times with the Associated Construction Contract*

It may be necessary or advisable to include the Procurement Contract Times in the associated construction contract, either as relevant information or as construction contract "Milestones," to better ensure proper coordination of the Procurement Contract and the construction contract, regardless of whether the Procurement Contract will be assigned.

A common source of coordination concerns is ensuring that the Procurement Contract Times are consistent with the construction contract times. It is not unusual for coordination issues to occur when delays arise in bidding and awarding the associated construction contract.

To reduce the potential for a possibly undesirable early delivery of the Goods, P-520 suggests a requirement limiting the Seller's early delivery of the Goods to a stipulated number of days (filled in by the drafter of the Procurement Agreement) ahead of the associated Procurement Contract Time for delivery. See the "Notes" column of the table in P-520 2.02.A. However, contractual language alone is not a substitute for effective



communication and coordination among the Project's participants to ensure necessary preparedness by the construction contractor when the Goods arrive at the Point of Destination.

The construction contractor typically has overall responsibility for the scheduling and sequencing of the Project's construction (C-700 7.01). Because the scheduling of the Seller's Special Services—including checkout, startup, field quality control activities, and training—can be a challenge, and many sellers' technical personnel who perform onsite special services are stretched thin juggling the requirements of multiple buyers, the Procurement Agreement attempts to impose schedule structure in advance, for the benefit of the Contractor/Assignee and the Project, by including as part of the Procurement Contract Times the start and completion of the Seller's onsite Special Services.

#### ***D. Liquidated Damages for Late Performance***

P-520 2.01 states that the deadlines (Milestones) for Seller's performance of its obligations, including but not limited to the delivery of the goods, are "of the essence" of the contract. This is a fundamental clause that appears in many contract clauses. It is EJCDC's firm conviction that timely performance by the Seller is essential to timely completion of the overall Project, and that the Seller's late performance will likely delay the work of others, such as construction contractors and the Engineer.

The essential importance of timely performance, as stated in P-520 2.01, is further emphasized and enforced by the liquidated damages clause, P-520 2.04, which presents suggested language for establishing liquidated damages to be assessed against the Seller for late performance. As indicated in P-520 2.01, attaining each of the Milestones on time is of the essence of the Procurement Contract; however, as a matter of standard practice, P-520 2.04 is limited to establishing liquidated damages solely for the critical delivery-of-the-Goods Milestone. Late delivery of the Goods is a likely source of Project delay, with adverse repercussions for the construction contractor and the Project Owner; thus the damages for late delivery are commonly liquidated, by establishing a specific per-day damages amount.

Similar logic may apply to the Seller's failure to complete its onsite Special Services on time, and the user may supplement P-520 2.04 to establish liquidated damages for the Special Services completion failure. On the other hand, the Seller's failure to submit Shop Drawings by the associated Milestone may have a less direct cost impact, and therefore it is uncommon to establish liquidated damages for Seller's failure to meet the Shop Drawings Milestone.

Note that although only the damages for late delivery of the Goods are liquidated in P-520 2.04, this does not preclude the Buyer from pursuing a claim for actual, proven damages in a specific instance where missing one of the other Milestones had a demonstrable adverse impact.

When included in the Procurement Contract, liquidated damages should be a realistic, reasonable, good faith estimate of the damages the Buyer is likely to incur because of late performance by the Seller. For increased potential for liquidated damages to be enforceable if challenged in a claim or dispute, EJCDC recommends that the rationale for the liquidated damages amount(s) be set forth in a memo to the Project Owner's and Engineer's files. In determining the monetary amount (usually a per-day rate) of liquidated damages, project owners and engineers should also consider whether "high" liquidated damages may discourage prospective Bidders, and liquidated damages' probable impact on the bid prices. As indicated elsewhere in this

Commentary, transfer of contractual risk often has an associated cost (included in the prices bid to the Project Owner). Some sellers are reluctant to accept liquidated damages of any sort and, when they do opt to accept such risk (by submitting a Bid), are likely to include in the bid price the cost of accepting such risk. On occasion, the price of such risk may be substantial.

If the Goods are required to be delivered in separate shipments, perhaps weeks or months apart, it may be the case that the Buyer would be damaged (incur costs) only for failure to timely deliver the final shipment. In other cases, it may be appropriate to pro-rate the liquidate damages for partial deliveries of the Goods. The specific circumstances of each Project and Procurement Contract should dictate the necessity for liquidated damages, and for modifications of the standard clause. Consideration should also be given to whether liquidated damages will be cumulative, again based on the specific circumstances of the Project. Liquidated damages are intended to compensate the Buyer, not to be punitive. The reader is invited to review the Notes at the beginning of P-520 Article 2 regarding drafting considerations for the liquidated damages clause, including possible inclusion of a cap on the aggregate amount of liquidated damages.

The Procurement Contract Times and related contract clauses in P-520 Article 2 are essential terms of the Procurement Contract. Before using the model language, the drafter should obtain the Project Owner's direction (and the Project Owner should, in turn, consult with its legal counsel) regarding the extent, if any, that the model language should be modified to comply with the Project Owner's intent and, for public procurements, for compliance with governing Laws and Regulations.

For additional discussion on liquidated damages, refer to Section 3.2.B of this Commentary.

#### **E. *Performance Damages***

"Performance damages" stipulate the monetary consequences of a failure of equipment to perform in accordance with the performance criteria in the Procurement Contract Documents. An example of performance damages would be a provision setting forth the method of calculating financial damages owed by the Seller to the Buyer when the efficiency of a large pump-motor-drive system, as furnished, is less than required by the Procurement Specifications and will therefore, if accepted by the Project Owner, result in long-term, increased electrical costs incurred by the Project Owner. There are many other examples of performance damages for under-performing equipment.

When performance damages provisions are included in the Procurement Contract, they should optimally be located in the Procurement Specifications where the equipment or system is specified, and cross-referenced in the Procurement Agreement. An appropriate location for such a cross-reference would be in a new provision added to Article 3 ("Procurement Contract Price") of the Procurement Agreement.

When performance damages provisions are included, they are typically imposed for the failure of the Goods (equipment) to comply with specified performance requirements compared against the results of factory (shop) testing. Factory testing provides a fair basis for comparison, as opposed to field testing after the equipment is installed. With field testing, there may be system elements or system design issues at the point of installation over which the Seller has no control—and these elements or issues may affect performance at the installation site. By contrast the Seller has full control over the equipment and the conditions of evaluation in a factory (shop) testing environment. To give the Buyer and Engineer increased assurance that the results of factory (shop) testing are accurate, the drafter of the Procurement Specifications may include

requirements for either (1) representatives of the Project Owner and/or Engineer to witness the factory testing, or (2) for a licensed, registered professional engineer (who may be an employee of the Seller and who need **not** be licensed in the same jurisdiction as the location where the Goods will be installed) to witness, seal, and certify the accuracy and completeness of the factory test results. The rationale for the latter is that the professional engineer is ethically bound, by the professional obligations of his/her licensure, to be accurate, complete, and truthful.

When included in the Procurement Contract, the basis for determining the amount of performance damages should be indicated very clearly in the Procurement Contract Documents. Sample calculations included in the Procurement Specifications may increase the clarity and intent of the damages provision. Where feasible, a table of pre-computed performance damages may be appropriate.

As discussed above regarding liquidated damages, when the liability for performance damages is significant, Bidders on the Procurement Contract are more likely to price such risk into their Bids, or may reconsider whether submitting a Bid is in the Bidder's interest. As always, the Project Owner and the Engineer should attempt to strike an appropriate balance between risk allocation and reasonable business decisions.

#### **F. *Mutual Waiver of Consequential Damages***

Starting with the 2010 edition of the P-Series Documents, EJCDC has included in the Procurement Agreement (P-520 9.01) a limited, mutual waiver of claims for consequential (indirect) damages arising from the Procurement Contract. By having both Buyer and Seller waive the right to make claims that are only remotely connected to the Procurement Contract, EJCDC's intent is that contract prices and insurance costs will be contained, in the best interests of the Project and both parties.

The mutual waiver of consequential damages clause at P-520 9.01 has several critical exceptions. It does not apply to contribution or indemnification claims—for example, if a third party has asserted a demand that includes damages that might be construed as "consequential" but there is a right by one of the parties to be indemnified by the other, the indemnity right is not waived by P-520 9.01. Traditional tort claims for bodily injury or death are likewise not waived or affected by P-520 9.01, nor are claims based on intentional or reckless conduct. Finally, P-520 9.01 will not limit the rights established in the Procurement Contract performance and payment bonds, regardless of how such rights might be categorized.

Additional discussion on waivers of consequential damages is presented in Section 3.2.E of this Commentary.

#### **G. *Payment Terms—In General, and After Assignment***

Payments under procurement contracts are typically structured such that the Seller is eligible for payment of a stipulated amount—often expressed as a percentage of the Procurement Contract Price—when the Seller has successfully completed a specific task in accordance with the Procurement Contract Documents, such as delivering the Goods to the Point of Destination. Because of this payment structure, the applications for payment on procurement contracts are commonly not submitted in accordance with a pre-determined periodic time schedule (in contrast, a contractor's progress payments are typically on a monthly basis). Thus, the drafter of the Project's Procurement Agreement should give due consideration to the potential timing of the receipt of the Seller's Applications for Payment relative to any pre-determined frequency for the Project Owner's (the initial Buyer's) issuance of payments.

In situations in which the Procurement Contract is assigned to a Contractor/Assignee, subsequent payments to the Seller go through the Contractor/Assignee. P-520 5.01.A.3.f provides that Contractor/Assignee (as Buyer) will review each such Application for Payment from Seller, then if approved include the amount in Contractor/Assignee's (Contractor's) next periodic payment application to the construction contract Owner; Seller will then be paid by Contractor/Assignee within a specified number of days after receipt of payment from the Owner. Understanding the logistics of the payment procedures and timing at the construction contract level will help Sellers plan for their receipt of payment. For example, if the Project Owner typically issues checks to its creditors on the 20th of each month, typically the Contractor/Assignee would need to submit its monthly application for payment under the construction contract to the Engineer by the first of the same month (assuming a 10-day period for the Engineer's review and 10 days for the Project Owner to issue payment; such times are consistent with C-700 15.01). If the Seller delivers the Goods on the 15th of the prior month, it may be feasible for the various entities to perform their initial observation of the delivered Goods (in accordance with P-700 9.02.B) and for the Buyer to issue to the Seller a notice on receipt of the Goods (P-625), in sufficient time for the Seller to issue an Application for Payment to the Contractor/Assignee in time to be included in the Contractor/Assignee's progress payment request, through the Engineer, on the first of the month. If, in contrast, the Seller delivered the Goods 30 days before the Contractor/Assignee's regular progress payment request, it is much more likely for the Seller to have to wait as much as 60 days for payment to be issued after the Seller's Application for Payment is submitted to the Contractor/Assignee.

In addition to that presented in this Section 5.3.G, commentary germane to the drafting of payment terms is presented in Section 3.2.C and Section 4.6 of this Commentary. Considerations regarding payments prior to the final payment are largely discussed in Section 3.2.C of this Commentary.

#### **H. *Payment Terms—Retainage and Final Payment***

Procurement contracts typically do **not** include provisions for retainage, as such. Rather, the percentage payments established in P-520 4.02.A should be structured to provide fair payment for Seller's attainment of the stated progress, while maintaining an adequate incentive for Seller to complete the Goods and Special Services. In a sense, retainage should be built into these percentages. Despite there being little or no need for retainage, as such, in a procurement contract, some project owners and engineers, who are often more experienced with construction contracts (which often include explicit retainage provisions), may be inclined to include retainage provisions in procurement contracts. Careful thought should be given before including retainage provisions in the Procurement Agreement; if so included, adjustment of the payment percentages may be needed.

The final payment to the Seller is not payment of "retainage." Rather, the amount of the final payment, as set forth as a percentage in P-520 4.02.A, should be a rational estimate of the value of the Seller's final obligations, such as submittal of Operations and Maintenance Manuals and warranties. EJCDC recommends against Procurement Agreement drafters arbitrarily enlarging the amount of the final payment as a means to disproportionately "encourage" performance by the Seller.

Many types of engineered equipment procured purchased using a procurement contract require a lengthy or seasonally-dependent proving period (i.e., monitored, full-scale operation after installation at the Project Owner's facility). EJCDC encourages the Project's Procurement

Agreement drafter to consider customizing the payment structure in P-520 4.02.A to coordinate with an extended proving period. For example, the Seller might first receive a payment for completion of checkout, startup, training, and furnishing operation and maintenance manuals, and a separate (final) payment for completing the Special Services associated with any prolonged, onsite performance testing or proving period.

#### **I. *Seller's Representations and Certifications***

P-520 Article 7 contains basic representations by the Seller regarding its examination of the Procurement Contract Documents, its familiarity with local conditions affecting the furnishing of the Goods and Special Services, its acceptance of Laws and Regulations affecting production and delivery of the Goods and furnishing of Special Services, and similar acknowledgements. P-520 7.01. Article 7 also includes standard certifications by the Seller that it has not engaged in fraudulent, corrupt, collusive, or coercive practices related to the Procurement Contract. P-520 7.02. These representations and certifications are very important and basic to the relationship between the Buyer and the Seller.

The representations and certifications in the Procurement Agreement are carefully coordinated with the parallel language of the Bidder's representations and certifications in the Procurement Bid Form; see P-400 Article 6. A change in the language in one document will likely require a corresponding change in the other.

### **5.4 Performance and Payment Bonds for Procurement**

#### **A. *EJCDC® P-610, Performance Bond for Procurement Contract***

A Seller-furnished performance bond provides the Buyer with a degree of security against the possibility of a serious default in performance by the Seller. The surety's bond obligation is a "safety net" that is fully deployed if the Buyer formally terminates the Procurement Contract for cause. In such a case the surety must act to complete the performance of the Procurement Contract through one of several alternative measures prescribed in P-610, including performance through a replacement seller. In return, the surety is entitled to the remaining balance of the Procurement Contract Price.

The performance bond is also a useful tool in encouraging an improvement in the Seller's performance prior to the extreme measure of termination of the contract. The Buyer must provide the Seller and the Surety with notice that it is contemplating a declaration of default. This notice may lead to productive negotiations or a conference to discuss the situation and find a remedy—the Surety's involvement can help spur a resolution.

#### **B. *EJCDC® P-615, Payment Bond for Procurement Contract***

The Procurement payment bond protects the Seller's suppliers and subcontractors against the risk of non-payment for the labor, materials, and equipment they furnish for the benefit of the Project and the Buyer; thus, the Procurement Payment Bond provides assurance for the Project Owner that its real property where the Goods will be installed will not be subject to liens or other financial encumbrance due to non-payment by the Seller of its creditors. Only first-tier (those having a direct purchase order or subcontract with the Seller) and second-tier (those having a direct purchase orders or subcontracts with a first-tier supplier or subcontractor) suppliers and subcontractors may make a claim under the terms of P-615. P-615 includes notice requirements and states that a legal action on the bond must commence within one year of the earlier of either

(1) the date a claim was sent to the surety, or (2) the last provision of labor, materials, or equipment for the Goods and Special Services. These terms may be affected by applicable state laws requiring a longer period in which to commence claims against the payment bond.

### **C. Standard Bond Forms**

P-610 and P-615 use terminology consistent with the other EJCDC's P-Series Documents, and are closely based on EJCDC® C-610—2018, Performance Bond, and EJCDC® C-615—2018, Payment Bond, which were developed jointly by EJCDC, the American Institute of Architects (AIA), and professional organizations representing the surety bond industry. EJCDC® C-610—2018 and EJCDC® C-615—2018 are reissues of the bond forms originally jointly developed by these entities, and published in standard form in 2010.

The Seller must furnish a performance bond and payment bond pursuant to the requirements of P-700 5.01. EJCDC recommends that the Procurement Contract specify that the surety use the standard EJCDC bond forms, P-610 and P-615, to meet the bonding requirement; this can be accomplished by including the suggested wording published in P-800 SC-5.01 in the contract.

If alternative forms of procurement contract security are allowed, then appropriate revisions should be made and included as added text in SC-5.01 of the Procurement Supplementary Conditions.

## **5.5 Administrative Forms for Procurement Contracts**

EJCDC publishes two administrative forms for procurement: EJCDC® P-625, *Buyer's Acknowledgment of Receipt of Goods*, and EJCDC® P-626, *Buyer's Notice Regarding Conformity of Goods and Special Services*.

These two documents are discussed in Section 5.7 below, concerning the Procurement General Conditions. With respect to P-625, see the comments in Section 5.7 regarding P-700 9.02.B, Visual Inspection; with respect to P-626, see the comments in Section 5.7 regarding P-700 9.02.C, Final Inspection, and P-700 13.05, Final Payment.

## **5.6 Procurement General Conditions and Procurement Supplementary Conditions**

### **A. EJCDC® P-700, Standard General Conditions of the Procurement Contract**

The Procurement General Conditions define the basic rights, responsibilities, risk allocations, and relationships of the Buyer and Seller, and establish how the Procurement Contract is to be administered. The document is critically important to the procurement and a range of involved entities:

- If the Procurement Contract is assigned (typically by the initial Buyer, the Project Owner, to the Contractor/Assignee), the Procurement General Conditions, as an integral part of the Procurement Contract, are a part of the assignment and continue to apply to Buyer and Seller, subject to the applicable conditions of assignment set forth in P-520 Article 5. Thus if there is an assignment the construction contractor (Contractor/Assignee), as the post-assignment Buyer, will have a vital interest in the Procurement General Conditions.

- Although not a party to the Procurement Contract, the Engineer has many duties and responsibilities under the Procurement General Conditions, as the Project Owner’s representative during the fabrication, delivery, and installation of the Goods; therefore, the wording and content of the Procurement General Conditions are of importance not only to the Buyer and Seller but also to the Engineer.
- Insurers, sureties, suppliers, subcontractors (when used), and others also have a strong stake in the Procurement General Conditions.

The Procurement General Conditions are a very different document than EJCDC® C-700—2018, *Standard General Conditions of the Construction Contract*, and a user familiar with a specific provision in C-700 should not assume that there will be a parallel requirement in P-700, though in some cases there will be such a parallel. A Procurement Contract is a sales transaction for a product or commodity—“Goods”—and is a “furnish and delivery” bargain, whereas construction includes both “furnish and deliver” as well as installation and a wide variety of other construction services. Thus, the provisions of C-700 and its basic risk allocations are different from those of P-700. However, P-700 is coordinated with, and suitable for assignment to a construction contractor retained by the Project Owner under a construction contract that includes C-700.

Because of the fundamental importance of the terms of the Procurement General Conditions, and the advantages of standardization of the text, the carefully chosen and coordinated language of P-700 should be modified and supplemented only when necessary, as a result of specific requirements of the Project, locale, or Project Owner, or negotiation by and between the parties. When revision of the requirements of P-700 is necessary, the drafter must take care to avoid conflicting with, or weakening, the remaining provisions of the Procurement General Conditions or other Project documents developed from the EJCDC P-Series Documents.

#### **B. *Revising and Supplementing the General Conditions***

For many decades, the typical practice of project owners, design professionals, attorneys, and other contract drafters was to make no changes in the General Conditions document itself, but rather to make all changes in a separate Supplementary Conditions (SC) document. EJCDC continues to prefer and recommend this approach.

In most cases, there is in any event good cause to have a Procurement Supplementary Conditions for certain additions to the contract; for example, as the location for specifying required insurance coverages, which are specific to the needs of the Project and to the preferences of the Project Owner. However, when there are numerous changes to the Procurement General Conditions, using the Procurement Supplementary Conditions to describe the changes can be awkward and more time-consuming than making changes directly to the Procurement General Conditions document.

Revisions to the Procurement General Conditions may be made by modifying the text of P-700 itself, or via the Procurement Supplementary Conditions (see Section 5.5.C, immediately below). Although EJCDC prefers that the standard language of P-700 not be directly edited, when such is deemed necessary by the Project Owner, the provisions of the EJCDC Procurement Documents License Agreement apply and must be complied with regarding such revisions. If revisions are made to the text of P-700, they must be clearly indicated or highlighted—most commonly by “tracking changes” or similar word processing techniques—so that Bidders, the Seller, and interested third parties such as sureties, insurers, lenders, attorneys, and others who rely on the

content of P-700 are able to readily see the changes. (If direct edits are made in this fashion, it is permissible for the parties to prepare a final version of the revised Procurement General Conditions that does not show the changes, in order to have a clean, Project-specific, user-friendly document.)

This Commentary contains references throughout to making necessary revisions or additions to the Procurement General Conditions in an associated provision of the Procurement Supplementary Conditions. In all such cases, the user may choose instead to make the change directly in the Procurement General Conditions, as described in the preceding paragraph.

### **C. EJCDC® P-800, Supplementary Conditions of the Procurement Contract**

When Procurement Supplementary Conditions are used, modifications or supplements to, or deletions from, the provisions of P-700 should be arranged in the Procurement Supplementary Conditions in the same order as the corresponding provisions appear in P-700. Each modification should be referenced specifically to the article, paragraph, subparagraph, or sentence to which it relates in P-700. Additional articles—in the rare case where any additional articles are necessary—should be added and referenced by using the next consecutive article number beyond those assigned in P-700.

Certain topics are essential on all projects, but are Project-specific and therefore cannot be fully addressed in P-700 as published. Insurance is addressed, in a general manner, in P-700 5.02, but every EJCDC-based Procurement Contract should include, at a minimum, P-800 SC-5.02.A, edited for the specific procurement, identifying specific insurance coverage requirements.

In addition to presenting model language, suggested paragraph structure, and guidance to users, P-800 also includes general guidance on preparing Procurement Supplementary Conditions, and the user is advised to read and heed such guidance language, which augments this Commentary.

## **5.7 Specific Provisions of the Procurement General Conditions and Related Supplementary Conditions**

Presented below is a detailed discussion of various provisions of P-700—primarily those that are unique to procurement contracts. Where the provisions of P-700 parallel the analogous language of C-700, detailed discussion is not presented in this Commentary and the user should refer to C-001, Construction Commentary. In the discussion of select provisions, commentary is presented on how and why P-700 differs from C-700—2018.

This commentary addresses certain optional provisions that may be included in the Procurement Supplementary Conditions; in addition, the user is referred to the text of C-800—2018, including both its copious guidance notes and its model language for optional Procurement Supplementary Conditions.

### **P-700 ARTICLE 1—DEFINITIONS AND TERMINOLOGY**

#### **P-700 1.01, *Defined Terms***

In the interest of uniformity, many of the defined terms set forth in P-700 1.01 are defined to have the same or similar meanings as those in C-700—2018 and, where applicable, EJCDC® E-500, Agreement between Owner and Engineer for Professional Services. However, by necessity there



are differences between some of the defined terms of P-700 and the corresponding definitions of C-700. Furthermore, many defined terms of C-700 are not included in P-700.

The terms “Buyer” and “Seller” are used in in P-700 1.01 and other P-Series Documents for the two contracting parties; this nomenclature is consistent with the Uniform Commercial Code. With the 2018 edition of P-700, EJCDC has introduced two new defined terms, “Contractor/Assignee”—to refer to the construction contractor to which the Procurement Contract is assigned, if such assignment occurs—and “Project Owner.” The latter is used to differentiate the Project Owner from the Buyer, because, when assignment is made and becomes effective, the Buyer is no longer the owner, but rather is the Contractor/Assignee. EJCDC realized that there were circumstances where it was necessary to clearly and unambiguously refer to either the “Project Owner” or the “Contractor/Assignee.”

The term “Engineer” remains as set forth in C-700 and is the entity that is so named in the Procurement Agreement (P-520 1.03). As such, the Engineer is the entity occupying the role during bidding of the Procurement Contract and during fabrication, delivery, and startup of the Goods, and may not necessarily be the same as the design engineer. However, the P-Series Documents assume that the Engineer is both the design professional that sealed and signed the Procurement Specifications and Procurement Drawings and will have the role of Engineer starting with the Procurement Contract’s bidding phase. If the Engineer’s responsibilities will be divided between the design engineer and a third-party construction manager as advisor (“CMA”), or if the Project Owner’s responsibilities will be shared with a program manager, substantial revisions to the model language of the P-Series Documents will be necessary.

For clarity, starting with the 2019 edition of P-700, the word “Procurement” has been added to several defined terms to differentiate them from similar defined terms set forth in any associated construction contract under which the Goods will be installed. Thus, P-700 and other P-Series Documents use terms such as “ “Effective Date of the Procurement Contract,” “Procurement Contract,” “Procurement Contract Documents,” “Procurement Contract Price,” “Procurement Contract Times,” “Procurement Drawings,” and “Procurement Specifications.”

The term "Work" as defined in C-700 and used throughout the C-Series is not used in the P-Series Documents. Instead, two definitions are very basic to the P-Series Documents: “Goods” and “Special Services.” The materials and equipment to be furnished by the Seller are defined as "Goods." Frequently, the Seller will be required to furnish checkout, startup, field quality control, and training, testing services, and/or other similar services for the benefit of the Buyer. Such services are defined as "Special Services." It is expected that the various categories of Special Services to be furnished will be identified generally in Article 1 of the Procurement Agreement (P-520) and fully set forth in the Procurement Specifications.

While C-700 and the C-Series use the term “Site” to refer to the location where the “Work” is performed, the term “Site” is not used in the P-Series Documents. Instead, the defined term “Point of Destination” (consistent with the UCC) is used to indicate the location where the Goods are to be delivered and at which the Goods, and associated risk of loss, become the Buyer’s responsibility. In most cases, the Point of Destination will be the same as where the Goods will be installed; however, this is not always the case, because the Goods may be delivered to a storage location, such as a bonded warehouse—in such a case the warehouse would be the Point of Destination. The P-Series Documents do not have a defined term to indicate the location where the Goods are installed, which is typically the location where the Special Services will be furnished.

Several commonly used terms defined in C-700 are not used in the P-Series as defined terms, such as “notice to proceed,” “schedule of values,” “progress schedule,” and others. Terms such as “constituent of concern” and “hazardous environmental condition” are not defined in P-700 because, in construction, they generally refer to conditions at the construction site, which are not germane to a procurement contract.

Similar to the 2018 edition of C-700, defined terms in P-700 include both “Shop Drawings” and “Submittals.” The term “Shop Drawing” generally includes drawings and other data and information specifically prepared for the Goods and submitted to the Engineer for approval or other appropriate action as a condition precedent to fabrication; submittal and approval of the Shop Drawings is often one of the Procurement Contract Times as set forth in the Procurement Agreement. The new defined term “Submittals” includes Shop Drawings, but also includes many other documents that the Seller is required by the Procurement Contract Documents to furnish to the Engineer (or, after an assignment, to the Contractor/Assignee), including testing plans, installation instructions, operations and maintenance data, source quality control results, field quality control results, qualifications of the Seller’s personnel that will perform the Special Services, reports of the Seller’s visits to the location where the Goods are installed, and others. The definition of “Submittals” specifically excludes certain types of documents from Submittals, such as Applications for Payment and Procurement Contract modifications. The specific Submittals required by the Procurement Contract Documents should be clearly set forth in the Procurement Specifications.

Consistent use of defined terms throughout the Procurement Contract’s bidding-related documents and Procurement Contract Documents improves the potential for consistent understanding of the intent of the Project’s procurement documents.

#### **P-700 1.02, Terminology**

Similar to C-700 1.02, P-700 1.02 sets forth the meaning of selected terms that, while not indicated with an initial capital letter (thus indicating a formally defined term), are sufficiently common and important in the P-Series Documents to warrant a clear understanding of their meaning. Most of the “terminology” set forth in P-700 1.02 is similar or identical to that in C-700 1.02 with one notable exception.

Whereas C-700 and other C-Series Documents refer to “defective Work” as work that is either not in accordance with the construction contract documents or is otherwise defective, the same terminology is not used in the P-Series Documents. Rather, the term “non-conforming” is used to modify the terms “Goods” and “Special Services.” When so used, “nonconforming”—which is consistent with the UCC—means Goods or Special Services that do not comply with the Procurement Contract Documents, thus requiring remedy by the Seller.

### **P-700 ARTICLE 2—PRELIMINARY MATTERS**

**P-700 2.01, Delivery of Bonds and Insurance Documents.** P-700 2.01, concerning the Seller’s initial submittal of performance and payment bonds and insurance documentation, is essentially the same as set forth in C-700 2.01; refer to C-001 for further commentary. Seller’s duty to submit the bonds is part of the process of delivering the signed Procurement Agreement to Buyer. Any revisions should be coordinated with similar revisions to P-200 18.01.

**P-700 2.02, *Copies of Documents***, concerning the Buyer’s (Project Owner’s) obligation to furnish copies of the Procurement Contract Documents to the Seller, is essentially identical to the parallel term of C-700 2.02. Refer to C-800 SC-2.02 for optional language for modifying the quantity or type (electronic or paper) copies of the Procurement Contract Documents.

**P-700 2.03, *Electronic Transmittals***. The provisions of P-700 2.03 parallel those of C-700 2.06; similarly, P-700 includes the defined terms “Electronic Documents” and “Electronic Means.” For a complete description of the meaning and intent of EJCDC’s provisions on electronic transmittals, refer to C-001, Construction Commentary, and its discussion of C-700 2.06.

- While C-800—2018 includes substantial model language for an electronic documents protocol, for brevity, P-800 includes only guidance notes.
- If an electronic documents protocol is established for the Procurement Contract, the protocol may be included in the Procurement Supplementary Conditions or in the Procurement Specifications at a Section 01 31 26, Electronic Communication Protocols (when the Procurement Specifications are organized in accordance with *CSI MasterFormat*).

**P-700 2.04, *Preliminary Schedules***. P-700 2.04 presents requirements for the Seller’s submittal of a progress schedule and a schedule of Submittals for the Procurement Contract. No provision is made for a schedule of values although, when there is potential for the Goods to be delivered in multiple shipments proposed by the Seller, a schedule of values may be useful to apportion the Procurement Contract Price among the various deliveries. When a schedule of values is desired, appropriate provisions may be included in the Procurement Supplementary Conditions at Paragraph SC-2.04 or in a Section 01 29 73, Schedule of Values, in the Procurement Specifications.

- Refer to C-001, Construction Commentary, and its discussion of C-700 2.03 and 2.05 for additional information on the Engineer’s review and acceptance of progress schedules and schedules of Submittals.

**P-700 2.05, *Preliminary Conference***. This clause provides for the parties and Engineer to participate in a preliminary conference soon after the Effective Date of the Procurement Contract. The intent of the preliminary conference is to review administrative and procedural requirements for the Procurement Contract and other matters as set forth in P-700 2.04, and as may be further addressed in Division 01 of the Procurement Specifications.

**P-700 2.06, *Safety***. This provision addresses the Seller’s responsibility for safety. In general, because the Procurement Contract is a “furnish and delivery” transaction where the Seller has no responsibility for the installation of the Goods, and the Buyer (whether as Project Owner or as Contractor/Assignee) has very little presence or connection to the Seller’s factory or other facilities, safety is not normally a primary concern in a procurement contract. However, there are some safety-related matters that are relevant and are addressed in P-700 2.06:

- When present at Buyer’s facility (for example, when performing Special Services), Seller is responsible for compliance by its personnel with Buyer’s safety programs.
- In performing its onsite Special Services, the Seller’s personnel are typically on the floor of the Project Owner’s facility, which is often an active construction site. Although the construction contractor has principal responsibility for safety at the construction site, in accordance with the construction contract and with Laws and Regulations, including the federal Occupational Safety and Health Act, each employer at a given site is responsible for the safety of its own employees.

Accordingly, the Seller is responsible for ensuring that its personnel furnishing Special Services have appropriate safety training and personal protective equipment.

- Furthermore, the Seller takes on a significant role for safety at the Project Owner’s facility when the Seller is onsite performing warranty-related services, after final payment. This is especially the case when the Procurement Contract has not been assigned to the construction contractor.
- In situations where a substantial nonconformity in the Goods becomes apparent after the Buyer issues its notice of conformity of the Goods (P-626), the nonconformity may be of a nature that the Goods must be removed from the Project Owner’s facility for repair or remedy at the Seller’s production facility, or be replaced with new items. When such is the case, the Goods must be removed from the facility and, eventually, reinstalled by the Seller. Although admittedly rare, such situations occur and involve the Seller’s assumption of substantial responsibility for safety at the Project Owner’s site.
- When Buyer sends representatives to Seller’s facility, for example to witness a test of the equipment, Seller will inform Buyer of safety protocols that must be followed.

## **P-700 ARTICLE 3—PROCUREMENT CONTRACT DOCUMENTS**

**P-700 3.01, *Intent***, indicates that all the Procurement Contract Documents are complementary. A similar clause is included in C-700 3.01. The provision also requires the Seller to furnish the necessary Goods for a complete system as contemplated by the Procurement Contract Documents, and articulates other standard principles regarding the interpretation of the contract.

**P-700 3.02, *Reference Standards***, parallels the language of C-700 3.02. The user is referred to C-001 for a discussion of C-700 3.02.

**P-700 3.03 and 3.04.** Paralleling the provisions of C-700, P-700 addresses the details of interpreting the substantive requirements of the Procurement Contract in P-700 3.03, ***Reporting and Resolving Discrepancies***, and P-700 3.04, ***Requirements of the Procurement Drawings and Procurement Specifications***.

**Detecting errors in the Procurement Drawings and Procurement Specifications.** In any substantial design, whether of equipment, infrastructure, or buildings, it is inevitable that there will be some errors, omissions, discrepancies, or conflicting provisions in the contract documents, including the drawings and specifications. Ideally, most of these are caught by the design professional’s team itself, by the project owner, or by their quality control reviewers, and are resolved prior to the distribution of the bidding documents.

**Finding errors during bidding.** During the bidding phase:

- The EJCDC documents expressly require that bidders carefully examine the bidding documents (refer to P-200 5.01 and P-400 6.01) and notify the Engineer of any conflicts, errors, ambiguities, or discrepancies. The Engineer will then have the opportunity to issue an addendum or take other appropriate action in response.

- EJCDC assigns the Engineer the responsibility for interpreting the bidding documents and issuing necessary addenda. (1) As the design professional in responsible charge, the Engineer is in the best position to understand the design intent, and (2) where addenda modify the drawings or specifications prepared, sealed, and signed by the Engineer, Laws and Regulations governing the practice of the associated design profession(s) typically require that only the design professional in responsible charge may alter or modify the design that they sealed and signed.

**Detecting errors after the Seller is under contract.** In the P-Series, (and similarly in the C-Series and CMA-Series documents), the Seller’s duty to be alert for errors, omissions, ambiguities, and discrepancies continues after the Effective Date of the Procurement Contract, which is addressed by P-700 3.03. Before commencing with performing each element of the Seller’s obligations under the Procurement Contract—for example, with production or fabrication of the Goods, or starting a certain activity of Special Services—the Seller is required by P-700 3.03 to review the applicable Procurement Contract Documents, verify quantities and dimensions, and report to the Engineer any and all discovered conflicts, errors, ambiguities, or discrepancies of which the Seller has knowledge.

The duty imposed on the Seller does not, however, impose any duty on the Seller to find all errors, omissions, or conflicts in the Procurement Contract Documents; rather, the Seller is to report only those concerns of which the Seller has actual knowledge after a careful evaluation of the Procurement Contract Documents. To impose a greater responsibility on the Seller, such as requiring the Seller to find and report all errors or omissions in the Procurement Contract Documents, would be an aggressive shifting of risk, and may be unenforceable, because the Seller is not a licensed design professional and therefore lacks the qualifications and licensing associated with accepting professional liability for the Engineer’s design.

**Reviews by Engineer:** For the same reasons set forth above on why the Engineer is the entity that is the interpreter of the requirements of the Procurement Drawings and Procurement Specifications, including that the Engineer is the entity that best understands the Project’s design intent, P-700 3.03 and 3.04 and P-700 10.02 establish the Engineer as the entity that interprets the contract’s requirements.

In the case of most discrepancies, conflicts, and ambiguities, it will be possible for the Engineer to issue a clarification or interpretation that is consistent with or reasonably inferable from the Procurement Contract Documents.

**Review of non-technical contract issues:** If the Seller submits a request for information or interpretation (RFI) concerning matters outside the Engineer’s area of experience, expertise, and responsibility, the Engineer is not obligated to respond to the RFI, and the responsibility to render the interpretation would devolve on the Buyer. An example of this would be a Seller’s RFI concerning insurance requirements or other matters not directly concerned with the Procurement Drawings and Procurement Specifications prepared by the Engineer.

**RFI administrative forms:** The Seller is typically required by the Division 01 Procurement Specifications (such as Section 01 26 00, Contract Modification Procedures, or a Section 01 26 13, Requests for Interpretation) to submit its “report” of the apparent ambiguity, error, or discrepancy on a “request for interpretation” (RFI) form. Typically, the Engineer’s response to the Seller, thus rendering the interpretation or clarification, is provided on the same RFI form.

**Contract modifications resulting from an RFI:** In some cases, the RFI response will necessitate an associated contract modification to resolve the matter raised by the RFI. Neither the Engineer nor the Buyer should attempt to modify the contract through an interpretation or clarification. Rather, if a RFI response requires a contract modification, the Engineer should so indicate in its RFI response and promptly prepare and issue either: (1) a proposal request, as the first step to either a Change Order or authorization to use any Project Owner-controlled contingency allowance; or (2) preparation of a Change Directive; or (3) issuance of a Field Order (which authorizes minor changes in the Goods or Special Services, not involving any change in the Procurement Contract Price or Procurement Contract Times).

**No Order of Precedence Clause:** The EJCDC P-Series Documents do not include an “order of precedence” clause. Such clauses establish a rigid hierarchy of the component parts of the contract documents, for example by providing that in the case of a difference between a drawing and a specification, the specification governs over the drawing.

- Such a clause automatically resolves certain conflicts within the contract documents, but the resolution is not necessarily satisfactory or in the best interests of the Project. “Order of precedence” clauses work against the Project Owner as often as they work to its benefit.
- Order of precedence provisions eliminate an opportunity for the project owner or engineer to review and resolve the issue in the broader context of the Project. Moreover, there are often conflicts within the drawings, or within the specifications, and an order of precedence clause is of no use in such cases.
- EJCDC prefers in the case of all conflicts within the Contract Documents that the threshold analysis will focus on the overall intent of the design, as expressed in the contract documents as a whole. It may also be necessary to apply basic tenets of contract interpretation, such as the principle that a more detailed provision will prevail over a more general term.
- Order of precedence provisions may also conflict with the common clause (P-700 3.01) that all the contract documents are complementary and are intended to be interpreted as a whole.

**P-700 3.05, *Reuse of Documents***, parallels the similar language of C-700 3.05; for a discussion, refer to C-001, Construction Commentary. The Project Owner/Buyer’s furnishing of the Procurement Contract Documents to the Seller does not confer on the Seller any title or ownership of the Procurement Drawings, Procurement Specifications, or other Procurement Contract Documents.

#### **P-700 ARTICLE 4—COMMENCEMENT AND SCHEDULE**

**P-700 4.01, *Commencement of Procurement Contract Times***, establishes that the Procurement Contract Times commence running on the Effective Date of the Procurement Contract, which is indicated immediately prior to the parties’ signatures at the end of the Procurement Agreement, P-520. Thus in a procurement contract, the Seller may commence performance of its obligations, such as drafting the Shop Drawings, immediately upon the Effective Date of the Procurement Contract.

To ensure consistency between the Effective Date of the Procurement Contract and the date of required performance and payment bonds, it is often necessary to fill in the Effective Date of the Procurement Contract prior to transmitting the Procurement Contract Documents to the Successful Bidder for signature.

EJCDC's C-Series and CMA-Series documents provide for their contract times to commence running in either of two ways: the owner may either issue a notice to proceed that establishes the date the contract times commence running or, if a notice to proceed is not issued within 30 days of the effective date of the contract, then the contract times start running 30 days after the effective date. The P-Series does **not**, however, have any provision for the Project Owner/Buyer to issue a notice to proceed, and simply starts the time for performance as of the effective date.

- In a construction contract, there is often need of a separate notice to proceed, sometimes because the owner needs to coordinate its existing onsite operations with the contractor's start of the work, or because the owner does not yet have access or rights to certain parts of the site, or lacks certain permits; none of these concerns applies in a procurement contract. Thus, there is no need for the Project Owner/Buyer to issue any "notice to proceed" to the Seller.

The P-Series Documents suggest a time schedule of events starting with the day of the bid opening and continuing to the Effective Date of the Procurement Contract (i.e., the day when the Procurement Contract Times start to run). The suggested schedule is based in part on experience with typical procurement transactions and, in part, on statutes that restrict the time that a public project owner may require that bids remain valid and subject to acceptance. For public project owners, this period is typically 60 days, although some jurisdictions or agencies mandate shorter or longer periods. EJCDC's assumption is that the bids are to be valid for 60 days from the date of the opening of bids.

Although some project owners or engineers may believe that the time for which bids are to be valid and subject to acceptance need only be sufficient for the project owner to issue a notice of award, in fact it is best that the Effective Date of the Procurement Contract also be reached within this time period. This ensures timely execution of the contract by both parties, and supports the timely start of the Procurement Contract Times. If a project owner delays its signature of the Procurement Agreement for, say, six months—perhaps due to financial conditions or other drivers—it is very likely that the Seller's costs will escalate beyond what the Seller assumed when it submitted its Bid with the expectation that the prices therein needed to be valid for only 60 days.

P-700 1.02.B.4 provides that the word "day" means a calendar day. A change to "working" or "business" day has ramifications throughout the documents. P-700 15.03 indicates that, when computing the times for certain deadlines specified in the Contract Documents, when such deadline falls on a weekend or legal holiday in the jurisdiction where the Project is located, the deadline is changed to the next business day.

The timeline below is based on a 60-day bid acceptance period. The maximum time that Bids are to remain open for public procurements and public work is often, stipulated by statute, and should be verified for each Project. When funding or financing entity approvals of conditional awards are required (and when supported by applicable maximums set forth in laws or Regulations), the various time frames in the various P-Series Documents should be appropriately revised.

EJCDC's assumed timeline of events, based on a 60-day period, is:

- a. *Day 1*: Bid opening.
- b. *Day 7*: Project Owner/Buyer releases the bid security of those Bidders that the Project Owner/Buyer believes do not have a reasonable chance of being awarded the Procurement Contract, in accordance with P-200 6.04.
- c. *Days 2 through 35*: During this period, the Engineer and Project Owner/Buyer will evaluate the Bids and the Engineer will prepare a recommendation for award. For public project owners/buyers, this period usually includes the Project Owner/Buyer's governing body's (board) meeting at which the Procurement Contract is awarded. Because it is relatively common for Bids for procurement contracts to be submitted with conditions and exceptions, this period is also the only time available for obtaining clarifications of bids and, for private project owners/buyers, negotiating the conditions or exceptions.
- d. *Day 36*: Notice of Award should be delivered to the Successful Bidder by the 36th day after the Bid opening, to allow sufficient time to complete the two subsequent events (signature of the Procurement Agreement by Successful Bidder; signature by Project Owner/Buyer) within the times specified and yet not exceed the 60-day period for bids to remain subject to acceptance. The Notice of Award must be accompanied by the Procurement Agreement in a form ready for signature by individuals with authority to bind the organization (refer to C-001's comments on Preparation of the Agreement) and with all other Procurement Contract Documents attached.
- e. *Day 51*: By this date (assuming Notice of Award on Day 36; the precise requirement is within 15 days of Successful Bidder's receipt of the Notice of Award, per P-200 19.01), the Successful Bidder must return the signed Procurement Agreement and attached Procurement Contract Documents to the Project Owner/Buyer. Failure to do so would allow the Project Owner/Buyer to declare a default with associated forfeiture of the bid security (typically a bid bond) under P-200 6.02. Also by Day 51, in accordance with P-200 18.01, the Successful Bidder is to submit acceptable performance and payment bonds and insurance documentation.
- f. *Day 61*: By this date (within 10 days of receipt of the signed Procurement Agreement and acceptable bonds and insurance documentation from the Successful Bidder, whichever occurs first) the Project Owner/Buyer shall sign and deliver to the Seller one fully signed counterpart of the Procurement Agreement with all attached Procurement Contract Documents (P-200 19.01). Upon the Project Owner/Buyer's signature of the Procurement Agreement, the Successful Bidder is henceforth referred to as the Seller. In accordance with P-200 6.03, the bid security of other Bidders that the Project Owner/Buyer believed to have a reasonable chance of receiving the award may be retained by the Project Owner/Buyer only until the earlier of 7 days after the Effective Date of the Procurement Contract or the 61st day after the Bid opening.
- g. *Day 61*: Latest day for the Effective Date of the Procurement Contract (i.e., the day on which the Procurement Contract Times may begin to run), per P-700 4.01.

The Project Owner/Buyer may accelerate the timeline by (1) issuing the Notice of Award sooner than Day 36; and/or (2) taking less than 10 days for the Project Owner/Buyer's signing of the Procurement Agreement.



The time frames for the release of bid security are indicated in P-200 6.02 through 6.04. If it is necessary for the Project Owner/Buyer to declare the initial Successful Bidder to be in default, there probably will not be sufficient time to proceed through each of the required steps with the next-lowest responsive Bid from a responsible Bidder prior to the date when that Bid expires. In such a case, and in other circumstances when more than 60 days after the Bid opening is required as a consequence of delay in the Project Owner/Buyer's award of the Procurement Contract, EJCDC recommends that the Project Owner/Buyer obtain from the low bidder (and, as required, other bidders that the Project Owner/Buyer believes have a reasonable chance to be awarded the Procurement Contract if the low bidder fails to sign the Procurement Contract), a letter or other written document that extends the time in which the Bid is valid and binding. Such documents should be signed by the person from the Bidder's organization who executed the Bid Form, and should be notarized and accompanied by consent of the Bidder's surety.

On many public projects it is customary to give a tentative Notice of Award (sometimes called a "Notice of Intent to Award"), and the actual award may be issued sometime later.

EJCDC's suggested timetable may not be appropriate for all procurement transactions. If a change is necessary, the drafter of the Procurement Contract's Division 00 documents should revise the Procurement Instructions (P-200 Article 6—regarding release of bid security; and P-200 18.01 and 19.01, as necessary—concerning the number of days allowed for furnishing performance and payment bonds and insurance documentation and for signing the Procurement Agreement) and the Procurement Bid Form (P-400 5.01—the number of days the Bid is to remain valid and subject to acceptance), and should appropriately fill in the Effective Date of the Procurement Agreement when finalizing the document for signature by the parties.

**P-700 4.02, *Continuing Performance*, and P-700 4.03, *Adjustments to Progress Schedule***, parallel C-700 4.04 ("Progress Schedule"). For a discussion of the issues addressed in P-700 4.02 and 4.03, refer to C-001, Construction Commentary's discussion of C-700 4.04.

**P-700 4.04, *Delays***, is an extremely important provision because it assigns the risk and responsibility for delays in the Seller's performance; this provision is closely linked with the Procurement Agreement's provisions on consequences of failure to comply with the Contract Times (P-520 2.04, "Liquidated Damages"). Because P-700 4.04 generally parallels C-700 4.05 ("Delays in Contractor's Progress"), refer to C-001, Construction Commentary's discussion of C-700 4.05.

P-700 4.04.C is the P-Series' "force majeure" provision, governing risks of delays that are controllable by neither the Seller nor the Buyer. While P-700 4.04 largely parallels the C-Series' force majeure provision (C-700 4.05.C), P-700 4.04.C includes as force majeure delays the following, which are not an express part of C-700 4.05.C:

...inspection delays by governmental authorities, and custom delays...international shipping delays...

Such delays, if encountered by Seller, would entitle Seller to a time extension. If the Procurement Contract is assigned, the Contractor/Assignee should be in a position to establishing that the downstream delay was "not the fault and beyond the control" of a supplier (Seller), and hence would also be eligible for a time extension under C-700 4.05.C. That said, a prudent Seller will make appropriate allowances for inspections and shipping problems in its progress schedule (P-700 2.04), and, in reviewing and ultimately accepting the Seller's progress schedule, the Engineer should ensure that reasonable times have been incorporated into the progress schedule.

## **P-700 ARTICLE 5—BONDS AND INSURANCE**

### **P-700 5.01, *Performance, Payment, and Other Bonds***

The default language of P-700 5.01 (as well as that of P-200 19.01 and P-700 2.01.A) requires the Successful Bidder/Seller to furnish a performance bond and a payment bond. For this, EJCDC recommends using EJCDC® P-610, *Performance Bond for Procurement Contract*, and EJCDC® P-615, *Payment Bond for Procurement Contract*. These are discussed above in Section 5.4 of this Commentary.

The Seller's performance of its Procurement Contract obligations will in most cases be critical to the success of the Project as a whole. Surety bonds help ensure the Seller will fabricate and deliver the Goods, perform the required Special Services, and pay its subcontractors and suppliers.

In the event the Procurement Contract is assigned to the Contractor/Assignee, the Procurement Agreement states that the "Contractor/Assignee shall have all the rights of the Buyer under the Performance Bond and Payment Bond." P-520 5.01.A.3.e. The surety under the two bonds is required to consent to the assignment, including the transfer of Buyer's (Project Owner's) rights to the Contractor/Assignee. After assignment, the unpaid balance of the Procurement Contract Price is part of the construction Contractor/Assignee's own contract price—i.e., the construction contract price—and, thus, is included in the amount of the Contractor/Assignee's own construction contract performance bond and payment bond, for which the Project Owner is the obligee.

The duration that the performance and payment bonds are to remain in effect is set forth in P-700 5.01 as:

...until one year after the date when final payment becomes due or until completion of the correction period specified in [P-700] Paragraph 9.04, whichever is later....

Because surety bond brokers typically price performance and payment bonds to include a 12-month correction period, if the Project includes a correction period of longer than 12 months (through a modification of P-700 9.04), then viable alternatives for ensuring that the work remains bonded during the extended correction period include: (1) providing a Procurement Supplementary Conditions Paragraph SC-5.01 to modify the duration that such bonds are to remain effect; however, this will result in added costs for the bonds, or (2) requiring that the Seller furnish a warranty bond in lieu of extending the performance bond for longer than the typical 12-month correction period. For the latter purpose, Although the P-Series Documents do not include provisions for a warranty bond expressly customized for procurement contracts, users who desire a warranty bond should refer to EJCDC® C-612, *Warranty Bond*, which may be used with appropriate revisions in terminology, and the model warranty bond language set out in C-800 SC-6.01.

As with any contract for construction, procurement, or design-build, because the preparer of the proposed contract documents is usually not an expert in risk management or surety bonds, it is advisable for the preparer to obtain written direction from the Project Owner/Buyer, in consultation with the Project Owner/Buyer's legal counsel and risk managers, concerning the contract's requirements for bonds. For this, the user should consider using the appropriate bond-related inquiries of P-050.

Industry-standard surety qualifications and requirements are set forth at P-700 5.01.C and P-700 5.03. For additional, general commentary on surety bonds, refer to C-001's discussion on C-700 6.01.

For public projects, the federal Miller Act or the applicable state's "Little Miller Act" will typically require that the contractor (on a procurement contract, the Seller) on a public contract furnish performance and payment bonds when the contract price exceeds a statutorily-established amount. There is no corresponding obligation for private owners to require performance and payment bonds on their construction, procurement, or design-build contracts, and it is therefore reasonably common for private-sector procurement contracts to either require or allow the Seller to furnish alternative procurement contract security, such as a letter of credit (a bank's commitment to make payments under specified conditions) or a corporate guarantee (a financially sound corporation's guarantee of payments or other responsibilities, on behalf of a second entity whose track record is less well established).

EJCDC's P-Series Documents do not include model language for using letters of credit, corporate guarantees, or other alternatives in lieu of surety bonds. Provisions to allow such alternatives should be drafted by the Project Owner's qualified legal counsel for inclusion in the Procurement Supplementary Conditions at P-800 SC-5.01. Also, if other than performance and payment bonds are required or accepted, the listing of what constitutes the Procurement Contract Documents (P-520 6.01) should be appropriately revised, together with P-520 5.01.A.3.e (which refers to the obligee of the performance and payment bonds after assignment is effective). Finally, if alternative forms of procurement contract security are acceptable, when the contract will be assigned, it will be necessary to either revise or delete the Procurement Agreement's Exhibit B, Surety's Consent to Assignment.

**P-700 5.02, *Insurance*; and P-700 5.03, *Surety or Insurance Companies***

The P-Series Documents address insurance requirements at (1) P-700 2.01.B and 2.01.C, which address the timing of when the Buyer and Seller are to furnish to each other appropriate evidence of contractually-required insurance; (2) P-700 5.02 and 5.03, which present broad, generalized requirements for insurance; and (3) P-800 SC-5.02, which presents model language for the specific insurance requirements for the Procurement Contract, and which provides a location for establishing minimum policy limits.

As with any contract for construction, procurement, or design-build, because the preparer of the proposed contract documents is usually not an expert in risk management or insurance, it is advisable for the preparer to obtain written direction from the Project Owner/Buyer, in consultation with the Project Owner/Buyer's legal counsel, risk managers, and insurance advisors, concerning the contract's requirements for insurance. For this, the preparer may find the insurance inquiries in P-050 useful.

The types of Seller-furnished insurance most commonly required on procurement contracts is set forth in the model language of P-800 SC-5.02—in many cases these will be modified to suit the needs of the specific procurement. In SC-5.02 the Seller is required to maintain workers' compensation or similar insurance (with the primary concern of Buyer being coverage of personnel who are at the Buyer's facility performing Special Services); commercial general liability insurance (especially with respect to injuries or property damage resulting from the use of the Goods); automobile insurance (travel by Seller's personnel to the Buyer's site); and professional liability insurance (if the Special Services include professional services). Detailed commentary regarding these requirements is not presented in P-001; for a discussion of general considerations

applicable to liability insurance, refer to C-001, Construction Commentary's discussion of C-700 Article 6.

### **Insurance on the Goods, Before and After Delivery**

P-700 8.01.A provides that the Seller is responsible for all costs of insurance associated with the shipment and delivery of the Goods, and P-700 8.02 and 8.03 establish that the Seller bears the risk of loss while the Goods are in Seller's care or responsibility, including Goods in transit; however, P-700 Article 8 does not include any express requirement for the Seller to furnish any specific property insurance on the Goods. This is because it is safely assumed that the Seller will be highly motivated to protect its interests, through appropriate insurance and appropriate policy limits, up until the point where the Goods are handed over to the Buyer (whether Project Owner or a Contractor/Assignee). The Seller is typically not eligible for payment for the Goods until the Goods are received, FOB at the Point of Destination, and are visually inspected (P-700 9.02.B) and found to be in good condition, quantity, and in apparent conformance with the Procurement Contract Documents. See additional discussion regarding risk of loss in this section's commentary regarding P-700 Article 8, Shipping and Delivery.

After delivery and unloading at the Point of Destination, others, such as the Project Owner or its construction contractor retained to unload and install the Goods, will furnish builder's risk insurance or an installation floater to protect against loss or damage to the Goods after delivery and prior to substantial completion of the associated construction contract. As provided in C-700 6.04 ("Builder's Risk and Other Property Insurance"), and as further discussed in C-001's commentary on C-700 6.04, upon substantial completion of the associated construction contract the installed Goods typically are covered under the Project Owner's regular property insurance for the facility.

### **P-700 ARTICLE 6—LICENSES AND FEES**

**P-700 6.01, *Intellectual Property and License Fees***, sets forth standard provisions on the ownership of intellectual property. By purchasing the Goods and Special Services, as a general matter the Buyer does not thereby obtain any ownership of patent rights or other intellectual property. Similarly, if the Seller is manufacturing to the specific requirements of the Buyer's design (whether provided by the Engineer or others), the Buyer retains ownership of all patent rights and intellectual property associated with that design. Other comments regarding Article 6:

- P-700 6.01.C requires the Buyer to advise the Seller when the Seller is obligated to use patented methods or items required by the Buyer.
- P-700 6.01.D requires that the Seller pay all license fees required to furnish the Goods and Special Services.
- P-700 6.01.C and 6.01.D are generally similar to corresponding provisions in C-700 7.08 ("Patent Fees and Royalties") and C-700 7.09 ("Permits").
- **P-700 6.02, *Seller's Infringement***, and **P-700 6.03, *Buyer's Infringement***, include provisions generally similar to the mutual indemnification provisions of C-700 7.08.

## **P-700 ARTICLE 7—SELLER’S RESPONSIBILITIES**

**P-700 7.01, *Performance of Obligations.*** The provisions of P-700 7.01, regarding the means and methods of Seller’s work, Seller’s supervision duties, and its coordination duties, generally parallel those of C-700 7.01 (“Contractor’s Means and Methods of Construction”) and P-700 7.02 (“Supervision and Superintendence”). These are basic, fundamental precepts and rarely need any modification.

**P-700 7.02, *Labor, Materials and Equipment.*** P-700 7.02 generally mirrors the language of C-700 7.03 (“Labor; Materials and Equipment”). Refer to C-001’s discussion of C-700 7.03 for additional commentary.

P-700 7.02.A requires the Seller to provide competent, suitably skilled and experienced workers to carry out the Seller’s obligations; EJCDC believes that it is neither necessary nor desirable for a drafter of Procurement Supplementary Conditions to augment either P-700 7.01.B or P-700 7.02.A with clauses allowing the Project Owner/Buyer to order the removal of Seller’s incompetent workers (such as personnel furnishing the Special Services at the Project Owner’s facility). Such a provision, if included, would involve the Project Owner/Buyer in Seller’s internal personnel or human resources issues, and might deteriorate into constant or continuous evaluations of the fitness of the Seller’s workforce.

P-700 7.02.B requires that all Goods be new and of good quality, in accordance with the Procurement Contract Documents. Additional broad language that such items be “of the best quality” or other such language is not included and is usually not desirable; any specific quality requirements should be addressed in the Procurement Specifications. P-700 7.02.B contains some language beyond that of C-700 7.04.B, requiring that the Goods be shop-assembled to the greatest extent possible and protected, assembled, connected, cleaned, and conditioned in accordance with the original manufacturer’s instructions.

**P-700 7.03, *Laws and Regulations,*** generally mirrors the language of C-700 7.11 (“Laws and Regulations”); for complete commentary, refer to C-001’s discussion of C-700 7.11.

Indicating applicable Laws and Regulations (a term defined at P-700 1.01.A.17) by name or citation is typically unnecessary (unless a specific citation is required by law to be stated or cited in the contract). In nearly every case dozens of Laws and Regulations will apply to the furnishing of the Goods and Special Services; specifically citing some but not others could potentially be construed as implying that the Laws or Regulations not expressly cited or included in the Procurement Contract somehow have lower standing or applicability than those that are included or cited.

### **P-700 7.04, “Or Equals”**

EJCDC’s P-Series, C-Series, and CMA-Series documents distinguish between furnishing an “or-equal” item and making an outright substitution.

- An “or-equal” refers to furnishing an item that is functionally equal to an item indicated in the Procurement Contract Documents by proprietary specifying methods (i.e., indicating an acceptable item by manufacturer and perhaps also by product name or model), as judged by the Engineer. If an “or equal” is approved for use, the contract price does not change. Most commonly, contractors request approval of an “or equal” because they can obtain the proposed equal item at a lower price than the

expressly specified item or items, though availability, ease of installation, or other factors may be the basis for the request.

- In contrast, a substitute is not the equivalent to what is specified—it is a new approach that the contractor believes will be advantageous to the project (and presumably to the contractor as well). A proposed substitute’s differences from the specified item may be subtle or significant, and often will require design changes by the Engineer; if approved, a substitute may result in a change in price, time, or both, and often must be documented via a Change Order or Field Order. An example would be substituting a solar heating system for the specified natural gas-fueled heating system.

The P-Series Documents do not allow substitutions because EJCDC believes that, when a procurement contract is used, the Project Owner and Engineer desire a specific type of equipment or materials, and these items are at the core of the contract, not incidental. The procurement process is founded on the acquisition of particular equipment or materials to be incorporated as a part of the Project Owner’s facility and, as such, its characteristics likely will be critical to the function of the Project. As a consequence, merely accomplishing the same or similar purpose is not a sufficient standard for acceptance. A true substitution would entail a major change of direction, and would rarely be of interest after the procurement has reached the stage of entering a contract or performance by the Seller.

The Procurement General Conditions do, however, allow the Seller to propose “or equals.” P-700 7.04 allows the Seller to propose the use of non-specified products deemed equal to items indicated in the Procurement Contract Documents using proprietary specifying methods. As set forth in P-700 7.04, the Engineer has sole authority to authorize use of an “or-equal” because the Engineer best understands the design intent with respect to the Goods, as a functioning whole, and has professional responsibility for the Project as a whole.

EJCDC allows proposal of “or-equals” in procurement contracts partly because the Seller may be a wholesaler or entity other than the actual manufacturer of the item, and because complex systems, such as a major item of process equipment, often include many parts and elements procured from the principal manufacturer’s suppliers. For example, a centrifuge system will often include a control panel with a programmable logic controller, motors, variable frequency drives, pressure gauges, mechanical seals, and many other elements that may, potentially, be specified in the Procurement Specifications using proprietary specifying methods. For such items, EJCDC believes it fair and appropriate to allow the Seller to propose equivalent items in accordance with P-700 7.04, possibly augmented by further requirements presented in a Procurement Specifications Section 01 62 00, Product Options (when CSI *MasterFormat* is used for organizing the procurement project manual).

For a detailed discussion of “or-equals,” refer to C-001’s discussion of C-700 7.05.

**P-700 7.05, Taxes**, addresses the Seller’s responsibility for taxes; this topic is also discussed in this Commentary’s Section 3.2.H. P-700 7.05 generally mirrors the language of C-700 7.10 (“Taxes”).

On public projects, the Project Owner/Buyer may be exempt from the payment of sales or excise taxes. Such exemption, if any, should be cross-referenced in the Procurement Instructions (example language is presented at P-200 20.01) and fully set forth in the Procurement Supplementary Conditions (example language is presented at P-800 SC-7.05).

- If the Procurement Contract for a public project will be assigned to a Contractor/Assignee, and the Project Owner/Buyer was entitled to a sales tax exemption, the Project Owner/Buyer's legal counsel should investigate the impact of the assignment on the sales tax exemption, and whether the Procurement Contract and construction contract can be coordinated to preserve the tax exemption.

For additional discussion of this matter, refer to C-001's commentary on C-700 7.10.

#### **P-700 7.06, *Submittals***

The terms "Shop Drawing" and "Submittals" are defined at P-700 1.01.A.35 and P-700 1.01.A.37; "Shop Drawing" is a subset of "Submittals."

P-700 7.06 sets forth broad yet very important requirements for the Seller to furnish Shop Drawings and other Submittals required by the Procurement Contract Documents. The provisions of P-700 7.06 generally mirror those of C-700 7.16 ("Submittals"); hence, for a complete discussion of this topic, refer to C-001's commentary on C-700 7.16.

As indicated in Section 6.1.A of this Commentary, it is common for the requirements of P-700 7.06 to be augmented by more detailed requirements for Submittals set forth in a Procurement Specifications Section 01 33 00, Submittal Procedures. Furthermore, when the Procurement Specifications are organized in accordance with CSI *SectionFormat*<sup>®</sup>, the individual Submittals required are typically indicated in the associated Procurement Specifications section(s) in an article titled "Submittals" in "Part 1—General."

**P-700 7.07, *Indemnification***, is an indemnification by the Seller that applies to claims for bodily injury, death, or property damage arising from the Seller's performance of its obligations, limited to the extent of the Seller's negligent acts or omissions. The Buyer, the Engineer, and their respective employees, consultants, contractors, and subcontractors are among those protected by P-700 7.07. The clause is consistent with coverage afforded by the Seller's commercial general liability policy.

P-700 7.07.B confirms that the primary indemnification duty in P-700 7.07.A applies even if an injury claim by an injured employee of the Seller has been resolved under a workers' compensation policy. This standard provision is in response to arguments proposed by some indemnitor/employers to the effect that they should not have indirect exposure to employee claims by way of the indemnification process.

**P-700 7.08, *Concerning Subcontractors and Suppliers***, expressly allows the Seller to retain subcontractors and suppliers deemed necessary by the Seller for the fulfillment of its obligations under the Procurement Contract, and places on the Seller the responsibility for such subcontractors and suppliers. Overall P-700 7.08 is succinct and omits the majority of the substantial detail of C-700 7.07 ("Concerning Subcontractors and Suppliers"). The reason for this is that subcontractors and suppliers, while retained by Sellers on procurement contracts, are less directly involved (for example, limited or no presence at the project site) than their counterparts under a construction contract.

Among the notable differences between P-700 7.08 and C-700 7.07 is that the Procurement General Conditions do not empower the Buyer to reject the Seller's proposed subcontractors and suppliers. This is because the Seller has overall responsibility for furnishing the Goods and Special Services in accordance with the Procurement Contract Documents, and, as noted above, the Seller's subcontractors are very rarely, if ever, at the Project Owner's site or facility.

P-700 7.08 also differs from C-700 7.07 by not requiring the Seller to retain subcontractors and suppliers under a subcontract or purchase order that specifically binds them to the Buyer to the same extent that the Seller is bound to the Buyer (“flowdown”). Suppliers are typically retained by manufacturers of materials and equipment under master contracts that pertain generally to furnishing raw materials or other items needed in the manufacturer’s production of its goods. Sellers rarely retain subcontractors, with the exception of subcontractors such as a shop or systems integrator that provides control panels or programming services, all of which are typically oriented toward furnishing goods for the Seller.

Because it is extremely rare for a Seller’s subcontractors or suppliers to have any contact whatsoever with the Buyer, P-700 7.08 does not include any provision that the Seller restrict its subcontractors and suppliers to communicating on the project through the Seller.

**No Provisions regarding Design Delegation.** In C-700, EJCDC includes a provision, C-700 7.19, that allows the owner to delegate specific elements of the project design to the construction contractor. This clause is frequently applicable, because it is common for specialist construction subcontractors to design the details of fire control systems, HVAC, and similar portions of a project that they will construct. The P-Series Documents do not include any provision on the delegation of professional design responsibilities to the Seller. This is because the Seller is tasked with furnishing and delivering a product (the Goods), not with professional engineering design or construction at the Project Owner’s facility. Furthermore, in the significant majority of jurisdictions in the United States, manufacturers of materials and equipment are specifically exempted from obligations to comply with state laws and regulations governing the practice of engineering and other design disciplines.

In specific cases it may be appropriate to delegate some aspects of the professional design to the Seller, because of Seller’s expertise, or because the delegated design must be closely integrated with the Seller’s Goods. An example of this would be the design of access stairs and platforms that must be closely coordinated with a large item of process equipment but which, themselves, must be designed in accordance with the applicable building code and whose layout will depend on the final configuration of the Goods that Seller furnishes. In such cases, which EJCDC believes are relatively rare—for example, in the example given, it would also be feasible for the stair/platform design to be done by the Engineer or a subconsultant—the Procurement Supplementary Conditions can be drafted to include a provision on delegation of professional design, adapted from C-700 7.19 (“Delegation of Professional Design Services”). Refer to C-001’s discussion of C-700 7.19 for additional discussion.

Prior to determining to include delegation or professional design services in the Procurement Contract, the Project Owner/Buyer (typically through the services of the Engineer) should consult with the prospective sellers concerning their ability to deliver delegated professional design services, whether such delegation would be beneficial to the Project, and whether the Engineer itself would be in the better position to furnish such design services.

## **P-700 ARTICLE 8—SHIPPING AND DELIVERY**

### **P-700 8.01, *Shipping***

The Seller is responsible for having the Goods delivered to the Point of Destination according to the Procurement Contract Times set forth in the Procurement Agreement (P-700 Article 2).



P-700 8.01 expressly confers on the Seller the responsibility for selecting the carrier and for paying all costs (expressly including packaging and insurance) associated with shipment and delivery.

**P-700 8.02, *Delivery***, sets forth the necessary provisions governing transfer of the Goods from the Seller to the Buyer, including responsibility for the handling and safeguarding of the Goods. P-700 8.02.A requires the Seller to deliver the Goods “free on board (FOB)” to the Point of Destination indicated in the Procurement Agreement (P-520 1.04). “FOB” is a mercantile term under which it is the selling party’s duty to deliver the specified goods, by its delivery method of choice (such as rail, truck, sea, or air transport), at the indicated destination without separate or further charge to the buyer. The term “freight on board” is sometimes used synonymously with “free on board.”

Other provisions of P-700 8.02 require the Seller to give the Buyer written notice of the date the Goods will be delivered and establishes that Buyer assumes responsibility for unloading the Goods and safeguarding them after delivery.

An essential element of required activities associated with delivery of the Goods is the visual inspection required by P-700 9.02.B, which is further discussed below.

**P-700 8.03, *Risk of Loss***

P-700 8.02.A imparts on the Seller a duty to deliver the Goods FOB at the Point of Destination, which under longstanding commercial law establishes that the risk of loss or damage to the Goods in transit resides with the Seller. This point is confirmed in P-700 8.03.A, which states that that the risk of loss and insurable interests in the Goods transfer from Seller upon Buyer’s receipt of the Goods.

EJCDC has established clear, “bright line” provisions regarding the transfer of responsibility from Seller to Buyer, to provide clarity in reaction to two factors: (1) the default position in the UCC is that the Buyer becomes responsible for the Goods when the Goods are placed on the carrier for delivery—EJCDC’s approach modifies the UCC; and (2) some sellers seek to have responsibility for shipping and risk of loss reside with the Buyer as soon as the Seller places the Goods on the carrier at the Seller’s fabrication facility—EJCDC has concluded that it is in the best interests of the parties for the costs and risk of loss to transfer upon delivery.

As set forth in P-700 8.01, the Seller has full responsibility for shipping to the Point of Destination, which includes properly packaging the Goods for shipment by the Seller’s selected transportation method and carrier. EJCDC believes that the Seller and its selected carrier are in a much better position to protect the Goods in transit from loss or damage than is the Buyer (whether the Project Owner, or a Contractor/Assignee). Many Project Owner/Buyers that would use the P-Series Documents have little or no experience with arranging shipping of major items of equipment or engineered materials; the same is true for many Contractor/Assignees. Therefore, P-700 8.03 clarifies that the Seller has all risk of loss in transit (a risk that Seller can manage through delegation to the shipper, and through insurance).

The P-Series Documents provide that the Buyer has the responsibility for the Goods and all risk of loss after receipt of the Goods, with the exception that if the Buyer rejects the Goods because they do not conform to the specified requirements, the risk of loss does not pass from Seller to Buyer until Seller corrects the problem or Buyer accepts the Goods despite their nonconformity, under the terms of P-700 8.03.B.

**Shifting shipping duties to Buyer.** If a Project Owner prefers to enter into a sales transaction in which the Buyer takes on the shipping responsibility, then:

- revisions to several paragraphs of the P-Series' standard language would be necessary, including changes to P-700 8.01, 8.02, 8.03, and 9.02, among others.
- the Point of Destination (P-520 1.04) would need to be appropriately designated in the Procurement Agreement.
- the Buyer would need to not only make arrangements for shipping, but also purchase insurance to cover the Goods in transit.

## **P-700 ARTICLE 9—BUYER'S RIGHTS**

**P-700 9.01, *Seller's Warranties and Guarantees***, establishes the Buyer's fundamental warranty rights. As a supplement to those rights, P-700 9.04, *Correction Period*, requires the Seller to make corrections of defective work during a one-year period. Drafters of the Procurement Specifications should be familiar with the significant protections established for the Buyer by P-700 9.01 and P-700 9.04 before specifying requirements for special or extended manufacturer's warranties. The Project Owner/Buyer and the Engineer should be aware of both P-700 9.01 and P-700 9.04 before any manufacturers' special or extended warranties are required by the Procurement Specifications.

If the Project Owner, as Buyer, assigns the Procurement Contractor to a Contractor/Assignee, the warranty rights in the Procurement Contract "will continue to run for the benefit of assignor (Project Owner) and, in addition, for the benefit of the Contractor/Assignee." P-520 5.01.A.3.d.

In P-700 9.01, the Seller expressly warrants: (1) that it is conveying to the Buyer clear title to the Goods (P-700 9.01.A), (2) that the Goods and Special Services will comply with the Procurement Contract Documents (P-700 9.01.B); and that the Seller's obligation to comply with the Procurement Contract Documents is absolute (P-700 9.01.D). These warranties are not limited to any time period expressly indicated in the Procurement Contract. As a result, the Buyer should be able to pursue its general warranty rights as long as the applicable statutory limitations period has not expired (subject to any applicable statute of repose). In contrast, the specific performance obligations of the Seller's correction obligation (P-700 9.04) are expressly limited to one year.

P-700 9.01.B and P-700 9.01.D may be construed as reminders to the drafter of the Procurement Drawings and Procurement Specifications of the importance of clearly indicating in the Procurement Drawings and Procurement Specifications the critical features or aspects of the Goods and Special Services. The express warranty provisions are powerful tools for ensuring that the procurement of Goods and Special Services complies with the Project's needs as set forth in the Procurement Contract, but only to the extent adequate care has been taken to draft effective Procurement Contract Documents. Any special performance or longevity warranties should be clearly stated in the Contract Documents.

The matter of guarantees and warranties of the Goods is one for which buyers and sellers often differ, as discussed in this Commentary's Section 3.2.D. Purchase orders, confirmations/acknowledgments, and other forms offered by manufacturers and suppliers frequently contain carefully worded standard warranty language which is generally intended to narrowly limit the Seller's liability. Many manufacturers' standard warranties also obviate or negate certain implied warranties established by the applicable version of the UCC in effect. Manufacturers and suppliers may prefer that their standard warranties be of limited duration.

The advice of the Project Owner’s legal counsel concerning the various warranty provisions of the Procurement Contract and any alternative language proposed by the Seller should be sought as needed.

Each sales transaction governed by the UCC has a seller’s warranty that title conveyed shall be good and its transfer rightful and that the goods will be delivered free and clear of any and all security interest which was known to the seller and buyer at the time of contracting; P-700 9.01.A is consistent with the UCC good title requirement. In P-700 9.01.A, EJCDC supplements the basic good title provision with a requirement that the Seller indemnify the Buyer against claims arising from a deficiency in the title to the Goods.

Implied warranties are, by definition, not expressly indicated in the terms of the Procurement Contract. Sellers often seek to limit their warranty liability and commonly endeavor to disclaim any implied warranties, but EJCDC’s P-Series Documents do not include any express, blanket disclaimer of such implied warranties. Therefore, implied warranties established by Laws or Regulations remain in effect unless expressly disclaimed in the Procurement Contract or negated by conspicuous contract language.

### **P-700 9.02, *Inspections and Testing***

P-700 9.02 sets out general provisions regarding inspections and testing (P-700 9.02.A), and establishes two mandatory inspections of the Goods by the Buyer: (1) a visual inspection upon delivery of the Goods at the Point of Destination (P-700 9.02.B), and (2) a final inspection when the Goods have been incorporated into the work, and all Special Services have been completed (P-700 9.02.C). Each of these two mandatory inspections are express obligations of the Buyer and should be conducted with care; Buyer should follow the inspections with formal acknowledgment/notices to Seller, as set out in P-700 9.02.B and C.

Both the visual inspection upon delivery and the final inspection, as well as the follow-up duties to give acknowledgment/notice to the Seller, are the responsibility of the Buyer. When the Procurement Contract has been assigned, the Buyer is the Contractor/Assignee; the inspection and acknowledgment duties under the assigned Procurement Contract are similar to the ordinary responsibilities of any contractor that purchases materials or equipment.

When the Procurement Contract has been assigned, under C-700 15.03 (“Substantial Completion”), P-700 15.04, *Partial Use or Occupancy*, and P-700 15.05, *Final Inspection*, the Engineer is obligated to inspect the work for (1) substantial completion, and (2) final completion and readiness for final payment. While neither of these inspections corresponds directly to the inspections required under P-700 9.02.B and P-700 9.02.C, they do give the Project Owner assurance that the Project’s design professional (Engineer) has given the installed Goods and Special Services a thorough inspection to endeavor to verify compliance with the requirements of the construction contract, including the incorporated Procurement Drawings and Procurement Specifications that become part of the construction contract’s “Contract Documents” upon assignment (P-520 Article 5).

**P-700 9.02.A, *General Provisions***, establishes the ground rules for inspections and testing of the Goods, including notice requirements and rules for allocating the costs of such tests and inspections.

In addition, although the P-Series Documents do not anticipate regular or extensive inspections of the Goods at the Seller’s facility, P-700 9.02.A.1 establishes the Buyer’s right to conduct such inspections, or to have the Engineer conduct them. If such inspections are necessary on a

particular Procurement Contract, provisions for them should be made in the Procurement Specifications or in the Procurement Supplementary Conditions, as notice may be required. P-700 9.02.A.2 provides that the Seller will not be responsible for the Buyer's travel expenses and similar costs of such inspections, unless the Goods are found to be nonconforming, in which case Seller will also bear the costs of any necessary re-inspection.

#### **P-700 9.02.B, *Visual Inspection on Delivery***

In accordance with P-700 9.02.B, upon delivery at the Point of Destination, the Goods are to be visually inspected by the Buyer for the purpose of identifying the Goods, general verification of quantities, and an observation of the Goods' general condition.

After the visual inspection required by P-700 9.02.B, if the Goods appear to be conforming, the Buyer will acknowledge receipt of the Goods, thereby establishing the Seller's eligibility for the key progress payment for delivery, as stipulated in the Procurement Agreement. The Buyer will find EJCDC® P-625, *Buyer's Acknowledgement of Receipt of Goods*, a new form published in 2019, useful in preparing and issuing the required acknowledgment.

P-700 9.02.B does not explicitly require that the Seller participate in the visual inspection of the delivered Goods but to facilitate the inspection it is often advisable to require—typically in the Procurement Specifications—that the Seller's obligations include furnishing the services of a qualified, factory-trained representative familiar with the general nature of the Goods and the specifics of the Goods required under the Procurement Contract, to assist the Buyer (or Engineer) with performing the visual inspection and inventorying the Goods delivered. When required, such services by the Seller, while constituting "Special Services" under the Procurement Contract, are typically **not** part of the onsite services covered by the Procurement Contract Times for starting and completing the onsite Special Services (P-520 2.02.A).

The Buyer and Engineer should understand that many sellers submit an invoice or application for payment for the delivery of the Goods as soon as possible—sometimes even before the Goods arrive at the Point of Destination. Premature processing of such applications for payment should be resisted until the visual inspection required by P-700 9.02.B has taken place and the Goods are confirmed to appear to be in the quantity, quality, and condition required by the Procurement Contract Documents.

P-700 9.02.B.1 establishes that the visual inspection of the Goods upon delivery, and acknowledgment of receipt of the Goods, are preliminary in nature and do **not** constitute a final acceptance of the Goods; rather, the clause acknowledges that "subsequent inspections or tests" may show that the Goods are non-conforming.

#### **P-700 9.02.C, *Final Inspection***

The final inspection may occur when the Goods have been installed and started up, all required field quality control activities have been successfully completed, and all required training and other Special Services have been completed. To document the result of a successful final inspection, the Buyer will issue formal notice to the Seller stating that the Goods and Special Services are conforming. The Buyer will find the new form published in 2019, EJCDC® P-626, *Buyer's Notice Regarding Conformity of Goods and Special Services*, useful in preparing the final notice regarding the conformity of the Goods and Special Services. Typically the notice of the successful final inspection will establish the Seller's eligibility for final payment.

**P-700 9.03, *Nonconforming Goods and Special Services***, spells out the Buyer's options if the Goods or Special Services do not conform to the requirements of the Procurement Drawings and

Procurement Specifications, thus breaching the Seller’s general warranty and guarantee (P-700 9.01):

- Require that Seller correct the non-conformance
- Reject the nonconforming Goods, and require that Seller remove and replace them
- Accept the non-conforming Goods, without correction, but Seller bears the costs and losses to Buyer associated with such acceptance, typically accounted for in a reduction to the contract price
- With respect to Special Services, promptly provide conforming Special Services
- In support of the, the Seller is required, without limitation, to remedy nonconforming Goods and Special Services.

P-700 9.03.G addresses the ramifications of the Buyer’s improper rejection of Goods ultimately found to be conforming.

The Buyer is required to give the Seller prompt notice of any and all nonconformities known to the Buyer. P-700 9.03.B.1; P-700 9.03.C.1. This allows the Seller to respond to problems as they become known, and before the problems potentially worsen and thus require a more extensive or more expensive remedy.

**P-700 9.04, *Correction Period***, states that the one-year period for correction of all nonconformities (a term parallel to “defective Work” in the EJCDC Construction Series) in the Goods and Special Services starts to run on the date of the Buyer’s acceptance of the Goods and Special Services, after the final inspection—see P-700 9.02.C (“Final Inspection”).

During the correction period the Seller is obligated to take direct action to correct any nonconformities that are discovered—for example, the Seller might send factory personnel to the Project Owner’s facility to correct the problem. This direct-action requirement is referred to in contract law as an entitlement to “specific performance.”

After the correction period ends, the Seller continues to bear responsibility for nonconforming Goods and Special Services, but its specific performance duty is over. Thereafter the Seller can meet its obligations by paying monetary damages to the Buyer, rather than actually performing the correction. In many cases, however, even after the correction period has ended the Seller will prefer to mitigate its exposure by taking direct action in response to warranty claims.

P-700 9.04’s correction obligation requiring specific performance by the Seller is a remedy separate, distinct, and additional to any warranties and guarantees, including those provided by P-700 9.01 and any manufacturer’s warranties furnished in accordance with the Procurement Specifications.

Project owners and engineers should understand that the start date for the Seller’s correction period is later than many sellers would prefer and may come with an associated cost, compared to the earlier start times preferred by sellers (as set forth in such sellers’ own standard warranties). Both to minimize project costs and to allay sellers’ concerns about warranty liability, the period between when the Goods are started up, field-tested, and placed into continuous beneficial use for the Project Owner, and the time when the final inspection under P-700 9.02.C occurs, should be as short as possible.

- The Project Owner and Engineer should not seek to withhold final acceptance pending an excessively extended duration of continuous operation.

- If the Goods or Special Services are nonconforming, strong consideration should be given to not operating the installed Goods to the extent practicable.
- A seller's correction period or warranty liability may be considerable during extended periods of disagreement about whether the Goods and Special Services conform, while the Project Owner is operating the Goods.

The Buyer's request that the Seller perform correction period obligations should be in writing, and should clearly indicate the nature of the problem and include a citation to the correction clause. The Seller is required by P-700 9.04 to investigate and remedy the matter promptly.

In the case of multiple deliveries (where the Goods are installed and placed into operation in stages, to maintain operations at an existing facility) or long storage of the Goods, particular attention must be paid to the requirements for the correction periods. Additionally, some Goods may require special maintenance procedures in the event of extended storage. Where performance of preventative maintenance for long-term storage is not part of the Seller's obligations under the Procurement Contract, the Project Owner will likely be responsible for such services. If required preventative maintenance is not performed when the Goods are in long-term storage, the Seller's warranties and the correction period obligation may be adversely affected, from the Project Owner's viewpoint.

#### **P-800 SC-9.05, *Limitation of Seller's Liability***

The Procurement General Conditions and the Procurement Agreement do not contain any default limitation or "cap" on either the Buyer's or the Seller's total liability under the Procurement Contract. As discussed in detail in Section 3.2.A of this Commentary, many sellers strongly prefer the inclusion of a clause that limits the Seller's total liability. An optional limitation of liability clause is included in P-800 as Paragraph SC-9.05, together with associated guidance notes.

Because limiting the liability under the Procurement Contract is a significant modification of the standard risk allocations in the contract, the drafter of the Project's Procurement Supplementary Conditions should include SC-9.05 only when expressly directed to do so by the Project Owner. As with the limited mutual waiver of consequential damages clause in the model language of P-520 9.01, any such limitation on liability should contain appropriate exceptions. Before including any SC-9.05—whether or not using the example language of P-800 SC-9.05—and prior to finalizing the Procurement Supplementary Conditions, EJCDC strongly recommends that the Project Owner consult with qualified, experienced legal counsel concerning any limitation of liability, weighed against the Project Owner's objectives for attracting qualified bidders, compliance with the Project budget, and desire for bids without conditions or exceptions.

#### **P-700 ARTICLE 10—ENGINEER'S STATUS**

The Engineer's authority as initial interpreter of the requirements of the Procurement Drawings and Procurement Specifications and arbiter of Claims, and other matters relating to the acceptability of the Goods or the interpretation of the Procurement Contract, is set forth in P-700 Article 10 and is generally similar to that contained in C-700 Article 10 ("Engineer's Status During Construction"). In general, P-700 Article 10 (like C-700 Article 10) is a grouping of cross-references to other specific provisions in the Procurement General Conditions where the Engineer's role and responsibilities are discussed.

The scope of the Engineer's services in its professional services agreement with the Project Owner should be consistent with the Engineer's third-party obligations set forth in P-700 and in other P-Series Documents. If the Engineer's services on a specific procurement will differ from the services indicated in P-700 Article 10—whether due to a reduced scope for the Engineer, or because of the involvement others such as a construction manager as advisor or program manager—then appropriate revisions to the Engineer's responsibilities should be indicated in the Procurement Supplementary Conditions and other Procurement Contract Division 00 documents and Procurement Specifications, as appropriate.

When the Procurement Contract will be assigned to the Contractor/Assignee, the provisions of the Procurement Agreement (P-520 5.01.A.3) govern the Engineer's role and obligations after the effective date of the assignment. Refer to this Commentary's Section 4.7.D for further discussion of how the Engineer's responsibilities change upon assignment.

When the Engineer and the Project Owner develop a specific scope of procurement-related services for inclusion in an Owner-Engineer professional services agreement, they should consider that a procurement contract is an entirely separate prime contract requiring substantial time and effort to develop, bid out, and administer. Although the engineering labor budget for services related to a procurement contract is typically less than that required for the Engineer's services on a construction contract, the scope and budget for the procurement-related professional services is nonetheless often considerable. The model scope language of EJCDC® E-500, *Agreement between Owner and Engineer for Professional Services*, Exhibit A, may be used, with significant editing, as the starting point for drafting a procurement-related scope of services.

## **P-700 ARTICLE 11—CHANGES**

**P-700 11.01, *Amending and Supplementing the Procurement Contract***, establishes that:

- The only ways to modify the Procurement Contract are (1) a Change Order, (2) a Change Directive, and (3) a Field Order.
- A change in Contract Price or change in Contract Times must be made in a Change Order.
- Changes that affect the design or involve technical matters must be supported by the Engineer; changes that merely modify contractual, risk allocation, or administrative provisions of the contract do not require the Engineer's recommendation.

**P-700 11.02, *Change Orders*; P-700 11.03, *Change Directives*; P-700 11.04, *Field Orders***

A Change Order is the most common way to make a change. Change Orders may be used for changing the Procurement Contract Price, Procurement Contract Times, or any other part of the Procurement Contract.

A Change Directive, analogous to a work change directive under EJCDC's C-Series and CMA-Series documents, is used by the Buyer to order a change in the Goods and Special Services before the parties have agreed upon the change's effect, if any, on the Procurement Contract Price and Procurement Contract Times. A Change Directive serves to keep the production of the Goods or the furnishing of the Special services moving forward while the parties reach an agreement on the change's effect on compensation and time. When the change initiated by the Change Directive

results in a change in time or in compensation, the result should ultimately be set out in a Change Order.

A Field Order, which is issued by the Engineer, is used to order minor changes in the Goods and Special Services. A “minor change” is one that does not involve a change in the Procurement Contract Price or the Procurement Contract Times.

For the Buyer, Change Orders and Change Directives should be signed only by an individual in the Buyer’s organization who is authorized to sign binding contracts on behalf of the Buyer’s organization. Similarly, the Seller’s representative who signs a Change Order should be authorized to sign contracts binding the Seller’s organization. A Seller’s signature is not necessary on Change Directives and Field Orders. The Buyer’s signature is not necessary on Field Orders.

The Engineer’s design professional of record should be the individual who recommends and signs Change Orders, Change Directives, and Field Orders that result in changes in the design. Modifications signed or recommended by other than the Engineer’s design professional of record should comply with Laws and Regulations regarding successor engineers. EJCDC recommends against unlicensed individuals signing or recommending contract modification instruments that change the Project’s design.

When the Project Owner, as Buyer, assigns the Procurement Contract to a Contractor/Assignee, the Project Owner may no longer enter into Change Orders with the Seller, or issue Change Directives to the Seller; and the Engineer may no longer issue Field Orders to the Seller. Rather, after the effective date of the assignment, under the rules for assignment in the Procurement Agreement the Procurement Drawings and Procurement Specifications become “Contract Documents” under the construction contract, and if changes to the procurement design are necessary, the Project Owner (as “Owner” under the construction contract) would issue change orders and work change directives (as applicable) to the Contractor/Assignee (under the construction contract the “Contractor”), and the Engineer would issue construction field orders to the Contractor/Assignee (Contractor). Thereafter, the Contractor/Assignee (as the Buyer) will execute a corresponding parallel Change Order with the Seller. P-520 5.01.A.3.a and b. In addition, under the terms of the assignment the Contractor/Assignee and Seller may not change the Procurement Drawings or Procurement Specifications under the Procurement Contract—as construction “Contract Documents,” such changes may only occur through the construction contract’s process for changes. P-520 5.01.A.3.c.

For further information on these matters, refer to C-001’s commentary on C-700 11.01 through 11.04.

EJCDC does not publish Change Order, Change Directive, or Field Order forms specifically adapted for use with procurement contracts. EJCDC recommends editing and using EJCDC® C-940—2018, *Work Change Directive*; EJCDC® C-941—2018, *Change Order*; and EJCDC® C-942—2018, *Field Order*.

**P-700 11.05, *Buyer-Authorized Changes in the Goods and Special Services***, specifically allows the Buyer to order changes in the Goods and Special Services. Construction contracts traditionally bestow a parallel right on the owner; the right seems to be less universally accepted in commercial equipment purchases, because some Sellers resist this clause and related provisions.

**P-700 11.06, *Buyer’s Contingency Allowance***, sets forth allowance provisions that parallel those in C-700 13.02.C (“Owner’s Contingency Allowance”). The Buyer’s contingency allowance (if any) is a stipulated element of the Procurement Contract Price, in an amount established by the Project



Owner/Buyer prior to issuing the Procurement Contract's bidding documents, as a fund to cover unanticipated costs. A Buyer's contingency allowance is entirely optional and perhaps most procurement contracts are issued without any Buyer's contingency allowance. A contingency allowance should be included in the contract only with the Project Owner's full knowledge and consent; the amount of any Buyer's contingency allowance should be established by the Project Owner/Buyer.

The only substantive difference between the Buyer's contingency allowance and the "Owner's Contingency Allowance" of C-700 13.02.C is that, when the Procurement Contract is assigned to the Contractor/Assignee, the Buyer's contingency allowance is "automatically reduced" to the amount, if any, already authorized, and will "cease to be operational." P-520 5.01.A.3.m. This is so that the Contractor/Assignee, in its new role as Buyer, does not have access to or authority to use the Project Owner's allowance funds. Therefore, when the Project Owner anticipates a relatively short period between award of the Procurement Contract and the effective date of the assignment, the usefulness of establishing a Buyer's contingency allowance should be considered. Any Buyer's contingency allowance would likely be more useful when the Procurement Contract will not be assigned, or if a relatively long period will elapse between the Effective Date of the Procurement Contract and the effective date of the assignment; or reallocated as part of the "Owner's Contingency Allowance" under the construction contract.

When the Project Owner/Buyer is considering authorizing the use of a portion of the Buyer's contingency allowance, a proposal request establishing the scope of the contemplated change in the Goods or Special Services is drafted and delivered to the Seller which, in turn, prepares and submits a proposal indicating the effect on price and, possibly, other contract elements. If the Seller's proposal is accepted, the Project Owner/Buyer issues a written authorization to use a specific amount of the contingency allowance.

Because authorizing use of the Buyer's contingency allowance is essentially spending the Project Owner's money, the Project Owner itself should issue such authorizations. EJCDC strongly recommends that the Engineer never undertake to authorize use of the Buyer's contingency allowance—even at the specific request of the Project Owner/Buyer. EJCDC further suggests that only a limited number of specific individuals in the Project Owner/Buyer's organization be empowered to authorize use of the Buyer's contingency allowance.

Details on the procedures to be used in proposing pricing and authorizing use of the Buyer's contingency allowance are not indicated in P-700 11.06. Rather, such administrative procedures, when indicated in the Procurement Contract Documents, should be in either the Procurement Supplementary Conditions or in the Procurement Specifications (as Section 01 21 00, Allowances, when CSI MasterFormat is used for organizing the procurement project manual).

Model language and guidance notes supporting use of a Buyer's contingency allowance are included in P-200 12.06, P-400 2.03, and P-520 3.01.D.

For further discussion on the use of contingency allowances, refer to C-001's commentary on C-700 13.02.C.

**P-700 11.07, *Unauthorized Changes in the Goods and Special Services***, is a brief and basic but essential provision stating that the Seller is not entitled to any change in compensation or time for a change that was not duly authorized in accordance with the Procurement Contract. There is rarely, if ever, any need to amend or modify P-700 11.07.

**P-700 11.08, *Change of Procurement Contract Price***, states that the only way to change the Procurement Contract Price is via a Change Order, and that such change may occur by one of three methods: (1) application of unit prices that are in the Procurement Contract, (2) a mutually agreeable lump sum; or (3) when unit prices do not apply and the parties cannot agree on a lump sum, on the basis of the Seller’s documented costs to implement the change plus a 15% fee for overhead and profit. The documented costs method should be resorted to only rarely. Many sellers’ accounting systems are not capable of tracking costs on a per-change or per-unit basis. Hence, documenting such costs in a manner acceptable to the Project Owner may, in practice, be problematic.

**P-700 11.09, *Change of Procurement Contract Times***, states that the only way the Procurement Contract Times can be changed is via a Change Order. It also sets forth that proposals for changes in the Procurement Contract Times must comply with the provisions for Claims at P-700 Article 12. P-700 4.04, Delays, is often applicable to P-700 11.09.

**P-700 11.10, *Notification to Surety***, establishes that the Seller is responsible for notifying its surety of changes to the Procurement Contract Price and Procurement Contract Times. This provision essentially parallels the requirements of C-700 11.10 (“Notification to Surety”).

**Proposed Changes.** The P-Series Documents do not include any established process for the Buyer or Engineer to furnish proposal requests to the Seller, requesting pricing or comments regarding potential changes to the Goods or Special Services. Such a process, perhaps setting forth minimum requirements or standard formats for the Seller’s response, may be indicated in either the Procurement Supplementary Conditions or in the Procurement Specifications, such as Section 01 26 00, Contract Modification Procedures.

## **P-700 ARTICLE 12—CLAIMS, DISPUTES, AND DISPUTE RESOLUTION**

### **P-700 12.01, *Claims***

The term “Claim” is defined (P-700 1.01.A.8) to include demands or assertions by Buyer or Seller seeking adjustments in Contract Price or Contract Times, or other relief under the Procurement Contract; the term does not include the claims of third parties.

The Claims procedure established in P-700 12.01 is traditional and straightforward. Starting with the 2013 edition of the C-Series, EJCDC introduced a multi-tier process that includes, among other features, change proposals and a modified role for the Engineer; that process is specific to construction contracts and is not familiar in commercial purchase transactions, and thus EJCDC did not adopt it for the Procurement Series.

### **Claims—The Role of the Engineer**

In the Claims procedure established in P-700 12.01, the Engineer is the entity that renders decisions on Claims. Because the Engineer is specifically required by P-700 10.02.D to be impartial in rendering decisions on the requirements of the Procurement Contract Documents and entitlement in Claims, and because it is the Project Owner/Buyer that retains the Engineer and pays the Engineer’s invoices, serving impartially as the entity determining entitlement in Claims can sometimes be challenging. In particular, the Project Owner/Buyer may attempt to pressure the Engineer for a decision on entitlement that is favorable to the Project Owner/Buyer. Similarly, the Engineer may take the viewpoint that, because the Project Owner/Buyer pays the Engineer’s

invoices, the Engineer should discuss its decisions on entitlement with the Project Owner/Buyer before finalizing them. To better-ensure the integrity of the Claims process, EJCDC strongly recommends that such actions be resisted by the Engineer. Partiality toward the Project Owner/Buyer or a subsequent revelation that the Engineer allowed the Project Owner/Buyer to review, comment on, and perhaps direct the Engineer's decision on entitlement in a Claim, could have adverse effects for Owner and Engineer alike if the matter escalates to mediation or final resolution of the dispute (via arbitration or litigation).

- In accordance with P-520 5.01.A.3.h, the Engineer's role in determining entitlement in Claims ends when the Procurement contract is assigned. After the assignment is effective, Claims between the Buyer (Contractor/Assignee) and Seller are to be resolved by direct, good-faith negotiation between the parties. P-520 5.01.A.3.h.
- If there are unresolved Claims on the effective date of the assignment, the Engineer's responsibility for determining entitlement remains, but the Contractor/Assignee (as the new Buyer) has all the rights and responsibilities of the Buyer in the Claims process.

### **Claims Procedures and Process**

The Claims procedure established in P-700 12.01 includes specific time frames: (1) for submitting the initial notice of the Claim—whether filed by the Buyer or the Seller—to the other party and the Engineer; for submitting supporting documentation/information (data) substantiating the Claim; and for the Engineer to render its decision on the Claim. Responses by the other party are permissible but not mandated or subject to a specific schedule.

While EJCDC strongly recommends that the parties and the Engineer comply with all contractual procedures, including time limits for the Claims process, and P-700 12.01.J states that no Claim is valid unless submitted in accordance with P-700 12.01, EJCDC also cautions the parties and the Engineer not to rely too heavily on procedural grounds—such as submitting a Claim notice late, or delivering such notice not fully in accordance with the requirements of P-700 15.01 (“Giving Notice”)—as a basis for rejecting or denying a Claim. Courts and arbitrators often allow minor deviations from contractual procedures and deadlines, especially if the other party has not been prejudiced by the deviation, or if there is a history of non-adherence and loose compliance with similar rules during the course of the project.

Although not required by the provisions of P-700 12.01, it may be advisable for the Engineer, immediately upon receipt of a Claim, to (1) ensure that the opposing party received the Claim (2) to separately contact the claimant and the receiving party for an oral discussion of the Claim; (3) to send the claimant (with a copy to the receiving party) a summary of the Engineer's understanding of the essence of the Claim and perhaps indicating any further information required by the Engineer to evaluate the Claim and render the Engineer's decision on entitlement. EJCDC believes that such approaches, when implemented impartially, support the intent of the Claims process, which is to resolve Claims promptly, as they occur, each on its own merits and contractual entitlement. When requested to do so, the Engineer should grant reasonable extensions of the time frames in P-700 12.01 for the claimant to furnish any needed supporting information and documentation.

After assignment, the applicable Claims procedures are those set out in the Procurement Agreement, at P-520 5.01.A.3.h, under which Claims are made directly between the two parties

(Contractor/Assignee, as Buyer, and Seller). Note especially the requirement that any Claim by Seller that will be passed up to the Project Owner must be submitted to the Buyer (Contractor/Assignee) with sufficient time to allow Buyer to preserve its related claim rights as Contractor under the construction contract.

A complete discussion of the Claims process is beyond the scope of this Commentary. There are many industry resources that present further information on claims resolution where the design professional (or other third party, such as an “initial decision maker” as used in AIA A101—2017 and AIA A201—2017) has responsibility for determining entitlement in Claims. Many such articles and resources are available free online and can be easily located using common search engines. The user is encouraged to consult such resources. Also, for substantial Claims it is often beneficial to augment the personnel handling the preparation and (especially) the resolution of Claims with appropriate, senior personnel with claims experience.

Because a Claim is the last contractual method available to resolve a disagreement between the parties before the formal dispute resolution process commences—in which the parties each typically engage legal counsel and likely incur fees for mediators, arbitrators, court costs, and fees of special consultants and expert witnesses—EJCDC strongly recommends that the Claims process be implemented in good faith in full accordance with the time frames and procedures set forth in the Procurement Contract Documents.

### **Claims—The Engineer’s Decision**

The Engineer’s written decision on a Claim should be formal and professionally drafted without bias or partiality. The Engineer’s decision on the Claim should typically include:

- a summary of the essence of the Claim,
- the background of events leading up to the Claim and relevant subsequent events,
- applicable contractual procedures for Claims and the extent to which the Claim submittal complied with such procedures, and
- the Engineer’s decision on entitlement, including the impact on the Procurement Contract Price and the Procurement Contract Times; other relief (if any) sought through the Claim; and the next steps.

Next steps following the Engineer’s decision on entitlement may include preparation of a Change Order to formalize any applicable change in compensation or time, or, in some cases, proceeding with changes to the design.

P-700 12.01.F establishes that a written decision by the Engineer (or failure to furnish one, in accordance with P-700 12.01.E or P-700 12.01.G) is a condition precedent to the parties exercising further rights under the Procurement Contract or under law. If the Engineer’s decision is disputed, either party may appeal within 30 days from the date of the Engineer’s decision. P-700 12.01.H; and P-700 12.01.I, when applicable. If the 30 days pass without either party invoking its appeal rights, the Engineer’s decision on the Claim becomes final and binding on the parties, pursuant to P-700 12.01.H.

### **P-700 12.02, *Dispute Resolution Method***

If either party to the Procurement Contract disagrees in whole or in part with the Engineer’s decision on a Claim, P-700 12.02 provides for a two-step process by which disputes may be

resolved: (1) mediation, followed if necessary by (2) binding dispute resolution, such as arbitration or litigation in a court of competent jurisdiction.

The standard dispute resolution process continues to apply to Buyer (Contractor/Assignee) and Seller after an assignment; see P-520 5.01.A.h.3.

The Project Owner should always direct the drafter of the Procurement Contract's Division 00 documents regarding the Project Owner's desired dispute resolution methods, typically after the Project Owner consults with its legal counsel. Many factors are worth considering, including potential costs, typical time frames, confidentiality versus transparency, and the possibility of appeals. The methods of dispute resolution directed by the Project Owner may be documented using the information-gathering process based on P-050, *Project Owner's Instructions Regarding Procurement Documents*. In most cases any changes to the standard EJCDC provisions in P-700 12.02 will be stated in the Procurement Supplementary Conditions at P-800 SC-12.02.

P-700 12.02.A requires mediation by the American Arbitration Association (AAA) in accordance with AAA's Construction Industry Mediation Rules. Some Project Owners may prefer to specify that the mediation be administered by an entity other than the AAA, or opt to use an alternative non-binding dispute resolution method, such as a standing neutral, disputes review board, or mini-trial.

P-700 12.02.B provides that the mediation process must conclude not later than 60 days after filing of notice for mediation. If the dispute is not successfully resolved by mediation, then the Engineer's decision on the Claim becomes final and binding unless either party, within 30 days of the conclusion of mediation, files for final dispute resolution in accordance with the Procurement Contract. If mediation is successful, the parties will likely sign a Change Order (to formalize any changes in compensation, time, or other relief under the Procurement Contract) and perhaps a settlement agreement (which may be recommended by the parties' legal counsels).

Final, binding resolution of the dispute is addressed generally in P-700 12.02.C. The default final method is litigation (adjudication in a court of law); P-700 12.02.C.3. However, the Procurement Contract may be drafted to require an alternative method of final resolution, most commonly arbitration; that method should be specified in the Procurement Supplementary Conditions. P-700 12.02.C.1. In addition, the contract makes clear that when a dispute actually occurs the parties may mutually agree to a preferred method of final dispute resolution, including a final method that is not established by the Procurement Contract. P-700 12.02.C.2.

EJCDC encourages the specification of a specific appropriate method for final resolution of disputes (litigation in a designated venue; arbitration; other) in the Procurement Supplementary Conditions. In this regard, P-800 SC-12.03 presents model language for a clause requiring binding arbitration.

## **P-700 ARTICLE 13—PAYMENT**

EJCDC's P-Series Documents address the fundamental terms of payment, including identification of the various progress payments, in the Procurement Agreement (P-520 Article 4). The Procurement General Conditions' provisions on payment (P-700 Article 13) are generally administrative and procedural. The payment requirements of P-700 13.01, *Applications for Progress Payments*, may be augmented by the Procurement Specifications, such as a Section 01 26 00, *Progress Payment Procedures* (when the Procurement Specifications are organized in

accordance with CSI *MasterFormat*). Also refer to this Commentary's Section 3.2.C for a discussion of sellers' common viewpoints on payment terms, and this Commentary's Section 5.3 for a discussion of P-520 Article 4.

**P-700 13.01 through 13.04.** A detailed discussion of payment procedures is not presented in this Commentary regarding P-700 13.01 through 13.04. For a more detailed treatment of this topic, refer to C-001's commentary on C-700 Article 15.

P-700 13.01.C requires that Seller's Applications for Payment for delivery of some or all of the Goods must be accompanied by documentation establishing that the Buyer is receiving title to the Goods free and clear of all liens or other financial encumbrances, together with lien releases and waivers. To protect the Project Owner's interest in its property and Project funds, obtaining such documentation is very important and should not be neglected by either the Engineer (when the Procurement Contract is not assigned) or by the Contractor/Assignee (Buyer) (when the Procurement Contract has been assigned).

As established in P-700 13.02, the Engineer is responsible for receiving and reviewing the Seller's Applications for Payment, and for issuing to the Project Owner/Buyer a recommendation for payment. However, if the Procurement Contract is assigned, the Engineer's obligations regarding the Seller's Applications for Payment ceases, in accordance with P-520 5.01.A.3.f, except to the extent that the contents of such applications are included in pay applications submitted by Contractor/Assignee under the construction contract.

**P-700 13.05, *Final Payment*,** sets forth basic requirements for the Seller's final Application for Payment. The Seller may submit its final Application for Payment upon the correction of all non-conformities and Seller's receipt of the Buyer's notice of conformity of the Goods and Special Services, as required by P-700 9.02.C; such notice may be made using the new administrative form for that purpose, EJCDC® P-626, *Buyer's Notice Regarding Conformity of Goods and Special Services*.

The final Application for Payment must be accompanied by all final documentation required of the Seller, as indicated in P-700 13.05.B. At the time the Procurement Contract's Division 00 documents are drafted, the documentation required by P-700 13.05.B may be augmented, either via the Procurement Supplementary Conditions or by a Procurement Specifications Section 01 77 00, Closeout Procedures (when the Procurement Specifications are organized using CSI *MasterFormat*). While a construction contract's close-out typically requires submittal of a list of all subcontractors and suppliers and waivers of lien rights from each and the contractor, such items are not required with the Seller's final Application for Payment because similar documents are required (P-700 13.01.C) with each Application for Payment that includes payment for all or part of the Goods.

In **P-700 13.06, *Waiver of Claims*,** the parties waive further Claims against each other, except the Buyer reserves its rights after final payment, such as rights arising from the discovery of latent nonconformities in the Goods or Special Services. The clause parallels the terms of C-700 15.07 ("*Waiver of Claims*"); refer to C-001's commentary on C-700 15.07 for a more detailed discussion of the final waiver of claims.

## **P-700 ARTICLE 14—CANCELLATION, SUSPENSION, AND TERMINATION**

**P-700 14.01, *Cancellation***, is the Procurement Contract’s provision allowing the Buyer to cancel the contract without cause. It is the equivalent of what would be called a termination for convenience clause in a construction contract.

If the Buyer cancels the Procurement Contract, the Buyer must pay the Seller for Goods that have been specially manufactured, based on the Seller’s direct costs plus a “fair and reasonable” fee for overhead and profit. Although not expressly stated, the presumption here is that the cancellation occurs while manufacturing is still in progress. If the specially-manufactured Goods have been fully completed when the cancellation occurs, it would be reasonable to determine the price through the progress payment schedule in the Procurement Agreement (P-520 2.02) or through a Procurement Contract schedule of values. Buyers and engineers should bear in mind that most sellers’ accounting systems are not set up to track costs on a per-unit basis.

For other Goods not specially fabricated for the Buyer (i.e., that can be sold to other customers), the Buyer must pay the Seller a restocking charge of 10 percent the unpaid portion of the Procurement Contract Price allocable to such items.

**P-700 14.02, *Suspension of Performance by Buyer***, allows the Buyer to suspend the purchase for up to 90 days by giving the Seller written notice. As long as the Seller did not create the need to suspend performance, the Seller is entitled to additional time and additional compensation, in accordance with P-700 4.04, for the effect of the suspension of performance.

**P-700 14.03, *Suspension of Performance by Seller***, addresses the more-limited situation where the Seller may suspend its performance under the Procurement Contract. The Seller’s right to suspend performance is limited to situations in which the Seller has reason to believe it will not be paid and, in response to the Seller’s written request for assurances of future payment, the Buyer has failed to provide adequate assurances.

### **P-700 14.04, *Breach and Termination***

Both the Buyer and the Seller have the right to terminate the agreement if the other party is in breach of its material contractual obligations. (A material obligation is a duty that goes to the heart or essence of the contract). The party at fault has seven days, however, in which to cure its breach (or diligently proceed with the cure) and thereby avoid termination.

When the Buyer seeks to terminate the Seller for a material breach of contract, the notice and cure procedures of the associated performance bond will supersede the procedural terms of P-700 14.04.B.2. The Buyer’s legal counsel should always be involved when a termination occurs, especially if relief will be sought under a performance bond.

## **P-700 ARTICLE 15—MISCELLANEOUS**

P-700 Article 15 includes several miscellaneous provisions that largely mirror those of C-700 Article 18 (“Miscellaneous”). P-700 Article 15 is briefly discussed below.

**P-700 15.01, *Giving Notice***, governs the delivery of all formal notices required by the Procurement Contract, including notice of Claims, required notices of delays, notices of suspension, cancellation, or termination, or breach, and other notices required by the Procurement Contract. Such notices are deemed to be valid only when delivered by one of the three methods set forth in P-700 15.01, including delivery in person (including commercial courier

services), by registered or certified mail, or by e-mail with the words “Formal Notice” (or similar) in the subject line.

**P-700 15.02, *Controlling Law***, establishes that the laws governing the Procurement Contract are those in effect at the location where the Goods will be installed. This provision is useful because it is common that the Seller is in a different jurisdiction (perhaps in a different country) than the location where the Goods will be installed, and the Project Owner and Contractor/Assignee may be in other locations as well. P-700 15.02.B further establishes that, in the event of any conflict between the Procurement Contract and the applicable version of the Uniform Commercial Code, the Procurement Contract governs.

**P-700 15.03, *Computation of Time***, establishes that when a contractual deadline falls on a Saturday, Sunday, or legal holiday, the deadline defaults to the next business day.

**P-700 15.04, *Cumulative Remedies***, states that remedies under the Procurement Contract are cumulative and pursuit by one avenue does not preclude pursuit through a different contractual mechanism. For example, the Buyer may seek relief from the Seller for nonconforming Goods under both the correction period (P-700 9.04) and the Seller’s general warranty and guarantee (P-700 9.01.B); the remedies are not mutually exclusive.

**P-700 15.05, *Survival of Obligations***, establishes that the Seller’s obligations for indemnification, warranties, and guarantees established under the Procurement Contract survive final payment, acceptance, and termination. See also P-700 5.01.A.3.d, concerning the continuation of these obligations after an assignment.

**P-700 15.06, *Entire Agreement***, indicates that the Procurement Contract is the final, formal agreement or bargain between the parties and supersedes all prior, related negotiations, whether written and oral.

**P-700 15.07, *No Waiver***, is a standard clause that asserts that a party’s failure to enforce a provision of the Procurement Contract does not infringe on or affect that party’s right to enforce the same provision at a later time, or any other provision(s) of the Procurement Contract.

**P-700 15.08, *Headings***, indicates that the headings of the Procurement General Conditions are for convenience only and are not themselves part of the Procurement General Conditions.

**P-700 15.09, *Successors and Assigns***, is a standard contract provision indicating the parties bind their successors and assigns to the terms of the Procurement Contract. This is a general provision that is separate from any provision on the Project Owner/Buyer’s assignment of the Procurement Contract, which is addressed in the Procurement Agreement (P-520 5.01).



## 6.0 COORDINATION OF PROCUREMENT SPECIFICATIONS

### 6.1 Specifications for the Procurement Contract

#### A. Division 01 Specifications—Procurement Contract

Some drafters of procurement contracts may assume that the only specifications needed are those for the engineered equipment or materials to be purchased. In fact, because they are typically in effect for many months or years, procurement contracts often have significant administrative and procedural requirements that are similar to those included in construction contracts. Failure to include appropriate general requirements for administrative and procedural matters has the potential to make administering the Procurement Contract more challenging for the Buyer and the Engineer. This need is accented by many sellers' habitual adherence to their own standard procedures for fulfilling a procurement contract, which are often very different from those desired by buyers and engineers.

Presented below are section numbers and titles of Division 01 Procurement Specifications, in accordance with the 2018 edition of the Construction Specifications Institute's (CSI) MasterFormat®, that are often appropriate or necessary in procurement contracts, together with associated commentary.

1. *Section 01 22 13, Measurement and Payment:* This section may be appropriate when the Procurement Contract includes multiple bid items/payment items, and may be used for clarifying the extent of the Goods and Special Services in each bid item. Use of a Section 01 22 13 is particularly relevant when the Procurement Contract includes unit price items.
2. *Section 01 26 00, Contract Modification Procedures:* This section may be used for indicating *administrative* and procedural requirements for requests for interpretation (RFI), clarification notices, proposal requests transmitted to the Seller, change proposals submitted by the Seller, Change Orders, Change Directives, and Field Orders.
3. *Section 01 29 73, Schedule of Values:* Although detailed requirements for a schedule of values are not necessary on all procurement contracts (a schedule of values is not required by P-700 2.04), where the extent and type of the Goods is complex, and where there is greater potential for the Seller to request approval to make multiple, partial deliveries of the Goods, a schedule of values from the Seller may be useful.
4. *Section 01 29 76, Payment Procedures:* Use this section to augment the basic requirements of the Procurement Agreement (P-520 Article 4) and the Procurement General Conditions (P-700 Article 13) to indicate detailed procedural requirements for the Seller's requests for progress payments. Where payment for stored Goods is made prior to final delivery to the Point of Destination, this section may also be used to set forth requirements concerning the Buyer's or Engineer's visual inspection of the Goods upon delivery to the storage location.
5. *Section 01 31 19.13, Preliminary Conference:* Requirements of this section would augment P-700 2.05's *requirement* for a preliminary conference between the Project Owner (the initial Buyer), Seller, and Engineer, analogous to many of the requirements for a preconstruction conference.
6. *Section 01 32 16, Progress Schedule:* Although a progress schedule may not be necessary on all procurement contracts, it is required by P-700 2.04. For larger or more-complex procurements—particularly those with increased potential for the Seller to propose

delivering the Goods in multiple shipments not stipulated in the Procurement Agreement—requiring a basic progress schedule from the Seller may be useful. The provisions of this section would augment the basic requirements for a progress schedule as set forth in P-700 2.04.

7. *Section 01 31 26, Electronic Communication Protocols:* If not otherwise addressed in the Procurement Supplementary Conditions using model language adapted from C-800 2.06 and C-800 Exhibit A (as prompted by the note to user in P-800 regarding a potential SC-2.03.A), this section, assigned in CSI's *MasterFormat*, is an alternative location to indicate procedures and protocols for the exchange of Electronic Documents via Electronic Means (terms defined in P-700 1.01.A.11 and 12).
8. *Section 01 33 00, Submittal Procedures:* Useful on almost all procurement contracts, this section may be used for augmenting P-700 2.04's requirements for the Seller's schedule of submittals; it often augments P-700 7.06 ("Submittals"); and it may include requirements for electronic Submittals. This section also may include required text of the Seller's Submittal approval stamp, indication of different types of Submittals (such as action Submittals, informational Submittals, closeout Submittals, and maintenance materials Submittals), Submittal numbering requirements, the quantity of paper *Submittals* required (if any) and to whom such Submittals are to be transmitted, and the meaning of the Engineer's dispositions (such as "approved", "approved as corrected," "revise and resubmit," and others) for each type of Submittal, and other requirements applicable to Submittals. Section 01 33 00 should consistently use defined terms, such as "Shop Drawing" (P-700 1.01.A.35) and "Submittal" (P-700 1.01.A.37).
9. *Section 01 42 00, References:* Used on most contracts, this section indicates codes and standard *specifications* (if any) applicable to the furnishing of the Goods and Special Services, acronyms, abbreviations, and related information.
10. *Section 01 61 00, Common Product Requirements:* This section is often used to indicate general *requirements* regarding uniformity of the Goods, appearance of the Goods, what is meant by P-700 7.02.B's requirement that the Goods be "new," and related requirements.
11. *Section 01 62 00, Product Options:* This section is typically used for indicating, among other things, *requirements* for the Seller's proposal(s) for approval of "or-equal" items, augmenting P-700 7.04 (regarding "or-equals").
12. *Section 01 65 00, Product Delivery Requirements:* Used on many procurement contracts, this section is the location to indicate requirements that augment P-700 Article 8, such as packing the Goods for shipment, delivery notification requirements, and detailed requirements for the Buyer's, Seller's, and Engineer's inspection of the Goods upon delivery to the point of destination( augmenting P-700 9.02.B regarding visual inspection upon delivery).
13. *Section 01 66 00, Product Storage and Handling Requirements:* Use this section to indicate general requirements for the Seller's handling and storage of the Goods. A separate, similar section should also be included in any associated construction documents to govern the contractor's handling and storage of the Goods after delivery.
14. *Section 01 75 00, Startup and Adjusting:* Where the Procurement Contract includes the Seller's onsite *Special Services* for checkout and startup of engineered equipment or

materials, this section is useful for indicating general requirements for the Seller's responsibilities for checkout and startup of the Goods. The associated construction contract, if any, should include a similar section indicating the contractor's general responsibilities for checkout and startup.

15. *Section 01 77 00, Closeout Procedures:* Use this section for augmenting the General Conditions' *requirements* concerning the Engineer's acceptance of the Goods (P-700 9.02.C ("Final Inspection")) and the Seller's request for final payment (P-700 13.05 ("Final Payment")).
16. *Section 01 78 23, Operations, and Maintenance Data:* This section is an appropriate location for indicating detailed requirements for operations and maintenance manuals and related information, particularly for engineered equipment and materials required of the Seller.
17. *Section 01 78 36, Warranties:* In this section, or its "parent" "01 78 00, Closeout Submittals" (if used), the specifier may indicate the general procedural and administrative *requirements* for warranties; this is an alternative location where a specimen warranty form (with mandatory language for special warranties) may be bound. Drafters of the Specifications may use this section to: (a) better-define the types of warranties required by the Procurement Contract Documents (such as manufacturers' general (standard) warranties and extended or special warranties); (b) indicate that the Seller's general warranties and guarantees (P-700 9.01) and the correction period (P-700 9.04) run in addition to and concurrent with manufacturers' warranties for materials and equipment; (c) indicate that limitations of manufacturers' warranties do not limit the Seller's obligations under the Seller's general warranty and the correction period; (d) state that the provisions of manufacturers' warranties do not limit the Buyer's and Project Owner's rights under the Procurement Contract; (e) indicate generalized requirements for special warranties required under the Procurement Contract; and (f) indicate the time at which manufacturer-furnished warranties are required to commence running. This section clarifies the relationship between the manufacturers' express warranties and the warranties required by the General Conditions (general warranty and guarantee of P-700 9.01.B through E, correction period of P-700 9.04, and warranty of title at P-700 9.01.A) and whether implied warranties through Laws and Regulations (such as the applicable version of the Uniform Commercial Code) are in effect or are disclaimed. For additional information on warranty types, refer to Section 2.3.B and Section 3.2.D of this Commentary.
18. *Section 01 78 43, Spare Parts:* Include in this section requirements for documenting the delivery and *handover* to the Buyer or Project Owner of required spare parts, extra stock materials, special tools required for maintaining the Goods, and similar items. Where the Buyer or Project Owner has a bar-coding system for tracking its inventory, include in this section requirements for the Seller's bar-coding of each item delivered.
19. *Section 01 79 23, Instruction of Operations and Maintenance Personnel:* Include in this section detailed *requirements* for the Seller's training of the Project Owner's operations and maintenance personnel in the use, care, and maintenance of the Goods.

In addition to the foregoing, other Division 01 Procurement Specifications may also be appropriate, depending on the needs of the Project and the Goods procured through the Procurement Contract.

## **B. Specifications for the Materials or Equipment to be Purchased**

Refer to Section 6.2.C of this Commentary for a discussion of how specifications sections for the Goods required in the Procurement Contract differ from (1) installation specifications for the Goods under the associated construction contract, and (2) traditional specifications for a design-bid-build project in which the contractor both furnishes and installs the materials and equipment.

Often, Procurement Specifications for the Goods are prepared from either standard specifications intended for design-bid-build construction or a prior project, in which the contractor both furnishes and installs the materials and equipment. Preparers of the Procurement Specifications should ensure that terminology and defined terms and terminology used in the Procurement Specifications are consistent with those set forth in P-700 Article 1. Thus, as examples:

- “Owner” should be changed to either “Buyer” or “Project Owner” depending on context;
- “Contractor” should be changed to “Seller” or “construction contractor” (if not assigned) or “Contractor/Assignee” (if assigned), depending on context,
- “Work” (with an initial capital) should be changed to “Goods and Special Services” (or other variant, such as “Goods,” “Goods or Special Services,” or “Special Services,” depending on the context).

As more fully described in Section 6.2.C of this Commentary, specifications for the Goods and Special Services in the Procurement Contract should not include requirements for installation of the Goods. Such requirements should, instead, be included in the “installation specifications” section of the associated construction contract.

## **6.2 Documents that Comprise the Associated Construction Contract**

### **A. Bidding and Contracting Requirements**

Refer to Section 4.2 of this Commentary for a discussion of provisions to be inserted into the construction contract’s Division 00 documents when the Procurement Contract will be assigned to the Contractor/Assignee.

Regardless of whether the Procurement Contract(s) will be assigned to the construction contractor, the Procurement Contract Documents should be included with the construction contract’s bidding documents, to enable prospective construction contract bidders to obtain a full understanding of the scope of the Seller’s Goods and Special Services under the Procurement Contract(s).

As set forth in Section 4.4 of this Commentary, when the Procurement Contract will be assigned to the Contractor/Assignee, the Procurement Contract Documents must be an exhibit to the construction contract’s agreement. When the Procurement Contract will not be assigned, the Procurement Contract Documents should be made available to the construction contract’s bidders and the contractor as additional information. When the Procurement Contract will not be assigned, it may be appropriate to redact the Procurement Contract price and, possibly, its payment terms.

Regardless of whether the Procurement Contract is assigned, the Procurement Contract Times will be of significant interest to the construction contractor (and bidders) for coordination purposes.

## **B. Division 01 Specifications—Construction Contract**

It may be necessary for the person drafting the Division 01 specifications for the construction contract under which the Goods will be installed to properly edit the specifications to address matters relative to the Procurement Contract and, potentially, its assignment to the construction contractor. Perhaps the most-important element of the construction contract's Division 01 specifications in this respect is Section 01 64 00, Owner-Furnished Products, which would include general requirements for the Goods furnished to the contractor by the Project Owner.

Section 01 64 00 can be used for indicating: (1) items in the owner's existing inventory that will be furnished to the contractor for installation; (2) identification of the Procurement Contract(s) under which Goods purchased by the Project Owner and will be installed by the contractor; (3) the general scope and extent of the items furnished by the owner; (4) general responsibilities of the owner and contractor with respect to the owner-furnished items, and associated coordination requirements; (5) whether the Procurement Contract(s) will be assigned to the contractor and, if so, details on the Contractor/Assignee's responsibilities for the Procurement Contract following the assignment; and (6) other relevant information and requirements pertinent to owner-furnished items.

When included, Section 01 64 00, Owner-Furnished Products, should not repeat or conflict with the requirements of Article 5 ("Assignment of Procurement Contract") of the Procurement Agreement when the Procurement Contract is assigned to the Contractor/Assignee. Section 01 64 00, Owner-Furnished Products, may arguably take on increased importance when the Procurement Contract will not be assigned.

## **C. Specifications for Installation of the Goods**

One specification section for a given equipment or material item is typically sufficient to communicate the contractual requirements for a traditional project where the construction contractor both furnishes and installs the materials and equipment. In contrast, where the contractor will install owner-furnished equipment, typically **two** separate specifications sections are required for the Goods: one in the Procurement Contract and one in the construction contract under which the Goods will be installed. These two separate sections are very different from each other, although they are interrelated.

The section number of the "installation section" will typically be similar to that of the associated Procurement Specifications section, and the title of the "installation section" will typically start with the words "installation of..." For example:

1. Procurement Contract: "Section 46 76 33, Dewatering Centrifuges."
2. Construction Contract's Installation Section: "Section 46 76 33.16, Installation of Dewatering Centrifuges."

## **6.3 Procurement and Construction Contract Specifications Table**

The following table summarizes the general content of (1) the Procurement Specifications section for the Goods and Special Services, and (2) the "installation contract section," based on the premise that the two sections are each organized in accordance with the three-part format presented in CSI's *SectionFormat*<sup>®</sup>. The following also assumes that the respective Procurement Specifications and "construction contract installation section" are each developed from a section originally drafted for traditional furnish-and-install construction contracts.

Procurement Specifications Section	Construction Contract's Specifications Section for Installation
<b>Part 1 – General</b> Administrative and procedural requirements for the work under that section	
<p><b>Include</b> all of “Part 1 – General” <b>except</b> for the requirements pertinent to installation.</p> <p>Indicate all quality assurance and Submittals requirements for which the Seller will be responsible.</p>	<p>“Part 1 – General” should include only procedural and administrative requirements pertaining to the installation of the items furnished under the Procurement Contract. Thus, while requiring submittals for an installation plan may be appropriate, shop drawings and product data for the equipment itself should not be required of the contractor.</p>
<b>Part 2 – Products</b> Generally, requirements for Seller’s/supplier’s efforts at the factory/production facility.	
<p><b>Include</b> all requirements of “Part 2–Products.”</p>	<p>In most cases, “Part 2 – Products” <b>will not be used</b>.</p>
<b>Part 3 – Execution</b> Generally, requirements for activities at the site where the products are to be installed.	
<p><b>Omit</b> from “Part 3–Execution” all pre-installation inspection of the installation location, installation requirements, and protection of the Goods.</p> <p><b>Include</b> requirements for Seller’s Special Services at the installation location, and include field quality control requirements that are within the scope of the Seller’s Special Services.</p>	<p><b>Include</b> all requirements for inspecting the items and installation location; installation; and protection of the owner-furnished items. Include field quality control requirements only for activities that will be performed by the construction contractor.</p> <p><b>Indicate</b> that contractor is to <u>assist</u> the Seller in performing the checkout, startup, and field quality control activities for the owner-furnished items.</p> <p><b>Omit</b> requirements for the supplier’s (Seller’s) onsite service, which are included in the Procurement Contract.</p>