

P.L. 2017, CHAPTER 317, *approved January 16, 2018*
Senate, No. 3409 (*First Reprint*)

1 AN ACT establishing standardized changed conditions clauses for
2 certain local public contracts and supplementing P.L.1971, c.198
3 (C.40A:11-1 et seq.).
4

5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:
7

8 1. All construction contracts issued by a contracting unit for
9 bids which were advertised on or after the effective date of P.L. ,
10 c. (C.) (pending before the Legislature as this bill) shall
11 include the changed conditions contract provisions set forth in this
12 section, which provisions shall be deemed to be a part of any such
13 contract even if not expressly incorporated therein, and which
14 provisions may not be modified in any manner by the contracting
15 unit.

16 a. A contract subject to this section shall include the following
17 differing site conditions provisions:

18 (1) If the contractor encounters differing site conditions during
19 the progress of the work of the contract, the contractor shall
20 promptly notify the contracting unit in writing of the specific
21 differing site conditions encountered before the site is further
22 disturbed and before any additional work is performed in the
23 impacted area.

24 (2) Upon receipt of a differing site conditions notice in
25 accordance with paragraph (1) of this subsection, or upon the
26 contracting unit otherwise learning of differing site conditions, the
27 contracting unit shall promptly undertake an investigation to
28 determine whether differing site conditions are present.

29 (3) If the contracting unit determines different site conditions
30 that may result in additional costs or delays exist, the contracting
31 unit shall provide prompt written notice to the contractor containing
32 directions on how to proceed.

33 (4) (a) ¹**【If the contracting unit's investigation and directions**
34 **increase the contractor's costs or time of performance, the】** The¹
35 contracting unit shall make a fair and equitable ¹**【upward】**¹
36 adjustment to the contract price and contract completion date ¹for
37 increased costs and delays resulting from the agreed upon differing
38 site conditions encountered by the contractor¹.

EXPLANATION – Matter enclosed in bold-faced brackets **【thus】** in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹Senate SSG committee amendments adopted December 11, 2017.

1 (b) If both parties agree that the contracting unit's investigation
2 and directions decrease the contractor's costs or time of
3 performance, the contracting unit shall be entitled to a fair and
4 equitable downward adjustment of the contract price or time of
5 performance.

6 (c) If the contracting unit determines that there are no differing
7 site conditions present that would result in additional costs or
8 delays, the contracting unit shall so advise the contractor, in
9 writing, and the contractor shall resume performance of the
10 contract, and shall be entitled to pursue a differing site conditions
11 claim against the contracting unit for additional compensation or
12 time attributable to the alleged differing site conditions.

13 (5) Execution of the contract by the contractor shall constitute a
14 representation that the contractor has visited the site and has
15 become generally familiar with the local conditions under which the
16 work is to be performed.

17 (6) As used in this subsection, "differing site conditions" mean
18 physical conditions at the contract work site that are subsurface or
19 otherwise concealed and which differ materially from those
20 indicated in the contract documents or are of such an unusual nature
21 that the conditions differ materially from those ordinarily
22 encountered and generally recognized as inherent in the work of the
23 character provided for in the contract.

24 b. A contract subject to this section shall include the following
25 suspension of work provisions:

26 (1) The contracting unit shall provide written notice to the
27 contractor in advance of any suspension of work lasting more than
28 10 calendar days of the performance of all or any portion of the
29 work of the contract.

30 (2) If the performance of all or any portion of the work of the
31 contract is suspended by the contracting unit for more than 10
32 calendar days due to no fault of the contractor or as a consequence
33 of an occurrence beyond the contracting unit's control, the
34 contractor shall be entitled to compensation for any resultant delay
35 to the project completion or additional contractor expenses, and to
36 an extension of time, provided that, to the extent feasible, the
37 contractor, within 10 calendar days following the conclusion of the
38 suspension, notifies the contracting unit, in writing, of the nature
39 and extent of the suspension of work. The notice shall include
40 available supporting information, which information may thereafter
41 be supplemented by the contractor as needed and as may be
42 reasonably requested by the contracting unit. Whenever a work
43 suspension exceeds 60 days, upon seven days' written notice, ¹【the
44 contractor】 either party¹ shall have the option to terminate the
45 contract for cause and to be fairly and equitably compensated
46 therefor.

47 (3) Upon receipt of the contractor's suspension of work notice
48 in accordance with paragraph (2) of this subsection, the contracting

1 unit shall promptly evaluate the contractor's notice and promptly
2 advise the contractor of its determination on how to proceed in
3 writing.

4 (4) (a) If the contracting unit determines that the contractor is
5 entitled to additional compensation or time, the contracting unit
6 shall make a fair and equitable upward adjustment to the contract
7 price and contract completion date.

8 (b) If the contracting unit determines that the contractor is not
9 entitled to additional compensation or time, the contractor shall
10 proceed with the performance of the contract work, and shall be
11 entitled to pursue a suspension of work claim against the
12 contracting unit for additional compensation or time attributable to
13 the suspension.

14 (5) Failure of the contractor to provide timely notice of a
15 suspension of work shall result in a waiver of a claim if the
16 contracting unit can prove by clear and convincing evidence that the
17 lack of notice or delayed notice by the contractor actually
18 prejudiced the contracting unit's ability to adequately investigate
19 and defend against the claim.

20 c. A contract subject to this section shall include the following
21 change in character of work provisions:

22 (1) If the contractor believes that a change directive by the
23 contracting unit results in a material change to the contract work,
24 the contractor shall so notify the contracting unit in writing. The
25 contractor shall continue to perform all work on the project that is
26 not the subject of the notice.

27 (2) Upon receipt of the contractor's change in character notice
28 in accordance with paragraph (1) of this subsection, the contracting
29 unit shall promptly evaluate the contractor's notice and promptly
30 advise the contractor of its determination on how to proceed in
31 writing.

32 (3) (a) If the contracting unit determines that a change to the
33 contractor's work caused or directed by the contracting unit
34 materially changes the character of any aspect of the contract work,
35 the contracting unit shall make a fair and equitable upward
36 adjustment to the contract price and contract completion date. The
37 basis for any such price adjustment shall be the difference between
38 the cost of performance of the work as planned at the time of
39 contracting and the actual cost of such work as a result of its change
40 in character, or as otherwise mutually agreed upon by the contractor
41 and the contracting unit prior to the contractor performing the
42 subject work.

43 (b) If the contracting unit determines that the contractor is not
44 entitled to additional compensation or time, the contractor shall
45 continue the performance of all contract work, and shall be entitled
46 to pursue a claim against the contracting unit for additional
47 compensation or time attributable to the alleged material change.

1 (4) As used in this subsection, “material change” means a
2 character change which increases or decreases the contractor’s cost
3 of performing the work, ¹【delays or shortens】 increases or
4 decreases¹ the amount of time by which the contractor completes
5 the work in relation to the contractually required completion date,
6 or both.

7 d. A contract subject to this section shall include the following
8 change in quantity provisions:

9 (1) The contracting unit may increase or decrease the quantity of
10 work to be performed by the contractor.

11 (2) (a) If the quantity of a pay item is cumulatively increased or
12 decreased by 20 percent or less from the bid proposal quantity, the
13 quantity change shall be considered a minor change in quantity.

14 (b) If the quantity of a pay item is increased or decreased by
15 more than 20 percent from the bid proposal quantity, the quantity
16 change shall be considered a major change in quantity.

17 (3) For any minor change in quantity, the contracting unit shall
18 make payment for the quantity of the pay item performed at the bid
19 price for the pay item.

20 (4) (a) For a major increase in quantity, the contracting unit or
21 contractor may request to renegotiate the price for the quantity in
22 excess of 120 percent of the bid proposal quantity. If a mutual
23 agreement cannot be reached on a negotiated price for a major
24 quantity increase, the contracting unit shall pay the actual costs plus
25 an additional 10 percent for overhead and an additional 10 percent
26 for profit ¹, unless otherwise specified in the original bid¹.

27 (b) For a major decrease in quantity, the contracting unit or
28 contractor may request to renegotiate the price for the quantity of
29 work performed. If a mutual agreement cannot be reached on a
30 negotiated price for a major quantity decrease, the contracting unit
31 shall pay the actual costs plus an additional 10 percent for overhead
32 and an additional 10 percent for profit ¹, unless otherwise specified
33 in the original bid¹; provided, however, that the contracting unit
34 shall not make a payment in an amount that exceeds 80 percent of
35 the value of the bid price multiplied by the bid proposal quantity.

36 (5) As used in this subsection, the term “bid proposal quantity”
37 means the quantity indicated in the bid proposal less the quantities
38 designated in the project plans as “if and where directed.”
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40 ¹2. The Commissioner of Community Affairs, not later than 90
41 days immediately following the effective date of P.L. , c. (C.)
42 (pending before the Legislature as this bill), shall promulgate rules
43 and regulations pursuant to the “Administrative Procedure Act,”
44 P.L.1968, c.410 (C.52:14B-1 et seq.) as may be necessary to
45 standardize the forms and procedures throughout the State for the
46 new changed conditions process.¹

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1 **1** **[2.] 3.**¹ This act shall take effect immediately.

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6 Establishes standardized changed conditions clauses for local
7 public construction contracts.