

[First Reprint]

**SENATE, No. 3409**

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**STATE OF NEW JERSEY**  
**217th LEGISLATURE**

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INTRODUCED JULY 1, 2017

**Sponsored by:**

**Senator ROBERT M. GORDON**

**District 38 (Bergen and Passaic)**

**Senator ANTHONY R. BUCCO**

**District 25 (Morris and Somerset)**

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**District 7 (Burlington)**

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**Assemblyman ERIC HOUGHTALING**

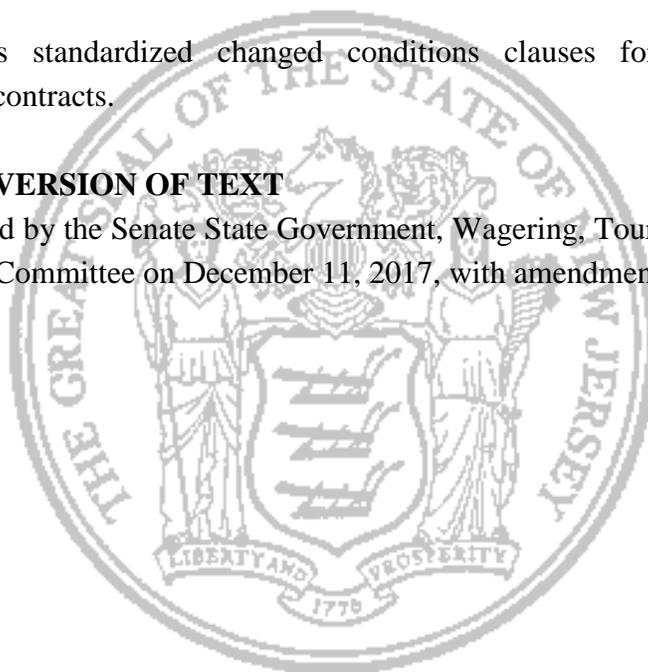
**District 11 (Monmouth)**

**SYNOPSIS**

Establishes standardized changed conditions clauses for local public construction contracts.

**CURRENT VERSION OF TEXT**

As reported by the Senate State Government, Wagering, Tourism & Historic Preservation Committee on December 11, 2017, with amendments.



**(Sponsorship Updated As Of: 1/9/2018)**

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 bids  
9 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) <sup>1</sup>**【If the contracting unit’s investigation and directions**  
34 **increase the contractor’s costs or time of performance, the】** The<sup>1</sup>  
35 contracting unit shall make a fair and equitable <sup>1</sup>**【upward】<sup>1</sup>**  
36 adjustment to the contract price and contract completion date <sup>1</sup>for  
37 increased costs and delays resulting from the agreed upon differing  
38 site conditions encountered by the contractor<sup>1</sup>.

39 (b) If both parties agree that the contracting unit’s investigation  
40 and directions decrease the contractor’s costs or time of  
41 performance, the contracting unit shall be entitled to a fair and  
42 equitable downward adjustment of the contract price or time of  
43 performance.

**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:**

<sup>1</sup>Senate SSG committee amendments adopted December 11, 2017.

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

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

12 (6) As used in this subsection, “differing site conditions” mean  
13 physical conditions at the contract work site that are subsurface or  
14 otherwise concealed and which differ materially from those  
15 indicated in the contract documents or are of such an unusual nature  
16 that the conditions differ materially from those ordinarily  
17 encountered and generally recognized as inherent in the work of the  
18 character provided for in the contract.

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

21 (1) The contracting unit shall provide written notice to the  
22 contractor in advance of any suspension of work lasting more than  
23 10 calendar days of the performance of all or any portion of the  
24 work of the contract.

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

42 (3) Upon receipt of the contractor’s suspension of work notice in  
43 accordance with paragraph (2) of this subsection, the contracting  
44 unit shall promptly evaluate the contractor’s notice and promptly  
45 advise the contractor of its determination on how to proceed in  
46 writing.

47 (4) (a) If the contracting unit determines that the contractor is  
48 entitled to additional compensation or time, the contracting unit

1 shall make a fair and equitable upward adjustment to the contract  
2 price and contract completion date.

3 (b) If the contracting unit determines that the contractor is not  
4 entitled to additional compensation or time, the contractor shall  
5 proceed with the performance of the contract work, and shall be  
6 entitled to pursue a suspension of work claim against the  
7 contracting unit for additional compensation or time attributable to  
8 the suspension.

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

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

17 (1) If the contractor believes that a change directive by the  
18 contracting unit results in a material change to the contract work,  
19 the contractor shall so notify the contracting unit in writing. The  
20 contractor shall continue to perform all work on the project that is  
21 not the subject of the notice.

22 (2) Upon receipt of the contractor's change in character notice in  
23 accordance with paragraph (1) of this subsection, the contracting  
24 unit shall promptly evaluate the contractor's notice and promptly  
25 advise the contractor of its determination on how to proceed in  
26 writing.

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

38 (b) If the contracting unit determines that the contractor is not  
39 entitled to additional compensation or time, the contractor shall  
40 continue the performance of all contract work, and shall be entitled  
41 to pursue a claim against the contracting unit for additional  
42 compensation or time attributable to the alleged material change.

43 (4) As used in this subsection, "material change" means a  
44 character change which increases or decreases the contractor's cost  
45 of performing the work, <sup>1</sup>~~【delays or shortens】~~ increases or  
46 decreases<sup>1</sup> the amount of time by which the contractor completes  
47 the work in relation to the contractually required completion date,  
48 or both.

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

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

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

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

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

14 (4) (a) For a major increase in quantity, the contracting unit or  
15 contractor may request to renegotiate the price for the quantity in  
16 excess of 120 percent of the bid proposal quantity. If a mutual  
17 agreement cannot be reached on a negotiated price for a major  
18 quantity increase, the contracting unit shall pay the actual costs plus  
19 an additional 10 percent for overhead and an additional 10 percent  
20 for profit <sup>1</sup>, unless otherwise specified in the original bid<sup>1</sup>.

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

30 (5) As used in this subsection, the term “bid proposal quantity”  
31 means the quantity indicated in the bid proposal less the quantities  
32 designated in the project plans as “if and where directed.”

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34 <sup>1</sup>2. The Commissioner of Community Affairs, not later than 90  
35 days immediately following the effective date of P.L. \_\_\_\_\_,  
36 c. (C. \_\_\_\_\_) (pending before the Legislature as this bill), shall  
37 promulgate rules and regulations pursuant to the “Administrative  
38 Procedure Act,” P.L.1968, c.410 (C.52:14B-1 et seq.) as may be  
39 necessary to standardize the forms and procedures throughout the  
40 State for the new changed conditions process.<sup>1</sup>

41

42 <sup>1</sup>[2.] 3.<sup>1</sup> This act shall take effect immediately.