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

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. All construction contracts issued by a contracting unit for bids which were advertised on or after the effective date of P.L. , c. (C. ) (pending before the Legislature as this bill) shall include the changed conditions contract provisions set forth in this section, which provisions shall be deemed to be a part of any such contract even if not expressly incorporated therein, and which provisions may not be modified in any manner by the contracting unit.
   a. A contract subject to this section shall include the following differing site conditions provisions:
      (1) If the contractor encounters differing site conditions during the progress of the work of the contract, the contractor shall promptly notify the contracting unit in writing of the specific differing site conditions encountered before the site is further disturbed and before any additional work is performed in the impacted area.
      (2) Upon receipt of a differing site conditions notice in accordance with paragraph (1) of this subsection, or upon the contracting unit otherwise learning of differing site conditions, the contracting unit shall promptly undertake an investigation to determine whether differing site conditions are present.
      (3) If the contracting unit determines different site conditions that may result in additional costs or delays exist, the contracting unit shall provide prompt written notice to the contractor containing directions on how to proceed.
      (4) (a) If the contracting unit’s investigation and directions increase the contractor’s costs or time of performance, the contracting unit shall make a fair and equitable upward adjustment to the contract price and contract completion date for increased costs and delays resulting from the agreed upon differing site conditions encountered by the contractor.
         (b) If both parties agree that the contracting unit’s investigation and directions decrease the contractor’s costs or time of performance, the contracting unit shall be entitled to a fair and equitable downward adjustment of the contract price or time of 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:
1Senate SSG committee amendments adopted December 11, 2017.
(c) If the contracting unit determines that there are no differing
site conditions present that would result in additional costs or
delays, the contracting unit shall so advise the contractor, in
writing, and the contractor shall resume performance of the
contract, and shall be entitled to pursue a differing site conditions
claim against the contracting unit for additional compensation or
time attributable to the alleged differing site conditions.

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

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

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

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

(2) If the performance of all or any portion of the work of the
contract is suspended by the contracting unit for more than 10
calendar days due to no fault of the contractor or as a consequence
of an occurrence beyond the contracting unit’s control, the
contractor shall be entitled to compensation for any resultant delay
to the project completion or additional contractor expenses, and to
an extension of time, provided that, to the extent feasible, the
contractor, within 10 calendar days following the conclusion of the
suspension, notifies the contracting unit, in writing, of the nature
and extent of the suspension of work. The notice shall include
available supporting information, which information may thereafter
be supplemented by the contractor as needed and as may be
reasonably requested by the contracting unit. Whenever a work
suspension exceeds 60 days, upon seven days’ written notice, [the
contractor] either party shall have the option to terminate the
contract for cause and to be fairly and equitably compensated
therefor.

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

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

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

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

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

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

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

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

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

(4) As used in this subsection, “material change” means a
character change which increases or decreases the contractor’s cost
of performing the work, delays or shortens the amount of time by which the contractor completes
the work in relation to the contractually required completion date,
or both.
d. A contract subject to this section shall include the following change in quantity provisions:

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

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

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

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

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

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

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

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

This act shall take effect immediately.