

CHAPTER 317

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:

C.40A:11-16.7 Changed conditions clauses for certain local public contracts.

1. All construction contracts issued by a contracting unit for bids which were advertised on or after the effective date of P.L.2017, c.317 (C.40A:11-16.7 et seq.) 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) The contracting unit shall make a fair and equitable 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.

(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, 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, increases or decreases 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.”

C.40A:11-16.8 Rules, regulations.

2. The Commissioner of Community Affairs, not later than 90 days immediately following the effective date of P.L.2017, c.317 (C.40A:11-16.7 et seq.), 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.

3. This act shall take effect immediately.

Approved January 16, 2018.