

# 40A:11-16.7 & 40A:11-16.8

## LEGISLATIVE HISTORY CHECKLIST

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**LAWS OF:** 2017          **CHAPTER:** 317

**NJSA:** 40A:11-16.7 & 40A:11-16.8 (Establishes standardized changed conditions clauses for local public construction contracts.)

**BILL NO:** S3409          (Substituted for A5071)

**SPONSOR(S)** Gordon and others

**DATE INTRODUCED:** 7/4/2017

**COMMITTEE:**          **ASSEMBLY:** ---

**SENATE:** State Government, Wagering, Tourism & Historic Preservation

**AMENDED DURING PASSAGE:** Yes

**DATE OF PASSAGE:**          **ASSEMBLY:** 1/8/2018

**SENATE:** 12/18/2017

**DATE OF APPROVAL:** 1/16/2018

### FOLLOWING ARE ATTACHED IF AVAILABLE:

**FINAL TEXT OF BILL** (First Reprint enacted) Yes

#### S3409

**SPONSOR'S STATEMENT:** (Begins on page 5 of introduced bill) Yes

**COMMITTEE STATEMENT:**          **ASSEMBLY:** No

**SENATE:** Yes

(Audio archived recordings of the committee meetings, corresponding to the date of the committee statement, *may possibly* be found at [www.njleg.state.nj.us](http://www.njleg.state.nj.us))

**FLOOR AMENDMENT STATEMENT:** No

**LEGISLATIVE FISCAL ESTIMATE:** No

#### A5071

**SPONSOR'S STATEMENT:** (Begins on page 5 of introduced bill) Yes

**COMMITTEE STATEMENT:**          **ASSEMBLY:** Yes

**SENATE:** No

(Audio archived recordings of the committee meetings, corresponding to the date of the committee statement, *may possibly* be found at [www.njleg.state.nj.us](http://www.njleg.state.nj.us))

**FLOOR AMENDMENT STATEMENT:** No

**LEGISLATIVE FISCAL ESTIMATE:** No

(continued)

**VETO MESSAGE:** No

**GOVERNOR'S PRESS RELEASE ON SIGNING:** No

**FOLLOWING WERE PRINTED:**

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**REPORTS:** No

**HEARINGS:** No

**NEWSPAPER ARTICLES:** No

RH/CL

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) <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>.

**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 (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, <sup>1</sup>【the  
44 contractor】 either party<sup>1</sup> 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, <sup>1</sup> **【delays or shortens】** increases or  
4 decreases<sup>1</sup> 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 <sup>1</sup>, unless otherwise specified in the original bid<sup>1</sup>.

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 <sup>1</sup>, unless otherwise specified  
33 in the original bid<sup>1</sup>; 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.”  
39

40 <sup>1</sup>2. 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.<sup>1</sup>

**S3409 [1R]**

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

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

**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)**

**SYNOPSIS**

Establishes standardized changed conditions clauses for local public construction contracts.

**CURRENT VERSION OF TEXT**

As introduced.





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. , c.  
10 (C. ) (pending before the Legislature as this bill) shall include  
11 the changed conditions contract provisions set forth in this section,  
12 which provisions shall be deemed to be a part of any such contract  
13 even if not expressly incorporated therein, and which provisions  
14 may not be modified in any manner by the contracting unit.

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

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

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

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

31 (4) (a) If the contracting unit's investigation and directions  
32 increase the contractor's costs or time of performance, the contracting  
33 unit shall make a fair and equitable upward adjustment to the contract  
34 price and contract completion date.

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

39 (c) If the contracting unit determines that there are no differing site  
40 conditions present that would result in additional costs or delays, the  
41 contracting unit shall so advise the contractor, in writing, and the  
42 contractor shall resume performance of the contract, and shall be  
43 entitled to pursue a differing site conditions claim against the  
44 contracting unit for additional compensation or time attributable to the  
45 alleged differing site conditions.

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

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

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

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

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

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

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

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

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

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

49 (1) If the contractor believes that a change directive by the  
50 contracting unit results in a material change to the contract work, the

1 contractor shall so notify the contracting unit in writing. The  
2 contractor shall continue to perform all work on the project that is not  
3 the subject of the notice.

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

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

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

23 (4) As used in this subsection, "material change" means a character  
24 change which increases or decreases the contractor's cost of  
25 performing the work, delays or shortens the amount of time by which  
26 the contractor completes the work in relation to the contractually  
27 required completion date, or both.

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

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

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

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

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

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

48 (b) For a major decrease in quantity, the contracting unit or  
49 contractor may request to renegotiate the price for the quantity of work  
50 performed. If a mutual agreement cannot be reached on a negotiated

1 price for a major quantity decrease, the contracting unit shall pay the  
2 actual costs plus an additional 10 percent for overhead and an  
3 additional 10 percent for profit; provided, however, that the  
4 contracting unit shall not make a payment in an amount that exceeds  
5 80 percent of the value of the bid price multiplied by the bid proposal  
6 quantity.

7 (5) As used in this subsection, the term "bid proposal quantity"  
8 means the quantity indicated in the bid proposal less the quantities  
9 designated in the project plans as "if and where directed."  
10

11 2. This act shall take effect immediately.  
12  
13

14 STATEMENT  
15

16 This bill would establish standardized changed condition clauses  
17 for construction contracts awarded under the "Local Public  
18 Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.). The bill  
19 requires that these clauses be included in local public construction  
20 contracts, and provides that they apply even if they are not  
21 expressly included in such a contract. The specific clauses required  
22 by the bill cover differing site conditions, suspensions of contract  
23 work, changes in the character of the contract work, and changes in  
24 the amount of work to be performed by a contractor. This bill  
25 would establish a standard process for the handling of changed  
26 conditions on local public construction projects.

27 Under the bill, a contractor that encounters differing site  
28 conditions in the performance of a contract would be required to  
29 promptly notify the contracting unit of the conditions. The bill  
30 defines differing site conditions as conditions at a contract work site  
31 that are subsurface or otherwise concealed, and that either differ  
32 materially from those indicated in the contract documents or are of  
33 such an unusual nature that they differ materially from those  
34 ordinarily encountered and generally recognized as inherent in the  
35 work of the character provided for in the contract. After receipt of  
36 a differing conditions notice, the contracting unit would have to  
37 promptly investigate the conditions and issue directions on how to  
38 proceed. Based on those directions, the contract price and  
39 completion date may be adjusted. If the contracting unit disagrees  
40 that differing site conditions exist, the contractor would have to  
41 continue to perform the contract, but would have the right to pursue  
42 a claim for additional compensation or time.

43 With respect to suspensions of contract work of more than 10  
44 days and material changes in the character of the contract work, the  
45 bill's provisions are similar to those for differing site conditions.  
46 More specifically, under these clauses, the contractor must first  
47 notify the contracting unit of the issue, the contracting unit must  
48 then evaluate and respond, a possible adjustment of the contract

**S3409 GORDON**

6

1 price or timeframe may then be made, and if the contracting unit  
2 determines that the contractor is not entitled to additional  
3 compensation or time, the contractor may pursue a claim.

4 The bill's change in quantity provisions authorize the contracting  
5 unit to increase or decrease the quantity of work to be performed by  
6 the contractor and provide how the contract price is to be adjusted  
7 depending on whether the quantity change qualifies as a major or  
8 minor. For a minor quantity change, the contracting unit is required  
9 to make payment for the quantity of the pay item performed at the  
10 bid price for the pay item. For a major quantity change, the  
11 contracting unit and contractor may renegotiate the price, but if  
12 agreement is not reached the bill provides that payment be made  
13 for actual costs plus an additional 10 percent for overhead and an  
14 additional 10 percent for profit.

15 The bill would apply to local public construction contracts for  
16 which the bids are first advertised after the effective date.

SENATE STATE GOVERNMENT, WAGERING, TOURISM &  
HISTORIC PRESERVATION COMMITTEE

STATEMENT TO

**SENATE, No. 3409**

with committee amendments

**STATE OF NEW JERSEY**

DATED: DECEMBER 11, 2017

The Senate State Government, Wagering, Tourism and Historic Preservation Committee reports favorably and with committee amendments Senate Bill No. 3409.

This bill would establish standardized changed condition clauses for construction contracts awarded under the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.). The bill requires that these clauses be included in local public construction contracts, and provides that they apply even if they are not expressly included in such a contract. The specific clauses required by the bill cover differing site conditions, suspensions of contract work, changes in the character of the contract work, and changes in the amount of work to be performed by a contractor. This bill would establish a standard process for the handling of changed conditions on local public construction projects.

Under the bill, a contractor that encounters differing site conditions in the performance of a contract would be required to promptly notify the contracting unit of the conditions. The bill defines differing site conditions as conditions at a contract work site that are subsurface or otherwise concealed, and that either differ materially from those indicated in the contract documents or are of such an unusual nature that they differ materially from those ordinarily encountered and generally recognized as inherent in the work of the character provided for in the contract. After receipt of a differing conditions notice, the contracting unit would have to promptly investigate the conditions and issue directions on how to proceed. Based on those directions, the contract price and completion date may be adjusted. If the contracting unit refutes that differing site conditions exist, the contractor would have to continue to perform the contract, but would have the right to pursue a claim for additional compensation or time. As amended, the bill requires the contracting unit to make a fair and equitable adjustment to the contact price and contract completion date for increased costs and delays resulting from the agreed upon differing site conditions encountered by the contractor.

With respect to suspensions of contract work of more than 10 days and material changes in the character of the contract work, the bill's provisions are similar to those for differing site conditions. Specifically, under these clauses, the contractor must first notify the contracting unit of the issue, and then the contracting unit must evaluate the issue and respond. A possible adjustment of the contract price or timeframe may then be made, and if the contracting unit determines that the contractor is not entitled to additional compensation or time, the contractor may pursue a claim. The amended bill defines "material change" as 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.

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 receive fair and equitable compensation.

The bill's change in quantity provisions authorize the contracting unit to increase or decrease the quantity of work to be performed by the contractor and provide how the contract price is to be adjusted depending on whether the quantity change qualifies as a major or minor quantity change. For a minor quantity change, the contracting unit is required to make payment for the quantity of the pay item performed at the bid price for the pay item. For a major quantity change, the contracting unit and contractor may renegotiate the price, but if the parties do not reach an agreement, the bill, as amended, provides that payment be made for actual costs of the change plus an additional 10 percent for overhead and an additional 10 percent for profit, unless otherwise specified in the original bid.

The bill would apply to local public construction contracts for which the bids are first advertised after the effective date.

#### COMMITTEE AMENDMENTS

The committee amended the bill to:

- require a contracting unit to 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;
- revise the definition of "material change" in the bill to include "increases or decreases" in the amount of time by which a contractor completes work in relation to the contractually required completion date;
- provide either party the option, upon seven days' notice, to terminate the contract for cause and to be fairly and equitably compensated whenever a work suspension exceeds 60 days;

- provide that if a mutual agreement cannot be reached on a negotiated price for a major quantity increase or decrease, the contracting unit must pay the actual costs of the quantity change, plus an additional 10 percent for overhead and an additional 10 percent for profit, unless otherwise specified in the original bid; and
- require that the Commissioner of Community Affairs promulgate rules and regulations as may be necessary to standardize the forms and procedures throughout the State for the new changed conditions process established in the bill.



# ASSEMBLY, No. 5071

## STATE OF NEW JERSEY 217th LEGISLATURE

INTRODUCED JUNE 29, 2017

**Sponsored by:**

**Assemblywoman VALERIE VAINIERI HUTTLE**  
**District 37 (Bergen)**

**SYNOPSIS**

Establishes standardized changed conditions clauses for local public construction contracts.

**CURRENT VERSION OF TEXT**

As introduced.



A5071 VAINIERI HUTTLE

2

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. , c.  
10 (C. ) (pending before the Legislature as this bill) shall include  
11 the changed conditions contract provisions set forth in this section,  
12 which provisions shall be deemed to be a part of any such contract  
13 even if not expressly incorporated therein, and which provisions  
14 may not be modified in any manner by the contracting unit.

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

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

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

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

31 (4) (a) If the contracting unit's investigation and directions increase  
32 the contractor's costs or time of performance, the contracting unit shall  
33 make a fair and equitable upward adjustment to the contract price and  
34 contract completion date.

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

39 (c) If the contracting unit determines that there are no differing site  
40 conditions present that would result in additional costs or delays, the  
41 contracting unit shall so advise the contractor, in writing, and the  
42 contractor shall resume performance of the contract, and shall be  
43 entitled to pursue a differing site conditions claim against the  
44 contracting unit for additional compensation or time attributable to the  
45 alleged differing site conditions.

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

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

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

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

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

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

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

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

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

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

49 (1) If the contractor believes that a change directive by the  
50 contracting unit results in a material change to the contract work, the

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1 contractor shall so notify the contracting unit in writing. The  
2 contractor shall continue to perform all work on the project that is not  
3 the subject of the notice.

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

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

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

23 (4) As used in this subsection, "material change" means a character  
24 change which increases or decreases the contractor's cost of  
25 performing the work, delays or shortens the amount of time by which  
26 the contractor completes the work in relation to the contractually  
27 required completion date, or both.

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

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

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

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

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

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

48 (b) For a major decrease in quantity, the contracting unit or  
49 contractor may request to renegotiate the price for the quantity of work  
50 performed. If a mutual agreement cannot be reached on a negotiated

1 price for a major quantity decrease, the contracting unit shall pay the  
2 actual costs plus an additional 10 percent for overhead and an  
3 additional 10 percent for profit; provided, however, that the  
4 contracting unit shall not make a payment in an amount that exceeds  
5 80 percent of the value of the bid price multiplied by the bid proposal  
6 quantity.

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

10

11 2. This act shall take effect immediately.

12

13

14

#### STATEMENT

15

16 This bill would establish standardized changed condition clauses  
17 for construction contracts awarded under the "Local Public  
18 Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.). The bill  
19 requires that these clauses be included in local public construction  
20 contracts, and provides that they apply even if they are not  
21 expressly included in such a contract. The specific clauses required  
22 by the bill cover differing site conditions, suspensions of contract  
23 work, changes in the character of the contract work, and changes in  
24 the amount of work to be performed by a contractor. This bill  
25 would establish a standard process for the handling of changed  
26 conditions on local public construction projects.

27 Under the bill, a contractor that encounters differing site  
28 conditions in the performance of a contract would be required to  
29 promptly notify the contracting unit of the conditions. The bill  
30 defines differing site conditions as conditions at a contract work site  
31 that are subsurface or otherwise concealed, and that either differ  
32 materially from those indicated in the contract documents or are of  
33 such an unusual nature that they differ materially from those  
34 ordinarily encountered and generally recognized as inherent in the  
35 work of the character provided for in the contract. After receipt of  
36 a differing conditions notice, the contracting unit would have to  
37 promptly investigate the conditions and issue directions on how to  
38 proceed. Based on those directions, the contract price and  
39 completion date may be adjusted. If the contracting unit disagrees  
40 that differing site conditions exist, the contractor would have to  
41 continue to perform the contract, but would have the right to pursue  
42 a claim for additional compensation or time.

43 With respect to suspensions of contract work of more than 10  
44 days and material changes in the character of the contract work, the  
45 bill's provisions are similar to those for differing site conditions.  
46 More specifically, under these clauses, the contractor must first  
47 notify the contracting unit of the issue, the contracting unit must  
48 then evaluate and respond, a possible adjustment of the contract

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1 price or timeframe may then be made, and if the contracting unit  
2 determines that the contractor is not entitled to additional  
3 compensation or time, the contractor may pursue a claim.

4 The bill's change in quantity provisions authorize the contracting  
5 unit to increase or decrease the quantity of work to be performed by  
6 the contractor and provide how the contract price is to be adjusted  
7 depending on whether the quantity change qualifies as a major or  
8 minor. For a minor quantity change, the contracting unit is required  
9 to make payment for the quantity of the pay item performed at the  
10 bid price for the pay item. For a major quantity change, the  
11 contracting unit and contractor may renegotiate the price, but if  
12 agreement is not reached the bill provides that payment be made  
13 for actual costs plus an additional 10 percent for overhead and an  
14 additional 10 percent for profit.

15 The bill would apply to local public construction contracts for  
16 which the bids are first advertised after the effective date.

ASSEMBLY STATE AND LOCAL GOVERNMENT  
COMMITTEE

STATEMENT TO

**ASSEMBLY, No. 5071**

with committee amendments

**STATE OF NEW JERSEY**

DATED: DECEMBER 4, 2017

The Assembly State and Local Government Committee reports favorably and with committee amendments Assembly Bill No. 5071.

As amended by the committee, this bill would establish standardized changed condition clauses for construction contracts awarded under the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.). The amended bill requires that these clauses be included in local public construction contracts, and provides that they apply even if they are not expressly included in such a contract. The specific clauses required by the amended bill cover differing site conditions, suspensions of contract work, changes in the character of the contract work, and changes in the amount of work to be performed by a contractor. The amended bill would establish a standard process for the handling of changed conditions on local public construction projects.

Under the amended bill, a contractor that encounters differing site conditions in the performance of a contract would be required to promptly notify the contracting unit of the conditions. The amended bill defines differing site conditions as conditions at a contract work site that are subsurface or otherwise concealed, and that either differ materially from those indicated in the contract documents or are of such an unusual nature that they differ materially from those ordinarily encountered and generally recognized as inherent in the work of the character provided for in the contract. After receipt of a differing conditions notice, the contracting unit would have to promptly investigate the conditions and issue directions on how to proceed. Based on those directions, the contract price and completion date may be adjusted. If the contracting unit disagrees that differing site conditions exist, the contractor would have to continue to perform the contract, but would have the right to pursue a claim for additional compensation or time. The amended bill requires the contracting unit to make a fair and equitable adjustment to the contact price and contract completion date for increased costs and delays resulting from the agreed upon differing site conditions encountered by the contractor.

With respect to suspensions of contract work of more than 10 days and material changes in the character of the contract work, the bill's provisions are similar to those for differing site conditions. More specifically, under these clauses, the contractor must first notify the contracting unit of the issue, the contracting unit must then evaluate and respond, a possible adjustment of the contract price or timeframe may then be made, and if the contracting unit determines that the contractor is not entitled to additional compensation or time, the contractor may pursue a claim. The amended bill defines "material change" as "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".

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.

The amended bill's change in quantity provisions authorize the contracting unit to increase or decrease the quantity of work to be performed by the contractor and provide how the contract price is to be adjusted depending on whether the quantity change qualifies as major or minor. For a minor quantity change, the contracting unit is required to make payment for the quantity of the pay item performed at the bid price for the pay item. For a major quantity change, the contracting unit and contractor may renegotiate the price, but if agreement is not reached the amended bill provides that payment be made for actual costs plus an additional 10 percent for overhead and an additional 10 percent for profit, unless otherwise specified in the original bid.

The amended bill would apply to local public construction contracts for which the bids are first advertised after the effective date.

#### COMMITTEE AMENDMENTS

The committee amended the bill to:

- require a contracting unit to 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
- revises the definition of "material change" in the bill to include "increases or decreases" in the amount of time by which a contractor completes work in relation to the contractually required completion date;
- require that 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.



- provide that if a mutual agreement cannot be reached on a negotiated price for a major quantity increase or decrease, the contracting unit must 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; and
- require that the Commissioner of Community Affairs promulgate rules and regulations as may be necessary to standardize the forms and procedures throughout the State for the new changed conditions process established in the bill.