

## 5:30-11

### LOCAL FINANCE BOARD -CHANGE ORDERS AND OPEN-END CONTRACTS

#### 5:30-11.1 Application, compliance and penalties

- (a) Unless specifically stated to the contrary, the rules in this subchapter apply to all local government agencies that are encompassed by the definition of contracting unit in N.J.S.A. 40A:11-2(1) by whatever name called, and referred to in this subchapter as contracting units.
- (b) Every governing body and chief executive officer shall take all steps necessary so that all officials and employees shall be aware of and comply with the requirements of these rules.

#### 5:30-11.2 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

*"Change order"* means a properly prepared document authorized by the governing body which directs and authorizes a vendor providing goods or performing services to a contracting unit pursuant to a contract awarded by governing body resolution to change the quantity or character of goods provided or services performed from that originally specified or estimated and to correspondingly change the payment due therefore.

*"Chief executive officer"* means the elected or appointed individual with the highest level of administrative authority of the contracting unit. In the case of a municipality, this may refer to the mayor as appropriate to the form of government; in the case of a county, the director of a board of chosen freeholders, county executive, or county manager as appropriate to the form of government; in the case of an authority, the chair of the authority; and, in the case of a fire district, the president or other presiding officer of the board of fire commissioners.

*"Open-end contracts"* means those contracts for which price bids were solicited on a unit basis because exact quantities needed were not known at the time bids were sought. Such contracts, when advertised and awarded, must include a minimum and a maximum number of units that can be ordered for each item under the contract. Zero is an acceptable minimum. Orders placed under such open-end contracts shall not be considered as change orders for purposes of this section, but shall be subject to the requirements specified in N.J.A.C. 5:30-11.10. Examples include, but are not limited to, blacktopping and office supplies such as stationery.

**5:30-11.3 General requirements for all change orders**

- (a) No changes in quantities, work performed, services rendered, materials, supplies or equipment delivered or provided shall be authorized, permitted or accepted except by the procedures established herein. All change orders unless otherwise stated in this subchapter shall be subject to the following:
1. Each change order shall be in writing and shall be numbered consecutively (beginning with number one) and attached to the original purchase order or contract for each project.
  2. Change orders which result in payment reduction below the originally contracted price may be made by locally established procedure, provided that any change orders increasing cost on the same contract shall include reference to such reductions.
  3. Quantities of items or work shall not be changed in such a manner as to nullify the effect of the competitive determination of lowest responsible bidder which was made at the time of contract award, if at said time the changes could have been reasonably foreseen.
  4. Responsibility required by these rules to be exercised specifically by the governing body, including authorization of change orders, shall not be delegated except for minor field (site) modifications pursuant to N.J.A.C. 5:30-11.4.
  5. Change orders may be executed by the representative appointed by the governing body but the responsibility for the authorization of change orders shall not be delegated by the governing body except for minor field (site) modifications pursuant to N.J.A.C. 5:30-11.4.
  6. Change orders shall be used to change the number of units or items originally advertised and contracted for, provided that:
    - i. Unit prices or a price methodology were sought in the original specifications and included in the contract;
    - ii. The original specification and the contract included a provision that the unit prices could be so used; and
    - iii. If (a)6i and ii above were not contained in the original specification, a change order shall not be issued.
  7. Change orders shall not be used to substantially change the quality or character of the items or work to be provided, inasmuch as such would have been a determining factor in the original bidding.
  8. Change orders shall not serve the purpose of escalation clauses and, therefore, shall not be utilized to effectuate upward price adjustments.
  9. Total number of change orders executed for a particular contract shall not cause the originally awarded contract price to be exceeded by more than 20 percent unless otherwise authorized by these rules.

10. If proposed change orders do exceed the 20 percent limitation of (a)9 above, no work shall be performed or purchases made until the procedures of N.J.A.C. 5:30-11.9 have been completed. If the governing body determines issuance of the change order is not justifiable, a new contract shall be executed in accordance with the Local Public Contracts Law.
11. Before authorizing any change orders resulting in additional expenditures, the availability of funds shall be certified in writing by the chief financial officer or certifying finance officer, as appropriate.
12. The 20 percent limitation of (a)9 above shall not apply to emergency situations as defined within N.J.S.A. 40A:11-6.
13. Change order authorizations shall not be withheld until the completion of the entire project.

#### **5:30-11.4 Procedures for minor field (site) modifications**

The governing body shall be required to authorize all change orders, except that minor field (site) modifications (for example, additional fill stone needed, modifications of footings, additional rock blasting) may be authorized, provided that they do not affect the overall scope of work of the contract, by the designated representative of the governing body. These change orders shall result only in minor price increases to the originally awarded contract price.

#### **5:30-11.5 General procedures for change orders**

- (a) The governing body approval process for change orders shall be as follows:
1. The chief executive officer of the contracting unit or his or her designee shall file with the governing body a request for the change order, stating the facts involved and indicating that the proposed change order may be allowed under these rules. If the request and justification are prepared by other than an official of the contracting unit, they must be countersigned by the chief executive officer or his or her designee.
  2. The governing body shall take such steps as it may find appropriate to assure that a change is necessary and that the work will be completed.
  3. The governing body shall then pass a resolution authorizing a written amendment to a contract covering the change(s) to be made. The exact form of this amendatory contract shall be at the discretion of the contracting unit attorney.
  4. The resolution described in (a)3 above shall be passed before execution of the change order. No work shall be performed or purchases made on the involved phase of the contract until the resolution is passed.

**5:30-11.6 Change orders for professional services and extraordinary unspecifiable services**

- (a) This section shall apply only to change orders for professional and extraordinary, unspecifiable services contracts.
- (b) In case of conflict with the general requirements of N.J.A.C. 5:30- 11.3, the specific language of this section shall prevail but, otherwise, the requirements of N.J.A.C. 5:30-11.3 shall be satisfied.
- (c) Changes should be within the scope of activities of the original contract, and not for the purpose of undertaking new or different work or projects. Changes in payments for activities within the scope of activities of the contract shall be in accordance with a schedule of specific charges or rates contained in the contract and shall be effectuated by a written change order authorized by the governing body. If such a schedule is not included in the contract, the contract should be amended to provide for same.
- (d) The 20 percent limitation of N.J.A.C. 5:30-11.3(a)9 shall not apply to professional and consultant contracts.
- (e) If the change is not within the scope of activities of the original contract and the contract was awarded without competitive bidding being required by law or rule, as is the case for professional services and certain authorized extraordinary unspecifiable services in accordance with N.J.S.A. 40A:11-5(1)(a)(i), any change beyond the original scope of activities shall be made by amendatory contract approved by the governing body.

**5:30-11.7 Change orders for materials, supplies and equipment which are part of construction contract**

- (a) The requirements of this section shall apply only to change orders for materials, supplies and equipment which are part of construction contracts.
- (b) In case of conflict with the general requirements of N.J.A.C. 5:30- 11.3, the specific language of this section shall prevail but, otherwise, the requirements of N.J.A.C. 5:30-11.3 shall be satisfied.
- (c) Change orders for materials, supplies and equipment items which are part of a contract which is primarily a construction contract shall be processed in accordance with the rules governing construction contracts. Contracts awarded on a unit price basis (including, but not limited to, asphalt overlays, curbing) as an open-end contract shall be handled under the section dealing with open-end contracts. However, contracts awarded for the paving, construction or reconstruction of specifically described streets, parking lots, or sections shall be treated as construction contracts.

**5:30-11.8 Change orders for construction, reconstruction and major repair contracts**

- (a) The requirements of this section shall apply only to the particular type of contract in question.
- (b) In case of conflict with the general requirements of N.J.A.C. 5:30- 11.3, the specific language of this section shall prevail but, otherwise, the requirements of N.J.A.C. 5:30- 11.3 shall be satisfied.
- (c) Change orders for construction, reconstruction and major repair contracts shall be limited to the following types:
  - 1. Unforeseeable problems, which are defined as conditions or circumstances that could not be foreseen at the time the specifications were written and the contract awarded; provided that a substantial amount of the construction would be delayed, which would result in substantial increases in costs above the original contract amount or substantial inconvenience to the public if bidding were to be required; and
  - 2. Minor modifications to effect economies, improve service or resolve minor problems with affected property owners.
- (d) Change orders for construction, reconstruction and major repair contracts shall not be made for the following:
  - 1. Changes that materially expand upon the size, nature or scope of the project as it was originally described in the bid specifications; or
  - 2. Extra work that could reasonably be effectuated by a separately bid contract without unduly disrupting the basic work or imposing adverse cost consequences.

**5:30-11.9 Procedures for change orders which exceed 20 percent limitation**

- (a) General provisions regarding the procedures for change orders which exceed the 20 percent limitation are as follows:
  - 1. The procedures in this section shall only be followed when a particular change order on any type of contract, except professional and extraordinary unspecifiable service contracts, will cause the total amount of change orders executed for the particular contract to exceed the originally awarded contract price by more than 20 percent. The purpose of the procedures is to allow for such a change only in limited instances. Such a change shall not be permitted when the factual circumstances make it reasonably possible to execute a new contract for the additional work. Such a change may be allowed, for example, when an unforeseen circumstance or differing site condition is combined with a

situation which renders execution of a new contract an unreasonable interference with the efficient completion of the work.

2. Generally such change orders are not justifiable and the ready issuance of them by contracting units would constitute an abuse of these rules.
- (b) A written certification justifying the performance of the work or the furnishing of the services which would necessitate issuance of such a change order shall be filed by the contractor with the chief executive officer or designee. This certification shall include an explanation of the factual circumstances which necessitate issuance of the change order; a statement indicating why these circumstances could not have been foreseen; a statement indicating why issuance of the change order would be in the best interests of the contracting unit and would not constitute an abuse of these rules; and, if the nature of the change order is technical, the certification shall include a certified statement from the contractor's appropriate expert, such as an engineer or architect. This statement shall explain in detail the factual circumstances which necessitate issuance of the proposed change order. A rewrite or paraphrase of the rules in this subchapter is not acceptable.
- (c) The governing body approval process for change orders which exceed the 20 percent limitation is as follows:
1. The chief executive officer or his or her designee shall file a request for the change order with the governing body. This request shall include a statement indicating why the proposed change may be allowed under this subchapter. A copy of the certification required under (b) above must also be attached to the request.
  2. If the certification required pursuant to (b) above includes a certified statement from an engineer or other expert as required by (b) above, the request to the governing body shall also include a statement from the contracting unit's engineer or an official or employee with the appropriate expertise. This statement shall explain in detail the factual circumstances which justify issuance of the proposed change order. A rewrite or paraphrase of the rules in this subchapter is not acceptable.
  3. The governing body shall take appropriate steps to assure that the change order is proper and allowable under this subchapter.
  4. The governing body shall then pass a resolution authorizing a written amendatory contract to be entered into covering the change(s) to be made. The exact form of this amendatory contract shall be at the discretion of the contracting unit attorney.
  5. The resolution described in (c)4 above shall be passed before execution of the change order.
  6. The governing body shall cause to be printed once, in an official newspaper, a brief notice indicating the additional amount to be expended, the original contract price, the nature of the original and additional work and why it is necessary to expend the additional funds. A copy of the advertisement shall also

be filed with the clerk or secretary of the governing body and be available for inspection by the public.

- (d) The clerk or secretary of the governing body of each contracting unit shall report to the Director on an appendix to the contracting unit's annual budget all change orders from the previous fiscal year which exceeded the 20 percent limitation. This report shall be made on a form provided by the Director. A summary of the report shall be included as supplemental material in the annual audit of the contracting unit.

### **5:30-11.10 Open-end contracts**

- (a) The issuance of purchase orders pursuant to an open-end contract shall be considered to be the carrying out of the contract and not a change order. The following requirements shall apply:
1. Purchase orders under open-end contracts shall not be used for purposes such as changing the quality or character of items to be provided, nor to exceed the maximum number(s) of items or units provided for in the original specifications and contract. Such changes would constitute a change order.
  2. Each time a purchase order is placed, the contracting agent shall ensure that funds are available for the purchase through either an encumbrance or certification of availability of funds.
  3. Purchase orders shall be placed by the contracting agent, subject to such controls or approval requirements as the governing body, chief executive or other administrative officer may lawfully impose.