

CHAPTER 45

CONSTRUCTION CONTROL

Authority

N.J.S.A. 27:1A-5, 27:1A-6 and 27:2-1 through 27:2-8.

Source and Effective Date

R.1999 d.246, effective July 9, 1999.
See: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).

Chapter Expiration Date

In accordance with N.J.S.A. 52:14B-5.1c, Chapter 45, Construction Control, expires on January 5, 2005. See: 34 N.J.R. 2537(a).

Chapter Historical Note

Chapter 45, Construction Control, was adopted as R.1989 d.505, effective September 18, 1989. See: 21 N.J.R. 1972(c), 21 N.J.R. 3020(b).

Pursuant to Executive Order No. 66(1978), Chapter 45, Construction Control, was readopted as R.1994 d.454, effective August 12, 1994, and Subchapter 1, General Provisions, and Subchapter 4, Claims Review Board, were adopted as new rules and Subchapter 1, Claims Committee, and Subchapter 2, Substantial Competition, were recodified Subchapters 2 and 3 by R.1994 d.454, effective September 6, 1994. See: 26 N.J.R. 2547(b), 26 N.J.R. 3740(c).

Pursuant to Executive Order No. 66(1978), Chapter 45, Construction Control, was readopted as R.1999 d.246, effective July 9, 1999, and Subchapter 3, Substantial Completion, was recodified as Subchapter 5 by R.1999 d.246, effective August 2, 1999. See: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).

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SUBCHAPTER 1. GENERAL PROVISIONS

16:45-1.1 Scope and purpose

The rules of this chapter establish the Department's Claims Committee process and the Department's Claims Review Board and the procedures to be followed by each of these bodies. These two claims review forums are part of the contractual claims review process which is available to contractors whose claims meet the requirements for review contained in contracts administered either by Capital Program Management or Operations. Participation by a contractor in this claims review process is voluntary. These forums have been established for the purpose of reviewing the merits of claims and facilitating the resolution of contract disputes. This chapter also defines the term "substantial completion" as required by the Legislature pursuant to N.J.S.A. 27:7-34.

Amended by R.1999 d.246, effective August 2, 1999.
See: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).
Rewrote the section.

16:45-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

"Specifications" means the compilation of provisions and requirements of the standard specifications, supplemental specifications, special provisions, addenda and other contract modifications comprising the contract under which a claim by a contractor arises.

Amended by R.1999 d.246, effective August 2, 1999.
See: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).

Rewrote "Specifications"; and deleted "Standard specifications" and "Supplementary specifications".

SUBCHAPTER 2. CLAIMS COMMITTEE

16:45-2.1 Establishment of Claims Committee

(a) The Commissioner of Transportation hereby establishes the Claims Committee for the purpose of reviewing and resolving claims arising from construction contracts administered by Capital Program Management or Operations. Claims are eligible for review by the Claims Committee subject to the specifications applicable to a particular contract. The presentation of a claim to the Claims Committee shall in no way alter or affect other rights of a contractor, including the right, pursuant to the Contractual Liability Act, N.J.S.A. 59:13-1 et seq., to seek redress in the courts. Said presentation to the Claims Committee shall in no way alter or affect the applicable statute of limitations. A contractor's request to have a claim reviewed by the

Claims Committee is considered to be a form of alternate dispute resolution (ADR) and a settlement procedure available to the contractor; a Claims Committee decision, when conveyed to the contractor, constitutes a settlement offer.

(b) As to claims arising under contracts administered by Capital Program Management, the Claims Committee shall be comprised of three voting members. The Chairperson shall be the individual holding the position of Director of the Division of Design Services who shall assemble a separate committee for each claim or group of claims arising under a single contract. The Chairperson, within his or her sole discretion, shall appoint two additional voting members who shall hold one of the following three positions with the Department of Transportation:

1. Director, Accounting and Auditing;
2. Director, Division of Construction Services and Materials; or
3. Director, Division of Project Management.

(c) In addition to the three voting members under (b) above, the Claims Committee shall have a Secretary who shall be a Department of Transportation employee. The Secretary may participate in deliberations but shall not have a vote as to recommendations. The Claims Committee shall also have a Deputy Attorney General assigned by the Division of Law who shall act as the legal advisor to the Committee but who shall not have the right to vote.

(d) As to claims arising under contracts administered by the Division of Operations, the Claims Committee shall be comprised of three voting members. The Chairperson shall be the individual holding the position of executive Director of Regional Operations selected by the Assistant Commissioner for Operations. The Chairperson shall assemble a separate committee for each claim or group of claims arising under a single contract and, within his or her sole discretion, shall appoint two additional voting members who shall hold one of the following four positions within the Department of Transportation:

1. Director, Accounting and Auditing;
2. Director, Division of Construction Services and materials;
3. Director, Division of Project Management; or
4. Director, Division of Design Services.

(e) In addition to the three voting members under (d) above, the Claims Committee shall have a Secretary who shall be a Department of Transportation employee. The Secretary may participate in deliberations but shall not have a vote as to recommendations. The Claims Committee shall also have a Deputy Attorney General assigned by the Division of Law who shall act as the legal advisor to the Committee but who shall not have the right to vote.

Amended by R.1994 d.454, effective September 6, 1994.
See: 26 N.J.R. 2547(b), 26 N.J.R. 3740(c).
Amended by R.1999 d.246, effective August 2, 1999.
See: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).
Rewrote the section.

Case Notes

Department failed to deal expressly and clearly with effect of administrative review of disputed claims on statute of limitations, and thus could not insist on limitations defense. *W.V. Pangborne & Co., Inc. v. New Jersey Dept. of Transp.*, 116 N.J. 543, 562 A.2d 222 (1989).

Contract was completed when project was accepted and conditional final payment was made, rather than at expiration of one-year surety agreement. *W.V. Pangborne & Co., Inc. v. New Jersey Dept. of Transp.*, 226 N.J.Super. 367, 544 A.2d 423 (A.D.1988) certification granted 114 N.J. 301, 554 A.2d 854, reversed 116 N.J. 543, 562 A.2d 222.

16:45-2.2 Claims Committee procedures

(a) The Claims Committee shall review only contractual transportation construction claims brought by a contractor who is in direct privity with the State under a contract awarded by the Department of Transportation. A contractor's request for review of a claim by the Claims Committee shall be in writing addressed to the Secretary of the Claims Committee. Upon determination by the Chairperson that the request for Claims Committee review complies with the requirements for review contained in the Specifications (typically Sections 104, 107 and 109 of the Specifications) applicable to the particular contract under which the claim is being asserted, the Claims Committee shall be assembled to review the claim. The Secretary, as directed by the Chairperson, shall schedule a meeting with notice to the contractor. The procedures to be followed by a Claims Committee in reviewing a claim shall be in accord with the procedures set forth in the Specifications for claims review (typically Sections 107 and 109 of the Specifications) applicable to that particular contract. Any claim presented to the Claims Committee shall be in accord with the Specifications for the contract under which the claim is being asserted.

(b) The procedures set forth in this section establish a method of reviewing contractual disputes and in no way constitute a waiver by the State of New Jersey of its sovereign immunity from suit.

Amended by R.1994 d.454, effective September 6, 1994.
See: 26 N.J.R. 2547(b), 26 N.J.R. 3740(c).
Amended by R.1999 d.246, effective August 2, 1999.
See: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).
Rewrote the section.

16:45-2.3 Disposition

The Commissioner or the Commissioner's designee shall make a determination as to the Claims Committee's recommendation prior to any decision being rendered to a contractor with regard to any claim brought before the Claims Committee. Thereafter, the Secretary of the Claims Committee shall provide a written decision together with supporting reasons to the contractor that presented the claim.

Amended by R.1994 d.454, effective September 6, 1994.
 See: 26 N.J.R. 2547(b), 26 N.J.R. 3740(c).
 Amended by R.1999 d.246, effective August 2, 1999.
 See: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).
 Rewrote the section.

SUBCHAPTER 3. (RESERVED)

SUBCHAPTER 4. CLAIMS REVIEW BOARD

16:45-4.1 Claims Review Board

(a) The Claims Review Board is hereby established for the purpose of reviewing and resolving claims arising from construction contracts administered by either Capital Program Management or Operations. Its function is supplemental to the Claims Committee review process. It is available only for specific contracts in which the Specifications provide for the review of claims by the Claims Review Board. The presentation of a claim to the Claims Review Board is voluntary and shall in no way alter or affect other rights of the contractor, including the right pursuant to the Contractual Liability Act, N.J.S.A. 59:13-1 et seq. to seek redress in the courts. Said presentation to the Claims Review Board shall in no way alter or affect the applicable statute of limitations. The Claims Review Board shall review only contractual transportation construction claims brought by a contractor that is in direct privity with the State under a contract awarded by the Department of Transportation. All claims presented must be in accord with the Specifications applicable to the contract under which the claim arises. The Claims Review Board shall be considered to be a form of ADR and a settlement procedure available to the contractor.

(b) The Claims Review Board shall be comprised of three members, one being the person holding the position of Assistant Commissioner for Capital Program Management. The two additional members shall be appointed by the Commissioner or the Commissioner's designee, for a two-year term and shall meet the following criteria:

1. One member shall be a Construction Industry Advancement Program (CIAP) representative; and
2. One member shall be a person who is a subject matter expert (such as an engineer), who is not involved with the Department or with the contractor.

(c) The Assistant Commissioner for Capital Program Management shall act as the Chairperson of the Claims Review Board.

Amended by R.1999 d.246, effective August 2, 1999.
 See: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).
 Rewrote the section.

Case Notes

Department failed to deal expressly and clearly with effect of administrative review of disputed claims on statute of limitations, and thus could not insist on limitations defense. *W.V. Pangborne & Co., Inc. v. New Jersey Dept. of Transp.*, 116 N.J. 543, 562 A.2d 222 (1989).

Contract was completed when project was accepted and conditional final payment was made, rather than at expiration of one-year surety agreement. *W.V. Pangborne & Co., Inc. v. New Jersey Dept. of Transp.*, 226 N.J.Super. 367, 544 A.2d 423 (A.D.1988) certification granted 114 N.J. 301, 554 A.2d 854, reversed 116 N.J. 543, 562 A.2d 222.

16:45-4.2 Claims Review Board procedures

(a) The procedure set forth in this section establish a method of reviewing contractual disputes and in no way constitute a waiver by the State of New Jersey of its sovereign immunity from suit.

(b) The contractor shall comply with the provisions of the specifications which govern the reservation, presentation, documentation and submission of claims to the claims review board as set forth in contract specifications Section 100—General Provisions (typically found in Sections 107 and 109 of the specifications). Claims review board matters are further limited to those cases in which there is full compliance with the bid document escrow requirement, the cost sharing requirement, and other such requirements, if any, as set forth in contract specifications Section 100—General Provisions (typically found in Sections 103, 107 and 109 of the specifications).

Amended by R.1999 d.246, effective August 2, 1999.
 See: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).

Case Notes

Contract between Department and contractor was complete when contractor's work had been accepted and final conditional payment was authorized. *W.V. Pangborne & Co., Inc. v. New Jersey Dept. of Transp.*, 116 N.J. 543, 562 A.2d 222 (1989).

Department failed to deal expressly and clearly with effect of administrative review of disputed claim on statute of limitations and thus could not insist on limitations defense. *W.V. Pangborne & Co., Inc. v. New Jersey Dept. of Transp.*, 116 N.J. 543, 562 A.2d 222 (1989).

16:45-4.3 Disposition

The Department and the contractor shall comply with the provisions of the Specifications which govern the disposition of claims as set forth in the Specifications Section 100—General Provisions (typically found in Sections 107 and 109 of the Specifications) applicable to the particular contract under which a claim is being asserted. The Chairperson or the Chairperson's designee shall notify the contractor in writing upon receipt of the determination of the Commissioner or the Commissioner's designee which, when made, constitutes a settlement offer.

Amended by R.1999 d.246, effective August 2, 1999.
 See: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).

Rewrote the section.

SUBCHAPTER 5. SUBSTANTIAL COMPLETION

16:45-5.1 Purpose

The following definition of "substantial completion" is adopted pursuant to N.J.S.A. 27:7-34. This definition will be incorporated into contracts on Department of Transportation construction projects, whether administered by Capital Program Management or by Operations, in substantially the same form as set forth in N.J.A.C. 16:45-5.2.

Amended by R.1999 d.246, effective August 2, 1999.

See: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).

Rewrote the last sentence.

16:45-5.2 Definition of substantial completion

(a) "Substantial completion" means the point at which the performance of all work on the project has been completed except landscaping items (including the planting of trees, shrubs, vines, ground covers and seedlings), final cleanup and repair of unacceptable work, and provided the engineer has determined, in his or her sole discretion, that:

1. The project is safe and convenient for use by the public;
2. Failure to complete the work and repairs excepted above does not result in the deterioration of other completed work; and
3. The value of the landscape work remaining to be performed, repairs and cleanup is less than two percent of the total adjusted contract price.

Amended by R.1999 d.246, effective August 2, 1999.

See: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).

In (a), rewrote the introductory paragraph .