

**CHAPTER 45**  
**CONSTRUCTION CONTROL**

**Authority**

N.J.S.A. 27:1A-5, 27:1A-6 and 27:2-1 et seq.

**Source and Effective Date**

R.2003 d.66, effective January 10, 2003.  
See: 34 N.J.R. 2537(a), 35 N.J.R. 622(a).

**Chapter Expiration Date**

In accordance with N.J.S.A. 52:14B-5.1c, Chapter 45, Construction Control, expires on July 8, 2008. See: 40 N.J.R. 866(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).

Chapter 45, Construction Control, was readopted as R.2003 d.66, effective January 10, 2003. See: Source and Effective Date. See, also, section annotations.

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**SUBCHAPTER 1. GENERAL PROVISIONS**

**16:45-1.1 Scope and purpose**

This chapter establishes the Department's Claims Committee and non-binding mediation processes and procedures. These two claims review forums are part of the contractual claims resolution process that is available to contractors whose claims meet the requirements for review contained in contracts administered either by Transportation Capital Program Management or Transportation Operations. Participation by a contractor in this claims resolution process is voluntary. The Department establishes these forums 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.

Amended by R.2003 d.66, effective February 3, 2003.  
See: 34 N.J.R. 2537(a), 35 N.J.R. 622(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".

**16:45-1.3 Litigation of claims by contractor**

Exhaustion of the contractual claims resolution procedure, as set forth under the contract specifications and this chapter, shall not be a prerequisite to the filing of a legal action against the Department. The Contractual Liability Act, N.J.S.A. 59:13-1 et seq., establishes prerequisites and conditions as to the litigation of a claim against the Department. If a contractor brings a legal action against the Department or any officials or employees thereof, allegedly arising out of or related to claims filed against the Department, any pending contractual claims resolution process at any step shall terminate as to those claims and as to related claims being litigated, whether or not the review has been completed at a particular step. Once a contractor files a legal action, the Department shall not review or process any claims related to the litigation at any of the various steps provided under this chapter or under the contract specifications. Unless and until

the legal action is dismissed, those claims and related claims instead shall be resolved under the legal action, subject to the provisions of the Contractual Liability Act, N.J.S.A. 59:13-1 et seq. The contractor may submit to the Department, for processing through the various steps of the claims resolution procedure, any claims that are unrelated to pending litigation, subject to the terms of the specifications and the Contractual Liability Act, N.J.S.A. 59:13-1 et seq.

New Rule, R.2003 d.66, effective February 3, 2003.  
See: 34 N.J.R. 2537(a), 35 N.J.R. 622(a).

## 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 Transportation 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, each of whom shall hold one of the following three positions within the Department:

1. Director of the Division of Accounting and Auditing;
2. Director of the Division of Project Management; or

3. Manager of the Bureau of Quality Management Services.

(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 Transportation Operations, 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 Operations Support, who shall assemble a separate committee for each claim or group of claims arising under a single contract. There shall be two additional voting members who shall hold the following positions within the Department:

1. Director of the Division of Accounting and Auditing; and
2. Director of the 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.

Amended by R.2003 d.66, effective February 3, 2003.

See: 34 N.J.R. 2537(a), 35 N.J.R. 622(a).

Rewrote (b) and (d).

#### 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.

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**SUBCHAPTER 3. (RESERVED)**

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**SUBCHAPTER 4. NON-BINDING MEDIATION**

**16:45-4.1 Non-binding mediation**

The Commissioner hereby authorizes the use of non-binding mediation for resolving claims arising from con-

struction contracts administered by either Transportation Capital Program Management or Transportation Operations. Non-binding mediation shall function as a supplement to the Claims Committee review process. It is available only for contracts in which the Specifications expressly provide for non-binding mediation of claims arising thereunder. The presentation of a claim to non-binding mediation 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 non-binding mediation shall in no way alter or affect the applicable statute of limitations. Non-binding mediation shall be available only for contractual transportation construction claims brought by a contractor that is in direct privity with the State under a contract awarded by the Department. All claims must be presented in accordance with the Specifications applicable to the contract under which the claim arises. Non-binding mediation shall be considered a form of ADR and a settlement procedure available to the contractor.

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.  
 Amended by R.2003 d.66, effective February 3, 2003.  
 See: 34 N.J.R. 2537(a), 35 N.J.R. 622(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 Non-binding mediation procedures**

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

(b) Contract specifications Division 100—General Provisions (typically found in contract specifications §§ 100 through 109, particularly §§ 107 and 109) shall govern the reservation, presentation, documentation and submission of claims, the submission and selection of a mediator, and representation and participation in the non-binding mediation process. Non-binding mediation shall be available only in those cases in which there is full compliance with the bid document escrow requirement, the cost-sharing agreement requirement, the non-discovery agreement requirement, and other such requirements, if any, as set forth in contract specifications Division 100—General Provisions (typically found in contract specifications §§ 100 through 109, particularly §§ 103, 107 and 109).

Amended by R.1999 d.246, effective August 2, 1999.  
 Sec: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).  
 Amended by R.2003 d.66, effective February 3, 2003.  
 Sec: 34 N.J.R. 2537(a), 35 N.J.R. 622(a).  
 Rewrote the section.

#### 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

Contract specifications Division 100—General Provisions (typically found in contract specifications §§ 100 through 109, particularly §§ 107 and 109) applicable to the particular contract under which a claim is being asserted shall govern the disposition of claims. The Claims Committee Secretary 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.  
 Sec: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).  
 Rewrote the section.  
 Amended by R.2003 d.66, effective February 3, 2003.  
 Sec: 34 N.J.R. 2537(a), 35 N.J.R. 622(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.  
 Sec: 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.  
 Sec: 31 N.J.R. 1295(a), 31 N.J.R. 2236(a).  
 In (a), rewrote the introductory paragraph.