

Contractors can benefit from recent changes to NYC's Standard Construction Contract

Here we go again. All contractors who conduct business with New York City must always carefully consider all the provisions and implications in the “onerous” City contract prior to signing the document. The latest round of modifications went into effect in April 2006. The Subcontractors Trade Association and other organizations were directly responsible for the more significant changes to **Article 26 regarding the fact that workers compensation insurance and surety bond premiums are now allocated as direct costs and not part of overhead.** This change should provide the contracting community with some needed relief on change order pricing.

Overall twelve of the seventy-five Articles in the New York City standard construction contract were modified in April 2006. Here is a brief summary of the changes:

1. *Article 5. **Compliance With Laws.*** Sections 5.4, 5.5 and 5.6 were added. Section 5.4 contains regulations requiring the use of ultra low sulfur diesel fuel in diesel powered nonroad vehicles including excavators, backhoes, cranes, compressors and similar equipment. Section 5.5 specifically concerns ultra low sulfur diesel fuel in lower Manhattan. Section 5.6 addresses the use of pesticides on any property owned or leased by New York City.

2. *Article 7. **Notice and Indemnification.*** Section 7.3 provides specific new requirements for notice. Section 7.4 enlarges the contractor's obligations under the indemnification provisions. Section 7.5 requires the contractor to waive all of its rights against New York City for any damages or losses that could be covered under a

commercial general liability policy, workers compensation insurance policy, employers' liability policy, builders' risk insurance, comprehensive business automobile liability insurance or pollution/environmental liability insurance, whether or nor such insurance has been procured. The prudent contractor should have these appropriate insurances in place.

3. *Article 17.1. **Subcontracts.*** Section 17.1 makes two changes – all subcontracts must be in writing and no work may be performed by the subcontractor before a written subcontract is executed. Section 17.9.1 requires the written subcontract to include "the same terms and conditions as to method of payment for work, labor and materials and as to retained percentages as are contained in this Contract." Section 17.9.3 requires the written subcontract to include the prevailing wage and benefit rates. Section 17.9.3 requires a subcontract in excess of \$50,000 to incorporate the provisions of Section 6-123 of the Administrative Code which prohibits unlawful discriminatory practices.

4. *Article 21. **Retained Percentage.*** Section 21.2 changes the contract award amount from \$250,000 to \$500,000 – when a performance and payment bond is not required – and requires a retained percentage of 10%.

5. *Article 22. **Insurance.*** Article 22 and Schedule A set forth new requirements for insurance coverage – when the coverage must start, what work is to be covered, specific endorsements, subcontractor liability for employers liability insurance, contractor liability for builders' risk insurance, comprehensive business automobile liability insurance, marine insurance and if transporting hazardous materials is involved, pollution liability coverage. The Article sets forth the requirements for insurance

companies' ratings and endorsements which protect New York City. Contractors should review the Article in light of the specific contract at issue.

6. *Article 23. **Money Retained Against Claims.*** Article 23 continues with almost no change the provision in the existing standard construction contract.- i.e., the Comptroller can use the moneys retained against the contractor to satisfy claims against the contractor

7. *Article 25. **Changes, Extra Work and Claims.*** Section 25.5 was deleted because it is addressed in PPB Rule 4-02(b)(1)(ii).

8. *Article 26. **Methods of Payment for Overruns and Extra Work.*** There are two changes in this Article – one, as set forth above, making the increased costs of Worker's Compensation Insurance, Performance Bonds and Payment Bonds a reimbursable direct cost rather than part of overhead and the second providing that the reasonable rental value of contractor-owned equipment and fuel costs shall be paid.

9. *Article 27. **Resolution of Disputes.*** As pointed out in the Notice to Bidders, changes were made in this Article to reflect the changes in PPB Rule 4-09 regarding “who may make determinations that are subject to the dispute resolution procedures.”

10. *Article 36. **No Discrimination.*** Section 36.5 was added to require the agreement on the part of the contractor and in every agreement between a contractor and a subcontractor, not to engage in unlawful discriminatory practices in violation of Title VIII of the Administrative Code.

11. *Article 37. **Labor Law Requirements.*** Section 37.1 makes compliance with the provisions of the New York Labor Law material terms of the contract and provides that noncompliance with this Article may result in an unsatisfactory performance evaluation.

12. *Article 70. **Health Insurance Coverage.*** As set forth in New York City's Notice to Bidders, the prior Article 70 concerned the contractor's dealings with the government of Burma, now called Myanmar. This prior Article has now been replaced with an Article on Health Insurance Coverage. Now Article 70 requires contractors, if their contract with New York City exceeds \$100,000, to submit the Health Insurance Coverage Form when the contract is registered and if the Agency so requests the Form requires the contractor to disclose if it provides health insurance benefits to its employees and whether it supplies health insurance to domestic partners of the employees. The Form makes clear that the answer and/or the refusal to answer may be made public.

In conclusion, every contractor with New York City must familiarize themselves with these changes and carefully read the new Standard Construction Contract to minimize potential disqualification, preserve potential claims and also to take full advantage of new reimbursable direct costs to maximize cost efficiencies.