

**POLICY ON
APPLICATION OF TITLE 39,
LARGE PUBLIC WORK CONTRACT CHANGE ORDERS**

I. POLICY STATEMENT

Auburn University Facilities Management's (Facilities Management's) "Policy on Application of Title 39, Large Public Work Contract Change Orders" provides direction regarding the execution of single or cumulative change orders to construction contracts to ensure compliance with Attorney General Opinions (AGO) regarding change orders that exceed ten percent (10%) of the original contract amount. This guidance is referred to as the "10% Guideline."

II. POLICY PRINCIPLES

- A. Facilities Management, as a general rule, shall adhere to the 10% Guideline on Large Public Work contracts (see appendix A).
- B. This policy ensures compliance with the spirit, intent, and requirements of the 10% Guideline put forth by the Alabama Public Works Laws, the Alabama Building Commission (ABC), and various AGO.
- C. The AGO has made clear that the 10% Guideline is a guideline, not a rule, and that exceptions to the guideline are permissible when in the best interest of the public and when not used to circumvent competitive bidding procedures (see appendix B).
- D. Facilities Management will follow the 10% Guideline regarding changes to Large Public Work contracts, unless keeping change orders at or below ten percent of the total contract amount would conflict with the best interests of the University or the public.

III. EFFECTIVE DATE

May 1, 2015

IV. APPLICABILITY

This policy applies to all change orders on Large Public Works Contracts.

V. POLICY MANAGEMENT

- Responsible Office:** Auburn University Facilities Management
- Responsible Executive:** Associate Vice President, Facilities Management
- Responsible Officer:** Executive Director, Design and Construction

VI. DEFINITIONS

10% Guideline: first appeared in the Attorney General's Opinion to W. A. Stevenson, June 15, 1979, no. 79-00313 ("the Opinion") regarding whether, and in accordance with what criteria, a public owner could negotiate with the low bidder to bring a project's cost within available funds. The Attorney General stated, "the amount of changes approved shall not exceed ten percent of the contract price whether made through negotiations ... or by change order" and that the "limit applies to each individual negotiation and each change order and to the cumulative total for each project." The Opinion makes clear that the change order criteria are "guidelines only, and each factual situation must be decided on the facts and merit of each case." This flexibility is consistent with the documented intent of the competitive bid law "to prevent fraud and mismanagement in construction contracts" and to "protect the public interest" by "insuring that public funds are spent as efficiently as possible."

AGO: Alabama Attorney General Opinion(s).

Alabama Building Commission (ABC): State commission that promulgates and enforces the State of Alabama Building Code through plan reviews, inspections, and by serving as the state's contract administrator for state-funded construction.

Large Public Works Bid Law: The State of Alabama Code Title 39 Public Works governs construction projects by State organizations within Alabama. Chapter 2 of Title 39, "Letting, Execution, and Administration of Public Improvements by Contracts by State Agencies Generally," details the legal requirements for bidding, award, and administration of construction contracts and projects by state and municipal organizations in Alabama.

VII. POLICY PROCEDURES

- A. Facilities Management, in its administration of changes to Large Public Work contracts, shall only exceed the 10% Guideline in the following cases:
1. Increased Cost to Taxpayers: when the overall cost to accomplish the work via a new design and the rebidding of a separate contract will cost the University more than accomplishing the work using a change order to the existing contract.
 2. Loss of Accountability/Responsibility: when the work required by the proposed change order is so integral and interconnected to the work being accomplished under the original contract, that a separate contract for the new work would result in one or more of the following:
 - a. Potential damage to the work being done under the original contract.

- b. A loss of clear accountability and/or warranties for the work being accomplished under the original contract through the introduction of new/separate contractor(s) in the original work area.
 - c. An incomplete building component or a partially executed project.
 - 3. Unforeseen Conditions: when the work involved in the proposed change order above 10%:
 - a. Could not have been reasonably foreseen in the original design.
 - b. Is not due to poor planning.
 - c. Represents an urgent and unforeseen condition.
 - d. The additional time to execute the work using any means other than a change order above 10% to the existing contract would:
 - (1) Impact the University's mission in a negative manner, or
 - (2) Expose the University to potential delay claims or other liabilities.
- B. Facilities Management, in its administration of Large Public Work contracts, will adhere to the 10% Guideline without exception, when:
 - 1. A change order to the existing contract would circumvent State of Alabama competitive bid law requirements; or
 - 2. Work in the proposed change order to the existing contract cannot reasonably be considered as being part of the scope of the original contract; or
 - 3. None of the situations described in section VII.A applies to the change under consideration.
- C. To ensure proper review and application of the 10% Guideline, Facilities Management shall:
 - 1. Produce written documentation in a standardized format as to the options considered, their associated impacts to the project, and the rationale and justification for the direction chosen, explaining specifically why exceeding the 10% Guideline is in the University's and public's best interest.
 - 2. Utilize ABC Form B –11 Change Order Justification to ensure adherence to ABC requirements. (Appendix C-1)
 - 3. Utilize the University's Attachment to ABC Form B –11 to keep track of the cumulative percentage of changes not competitively bid on each specific Large Public Works contract. (Appendix C-2)

4. Utilize ABC Form B-12 Change Order Checklist to ensure adherence to ABC requirements. (Appendix C-3)
5. Utilize a University Change Order Review Checklist to aid in systematic review of changes and adherence to University requirements.
6. Ensure that the Designer of Record, Construction Manager (if applicable), and the University have reviewed, analyzed, critiqued, challenged, and approved of the change and have clearly documented that this change is in the public's best interest.
7. Ensure that, per the 1979 AGO, documentation for a change order in excess of the 10% Guideline shall include a signed justification statement from the Designer of Record including:
 - a. A statement detailing the change order's scope, who instituted the change order, and why it is necessary or desired;
 - b. A statement of the reason for using a change order rather than competitive bids;
 - c. A statement that all prices have been reviewed and found reasonable, fair, and equitable and that recommends approval of the same.
- D. Final Approval for exceeding the 10% Guideline rests with the Associate Vice President, Facilities Management.
- E. Prior to exceeding the 10% Guideline, Facilities Management will consult with University Legal Counsel.

VIII. SANCTIONS

Failure to comply with this policy may result in loss of contracting authority or disciplinary action.

IX. EXCEPTIONS

The 10% Guideline does not apply to work in which the price was established through the competitive bidding process such as:

- A. Bid Add Alternates
- B. Pre-priced line items
- C. Unit Costs

APPROVAL

D. P. [Signature]

Associate VP, Auburn University Facilities Management

4/28/15

Date

[Signature]

Executive Director, Design and Construction

4.27.15

Date

ADOPTED: April 27, 2015

REVISED: _____

APPENDIX A

Decision Matrix for Execution of Large Public Works Contract Changes over 10%

Cost and Delays		Accountability and Liability	
	Executing work via a new and separate contract...	may result in the loss of accountability and liability.	will not result in the loss of accountability and liability.
	may result in project delays and claims.	Execute Work via Change Order	Execute Work via Change Order
	will not result in project delays and claims.	Execute Work via Change Order	Execute Work via Separate Contract
	will result in increased cost to taxpayers.	Execute Work via Change Order	Execute Work via Change Order
	will not result in increased cost to taxpayers.	Execute Work via Change Order	Execute Work via Separate Contract

APPENDIX B

Decision Matrix for Execution of Large Public Works Contract Changes in Excess of Ten Percent



MEMORANDUM

TO Scott Fuller
FROM David Pugh
DATE June 7, 2012
SUBJECT Auburn University/Contract Advice: "10% Rule"

Question Presented:

You have asked whether a public owner in Alabama is limited by the so-called "10% rule" (the "Rule") when approving change orders, whether individually or in the aggregate.

Short Answer:

While the Rule may be useful for guidance in promoting the policy behind Alabama's competitive bid laws, it is not a strict limitation on change orders to public contracts. Owners who have applied the Rule as a strict limitation have done so unnecessarily. It is more accurately referred to as a "Guideline."

Discussion:

There is no express statutory basis for the Rule. The Rule was first referenced in a 1979 Attorney General's Opinion. *See*, Opinion to W. A. Stevenson, June 15, 1979, A.G. No. 79-00313. The opinion was authored by then Assistant Attorney General James R. Solomon, Jr. during the tenure of Attorney General Charles A. Graddick.¹

In the 1979 Opinion, the Director of the Technical Staff of the Alabama Building Commission asked whether and in accordance with what criteria a public owner could negotiate with the low bidder to bring the cost within available funds. One of the criteria listed by the Attorney General was that the price of the negotiated changes not exceed 10% of the base bid. The Attorney General stated further that "the amount of changes approved shall not exceed 10% of the contract price whether made through negotiations . . . or by change order" and that the "limit applies to each individual negotiation and each change order and to the cumulative total for each project." Notably, the Opinion also stated that the change order criteria listed were "guidelines only and each factual situation must be decided on the facts and merit of each case" consistent with the underlying policy of the competitive bid laws which is "to prevent fraud and mismanagement in construction contracts" and to "protect the public interest" by insuring that public funds are spent as efficiently as

possible.¹ Despite the “guideline only” disclaimer, many public owners adopted the 10% limitation as a strict rule after the Opinion was issued.

After the Opinion was published, although the Rule was widely applied, exceptions soon developed which essentially undermined the so-called “rule.” The Attorney General issued subsequent opinions holding that under extraordinary circumstances, a change order could exceed 10%. *See, e.g.*, Opinion to Ed Godfrey, May 26, 1987, A.G. No. 87-000197; Opinion to G.R. Swift, April 29, 1987, A.G. No. 87-000153. In 1991, James R. Solomon, Jr. – the author of the original opinion – wrote another opinion expanding upon the “extraordinary circumstances” exception to the Rule. The Town of Blountsville contracted for the construction of a sewer project for \$161,389.50. Interferences with existing utilities and differing site conditions encountered during excavation resulted in the submission of a change order request for \$49,000. This request represented an increase in excess of 30% of the original contract price. The Attorney General opined that so long as the lead designer set forth in writing why the changes were necessary and certified that the change order pricing was reasonable, fair and equitable, then the change order request could be approved. To have held otherwise would have meant that the project would either be delayed or canceled, grant money for funding the project would have been lost and subsequent improvements to the system would have been more costly. Thus, so long as the decision was made in good faith after an independent review and written assessment by the lead designer, the change order work could proceed despite being substantially in excess of the 10% rule.

Subsequent Attorney General Opinions reflect a substantial “loosening” of the Rule provided the awarding authority approves the changes in good faith. *White v. McDonald Ford Tractor Co., Inc.*, 248 So.2d 121 (Ala. 1971)(“The single most important requirement of the Competitive Bid Law is the good faith of the officials charged in executing the requirements of the law.”).

- Opinion to Victor Ficker, August 3, 1992, A.G. No. 92-00363. (If the awarding authority determines in good faith that the facts are as outlined and that the changes are necessary for the proper completion of the project and, furthermore, can find and substantiate that the circumstances are extraordinary, then it would be justified in utilizing the change order to effect these changes.) (*emphasis added*)[12.2% increase].
- Opinion to David Brantley, August 28, 1992, A.G. No. 92-00388. (Possible danger to students dictates expediting renovation of the project to avoid emergency situation. AG has long held that 10% rule is a guideline only, and each factual situation must be decided on the facts and merit of each case.)(*emphasis added*)[17.6% increase].
- Opinion to Barbara Coffey, January 8, 1993, A.G. No. 93-00105. (Change Order of 31.3% was justified rather than rebidding and possibly losing use of grant funds for the project)[31.3% increase].
- Opinion to William M. Bouldin, February 28, 2000, A.G. No. 00-098. (Differing Site Conditions justified the change)[34.9% increase].

¹ As an interesting historical side note, this Opinion was issued in 1979, nearing the end of a period which had seen extraordinarily high double digit inflation. Given that the state only used traditional design-bid-build project delivery, there was often a significant period of time between the development of the designer’s budget and the receipt of competitive bids. Due to price inflation during that period of time, the bids received were often all higher than the designer’s estimate on which the Owner’s budget had been based. The result was the frequent need for public owners to try to negotiate with the low bidder to bring the price to within budget. The only alternative was to redesign and rebid.

- Opinion to Alfred C. Lackey, March 22, 2002, A.G. No. 02-182. (If the change is necessary for the proper completion of the Project, if grant funds for the Project can be retained and the circumstances are extraordinary, then a change order in excess of 30% is justified)[61.8% increase].
- Opinion to Joey Hargrove, July 20, 2011, A.G. No. 11-078. (Use of a change order determined to be less expensive than rebidding and delay would prolong the period of time during which public building was not compliant with fire codes and the time during which public officials would be working in inadequate office conditions)[In excess of 30% increase].

One of the consistent guidelines included in the AG's Opinions is the requirement that each change order in excess of the 10% limit should include a signed statement from the lead designer including:

- a. A statement of what the change order covers, who instituted the change order, and why it is necessary or desired;
- b. A statement of the reason for using a change order rather than competitive bids; and
- c. A statement that all prices have been reviewed and found reasonable, fair and equitable and recommending the approval of the same.

The Alabama Building Commission ("ABC") Manual (2004) reflects current practice and makes the following points with respect to all Change Orders:

- a. Public officials have discretion in administering the competitive bid laws so long as they are acting in good faith and in the public interest.
- b. Determination of the legality of a change order rests with the Awarding Authority and its legal advisor(s).
- c. Each change order should be based on a written change order justification prepared by the lead designer and signed by the Awarding Authority. The ABC highly recommends that the Awarding Authority's legal advisor(s) review each proposed change order and confirm the change order action by signing the respective change order justifications.

Although the majority, if not all, of the published AG Opinions address a single change, the same analysis would apply to cumulative or a group of changes. So long as the element of good faith is present and the public owner examines the factors discussed in the AG Opinions and provides a written rationale for exceeding the 10% "guideline" and adequately discloses the compelling circumstances, then the Rule need not be thought of as an absolute limit.

Conclusion

Since the issuance of the original Attorney General's Opinion declaring the Rule, there has yet to be a situation in which the Attorney General declined to approve a Change Order Request in excess of 10%. The Rule seems to have been subsumed by the exceptions. So long as the lead designer and awarding authority take care to justify a change order in a written change order justification and exercise the authority to undertake such changes in good faith, the decision to approve a change order greater than 10% of the contract price will likely be approved. As the opinions referenced above indicate, the amounts can even be substantially in excess of 10%. Present practice indicates that today, the Rule is more accurately described as a threshold for increased scrutiny rather than a limit beyond which changes are prohibited.

APPENDIX C-1
ABC Form B-11, Change Order Justification

ABC Form B-11
 August 2001

TO: STATE OF ALABAMA
BUILDING COMMISSION
 770 Washington Avenue, Suite 444
 Montgomery, Alabama 36130
 (334) 242-4082 FAX (334) 242-4182

CHANGE ORDER JUSTIFICATION

Change Order No. _____
Date: _____

PURPOSE AND INSTRUCTIONS ON REVERSE SIDE

B.C. No. _____

(A)	PROJECT:	OWNER:
	CONTRACTOR:	ARCHITECT/ENGINEER:
(B)	DESCRIPTION OF PROPOSED CHANGE(S): ATTACH CONTRACTOR'S DETAILED COST PROPOSAL(s)	
	AMOUNT: <input type="checkbox"/> ADD <input type="checkbox"/> DEDUCT \$ _____ TIME EXTENSION: _____ CALENDAR DAYS	
(C)	ORIGINAL CONTRACT PREVIOUS C.O.'s _____ THRU _____ CURRENT CONTRACT \$ _____ \$ _____ \$ _____	
(D)	JUSTIFICATION FOR NEED OF CHANGE(S):	
(E)	JUSTIFICATION OF CHANGE ORDER vs. COMPETITIVE BID:	
(F)	ARCHITECT/ENGINEER'S EVALUATION OF PROPOSED COST:	
(G)	CHANGE ORDER RECOMMENDED _____ NAME OF ARCHITECTURAL/ENGINEERING FIRM By: _____ ARCHITECT/ENGINEER By: _____ OWNER'S PROJECT REPRESENTATIVE	CHANGE ORDER JUSTIFIED AND APPROVED _____ LOCAL OWNER By: _____ SIGNATURE By: _____ OWNER'S LEGAL COUNSEL

CHANGE ORDER JUSTIFICATION: PURPOSE and INSTRUCTIONS

PURPOSE

The awarding of work through an existing contract may potentially conflict with, or violate, the "Competitive Bid Laws" of the State of Alabama. **The determination of legality of Change Orders rests with the Awarding Authority and its legal advisor.** In a June 15, 1979, Opinion, the Office of the Attorney General offered guidelines for making such determinations in conjunction with considering the facts and merits of each situation. The purpose of the CHANGE ORDER JUSTIFICATION is to provide a means through which the Awarding Authority considers these guidelines and the intent of the "Competitive Bid Laws" when authorizing Change Orders. Pursuant to these guidelines, the following types of changes meet the criteria for awarding work through Change Orders in lieu of through the Competitive Bid process:

- I. Minor Changes for a monetary value less than required for competitive bidding.
- II. Changes for matters relatively minor and incidental to the original contract necessitated by unforeseeable circumstances arising during the course of the work.
- III. Emergencies arising during the course of the work of the contract.
- IV. Bid alternates provided for in the original bidding where there is no difference in price of the change order from the original best bid on the alternate.
- V. Changes of relatively minor items not contemplated when the plans and specifications were prepared and the project was bid which are in the public interest and which do not exceed 10% of the contract price.

Under these guidelines the cumulative total of Change Orders, including any negotiations to bring the original contract price within the funds available, would become questionable if the total of such changes and negotiations exceed 10% of the original contract price. These guidelines are not intended to interfere with the Awarding Authority's good faith discretion to respond to specific situations in the public's best interest.

INSTRUCTIONS

The CHANGE ORDER JUSTIFICATION is to be prepared by the design professional, who has evaluated the fairness and reasonableness of the proposed cost of the change(s) and recommends that the proposed Change Order be executed. The fully executed CHANGE ORDER JUSTIFICATION must accompany the proposed Change Order. Instructions for completing the form are:

1. Insert the proposed Change Order Number, date of the Justification, and BC Project Number in the spaces provided in the upper right-hand corner.
2. **Section (A):** Insert the complete name and address of the PROJECT, OWNER, CONTRACTOR, AND ARCHITECT/ENGINEER.
3. **Section (B):** Provide a complete description of the proposed changes in work, referring to and attaching revised specifications and/or drawings as appropriate. An attachment may be used if additional space is needed, but insert the proposed amount and time extension of the change(s) in the spaces provided. **Attached a copy of the contractor's detailed cost proposal.**
4. **Section (C):** Insert the Original Contract amount, the net increase or decrease of previous Change Orders, and the Current Contract amount (preceding the currently proposed Change Order).
5. **Section (D):** Explain why it is necessary, or in the public's interest, to make the proposed change(s) to the Work.
6. **Section (E):** Explain why award of the changed work to the existing contractor instead of awarding the work under the competitive bid process is justified.
7. **Section (F):** The design professional must state his evaluation of the reasonableness and fairness of the proposed costs based upon his review of the contractor's proposal.
8. **Section (G):** The design professional must recommend the Change Order to the Owner by signing the document; the Owner may require such recommendation from other individuals. The Owner must sign the document indicating that they believe change order action in lieu of the competitive bid process is justified for the proposed change(s). **Review of the matter and signing of the document by the Owner's legal**

counsel is highly recommended.

APPENDIX C-2

University Attachment to ABC Form B –11

ATTACHMENT to ABC Form - B11: (This is an Auburn University Document)

Auburn University uses Building Commission documents *B11 (Change Order Justification)* and Standard Form *ABC C12 (Contract Change Order)* as a means to adjust the original contract amount for two classifications of changes.

CLASSIFICATION 1 Definition:

Classification 1: changes which result from work being added to or deleted from the original contract documents, the cost for which was NOT determined by competitive bidding. The cumulative total of such changes IS subject to the ten percent (10%) guideline.

CLASSIFICATION 2 Definition:

Classification 2: changes resulting from implementation of provisions of the original contract documents (unit prices and alternates) which were not included in the original Contract Agreement for Construction as well as other items which WERE determined through competitive bidding and, consequently, are NOT considered as part of the ten percent (10%) guideline.

CLASSIFICATION 1 CHANGES:

Negotiated (prior to bid) and Change Order (post bid) items:

	Classification 1 Totals	
Change Order 1	\$1,000.00	
Change Order 2	\$2,000.00	
Change Order 3	-\$1,000.00	
Change Order 4	\$4,000.00	
Change Order 5	\$3,000.00	
Change Order 6	-\$2,500.00	
Change Order 7		
Change Order 8		
Change Order 9		
Change Order 10		
		Original Contract Price: \$100,000.00
		Cumulative Total Classification 1: \$8,500.00
		Classification 1: Percentage of the Original Contract: 8.50%

CLASSIFICATION 2 CHANGES :

Competitively Bid Items: Unit prices, alternates, other:

	Classification 2 Totals	
Change Order 1	\$2,500.00	
Change Order 2		
Change Order 3		
Change Order 4		
Change Order 5		
Change Order 6		
Change Order 7		
Change Order 8		
Change Order 9		
Change Order 10		
		Cumulative Total Classification 2:: \$2,500.00

Cumulative Total of all Change Orders : \$9,000.00

Revised Contract Value \$109,000.00

APPENDIX C-3

ABC Form B-12 Change Order Checklist

ABC Form B-12
August 2001

**STATE OF ALABAMA
BUILDING COMMISSION**

770 Washington Avenue, Suite 444
Montgomery, Alabama 36130
(334) 242-4082 FAX (334) 242-4182

CHANGE ORDER CHECKLIST

For use with ABC Form C-12 and ABC Form 9-J

WHICH FORM DO YOU USE?

Use **ABC Form C-12** for contracts of state agencies and department, Postsecondary Education, & SDE.
Use **ABC Form 9-J** for contracts involving the Public School and College Authority (PSCA)

Verify that the following information is inserted in the spaces provided on the CONTRACT CHANGE ORDER form, or attached to the form where attachments are noted to be acceptable or obviously necessary.

1.	CHANGE ORDER NUMBER
2.	DATE
3.	BC PROJECT NUMBER: Insert BC Project Number in the block provided at top of document.
4.	CONTRACTOR Insert name and address of the Contractor, exactly as they appear on the Construction Contract.
5.	NAME OF PROJECT: Under "Project", insert the complete name of the project as identified in the bid documents. If using ABC Form 9-J, insert the PSCA Project Number in the space provided.
6.	CONTRACTOR'S PROPOSALS: Under "TERMS", identify the change order proposals submitted by the contractor that are being addressed by the Contract Change Order. Identify these proposals by inserting their dates.
7.	DESCRIPTION OF THE CHANGE(S) IN WORK: Fully describe the change or changes to the original contract work for which the Construction Contract is being modified. This description should be written so that a reader of the document who is not directly involved in the project can understand what is being changed. If the space provided on the form is inadequate for such a description, use attachments and cite them.
8.	CONTRACT AND CHANGE ORDER AMOUNTS: Insert the applicable dollar amounts to record the original contract sum, change orders, and the currently revised contract sum.
9.	EXTENSION OF TIME: If the Contract Time is being extended by the Contract Change Order, insert appropriate number of calendar days in the space provided. If the Contract Time is not being extended, insert "NONE".
10.	RESPONSIBILITY FOR CHANGE ORDER FUNDING - ABC Form 9-J ONLY: The authority responsible for funding the change order is to be identified in the following sentence in the form,; "The amount of this Change Order will be the responsibility of _____." Insert whichever is appropriate: (1) "PSCA", (2) name of LEA, or (3) "PSCA" and name of LEA.
11.	SIGNATURES: The Contract Change Order must be prepared for the appropriate signatures. Refer to Appendixes A-1, A-2, and A-3 for instructions for State Agency, PSCA, and Postsecondary Education projects. Before submitting a Contract Change Order to the ABC, the document must be signed by the contractor, surety , design professional, and owner (local owner or using agency). Signature by the surety ("CONSENT OF SURETY") is not necessary on change orders involving only extensions of time.
12.	ATTACHMENTS: To each copy of the Contract Change Order form attach, <ul style="list-style-type: none"> a. A copy of each of the contractor's change order proposals providing a detailed breakdown of the change order costs. b. POWER OF ATTORNEY for the individual signing the Contract Change Order for the surety. c. ABC Form B-11, CHANGE ORDER JUSTIFICATION: completed and signed by the design professional and owner.