

Senate Fiscal Agency  
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**SFA****BILL ANALYSIS**

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House Bill 4505 (as reported without amendment)  
Sponsor: Representative Judson Gilbert  
House Committee: Local Government and Urban Policy  
Senate Committee: Economic Development, International Trade and Regulatory Affairs

Date Completed: 6-1-01

### **RATIONALE**

Sometimes, in the course of conducting construction work, a contractor will discover physical conditions at a work site that had not been foreseen and that could have an effect on the cost of completing the project and/or on the amount of time needed to complete it. Because of this possibility, construction contracts often contain a "differing site condition" clause, which allows the adjustment of the contract upon the discovery of conditions that are unanticipated or are contrary to earlier plans. This could include the discovery of old or illegal underground dumps, old building foundations, or unexpected soil or rock conditions, for example.

Public Act 57 of 1998 effectively inserted a differing site condition clause into any contract between a contractor and a governmental entity for improvements whose value exceeds \$75,000. The Act is scheduled to expire on December 31, 2001. It has been suggested that Public Act 57 has been useful to governmental entities and those with whom they contract for construction work, and should be kept in statute.

### **CONTENT**

The bill would amend Public Act 57 of 1998 to repeal the Act's December 31, 2001, sunset provision.

MCL 125.1596

### **BACKGROUND**

Public Act 57 of 1998 provides that a contract between a contractor and a governmental entity (the State, a county, city, township,

village, public educational institution, or any political subdivision of such an entity) for an improvement that exceeds \$75,000 must contain a provision that, if a contractor discovers one or both of the following physical conditions of the surface or subsurface at the improvement site, before disturbing the physical condition, the contractor promptly must give the governmental entity written notice of the physical condition:

- A subsurface or a latent physical condition at the site is differing materially from those indicated in the improvement contract.
- An unknown physical condition at the site is of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the improvement contract.

Under the Act, the contract also must provide that, if the governmental entity receives such a notice, it promptly must investigate the physical condition; and, if the governmental entity determines that the physical conditions does materially differ and will cause an increase or decrease in costs or additional time needed to perform the contract, that determination must be made in writing, an equitable adjustment must be made, and the contract must be modified in writing accordingly.

In addition, the contract must provide that the contractor may not make a claim for additional costs or time because of a physical condition unless the contractor complies with the notice requirements described above. The governmental entity may extend the time required for the notice. Further, the contract

must provide that the contractor may not make a claim for an adjustment after receiving the final payment under the contract.

The Act specifies that if an improvement contract does not contain the provisions required above, they are incorporated into and considered part of the contract.

If the contractor does not agree with the governmental entity's determination, the contractor may complete performance on the contract with the governmental entity's consent. At the option of the governmental entity, the contractor and the entity may arbitrate the contractor's entitlement to recover the actual increase in contract time and costs incurred because of the physical conditions of the improvement site.

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

Public Act 57 of 1998 effectively added, by statute, a differing site condition clause to contracts between governmental entities and contractors carrying out improvement projects for contracts that exceed \$75,000. These clauses protect contractors when they discover that conditions at a work site, particularly underground conditions, differ from what was expected when the contract was signed. Clauses of this kind, which reportedly are common in Federal government and private-sector contracts, provide a means of resolving conflicts over unexpected additional costs or work hours. Differing site condition clauses can lower the risks for contractors, leading to better relations among the contracting parties, and reducing the potential for litigation. Further, a differing site condition clause may reduce the cost of some bids because contractors do not have to add margins to cover possible unexpected circumstances. Public Act 57 should not be allowed to expire.

Legislative Analyst: P. Affholter

## **FISCAL IMPACT**

The Michigan Department of Transportation used a similar differing site condition clause prior to the enactment of Public Act 57 of

1998. The legislation did not have a fiscal impact on State contracts. According to the Michigan Municipal League, there has been no fiscal impact on local government.

Fiscal Analyst: B. Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.