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**SFA****BILL ANALYSIS**

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House Bill 5607 (as passed by the House)  
Sponsor: Representative James M. Middaugh  
House Committee: Commerce  
Senate Committee: Economic Development, International Trade and Regulatory Affairs

Date Completed: 3-18-98

### **CONTENT**

**The bill would create a new statute to provide that a contract with a governmental entity for an improvement over \$75,000 would have to contain provisions concerning differing site conditions, and would require an adjustment to be made if the conditions materially differed and would cause an increase or decrease in costs or additional time for performance. The bill would be repealed effective June 30, 2002.**

Specifically, 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 exceeded \$75,000 would have to contain a provision that, if a contractor discovered one or both of the following physical conditions of the surface or subsurface at the improvement site, before disturbing the physical condition, the contractor would promptly have to give the governmental entity written notice of the physical condition:

- A subsurface or a latent physical condition at the site was differing materially from those indicated in the improvement contract.
- An unknown physical condition at the site was 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.

The contract also would have to provide that, if the governmental entity received such a notice, it promptly would have to investigate the physical condition; and, if the governmental entity determined that the physical conditions did materially differ and would cause an increase or decrease in costs or additional time needed to perform the contract, that determination would have to be made in writing, an equitable adjustment would have to be made, and the contract modified in writing accordingly.

In addition, the contract would have to provide that the contractor could not make a claim for additional costs or time because of a physical condition unless the contractor had complied with the notice requirements described above. The governmental entity could extend the time required for the notice.

Further, the contract would have to provide that the contractor could not make a claim for an adjustment after the contractor had received the final payment under the contract.

The bill specifies that if an improvement contract did not contain the provisions required above, the provisions would be incorporated into and considered part of the contract.

If the contractor did not agree with the governmental entity's determination, the contractor could complete performance on the contract with the governmental entity's consent. At the option of the governmental entity, the contractor and the entity would have to 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. The arbitration would have to be conducted according to the rules of the American Arbitration Association, and judgment rendered could be entered in any court having jurisdiction.

The bill provides that it would not limit the rights or remedies otherwise available to a contractor or the governmental entity under any other law or statute.

Legislative Analyst: S. Lowe

### **FISCAL IMPACT**

The bill would have an indeterminate impact on the State and local units of government. It could reduce conflicts regarding physical conditions at construction sites that differ materially from the contract. The Michigan Department of Transportation currently uses a similar clause in its contracts.

Fiscal Analyst: B. Bowerman