



Senate Fiscal Agency  
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BILL ANALYSIS



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House Bill 4957 (Substitute S-1 as reported)  
Sponsor: Representative James M. Middaugh  
House Committee: Local Government  
Senate Committee: Economic Development, International Trade and Regulatory Affairs

Date Completed: 3-25-96

### RATIONALE

Apparently, while working at construction sites, contractors sometimes are confronted with physical conditions that were not foreseen and that could affect the cost of completing the work or the amount of time necessary to complete the project. For example, illegal underground dumps, old foundations, and unexpected soil and rock conditions reportedly have been found at various construction sites. Contracts, therefore, often contain a "differing site condition" clause, which allows the adjustment of a contract when unanticipated conditions or conditions contrary to earlier plans are discovered. It is believed by some that such clauses help reduce risks for contractors and litigation between the parties to the contract. Moreover, some say, the clauses help reduce the cost of some projects since contractors then do not have to add margins to their contract bids to cover possible unexpected circumstances. It has been suggested, therefore, that State law require that differing site condition clauses be included in contracts between governmental entities and contractors carrying out large improvement projects.

### CONTENT

**The bill would create a new act to require a contract between a contractor and a governmental entity for improvements exceeding \$75,000 to contain certain provisions regarding situations in which previously unknown physical conditions were discovered at a work site.** Specifically, the contract would have to contain the following provisions:

- The contractor promptly would have to notify the governmental entity in writing if he or

she discovered that 1) a subsurface or a latent physical condition at the site was differing materially from those indicated in the improvement contract, and/or 2) 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.

- If the governmental entity received such a notice, it promptly would have to investigate the physical condition.
- 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, it would have to put its determination in writing. Further, an equitable adjustment would have to be made and the contract modified in writing accordingly.
- The contractor could not make a claim for additional costs or time because of a physical condition unless he or she had provided the required notice. The governmental entity could extend the time required for notice.
- The contractor could not make a claim for an adjustment under the contract after he or she had received the final payment under the contract.

If an improvement contract did not contain the provisions required, they would have to be incorporated into and considered part of the improvement contract.

If a contractor did not agree with the governmental entity's determination, he or she, with the consent

of the governmental entity, could complete performance on the contract and bring a cause of action to recover the actual increase in contract time and costs incurred because of the physical condition of the improvement site.

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

“Contractor” would mean a person who contracted with a governmental entity to improve real property or perform or manage construction services. It would not include a person licensed under Article 20 of the Occupational Code, which applies to architects, professional engineers, and land surveyors. “Governmental entity” would mean the State, a county, city, township, village, public educational institution, or any political subdivision of such an entity. “Public educational institution” would mean a public elementary or secondary educational entity or agency established under the School Code and institutions of higher education as described in the State Constitution.

“Improve” would mean to build, alter, repair, or demolish an improvement on, connected with, or beneath the surface of any real property, to excavate, clear, grade, fill, or landscape any real property, to construct driveways and roadways, or to perform labor on improvements. “Improvement” would include, but would not be limited to, all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, landscaping, trees, shrubbery, driveways, and roadways on real property. “Real property” would mean the real estate that was improved, including, but not limited to, lands, leaseholds, tenements, hereditaments (property that can be inherited), and improvements placed on the real property.

### **SENATE COMMITTEE ACTION**

The Senate Economic Development, International Trade and Regulatory Affairs adopted a substitute (S-1) that includes a definition of “public educational institution”.

### **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**

Differing site condition clauses help protect contractors when they discover that conditions at a site, particularly those underground, differ from what was expected when the contract was initially negotiated. Clauses of this kind, reportedly common in Federal environmental contracts, help to avoid or resolve conflicts over unexpected additional costs or work hours. Further, they help reduce litigation and promote a more cost-effective and competitive bidding process because contractors do not have to inflate their bids to cover potential site problems.

Legislative Analyst: L. Burghardt

### **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

### **H9596\S4957A**

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.