House
Legislative
Analysis
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IMPROVEMENT CONTRACTS: DIFFERING SITE CONDITIONS

House Bill 5607 as enrolled
Public Act 57 of 1998
Second Analysis (4-3-98)

Sponsor: Rep. James M. Middaugh
House Committee: Commerce
Senate Committee: Economic Development, International Trade and Regulatory Affairs

THE APPARENT PROBLEM:

Sometimes in carrying out construction work, contractors come across circumstances at a site that had not been foreseen, physical conditions that could have an effect on the cost of completing the work and/or on the amount of time needed to complete the work. Contracts often contain a "differing site condition" clause, which allows for the adjustment of a contract when unanticipated conditions or conditions contrary to earlier plans are discovered. Examples that have been cited include the discovery of illegal underground dumps, old foundations, and unexpected soil or rock conditions. Advocates say that such clauses can provide for a process whereby a contract can be adjusted, reducing the risks for contractors, leading to better relations among the contracting parties, and reducing litigation. It also could reduce the cost of some projects because contractors will not have to add margins to cover possible unexpected circumstances. Legislation has been introduced that would make certain differing site condition provisions part of contracts between governmental agencies and contractors carrying out large improvement projects.

THE CONTENT OF THE BILL:

House Bill 5607 would create a new act to require that a contract between a contractor and a governmental entity for improvements exceeding $75,000 contain certain provisions regarding situations in which previously unknown physical conditions are discovered at a work site. The contract would have to contain the following provisions.

** A contractor would have to promptly notify the governmental entity if he or she discovered 1) that a subsurface or latent physical condition at the site differed materially from those indicated in the improvement contract, and/or 2) that 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 a governmental entity received such a notice, it would have to promptly investigate the physical condition.

** If the governmental entity determined that the physical conditions were materially different 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 and 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 to the governmental entity. A governmental entity could extend the time for the notice to be provided.

** The contractor could not make a claim for an adjustment under the contract after the contractor had received the final payment under the contract.

If a contract did not contain the provisions cited above, the provisions would 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 could, with the consent of the entity, complete performance on the contract. At the option of the governmental agency, the contractor and the entity would arbitrate the contractor's entitlement to recover the actual increase

in contract time and costs incurred because of the physical condition of the improvement site. The arbitration would have to be conducted in accordance with the rules of the American Arbitration Association and judgment rendered could be entered in any court having jurisdiction.

The bill would specify that it would not limit the rights or remedies otherwise available to a contractor or the governmental entity under any other law or statute. The term "contractor" would not apply to a person licensed under Article 20 of the Occupational Code, which applies to architects, professional engineers, and surveyors. Otherwise, the term would refer to an individual or entity that contracts with a governmental entity to improve real property or perform or manage construction services. The term "governmental entity" would refer to the state, a county, city, township, village, public educational institution, or any political subdivision thereof. The term "improvement" includes but is not 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.

The bill would take effect 180 days after enactment, and it would be repealed December 31, 2001.

BACKGROUND INFORMATION:

House Bill 5607 is similar to two bills--House Bills 4957 and 6197--that passed the legislature in the 1995-96 session. Both House Bill 4957 and House Bill 6197 were vetoed by the governor. House Bill 6197 differed from the earlier bill in that (1) it did not contain a provision authorizing a contractor to bring a cause of action against a governmental entity when there was a disagreement over a determination of physical conditions -- which was one reason for the veto; and (2) it contained a new provision allowing for arbitration of a disagreement at the option of a governmental entity. House Bill 5607 incorporates both of those changes, and in addition it specifies that the law would be repealed, effective December 31, 2001, and that the bill would take effect 180 days after enactment.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The bill would put a differing site condition clause into contracts between governmental entities and contractors carrying out improvement projects under contracts exceeding $75,000. Such clauses protect contractors when they discover that conditions at a site, particularly underground at a site, differ from what was expected when the contract was entered into. Clauses of this kind, said to be common in federal environmental contracts, among others, provide a means of resolving conflicts over unexpected additional costs or work hours. Such clauses can reduce litigation and lead to a better bidding process because contractors will not have to build in amounts to cover potential site problems. The language in the bill is said by advocates to be similar to that used in federal contracts.

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■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.