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BILL ANALYSIS



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Senate Bills 603 and 604 (as enrolled)

PUBLIC ACTS 489 & 490 of 2006

Sponsor: Senator Ron Jelinek

Senate Committee: Economic Development, Small Business and Regulatory Reform

House Committee: Commerce

Date Completed: 1-4-07

RATIONALE

In recent years, an increasing number of sellers seeking a competitive price for goods and property have been turning to auctioneers. There are said to be more than 700 auctioneers operating in Michigan, yet, with the exception of those selling livestock, motor vehicles, or boats, auctioneers are not required to be registered or licensed by the State. Cities and villages have the authority to regulate auction sales under the provisions of home rule laws, and a person planning to hold an auction in a township must obtain a license from the township clerk, pay a \$25 license fee, and post a bond, as well as submit a report to the Department of Treasury. Reportedly, however, these requirements are not commonly met or enforced. Since most states require auctioneers to be licensed, according to the Michigan State Auctioneers Association, many operating in Michigan are concerned that this State is becoming a haven for unethical auctioneers. Some people believe that auctioneers operating in Michigan should be registered, so buyers and sellers working with a registered auctioneer will know that he or she has achieved a basic level of competency and is subject to sanctions for operating in an improper manner.

- **Create a Board of Auctioneers and require the Board and DLEG to develop an exam for registration applicants.**
- **Require registered auctioneers to comply with provisions for written contracts, trust accounts, financial ledgers, and records of sales.**
- **Subject registrants who commit certain acts to sanctions under the Code.**

Senate Bill 604 amended the State License Fee Act to establish application, examination, and registration fees for auctioneers.

The bills were tie-barred to each other. Senate Bill 603 will take effect on October 1, 2007. Senate Bill 604 took effect on December 29, 2006.

Senate Bill 603

Registration Requirement

The bill prohibits a person from using the title "registered auctioneer" unless registered under Article 29. (The bill defines "auctioneer" as an individual who, for compensation, is engaged in the business of the conduct of, or offers to engage in the conduct of, an auction. "Auction" means the sale or offer for sale by bidding of real or personal property at a public or private location.)

A corporation, partnership, limited liability company, association, or other legal entity may apply for registration if at least one of its officers, partners, members, or managing

CONTENT

Senate Bill 603 adds Article 29 to the Occupational Code to do the following:

- **Establish registration requirements for auctioneers and related responsibilities of the Department of Labor and Economic Growth (DLEG).**

agents is designated as a qualifying member. The Department may issue a registration to the qualifying member if he or she fulfills the requirements of Article 29. The qualifying member will be responsible for supervising and controlling the activities regulated by Article 29 to assure full compliance with the article and any rules promulgated under it.

The Department must suspend, revoke, or deny an entity's registration when the qualifying member's registration is suspended, revoked, or denied. If the qualifying member of a registrant stops being its qualifying member, the entity's registration will be automatically suspended. Upon request, however, DLEG may permit the registration to remain in force for 60 days to allow the qualifying of a new qualifying member.

Registration Criteria; Place of Business

The bill requires DLEG to issue a registration to an individual or the qualifying member of a legal entity who meets all of the following requirements:

- Has either two years of apprentice experience with a registered auctioneer or proof of graduation from an accredited auction school acceptable to the Board of Auctioneers and one year of apprentice experience with a registered auctioneer.
- Has actively participated in the conduct of at least 10 auctions, verified by an affidavit of a registered auctioneer providing the names and addresses of the parties on whose behalf the auction was held and the dates of the auction.
- Has completed an examination (as described below).
- Is of good moral character.

Notwithstanding these requirements, DLEG must register as an auctioneer an individual who applies within two years of the bill's effective date and submits to the Department an affidavit attesting to at least three years' experience in the conduct of auctions before the bill's effective date, if the individual has conducted at least 12 auctions. The Department must verify the applicant's experience.

A registered auctioneer must maintain a regular place of business in this State. Records required to be kept under Article 29

must be kept at that regular place of business. If an auctioneer maintains more than one place of business, DLEG must issue a duplicate registration at no additional cost. A regular place of business does not include a location used only as a warehouse.

A registrant must conspicuously post a copy of the registration issued under Article 29 at the regular place of business.

The term of a registration will commence on October 1.

Written Contract & Record of Sale

The bill prohibits a registered auctioneer from conducting an auction unless he or she executes a written contract with the person desiring auction services. A registrant must keep a written copy of the contract as part of his or her records and, upon request, make them available to DLEG for inspection and/or audit during normal business hours.

The bill requires a registrant to maintain written records of each auction sale for a period of at least three years from the date of the sale or at least three years from consummation or termination of the transaction, whichever is later. The records must include consignment receipts, bidder registrations, and documents relating to final settlements with consignors.

Trust Account

The bill states that money paid by a person to a registrant in connection with an auction under Article 29 is considered to be held in trust for the benefit of the person making the payment, and the registrant is considered the trustee for the money.

The bill requires a registrant to establish a trust account, or other segregated type of account, and deposit into it all checks, drafts, negotiable instruments, and cash tendered by one or more buyers for the payment of an item sold by auction. The registrant must make disbursements relative to a sale by auction through that account in the time period and manner described in the bill.

A registrant may not permit an advance payment of money by a customer to be deposited in the registrant's business or personal account or to be commingled in any

way with the registrant's own funds, except as otherwise provided. The registrant must deposit customer money into a trust account within two days after the auction transaction but not later than five days after its receipt, until the transaction involved is consummated or terminated.

The trust account may be an interest-bearing account maintained in a depository recognized by DLEG. Interest accrued must be allocated as provided for in the contract between the parties. (The bill defines "depository" as a State- or nationally-chartered bank, savings and loan association, savings bank, or credit union whose deposits are insured by an agency of the United States government.)

The account must designate the registrant as the trustee or custodian, must provide for withdrawal of money without previous notice, and may not be encumbered in any manner. The account may not contain any of the registrant's money except for an amount sufficient to pay service charges on the account or to maintain the account when customer money is not on deposit. That amount may not exceed \$500.

Disbursements from the trust account may be made only for the following purposes:

- Payment as a result of the sale of an item by the registrant pursuant to the contract.
- Refund of an amount to the customer upon termination of the transaction.
- Payment to the registrant of a commission and documented and approved expenses following the consummation of a transaction.

The registrant must keep records of money deposited in the account. The records must show all of the following:

- The date of the receipt of money from a customer, the amount received, and the name of the customer on whose behalf the money was paid.
- The purpose for which the money was paid.
- The date the money was deposited in the account.
- The date of disbursement of the money, the purpose of the withdrawal, and the name of the person to whom the money was paid upon disbursement.

- Any other pertinent information regarding the transaction.

Upon giving notice to a registrant, DLEG and the Board of Auctioneers may inspect and/or audit these records or other relevant documents.

Ledgers

The bill requires a registrant to create, electronically or otherwise, a cash receipts and disbursements journal and ledgers. The ledgers must be maintained separately for each transaction and contain the following:

- The names of both parties.
- Postings of all transactions.
- The date of each transaction, in chronological sequence.
- The amount received and/or disbursed; the name of the party giving money; the name of the principal or payee; and the purpose of disbursements.
- Check numbers of disbursements.
- A running balance after each receipt and disbursement.
- A description of the property being sold.

A registrant also must create, electronically or otherwise, and maintain a personal money ledger to account for personal money maintained in the trust account. This ledger must include the following:

- The chronological sequence of funds received and disbursed.
- A running balance after each receipt and disbursement.
- Receipt postings, including the date of receipt, date of deposit, name of the party giving money, name of the principal, and amount received.
- Disbursement postings, including the date; check number, if applicable; payee; amount; purpose; and a running balance after each receipt and disbursement.

The ledgers and journals, as well as trust account bank statements, deposit tickets, and copies of deposit receipts, canceled checks, and voided checks must be maintained for at least three years from the date of inception of the records or from the consummation or termination of the transaction, whichever is later.

Auctioneer Examination; Nonresidents

The bill requires DLEG and the Board of Auctioneers to develop an examination for registration applicants in the manner specified in Section 316 of the Code. (That section requires a board and DLEG to develop an examination or test required by an article. The board and DLEG must give special emphasis to an alternative form of testing that permits a person to demonstrate qualifications that may not be evident under a written examination. The board and DLEG may adopt an examination or test prepared by another agency if it serves as a basis for determining whether a person has the knowledge and skills to perform an occupation with competence.)

In developing the examination, DLEG and the Board must consult with and accept advice from prominent industry and trade groups. The Department may adopt all or part of any existing examinations developed by industry and trade groups.

The examination must include at least the following subject matter:

- The provisions of Article 29.
- Ethics and ethical practices as they relate to the business of conducting auctions.
- Record-keeping.
- Elementary mathematics.
- Elementary principles of real estate and personal property economics.
- Elementary principles of the law regarding bulk sales, deeds, mortgages, contracts of sale, agency, leases, auctions, and brokerage.

The Department must administer the examinations at least quarterly, and may administer them more frequently if the Board determines that more frequent administration is warranted.

The Department must issue a registration without examination to a nonresident individual who, at the time of application, is licensed, registered, certified, or otherwise regulated by another state, if the Board determines that the requirements of that state are substantially the equivalent of the requirements of Article 29 and if that state offers similar registration on a reciprocal basis to registrants under Article 29.

A nonresident applicant must file with DLEG an irrevocable consent to service of process, signed by the registrant. A process or pleading served upon DLEG will be sufficient service upon the registrant. The process or pleading must be in duplicate, and the Department immediately must serve a copy by first-class mail to the registrant's last known address.

Sanctions & Penalties

A registrant who commits any of the following acts will be subject to the sanctions and penalties specified in Article 6:

- Fails to enter into a written contract with a seller or consignor before placing or authorizing any advertising for an auction.
- Fails to reduce to writing or fails to issue any appropriate documentation relative to an auction-related transaction.
- Fails to use or issue payment appropriately from a trust fund.
- Is involved in capping, shilling, or steering relative to an auction.
- Fails to disclose his or her registration number on all advertising.
- Fails to account for all money deposited into a trust account.
- Fails to account for or remit money belonging to others that comes into the registrant's possession.
- Fails to deposit money belonging to others, in compliance with the bill.
- Fails to establish and maintain records as required by Article 29.
- Knowingly misrepresents the nature or value of an item being auctioned.
- Violates the requirements of Article 29 or a rule promulgated under it.

(Sanctions under Article 6 include the suspension, denial, or revocation of a license or certificate of registration, the placement of limits on a license or certificate of registration, censure, probation, an administrative fine of up to \$10,000, and payment of restitution.)

Senate Bill 604

The bill establishes the following fees for an individual registered or seeking registration as an auctioneer under the Occupational Code:

Application processing for registered auctioneer	\$50
Examination fee for registered auctioneer	\$50
Annual registration fee for auctioneer (individual)	\$200
Annual registration fee for auctioneer (firm)	\$200

MCL 339.303a et al. (S.B. 603)
338.2228 (S.B. 604)

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

Currently, over three dozen states--including those surrounding Michigan--require auctioneers to be licensed, according to the Michigan State Auctioneers Association. Michigan, however, does not require either licensure or registration of auctioneers conducting business in the State (except those conducting livestock, motor vehicle, or watercraft auctions). In addition, according to DLEG, local requirements relating to auction sales are frequently ignored and seldom enforced. Reportedly, this lack of regulation has led to a situation in which out-of-State auctioneers will sometimes travel to Michigan to hold weekend auctions. Buyers and sellers who work with an out-of-State auctioneer have no way of knowing whether the auctioneer is reputable or is complying with the law while conducting the auction. Unethical or illegal behavior by auctioneers, whether they hail from Michigan or another state, blemishes the reputation of all auctioneers and makes sellers and bidders less likely to do business in Michigan. By giving Michigan auctioneers the opportunity to be registered, the bills should increase public confidence in auctions conducted by registered auctioneers. To be registered, an auctioneer will need to pass an exam and comply with specified requirements in conducting business, including requirements for contracts, record-keeping, and trust accounts.

Additionally, the Michigan State Auctioneers Association has reported that, if Michigan begins to register its auctioneers, other states have agreed to provide reciprocity for them. If granted reciprocity, registered Michigan auctioneers will be allowed to

conduct auctions in the granting state without seeking a separate license there. Without reciprocity, Michigan auctioneers are at a competitive disadvantage to their out-of-State counterparts, who may conduct auctions in Michigan almost without limitation.

Opposing Argument

While Senate Bill 603 might provide consumer protection for sellers and buyers who attend auctions conducted by registered auctioneers, it will do nothing to prevent out-of-State auctioneers from coming into Michigan for a weekend, conducting an auction, and then leaving the State without paying their taxes or fulfilling their obligations to buyers or sellers. Registered auctioneers will be subject to penalties if they violate Article 29 or rules promulgated under it, but unscrupulous auctioneers who are not registered will not be penalized.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

These bills will require the Department of Labor and Economic Growth to set up a registration program for auctioneers and auction companies, including the administration of exams and enforcement for noncompliance. The bills create a new Board of Auctioneers and set registration standards for the profession. Senate Bill 604 also creates a fee structure to offset the costs to the Department for performing these new responsibilities. According to the Department, the cost of regulating the estimated 800 applicants/registrants in the first year will be approximately \$169,000, and the revenue that will be generated for the same number under the new fee schedule is approximately \$205,000 for that year.

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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.