

HOUSE BILL No. 6174

May 22, 2008, Introduced by Rep. Farrah and referred to the Committee on Regulatory Reform.

A bill to amend 1998 PA 57, entitled

"An act to require contractors to provide certain notices to governmental entities concerning improvements on real property; to allow for the modification of contracts for improvement to real property; to provide for remedies; and to repeal acts and parts of acts,"

by amending sections 1, 2, 3, 4, and 5 (MCL 125.1591, 125.1592, 125.1593, 125.1594, and 125.1595).

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. As used in this act:

2 (A) "CONSTRUCTION MANAGER" MEANS AN INDIVIDUAL, SOLE
3 PROPRIETORSHIP, PARTNERSHIP, CORPORATION, LIMITED LIABILITY
4 COMPANY, JOINT VENTURE, OR OTHER LEGAL ENTITY, THAT, PURSUANT TO AN
5 ENGAGEMENT BY A GOVERNMENTAL ENTITY AND ACTING PRIMARILY IN AN

1 ADMINISTRATIVE OR MANAGERIAL CAPACITY, PROCURES AND ENTERS INTO 1
2 OR MORE CONTRACTS FOR THE CONSTRUCTION, ALTERATION, DEMOLITION, OR
3 REPAIR OF AN IMPROVEMENT.

4 (B) ~~(a)~~-"Contractor" means a person who contracts with a
5 governmental entity **OR CONSTRUCTION MANAGER** to improve real
6 property. ~~or perform or manage construction services.~~ Contractor
7 does not include a person licensed **AS AN ARCHITECT, PROFESSIONAL**
8 **ENGINEER, OR PROFESSIONAL SURVEYOR** under article 20 of the
9 occupational code, 1980 PA 299, MCL 339.2001 to 339.2014.

10 (C) ~~(b)~~-"Governmental entity" means the state, a county, city,
11 township, village, public educational institution, or any political
12 subdivision thereof.

13 (D) ~~(c)~~-"Improve" means to build, alter, repair, or demolish
14 an improvement upon, connected with, or beneath the surface of any
15 real property, to excavate, clear, grade, fill, or landscape any
16 real property, to construct driveways and roadways, or to perform
17 labor upon improvements.

18 (E) ~~(d)~~-"Improvement" includes, but is not limited to, all or
19 any part of any building, structure, erection, alteration,
20 demolition, excavation, clearing, grading, filling, landscaping,
21 trees, shrubbery, driveways, and roadways on real property, **THAT IS**
22 **PAID BY PUBLIC FUNDS OR BY SPECIAL ASSESSMENT.**

23 (F) ~~(e)~~-"Person" means an individual, corporation,
24 partnership, association, **LIMITED LIABILITY COMPANY**, governmental
25 entity, or any other legal entity.

26 (G) ~~(f)~~-"Real property" means the real estate that is
27 improved, including, but not limited to, lands, leaseholds,

1 tenements, hereditaments, and improvements placed on the real
2 property.

3 Sec. 2. A contract between a contractor and a governmental
4 entity **OR A CONSTRUCTION MANAGER ACTING FOR OR ON BEHALF OF A**
5 **GOVERNMENTAL ENTITY** for an improvement that exceeds \$75,000.00
6 shall contain all of the following provisions:

7 (a) That if a contractor discovers 1 or both of the following
8 physical conditions of the surface or subsurface at the improvement
9 site, before disturbing the physical condition, the contractor
10 shall promptly notify the governmental entity **OR CONSTRUCTION**
11 **MANAGER** of the physical condition in writing:

12 (i) A subsurface or a latent physical condition at the site is
13 differing materially from those indicated in the improvement
14 contract.

15 (ii) An unknown physical condition at the site is of an unusual
16 nature differing materially from those ordinarily encountered and
17 generally recognized as inhering in work of the character provided
18 for in the improvement contract.

19 (b) That if the governmental entity **OR CONSTRUCTION MANAGER**
20 receives a notice under subdivision (a), the governmental entity
21 shall promptly investigate the physical condition.

22 (c) That if the governmental entity determines that the
23 physical conditions do materially differ and will cause an increase
24 or decrease in costs or additional time needed to perform the
25 contract, the governmental entity's determination shall be made in
26 writing and an equitable adjustment shall be made **TO THE**
27 **CONTRACTOR'S PRICE AND TIME FOR THE IMPROVEMENT** and ~~the~~ **ITS**

1 contract modified in writing accordingly.

2 (d) That the contractor cannot make a claim for additional
3 costs or time because of a physical condition unless the contractor
4 has complied with the notice requirements of subdivision (a). The
5 governmental entity **OR CONSTRUCTION MANAGER** may extend the time
6 required for notice under subdivision (a).

7 **(E) THAT THE IMPROVEMENT CONTRACT SHALL BE CONSIDERED TO**
8 **INCLUDE INFORMATION REPRESENTING, DEPICTING, DESCRIBING, OR**
9 **CONCERNING PHYSICAL CONDITIONS PRESENT ON, IN, OR UNDER THE SITE OF**
10 **THE PROPOSED IMPROVEMENT, OR INFORMATION FROM WHICH SUCH CONDITIONS**
11 **CAN BE REASONABLY DERIVED, WHICH THE GOVERNMENTAL ENTITY,**
12 **CONSTRUCTION MANAGER, OR ITS REPRESENTATIVE PROVIDED OR OFFERED FOR**
13 **INSPECTION TO THE BIDDERS PRIOR TO THE SUBMISSION OF BIDS,**
14 **NOTWITHSTANDING ANY DISCLAIMER OR DISAVOWAL OF SUCH INFORMATION**
15 **ELSEWHERE IN THE IMPROVEMENT CONTRACT.**

16 **(F)** ~~(e)~~ That the contractor cannot make a claim for an
17 adjustment under the contract after the contractor has received the
18 final payment under the contract.

19 ~~Sec. 3. (1) If the contractor does not agree with the~~
20 ~~governmental entity's determination, with the governmental entity's~~
21 ~~consent the contractor may complete performance on the contract.~~

22 ~~—— (2) At~~ **IN LIEU OF LITIGATION IN A COURT OF COMPETENT**
23 **JURISDICTION AND AT** the option of the governmental entity, **THE**
24 **CONSTRUCTION MANAGER, OR THE CONTRACTOR,** the contractor and the
25 governmental entity **OR CONSTRUCTION MANAGER** shall arbitrate the
26 contractor's entitlement to recover the actual increase in contract
27 time and costs incurred because of the physical condition of the

1 improvement site. The arbitration shall be conducted in accordance
2 with the rules of the American arbitration ~~association~~
3 **ASSOCIATION'S CONSTRUCTION INDUSTRY ARBITRATION RULES AND MEDIATION**
4 **PROCEDURES**, and ~~judgment~~**THE DECISION** rendered may be entered in
5 any court having jurisdiction **OVER THE MATTER**.

6 Sec. 4. (1) If an improvement contract does not contain the
7 provisions required under section 2, the provisions shall be
8 incorporated into and considered part of the improvement contract.

9 (2) **ANY PROVISION CONTAINED IN THE IMPROVEMENT CONTRACT THAT**
10 **PURPORTS TO WAIVE, RELEASE, OR EXTINGUISH THE RIGHTS OF A**
11 **CONTRACTOR TO RECOVER COSTS OR DAMAGES FOR UNREASONABLE DELAY IN**
12 **PERFORMING THE IMPROVEMENT CONTRACT, EITHER ON HIS OR HER BEHALF OR**
13 **ON BEHALF OF HIS OR HER SUBCONTRACTOR, IF AND TO THE EXTENT THE**
14 **DELAY IS CAUSED BY THE ACTS OR OMISSIONS OF THE GOVERNMENTAL ENTITY**
15 **OR CONSTRUCTION MANAGER, ITS AGENTS, OR EMPLOYEES AND DUE TO CAUSES**
16 **WITHIN THEIR CONTROL, SHALL BE VOID AND UNENFORCEABLE AS AGAINST**
17 **PUBLIC POLICY.**

18 Sec. 5. This act does not limit the rights or remedies
19 otherwise available to a contractor or the governmental entity **OR**
20 **CONSTRUCTION MANAGER** under any other law or statute.

21 Enacting section 1. (1) This amendatory act takes effect
22 January 1, 2009.

23 (2) This amendatory act applies to any contracts entered into
24 on or after January 1, 2009.

25 Enacting section 2. This amendatory act does not take effect
26 unless all of the following bills of the 94th Legislature are
27 enacted into law:

1 (a) Senate Bill No. _____ or House Bill No. 6176 (request no.
2 04828'07).

3 (b) Senate Bill No. _____ or House Bill No. 6175 (request no.
4 04829'07).

5 (c) Senate Bill No. _____ or House Bill No. 6173 (request no.
6 04831'07).