

ORIGINAL       UPDATED  
 CORRECTED       SUPPLEMENTAL

FISCAL ESTIMATE  
DOA-2048 N(R10/94)

Subject Relating to the expenditure of \$1,277,306 from moneys appropriated to the department of transportation for payment of a claim against the State made by James Cape and Sons Company

Fiscal Effect

State:  No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation       Increase Existing Revenues
- Decrease Existing Appropriation       Decrease Existing Revenues
- Create New Appropriation

Increase Costs - May be possible to Absorb Within Agency's Budget     Yes     No

Decrease Costs

Local:  No local government costs

- |   |   |  |
|---|---|--|
| <p>1. <input type="checkbox"/> Increase Costs<br/>    <input type="checkbox"/> Permissive    <input type="checkbox"/> Mandatory</p> <p>2. <input type="checkbox"/> Decrease Costs<br/>    <input type="checkbox"/> Permissive    <input type="checkbox"/> Mandatory</p> | <p>3. <input type="checkbox"/> Increase Revenues<br/>    <input type="checkbox"/> Permissive    <input type="checkbox"/> Mandatory</p> <p>4. <input type="checkbox"/> Decrease Revenues<br/>    <input type="checkbox"/> Permissive    <input type="checkbox"/> Mandatory</p> | <p>5. Types of Local Governmental Units Affected:<br/><input type="checkbox"/> Towns      <input type="checkbox"/> Villages      <input type="checkbox"/> Cities<br/><input type="checkbox"/> Counties    <input type="checkbox"/> Others _____<br/><input type="checkbox"/> School Districts      <input type="checkbox"/> WTCS Districts</p> |
|---|---|--|

Fund Sources Affected

GPR    FED    PRO    PRS    SEG    SEG-S

Affected Ch. 20 Appropriations

20.395(3)(bq), (br) or (bx) or any combination thereof

Assumptions Used in Arriving at Fiscal Estimate:

The bill directs WISDOT to pay \$1,277,306.00 to James Cape and Sons Company (Cape) relating to a contract for highway work. The same bill was introduced as 1997 AB 973. That bill was drafted May 5, 1998, when neither WISDOT nor the Claims Board had made any recommendation with respect to this claim. That bill was introduced May 13, 1998; the Claims Board held a hearing on the claim May 14, 1998. WISDOT submitted its written position and analysis of the claim to the Claims Board on the same date as a result of accelerated scheduling of the hearing at the request of Cape. Under sec. 16.007(1), Stats., "No claim or bill relating to such a claim shall be considered by the legislature until a recommendation thereon has been made by the Claims Board." In State v. P.G. Miron Const. Co. Inc., 181 Wis.2d 1045, 1053 (1994), the Supreme Court stated,

"Under sec. 16.007, a party may present a claim to the state claims board, which first holds a hearing and then makes a recommendation to the legislature to grant or deny the claim. If the legislature refuses to allow a claim against the state, the claimant may then under s. 775.01, bring an action against the state." (Emphasis added.)

The Claims Board orally denied the claim at the hearing on the same date, May 14, 1998. The final extraordinary session of the Legislature had already ended May 13, 1998. The written recommendation of the 1997-1998 Claims Board denying the claim was made May 27, 1998. Under sec. 775.01, Stats.,

"Upon refusal of the legislature to allow a claim against the state the claimant may commence an action against the state by service as provided in s. 801.11(3) and by filing with the clerk of court a bond, not exceeding \$1,000, with 2 or more sureties, to be approved by the attorney general, to the effect that the claimant will indemnify the state against all costs that may accrue in such action and pay to the clerk of court all costs, in case the claimant fails to obtain judgment against the state."

Cape filed suit against the State in Dane County Circuit Court on Aug. 28, 1998 demanding payment of "\$1,277,306.00, plus interest, costs and attorney's fees incurred in this matter, and any other additional relief." On November 6, 1998, the State filed a Motion to Dismiss the claim because Cape had failed to satisfy these conditions precedent to filing suit against the State. The State's brief was submitted Jan. 4, 1999. Cape's response is due Feb. 3, 1999. The Claims Board is created under sec. 15.105(2), Stats., as follows:

"Claims board. There is created a claims board, attached to the department of administration under s. 15.03, consisting of a representative of the office of the governor designated by the governor, a representative of the department of administration designated by the secretary of administration, a representative of the department of justice designated by the attorney general and the chairpersons of the senate and assembly committees on finance or their designees appointed at the commencement of each legislative biennium from the membership of their respective committees on finance." (Emphasis added.)

The Claims Board for the 1999-2000 session has not been presented this claim, has not held a hearing on this claim, and has not made a recommendation to the Legislature to grant or deny this claim in 1999 Assembly Bill 38, introduced Jan. 19, 1999, as is required by law.

Long-Range Fiscal Implications:

In all likelihood, Cape will oppose the State's motion to dismiss Cape's pending claim in Dane County Circuit Court and argue in its brief on Feb. 3, 1999, that this 1999 bill somehow perfects Cape's previous defective claim, even though Cape did not comply with and has not complied with the order of remedies prescribed by statute before commencing this action against the State.

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