A BILL ENTITLED

AN ACT concerning

Construction Contract Clauses – Change Orders
(State Procurement Change Order Fairness Act)

FOR the purpose of requiring each State procurement contract for construction to include a change order clause that prohibits a contractor from requiring a subcontractor to complete work under a change order except under certain circumstances, allows a prime contractor or subcontractor to stop work under certain circumstances, requires a prime contractor to include in its subcontracts a certain clause, and prohibits certain persons from taking certain action under certain circumstances; applying the change order clause requirement to certain procurements and units of State government that are generally excluded from State procurement law; requiring a contractor to pay a subcontractor an undisputed amount to which the subcontractor is entitled within a certain number of days of receiving a payment for a change order or additional work; providing that a certain catchline is not law and may not be considered to have been enacted as part of this Act; and generally relating to required contract clauses for State procurement contracts for construction.

BY repealing and reenacting, without amendments,
Article – State Finance and Procurement
Section 11–203(a) and (e)(1) and (2) and 15–226(a)
Annotated Code of Maryland
(2009 Replacement Volume and 2014 Supplement)

BY repealing and reenacting, with amendments,
Article – State Finance and Procurement
Section 11–203(b)(1), (c), (e)(5), and (h) and 15–226(c)
Annotated Code of Maryland
(2009 Replacement Volume and 2014 Supplement)

BY adding to
Article – State Finance and Procurement

11–203.

(a) Except as provided in subsection (b) of this section, this Division II does not apply to:

(1) procurement by:

(i) the Blind Industries and Services of Maryland;

(ii) the Maryland State Arts Council, for the support of the arts;

(iii) the Maryland Health and Higher Educational Facilities Authority, if no State money is to be spent on a procurement contract;

(iv) the Maryland Industrial Training Program or the Partnership for Workforce Quality Program in the Department of Business and Economic Development, for training services or programs for new or expanding businesses or industries or businesses or industries in transition;

(v) the Maryland Food Center Authority, to the extent the Authority is exempt under Title 10, Subtitle 2 of the Economic Development Article;

(vi) the Maryland Public Broadcasting Commission:

1. for services of artists for educational and cultural television productions; or

2. when planning for or fulfilling the obligations of grants or cooperative agreements that support the educational and cultural activities of the Commission;

(vii) public institutions of higher education, for cultural, entertainment, and intercollegiate athletic procurement contracts;

(viii) the Maryland State Planning Council on Developmental Disabilities, for services to support demonstration, pilot, and training programs;
(ix) the Maryland Historical Trust for:

1. surveying and evaluating architecturally, archeologically, historically, or culturally significant properties; and

2. other than as to architectural services, preparing historic preservation planning documents and educational material;

(x) the University of Maryland, for University College Overseas Programs, if the University adopts regulations that:

1. establish policies and procedures governing procurement for University College Overseas Programs; and

2. promote the purposes stated in § 11–201(a) of this subtitle;

(xi) the Department of Business and Economic Development, for negotiating and entering into private sector cooperative marketing projects that directly enhance promotion of Maryland and the tourism industry where there will be a private sector contribution to the project of not less than 50% of the total cost of the project, if the project is reviewed by the Attorney General and approved by the Secretary of Business and Economic Development or the Secretary’s designee;

(xii) the Rural Maryland Council;

(xiii) the Maryland State Lottery and Gaming Control Agency, for negotiating and entering into private sector cooperative marketing projects that directly enhance promotion of the Maryland State Lottery and its products, if the cooperative marketing project:

1. provides a substantive promotional or marketing value that the lottery determines acceptable in exchange for advertising or other promotional activities provided by the lottery;

2. does not involve the advertising or other promotion of alcohol or tobacco products; and

3. is reviewed by the Attorney General and approved by the Maryland Lottery Director or the Director’s designee;

(xiv) the Maryland Health Insurance Plan established under Title 14, Subtitle 5 of the Insurance Article;

(xv) the Maryland Energy Administration, when negotiating or entering into grants or cooperative agreements with private entities to meet federal specifications or solicitation requirements related to energy conservation, energy efficiency, or renewable energy projects that benefit the State;
(xvi) the Maryland Developmental Disabilities Administration of the Department of Health and Mental Hygiene for family and individual support services, and individual family care services, as those terms are defined by the Department of Health and Mental Hygiene in regulation;

(xvii) the Department of General Services for the renovation of a structure that:

1. was built during the 18th or 19th century; and

2. is listed in or eligible for listing in the National Register of Historic Places; and

(xviii) the Department of Natural Resources, for negotiating or entering into grants, agreements, or partnerships with nonprofit entities related to conservation service opportunities;

(2) procurement by a unit from:

(i) another unit;

(ii) a political subdivision of the State;

(iii) an agency of a political subdivision of the State;

(iv) a government, including the government of another state, of the United States, or of another country;

(v) an agency or political subdivision of a government; or

(vi) a bistate, multistate, bicounty, or multicounty governmental agency; or

(3) procurement in support of enterprise activities for the purpose of:

(i) direct resale; or

(ii) remanufacture and subsequent resale.

(b) (1) The following provisions of this Division II apply to each procurement enumerated in subsection (a) of this section:

(i) § 11–205 of this subtitle (“Collusion”);

(ii) § 10–204 of this article (“Approval for designated contracts”);
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(iii) Title 12, Subtitle 2 of this article (“Supervision of Capital Expenditures and Real Property Leases”);

(iv) § 13–219 of this article (“Required clauses – Nondiscrimination clause”);

(V) § 13–218.2 OF THIS ARTICLE (“REQUIRED CLAUSES – CHANGE ORDERS”);

[(v)] (VI) § 13–221 of this article (“Disclosures to Secretary of State”);

[(vi)] (VII) Title 12, Subtitle 4 of this article (“Policies and Procedures for Exempt Units”);

[(vii)] (VIII) Title 16 of this article (“Suspension and Debarment of Contractors”); and

[(viii)] (IX) Title 17 of this article (“Special Provisions – State and Local Subdivisions”).

(c) Except as provided in Title 12, Subtitle 4 and Title 14, Subtitle 3 of this article AND EXCEPT FOR § 13–219.1 OF THIS ARTICLE, this Division II does not apply to the Maryland Stadium Authority.

(e) (1) In this subsection, “University” means the University System of Maryland, Morgan State University, or St. Mary’s College of Maryland.

(2) Except as otherwise provided in this subsection, this Division II does not apply to the University System of Maryland, Morgan State University, or St. Mary’s College of Maryland.

(5) (i) Except as provided in paragraph (7) of this subsection, the following provisions of Division II of this article apply to a University:

1. § 11–205 of this subtitle (“Collusion”);

2. § 11–205.1 of this subtitle (“Falsification, concealment, etc., of material facts”);

3. § 13–219 of this article (“Required clauses – Nondiscrimination clause”);

4. § 13–219.1 OF THIS ARTICLE (“REQUIRED CLAUSES – CHANGE ORDERS”);
[4.] 5. § 13–225 of this article (“Retainage”);

[5.] 6. Title 14, Subtitle 3 of this article (“Minority Business Participation”);

[6.] 7. Title 15, Subtitle 1 of this article (“Procurement Contract Administration”);

[7.] 8. § 15–226 of this article (“Policy established; timing of payments; notice upon nonpayment; disputes; appeals”); and

[8.] 9. Title 16 of this article (“Suspension and Debarment of Contractors”).

(ii) If a procurement violates the provisions of this subsection or policies adopted in accordance with this subsection, the procurement contract is void or voidable in accordance with the provisions of § 11–204 of this subtitle.

(h) (1) Except as provided in paragraph (2) of this subsection, this division does not apply to a public–private partnership under Title 10A of this article.

(2) To the extent otherwise required by law, the following provisions of this division apply to a public–private partnership under Title 10A of this article:

(i) § 11–205 of this subtitle (“Collusion”);

(ii) § 11–205.1 of this subtitle (“Falsification, concealment, etc. of material facts”);

(iii) Title 12, Subtitle 4 of this article (“Policies and Procedures for Exempt Units”);

(iv) § 13–219 of this article (“Required clauses – Nondiscrimination clause”);

(V) § 13–219.1 OF THIS ARTICLE (“REQUIRED CLAUSES – CHANGE ORDERS”);

[(v)] (VI) Title 17, Subtitle 1 of this article (“Security for Construction Contracts”);

[(vi)] (VII) Title 17, Subtitle 2 of this article (“Prevailing Wage Rates – Public Work Contracts”); and

[(vii)] (VIII) Title 18 of this article (“Living Wage”).
13–219.1. REQUIRED CLAUSES – CHANGE ORDERS.

(A) EACH STATE PROCUREMENT CONTRACT FOR CONSTRUCTION SHALL INCLUDE A CHANGE ORDER CLAUSE AS PROVIDED IN THIS SECTION.

(B) THE CHANGE ORDER CLAUSE SHALL:

(1) EXCEPT AS PROVIDED IN ITEM (2) OF THIS SUBSECTION, PROHIBIT THE STATE, A PRIME CONTRACTOR, AND, IN THE CASE OF A PUBLIC–PRIVATE PARTNERSHIP, THE PRIVATE ENTITY FROM REQUIRING A PRIME CONTRACTOR OR SUBCONTRACTOR TO:

(I) START WORK UNDER:

1. A STATE–ISSUED CHANGE ORDER; OR

2. IN THE CASE OF A PUBLIC–PRIVATE PARTNERSHIP, A CHANGE ORDER ISSUED BY THE PRIVATE ENTITY; OR

(II) START ANY ADDITIONAL WORK DIRECTED AND ACKNOWLEDGED BY THE STATE, THE PRIME CONTRACTOR, OR, IN THE CASE OF A PUBLIC–PRIVATE PARTNERSHIP, THE PRIVATE ENTITY THAT IS DETERMINED TO BE BEYOND THE ORIGINAL SCOPE OF THE CONTRACT;

(2) ALLOW THE STATE, THE PRIME CONTRACTOR, OR THE PRIVATE ENTITY TO REQUIRE A PRIME CONTRACTOR OR SUBCONTRACTOR TO START WORK THAT THE STATE, THE PRIME CONTRACTOR, OR THE PRIVATE ENTITY COULD NOT OTHERWISE REQUIRE THE PRIME CONTRACTOR OR SUBCONTRACTOR TO START UNDER ITEM (1) OF THIS SUBSECTION IF:

(I) THE STATE OR THE PRIVATE ENTITY HAS AGREED WITH THE PRIME CONTRACTOR AND, IF APPLICABLE, THE SUBCONTRACTOR ON A PRICE FOR THE CHANGE ORDER OR ADDITIONAL WORK; AND

(II) THE FISCAL AUTHORITY RESPONSIBLE FOR THE UNIT OR THE PRIVATE ENTITY HAS:

1. SET ASIDE FUNDS TO PAY FOR THE CHANGE ORDER OR ADDITIONAL WORK;

2. MADE A WRITTEN, BINDING COMMITMENT TO PAY FOR THE CHANGE ORDER OR ADDITIONAL WORK WITHIN 30 DAYS AFTER THE PRIME
CONTRACTOR SUBMITS AN INVOICE FOR THE CHANGE ORDER OR ADDITIONAL WORK
TO THE STATE OR THE PRIVATE ENTITY; AND

3. GIVEN WRITTEN NOTICE OF THE SET–ASIDE AND
BINDING COMMITMENT TO THE PRIME CONTRACTOR;

(3) IF THE STATE OR, IN THE CASE OF A PUBLIC–PRIVATE
PARTNERSHIP, THE PRIVATE ENTITY FAILS TO PAY FOR THE CHANGE ORDER OR
ADDITIONAL WORK IN THE MANNER COMMITTED TO UNDER ITEM (2)(II)2 OF THIS
SUBSECTION, ALLOW THE PRIME CONTRACTOR OR SUBCONTRACTOR TO STOP WORK
WITHOUT INCURRING ANY PENALTY OTHERWISE ALLOWED FOR UNDER THE
CONTRACT;

(4) REQUIRE A PRIME CONTRACTOR TO INCLUDE IN ITS
SUBCONTRACTS A CLAUSE THAT REQUIRES THE PRIME CONTRACTOR TO:

(I) WITHIN 5 BUSINESS DAYS OF RECEIPT OF THE NOTICE
REQUIRED UNDER ITEM (2)(II)3 OF THIS SUBSECTION, PROVIDE THE
SUBCONTRACTOR WITH A COPY OF THE APPROVED AMOUNT TO BE PAID TO THE
SUBCONTRACTOR BASED ON THE PORTION OF THE ADDITIONAL WORK TO BE
COMPLETED BY THE SUBCONTRACTOR;

(II) PAY THE SUBCONTRACTOR AN UNDISPUTED AMOUNT, AS
DEFINED BY § 15–226(A) OF THIS ARTICLE, TO WHICH THE SUBCONTRACTOR IS
ENTITLED WITHIN 10 DAYS OF RECEIPT OF PAYMENT FOR THE CHANGE ORDER OR
ADDITIONAL WORK FROM THE STATE OR THE PRIVATE ENTITY; AND

(III) IF THE PRIME CONTRACTOR WITHHOLDS PAYMENT FROM A
SUBCONTRACTOR:

1. NOTIFY THE SUBCONTRACTOR IN WRITING AND STATE
THE REASON WHY PAYMENT IS BEING WITHHELD; AND

2. PROVIDE A COPY OF THE NOTICE TO THE UNIT AND, IN
THE CASE OF A PUBLIC–PRIVATE PARTNERSHIP, THE PRIVATE ENTITY; AND

(5) PROHIBIT THE STATE, A PRIME CONTRACTOR, A
SUBCONTRACTOR, AND, IN THE CASE OF A PUBLIC–PRIVATE PARTNERSHIP, THE
PRIVATE ENTITY FROM DECLARING THE CONTRACT IN DEFAULT OR ASSESSING,
CLAIMING, OR PURSUING DAMAGES FOR DELAYS IN THE COMPLETION OF THE
CONSTRUCTION THAT ARE DUE TO THE INABILITY OF THE PARTIES TO AGREE ON A
PRICE FOR THE CHANGE ORDER OR ADDITIONAL WORK.
15–226.

(a) In this section, “undisputed amount” means an amount owed by a contractor to a subcontractor for which there is no good faith dispute, including any retainage withheld.

(c) (1) A contractor shall pay a subcontractor an undisputed amount to which the subcontractor is entitled within 10 days of receiving a progress or final payment OR PAYMENT FOR A CHANGE ORDER OR ADDITIONAL WORK from the State.

(2) If a contractor withholds payment from a subcontractor, within the time period in which payment normally would be made, the contractor shall:

   (i) notify the subcontractor in writing and state the reason why payment is being withheld; and

   (ii) provide a copy of the notice to the procurement officer.

SECTION 2. AND BE IT FURTHER ENACTED, That the catchline contained in this Act is not law and may not be considered to have been enacted as part of this Act.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 2015.