

HOUSE BILL 403

P2

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By: **Delegates Morhaim, Branch, Bromwell, Fennell, Glenn, Kipke, Krebs, Lam, McCray, Miele, W. Miller, Oaks, B. Robinson, Szeliga, Vaughn, Walker, and West**

Introduced and read first time: January 29, 2016

Assigned to: Health and Government Operations

A BILL ENTITLED

1 AN ACT concerning

2 **Construction Contracts – Change Orders**
3 **(State Procurement Change Order Fairness Act)**

4 FOR the purpose of prohibiting a unit from requiring a prime contractor, and a prime
5 contractor from requiring a subcontractor, to begin work under a contract until the
6 procurement officer for the unit issues a certain change order; providing, under
7 certain circumstances, that nothing in a certain provision of this Act prohibits a
8 procurement officer from issuing a certain order, authorizes a prime contractor to
9 refuse to perform certain work or furnish certain labor and materials, or prejudices
10 or impairs the right of a prime contractor to submit a certain claim or dispute to a
11 procurement officer; requiring, under certain circumstances, a unit to pay an invoice
12 for work performed and accepted under a change order within a certain time period
13 and in accordance with a certain provision of law; requiring a prime contractor to
14 provide, within a certain time period, a subcontractor with a copy of a certain change
15 order and a certain amount to be paid to the subcontractor; requiring the Board of
16 Public Works to propose certain regulations before a certain date; requiring each
17 unit to issue certain guidelines on or before a certain date; requiring that certain
18 guidelines be updated and reissued under certain circumstances; providing that
19 certain provisions of this Act have effect only to the extent that the provisions do not
20 conflict with federal law; applying certain provisions of this Act to certain
21 procurements and units of State government that are generally excluded from State
22 procurement law; providing for the application of certain provisions of this Act;
23 requiring the Secretary of General Services to convene a certain workgroup to
24 develop recommendations that address certain issues; requiring the workgroup to
25 include representatives from certain entities and to coordinate its activities with a
26 certain commission for a certain purpose; requiring the workgroup to report its
27 recommendations to certain committees of the General Assembly on or before a
28 certain date; providing that a certain catchline is not law and may not be considered
29 to have been enacted as part of this Act; providing for the effective dates of this Act;

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 and generally relating to change orders for State procurement contracts for
2 construction.

3 BY repealing and reenacting, without amendments,
4 Article – State Finance and Procurement
5 Section 11–203(a) and (e)(1), (2), and (5)
6 Annotated Code of Maryland
7 (2015 Replacement Volume)

8 BY repealing and reenacting, with amendments,
9 Article – State Finance and Procurement
10 Section 11–203(b)(1) and (c)
11 Annotated Code of Maryland
12 (2015 Replacement Volume)

13 BY adding to
14 Article – State Finance and Procurement
15 Section 15–112
16 Annotated Code of Maryland
17 (2015 Replacement Volume)

18 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
19 That the Laws of Maryland read as follows:

20 **Article – State Finance and Procurement**

21 11–203.

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

24 (1) procurement by:

25 (i) the Blind Industries and Services of Maryland;

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

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

29 (iv) the Maryland Industrial Training Program or the Partnership
30 for Workforce Quality Program in the Department of Economic Competitiveness and
31 Commerce, for training services or programs for new or expanding businesses or industries
32 or businesses or industries in transition;

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

1 (vi) the Maryland Public Broadcasting Commission:

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

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

7 3. for procurement contracts needed to implement the
8 repackaging requirements of the federal Spectrum Act;

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

11 (viii) the Maryland State Planning Council on Developmental
12 Disabilities, for services to support demonstration, pilot, and training programs;

13 (ix) the Maryland Historical Trust for:

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

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

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

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

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

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

29 (xii) the Rural Maryland Council;

30 (xiii) the Maryland State Lottery and Gaming Control Agency, for
31 negotiating and entering into private sector cooperative marketing projects that directly

1 enhance promotion of the Maryland State Lottery and its products, if the cooperative
2 marketing project:

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

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

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

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

12 (xv) the Maryland Energy Administration, when negotiating or
13 entering into grants or cooperative agreements with private entities to meet federal
14 specifications or solicitation requirements related to energy conservation, energy efficiency,
15 or renewable energy projects that benefit the State;

16 (xvi) the Maryland Developmental Disabilities Administration of the
17 Department of Health and Mental Hygiene for family and individual support services, and
18 individual family care services, as those terms are defined by the Department of Health
19 and Mental Hygiene in regulation;

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

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

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

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

28 (2) procurement by a unit from:

29 (i) another unit;

30 (ii) a political subdivision of the State;

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

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

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

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

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

7 (i) direct resale; or

8 (ii) remanufacture and subsequent resale.

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

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

12 (ii) § 10–204 of this article (“Approval for designated contracts”);

13 (iii) Title 12, Subtitle 2 of this article (“Supervision of Capital
14 Expenditures and Real Property Leases”);

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

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

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

20 **(VII) § 15–112 OF THIS ARTICLE (“CHANGE ORDERS”);**

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

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

25 (c) Except as provided in Title 12, Subtitle 4 and Title 14, Subtitle 3 of this article
26 **AND EXCEPT FOR § 15–112 OF THIS ARTICLE**, this Division II does not apply to the
27 Maryland Stadium Authority.

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

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

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

6 1. § 11–205 of this subtitle (“Collusion”);

7 2. § 11–205.1 of this subtitle (“Falsification, concealment,
8 etc., of material facts”);

9 3. § 13–219 of this article (“Required clauses –
10 Nondiscrimination clause”);

11 4. § 13–225 of this article (“Retainage”);

12 5. Title 14, Subtitle 3 of this article (“Minority Business
13 Participation”);

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

16 7. § 15–226 of this article (“Policy established; timing of
17 payments; notice upon nonpayment; disputes; appeals”); and

18 8. Title 16 of this article (“Suspension and Debarment of
19 Contractors”).

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

23 **15–112. CHANGE ORDERS.**

24 **(A) (1) EXCEPT AS PROVIDED IN PARAGRAPH (2) OF THIS SUBSECTION,**
25 **THIS SECTION APPLIES TO STATE PROCUREMENT CONTRACTS FOR CONSTRUCTION.**

26 **(2) THIS SECTION DOES NOT APPLY TO STATE PROCUREMENT**
27 **CONTRACTS FOR PUBLIC SCHOOL CONSTRUCTION OR PUBLIC SCHOOL CAPITAL**
28 **IMPROVEMENTS.**

29 **(B) (1) EXCEPT AS PROVIDED IN PARAGRAPH (2) OF THIS SUBSECTION, A**
30 **UNIT MAY NOT REQUIRE A PRIME CONTRACTOR AND A PRIME CONTRACTOR MAY NOT**
31 **REQUIRE A SUBCONTRACTOR TO BEGIN CHANGE ORDER WORK UNDER A CONTRACT**
32 **UNTIL THE PROCUREMENT OFFICER FOR THE UNIT ISSUES A WRITTEN CHANGE**

1 ORDER THAT SPECIFIES WHETHER THE WORK IS TO PROCEED ON AN AGREED-TO
2 PRICE, FORCE ACCOUNT, CONSTRUCTION CHANGE DIRECTIVE, OR TIME AND
3 MATERIALS BASIS IN COMPLIANCE WITH THE TERMS OF THE CONTRACT.

4 (2) IF A PROCUREMENT OFFICER AND A PRIME CONTRACTOR DO NOT
5 AGREE THAT WORK IS INCLUDED WITHIN THE ORIGINAL SCOPE AND TERMS OF A
6 CONTRACT, NOTHING IN THIS SECTION:

7 (I) PROHIBITS A PROCUREMENT OFFICER FROM ISSUING AN
8 ORDER TO A PRIME CONTRACTOR TO PERFORM WORK OR TO FURNISH LABOR OR
9 MATERIALS DETERMINED BY THE PROCUREMENT OFFICER TO BE REQUIRED BY A
10 CONTRACT BETWEEN A UNIT AND THE PRIME CONTRACTOR;

11 (II) AUTHORIZES A PRIME CONTRACTOR TO REFUSE TO
12 PERFORM WORK OR TO FURNISH LABOR OR MATERIALS THAT A PROCUREMENT
13 OFFICER HAS ORDERED THE PRIME CONTRACTOR TO PERFORM OR TO FURNISH
14 BECAUSE THE PROCUREMENT OFFICER HAS DETERMINED THAT THE WORK OR
15 LABOR IS OR THE MATERIALS ARE REQUIRED BY A CONTRACT BETWEEN A UNIT AND
16 THE PRIME CONTRACTOR; OR

17 (III) PREJUDICES OR IMPAIRS THE RIGHT OF A PRIME
18 CONTRACTOR TO SUBMIT A CLAIM OR DISPUTE TO A PROCUREMENT OFFICER, IN
19 ACCORDANCE WITH APPLICABLE LAW AND THE CONTRACT, SEEKING ADDITIONAL
20 COMPENSATION FOR COMPLYING WITH AN ORDER OF THE PROCUREMENT OFFICER
21 TO PERFORM WORK OR TO FURNISH LABOR OR MATERIALS DETERMINED BY THE
22 PROCUREMENT OFFICER TO BE REQUIRED BY A CONTRACT BETWEEN THE PRIME
23 CONTRACTOR AND A UNIT.

24 (C) IF THE AMOUNT TO BE PAID UNDER AN APPROVED CHANGE ORDER DOES
25 NOT EXCEED \$50,000, A UNIT SHALL PAY AN INVOICE FOR WORK PERFORMED AND
26 ACCEPTED UNDER THE CHANGE ORDER AS PROVIDED FOR IN THE CONTRACT
27 WITHIN 30 DAYS AFTER THE UNIT RECEIVES THE INVOICE AND IN ACCORDANCE
28 WITH § 15-103 OF THIS SUBTITLE.

29 (D) WITHIN 5 DAYS AFTER RECEIPT OF A WRITTEN CHANGE ORDER, A PRIME
30 CONTRACTOR SHALL PROVIDE A SUBCONTRACTOR WITH A COPY OF THE APPROVED
31 CHANGE ORDER AND THE AMOUNT TO BE PAID TO THE SUBCONTRACTOR BASED ON
32 THE PORTION OF THE CHANGE ORDER WORK TO BE COMPLETED BY THE
33 SUBCONTRACTOR.

34 (E) BEFORE JANUARY 1, 2017, THE BOARD SHALL PROPOSE REGULATIONS
35 THAT PROVIDE FOR AN EXPEDITED CHANGE ORDER PROCESS FOR CHANGE ORDERS
36 VALUED AT MORE THAN \$50,000.

1 **(F) (1) ON OR BEFORE DECEMBER 31, 2016, EACH UNIT SHALL ISSUE**
2 **GUIDELINES FOR THE UNIT'S CHANGE ORDER PROCESS.**

3 **(2) THE GUIDELINES ISSUED UNDER PARAGRAPH (1) OF THIS**
4 **SUBSECTION SHALL BE UPDATED AND REISSUED WHEN ANY CHANGES ARE MADE TO**
5 **THE UNIT'S CHANGE ORDER PROCESS.**

6 **(G) A PROVISION OF THIS SECTION HAS EFFECT ONLY TO THE EXTENT THAT**
7 **THE PROVISION DOES NOT CONFLICT WITH FEDERAL LAW.**

8 SECTION 2. AND BE IT FURTHER ENACTED, That:

9 (a) The Secretary of General Services shall convene a workgroup of stakeholders
10 to develop recommendations that address the following issues related to State procurement
11 for construction contracts:

12 (1) scope review process;

13 (2) termination for convenience;

14 (3) uniformity of change order practices and authority;

15 (4) prompt payment and interest;

16 (5) force account practice and policies;

17 (6) funding;

18 (7) contractor capacity; and

19 (8) any other issues that the workgroup determines to be relevant and
20 appropriate to address.

21 (b) The workgroup shall include representatives from:

22 (1) the Maryland Chapter of the Associated General Contractors of
23 America;

24 (2) the Associated Builders and Contractors of Metro Washington;

25 (3) the Alliance for Construction Excellence;

26 (4) the Coalition for Contracting Fairness;

27 (5) the Maryland Washington Minority Contractors Association; and

1 (6) any units of the State the Secretary of General Services deems
2 appropriate.

3 (c) The workgroup shall coordinate its activities with the One Maryland Blue
4 Ribbon Commission on Procurement to ensure consistency and avoid unnecessary
5 duplication in the recommendations reported under subsection (d) of this section.

6 (d) On or before December 31, 2016, the workgroup shall report its policy,
7 regulatory, and legislative recommendations to the Senate Education, Health, and
8 Environmental Affairs Committee and the House Health and Government Operations
9 Committee in accordance with § 2-1246 of the State Government Article.

10 SECTION 3. AND BE IT FURTHER ENACTED, That the catchline contained in
11 this Act is not law and may not be considered to have been enacted as part of this Act.

12 SECTION 4. AND BE IT FURTHER ENACTED, That Section 1 of this Act shall take
13 effect July 1, 2016.

14 SECTION 5. AND BE IT FURTHER ENACTED, That, except as provided in Section
15 4 of this Act, this Act shall take effect June 1, 2016.