

SB375_USM_FAV.pdf

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Position: FAV



SENATE BUDGET AND TAXATION COMMITTEE

Senate Bill 375

State Contracts – Prohibited Provisions

January 24, 2024

Favorable

Chair Guzzone, Vice Chair Rosapepe and members of the committee, thank you for allowing the University System of Maryland (USM) the opportunity to offer testimony on Senate Bill 375.

The USM is comprised of twelve distinguished institutions, and three regional centers. We award eight out of every ten bachelor's degrees in the State. Each of University USM's 12 institutions has a distinct and unique approach to the mission of educating students and promoting the economic, intellectual, and cultural growth of its surrounding community. These institutions are located throughout the state, from Western Maryland to the Eastern Shore, with the flagship campus in the Washington suburbs. The USM includes three Historically Black Institutions, comprehensive institutions and research universities, and the country's largest public online institution.

Our institutions have noticed an increase in vendors who refuse to amend and correct their form agreements. These agreements often include impermissibly broad indemnification clauses, binding dispute resolution clauses, and terms specifying the governing law or jurisdiction of another state or country. The problematic terms appear in contracts of all sizes, for both goods and services. Maryland state agencies, including USM and its institutions, are not permitted to accept the governing law of jurisdictions other than Maryland (and, when negotiating with federal agencies, U.S. federal law).

Though procurement and legal staff attempt to negotiate these terms and offer creative solutions such as addenda and side letters, negotiations are often protracted, and they regularly fail. In the case of click-through agreements, it is often difficult to identify a vendor representative willing to engage in discussions at all. When contract negotiations are unsuccessful, University academic and administrative priorities suffer. External parties often ask USM for a statutory citation to support our position that USM cannot accept the laws of other jurisdictions. A potential solution is to have an actual statute that USM attorneys can rely on during their negotiations with outside-the-state vendors.

In 2021, the Ohio state legislature followed up by enacting a statute which effectively resolved the issue for all state contracts. The Ohio statute includes a list of prohibited contract terms, and the following stipulation:

(C) If a contract contains a term or condition described in division (B) of this section, the term or condition is void ab initio, and the contract containing that term or condition otherwise shall be enforceable as if it did not contain such term or condition.

Ohio universities can now rely on the state statute for explicit authority, and as a defense when vendors refuse to negotiate. Some Ohio universities now include a reference to the statute in their standard contract terms (though, under the statute, such notice is not required). See, for example, [Ohio State](#):

Notwithstanding any other provision of the Agreement, SELLER acknowledges and agrees that the Agreement is subject to and governed by the provisions of Ohio Revised Code 9.27. and [Ohio University](#):

The parties herein acknowledge and understand that this Agreement is subject to Ohio Revised Code § 9.27 and that nothing herein shall be interpreted in a manner that would be inconsistent with the provisions of Ohio Revised Code § 9.27.

A similar statutory approach in Maryland could streamline the contracting process, significantly reduce the time legal and procurement staff spend negotiating small dollar agreements and reduce risk and potential litigation by ensuring that the most common problematic contract terms do not impact state agreements.

For these reasons, the USM urges a Favorable Report on Senate Bill 375.



Contact: Susan Lawrence, Vice Chancellor for Government Relations, slawrence@usmd.edu

SB375_Gartner testimony (final).pdf

Uploaded by: Jen Gartner

Position: FAV



SENATE BUDGET AND TAXATION COMMITTEE
Senate Bill 376 – State Contracts – Prohibited Provisions
January 24, 2024
Favorable Report (FAV)

Chair Senator Guy Guzzone, Vice-Chair Senator Jim Rosapepe, and members of the Budget and Taxation Committee,

Thank you for the opportunity to share our thoughts on Senate Bill 376. My name is Jen Gartner and I serve as Deputy General Counsel at the University of Maryland, College Park. I am here today representing the University but also speaking as a Maryland resident of District 47A. I have worked in the University's Office of General Counsel as an attorney for over ten years and negotiate contracts with the University's partners and vendors on a daily basis.

As a native Marylander and a contracts attorney for over twenty years, I am thrilled to be here with you today! I get the opportunity to help solve a problem my clients face daily, while saving the State money and increasing its efficiencies.

Over the past ten years, the University has noticed an increase in vendors and partner organizations who refuse to make changes to their boilerplate contracts. Contract terms that the University cannot accept, such as governing law of another state or broad indemnification provisions, appear in contracts of all sizes: \$500 procurements of goods and services, \$300,000 scientific research awards, and multi-million dollar clinical trial agreements.

These prohibited terms are also found in legally-binding "click-through" contracts that University personnel often need to accept in order to perform their University duties. For example, even laboratory equipment, such as an electron-scanning microscope, can require a faculty member to click "I accept" or "I agree" on the software used to operate the equipment. That click turns into a contract that legally binds the University to terms that are not acceptable for a State of Maryland agency, such as California governing law or mandatory and binding arbitration in Germany.

On contracts of all sizes, the University's procurement office, sponsored research office, and other contracting units can spend months negotiating over these prohibited terms. When it is possible for me to connect directly with an attorney at the other organization, I'm able to explain our legal rationale and we have been able to reach mutually-acceptable terms. In most cases, our negotiating partners simply want the University to identify a statute that prohibits the University from accepting these terms. If this bill becomes law, our contracting personnel will be able to point to it upon request. That simple step will save thousands of wasted hours and needless frustration for the University *and* our contracting partners every year. The same is true for the contracting personnel at other State agencies, and their contracting partners. This bill will maximize efficiency by allowing State personnel to focus on the substantive work of advancing the State's initiatives and serving the State's citizens.

This bill will also curb abusive practices by vendors. As one example, a vendor suddenly invoiced the University for overage charges based on a term that was unknown to the University at the time the contract was signed. The vendor refused to provide any support for the overage charges and threatened to

immediately stop work and initiate a lawsuit. Because the vendor provides a service that is critical to University operations, the University had no choice but to pay over \$80,000 in these overage charges. The vendor has continued to escalate its invoices, which now exceed \$250,000. A team of University personnel have spent over a year negotiating to maintain a critical service and avoid the vendor's threatened lawsuit. Had this law been in place, the University would have relied upon it to reject the vendor's unreasonable monetary demands. This is just one contract out of the hundreds that the University enters into each fiscal year. Imagine the cost savings not just for the University, but across all State agencies, if contracting personnel could rely on statutory authority to reject these unreasonable invoices and threats of litigation!

I have spoken with attorneys and contracting personnel at public universities in states that have adopted legislation similar to this bill. They have found it much easier and faster to negotiate agreements and reported better relationships with partners and vendors because negotiations do not drag on and require each party to involve attorneys.

A similar statutory approach in Maryland could streamline the contracting process, significantly reduce the time legal and contract personnel spend negotiating agreements (especially small- and zero-dollar ones), and reduce risk and potential litigation by ensuring that the most common problematic commercial contract terms do not impact State agreements.

Thank you for allowing me to share my thoughts regarding Senate Bill 376. I strongly urge a favorable report.

SB375 King Sponsor Testimony.pdf

Uploaded by: Senator Nancy King

Position: FAV

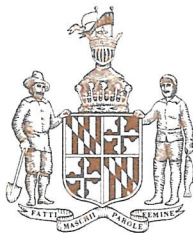
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MAJORITY LEADER

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THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

SPONSOR STATEMENT

Senate Bill 375 – State Contracts – Prohibited Provisions

January 24, 2024

Mister Chairman and Members of the Budget and Taxation Committee:

State agencies enter into hundreds of contracts and other legal agreements every year. Contracts with vendors and other organizations frequently contain numerous contract terms that Maryland agencies are not authorized to accept, such as the governing law of other states, broad indemnification terms, and binding arbitration. And many vendor contracts now incorporate terms found on vendor websites, which allows vendors to unilaterally modify contracts.

Over the past 10 years, vendors have become unwilling to change their boilerplate contract terms *unless* State contracting personnel can identify a statutory prohibition on certain contract terms.

Senate Bill 375 would provide precisely the type of statute that vendors have requested. Without such a statute in place, negotiations often take months and are not resolved until an attorney for the State agency is able to connect with an attorney for the vendor; even then, negotiations can fail. This is frustrating for all involved, including the vendor.

This bill will streamline the contracting process for all Maryland agencies, significantly reduce personnel time required to negotiate (sometimes hundreds of hours for zero-dollar contracts), reduce frustration for State personnel and vendors, and protect the State by reducing the risk of liability and litigation.

I respectfully request a favorable report on Senate Bill 375.

ABC_UNFAV_SB0375.pdf

Uploaded by: Martin Kraska

Position: UNF



The Voice of Merit Construction

January 24, 2024

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To: Senate Budget & Taxation Committee
From: Associated Builders & Contractors
RE: SB 375 - State Contracts - Prohibited Provisions
Position: Unfavorable

Associated Builders and Contractors (ABC) represent more than 1500 construction and construction-related companies through its four Maryland chapters. Our members believe in the tenants of free enterprise, investing in their workforce and giving back to the communities in which they live, work and play.

Senate Bill 375 prohibits State contracts from including specified provisions that generally restrict the power and rights of the State. If a contract includes a prohibited provision, the provision is void and the contract remains enforceable as if it did not contain the provision. A State contract that includes a prohibited provision is governed by and must be construed in accordance with State law, regardless of any term or condition to the contrary within the contract.

ABC is opposed to SB 375, while we acknowledge the intent of the legislation, we express concerns about the potential consequences of this legislation on contractors. Contractors, aware or unaware of heightened liabilities, may persist in bidding and signing contracts. This could escalate insurance expenses and potentially limit bonding access, given the State-centric tilt in owner-contractor agreements. The ripple effect through insurance and surety markets, exacerbated by losses impeding the equitable application of negligence and responsibility, would burden contractors with an increased share of responsibility over time.

ABC appreciates your consideration and, for these reasons, respectfully requests a **unfavorable** report on Senate Bill 375.

*Martin "MJ" Kraska
Government Affairs Director
Chesapeake Shores Chapter*

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Uploaded by: Ellen Robertson

Position: INFO



Wes Moore, Governor | Aruna Miller, Lt. Governor | Atif Chaudhry, Secretary

BILL: Senate Bill 375 - State Contracts - Prohibited Provisions

COMMITTEE: Senate Budget and Taxation

DATE: January 24, 2024

POSITION: Letter of Information

Upon review of Senate Bill 375 State Contracts - Prohibited Provisions, the Maryland Department of General Services (DGS) provides these comments for your consideration.

This bill prohibits certain provisions from being included in state contracts and would generally be favorable to the state. This would provide clarification and references from Procurement Officers to use during this process and limit the need to negotiate.

Additional mandatory contract provisions are being codified, which will provide statutory reference for Procurement Officers to use.

DGS conducts Statewide and agency specific procurements, and oversees procurements for Executive Branch Agencies for Architectural and Engineering Services, Commodities, Construction Services, Facilitates Maintenance, Information Technology and Professional Service to obtain services and products for the State. While this would be beneficial to the state as they negotiate contracts, it remains to be seen if it would detract potential bidders.

For additional information, contact Ellen Robertson at Ellen.Robertson@maryland.gov or 410-260-2908 or Lisa Nissley at Lisa.Nissley1@maryland.gov or 410-260-2922.