

Department of Legislative Services
Maryland General Assembly
2024 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 289

(Delegate Kerr, *et al.*)

Health and Government Operations

Budget and Taxation

State Contracts - Prohibited Provisions

This bill 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. The bill applies prospectively only and may not be applied to or interpreted to have any effect on or application to contracts executed before its effective date (or to renewals or extensions of such contracts).

Fiscal Summary

State Effect: None. The bill is procedural in nature and also generally conforms statute to current practice.

Local Effect: None. The bill applies only to State contracts.

Small Business Effect: Minimal.

Analysis

Bill Summary: A State contract is defined as any agreement entered into by the State. Except as required by State or federal law, a State contract may not contain a provision:

- that requires the State to indemnify, defend, or hold harmless another person without an appropriation of State funds for that purpose;

- by which the State agrees to binding arbitration or any other binding extrajudicial dispute resolution process;
- that names a jurisdiction or venue for any action or dispute against the State other than a court of proper jurisdiction in the State;
- that requires the State to agree to limit the liability for any direct loss to the State, as specified, or that would otherwise impose an indemnification obligation on the State;
- that requires the State to be bound by a term or condition that (1) is unknown to the State at the time of signing the contract; (2) may be unilaterally changed by the other party; or (3) is electronically accepted by a State employee without authority;
- that requires a person other than the Attorney General of Maryland to serve as legal counsel for the State, except as allowed under current law;
- that is inconsistent with the State's Open Meetings Act or Public Information Act;
- that binds the State to pay unappropriated amounts or otherwise causes the State to incur unfunded liabilities, as specified under State law;
- for automatic renewal that obligates the State to allocate funding in subsequent fiscal years; or
- that limits the State's ability to recover the cost of a replacement contractor.

Current Law: An officer or agent of the State charged with specified responsibilities may not:

- make or participate in making for any purpose a contract that purports to bind the State to pay any amount unless money has been appropriated for that purpose and remains unspent;
- create a deficiency; or
- incur a liability or spend money in excess of the applicable appropriation.

A State procurement contract must include several specific contract provisions. After the parties enter into a contract, they may include additional clauses in the contract by consent and without consideration. Each procurement contract must include clauses covering:

- termination for default;
- termination wholly or partly by the State for its convenience, as specified;
- variations that occur between estimated and actual quantities of work;
- liquidated damages, as appropriate;
- specified excuses for nonperformance;
- the unilateral right of the State to order in writing changes to the work and a temporary stop or delay in performance (not applicable for real property leases);

- the contractor’s obligation to comply with statutory political contribution reporting requirements; and
- nonvisual access for information technology.

In addition, construction contracts must allow for contract modifications and include requirements for the notice, submission, and resolution of contract claims in accordance with State law.

Additional Information

Recent Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: SB 375 (Senator King) - Budget and Taxation.

Information Source(s): State Board of Contract Appeals; Office of the Attorney General; Judiciary (Administrative Office of the Courts); Department of General Services; Board of Public Works; Maryland Department of Transportation; State Treasurer’s Office; Department of Legislative Services

Fiscal Note History: First Reader - January 19, 2024
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