
By: Delegates Poole, Benson, Clagett, Dypski, and Snodgrass

Introduced and read first time: January 26, 1996

Assigned to: Commerce and Government Matters

A BILL ENTITLED

1 AN ACT concerning

2 **State Procurement Law - Contract Claims Process**

3 FOR the purpose of modifying the time frame by which a procurement officer must give
4 notice of final action on a procurement protest or contract claim; requiring that a
5 claim under a procurement contract for construction be filed within a specified
6 interval; restricting recovery when a claim is not timely filed; requiring a person
7 charged with reviewing certain claims under a contract for construction to approve
8 certain payments under specified circumstances; requiring that a procurement
9 contract for construction include a certain provision; modifying circumstances under
10 which interest may be paid when a claim is filed under a contract for construction;
11 authorizing the Maryland State Board of Contract Appeals to require an agency to
12 pay a penalty to a contractor under specified circumstances; limiting the amount of
13 a penalty; providing for interest on a penalty; requiring the Governor to include a
14 certain amount in the budget bill in certain circumstances; and generally relating to
15 the State procurement process and contract management, claims processing, and
16 dispute resolution.

17 BY repealing and reenacting, with amendments,
18 Article - State Finance and Procurement
19 Section 13-218, 15-105, 15-217, 15-218, and 15-219
20 Annotated Code of Maryland
21 (1995 Replacement Volume and 1995 Supplement)

22 BY repealing and reenacting, without amendments,
23 Article - State Finance and Procurement
24 Section 15-104, 15-201, 15-215(a) and (b), and 15-220
25 Annotated Code of Maryland
26 (1995 Replacement Volume and 1995 Supplement)

27 BY adding to
28 Article - State Finance and Procurement
29 Section 15-222.1
30 Annotated Code of Maryland
31 (1995 Replacement Volume and 1995 Supplement)

2

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

3 **Article - State Finance and Procurement**

4 13-218.

5 (a) Each procurement contract shall include clauses covering:

6 (1) termination for default;

7 (2) termination wholly or partly by the State for its convenience if the head
8 of the primary procurement unit determines that termination is appropriate;

9 (3) variations that occur between estimated and actual quantities of work in
10 a procurement contract;

11 (4) liquidated damages, as appropriate;

12 (5) specified excuses for nonperformance; and

13 (6) except for real property leases, the unilateral right of the State to order
14 in writing:

15 (i) changes in the work, if the changes are within the scope of the
16 procurement contract; and

17 (ii) a temporary stop or delay in performance.

18 (b) In addition to the clauses required under subsection (a) of this section, a
19 procurement contract for construction shall include a clause providing for contract
20 modification if the condition of a site differs from the condition described in the
21 specifications.

22 (c) Each procurement contract shall include a clause that gives to the parties
23 notice that preexisting regulations apply to the procurement contract in accordance with
24 § 11-206 of this article.

25 (d) At any time after the parties enter into a procurement contract they may
26 include additional clauses in the procurement contract, by consent, without consideration.

27 (e) A clause required under this section for contract modification of or change
28 orders to a procurement contract for construction shall:

29 (1) make each contract modification or change order that affects the price
30 of the procurement contract subject to:

31 (i) prior written approval from the unit and any other person
32 responsible for the procurement contract; and

33 (ii) prior certification by the fiscal authority responsible for the unit
34 about:

35 1. the availability of money; and

4

1 (b) (1) "Contract claim" means a claim that relates to a procurement contract.

2 (2) "Contract claim" includes a claim about the performance, breach,
3 modification, or termination of the procurement contract.

4 15-217.

5 (a) (1) A prospective bidder or offeror, a bidder, or an offeror may submit a
6 protest to the procurement officer.

7 (2) A person who has been awarded a procurement contract may submit a
8 contract claim to the procurement officer.

9 (b) (1) [A] EXCEPT AS PROVIDED IN PARAGRAPH (2) OF THIS SUBSECTION,
10 A protest or contract claim shall be submitted within the time required under regulations
11 adopted by the primary procurement unit responsible for the procurement.

12 (2) A CONTRACTOR SHALL SUBMIT A CONTRACT CLAIM UNDER A
13 CONTRACT FOR CONSTRUCTION WITHIN 30 DAYS AFTER:

14 (I) RECEIVING A WRITTEN CHANGE ORDER OR CONTRACT
15 MODIFICATION THAT, IN THE CONTRACTOR'S VIEW, REQUIRES AN EQUITABLE
16 ADJUSTMENT UNDER THE CONTRACT; OR

17 (II) ANY OTHER ACTION BY THE PROCUREMENT OFFICER OR
18 AUTHORIZED AGENT OF THE UNIT THAT, IN THE CONTRACTOR'S VIEW,
19 CONSTITUTES A CHANGE ORDER OR CONTRACT MODIFICATION.

20 15-218.

21 (a) Except as provided under § 15-219 of this subtitle, a procurement officer who
22 receives a protest or a contract claim shall comply with this section.

23 (b) (1) On receipt of a protest or contract claim under § 15-217 of this subtitle,
24 a procurement officer:

25 (i) shall review the substance of the protest or contract claim;

26 (ii) may request additional information or substantiation through an
27 appropriate procedure;

28 (iii) may discuss with interested parties and, if appropriate, may
29 conduct negotiations with the person initiating the protest or contract claim; and

30 (iv) shall comply with any applicable regulations.

31 (2) Unless clearly inappropriate, the procurement officer shall seek the
32 advice of the Office of the Attorney General.

33 (c) (1) Subject to subsection (b) of this section and consistent with the State
34 budget and other applicable laws, the procurement officer shall:

35 (i) resolve the protest or contract claim by agreement of the parties;

36 (ii) wholly or partly deny the protest or contract claim; or

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1 (iii) wholly or partly grant the relief sought by the person who
2 submitted the protest or contract claim.

3 (2) The procurement officer promptly shall send the decision in writing to
4 the reviewing authority.

5 (d) Unless otherwise provided by regulation, the decision of the procurement
6 officer shall be reviewed promptly by:

7 (1) the head of the unit; and

8 (2) the head of the principal department or other equivalent unit of which
9 the unit is a part.

10 (e) (1) Except as provided under paragraph (3) of this subsection, the reviewing
11 authority shall approve, disapprove, or modify the decision of the procurement officer.

12 (2) The action of the reviewing authority under this subsection shall be the
13 final action of the unit.

14 (3) The reviewing authority may remand the proceeding with instructions to
15 the procurement officer.

16 (4) On remand, the procurement officer shall proceed under subsection (b)
17 of this section in accordance with those instructions.

18 (F) THE PROCUREMENT OFFICER WITHIN 90 DAYS AFTER RECEIVING A
19 PROTEST OR A CONTRACT CLAIM OR WITHIN A LONGER PERIOD TO WHICH THE
20 PARTIES AGREE SHALL GIVE THE CLAIMANT WRITTEN NOTICE OF THE FINAL
21 ACTION TAKEN UNDER THIS SECTION.

22 15-219.

23 (a) Within 30 days after submitting a notice of a contract claim under a
24 procurement contract for construction UNDER § 15-217 OF THIS SUBTITLE, a contractor
25 shall submit to the unit a written explanation that states:

26 (1) the amount of the contract claim;

27 (2) the facts on which the contract claim is based; and

28 (3) all relevant data and correspondence that may substantiate the contract
29 claim.

30 (b) (1) Subject to paragraph (2) of this subsection, the head of the unit engaged
31 in procurement of the construction shall review the contract claim.

32 (2) If the unit is part of a principal department or other equivalent unit, the
33 Secretary of the principal department or the equivalent official shall review the contract
34 claim, unless review has been delegated by regulation to the head of the unit.

35 (c) The person who reviews a contract claim under subsection (b) of this section
36 shall:

37 (1) investigate the contract claim; and

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1 (2) give the contractor written notice of a resolution of the contract claim
2 within [180] 90 days after receiving the contract claim or a longer period to which the
3 parties agree.

4 (D) RECOVERY UNDER A CONTRACT CLAIM FOR ANY EXPENSE INCURRED
5 MORE THAN 30 DAYS BEFORE THE REQUIRED SUBMISSION OF THE CLAIM UNDER §
6 15-217(B)(2) OF THIS SUBTITLE IS NOT ALLOWED.

7 (E) (1) IF THE PERSON WHO REVIEWS A CLAIM UNDER SUBSECTION (B) OF
8 THIS SECTION AGREES WITH ANY OF THE FACTS ON WHICH THE CONTRACT CLAIM
9 IS BASED BUT DISPUTES THE AMOUNT OF THE CLAIM, ON RECEIPT OF AN INVOICE,
10 THE PERSON SHALL APPROVE PAYMENT OF 80% OF THAT PORTION OF THE CLAIM
11 NOT IN DISPUTE AS ESTIMATED BY THE UNIT.

12 (2) PAYMENT SHALL BE MADE IN ACCORDANCE WITH THE TERMS
13 GOVERNING PROGRESS PAYMENTS UNDER THE CONTRACT.

14 [(d)] (F) (1) A decision not to pay a contract claim OR TO DENY PARTIAL
15 PAYMENT OF THE CLAIM is a final action for the purpose of appeal to the Appeals
16 Board.

17 (2) The failure to reach a decision within the time required under
18 subsection (c) of this section may be deemed, at the option of the contractor, to be a
19 decision not to pay the contract claim.

20 [(e)] (G) At the time of final payment, the unit shall:

21 (1) release the retainage due to the contractor; and

22 (2) pay any interest that:

23 (i) has accrued on the retainage from the time of payment of the
24 semifinal estimate; and

25 (ii) is due and payable to the contractor.

26 15-220.

27 (a) Except for a contract claim related to a lease for real property, a bidder or
28 offeror, a prospective bidder or offeror, or a contractor may appeal the final action of a
29 unit to the Appeals Board.

30 (b) An appeal under this section shall be filed:

31 (1) for a protest, within 10 days after receipt of the notice of a final action;

32 and

33 (2) for a contract claim, within 30 days after receipt of the notice of a final
34 action.

35 15-222.1.

36 (A) (1) NOTWITHSTANDING ANY PROVISION IN A PROCUREMENT
37 CONTRACT, THE APPEALS BOARD MAY ORDER AN AGENCY TO PAY A PENALTY TO A
38 CONTRACTOR IN ACCORDANCE WITH PARAGRAPH (2) OF THIS SUBSECTION IF THE

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1 APPEALS BOARD FINDS THAT, IN PROCESSING OR RENDERING A DECISION UNDER A
2 CONTRACT CLAIM, OR IN PROVIDING PARTIAL PAYMENT UNDER A CONTRACT FOR
3 CONSTRUCTION AS REQUIRED UNDER § 15-219(E) OF THIS SUBTITLE, THE
4 PROCUREMENT OFFICER OR OTHER RESPONSIBLE AGENCY PERSONNEL'S ACTION
5 WAS SO ARBITRARY OR CAPRICIOUS, FRAUDULENT, OR GROSSLY ERRONEOUS AS
6 TO NECESSARILY IMPLY BAD FAITH.

7 (2) A PENALTY PAYMENT AWARDED UNDER THIS SECTION MAY NOT
8 EXCEED 100% OF THE AMOUNT:

9 (I) AWARDED TO THE CONTRACTOR BY THE APPEALS BOARD ON
10 THE CONTRACT CLAIM;

11 (II) THAT SHOULD HAVE BEEN PAID UNDER § 15-219(E) OF THIS
12 SUBTITLE IF THE APPEALS BOARD FINDS THAT THE BAD FAITH EXTENDED SOLELY
13 TO THE ISSUE OF PARTIAL PAYMENT AS REQUIRED UNDER THAT SUBSECTION.

14 (B) (1) SUBJECT TO PARAGRAPH (3) OF THIS SUBSECTION, A PENALTY
15 PAYMENT AWARDED UNDER A DECISION BY THE APPEALS BOARD SHALL ACCRUE
16 INTEREST UNTIL THE DAY ON WHICH THE PENALTY IS PAID.

17 (2) THE RATE OF INTEREST UNDER THIS SECTION SHALL BE THE RATE
18 OF INTEREST ON JUDGMENTS AS PROVIDED UNDER § 11-107(A) OF THE COURTS
19 ARTICLE.

20 (3) IF A PENALTY IS REDUCED AS A RESULT OF A JUDICIAL REVIEW OF
21 THE DECISION OF THE APPEALS BOARD, INTEREST SHALL BE PAID ONLY ON THE
22 REDUCED PENALTY.

23 (C) IF THE AGENCY RESPONSIBLE FOR A PENALTY AWARDED UNDER THIS
24 SECTION LACKS ADEQUATE FUNDS TO PAY THE PENALTY, THE GOVERNOR SHALL
25 INCLUDE IN THE BUDGET BILL AN AMOUNT THAT IS ADEQUATE TO SATISFY, AFTER
26 THE EXHAUSTION OF THE RIGHTS OF APPEAL, THE PENALTY AND INTEREST THAT IS
27 RENDERED AGAINST THE AGENCY.

28 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
29 October 1, 1996.