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

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Assigned to: Commerce and Government Matters

Committee Report: Favorable with amendments

House action: Adopted

Read second time: March 20, 1996

CHAPTER ____

1 AN ACT concerning

2 **State Procurement Law - Construction Contracts - 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~~ notice concerning
5 the resolution of certain construction contract claims must be given; requiring that
6 a notice of a claim under a procurement contract for construction be filed within a
7 specified interval; restricting recovery when a notice of a claim ~~ora~~ claim is not
8 timely filed; requiring a ~~person charged with reviewing certain claims under a~~
9 ~~contract for construction to approve certain payments~~ unit to pay undisputed
10 amount under a contract claim under specified circumstances; requiring that a
11 procurement contract for construction include a certain provision; ~~modifying~~
12 ~~circumstances under which interest may be paid when a claim is filed under a~~
13 ~~contract for construction~~; ~~authorizing the Maryland State Board of Contract~~
14 ~~Appeals to require an agency to pay a penalty to a contractor under specified~~
15 ~~circumstances~~; ~~limiting the amount of a penalty~~; ~~providing for interest on a penalty~~;
16 ~~requiring the Governor to include a certain amount in the budget bill in certain~~
17 providing that the Maryland State Board of Contract Appeals may award a
18 contractor certain costs under limited circumstances; requiring the adoption of
19 certain regulations; and generally relating to the State procurement process as it
20 relates to construction contracts and contract management, claims processing, and
21 dispute resolution.

22 BY repealing and reenacting, with amendments,
23 Article - State Finance and Procurement
24 Section 13-218, ~~45-105~~, 15-217, ~~45-218~~, and 15-219
25 Annotated Code of Maryland
26 (1995 Replacement Volume and 1995 Supplement)

2

1 BY repealing and reenacting, without amendments,
2 Article - State Finance and Procurement
3 Section 15-104, 15-105, 15-201, 15-215(a) and (b), 15-218, and 15-220
4 Annotated Code of Maryland
5 (1995 Replacement Volume and 1995 Supplement)

6 BY adding to
7 Article - State Finance and Procurement
8 Section ~~15-222.1~~ 15-221.2
9 Annotated Code of Maryland
10 (1995 Replacement Volume and 1995 Supplement)

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

13 **Article - State Finance and Procurement**

14 13-218.

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

16 (1) termination for default;

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

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

21 (4) liquidated damages, as appropriate;

22 (5) specified excuses for nonperformance; and

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

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

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

28 (b) In addition to the clauses required under subsection (a) of this section, a
29 procurement contract for construction shall include:

30 (1) a clause providing for contract modification if the condition of a site
31 differs from the condition described in the specifications; AND

32 (2) A CLAUSE COVERING THE REQUIREMENTS FOR NOTICE OF
33 CONTRACT CLAIMS, SUBMISSION OF CONTRACT CLAIMS, AND RESOLUTION OF
34 CONTRACT CLAIMS UNDER § 15-219 OF THIS ARTICLE.

3

1 (c) Each procurement contract shall include a clause that gives to the parties
2 notice that preexisting regulations apply to the procurement contract in accordance with
3 § 11-206 of this article.

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

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

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

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

12 (ii) prior certification by the fiscal authority responsible for the unit
13 about:

14 1. the availability of money; and

15 2. the effect of the contract modification or change order on the
16 project budget or the total construction cost; ~~and~~

17 (2) prohibit the contract modification or change order if the certification by
18 the fiscal authority discloses that the contract modification or change order will increase
19 the cost beyond budgeted and available money, unless:

20 (i) sufficient additional money is made available; or

21 (ii) the scope of the project is adjusted to allow completion within the
22 project budget; ~~AND~~

23 ~~(3) INCLUDE A PROVISION COVERING CLAIMS PROCEDURES UNDER §§~~
24 ~~45-217 AND 15-219 OF THIS ARTICLE.~~

25 15-104.

26 (a) Except as provided in § 15-105 of this subtitle, interest shall accrue at the rate
27 of 9% per annum on any amount that:

28 (1) is due and payable by law and under the written procurement contract;
29 and

30 (2) remains unpaid more than 45 days after a unit receives an invoice.

31 (b) Interest shall accrue beginning on the 31st day after:

32 (1) the day on which payment becomes due under a procurement contract;
33 or

34 (2) if later, the day on which the unit receives an invoice.

4

1 15-105.

2 A unit is not liable under § 15-104 of this subtitle for interest:

3 (1) unless within 30 days after the date on the State's check for the amount
4 on which the interest accrued, the contractor submits an invoice for the interest;

5 (2) if a contract claim has been filed under Subtitle 2 of this title, ~~EXCEPT~~
6 ~~TO THE EXTENT PAYMENT IS AUTHORIZED UNDER § 15-219(E) OF THIS TITLE;~~

7 (3) accruing more than 1 year after the 31st day after the unit receives an
8 invoice; or

9 (4) on an amount that represents unpaid interest.

10 15-201.

11 In this subtitle, "Appeals Board" means the Maryland State Board of Contract
12 Appeals.

13 15-215.

14 (a) In this Part III of this subtitle the following words have the meanings
15 indicated.

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

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

19 15-217.

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

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

24 (b) ~~(4) [A] EXCEPT AS PROVIDED IN PARAGRAPH (2) OF THIS SUBSECTION~~
25 ~~§ 15-219 OF THIS SUBTITLE.~~ A protest or contract claim shall be submitted within the time
26 required under regulations adopted by the primary procurement unit responsible for the
27 procurement.

28 ~~(2) A CONTRACTOR SHALL SUBMIT A CONTRACT CLAIM UNDER A~~
29 ~~CONTRACT FOR CONSTRUCTION WITHIN 30 DAYS AFTER:~~

30 ~~(I) RECEIVING A WRITTEN CHANGE ORDER OR CONTRACT~~
31 ~~MODIFICATION THAT, IN THE CONTRACTOR'S VIEW, REQUIRES AN EQUITABLE~~
32 ~~ADJUSTMENT UNDER THE CONTRACT; OR~~

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

5

1 15-218.

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

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

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

7 (ii) may request additional information or substantiation through an
8 appropriate procedure;

9 (iii) may discuss with interested parties and, if appropriate, may
10 conduct negotiations with the person initiating the protest or contractclaim; and

11 (iv) shall comply with any applicable regulations.

12 (2) Unless clearly inappropriate, the procurement officer shallseek the
13 advice of the Office of the Attorney General.

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

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

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

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

20 (2) The procurement officer promptly shall send the decision inwriting to
21 the reviewing authority.

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

24 (1) the head of the unit; and

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

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

29 (2) The action of the reviewing authority under this subsectionshall be the
30 final action of the unit.

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

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

35 ~~(F) THE PROCUREMENT OFFICER WITHIN 90 DAYS AFTER RECEIVING A~~
36 ~~PROTEST OR A CONTRACT CLAIM OR WITHIN A LONGER PERIOD TO WHICH THE~~

~~1 PARTIES AGREE SHALL GIVE THE CLAIMANT WRITTEN NOTICE OF THE FINAL
2 ACTION TAKEN UNDER THIS SECTION.~~

3 15-219.

4 (a) EXCEPT TO THE EXTENT A SHORTER PERIOD IS PRESCRIBED BY
5 REGULATION GOVERNING DIFFERING SITE CONDITIONS, A CONTRACTOR SHALL
6 FILE A WRITTEN NOTICE OF A CLAIM RELATING TO A PROCUREMENT CONTRACT
7 FOR CONSTRUCTION WITHIN 30 DAYS AFTER THE BASIS FOR THE CLAIM IS KNOWN
8 OR SHOULD HAVE BEEN KNOWN.

9 ~~(B) Within~~ UNLESS EXTENDED BY THE UNIT, WITHIN 30 days after submitting a
10 notice of a contract claim under a procurement contract for construction ~~UNDER § 15-217~~
11 ~~OF THIS SUBTITLE~~, a contractor shall submit to the unit a written explanation that states:

- 12 (1) the amount of the contract claim;
- 13 (2) the facts on which the contract claim is based; and
- 14 (3) all relevant data and correspondence that may substantiate the contract
15 claim.

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

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

21 ~~(c)~~ (D) The person who reviews a contract claim under subsection ~~(b)~~ (C) of this
22 section shall:

- 23 (1) investigate the contract claim; and
- 24 (2) give the contractor written notice of a resolution of the contract claim;

25 (I) within [180] 90 days after receiving the contract claim or a longer
26 period to which the parties agree, IF THE AMOUNT OF THE CONTRACT CLAIM IS NOT
27 MORE THAN THE AMOUNT UNDER WHICH THE ACCELERATED PROCEDURE MAY BE
28 SELECTED BEFORE THE APPEALS BOARD; OR

29 (II) FOR ANY OTHER CONTRACT CLAIM, WITHIN 180 DAYS AFTER
30 RECEIVING THE CONTRACT CLAIM OR A LONGER PERIOD TO WHICH THE PARTIES
31 AGREE.

32 ~~(D)~~ (E) RECOVERY UNDER A CONTRACT CLAIM IS NOT ALLOWED FOR ANY
33 EXPENSE INCURRED;

34 (1) MORE THAN 30 DAYS BEFORE THE REQUIRED SUBMISSION OF THE A
35 NOTICE OF A CLAIM UNDER § 15-217(B)(2) OF THIS SUBTITLE IS NOT ALLOWED
36 SUBSECTION (A) OF THIS SECTION; OR

1 (2) UNLESS THE TIME FOR SUBMISSION OF A CLAIM IS EXTENDED
2 UNDER SUBSECTION (B) OF THIS SECTION, MORE THAN 60 DAYS BEFORE THE
3 REQUIRED SUBMISSION OF THE CLAIM.

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

9 ~~(2) PAYMENT SHALL BE MADE IN ACCORDANCE WITH THE TERMS~~
10 ~~GOVERNING PROGRESS PAYMENTS UNDER THE CONTRACT UNIT DETERMINES~~
11 ~~THAT IT IS RESPONSIBLE FOR A PORTION BUT NOT ALL OF THE AMOUNT CLAIMED~~
12 ~~BY THE CONTRACTOR, SUBJECT TO THE TERMS OF THE CONTRACT, THE UNIT SHALL~~
13 ~~PAY THE UNDISPUTED AMOUNT.~~

14 (2) PAYMENT OF THE UNDISPUTED AMOUNT:

15 (I) IS NOT AN ADMISSION OF THE LIABILITY OF THE UNIT ON THE
16 CLAIMS; AND

17 (II) DOES NOT PRECLUDE RECOVERY OF THE AMOUNT PAID IF IT
18 SUBSEQUENTLY IS DETERMINED THAT THE DETERMINATION OF THE UNIT WAS NOT
19 CORRECT.

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

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

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

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

28 (2) pay any interest that:

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

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

32 15-220.

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

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

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

38 and

8

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

3 15-221.2.

4 (A) THIS SECTION ONLY APPLIES TO A CLAIM RESULTING UNDER A
5 CONTRACT FOR CONSTRUCTION.

6 (B) THE APPEALS BOARD MAY AWARD TO A CONTRACTOR THE REASONABLE
7 COSTS OF FILING AND PURSUING A CLAIM, INCLUDING REASONABLE ATTORNEY
8 FEES, IF THE APPEALS BOARD FINDS THAT THE CONDUCT OF UNIT PERSONNEL IN
9 PROCESSING A CONTRACT CLAIM IS IN BAD FAITH OR WITHOUT SUBSTANTIAL
10 JUSTIFICATION.

11 (C) THE APPEALS BOARD SHALL ADOPT REGULATIONS TO IMPLEMENT THIS
12 SECTION.

13 ~~45-222.1.~~

14 ~~(A)(1) NOTWITHSTANDING ANY PROVISION IN A PROCUREMENT~~
15 ~~CONTRACT, THE APPEALS BOARD MAY ORDER AN AGENCY TO PAY A PENALTY TO A~~
16 ~~CONTRACTOR IN ACCORDANCE WITH PARAGRAPH (2) OF THIS SUBSECTION IF THE~~
17 ~~APPEALS BOARD FINDS THAT, IN PROCESSING OR RENDERING A DECISION UNDER A~~
18 ~~CONTRACT CLAIM, OR IN PROVIDING PARTIAL PAYMENT UNDER A CONTRACT FOR~~
19 ~~CONSTRUCTION AS REQUIRED UNDER § 15-219(E) OF THIS SUBTITLE, THE~~
20 ~~PROCUREMENT OFFICER OR OTHER RESPONSIBLE AGENCY PERSONNEL'S ACTION~~
21 ~~WAS SO ARBITRARY OR CAPRICIOUS, FRAUDULENT, OR GROSSLY ERRONEOUS AS~~
22 ~~TO NECESSARILY IMPLY BAD FAITH.~~

23 ~~(2) A PENALTY PAYMENT AWARDED UNDER THIS SECTION MAY NOT~~
24 ~~EXCEED 100% OF THE AMOUNT:~~

25 ~~(i) AWARDED TO THE CONTRACTOR BY THE APPEALS BOARD ON~~
26 ~~THE CONTRACT CLAIM;~~

27 ~~(ii) THAT SHOULD HAVE BEEN PAID UNDER § 15-219(E) OF THIS~~
28 ~~SUBTITLE IF THE APPEALS BOARD FINDS THAT THE BAD FAITH EXTENDED SOLELY~~
29 ~~TO THE ISSUE OF PARTIAL PAYMENT AS REQUIRED UNDER THAT SUBSECTION.~~

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

33 ~~(2) THE RATE OF INTEREST UNDER THIS SECTION SHALL BE THE RATE~~
34 ~~OF INTEREST ON JUDGMENTS AS PROVIDED UNDER § 11-107(A) OF THE COURTS~~
35 ~~ARTICLE.~~

36 ~~(3) IF A PENALTY IS REDUCED AS A RESULT OF A JUDICIAL REVIEW OF~~
37 ~~THE DECISION OF THE APPEALS BOARD, INTEREST SHALL BE PAID ONLY ON THE~~
38 ~~REDUCED PENALTY.~~

39 ~~(C) IF THE AGENCY RESPONSIBLE FOR A PENALTY AWARDED UNDER THIS~~
40 ~~SECTION LACKS ADEQUATE FUNDS TO PAY THE PENALTY, THE GOVERNOR SHALL~~

9

1 ~~INCLUDE IN THE BUDGET BILL AN AMOUNT THAT IS ADEQUATE TO SATISFY, AFTER~~
2 ~~THE EXHAUSTION OF THE RIGHTS OF APPEAL, THE PENALTY AND INTEREST THAT IS~~
3 ~~RENDERED AGAINST THE AGENCY.~~

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