

SENATE BILL 416

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P2

2004 Regular Session
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By: **Senators Grosfeld and Jones**

Introduced and read first time: February 5, 2004

Assigned to: Education, Health, and Environmental Affairs

A BILL ENTITLED

1 AN ACT concerning

2 **Procurement - Board of Contract Appeals - Jurisdiction over State Claims**

3 FOR the purpose of authorizing an interested party to appeal a final action on a
4 procurement contract claim made by a State agency to the State Board of
5 Contract Appeals; altering the jurisdiction of the Appeals Board; clarifying that
6 certain claims procedures for a procurement contract apply only to a claim by a
7 contractor; establishing certain contract claims procedures for a State contract
8 claim; requiring a State contract claim to include certain information; requiring
9 the procurement officer to review a State contract claim; authorizing the
10 procurement officer to request additional information or to discuss or negotiate
11 a State contract claim with the State agency or the contractor; requiring the
12 procurement officer to prepare a proposed decision on a State contract claim
13 under certain circumstances; requiring a procurement officer to include certain
14 information and the supporting rationale in a proposed decision; providing for
15 review of a proposed decision by certain persons under certain circumstances;
16 authorizing a reviewing authority to approve, disapprove, or modify a proposed
17 decision; establishing that approval, disapproval, or modification of a proposed
18 decision by the reviewing authority constitutes the final action of the State
19 agency on the contract claim; authorizing a reviewing authority to remand with
20 instructions a disapproved proposed decision to the procurement officer;
21 authorizing the award of interest to a State agency under a procurement
22 contract claim; and generally relating to the authority of the State Board of
23 Contract Appeals over a procurement contract claim made by a State agency.

24 BY repealing and reenacting, without amendments,
25 Article - State Finance and Procurement
26 Section 15-201, 15-215(b), and 15-219
27 Annotated Code of Maryland
28 (2001 Replacement Volume and 2003 Supplement)

29 BY repealing and reenacting, with amendments,
30 Article - State Finance and Procurement
31 Section 15-211, 15-217(a), 15-218, 15-220(a), and 15-222(a) and (b)
32 Annotated Code of Maryland

1 (2001 Replacement Volume and 2003 Supplement)

2 BY adding to

3 Article - State Finance and Procurement

4 Section 15-219.1

5 Annotated Code of Maryland

6 (2001 Replacement Volume and 2003 Supplement)

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

9 **Article - State Finance and Procurement**

10 15-201.

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

13 15-211.

14 (a) The Appeals Board shall have jurisdiction to hear and decide all appeals
15 arising from the final action of a unit:

16 (1) on a protest relating to the formation of a procurement contract; or

17 (2) except for a contract claim relating to a lease of real property, on a
18 contract claim BY A CONTRACTOR OR A UNIT concerning:

19 (i) breach;

20 (ii) performance;

21 (iii) modification; or

22 (iv) termination.

23 (b) A decision of the Appeals Board is final, subject to any judicial review.

24 15-215.

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

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

29 15-217.

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

1 (2) A UNIT OR A person who has been awarded a procurement contract
2 may submit a contract claim to the procurement officer.

3 15-218.

4 (a) Except as provided under § 15-219 of this subtitle, a procurement officer
5 who receives a protest or a contract claim FROM A CONTRACTOR shall comply with
6 this section.

7 (b) (1) On receipt of a protest or contract claim [under § 15-217 of this
8 subtitle] FROM A CONTRACTOR, a procurement officer:

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

10 (ii) may request additional information or substantiation through
11 an appropriate procedure;

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

14 (iv) shall comply with any applicable regulations.

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

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

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

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

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

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

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

28 (1) the head of the unit; and

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

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

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

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

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

7 15-219.

8 (a) Except to the extent a shorter period is prescribed by regulation governing
9 differing site conditions, a contractor shall file a written notice of a claim relating to
10 a procurement contract for construction within 30 days after the basis for the claim is
11 known or should have been known.

12 (b) Unless extended by the unit, within 90 days after submitting a notice of a
13 contract claim under a procurement contract for construction, a contractor shall
14 submit to the unit a written explanation that states:

15 (1) the amount of the contract claim;

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

17 (3) all relevant data and correspondence that may substantiate the
18 contract claim.

19 (c) (1) Subject to paragraph (2) of this subsection, the head of the unit
20 engaged in procurement of the construction shall review the contract claim.

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

24 (d) The person who reviews a contract claim under subsection (c) of this
25 section shall:

26 (1) investigate the contract claim; and

27 (2) give the contractor written notice of a resolution of the contract claim:

28 (i) within 90 days after receiving the contract claim or a longer
29 period to which the parties agree, if the amount of the contract claim is not more than
30 the amount under which the accelerated procedure may be selected before the
31 Appeals Board; or

32 (ii) for any other contract claim, within 180 days after receiving the
33 contract claim or a longer period to which the parties agree.

34 (e) Recovery under a contract claim is not allowed for any expense incurred:

1 (1) more than 30 days before the required submission of a notice of a
2 claim under subsection (a) of this section; or

3 (2) unless the time for submission of a claim is extended under
4 subsection (b) of this section, more than 120 days before the required submission of
5 the claim.

6 (f) (1) If the unit determines that it is responsible for a portion but not all of
7 the amount claimed by the contractor, subject to the terms of the contract, the unit
8 shall pay the undisputed amount.

9 (2) Payment of the undisputed amount:

10 (i) is not an admission of the liability of the unit on the claims; and

11 (ii) does not preclude recovery of the amount paid if it subsequently
12 is determined that the determination of the unit was not correct.

13 (g) (1) A decision not to pay a contract claim is a final action for the purpose
14 of appeal to the Appeals Board.

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

18 (h) At the time of final payment, the unit shall:

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

20 (2) pay any interest that:

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

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

24 15-219.1.

25 (A) (1) A UNIT MAY ASSERT A CONTRACT CLAIM AGAINST A CONTRACTOR BY
26 SENDING WRITTEN NOTICE TO THE CONTRACTOR AND THE PROCUREMENT OFFICER
27 THAT STATES:

28 (I) THE BASIS FOR THE CONTRACT CLAIM;

29 (II) TO THE EXTENT KNOWN, THE AMOUNT, OR THE PERFORMANCE
30 OR OTHER ACTION, REQUESTED BY THE UNIT IN THE CONTRACT CLAIM; AND

31 (III) THE DATE BY WHICH THE CONTRACTOR IS REQUIRED TO
32 PROVIDE A WRITTEN RESPONSE TO THE CONTRACT CLAIM.

1 (2) ON RECEIPT OF A CONTRACT CLAIM FROM A UNIT, A PROCUREMENT
2 OFFICER:

3 (I) SHALL REVIEW THE SUBSTANCE OF THE CONTRACT CLAIM;

4 (II) MAY REQUEST ADDITIONAL INFORMATION OR
5 SUBSTANTIATION THROUGH AN APPROPRIATE PROCEDURE; AND

6 (III) MAY DISCUSS OR, IF APPROPRIATE, NEGOTIATE THE CONTRACT
7 CLAIM WITH THE UNIT OR CONTRACTOR.

8 (3) THE PROCUREMENT OFFICER SHALL PROCEED UNDER SUBSECTION
9 (B) OF THIS SECTION IF THE CONTRACTOR FAILS TO RESPOND, PROVIDES AN
10 INADEQUATE RESPONSE, OR DENIES THE CONTRACT CLAIM OR THE RELIEF SOUGHT
11 BY THE UNIT IN WHOLE OR IN PART.

12 (B) (1) IF THE CONTRACTOR AND THE UNIT DO NOT RESOLVE THE
13 CONTRACT CLAIM, THE PROCUREMENT OFFICER SHALL PREPARE A PROPOSED
14 DECISION ON THE CONTRACT CLAIM, INCLUDING:

15 (I) A DESCRIPTION OF THE CONTRACT CLAIM;

16 (II) REFERENCES TO PERTINENT CONTRACT PROVISIONS;

17 (III) A STATEMENT OF FACTUAL AREAS OF AGREEMENT OR
18 DISAGREEMENT; AND

19 (IV) A STATEMENT IN THE PROPOSED DECISION WHOLLY OR
20 PARTLY GRANTING OR DENYING THE RELIEF SOUGHT, WITH SUPPORTING
21 RATIONALE.

22 (2) UNLESS OTHERWISE PROVIDED BY REGULATION, THE
23 PROCUREMENT OFFICER SHALL SUBMIT THE CONTRACT CLAIM AND PROPOSED
24 DECISION TO:

25 (I) THE HEAD OF THE UNIT; AND

26 (II) THE HEAD OF THE PRINCIPAL DEPARTMENT OR OTHER
27 EQUIVALENT UNIT OF WHICH THE UNIT IS A PART.

28 (3) (I) THE REVIEWING AUTHORITY SHALL APPROVE, MODIFY, OR
29 DISAPPROVE THE PROPOSED DECISION.

30 (II) IN DISAPPROVING A PROPOSED DECISION, THE REVIEWING
31 AUTHORITY MAY REMAND THE CONTRACT CLAIM WITH INSTRUCTIONS TO THE
32 PROCUREMENT OFFICER.

33 (III) ON REMAND, THE PROCUREMENT OFFICER SHALL PROCEED AS
34 REQUIRED UNDER THIS SUBSECTION AND IN ACCORDANCE WITH THE
35 INSTRUCTIONS OF THE REVIEWING AUTHORITY.

1 (4) THE DECISION OF THE REVIEWING AUTHORITY IS THE FINAL
2 ACTION OF THE UNIT.

3 15-220.

4 (a) Except for a contract claim related to a lease for real property, a bidder or
5 offeror, a prospective bidder or offeror, A UNIT, or a contractor may appeal the final
6 action of a unit to the Appeals Board.

7 15-222.

8 (a) Notwithstanding any provision of a procurement contract, the Appeals
9 Board may award interest on money that the Appeals Board determines to be due to
10 the UNIT OR THE contractor under a contract claim.

11 (b) (1) Subject to paragraph (2) of this subsection, interest may accrue from
12 a day that the Appeals Board determines to be fair and reasonable after hearing all
13 the facts until the day of the decision by the Appeals Board.

14 (2) Interest may not accrue before the procurement officer receives a
15 contract claim from the UNIT OR THE contractor.

16 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
17 October 1, 2004.