

Department of Legislative Services
Maryland General Assembly
2006 Session

FISCAL AND POLICY NOTE
Revised

House Bill 1464 (Delegates Trueschler and Barkley)
Health and Government Operations

**Procurement - Public Facility Construction - Delayed Completion Damages
Formula**

This bill allows procurement contracts for the construction of public facilities such as schools, hospitals, mass transit stations, and recreation centers to include delayed completion damage clauses. If a contract contains such a clause, the formula for calculating damages payable by the contractor would be 0.0005 multiplied by the total design and construction costs for the facility. Contractors would be liable for the damages if a facility is not substantially complete by the date specified in the contract. Substantially completed means (1) all of the work required has been completed except for work having a value of less than 1% of the total contract price; or (2) the facility has been substantially completed and opened to the public except for work items that do not materially impair the usefulness of the facility. The delayed damage penalty created by this bill would be in addition to any other recognized damages.

Fiscal Summary

State Effect: Assuming that the damage formula is for a daily penalty, State revenues (all funds) could increase to the extent that State contracts include delayed damage clauses and construction contractors do not complete public facility projects on time.

Local Effect: None. Although the bill includes school buildings and town and city halls in its definition of public facilities, the State does not contract for the construction of those facilities. Rather, counties, school districts, cities, and towns contract for and manage construction contracts for those facilities, and they are not bound by State procurement laws.

Small Business Effect: Potentially significant to the extent that construction contracts for public facilities include delayed damage clauses, and if the formula represents a daily penalty, contractors could be subject to substantial penalty payments if they do not finish public facilities on time.

Analysis

Current Law/Background: State law does not explicitly allow procurement contracts to include delayed completion damage clauses, but it does require them to include liquidated damage clauses. State regulations require that those clauses specify that any work not completed by the time specified in the contract is liable for liquidated damages provided in the solicitation.

The Maryland Aviation Administration (MAA), Morgan State University, and the Public School Construction Program (PCSP) all indicate that current contracts for airport construction, school construction, and university buildings all carry delayed completion damage clauses. If the penalty formula specified in the bill were for total damages for delayed completion, they advise that the clauses used in existing contracts carry more severe penalties than those allowed by this bill. As an example, a \$20 million school construction project would carry a total penalty of \$10,000 for delayed completion under this bill. According to PCSP, most existing contracts for school construction include penalties ranging from \$1,000 to \$1,500 for each day the project is not completed; the \$10,000 threshold would be met after just 7 to 10 days. MAA reports that contracts for construction or expansion of airport runways and facilities carry substantial penalties that reflect the millions of dollars in lost revenue from airlines that could result from a project not being completed on time.

The University System of Maryland, Morgan State University, St. Mary's College of Maryland, counties, school districts, and local cities and towns are exempt from or not subject to State procurement laws.

State Effect: The bill allows but does not require the use of delayed completion damage clauses in State procurement contracts. The bill is unclear as to whether the specified penalty is a daily or a total penalty. For the purpose of this analysis, it is assumed that it is a daily penalty, meaning that it would be substantially higher than the penalties specified in existing contracts described above. For instance, a \$20 million construction project would be subject to a \$10,000 penalty for each day it is not completed instead of \$1,000 or \$1,500 a day. If construction contracts choose to include the clause specified by this bill, and if public facility projects are not completed on time, State revenues could increase substantially from the collection of the delayed damage penalties. Alternatively,

more public facility projects could be completed on time by contractors who do not want to pay the higher penalties.

If delayed damage formula is interpreted to represent total damages, the State could lose revenue because the penalty would be substantially less than current penalties already specified in contracts. The State could also lose leverage over contractors because the penalty is not sufficiently onerous to motivate contractors to complete projects on time.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts), Department of General Services, Board of Public Works, Maryland State Department of Education, St. Mary's College, Morgan State University, University System of Maryland, Maryland Department of Transportation, Public School Construction Program, Department of Budget and Management, Department of Public Safety and Correctional Services, Department of Legislative Services

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Analysis by: Michael C. Rubenstein

Direct Inquiries to:
(410) 946-5510
(301) 970-5510