

HOUSE BILL 403

P2

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CF SB 826

By: **Delegates Morhaim, Branch, Bromwell, Fennell, Glenn, Kipke, Krebs, Lam, McCray, Miele, W. Miller, Oaks, B. Robinson, Szeliga, Vaughn, Walker, and West**

Introduced and read first time: January 29, 2016
Assigned to: Health and Government Operations

Committee Report: Favorable with amendments
House action: Adopted
Read second time: March 9, 2016

CHAPTER _____

1 AN ACT concerning

2 **Construction Contracts – Change Orders**
3 **(State Procurement Change Order Fairness Act)**

4 FOR the purpose of prohibiting a unit from requiring a prime contractor, and a prime
5 contractor from requiring a subcontractor, to begin work under a contract until the
6 procurement officer for the unit issues a certain change order; providing that certain
7 acceptance letters for certain procurement contracts for construction have the same
8 force and effect as change orders for certain purposes until certain units issue
9 written change orders; providing, under certain circumstances, that nothing in a
10 certain provision of this Act prohibits a procurement officer from issuing a certain
11 order, authorizes a ~~prime contractor to refuse~~ refusal to perform certain work or
12 furnish certain labor and materials, or prejudices or impairs the right of a prime
13 contractor to submit a certain claim or dispute to a procurement officer; prohibiting
14 a change order from being required, under certain circumstances, for work to
15 continue and be completed beyond certain quantities; requiring a certain unit to
16 make a certain determination and issue a certain change order after certain work is
17 completed; requiring, under certain circumstances, a unit to pay an invoice for work
18 performed and accepted under a change order within a certain time period and in
19 accordance with a certain provision of law; requiring a prime contractor to provide,
20 within a certain time period, a subcontractor with a copy of a certain change order
21 and a certain amount to be paid to the subcontractor; requiring the Board of Public
22 Works to propose certain regulations before a certain date; requiring each unit to
23 issue certain guidelines on or before a certain date; requiring that certain guidelines

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.



1 be updated and reissued under certain circumstances; providing that certain
 2 provisions of this Act have effect only to the extent that the provisions do not conflict
 3 with federal law or regulation; applying certain provisions of this Act to certain
 4 procurements and units of State government that are generally excluded from State
 5 procurement law; providing for the application of certain provisions of this Act;
 6 requiring the Secretary of General Services to convene a certain workgroup to
 7 develop recommendations that address certain issues; requiring the workgroup to
 8 include representatives from certain entities and to coordinate its activities with a
 9 certain commission for a certain purpose; requiring the workgroup to report its
 10 recommendations to certain committees of the General Assembly on or before a
 11 certain date; providing that a certain catchline is not law and may not be considered
 12 to have been enacted as part of this Act; providing for the effective dates of this Act;
 13 and generally relating to change orders for State procurement contracts for
 14 construction.

15 BY repealing and reenacting, without amendments,
 16 Article – State Finance and Procurement
 17 Section 11–203(a) and (e)(1), (2), and (5)
 18 Annotated Code of Maryland
 19 (2015 Replacement Volume)

20 BY repealing and reenacting, with amendments,
 21 Article – State Finance and Procurement
 22 Section 11–203(b)(1) and (c)
 23 Annotated Code of Maryland
 24 (2015 Replacement Volume)

25 BY adding to
 26 Article – State Finance and Procurement
 27 Section 15–112
 28 Annotated Code of Maryland
 29 (2015 Replacement Volume)

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

32 **Article – State Finance and Procurement**

33 11–203.

34 (a) Except as provided in subsection (b) of this section, this Division II does not
 35 apply to:

36 (1) procurement by:

37 (i) the Blind Industries and Services of Maryland;

1 (ii) the Maryland State Arts Council, for the support of the arts;

2 (iii) the Maryland Health and Higher Educational Facilities
3 Authority, if no State money is to be spent on a procurement contract;

4 (iv) the Maryland Industrial Training Program or the Partnership
5 for Workforce Quality Program in the Department of Economic Competitiveness and
6 Commerce, for training services or programs for new or expanding businesses or industries
7 or businesses or industries in transition;

8 (v) the Maryland Food Center Authority, to the extent the Authority
9 is exempt under Title 10, Subtitle 2 of the Economic Development Article;

10 (vi) the Maryland Public Broadcasting Commission:

11 1. for services of artists for educational and cultural
12 television productions;

13 2. when planning for or fulfilling the obligations of grants or
14 cooperative agreements that support the educational and cultural activities of the
15 Commission; or

16 3. for procurement contracts needed to implement the
17 repackaging requirements of the federal Spectrum Act;

18 (vii) public institutions of higher education, for cultural,
19 entertainment, and intercollegiate athletic procurement contracts;

20 (viii) the Maryland State Planning Council on Developmental
21 Disabilities, for services to support demonstration, pilot, and training programs;

22 (ix) the Maryland Historical Trust for:

23 1. surveying and evaluating architecturally, archeologically,
24 historically, or culturally significant properties; and

25 2. other than as to architectural services, preparing historic
26 preservation planning documents and educational material;

27 (x) the University of Maryland, for University College Overseas
28 Programs, if the University adopts regulations that:

29 1. establish policies and procedures governing procurement
30 for University College Overseas Programs; and

31 2. promote the purposes stated in § 11–201(a) of this subtitle;

1 (xi) the Department of Economic Competitiveness and Commerce, for
2 negotiating and entering into private sector cooperative marketing projects that directly
3 enhance promotion of Maryland and the tourism industry where there will be a private
4 sector contribution to the project of not less than 50% of the total cost of the project, if the
5 project is reviewed by the Attorney General and approved by the Secretary of Commerce or
6 the Secretary's designee;

7 (xii) the Rural Maryland Council;

8 (xiii) the Maryland State Lottery and Gaming Control Agency, for
9 negotiating and entering into private sector cooperative marketing projects that directly
10 enhance promotion of the Maryland State Lottery and its products, if the cooperative
11 marketing project:

12 1. provides a substantive promotional or marketing value
13 that the lottery determines acceptable in exchange for advertising or other promotional
14 activities provided by the lottery;

15 2. does not involve the advertising or other promotion of
16 alcohol or tobacco products; and

17 3. is reviewed by the Attorney General and approved by the
18 Maryland Lottery Director or the Director's designee;

19 (xiv) the Maryland Health Insurance Plan established under Title 14,
20 Subtitle 5 of the Insurance Article;

21 (xv) the Maryland Energy Administration, when negotiating or
22 entering into grants or cooperative agreements with private entities to meet federal
23 specifications or solicitation requirements related to energy conservation, energy efficiency,
24 or renewable energy projects that benefit the State;

25 (xvi) the Maryland Developmental Disabilities Administration of the
26 Department of Health and Mental Hygiene for family and individual support services, and
27 individual family care services, as those terms are defined by the Department of Health
28 and Mental Hygiene in regulation;

29 (xvii) the Department of General Services for the renovation of a
30 structure that:

31 1. was built during the 18th or 19th century; and

32 2. is listed in or eligible for listing in the National Register of
33 Historic Places; and

1 (xviii) the Department of Natural Resources, for negotiating or entering
2 into grants, agreements, or partnerships with nonprofit entities related to conservation
3 service opportunities;

4 (2) procurement by a unit from:

5 (i) another unit;

6 (ii) a political subdivision of the State;

7 (iii) an agency of a political subdivision of the State;

8 (iv) a government, including the government of another state, of the
9 United States, or of another country;

10 (v) an agency or political subdivision of a government; or

11 (vi) a bistate, multistate, bicounty, or multicounty governmental
12 agency; or

13 (3) procurement in support of enterprise activities for the purpose of:

14 (i) direct resale; or

15 (ii) remanufacture and subsequent resale.

16 (b) (1) The following provisions of this Division II apply to each procurement
17 enumerated in subsection (a) of this section:

18 (i) § 11–205 of this subtitle (“Collusion”);

19 (ii) § 10–204 of this article (“Approval for designated contracts”);

20 (iii) Title 12, Subtitle 2 of this article (“Supervision of Capital
21 Expenditures and Real Property Leases”);

22 (iv) § 13–219 of this article (“Required clauses – Nondiscrimination
23 clause”);

24 (v) § 13–221 of this article (“Disclosures to Secretary of State”);

25 (vi) Title 12, Subtitle 4 of this article (“Policies and Procedures for
26 Exempt Units”);

27 **(VII) § 15–112 OF THIS ARTICLE (“CHANGE ORDERS”);**

1 [(vii)] **(VIII)** Title 16 of this article (“Suspension and Debarment of
2 Contractors”); and

3 [(viii)] **(IX)** Title 17 of this article (“Special Provisions – State and
4 Local Subdivisions”).

5 (c) Except as provided in Title 12, Subtitle 4 and Title 14, Subtitle 3 of this article
6 **AND EXCEPT FOR § 15–112 OF THIS ARTICLE**, this Division II does not apply to the
7 Maryland Stadium Authority.

8 (e) (1) In this subsection, “University” means the University System of
9 Maryland, Morgan State University, or St. Mary’s College of Maryland.

10 (2) Except as otherwise provided in this subsection, this Division II does
11 not apply to the University System of Maryland, Morgan State University, or St. Mary’s
12 College of Maryland.

13 (5) (i) Except as provided in paragraph (7) of this subsection, the
14 following provisions of Division II of this article apply to a University:

- 15 1. § 11–205 of this subtitle (“Collusion”);
- 16 2. § 11–205.1 of this subtitle (“Falsification, concealment,
17 etc., of material facts”);
- 18 3. § 13–219 of this article (“Required clauses –
19 Nondiscrimination clause”);
- 20 4. § 13–225 of this article (“Retainage”);
- 21 5. Title 14, Subtitle 3 of this article (“Minority Business
22 Participation”);
- 23 6. Title 15, Subtitle 1 of this article (“Procurement Contract
24 Administration”);
- 25 7. § 15–226 of this article (“Policy established; timing of
26 payments; notice upon nonpayment; disputes; appeals”); and
- 27 8. Title 16 of this article (“Suspension and Debarment of
28 Contractors”).

29 (ii) If a procurement violates the provisions of this subsection or
30 policies adopted in accordance with this subsection, the procurement contract is void or
31 voidable in accordance with the provisions of § 11–204 of this subtitle.

32 **15–112. CHANGE ORDERS.**

1 (A) (1) (I) EXCEPT AS PROVIDED IN ~~PARAGRAPH (2) OF THIS~~
2 ~~SUBSECTION~~ SUBPARAGRAPH (II) OF THIS PARAGRAPH, THIS SECTION APPLIES TO
3 STATE PROCUREMENT CONTRACTS FOR CONSTRUCTION.

4 ~~(2)~~ (II) THIS SECTION DOES NOT APPLY TO STATE PROCUREMENT
5 CONTRACTS FOR PUBLIC SCHOOL CONSTRUCTION OR PUBLIC SCHOOL CAPITAL
6 IMPROVEMENTS.

7 (2) FOR PURPOSES OF THIS SECTION, A WRITTEN ACCEPTANCE
8 LETTER FOR A STATE HIGHWAY ADMINISTRATION OR MARYLAND AVIATION
9 ADMINISTRATION PROCUREMENT CONTRACT FOR CONSTRUCTION SHALL HAVE THE
10 SAME FORCE AND EFFECT AS A CHANGE ORDER UNTIL THE STATE HIGHWAY
11 ADMINISTRATION OR MARYLAND AVIATION ADMINISTRATION ISSUES A WRITTEN
12 CHANGE ORDER.

13 (B) (1) EXCEPT AS PROVIDED IN ~~PARAGRAPH (2)~~ PARAGRAPHS (2) AND
14 (3) OF THIS SUBSECTION, A UNIT MAY NOT REQUIRE A PRIME CONTRACTOR AND A
15 PRIME CONTRACTOR MAY NOT REQUIRE A SUBCONTRACTOR TO BEGIN CHANGE
16 ORDER WORK UNDER A CONTRACT UNTIL THE PROCUREMENT OFFICER FOR THE
17 UNIT ISSUES A WRITTEN CHANGE ORDER THAT SPECIFIES WHETHER THE WORK IS
18 TO PROCEED ~~ON AN AGREED-TO PRICE, FORCE ACCOUNT, CONSTRUCTION CHANGE~~
19 ~~DIRECTIVE, OR TIME AND MATERIALS BASIS~~, IN COMPLIANCE WITH THE TERMS OF
20 THE CONTRACT, ON:

21 (I) AN AGREED-TO PRICE WHICH MAY INCLUDE A
22 PREESTABLISHED CATALOG OR UNIT PRICES BASED ON LOCAL PREVAILING WAGE
23 RATES AND EQUIPMENT AND MATERIAL COSTS FOR EACH TASK REQUIRED FOR THE
24 CHANGE ORDER AS INCLUDED IN THE BID DOCUMENTS AT THE TIME OF BID;

25 (II) A FORCE ACCOUNT;

26 (III) A CONSTRUCTION CHANGE DIRECTIVE; OR

27 (IV) A TIME AND MATERIALS BASIS.

28 (2) IF A PROCUREMENT OFFICER AND A PRIME CONTRACTOR DO NOT
29 AGREE THAT WORK IS INCLUDED WITHIN THE ORIGINAL SCOPE AND TERMS OF A
30 CONTRACT, NOTHING IN THIS SECTION:

31 (I) PROHIBITS A PROCUREMENT OFFICER FROM ISSUING AN
32 ORDER TO A PRIME CONTRACTOR TO PERFORM WORK OR TO FURNISH LABOR OR
33 MATERIALS DETERMINED BY THE PROCUREMENT OFFICER TO BE REQUIRED BY A
34 CONTRACT BETWEEN A UNIT AND THE PRIME CONTRACTOR;

1 (II) ~~AUTHORIZES A PRIME CONTRACTOR TO REFUSE~~ REFUSAL
2 TO PERFORM WORK OR TO FURNISH LABOR OR MATERIALS THAT A PROCUREMENT
3 OFFICER HAS ORDERED THE PRIME CONTRACTOR TO PERFORM OR TO FURNISH
4 BECAUSE THE PROCUREMENT OFFICER HAS DETERMINED THAT THE WORK OR
5 LABOR IS OR THE MATERIALS ARE REQUIRED BY A CONTRACT BETWEEN A UNIT AND
6 THE PRIME CONTRACTOR; OR

7 (III) PREJUDICES OR IMPAIRS THE RIGHT OF A PRIME
8 CONTRACTOR TO SUBMIT A CLAIM OR DISPUTE TO A PROCUREMENT OFFICER, IN
9 ACCORDANCE WITH APPLICABLE LAW AND THE CONTRACT, SEEKING ADDITIONAL
10 COMPENSATION FOR COMPLYING WITH AN ORDER OF THE PROCUREMENT OFFICER
11 TO PERFORM WORK OR TO FURNISH LABOR OR MATERIALS DETERMINED BY THE
12 PROCUREMENT OFFICER TO BE REQUIRED BY A CONTRACT BETWEEN THE PRIME
13 CONTRACTOR AND A UNIT.

14 (3) (I) IF A UNIT IS TO PAY FOR A CONTRACT OR A PART OF A
15 CONTRACT USING A UNIT PRICE METHODOLOGY, A CHANGE ORDER MAY NOT BE
16 REQUIRED FOR WORK TO CONTINUE AND BE COMPLETED BEYOND THE ESTIMATED
17 QUANTITIES IN THE CONTRACT.

18 (II) AFTER WORK IS COMPLETED, A UNIT SHALL:

19 1. DETERMINE THE ACTUAL QUANTITY USED TO
20 COMPLETE THE CONTRACT; AND

21 2. IF NECESSARY, ISSUE A FINAL ADJUSTMENT CHANGE
22 ORDER TO THE CONTRACTOR.

23 (C) IF THE AMOUNT TO BE PAID UNDER AN APPROVED CHANGE ORDER DOES
24 NOT EXCEED \$50,000, A UNIT SHALL PAY AN INVOICE FOR WORK PERFORMED AND
25 ACCEPTED UNDER THE CHANGE ORDER AS PROVIDED FOR IN THE CONTRACT
26 WITHIN 30 DAYS AFTER THE UNIT RECEIVES THE INVOICE AND IN ACCORDANCE
27 WITH § 15-103 OF THIS SUBTITLE.

28 (D) WITHIN 5 DAYS AFTER RECEIPT OF A WRITTEN CHANGE ORDER, A PRIME
29 CONTRACTOR SHALL PROVIDE A SUBCONTRACTOR WITH A COPY OF THE APPROVED
30 CHANGE ORDER AND THE AMOUNT TO BE PAID TO THE SUBCONTRACTOR BASED ON
31 THE PORTION OF THE CHANGE ORDER WORK TO BE COMPLETED BY THE
32 SUBCONTRACTOR.

33 (E) BEFORE JANUARY 1, 2017, THE BOARD SHALL PROPOSE REGULATIONS
34 THAT PROVIDE FOR AN EXPEDITED CHANGE ORDER PROCESS FOR CHANGE ORDERS
35 VALUED AT MORE THAN \$50,000.

1 **(F) (1) ON OR BEFORE DECEMBER 31, 2016, EACH UNIT SHALL ISSUE**
2 **GUIDELINES FOR THE UNIT'S CHANGE ORDER PROCESS.**

3 **(2) THE GUIDELINES ISSUED UNDER PARAGRAPH (1) OF THIS**
4 **SUBSECTION SHALL BE UPDATED AND REISSUED WHEN ANY CHANGES ARE MADE TO**
5 **THE UNIT'S CHANGE ORDER PROCESS.**

6 **(G) A PROVISION OF THIS SECTION HAS EFFECT ONLY TO THE EXTENT THAT**
7 **THE PROVISION DOES NOT CONFLICT WITH FEDERAL LAW OR REGULATION.**

8 SECTION 2. AND BE IT FURTHER ENACTED, That:

9 (a) The Secretary of General Services shall convene a workgroup of stakeholders
10 to develop recommendations that address the following issues related to State procurement
11 for construction contracts:

12 (1) scope review process;

13 (2) termination for convenience;

14 (3) uniformity of change order practices and authority;

15 (4) prompt payment and interest;

16 (5) force account practice and policies;

17 (6) funding;

18 (7) contractor capacity; and

19 (8) any other issues that the workgroup determines to be relevant and
20 appropriate to address.

21 (b) The workgroup shall include representatives from:

22 (1) the Maryland Chapter of the Associated General Contractors of
23 America;

24 (2) the Associated Builders and Contractors ~~of Metro Washington;~~

25 (3) the Alliance for Construction Excellence;

26 (4) the Coalition for Contracting Fairness;

27 (5) the Maryland Washington Minority Contractors Association; and

1 (6) any units of the State the Secretary of General Services deems
2 appropriate.

3 (c) The workgroup shall coordinate its activities with the One Maryland Blue
4 Ribbon Commission on Procurement to ensure consistency and avoid unnecessary
5 duplication in the recommendations reported under subsection (d) of this section.

6 (d) On or before December 31, 2016, the workgroup shall report its policy,
7 regulatory, and legislative recommendations to the Senate Education, Health, and
8 Environmental Affairs Committee and the House Health and Government Operations
9 Committee in accordance with § 2-1246 of the State Government Article.

10 SECTION 3. AND BE IT FURTHER ENACTED, That the catchline contained in
11 this Act is not law and may not be considered to have been enacted as part of this Act.

12 SECTION 4. AND BE IT FURTHER ENACTED, That Section 1 of this Act shall take
13 effect July 1, 2016.

14 SECTION 5. AND BE IT FURTHER ENACTED, That, except as provided in Section
15 4 of this Act, this Act shall take effect June 1, 2016.

Approved:

Governor.

Speaker of the House of Delegates.

President of the Senate.