

Chapter 580

(Senate Bill 826)

AN ACT concerning

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

FOR the purpose of prohibiting a unit from requiring a prime contractor, and a prime contractor from requiring a subcontractor, to begin work under a contract until the procurement officer for the unit issues a certain change order; providing that certain acceptance letters for certain procurement contracts for construction have the same force and effect as change orders for certain purposes until certain units issue written change orders; providing, under certain circumstances, that nothing in a certain provision of this Act prohibits a procurement officer from issuing a certain order, authorizes a ~~prime contractor to refuse~~ refusal to perform certain work or furnish certain labor and materials, or prejudices or impairs the right of a prime contractor to submit a certain claim or dispute to a procurement officer; prohibiting a change order from being required, under certain circumstances, for work to continue and be completed beyond certain quantities; requiring a certain unit to make a certain determination and issue a certain change order after certain work is completed; requiring, under certain circumstances, a unit to pay an invoice for work performed and accepted under a change order within a certain time period and in accordance with a certain provision of law; requiring a prime contractor to provide, within a certain time period, a subcontractor with a copy of a certain change order and a certain amount to be paid to the subcontractor; requiring the Board of Public Works to propose certain regulations before a certain date; requiring each unit to issue certain guidelines on or before a certain date; requiring that certain guidelines be updated and reissued under certain circumstances; providing that certain provisions of this Act have effect only to the extent that the provisions do not conflict with federal law or regulation; applying certain provisions of this Act to certain procurements and units of State government that are generally excluded from State procurement law; providing for the application of certain provisions of this Act; requiring the Secretary of General Services to convene a certain workgroup to develop recommendations that address certain issues; requiring the workgroup to include representatives from certain entities and to coordinate its activities with a certain commission for a certain purpose; requiring the workgroup to report its recommendations to certain committees of the General Assembly on or before a certain date; providing that a certain catchline is not law and may not be considered to have been enacted as part of this Act; providing for the effective dates of this Act; and generally relating to change orders for State procurement contracts for construction.

BY repealing and reenacting, without amendments,

Article – State Finance and Procurement

Section 11–203(a) and (e)(1), (2), and (5)

Annotated Code of Maryland
(2015 Replacement Volume)

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

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

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

Article – State Finance and Procurement

11–203.

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

(1) procurement by:

(i) the Blind Industries and Services of Maryland;

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

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

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

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

(vi) the Maryland Public Broadcasting Commission:

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

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

3. for procurement contracts needed to implement the repacking requirements of the federal Spectrum Act;

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

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

(ix) the Maryland Historical Trust for:

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

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

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

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

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

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

(xii) the Rural Maryland Council;

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

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

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

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

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

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

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

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

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

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

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

(2) procurement by a unit from:

(i) another unit;

(ii) a political subdivision of the State;

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

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

- (v) an agency or political subdivision of a government; or
 - (vi) a bistate, multistate, bicounty, or multicounty governmental agency; or
- (3) procurement in support of enterprise activities for the purpose of:
- (i) direct resale; or
 - (ii) remanufacture and subsequent resale.

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

- (i) § 11–205 of this subtitle (“Collusion”);
- (ii) § 10–204 of this article (“Approval for designated contracts”);
- (iii) Title 12, Subtitle 2 of this article (“Supervision of Capital Expenditures and Real Property Leases”);
- (iv) § 13–219 of this article (“Required clauses – Nondiscrimination clause”);
- (v) § 13–221 of this article (“Disclosures to Secretary of State”);
- (vi) Title 12, Subtitle 4 of this article (“Policies and Procedures for Exempt Units”);
- (VII) § 15–112 OF THIS ARTICLE (“CHANGE ORDERS”);**
- ~~[(vii)] (VIII)~~ Title 16 of this article (“Suspension and Debarment of Contractors”); and
- ~~[(viii)] (IX)~~ Title 17 of this article (“Special Provisions – State and Local Subdivisions”).

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

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

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

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

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

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

15–112. CHANGE ORDERS.

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

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

(2) FOR PURPOSES OF THIS SECTION, A WRITTEN ACCEPTANCE LETTER FOR A STATE HIGHWAY ADMINISTRATION OR MARYLAND AVIATION

ADMINISTRATION PROCUREMENT CONTRACT FOR CONSTRUCTION SHALL HAVE THE SAME FORCE AND EFFECT AS A CHANGE ORDER UNTIL THE STATE HIGHWAY ADMINISTRATION OR MARYLAND AVIATION ADMINISTRATION ISSUES A WRITTEN CHANGE ORDER.

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

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

(II) A FORCE ACCOUNT;

(III) A CONSTRUCTION CHANGE DIRECTIVE; OR

(IV) A TIME AND MATERIALS BASIS.

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

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

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

(III) PREJUDICES OR IMPAIRS THE RIGHT OF A PRIME CONTRACTOR TO SUBMIT A CLAIM OR DISPUTE TO A PROCUREMENT OFFICER, IN ACCORDANCE WITH APPLICABLE LAW AND THE CONTRACT, SEEKING ADDITIONAL

COMPENSATION FOR COMPLYING WITH AN ORDER OF THE PROCUREMENT OFFICER TO PERFORM WORK OR TO FURNISH LABOR OR MATERIALS DETERMINED BY THE PROCUREMENT OFFICER TO BE REQUIRED BY A CONTRACT BETWEEN THE PRIME CONTRACTOR AND A UNIT.

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

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

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

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

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

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

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

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

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

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

SECTION 2. AND BE IT FURTHER ENACTED, That:

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

- (1) scope review process;
- (2) termination for convenience;
- (3) uniformity of change order practices and authority;
- (4) prompt payment and interest;
- (5) force account practice and policies;
- (6) funding;
- (7) contractor capacity; and

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

(b) The workgroup shall include representatives from:

- (1) the Maryland Chapter of the Associated General Contractors of America;
- (2) the Associated Builders and Contractors of Metro Washington;
- (3) the Alliance for Construction Excellence;
- (4) the Coalition for Contracting Fairness;
- (5) the Maryland Washington Minority Contractors Association; and
- (6) any units of the State the Secretary of General Services deems appropriate.

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

(d) On or before December 31, 2016, the workgroup shall report its policy, regulatory, and legislative recommendations to the Senate Education, Health, and

Environmental Affairs Committee and the House Health and Government Operations Committee in accordance with § 2-1246 of the State Government Article.

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

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

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

Approved by the Governor, May 19, 2016.