

SENATE BILL 773

P2

(3lr1482)

ENROLLED BILL

— *Budget and Taxation/Health and Government Operations* —

Introduced by **Senator Lam**

Read and Examined by Proofreaders:

Proofreader.

Proofreader.

Sealed with the Great Seal and presented to the Governor, for his approval this

_____ day of _____ at _____ o'clock, _____ M.

President.

CHAPTER _____

1 AN ACT concerning

2 State Procurement – Liquidated Damages – Policies and Requirements

3 FOR the purpose of requiring the Board of Public Works, on or before a certain date, to
4 publish a model policy concerning the inclusion and use of liquidated damages
5 provisions in procurement contracts; requiring a unit of State government, on or
6 before a certain date, to adopt a written policy concerning the inclusion and use of
7 liquidated damages provisions that is substantially similar to the policy published
8 by the Board; authorizing a primary procurement unit to establish a written
9 liquidated damages policy that is applicable to units within the control authority of
10 the primary procurement unit; ~~requiring, for certain procurements, the unit to obtain~~
11 ~~the approval of the Board if the unit does not include liquidated damages provisions~~
12 ~~as recommended by the policy applicable to the unit; requiring the head of a unit and~~
13 ~~the procurement officer to make certain attestations to the Board with a request to~~
14 ~~modify certain contracts in a certain way; requiring the unit to obtain a certain~~
15 ~~approval if the unit decides not to pursue certain liquidated damages; requiring a~~

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.

Italics indicate opposite chamber/conference committee amendments.



unit that decides not to include in a contract a liquidated damages clause under certain circumstances to maintain certain documentation obtain the approval of the head of the unit; requiring, for certain procurements, a unit to obtain the approval of the head of the unit and maintain certain documentation if the unit decides not to pursue certain liquidated damages; and generally relating to State procurements and liquidated damages provisions.

BY repealing and reenacting, with amendments,
Article – State Finance and Procurement
Section 11–203(b)(1), (d), (e)(7), (f), (h), and (i)
Annotated Code of Maryland
(2021 Replacement Volume and 2022 Supplement)

12 BY repealing and reenacting, with amendments,
13 Article – State Finance and Procurement
14 Section 11–203(c)
15 Annotated Code of Maryland
16 (2021 Replacement Volume and 2022 Supplement)
17 (As enacted by Chapters 580 and 581 of the Acts of the General Assembly of 2016)

18 BY repealing and reenacting, without amendments,
19 Article – State Finance and Procurement
20 Section 13–218(a)(4)
21 Annotated Code of Maryland
22 (2021 Replacement Volume and 2022 Supplement)

23 BY adding to
24 Article – State Finance and Procurement
25 Section 15–113
26 Annotated Code of Maryland
27 (2021 Replacement Volume and 2022 Supplement)

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

Article – State Finance and Procurement

31 11-203.

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

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

35 (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");

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

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

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

8 (vii) § 15–112 of this article (“Change orders”);

9 (viii) § 15-113 OF THIS ARTICLE (“LIQUIDATED DAMAGES
10 POLICIES AND REPORTING”);

15 (c) Except as provided in Title 12, Subtitle 4 and Title 14, Subtitle 3 of this article
16 and except for **[\$ 15–112] §§ 15–112 AND 15–113** of this article, this Division II does not
17 apply to the Maryland Stadium Authority.

18 (d) Except as provided in Title 12, Subtitle 4 and Title 14, Subtitle 3 of this article
19 **AND EXCEPT FOR § 15–113 OF THIS ARTICLE**, this Division II does not apply to the Board
20 of Trustees of the State Retirement and Pension System for:

(4) services related to the administration of the Postretirement Health Benefits Trust Fund; and

(5) expenditures for the safe custody, domestic or global, of investments as provided under § 21-123(f) of the State Personnel and Pensions Article.

4 (i) procurement by a University or Baltimore City Community
5 College from:

6 1. another unit;

3. an agency of a political subdivision of the State;

5. an agency or political subdivision of a government; or

14 (ii) procurement by a University in support of enterprise activities
15 for the purpose of:

16 1. direct resale;

17 2. remanufacture and subsequent resale; or

18 3. procurement by the University for overseas programs; or

19 (iii) procurement by the University System of Maryland for:

28 (f) Except as provided in Title 12, Subtitle 4 and Title 14, Subtitle 3 of this article
29 **AND EXCEPT FOR § 15-113 OF THIS ARTICLE**, this Division II does not apply to Maryland
30 529 for:

(2) To the extent otherwise required by law, the following provisions of this division apply to a public–private partnership under Title 10A of this article:

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

14 (ii) § 11–205.1 of this subtitle (“Falsification, concealment, etc. of
15 material facts”);

16 (iii) Title 12, Subtitle 4 of this article ("Policies and Procedures for
17 Exempt Units");

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

20 (v) Title 14, Subtitle 3 of this article (“Minority Business
21 Participation”);

22 (vi) § 15-113 OF THIS ARTICLE (“LIQUIDATED DAMAGES
23 POLICIES AND REPORTING”);

24 (VII) Title 17, Subtitle 1 of this article (“Security for Construction
25 Contracts”);

²⁸ [viii] (ix) Title 18 of this article (“Living Wage”).

(2) The Maryland Corps Program established under Title 24, Subtitle 11 of the Education Article is subject to Title 14, Subtitle 3 **AND § 15-113** of this article.

3 13-218.

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

5 (4) liquidated damages, as appropriate;

6 15-113.

7 (A) IN THIS SECTION, "LIQUIDATED DAMAGES" MEANS DAMAGES IN AN
8 AMOUNT DESIGNATED BY THE PARTIES TO A CONTRACT THAT THE INJURED PARTY
9 IS ELIGIBLE TO COLLECT AS COMPENSATION FOR A SPECIFIC BREACH OF THE
10 CONTRACT.

11 (B) (1) ON OR BEFORE JANUARY 1, 2024, THE BOARD, IN CONSULTATION
12 WITH THE PROCUREMENT IMPROVEMENT COUNCIL, SHALL PUBLISH A MODEL
13 POLICY CONCERNING THE INCLUSION AND USE OF LIQUIDATED DAMAGES
14 PROVISIONS IN PROCUREMENT CONTRACTS.

15 (2) THE MODEL POLICY SHALL INCLUDE THE FOLLOWING ELEMENTS:

23 (II) GUIDANCE FOR DRAFTING LIQUIDATED DAMAGES
24 PROVISIONS, INCLUDING RECOMMENDED METHODS FOR CALCULATING THE
25 AMOUNT TO BE ASSESSED:

26 (III) A DRAFT PLAN FOR RESPONDING TO DEFICIENCIES IN A
27 CONTRACTOR'S PERFORMANCE THAT MAY TRIGGER A LIQUIDATED DAMAGES
28 PROVISION, REVIEWED BY LEGAL COUNSEL FOR THE BOARD; AND

3 (4) THE BOARD MAY DELEGATE THE DUTIES UNDER THIS
4 SUBSECTION TO THE PROCUREMENT IMPROVEMENT COUNCIL ESTABLISHED
5 UNDER § 12–105 OF THIS DIVISION II.

6 (c) (1) SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION, ON OR
7 BEFORE JULY 1, 2024, A UNIT SHALL ADOPT A WRITTEN POLICY CONCERNING THE
8 INCLUSION AND USE OF LIQUIDATED DAMAGES PROVISIONS IN PROCUREMENT
9 CONTRACTS BY THE UNIT THAT IS SUBSTANTIALLY SIMILAR TO THE MODEL POLICY
10 ESTABLISHED UNDER SUBSECTION (B) OF THIS SECTION.

15 (II) A UNIT THAT PERFORMS A PROCUREMENT SUBJECT TO THE
16 CONTROL AUTHORITY OF A PRIMARY PROCUREMENT UNIT SHALL APPLY THE
17 LIQUIDATED DAMAGES POLICY ESTABLISHED BY THE PRIMARY PROCUREMENT UNIT
18 TO ANY RESULTING PROCUREMENT CONTRACT.

19 (D) (1) IN THIS SUBSECTION, "SERVICES" INCLUDES:

(1) CONSTRUCTION RELATED SERVICES:

(H) ~~ARCHITECTURAL SERVICES:~~

(III) ~~ENGINEERING SERVICES~~:

(IV) ENERGY PERFORMANCE CONTRACT SERVICES:

~~(V) INFORMATION PROCESSING SERVICES, AS PROVIDED IN
TITLE 3 OF THIS ARTICLE; AND~~

26 **(VI) TELECOMMUNICATION SERVICES AND SYSTEMS**
27 **MANAGEMENT, AS PROVIDED IN TITLE 3.5, SUBTITLE 4 OF THIS ARTICLE.**

(2) THIS SUBSECTION APPLIES TO PROCUREMENTS FOR SERVICES:

6 (3) BEFORE EXECUTING A PROCUREMENT CONTRACT FOR A
7 PROCUREMENT, THE UNIT SHALL OBTAIN THE APPROVAL OF THE BOARD IF THE
8 UNIT DOES NOT INCLUDE LIQUIDATED DAMAGES PROVISIONS AS RECOMMENDED BY
9 THE POLICY ESTABLISHED UNDER SUBSECTION (C) OF THIS SECTION.

13 (i) DELIVERABLES ARE BEING PROVIDED IN ACCORDANCE
14 WITH TIMELINES ESTABLISHED IN THE PROCUREMENT CONTRACT; AND

15 (ii) ~~THERE ARE NO MAJOR ISSUES WITH CONTRACT~~
16 ~~PERFORMANCE.~~

17 (5) A UNIT SHALL OBTAIN BOARD APPROVAL OF THE UNIT'S
18 DECISION NOT TO PURSUE LIQUIDATED DAMAGES IN THE EVENT THE SPECIFIED
19 BREACH ASSOCIATED WITH A LIQUIDATED DAMAGES PROVISION OCCURS.

20 (6) ~~ON OR BEFORE SEPTEMBER 1, 2025, AND EACH SEPTEMBER 1~~
21 ~~THEREAFTER, A UNIT SHALL FILE A REPORT WITH THE BOARD AND, IN ACCORDANCE~~
22 ~~WITH § 2-1257 OF THE STATE GOVERNMENT ARTICLE, THE GENERAL ASSEMBLY~~
23 ~~THAT IDENTIFIES FOR THE PREVIOUS FISCAL YEAR:~~

24 (ii) ANY PROCUREMENTS THAT HAVE EXPERIENCED DELAYS IN
25 CONTRACT PERFORMANCE OR OTHER NONCOMPLIANCE WITH THE TERMS OF THE
26 PROCUREMENT CONTRACT;

27 (ii) WHETHER THE PROCUREMENT CONTRACT AT ISSUE
28 CONTAINS LIQUIDATED DAMAGES PROVISIONS;

29 (iii) WHETHER THE UNIT IS PURSUING A CLAIM FOR LIQUIDATED
30 DAMAGES AGAINST THE VENDOR AND THE STATUS OF THAT CLAIM; AND

31 **(IV) ~~IF THE UNIT IS NOT PURSUING A CLAIM FOR LIQUIDATED~~**
32 **~~DAMAGES, WHETHER THE UNIT:~~**

1 1. ~~RECEIVED APPROVAL FROM THE BOARD AS~~
2 ~~REQUIRED UNDER PARAGRAPH (5) OF THIS SUBSECTION AND THE BASIS FOR THE~~
3 ~~BOARD'S APPROVAL; OR~~

4 2. ~~THE PLAN FOR REQUESTING APPROVAL FROM THE~~
5 ~~BOARD, INCLUDING THE TIMELINE FOR WHEN APPROVAL WILL BE REQUESTED.~~

6 (D) ~~IF A UNIT DECIDES NOT TO INCLUDE IN A CONTRACT A LIQUIDATED~~
7 ~~DAMAGES CLAUSE SPECIFIED UNDER § 13-218(A)(4) OF THIS ARTICLE, THE UNIT~~
8 ~~SHALL MAINTAIN DOCUMENTATION OF THE INDIVIDUAL WHO APPROVED THE~~
9 ~~DECISION NOT TO INCLUDE THE LIQUIDATED DAMAGES CLAUSE.~~

10 (E) (1) ~~THIS SUBSECTION APPLIES ONLY TO PROCUREMENTS VALUED AT~~
11 ~~\$5,000,000 OR MORE.~~

12 (2) ~~IF A UNIT DECIDES NOT TO PURSUE LIQUIDATED DAMAGES WHEN~~
13 ~~A SPECIFIED BREACH ASSOCIATED WITH A LIQUIDATED DAMAGES PROVISION HAS~~
14 ~~OCCURRED, THE UNIT SHALL MAINTAIN DOCUMENTATION ON:~~

15 (I) ~~THE REASON THE UNIT DECIDED NOT TO PURSUE~~
16 ~~LIQUIDATED DAMAGES; AND~~

17 (II) ~~THE INDIVIDUAL WHO APPROVED THE DECISION NOT TO~~
18 ~~PURSUE LIQUIDATED DAMAGES.~~

19 (D) ~~A UNIT SHALL OBTAIN THE APPROVAL OF THE HEAD OF THE UNIT IF THE~~
20 ~~UNIT DECIDES NOT TO INCLUDE IN A CONTRACT A LIQUIDATED DAMAGES CLAUSE~~
21 ~~SPECIFIED UNDER § 13-218(A)(4) OF THIS ARTICLE.~~

22 (E) (1) ~~THIS SUBSECTION APPLIES ONLY TO PROCUREMENTS VALUED AT~~
23 ~~\$5,000,000 OR MORE.~~

24 (2) ~~IF A UNIT DECIDES NOT TO PURSUE LIQUIDATED DAMAGES WHEN~~
25 ~~A SPECIFIED BREACH ASSOCIATED WITH A LIQUIDATED DAMAGES PROVISION HAS~~
26 ~~OCCURRED, THE UNIT SHALL:~~

27 (I) ~~OBTAIN THE APPROVAL OF THE DECISION BY THE HEAD OF~~
28 ~~THE UNIT; AND~~

29 (II) ~~MAINTAIN DOCUMENTATION ON THE REASON THE UNIT~~
30 ~~DECIDED NOT TO PURSUE LIQUIDATED DAMAGES.~~

31 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July
32 1, 2023.

Approved:

Governor.

President of the Senate.

Speaker of the House of Delegates.