

SENATE BILL 773

P2

3lr1482

By: **Senator Lam**

Introduced and read first time: February 6, 2023

Assigned to: Budget and Taxation

A BILL ENTITLED

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; and generally
16 relating to State procurements and liquidated damages provisions.

17 BY repealing and reenacting, with amendments,
18 Article – State Finance and Procurement
19 Section 11–203(b)(1), (d), (e)(7), (f), (h), and (i)
20 Annotated Code of Maryland
21 (2021 Replacement Volume and 2022 Supplement)

22 BY repealing and reenacting, with amendments,
23 Article – State Finance and Procurement
24 Section 11–203(c)
25 Annotated Code of Maryland
26 (2021 Replacement Volume and 2022 Supplement)
27 (As enacted by Chapters 580 and 581 of the Acts of the General Assembly of 2016)

28 BY repealing and reenacting, without amendments,

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 Article – State Finance and Procurement
 2 Section 13–218(a)(4)
 3 Annotated Code of Maryland
 4 (2021 Replacement Volume and 2022 Supplement)

5 BY adding to
 6 Article – State Finance and Procurement
 7 Section 15–113
 8 Annotated Code of Maryland
 9 (2021 Replacement Volume and 2022 Supplement)

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

12 **Article – State Finance and Procurement**

13 11–203.

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

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

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

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

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

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

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

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

26 (viii) **§ 15–113 OF THIS ARTICLE (“LIQUIDATED DAMAGES
 27 POLICIES AND REPORTING”);**

28 **(IX)** Title 16 of this article (“Suspension and Debarment of
 29 Contractors”); and

30 **[(ix)] (X)** Title 17 of this article (“Special Provisions – State and
 31 Local Subdivisions”).

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

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

7 (1) services of managers to invest the assets of the State Retirement and
8 Pension System, including real and personal property;

9 (2) expenditures to manage, maintain, and enhance the value of the assets
10 of the State Retirement and Pension System in accordance with investment guidelines
11 adopted by the Board of Trustees;

12 (3) services related to the administration of the optional retirement
13 program under Title 30 of the State Personnel and Pensions Article;

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

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

18 (e) (7) [Paragraphs] **EXCEPT WITH REGARD TO THE PROVISIONS OF §**
19 **15–113 OF THIS ARTICLE, PARAGRAPHS (3), (4), and (5)** of this subsection do not apply
20 to:

21 (i) procurement by a University or Baltimore City Community
22 College from:

23 1. another unit;

24 2. a political subdivision of the State;

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

26 4. a government, including the government of another state,
27 of the United States, or of another country;

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

29 6. a bistate, multistate, bicounty, or multicounty
30 governmental agency;

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

- 1 1. direct resale;
- 2 2. remanufacture and subsequent resale; or
- 3 3. procurement by the University for overseas programs; or

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

5 1. services of managers to invest, in accordance with the
6 management and investment policies adopted by the Board of Regents of the University
7 System of Maryland, gift and endowment assets received by the University System of
8 Maryland in accordance with § 12–104(e) of the Education Article; or

9 2. expenditures to manage, maintain, and enhance, in
10 accordance with the management and investment policies adopted by the Board of Regents
11 of the University System of Maryland, the value of gift and endowment assets received by
12 the University System of Maryland in accordance with § 12–104(e) of the Education Article.

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

16 (1) services of managers to invest the assets of the Maryland Senator
17 Edward J. Kasemeyer Prepaid College Trust in accordance with the comprehensive
18 investment plan adopted by the Maryland 529 Board under § 18–1906 of the Education
19 Article; and

20 (2) expenditures to manage, maintain, and enhance the value of the assets
21 of the Maryland Senator Edward J. Kasemeyer Prepaid College Trust in accordance with
22 the comprehensive investment plan adopted by the Maryland 529 Board under § 18–1906
23 of the Education Article.

24 (h) (1) Except as provided in paragraph (2) of this subsection, this division does
25 not apply to a public–private partnership under Title 10A of this article.

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

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

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

31 (iii) Title 12, Subtitle 4 of this article (“Policies and Procedures for
32 Exempt Units”);

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

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

5 (vi) **§ 15–113 OF THIS ARTICLE (“LIQUIDATED DAMAGES
6 POLICIES AND REPORTING”)**;

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

9 [(vii)] (VIII) Title 17, Subtitle 2 of this article (“Prevailing Wage Rates
10 – Public Work Contracts”); and

11 [(viii)] (IX) Title 18 of this article (“Living Wage”).

12 (i) (1) Except as provided in paragraph (2) of this subsection, this Division II
13 does not apply to the Maryland Corps Program established under Title 24, Subtitle 11 of
14 the Education Article.

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

17 13–218.

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

19 (4) liquidated damages, as appropriate;

20 **15–113.**

21 (A) IN THIS SECTION, “LIQUIDATED DAMAGES” MEANS DAMAGES IN AN
22 AMOUNT DESIGNATED BY THE PARTIES TO A CONTRACT THAT THE INJURED PARTY
23 IS ELIGIBLE TO COLLECT AS COMPENSATION FOR A SPECIFIC BREACH OF THE
24 CONTRACT.

25 (B) (1) ON OR BEFORE JANUARY 1, 2024, THE BOARD SHALL PUBLISH A
26 MODEL POLICY CONCERNING THE INCLUSION AND USE OF LIQUIDATED DAMAGES
27 PROVISIONS IN PROCUREMENT CONTRACTS.

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

29 (I) GUIDANCE ON WHEN TO INCLUDE LIQUIDATED DAMAGES
30 PROVISIONS IN PROCUREMENT CONTRACTS, INCLUDING:

1 1. INSTANCES WHERE LIQUIDATED DAMAGES
2 PROVISIONS ARE REQUIRED BY LAW, INCLUDING THE REQUIREMENTS UNDER §§
3 14-303, 17-220, 17-222, AND 18-108 OF THIS DIVISION II; AND

4 2. CONDITIONS WHERE LIQUIDATED DAMAGES
5 PROVISIONS ARE RECOMMENDED TO PROTECT STATE INTERESTS;

6 (ii) GUIDANCE FOR DRAFTING LIQUIDATED DAMAGES
7 PROVISIONS, INCLUDING RECOMMENDED METHODS FOR CALCULATING THE
8 AMOUNT TO BE ASSESSED;

9 (iii) A DRAFT PLAN FOR RESPONDING TO DEFICIENCIES IN A
10 CONTRACTOR'S PERFORMANCE THAT MAY TRIGGER A LIQUIDATED DAMAGES
11 PROVISION, REVIEWED BY LEGAL COUNSEL FOR THE BOARD; AND

12 (iv) EXAMPLES OF LIQUIDATED DAMAGES PROVISIONS THAT
13 MAY BE USED IN A PROCUREMENT CONTRACT WITH APPROPRIATE MODIFICATION
14 BY THE UNIT.

15 (3) THE BOARD MAY PROPOSE ALTERNATIVE ELEMENTS OR MODELS
16 BASED ON CONTRACT TYPE.

17 (4) THE BOARD MAY DELEGATE THE DUTIES UNDER THIS
18 SUBSECTION TO THE PROCUREMENT IMPROVEMENT COUNCIL ESTABLISHED
19 UNDER § 12-105 OF THIS DIVISION II.

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

25 (2) (i) A PRIMARY PROCUREMENT UNIT MAY ESTABLISH A POLICY
26 AS REQUIRED UNDER PARAGRAPH (1) OF THIS SUBSECTION THAT IS APPLICABLE TO
27 THOSE PROCUREMENTS THAT ARE WITHIN THE CONTROL AUTHORITY OF THE
28 PRIMARY PROCUREMENT UNIT.

29 (ii) A UNIT THAT PERFORMS A PROCUREMENT SUBJECT TO THE
30 CONTROL AUTHORITY OF A PRIMARY PROCUREMENT UNIT SHALL APPLY THE
31 LIQUIDATED DAMAGES POLICY ESTABLISHED BY THE PRIMARY PROCUREMENT UNIT
32 TO ANY RESULTING PROCUREMENT CONTRACT.

1 **(D) (1) IN THIS SUBSECTION, “SERVICES” INCLUDES:**

2 **(I) CONSTRUCTION-RELATED SERVICES;**

3 **(II) ARCHITECTURAL SERVICES;**

4 **(III) ENGINEERING SERVICES;**

5 **(IV) ENERGY PERFORMANCE CONTRACT SERVICES;**

6 **(V) INFORMATION PROCESSING SERVICES, AS PROVIDED IN**
7 **TITLE 3.5, SUBTITLE 3 OF THIS ARTICLE; AND**

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

10 **(2) THIS SUBSECTION APPLIES TO PROCUREMENTS FOR SERVICES:**

11 **(I) VALUED AT \$5,000,000 OR MORE, INCLUDING ALL OPTIONS,**
12 **REGARDLESS OF WHETHER THE OPTIONS HAVE BEEN EXECUTED, AND ALL**
13 **AMENDMENTS; OR**

14 **(II) WHERE AT LEAST \$1,000,000 IS SPENT OR ANTICIPATED TO**
15 **BE SPENT IN A SINGLE YEAR.**

16 **(3) BEFORE EXECUTING A PROCUREMENT CONTRACT FOR A**
17 **PROCUREMENT, THE UNIT SHALL OBTAIN THE APPROVAL OF THE BOARD IF THE**
18 **UNIT DOES NOT INCLUDE LIQUIDATED DAMAGES PROVISIONS AS RECOMMENDED BY**
19 **THE POLICY ESTABLISHED UNDER SUBSECTION (C) OF THIS SECTION.**

20 **(4) A UNIT SHALL INCLUDE WITH A CONTRACT MODIFICATION THAT**
21 **HAS A VALUE OF AT LEAST \$1,000,000 A STATEMENT BY THE HEAD OF THE UNIT AND**
22 **THE PROCUREMENT OFFICER ATTESTING THAT:**

23 **(I) DELIVERABLES ARE BEING PROVIDED IN ACCORDANCE**
24 **WITH TIMELINES ESTABLISHED IN THE PROCUREMENT CONTRACT; AND**

25 **(II) THERE ARE NO MAJOR ISSUES WITH CONTRACT**
26 **PERFORMANCE.**

27 **(5) A UNIT SHALL OBTAIN BOARD APPROVAL OF THE UNIT’S**
28 **DECISION NOT TO PURSUE LIQUIDATED DAMAGES IN THE EVENT THE SPECIFIED**
29 **BREACH ASSOCIATED WITH A LIQUIDATED DAMAGES PROVISION OCCURS.**

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

5 **(I) ANY PROCUREMENTS THAT HAVE EXPERIENCED DELAYS IN**
6 **CONTRACT PERFORMANCE OR OTHER NONCOMPLIANCE WITH THE TERMS OF THE**
7 **PROCUREMENT CONTRACT;**

8 **(II) WHETHER THE PROCUREMENT CONTRACT AT ISSUE**
9 **CONTAINS LIQUIDATED DAMAGES PROVISIONS;**

10 **(III) WHETHER THE UNIT IS PURSUING A CLAIM FOR LIQUIDATED**
11 **DAMAGES AGAINST THE VENDOR AND THE STATUS OF THAT CLAIM; AND**

12 **(IV) IF THE UNIT IS NOT PURSUING A CLAIM FOR LIQUIDATED**
13 **DAMAGES, WHETHER THE UNIT:**

14 **1. RECEIVED APPROVAL FROM THE BOARD AS**
15 **REQUIRED UNDER PARAGRAPH (5) OF THIS SUBSECTION AND THE BASIS FOR THE**
16 **BOARD'S APPROVAL; OR**

17 **2. THE PLAN FOR REQUESTING APPROVAL FROM THE**
18 **BOARD, INCLUDING THE TIMELINE FOR WHEN APPROVAL WILL BE REQUESTED.**

19 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July
20 1, 2023.