

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 773

(Senator Lam)

Budget and Taxation

Health and Government Operations

State Procurement - Liquidated Damages - Policies and Requirements

This bill requires (1) the Board of Public Works (BPW), by January 1, 2024, to publish a model policy concerning the inclusion and use of liquidated damages provisions in procurement contracts and (2) each unit of State government, including a unit otherwise exempt from State procurement law, to adopt a written policy that is substantially similar to the model policy by July 1, 2024. Each procurement unit must also obtain specified approval related to decisions not to (1) include liquidated damages provisions in contracts or (2) pursue damages in the event of a breach of contract (in which case specified written documentation must also be maintained). **The bill takes effect July 1, 2023.**

Fiscal Summary

State Effect: BPW and procuring agencies can implement the bill with existing resources. No effect on revenues.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: “Liquidated damages” is defined as damages in an amount designated by the parties to a contract that the injured party is eligible to collect as compensation for a specific breach of the contract.

All of the bill’s provisions apply to State procurement units that are otherwise exempt from certain provisions of State procurement law.

The model policy developed by BPW must be developed in consultation with the Procurement Improvement Council and include:

- guidance on when to include liquidated damages provisions in procurement contracts;
- guidance for drafting liquidated damages provisions, including recommended methods for calculating the amount to be assessed;
- a draft plan for responding to deficiencies in a contractor's performance that may trigger a liquidated damages provision; and
- examples of liquidated damages provisions that may be used.

In adopting a similar policy, a primary procurement unit may establish a policy that applies to procurements under its control.

If a procurement unit decides not to include a liquidated damages clause in a specific contract, it must obtain the approval of the head of the unit.

For procurements valued at \$5.0 million or more, if a procurement unit decides not to pursue liquidated damages in the event of a breach, the unit must obtain the approval of the head of the unit and maintain documentation on the reason the unit decided not to pursue liquidated damages.

Current Law:

Procurement Exemptions

The University System of Maryland (USM), Morgan State University (MSU), St. Mary's College of Maryland (SMCM), and Baltimore City Community College are exempt from most provisions of State procurement law. In addition, the following agencies are exempted in whole or in part from most State procurement law.

- Blind Industries and Services of Maryland;
- Maryland State Arts Council;
- Maryland Health and Higher Educational Facilities Authority;
- Department of Commerce;
- Maryland Food Center Authority;
- Maryland Public Broadcasting Commission;
- Maryland State Planning Council on Developmental Disabilities;
- Maryland Historical Trust;
- Rural Maryland Council;

- Maryland State Lottery and Gaming Control Agency;
- Maryland Health Insurance Plan;
- Maryland Energy Administration;
- Maryland Developmental Disabilities Administration;
- Department of General Services (DGS), for historic preservation;
- Department of Natural Resources, for conservation service opportunities;
- Maryland State Archives;
- Maryland Stadium Authority;
- State Retirement and Pension System;
- College Savings Plan of Maryland; and
- Chesapeake Bay Trust.

Liquidated Damages

Each State procurement contract must include a clause or clauses covering liquidated damages, as appropriate. DGS advises that (1) for construction contracts, liquidated damages are required unless the agency head determines otherwise and (2) determinations for other contracts are made on a contract-by-contract basis by a procurement officer in consultation with the Office of the Attorney General.

In addition, with respect to State procurement, liquidated damages may be collected for specified violations of:

- the Minority Business Enterprise program;
- the State's prevailing wage requirements; and
- the State's Living Wage law.

Primary Procurement Units

In general, BPW may control procurement by units of the Executive Branch, except for procurements related to roads, bridges, and highways. BPW may delegate its authority; it has delegated much of its authority as described below. However, most construction and services contracts with a value of at least \$200,000 require final approval from BPW.

The State Treasurer controls procurements by other agencies for insurance and banking services; DGS controls most other procurements, including those for construction, services, commodities, construction-related services, and information technology.

Primary procurement units are those units that can conduct their own procurements without the approval of any other unit. They are:

- the State Treasurer;
- DGS;
- Maryland Department of Transportation;
- USM;
- Maryland Port Administration;
- MSU; and
- SMCM.

Additional Information

Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: None.

Information Source(s): Maryland Department of Aging; Department of Commerce; Maryland Department of Emergency Management; Maryland Department of Agriculture; Maryland Department of the Environment; Department of General Services; Department of Housing and Community Development; Department of Human Services; Department of Juvenile Services; Maryland Department of Labor; Department of Natural Resources; Department of Public Safety and Correctional Services; Board of Public Works; Maryland Department of Transportation; Department of Legislative Services

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Analysis by: Michael C. Rubenstein

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