

Chapter 206

(Senate Bill 773)

AN ACT concerning

State Procurement – Liquidated Damages – Policies and Requirements

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

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

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

BY adding to

Article – State Finance and Procurement
 Section 15–113
 Annotated Code of Maryland
 (2021 Replacement Volume and 2022 Supplement)

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.

(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”);
- (viii) **§ 15–113 OF THIS ARTICLE (“LIQUIDATED DAMAGES POLICIES AND REPORTING”)**;
- (ix) Title 16 of this article (“Suspension and Debarment of Contractors”); and
- [(ix)] (X)** 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] §§ 15–112 AND 15–113** of this article, this Division II does not apply to the Maryland Stadium Authority.

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

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

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

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

(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.

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

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

1. another unit;
2. a political subdivision of the State;
3. an agency of a political subdivision of the State;
4. a government, including the government of another state, of the United States, or of another country;
5. an agency or political subdivision of a government; or
6. a bistate, multistate, bicounty, or multicounty governmental agency;

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

1. direct resale;

2. remanufacture and subsequent resale; or
 3. procurement by the University for overseas programs; or
- (iii) procurement by the University System of Maryland for:

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

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

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

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

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

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

(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:

- (i) § 11–205 of this subtitle (“Collusion”);
- (ii) § 11–205.1 of this subtitle (“Falsification, concealment, etc. of material facts”);
- (iii) Title 12, Subtitle 4 of this article (“Policies and Procedures for Exempt Units”);
- (iv) § 13–219 of this article (“Required clauses – Nondiscrimination clause”);

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

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

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

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

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

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

(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.

13–218.

(a) Each procurement contract shall include clauses covering:

(4) liquidated damages, as appropriate;

15–113.

(A) IN THIS SECTION, “LIQUIDATED DAMAGES” MEANS 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.

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

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

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

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

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

(II) GUIDANCE FOR DRAFTING LIQUIDATED DAMAGES PROVISIONS, INCLUDING RECOMMENDED METHODS FOR CALCULATING THE AMOUNT TO BE ASSESSED;

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

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

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

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

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

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

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

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

~~(I) CONSTRUCTION RELATED SERVICES;~~

~~(II) ARCHITECTURAL SERVICES;~~

~~(III) ENGINEERING SERVICES;~~

~~(IV) ENERGY PERFORMANCE CONTRACT SERVICES;~~

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

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

~~(2) THIS SUBSECTION APPLIES TO PROCUREMENTS FOR SERVICES:~~

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

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

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

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

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

~~(II) THERE ARE NO MAJOR ISSUES WITH CONTRACT PERFORMANCE.~~

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

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

~~(i) ANY PROCUREMENTS THAT HAVE EXPERIENCED DELAYS IN CONTRACT PERFORMANCE OR OTHER NONCOMPLIANCE WITH THE TERMS OF THE PROCUREMENT CONTRACT;~~

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

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

~~(iv) IF THE UNIT IS NOT PURSUING A CLAIM FOR LIQUIDATED DAMAGES, WHETHER THE UNIT:~~

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

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

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

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

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

~~(i) THE REASON THE UNIT DECIDED NOT TO PURSUE LIQUIDATED DAMAGES; AND~~

~~(ii) THE INDIVIDUAL WHO APPROVED THE DECISION NOT TO PURSUE LIQUIDATED DAMAGES.~~

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

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

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

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

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

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

Approved by the Governor, April 24, 2023.