

Chapter 654

(Senate Bill 556)

AN ACT concerning

Procurement – Construction Contingency Fund ~~and Contract Modification~~

FOR the purpose of altering the conditions under which the Secretaries of Budget and Management and General Services may request the Board of Public Works to authorize a certain expenditure from the Construction Contingency Fund; ~~requiring a procurement contract for construction to include a clause providing for contract modification when there is a substantial increase or decrease in the price of materials required to complete the contract, according to prevailing average market prices and as determined by the unit, due to certain factors;~~ and generally relating to ~~construction projects and contracts~~ the Construction Contingency Fund.

BY repealing and reenacting, without amendments,
 Article – State Finance and Procurement
 Section 3–609(a) and (b)
 Annotated Code of Maryland
 (2021 Replacement Volume and 2023 Supplement)

BY repealing and reenacting, with amendments,
 Article – State Finance and Procurement
 Section ~~3–609(e), 13–201, and 13–218~~ 3–609(e)
 Annotated Code of Maryland
 (2021 Replacement Volume and 2023 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

3–609.

- (a) There is a Construction Contingency Fund.
- (b) The Fund is a continuing, nonlapsing, revolving fund that consists of:
 - (1) money appropriated to the Fund:
 - (i) in the annual budget; or
 - (ii) in an annual General Construction Loan Act or in a Maryland Consolidated Capital Bond Loan Act; or

(2) unspent proceeds of an enabling act allocated to the Fund by the Governor under § 8–129 of this article; or

(3) the amount of an appropriation in an annual General Construction Loan Act or in a Maryland Consolidated Capital Bond Loan Act that is in excess of the amount needed for a project included in the Act and that is allocated to the Fund by the Governor.

(e) With the approval of the Governor, the Secretaries of Budget and Management and General Services may request the Board of Public Works to authorize an expenditure from the Fund to supplement any capital appropriation or to conduct value engineering on a project:

(1) that is for a capital project to be owned by the State or a unit of the State government;

(2) that was contained in a capital appropriation of an annual budget, in an annual general construction loan, or in an annual Maryland consolidated capital bond loan; and

(3) (i) that is insufficient in amount to permit the initial award of a contract for the project to the bidder or offeror selected in accordance with applicable State law, or to cover change orders during construction of the project which do not increase the scope of the project; [or]

(ii) if, in the belief of the Department of General Services or at the request of the budget committees, the project cost could be reduced or quality improved through the use of value engineering; OR

(III) THAT INCLUDES PRICE ADJUSTMENTS FOR MATERIAL PRICE FLUCTUATIONS OF IDENTIFIED ELIGIBLE PROJECT-SPECIFIC MATERIALS.

~~13-201~~

~~(a) In this subtitle the following words have the meanings indicated.~~

~~(b) “Change order” means a written order that:~~

~~(1) is signed by the procurement officer; and~~

~~(2) directs the contractor to make changes that the procurement contract authorizes the procurement officer to order without the consent of the contractor.~~

~~(c) “Contract modification” means a written alteration that:~~

~~(1) affects specifications, delivery point, date of delivery, period of performance, price, quantity, or other provisions of a procurement contract; and~~

~~(2) is accomplished by mutual action of the parties to the procurement contract.~~

~~(d) "Cost reimbursement contract" means a procurement contract under which the State reimburses a contractor for fees and other costs that are:~~

~~(1) recognized as allowable and allocable under the regulations of the Board on price and cost principles; and~~

~~(2) within a stated ceiling.~~

~~(E) "SUBSTANTIAL" MEANS LARGE IN AMOUNT, SIZE, OR NUMBER.~~

~~13-218.~~

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

~~(1) termination for default;~~

~~(2) termination wholly or partly by the State for its convenience if the head of the primary procurement unit determines that termination is appropriate;~~

~~(3) variations that occur between estimated and actual quantities of work in a procurement contract;~~

~~(4) liquidated damages, as appropriate;~~

~~(5) specified excuses for nonperformance;~~

~~(6) except for real property leases, the unilateral right of the State to order in writing:~~

~~(i) changes in the work, if the changes are within the scope of the procurement contract; and~~

~~(ii) a temporary stop or delay in performance;~~

~~(7) the obligation of the contractor to comply with the political contribution reporting requirements under Title 14 of the Election Law Article, to which the contractor may be subject as required under § 17-402 of this article; and~~

~~(8) nonvisual access for information technology as required under § 3A-312 of this article.~~

~~(b) In addition to the clauses required under subsection (a) of this section, a procurement contract for construction shall include:~~

~~(1) SUBJECT TO THE REQUIREMENTS OF SUBSECTION (E) OF THIS SECTION, A CLAUSE PROVIDING FOR CONTRACT MODIFICATION WHEN THERE IS A SUBSTANTIAL INCREASE OR DECREASE IN THE PRICE OF MATERIALS, UP TO A MAXIMUM OF 10%, REQUIRED TO COMPLETE THE CONTRACT, ACCORDING TO PREVAILING AVERAGE MARKET PRICES AND AS DETERMINED BY THE PROCURING UNIT, DUE TO:~~

~~(I) DELAYED NOTICE OF COMMENCEMENT BY THE UNIT FOR ANY REASON;~~

~~(II) ACTS OR OMISSIONS BY THE UNIT;~~

~~(III) CHANGES IN THE WORK OR THE SEQUENCING OF THE WORK ORDERED BY THE UNIT OR ARISING FROM THE DECISIONS OF THE UNIT THAT IMPACT THE TIME OF PERFORMANCE OF THE WORK;~~

~~(IV) ENCOUNTERING HAZARDOUS MATERIALS OR CONCEALED OR UNKNOWN CONDITIONS;~~

~~(V) DELAY AUTHORIZED BY THE UNIT PENDING DISPUTE RESOLUTION OR SUSPENSION BY THE UNIT; OR~~

~~(VI) FORCE MAJEURE EVENTS, INCLUDING AN EPIDEMIC OR A PANDEMIC;~~

~~(2) a clause providing for contract modification if the condition of a site differs from the condition described in the specifications; and~~

~~[(2)] (3) a clause covering the requirements for notice of contract claims, submission of contract claims, and resolution of contract claims under § 15-219 of this article.~~

~~(c) Each procurement contract shall include a clause that gives to the parties notice that preexisting regulations apply to the procurement contract in accordance with § 11-206 of this article.~~

~~(d) At any time after the parties enter into a procurement contract they may include additional clauses in the procurement contract, by consent, without consideration.~~

~~(e) A clause required under this section for contract modification or change orders to a procurement contract for construction shall:~~

~~(1) make each contract modification or change order that affects the price of the procurement contract subject to:~~

~~(i) prior written approval from the unit and any other person responsible for the procurement contract; and~~

~~(ii) prior certification by the fiscal authority responsible for the unit about:~~

~~1. the availability of money; and~~

~~2. the effect of the contract modification or change order on the project budget or the total construction cost; and~~

~~(2) prohibit the contract modification or change order if the certification by the fiscal authority discloses that the contract modification or change order will increase the cost beyond budgeted and available money, unless:~~

~~(i) sufficient additional money is made available; or~~

~~(ii) the scope of the project is adjusted to allow completion within the project budget.~~

~~SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any construction contract executed before the effective date of this Act.~~

SECTION ~~2.~~ 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2024.

Approved by the Governor, May 9, 2024.