

**SB 773-CBH-FAV.pdf**

Uploaded by: Lori Doyle

Position: FAV



**Testimony on SB 773**  
**State Procurement – Liquidated Damages – Policies and Requirements**

Senate Budget & Taxation Committee

March 8, 2023

**POSITION: SUPPORT**

The Community Behavioral Health Association of Maryland (CBH) is the leading voice for community-based providers serving the mental health and addiction needs of vulnerable Marylanders. Our 110 members serve the majority of those accessing care through the public behavioral health system. CBH members provide outpatient and residential treatment for mental health and addiction-related disorders, day programs, case management, Assertive Community Treatment (ACT), employment supports, and crisis intervention.

The last three-plus years have been extremely hard on behavioral health providers due to the dysfunction of the vendor chosen to manage the public behavioral health system, Optum Maryland. When Optum went live on January 1, 2020, its authorization and claims payment systems immediately failed, requiring the Maryland Department of Health (MDH) to make advances – or estimated payments – to providers to keep them whole. These payments were based on 2019 claims history but the onset of the pandemic in 2020 disrupted normal service delivery patterns. Providers continued to bill Optum for services rendered but were reimbursed through estimated payments from Jan. 1, 2020 through early August of that year, since Optum’s system could neither process authorizations nor pay claims.

Providers are now repaying the money Optum says they owe from that period, even though millions of dollars of claims recoupment are in dispute. Optum is unable to provide the information needed for providers to verify that they owe money back on any particular claim due to Optum’s processing errors that resulted in claims being reprocessed multiple times. There is also no way to ensure that providers are not repaying the same claims multiple times. Those providers who have not yet been able to fully pay off their balances are having their claims clipped (a percentage of current billing for services rendered being withheld) and face a balloon payment at the end of the 12-month recoupment period. Those providers who cannot then pay in full will be turned over to Central Collections.

Optum failed to meet its contract deliverables in other ways as well. There have been security breaches, demonstrated failure to comply with HIPAA’s electronic transmission requirements, and failure to meet 11 of 12 Service Level Agreements (SLAs). The system’s shortcomings were thoroughly documented in an Office of Legislative Audits (OLA) report that came out on October 25 of last year. The Maryland Department of Health agreed with every issue raised and



recommendation made by the OLA with one exception; they disagreed that liquidated damages – up to \$20.5 million - should have been imposed on Optum for their failure to meet contract deliverables.

Providers are bearing the financial impact of Optum’s shortcomings while Optum continues to operate with impunity. It would be hard to overstate the damage Optum has created and the toll it has taken on providers and those with behavioral health conditions they serve. At a time when behavioral health demand is at an all-time high, providers are being forced to divert their attention to chasing authorizations and claims payment for services. The result has been service line closures and staff reductions; we expect more damage to surface as the balloon payments draw near.

SB 773 would codify the OLA recommendations by requiring the Board of Public Works to publish a model policy by Jan. 1, 2024 on the inclusion of liquidated damages in vendor contracts and the circumstances prompting the imposition of liquidated damages. Given the heavy weighting of low bid in the awarding of human service vendor contracts, such as the one awarded to Optum, it is critical that there be sufficient penalties for vendors that are unable or unwilling to meet contract deliverables.

We urge a favorable report on SB 773.

**SB 0773 AIAMD Ltr of Concern.pdf**

Uploaded by: Daniel Bailey

Position: INFO

7 March 2023

Senator Guy Guzzone  
Chair, Budget and Taxation Committee  
3 West  
Miller Senate Office Building  
Annapolis, Maryland 21401

Re: Letter of Concern Senate Bill 773  
State Procurement – Liquidated Damages – Policies and Requirements

Dear Chairman Guzzone and members of the Budget and Taxation Committee:

On behalf of AIA Maryland and the nearly 2,000 Architects we represent, we express our concern of this bill that provides for the inclusion and use of liquidated damages provisions in procurement contracts, including professional service contracts with Architects or Engineers, as specifically defined under SB 773, Section 15-113 (D)(I), (II) and (III). AIA Maryland agrees and supports procurement and contract strategies that provide incentive for efficient, effective, and accountable performance on behalf of the State of Maryland. In fact, part of the services that Architects and Engineers render on behalf of the State of Maryland is to assist in the oversight of Contractors, subcontractors, vendors, and material suppliers with respect to their obligations on all construction contracts, including schedule.

While the use of liquidated damages is commonplace with contractors, architectural and engineering design professional services do not customarily lend themselves to strict schedules. Architects and engineers, as design professionals, provide an intellectual service. The design services that architects and engineers regularly perform do not provide a tangible product, nor do they perform a physical task akin to contractors. During the proposal and contract negotiation stages, it is impossible to know precisely how much time we will need to complete our engineering and architectural professional services in accordance with the Professional Standard of Care. Moreover, architects and engineers who perform professional design services do not have control over the responsiveness of the owner, the contractor or applicable public agency staff, and the regulatory review schedules. It is unreasonable, therefore, to expect engineering and architectural professionals to accept liability for delays in the completion of our design services.

Liquidated damages impose an increased risk not covered by professional liability coverage. All professional liability insurance policies exclude coverage for penalties and fines and any type of liability assumed by contract that is not the result of our professional negligence. Since the inclusion of liquidated damages in engineering and architectural professional service contracts is not covered by insurance, it may preclude Maryland's architects and engineers from obtaining any professional liability coverage for a given project. Therefore, many architects and engineers, especially small business enterprises, in recognition of the increased risk and burden not covered by professional liability insurance, may consider not pursuing

state projects. Furthermore, current state procurement requests for proposals and state contracts require professional liability insurance for all professional services. Since liquidated damages are not covered by professional liability insurance policies, the burden would unreasonably be placed upon the architect and engineer.

For these reasons, including a liquidated damages clause in architectural and engineering professional service contracts would be a serious deterrent for many architects and engineers. This would negatively affect Maryland's ability to engage architects and engineers for professional services. We therefore respectfully ask your committee to reconsider the inclusion of architects and engineers in SB 773.

Sincerely



Daniel L. Bailey, AIA  
Director and Past President

**'23 SB 773 Liquidated damages DGS LOI B&T 3-8-23.p**

Uploaded by: Ellen Robertson

Position: INFO



Wes Moore, Governor · Aruna Miller, Lt. Governor · Atif Chaudhry, Secretary

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**BILL:** Senate Bill 773 - State Procurement - Liquidated Damages - Policies and Requirements

**COMMITTEE:** Senate Budget and Taxation

**DATE:** March 8, 2023

**POSITION:** Letter of Information

Upon review of Senate Bill 773 - State Procurement - Liquidated Damages - Policies and Requirements, the Maryland Department of General Services (DGS) provides these comments for your consideration.

This bill requires the Board of Public Works (BPW) to publish a model policy for liquidated damages in procurement contracts by 2024. The model policy must include:

- When to include liquidated damages provisions in procurement contracts.
- How to draft 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.
- Examples of liquidated damages provisions.

The bill also requires:

- By Fiscal Year 2025, a unit must adopt a written liquidated damages provisions policy for procurement contracts.
- BPW approval to exclude liquidated damages provisions from contracts over \$5 million or if at least \$1 million of a contract is spent in a single year.
- BPW approval for the unit to not pursue liquidated damages if a breach of the provisions in a contract occurs.
- The unit head and procurement officer must attest that the deliverables are on schedule and that there are no major issues with contract performance for a contract modification over \$1 million.
- An annual report to BPW on delays in contract performance or other noncompliance; liquidated damages provision inclusion in contracts; and pursuit of liquidated damages.
- BPW has the ability to delegate any of the duties listed in this bill to the Procurement Improvement Council (PIC).



Currently, there are two mandatory provisions for liquidated damages for all procurement contracts. One provision is for Minority Business Enterprise participation goals. The other is for contracts deemed appropriate by the procurement officer, in consultation with the Office of the Attorney General. This decision is based on market research and the scope of work. **All construction contracts are required to have a liquidated damages clause unless determined by the agency head.** DGS Office of State Procurement (DGS OSP) has a solicitation template for all Executive Branch Agencies under its delegated procurement authority which contains the liquidated damages clause.

DGS believes additional guidance on when to include liquidated damages would benefit procurement officers, however, these guidelines should be created by primary procurement units\* since they oversee agencies' procurements and best understand when liquidated damages clauses should be applied.

BPW approval for liquidated damages provisions would add costly delays to the procurement cycle time. The time required to submit an action agenda item to BPW is minimally a month prior to the meeting. For contracts over \$5 million, this process is at least two months. Conversely, contract managers could pursue alternate solutions with the contractor rather than imposing liquidated damages. The decision to include liquidated damages in a contract is most appropriately made by the agency and its subject matter experts.

DGS OSP would require a database specialist, four procurement officers, and two contract managers to fulfill the bill's reporting requirements. The language "delays in contract performance or other noncompliance" is too broad and would include all procurements in the report. It is impractical to track every delay or noncompliance in a contract that did not rise to the level of liquidated damages.

For additional information, contact Ellen Robertson at 410-260-2908.

*\*[Primary procurement units include the State Treasurer's Office, DGS, the Maryland Department of Transportation, the University System of Maryland, the Maryland Port Commission, Morgan State University, and St. Mary's College of Maryland]*

**SB773\_MAA\_LOI.pdf**

Uploaded by: Nicolae Copper

Position: INFO

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Jeff Graf  
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David Slaughter

**MARYLAND ASPHALT ASSOCIATION**



TREASURER:  
Paul Bramble  
SECRETARY:  
Curtis Hall  
PRESIDENT:  
G. Marshall Klinefelter

March 8, 2023

Senator Guy Guzzone, Chair  
Senate Budget and Taxation Committee  
3 West, Miller Senate Office Building  
Annapolis, MD 21401

**RE: Senate Bill 773 – LETTER OF INQUIRY – State Procurement – Liquidated Damages – Policies and Requirements**

Dear Chair Guzzone and Members of the Budget and Taxation Committee:

The Maryland Asphalt Association (MAA) is comprised of 19 producer members representing more than 48 production facilities, 25 contractor members, 25 consulting engineer firms and 41 other associate members. MAA works proactively with regulatory agencies to represent the interests of the asphalt industry both in the writing and interpretation of state and federal regulations that may affect our members. We also advocate for adequate state and federal funding for Maryland's multimodal transportation system.

Senate Bill 773 would require the Board of Public Works to publish a model policy concerning the inclusion and use of liquidated damages provisions in procurement contracts by January 1, 2024 before then requiring each unit of State government, including those currently exempt from State procurement law, to adopt a written policy that is substantially similar to the model policy by July 1, 2024.

MAA's primary concern with Senate Bill 773 is that we view the central provisions of the bill to be entirely duplicative and unnecessary. The contracts our members enter into with the State, which have undoubtedly been reviewed for legal sufficiency and approved by countless procurement officers, agency legal counsels, and department heads over the years, already include provisions related to liquidated damages, so we see no need to codify this as a requirement in State law. While we certainly do not oppose the inclusion of such provisions, we question whether enshrining this in the Maryland Code will raise more administrative problems than it is worth, especially given the recognition in the bill's fiscal note that Senate Bill 773 creates administrative inefficiencies that may have inestimable fiscal effects.

We appreciate you taking the time to consider our concerns about Senate Bill 773.

Sincerely,

Marshall Klinefelter  
President  
Maryland Asphalt Association

**SB773\_MTBMA\_LOI.pdf**

Uploaded by: Nicolae Copper

Position: INFO



March 8, 2023

Senator Guy Guzzone, Chair  
Senate Budget and Taxation Committee  
3 West, Miller Senate Office Building  
Annapolis, MD 21401

**RE: Senate Bill 773 – LETTER OF INQUIRY – State Procurement – Liquidated Damages – Policies and Requirements**

Dear Chair Guzzone and Members of the Budget and Taxation Committee:

The Maryland Transportation Builders and Materials Association (MTBMA) has been and continues to serve as the voice for Maryland's construction transportation industry since 1932. Our association is comprised of 200 members. MTBMA encourages, develops, and protects the prestige of the transportation construction and materials industry in Maryland by establishing and maintaining respected relationships with federal, state, and local public officials. We proactively work with regulatory agencies and governing bodies to represent the interests of the transportation industry and advocate for adequate state and federal funding for Maryland's multimodal transportation system.

Senate Bill 773 would require the Board of Public Works to publish a model policy concerning the inclusion and use of liquidated damages provisions in procurement contracts by January 1, 2024 before then requiring each unit of State government, including those currently exempt from State procurement law, to adopt a written policy that is substantially similar to the model policy by July 1, 2024.

MTBMA's primary concern with Senate Bill 773 is that we view the central provisions of the bill to be entirely duplicative and unnecessary. The contracts our members enter into with the State, which have undoubtedly been reviewed for legal sufficiency and approved by countless procurement officers, agency legal counsels, and department heads over the years, already include provisions related to liquidated damages, so we see no need to codify this as a requirement in State law. While we certainly do not oppose the inclusion of such provisions, we question whether enshrining this in the Maryland Code will raise more administrative problems than it is worth, especially given the recognition in the bill's fiscal note that Senate Bill 773 creates administrative inefficiencies that may have inestimable fiscal effects.

We appreciate you taking the time to consider our concerns about Senate Bill 773.

Thank you,

Michael Sakata  
President and CEO  
Maryland Transportation Builders and Materials Association