



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]*