



HOUSE HEALTH AND GOVERNMENT OPERATIONS COMMITTEE
House Bill 289 – State Contracts – Prohibited Provisions
January 23, 2024
Favorable

Chair Pena-Melnyk, Vice Chair Cullison and members of the committee, thank you for allowing the University System of Maryland (USM) the opportunity to offer testimony on House Bill 289.

The USM is comprised of twelve distinguished institutions, and three regional centers. We award eight out of every ten bachelor's degrees in the State. Each of University USM's 12 institutions has a distinct and unique approach to the mission of educating students and promoting the economic, intellectual, and cultural growth of its surrounding community. These institutions are located throughout the state, from Western Maryland to the Eastern Shore, with the flagship campus in the Washington suburbs. The USM includes three Historically Black Institutions, comprehensive institutions and research universities, and the country's largest public online institution.

Our institutions have noticed an increase in vendors who refuse to amend and correct their form agreements. These agreements often include impermissibly broad indemnification clauses, binding dispute resolution clauses, and terms specifying the governing law or jurisdiction of another state or country. The problematic terms appear in contracts of all sizes, for both goods and services. Maryland state agencies, including USM and its institutions, are not permitted to accept the governing law of jurisdictions other than Maryland (and, when negotiating with federal agencies, U.S. federal law).

Though procurement and legal staff attempt to negotiate these terms and offer creative solutions such as addenda and side letters, negotiations are often protracted, and they regularly fail. In the case of click-through agreements, it is often difficult to identify a vendor representative willing to engage in discussions at all. When contract negotiations are unsuccessful, University academic and administrative priorities suffer. External parties often ask USM for a statutory citation to support our position that USM cannot accept the laws of other jurisdictions. A potential solution is to have an actual statute that USM attorneys can rely on during their negotiations with outside-the-state vendors.

In 2021, the Ohio state legislature followed up by enacting a statute which effectively resolved the issue for all state contracts. The Ohio statute includes a list of prohibited contract terms, and the following stipulation:

(C) If a contract contains a term or condition described in division (B) of this section, the term or condition is void ab initio, and the contract containing that term or condition otherwise shall be enforceable as if it did not contain such term or condition.

Ohio universities can now rely on the state statute for explicit authority, and as a defense when vendors refuse to negotiate. Some Ohio universities now include a reference to the statute in their

standard contract terms (though, under the statute, such notice is not required). See, for example, [Ohio State](#):

Notwithstanding any other provision of the Agreement, SELLER acknowledges and agrees that the Agreement is subject to and governed by the provisions of Ohio Revised Code 9.27. and [Ohio University](#):

The parties herein acknowledge and understand that this Agreement is subject to Ohio Revised Code § 9.27 and that nothing herein shall be interpreted in a manner that would be inconsistent with the provisions of Ohio Revised Code § 9.27.

A similar statutory approach in Maryland could streamline the contracting process, significantly reduce the time legal and procurement staff spend negotiating small dollar agreements and reduce risk and potential litigation by ensuring that the most common problematic contract terms do not impact state agreements.

For these reasons, the USM urges a Favorable Report on House Bill 289.



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