

SENATE BILL 708

P2

5lr2632
CF HB 119

By: **Senator Conway**

Introduced and read first time: February 11, 2015

Assigned to: Rules

Re-referred to: Education, Health, and Environmental Affairs, February 18, 2015

Committee Report: Favorable with amendments

Senate action: Adopted

Read second time: April 7, 2015

CHAPTER _____

1 AN ACT concerning

2 **Construction ~~Contract Clauses~~ Contracts – Change Orders**
3 **(State Procurement Change Order Fairness Act)**

4 FOR the purpose of ~~requiring each State procurement contract for construction to include~~
5 ~~a change order clause that prohibits a contractor from requiring a subcontractor to~~
6 ~~complete work under a change order except under certain circumstances, allows a~~
7 ~~prime contractor or subcontractor to stop work under certain circumstances, requires~~
8 ~~a prime contractor to include in its subcontracts a certain clause, and prohibits~~
9 ~~certain persons from taking certain action under certain circumstances; prohibiting~~
10 a unit from requiring a prime contractor and a prime contractor from requiring a
11 subcontractor to begin work under a contract until the procurement officer for the
12 unit issues a certain change order; requiring, under certain circumstances, a unit to
13 pay an invoice for work performed and accepted under a change order within a
14 certain time period and in accordance with a certain provision of law; requiring a
15 prime contractor to provide, within a certain time period, a subcontractor with a copy
16 of a certain change order and a certain amount to be paid to the subcontractor;
17 requiring the Board of Public Works to adopt certain regulations before a certain
18 date; requiring each unit to issue certain guidelines; requiring that certain
19 guidelines be updated and reissued under certain circumstances; providing that
20 certain provisions of this Act have effect only to the extent that the provisions do not
21 conflict with federal law; applying ~~the change order clause requirement~~ certain
22 provisions of this Act to certain procurements and units of State government that
23 are generally excluded from State procurement law; ~~requiring a contractor to pay a~~
24 subcontractor an undisputed amount to which the subcontractor is entitled within a

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.



~~certain number of days of receiving a payment for a change order or additional work;~~
 providing for the application of certain provisions of this Act; requiring the Secretary of Transportation, in consultation with certain organizations, to convene a certain workgroup to develop recommendations that address certain issues; requiring the workgroup to report its recommendations to certain committees of the General Assembly on or before a certain date; requiring each unit to issue a certain document on or before a certain date; providing that a certain catchline is not law and may not be considered to have been enacted as part of this Act; providing for the effective dates of this Act; and generally relating to ~~required contract clauses~~ change orders for State procurement contracts for construction.

BY repealing and reenacting, without amendments,
 Article – State Finance and Procurement
 Section 11–203(a) and (e)(1) ~~and (2) and 15–226(a), and (5)~~
 Annotated Code of Maryland
 (2009 Replacement Volume and 2014 Supplement)

BY repealing and reenacting, with amendments,
 Article – State Finance and Procurement
 Section 11–203(b)(1), ~~and (c), (e)(5), and (h) and 15–226(e)~~
 Annotated Code of Maryland
 (2009 Replacement Volume and 2014 Supplement)

BY adding to
 Article – State Finance and Procurement
 Section ~~13–219.1~~ 15–112
 Annotated Code of Maryland
 (2009 Replacement Volume and 2014 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.

(a) Except as provided in subsection (b) of this section, this Division II does not apply to:

(1) procurement by:

(i) the Blind Industries and Services of Maryland;

(ii) the Maryland State Arts Council, for the support of the arts;

(iii) the Maryland Health and Higher Educational Facilities Authority, if no State money is to be spent on a procurement contract;

1 (iv) the Maryland Industrial Training Program or the Partnership
2 for Workforce Quality Program in the Department of Business and Economic Development,
3 for training services or programs for new or expanding businesses or industries or
4 businesses or industries in transition;

5 (v) the Maryland Food Center Authority, to the extent the Authority
6 is exempt under Title 10, Subtitle 2 of the Economic Development Article;

7 (vi) the Maryland Public Broadcasting Commission:

8 1. for services of artists for educational and cultural
9 television productions; or

10 2. when planning for or fulfilling the obligations of grants or
11 cooperative agreements that support the educational and cultural activities of the
12 Commission;

13 (vii) public institutions of higher education, for cultural,
14 entertainment, and intercollegiate athletic procurement contracts;

15 (viii) the Maryland State Planning Council on Developmental
16 Disabilities, for services to support demonstration, pilot, and training programs;

17 (ix) the Maryland Historical Trust for:

18 1. surveying and evaluating architecturally, archeologically,
19 historically, or culturally significant properties; and

20 2. other than as to architectural services, preparing historic
21 preservation planning documents and educational material;

22 (x) the University of Maryland, for University College Overseas
23 Programs, if the University adopts regulations that:

24 1. establish policies and procedures governing procurement
25 for University College Overseas Programs; and

26 2. promote the purposes stated in § 11–201(a) of this subtitle;

27 (xi) the Department of Business and Economic Development, for
28 negotiating and entering into private sector cooperative marketing projects that directly
29 enhance promotion of Maryland and the tourism industry where there will be a private
30 sector contribution to the project of not less than 50% of the total cost of the project, if the
31 project is reviewed by the Attorney General and approved by the Secretary of Business and
32 Economic Development or the Secretary's designee;

1 (xii) the Rural Maryland Council;

2 (xiii) the Maryland State Lottery and Gaming Control Agency, for
3 negotiating and entering into private sector cooperative marketing projects that directly
4 enhance promotion of the Maryland State Lottery and its products, if the cooperative
5 marketing project:

6 1. provides a substantive promotional or marketing value
7 that the lottery determines acceptable in exchange for advertising or other promotional
8 activities provided by the lottery;

9 2. does not involve the advertising or other promotion of
10 alcohol or tobacco products; and

11 3. is reviewed by the Attorney General and approved by the
12 Maryland Lottery Director or the Director's designee;

13 (xiv) the Maryland Health Insurance Plan established under Title 14,
14 Subtitle 5 of the Insurance Article;

15 (xv) the Maryland Energy Administration, when negotiating or
16 entering into grants or cooperative agreements with private entities to meet federal
17 specifications or solicitation requirements related to energy conservation, energy efficiency,
18 or renewable energy projects that benefit the State;

19 (xvi) the Maryland Developmental Disabilities Administration of the
20 Department of Health and Mental Hygiene for family and individual support services, and
21 individual family care services, as those terms are defined by the Department of Health
22 and Mental Hygiene in regulation;

23 (xvii) the Department of General Services for the renovation of a
24 structure that:

25 1. was built during the 18th or 19th century; and

26 2. is listed in or eligible for listing in the National Register of
27 Historic Places; and

28 (xviii) the Department of Natural Resources, for negotiating or entering
29 into grants, agreements, or partnerships with nonprofit entities related to conservation
30 service opportunities;

31 (2) procurement by a unit from:

32 (i) another unit;

33 (ii) a political subdivision of the State;

1 (iii) an agency of a political subdivision of the State;

2 (iv) a government, including the government of another state, of the
3 United States, or of another country;

4 (v) an agency or political subdivision of a government; or

5 (vi) a bistate, multistate, bicounty, or multicounty governmental
6 agency; or

7 (3) procurement in support of enterprise activities for the purpose of:

8 (i) direct resale; or

9 (ii) remanufacture and subsequent resale.

10 (b) (1) The following provisions of this Division II apply to each procurement
11 enumerated in subsection (a) of this section:

12 (i) § 11–205 of this subtitle (“Collusion”);

13 (ii) § 10–204 of this article (“Approval for designated contracts”);

14 (iii) Title 12, Subtitle 2 of this article (“Supervision of Capital
15 Expenditures and Real Property Leases”);

16 (iv) § 13–219 of this article (“Required clauses – Nondiscrimination
17 clause”);

18 ~~(v) § 13–218.2 OF THIS ARTICLE (“REQUIRED CLAUSES –~~
19 ~~CHANGE ORDERS”);~~

20 ~~[(v)] (VI)~~ § 13–221 of this article (“Disclosures to Secretary of
21 State”);

22 ~~[(vi)] (VII)~~ Title 12, Subtitle 4 of this article (“Policies and Procedures
23 for Exempt Units”);

24 **(VII) § 15–112 OF THIS ARTICLE (“CHANGE ORDERS”);**

25 ~~[(vii)] (VIII)~~ Title 16 of this article (“Suspension and Debarment of
26 Contractors”); and

27 ~~[(viii)] (IX)~~ Title 17 of this article (“Special Provisions – State and
28 Local Subdivisions”).

1 (c) Except as provided in Title 12, Subtitle 4 and Title 14, Subtitle 3 of this article
 2 **AND EXCEPT FOR ~~§ 13-219.1~~ § 15-112 OF THIS ARTICLE**, this Division II does not apply
 3 to the Maryland Stadium Authority.

4 (e) (1) In this subsection, “University” means the University System of
 5 Maryland, Morgan State University, or St. Mary’s College of Maryland.

6 (2) Except as otherwise provided in this subsection, this Division II does
 7 not apply to the University System of Maryland, Morgan State University, or St. Mary’s
 8 College of Maryland.

9 (5) (i) Except as provided in paragraph (7) of this subsection, the
 10 following provisions of Division II of this article apply to a University:

11 1. § 11-205 of this subtitle (“Collusion”);

12 2. § 11-205.1 of this subtitle (“Falsification, concealment,
 13 etc., of material facts”);

14 3. § 13-219 of this article (“Required clauses –
 15 Nondiscrimination clause”);

16 ~~4. § 13-219.1 OF THIS ARTICLE (“REQUIRED CLAUSES~~
 17 ~~CHANGE ORDERS”);~~

18 ~~{4.} 5.~~ § 13-225 of this article (“Retainage”);

19 ~~{5.} 6.~~ Title 14, Subtitle 3 of this article (“Minority Business
 20 Participation”);

21 ~~{6.} 7.~~ Title 15, Subtitle 1 of this article (“Procurement
 22 Contract Administration”);

23 ~~{7.} 8.~~ § 15-226 of this article (“Policy established; timing of
 24 payments; notice upon nonpayment; disputes; appeals”); and

25 ~~{8.} 9.~~ Title 16 of this article (“Suspension and Debarment of
 26 Contractors”).

27 (ii) If a procurement violates the provisions of this subsection or
 28 policies adopted in accordance with this subsection, the procurement contract is void or
 29 voidable in accordance with the provisions of § 11-204 of this subtitle.

30 ~~(h) (1) Except as provided in paragraph (2) of this subsection, this division does~~
 31 ~~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) § 13-219.1 OF THIS ARTICLE (“REQUIRED CLAUSES—CHANGE ORDERS”);~~

~~[(v)] (VI) Title 17, Subtitle 1 of this article (“Security for Construction Contracts”);~~

~~[(vi)] (VII) Title 17, Subtitle 2 of this article (“Prevailing Wage Rates—Public Work Contracts”); and~~

~~[(vii)] (VIII) Title 18 of this article (“Living Wage”).~~

15-112. CHANGE ORDERS.

(A) (1) EXCEPT AS PROVIDED IN PARAGRAPH (2) OF THIS SUBSECTION, THIS SECTION APPLIES TO STATE PROCUREMENT CONTRACTS FOR CONSTRUCTION.

(2) THIS SECTION DOES NOT APPLY TO STATE PROCUREMENT CONTRACTS FOR PUBLIC SCHOOL CONSTRUCTION OR PUBLIC SCHOOL CAPITAL IMPROVEMENTS.

(B) A UNIT MAY NOT REQUIRE A PRIME CONTRACTOR AND A PRIME CONTRACTOR MAY NOT REQUIRE A SUBCONTRACTOR TO BEGIN CHANGE ORDER WORK UNDER A CONTRACT UNTIL THE PROCUREMENT OFFICER FOR THE UNIT ISSUES A WRITTEN CHANGE ORDER THAT SPECIFIES WHETHER THE WORK IS TO PROCEED ON AN AGREED-TO PRICE, FORCE ACCOUNT, CONSTRUCTION CHANGE DIRECTIVE, OR TIME AND MATERIALS BASIS IN COMPLIANCE WITH THE TERMS OF THE CONTRACT.

(C) IF THE AMOUNT TO BE PAID UNDER AN APPROVED CHANGE ORDER DOES NOT EXCEED \$50,000, A UNIT SHALL PAY AN INVOICE FOR WORK PERFORMED AND

1 ACCEPTED UNDER THE CHANGE ORDER AS PROVIDED FOR IN THE CONTRACT
 2 WITHIN 30 DAYS AFTER THE UNIT RECEIVES THE INVOICE AND IN ACCORDANCE
 3 WITH § 15-103 OF THIS SUBTITLE.

4 (D) WITHIN 5 DAYS AFTER RECEIPT OF A WRITTEN CHANGE ORDER, A PRIME
 5 CONTRACTOR SHALL PROVIDE A SUBCONTRACTOR WITH A COPY OF THE APPROVED
 6 CHANGE ORDER AND THE AMOUNT TO BE PAID TO THE SUBCONTRACTOR BASED ON
 7 THE PORTION OF THE CHANGE ORDER WORK TO BE COMPLETED BY THE
 8 SUBCONTRACTOR.

9 (E) BEFORE JANUARY 1, 2017, THE BOARD SHALL ADOPT REGULATIONS
 10 THAT PROVIDE FOR AN EXPEDITED CHANGE ORDER PROCESS FOR CHANGE ORDERS
 11 VALUED AT MORE THAN \$50,000.

12 (F) (1) EACH UNIT SHALL ISSUE GUIDELINES FOR THE UNIT'S CHANGE
 13 ORDER PROCESS.

14 (2) THE GUIDELINES ISSUED UNDER PARAGRAPH (1) OF THIS
 15 SUBSECTION SHALL BE UPDATED AND REISSUED WHEN ANY CHANGES ARE MADE TO
 16 THE UNIT'S CHANGE ORDER PROCESS.

17 (G) A PROVISION OF THIS SECTION HAS EFFECT ONLY TO THE EXTENT THAT
 18 THE PROVISION DOES NOT CONFLICT WITH FEDERAL LAW.

19 ~~13-219.1. REQUIRED CLAUSES - CHANGE ORDERS.~~

20 ~~(A) EACH STATE PROCUREMENT CONTRACT FOR CONSTRUCTION SHALL~~
 21 ~~INCLUDE A CHANGE ORDER CLAUSE AS PROVIDED IN THIS SECTION.~~

22 ~~(B) THE CHANGE ORDER CLAUSE SHALL:~~

23 ~~(1) EXCEPT AS PROVIDED IN ITEM (2) OF THIS SUBSECTION, PROHIBIT~~
 24 ~~THE STATE, A PRIME CONTRACTOR, AND, IN THE CASE OF A PUBLIC PRIVATE~~
 25 ~~PARTNERSHIP, THE PRIVATE ENTITY FROM REQUIRING A PRIME CONTRACTOR OR~~
 26 ~~SUBCONTRACTOR TO:~~

27 ~~(i) START WORK UNDER:~~

28 ~~1. A STATE ISSUED CHANGE ORDER; OR~~

29 ~~2. IN THE CASE OF A PUBLIC PRIVATE PARTNERSHIP, A~~
 30 ~~CHANGE ORDER ISSUED BY THE PRIVATE ENTITY; OR~~

~~(H) START ANY ADDITIONAL WORK DIRECTED AND ACKNOWLEDGED BY THE STATE, THE PRIME CONTRACTOR, OR, IN THE CASE OF A PUBLIC PRIVATE PARTNERSHIP, THE PRIVATE ENTITY THAT IS DETERMINED TO BE BEYOND THE ORIGINAL SCOPE OF THE CONTRACT;~~

~~(2) ALLOW THE STATE, THE PRIME CONTRACTOR, OR THE PRIVATE ENTITY TO REQUIRE A PRIME CONTRACTOR OR SUBCONTRACTOR TO START WORK THAT THE STATE, THE PRIME CONTRACTOR, OR THE PRIVATE ENTITY COULD NOT OTHERWISE REQUIRE THE PRIME CONTRACTOR OR SUBCONTRACTOR TO START UNDER ITEM (1) OF THIS SUBSECTION IF:~~

~~(I) THE STATE OR THE PRIVATE ENTITY HAS AGREED WITH THE PRIME CONTRACTOR AND, IF APPLICABLE, THE SUBCONTRACTOR ON A PRICE FOR THE CHANGE ORDER OR ADDITIONAL WORK; AND~~

~~(II) THE FISCAL AUTHORITY RESPONSIBLE FOR THE UNIT OR THE PRIVATE ENTITY HAS:~~

~~1. SET ASIDE FUNDS TO PAY FOR THE CHANGE ORDER OR ADDITIONAL WORK;~~

~~2. MADE A WRITTEN, BINDING COMMITMENT TO PAY FOR THE CHANGE ORDER OR ADDITIONAL WORK WITHIN 30 DAYS AFTER THE PRIME CONTRACTOR SUBMITS AN INVOICE FOR THE CHANGE ORDER OR ADDITIONAL WORK TO THE STATE OR THE PRIVATE ENTITY; AND~~

~~3. GIVEN WRITTEN NOTICE OF THE SET ASIDE AND BINDING COMMITMENT TO THE PRIME CONTRACTOR;~~

~~(3) IF THE STATE OR, IN THE CASE OF A PUBLIC PRIVATE PARTNERSHIP, THE PRIVATE ENTITY FAILS TO PAY FOR THE CHANGE ORDER OR ADDITIONAL WORK IN THE MANNER COMMITTED TO UNDER ITEM (2)(H)2 OF THIS SUBSECTION, ALLOW THE PRIME CONTRACTOR OR SUBCONTRACTOR TO STOP WORK WITHOUT INCURRING ANY PENALTY OTHERWISE ALLOWED FOR UNDER THE CONTRACT;~~

~~(4) REQUIRE A PRIME CONTRACTOR TO INCLUDE IN ITS SUBCONTRACTS A CLAUSE THAT REQUIRES THE PRIME CONTRACTOR TO:~~

~~(I) WITHIN 5 BUSINESS DAYS OF RECEIPT OF THE NOTICE REQUIRED UNDER ITEM (2)(H)3 OF THIS SUBSECTION, PROVIDE THE SUBCONTRACTOR WITH A COPY OF THE APPROVED AMOUNT TO BE PAID TO THE SUBCONTRACTOR BASED ON THE PORTION OF THE ADDITIONAL WORK TO BE COMPLETED BY THE SUBCONTRACTOR;~~

1 ~~(II) PAY THE SUBCONTRACTOR AN UNDISPUTED AMOUNT, AS~~
 2 ~~DEFINED BY § 15-226(A) OF THIS ARTICLE, TO WHICH THE SUBCONTRACTOR IS~~
 3 ~~ENTITLED WITHIN 10 DAYS OF RECEIPT OF PAYMENT FOR THE CHANGE ORDER OR~~
 4 ~~ADDITIONAL WORK FROM THE STATE OR THE PRIVATE ENTITY; AND~~

5 ~~(III) IF THE PRIME CONTRACTOR WITHHOLDS PAYMENT FROM A~~
 6 ~~SUBCONTRACTOR:~~

7 ~~1. NOTIFY THE SUBCONTRACTOR IN WRITING AND STATE~~
 8 ~~THE REASON WHY PAYMENT IS BEING WITHHELD; AND~~

9 ~~2. PROVIDE A COPY OF THE NOTICE TO THE UNIT AND, IN~~
 10 ~~THE CASE OF A PUBLIC-PRIVATE PARTNERSHIP, THE PRIVATE ENTITY; AND~~

11 ~~(5) PROHIBIT THE STATE, A PRIME CONTRACTOR, A~~
 12 ~~SUBCONTRACTOR, AND, IN THE CASE OF A PUBLIC-PRIVATE PARTNERSHIP, THE~~
 13 ~~PRIVATE ENTITY FROM DECLARING THE CONTRACT IN DEFAULT OR ASSESSING,~~
 14 ~~CLAIMING, OR PURSUING DAMAGES FOR DELAYS IN THE COMPLETION OF THE~~
 15 ~~CONSTRUCTION THAT ARE DUE TO THE INABILITY OF THE PARTIES TO AGREE ON A~~
 16 ~~PRICE FOR THE CHANGE ORDER OR ADDITIONAL WORK.~~

17 ~~15-226.~~

18 ~~(a) In this section, "undisputed amount" means an amount owed by a contractor~~
 19 ~~to a subcontractor for which there is no good faith dispute, including any retainage~~
 20 ~~withheld.~~

21 ~~(c) (1) A contractor shall pay a subcontractor an undisputed amount to which~~
 22 ~~the subcontractor is entitled within 10 days of receiving a progress or final payment OR~~
 23 ~~PAYMENT FOR A CHANGE ORDER OR ADDITIONAL WORK from the State.~~

24 ~~(2) If a contractor withholds payment from a subcontractor, within the time~~
 25 ~~period in which payment normally would be made, the contractor shall:~~

26 ~~(i) notify the subcontractor in writing and state the reason why~~
 27 ~~payment is being withheld; and~~

28 ~~(ii) provide a copy of the notice to the procurement officer.~~

29 SECTION 2. AND BE IT FURTHER ENACTED, That:

30 (a) The Secretary of Transportation, in consultation with the Maryland
 31 Associated General Contractors, shall convene a workgroup of stakeholders to develop

1 recommendations that address the following issues related to State procurement for
2 construction contracts:

3 (1) scope review process;

4 (2) termination for convenience;

5 (3) uniformity of change order practices and authority;

6 (4) prompt payment and interest;

7 (5) force accounts;

8 (6) funding;

9 (7) contractor capacity; and

10 (8) any other issues that the workgroup determines need to be addressed.

11 (b) On or before December 31, 2015, the workgroup shall report its policy,
12 regulatory, and legislative recommendations to the Senate Education, Health, and
13 Environmental Affairs Committee and the House Health and Government Operations
14 Committee in accordance with § 2-1246 of the State Government Article.

15 SECTION 3. AND BE IT FURTHER ENACTED, That, on or before December 31,
16 2015, each unit, as defined in § 11-101 of the State Finance and Procurement Article, shall
17 issue guidelines for the unit's change order process.

18 SECTION ~~2~~ 4. AND BE IT FURTHER ENACTED, That the catchline contained in
19 this Act is not law and may not be considered to have been enacted as part of this Act.

20 SECTION 5. AND BE IT FURTHER ENACTED, That Section 1 of this Act shall take
21 effect January 1, 2016.

22 SECTION ~~2~~ 6. AND BE IT FURTHER ENACTED, That, except as provided in
23 Section 5 of this Act, this Act shall take effect ~~July~~ June 1, 2015.