

SENATE BILL 708

P2

5lr2632
CF HB 119

By: **Senator Conway**

Introduced and read first time: February 11, 2015

Assigned to: Rules

A BILL ENTITLED

1 AN ACT concerning

2 **Construction Contract Clauses – 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; applying the
10 change order clause requirement to certain procurements and units of State
11 government that are generally excluded from State procurement law; requiring a
12 contractor to pay a subcontractor an undisputed amount to which the subcontractor
13 is entitled within a certain number of days of receiving a payment for a change order
14 or additional work; providing that a certain catchline is not law and may not be
15 considered to have been enacted as part of this Act; and generally relating to required
16 contract clauses for State procurement contracts for construction.

17 BY repealing and reenacting, without amendments,
18 Article – State Finance and Procurement
19 Section 11–203(a) and (e)(1) and (2) and 15–226(a)
20 Annotated Code of Maryland
21 (2009 Replacement Volume and 2014 Supplement)

22 BY repealing and reenacting, with amendments,
23 Article – State Finance and Procurement
24 Section 11–203(b)(1), (c), (e)(5), and (h) and 15–226(c)
25 Annotated Code of Maryland
26 (2009 Replacement Volume and 2014 Supplement)

27 BY adding to
28 Article – State Finance and Procurement

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 Section 13–219.1
2 Annotated Code of Maryland
3 (2009 Replacement Volume and 2014 Supplement)

4 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
5 That the Laws of Maryland read as follows:

6 **Article – State Finance and Procurement**

7 11–203.

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

10 (1) procurement by:

11 (i) the Blind Industries and Services of Maryland;

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

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

15 (iv) the Maryland Industrial Training Program or the Partnership
16 for Workforce Quality Program in the Department of Business and Economic Development,
17 for training services or programs for new or expanding businesses or industries or
18 businesses or industries in transition;

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

21 (vi) the Maryland Public Broadcasting Commission:

22 1. for services of artists for educational and cultural
23 television productions; or

24 2. when planning for or fulfilling the obligations of grants or
25 cooperative agreements that support the educational and cultural activities of the
26 Commission;

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

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

31 (ix) the Maryland Historical Trust for:

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

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

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

7 1. establish policies and procedures governing procurement
8 for University College Overseas Programs; and

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

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

16 (xii) the Rural Maryland Council;

17 (xiii) the Maryland State Lottery and Gaming Control Agency, for
18 negotiating and entering into private sector cooperative marketing projects that directly
19 enhance promotion of the Maryland State Lottery and its products, if the cooperative
20 marketing project:

21 1. provides a substantive promotional or marketing value
22 that the lottery determines acceptable in exchange for advertising or other promotional
23 activities provided by the lottery;

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

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

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

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

1 (xvi) the Maryland Developmental Disabilities Administration of the
2 Department of Health and Mental Hygiene for family and individual support services, and
3 individual family care services, as those terms are defined by the Department of Health
4 and Mental Hygiene in regulation;

5 (xvii) the Department of General Services for the renovation of a
6 structure that:

- 7 1. was built during the 18th or 19th century; and
- 8 2. is listed in or eligible for listing in the National Register of
9 Historic Places; and

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

13 (2) procurement by a unit from:

- 14 (i) another unit;
- 15 (ii) a political subdivision of the State;
- 16 (iii) an agency of a political subdivision of the State;
- 17 (iv) a government, including the government of another state, of the
18 United States, or of another country;
- 19 (v) an agency or political subdivision of a government; or
- 20 (vi) a bistate, multistate, bicounty, or multicounty governmental
21 agency; or

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

- 23 (i) direct resale; or
- 24 (ii) remanufacture and subsequent resale.

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

- 27 (i) § 11–205 of this subtitle (“Collusion”);
- 28 (ii) § 10–204 of this article (“Approval for designated contracts”);

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

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

5 (v) **§ 13–218.2 OF THIS ARTICLE (“REQUIRED CLAUSES –
6 CHANGE ORDERS”)**;

7 [(v)] (vi) § 13–221 of this article (“Disclosures to Secretary of
8 State”);

9 [(vi)] (vii) Title 12, Subtitle 4 of this article (“Policies and Procedures
10 for Exempt Units”);

11 [(vii)] (viii) Title 16 of this article (“Suspension and Debarment of
12 Contractors”); and

13 [(viii)] (ix) Title 17 of this article (“Special Provisions – State and
14 Local Subdivisions”).

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

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

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

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

25 1. § 11–205 of this subtitle (“Collusion”);

26 2. § 11–205.1 of this subtitle (“Falsification, concealment,
27 etc., of material facts”);

28 3. § 13–219 of this article (“Required clauses –
29 Nondiscrimination clause”);

30 4. **§ 13–219.1 OF THIS ARTICLE (“REQUIRED CLAUSES –
31 CHANGE ORDERS”)**;

1 [4.] 5. § 13–225 of this article (“Retainage”);

2 [5.] 6. Title 14, Subtitle 3 of this article (“Minority Business
3 Participation”);

4 [6.] 7. Title 15, Subtitle 1 of this article (“Procurement
5 Contract Administration”);

6 [7.] 8. § 15–226 of this article (“Policy established; timing of
7 payments; notice upon nonpayment; disputes; appeals”); and

8 [8.] 9. Title 16 of this article (“Suspension and Debarment of
9 Contractors”).

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

13 (h) (1) Except as provided in paragraph (2) of this subsection, this division does
14 not apply to a public–private partnership under Title 10A of this article.

15 (2) To the extent otherwise required by law, the following provisions of this
16 division apply to a public–private partnership under Title 10A of this article:

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

18 (ii) § 11–205.1 of this subtitle (“Falsification, concealment, etc. of
19 material facts”);

20 (iii) Title 12, Subtitle 4 of this article (“Policies and Procedures for
21 Exempt Units”);

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

24 (v) **§ 13–219.1 OF THIS ARTICLE (“REQUIRED CLAUSES –
25 CHANGE ORDERS”);**

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

28 [(vi)] (vii) Title 17, Subtitle 2 of this article (“Prevailing Wage Rates
29 – Public Work Contracts”); and

30 [(vii)] (viii) Title 18 of this article (“Living Wage”).

1 **13-219.1. REQUIRED CLAUSES – CHANGE ORDERS.**

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

4 (B) THE CHANGE ORDER CLAUSE SHALL:

5 (1) EXCEPT AS PROVIDED IN ITEM (2) OF THIS SUBSECTION, PROHIBIT
6 THE STATE, A PRIME CONTRACTOR, AND, IN THE CASE OF A PUBLIC-PRIVATE
7 PARTNERSHIP, THE PRIVATE ENTITY FROM REQUIRING A PRIME CONTRACTOR OR
8 SUBCONTRACTOR TO:

9 (I) START WORK UNDER:

10 1. A STATE-ISSUED CHANGE ORDER; OR

11 2. IN THE CASE OF A PUBLIC-PRIVATE PARTNERSHIP, A
12 CHANGE ORDER ISSUED BY THE PRIVATE ENTITY; OR

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

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

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

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

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

29 2. MADE A WRITTEN, BINDING COMMITMENT TO PAY FOR
30 THE CHANGE ORDER OR ADDITIONAL WORK WITHIN 30 DAYS AFTER THE PRIME

1 CONTRACTOR SUBMITS AN INVOICE FOR THE CHANGE ORDER OR ADDITIONAL WORK
2 TO THE STATE OR THE PRIVATE ENTITY; AND

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

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

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

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

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

22 (III) IF THE PRIME CONTRACTOR WITHHOLDS PAYMENT FROM A
23 SUBCONTRACTOR:

24 1. NOTIFY THE SUBCONTRACTOR IN WRITING AND STATE
25 THE REASON WHY PAYMENT IS BEING WITHHELD; AND

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

28 (5) PROHIBIT THE STATE, A PRIME CONTRACTOR, A
29 SUBCONTRACTOR, AND, IN THE CASE OF A PUBLIC-PRIVATE PARTNERSHIP, THE
30 PRIVATE ENTITY FROM DECLARING THE CONTRACT IN DEFAULT OR ASSESSING,
31 CLAIMING, OR PURSUING DAMAGES FOR DELAYS IN THE COMPLETION OF THE
32 CONSTRUCTION THAT ARE DUE TO THE INABILITY OF THE PARTIES TO AGREE ON A
33 PRICE FOR THE CHANGE ORDER OR ADDITIONAL WORK.

1 15-226.

2 (a) In this section, “undisputed amount” means an amount owed by a contractor
3 to a subcontractor for which there is no good faith dispute, including any retainage
4 withheld.

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

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

10 (i) notify the subcontractor in writing and state the reason why
11 payment is being withheld; and

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

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

15 SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect July
16 1, 2015.