

SENATE BILL 358

P2

3lr2131

By: **Senators Salling, Rosapepe, and Bailey**

Introduced and read first time: January 30, 2023

Assigned to: Budget and Taxation

Committee Report: Favorable with amendments

Senate action: Adopted

Read second time: March 10, 2023

CHAPTER _____

1 AN ACT concerning

2 **Procurement – Construction Contracts – Contract Modification Clause**

3 FOR the purpose of requiring a procurement contract for construction to include a clause
4 providing for contract modification when there is a substantial increase or decrease
5 in the price of materials required to complete the contract, according to prevailing
6 average market prices and as determined by the unit, due to certain factors; and
7 generally relating to contract modification for construction contracts.

8 BY repealing and reenacting, with amendments,
9 Article – State Finance and Procurement
10 Section ~~13–201~~ and 13–218
11 Annotated Code of Maryland
12 (2021 Replacement Volume and 2022 Supplement)

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

15 **Article – State Finance and Procurement**

16 ~~13–201.~~

17 (a) In this subtitle the following words have the meanings indicated.

18 (b) “Change order” means a written order that:

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.



(1) is signed by the procurement officer; and

(2) directs the contractor to make changes that the procurement contract authorizes the procurement officer to order without the consent of the contractor.

(c) “Contract modification” means a written alteration that:

(1) affects specifications, delivery point, date of delivery, period of performance, price, quantity, or other provisions of a procurement contract; and

(2) is accomplished by mutual action of the parties to the procurement contract.

(d) “Cost–reimbursement contract” means a procurement contract under which the State reimburses a contractor for fees and other costs that are:

(1) recognized as allowable and allocable under the regulations of the Board on price and cost principles; and

(2) within a stated ceiling.

(E) “SUBSTANTIAL” MEANS LARGE IN AMOUNT, SIZE, OR NUMBER.

13–218.

(a) Each procurement contract shall include clauses covering:

(1) termination for default;

(2) termination wholly or partly by the State for its convenience if the head of the primary procurement unit determines that termination is appropriate;

(3) variations that occur between estimated and actual quantities of work in a procurement contract;

(4) liquidated damages, as appropriate;

(5) specified excuses for nonperformance;

(6) except for real property leases, the unilateral right of the State to order in writing:

(i) changes in the work, if the changes are within the scope of the procurement contract; and

(ii) a temporary stop or delay in performance;

(7) the obligation of the contractor to comply with the political contribution reporting requirements under Title 14 of the Election Law Article, to which the contractor may be subject as required under § 17–402 of this article; and

(8) nonvisual access for information technology as required under § 3A–312 of this article.

(b) In addition to the clauses required under subsection (a) of this section, a procurement contract for construction shall include:

(1) **SUBJECT TO THE REQUIREMENTS OF SUBSECTION (E) OF THIS SECTION, A CLAUSE PROVIDING FOR CONTRACT MODIFICATION WHEN THERE IS A SUBSTANTIAL INCREASE OR DECREASE IN THE PRICE OF MATERIALS, UP TO A MAXIMUM OF 10%, REQUIRED TO COMPLETE THE CONTRACT, ACCORDING TO PREVAILING AVERAGE MARKET PRICES AND AS DETERMINED BY THE PROCURING UNIT, DUE TO:**

(I) **DELAYED NOTICE OF COMMENCEMENT BY THE UNIT FOR ANY REASON;**

(II) **ACTS OR OMISSIONS BY THE UNIT;**

(III) **CHANGES IN THE WORK OR THE SEQUENCING OF THE WORK ORDERED BY THE UNIT OR ARISING FROM THE DECISIONS OF THE UNIT THAT IMPACT THE TIME OF PERFORMANCE OF THE WORK;**

(IV) **ENCOUNTERING HAZARDOUS MATERIALS OR CONCEALED OR UNKNOWN CONDITIONS;**

(V) **DELAY AUTHORIZED BY THE UNIT PENDING DISPUTE RESOLUTION OR SUSPENSION BY THE UNIT; OR**

(VI) **FORCE MAJEURE EVENTS, INCLUDING AN EPIDEMIC OR A PANDEMIC;**

(2) a clause providing for contract modification if the condition of a site differs from the condition described in the specifications; and

~~[(2)]~~ (3) a clause covering the requirements for notice of contract claims, submission of contract claims, and resolution of contract claims under § 15–219 of this article.

(c) Each procurement contract shall include a clause that gives to the parties notice that preexisting regulations apply to the procurement contract in accordance with § 11–206 of this article.

(d) At any time after the parties enter into a procurement contract they may include additional clauses in the procurement contract, by consent, without consideration.

(e) A clause required under this section for contract modification of or change orders to a procurement contract for construction shall:

(1) make each contract modification or change order that affects the price of the procurement contract subject to:

(i) prior written approval from the unit and any other person responsible for the procurement contract; and

(ii) prior certification by the fiscal authority responsible for the unit about:

1. the availability of money; and

2. the effect of the contract modification or change order on the project budget or the total construction cost; and

(2) prohibit the contract modification or change order if the certification by the fiscal authority discloses that the contract modification or change order will increase the cost beyond budgeted and available money, unless:

(i) sufficient additional money is made available; or

(ii) the scope of the project is adjusted to allow completion within the project budget.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any construction contract executed before the effective date of this Act.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2023.