

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 429 (Senators Gallion and Simonaire)
Education, Health, and Environmental Affairs

**Procurement Contracts - Architectural and Engineering Services - Indemnity
Clauses**

This bill prohibits a procurement contract for architectural and engineering (A&E) services from including an indemnity clause that requires the contractor to indemnify or defend against claims arising from the contractor's performance or services unless a negligent performance standard is used to apportion liability. "Negligent performance" is defined as a failure to perform with the standard degree of skill and care ordinarily exercised by design professionals at the same time and location when performing similar services under similar circumstances.

Fiscal Summary

State Effect: No direct fiscal effect on State procurement costs, but the bill may lead to lower direct costs for A&E contracts and also, in some instances, expose the State to greater risk for losses, as discussed below. No effect on revenues.

Local Effect: None.

Small Business Effect: Potential meaningful.

Analysis

Current Law: Each procurement contract must have clauses covering, among other things:

- termination for default;
- termination wholly or partly by the State for its convenience;

- variations that occur between estimated and actual quantities of work;
- liquidated damages, as appropriate;
- specified excuses for nonperformance; and
- the unilateral right of the State to order (1) changes in work within the scope of the contract and (2) a temporary stop or delay in performance.

For A&E contracts, the Department of General Services (DGS) or the Maryland Department of Transportation (MDOT) may terminate a contract without liability in the event of a criminal conviction related to the contract or if there is a breach or violation of the statute governing procurement of A&E contracts. In that instance, a contractor (1) is entitled only to the earned value of completed work at the time of termination, plus termination costs; (2) is liable for any costs incurred for completion of the work over the maximum amount payable; and (3) must refund all profits or fixed fees realized under the contract. DGS and MDOT do not waive any other right or remedy provided by law.

Background: DGS advises that its current A&E contracts do not have any indemnification clauses except for instances involving patents, copyrights, and records. MDOT notes that its current contract indemnification clauses protect the State against errors, omissions, negligence, and nonperformance by the contractor and subcontractor, as well as against any claims for personal injury, bodily injury, or property damage that is the obligation of the contractor.

State Expenditures: As DGS generally does not use indemnification clauses in A&E contracts, the bill does not affect its contracts because it only applies in instances where contracts have such clauses.

MDOT notes that the indemnification clause allowed by the bill is more restrictive than the clauses it currently uses in its contracts. To the extent that the bill limits the contractor's liability, it may reduce the cost of A&E services since contractors are assuming less risk and, therefore, can charge less for their services. However, the bill exposes the State to greater risk in the event of losses resulting from negligence or other errors by the contractor.

Small Business Effect: A&E firms, which tend to be small businesses, may benefit from more limited liability for negligence or errors related to their work on MDOT contracts.

Additional Information

Prior Introductions: None.

Cross File: HB 452 (Delegate Krebs, *et al.*) - Health and Government Operations.

Information Source(s): State Board of Contract Appeals; Department of General Services; Board of Public Works; Maryland Department of Transportation; Department of Legislative Services

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