

Larry Hogan
Governor

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Lt. Governor



Ellington E. Churchill, Jr.
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MARYLAND DEPARTMENT OF GENERAL SERVICES
OFFICE OF THE SECRETARY

BILL: **Senate Bill 368**
Courts – Prohibited Indemnity and Defense Agreements

COMMITTEE: Senate Judicial Procedures

DATE: February 12, 2020

POSITION: Letter of Information

Upon review of Senate Bill 368 – Courts – Prohibited Indemnity and Defense Agreements, the Department of General Services (DGS) provides these comments for your consideration.

Senate Bill 368 holds that a provision within an architectural or engineering services (A/E) contract or agreement protecting the State against loss, damages or expenses is void and unenforceable unless the design professional is the proximate cause of the loss, damage or expense. Further, Senate Bill 368 holds that a provision within a contract or agreement protecting the State against damages or expenses due to an A/E's negligence is against public policy and is void and unenforceable.

Senate Bill 368 shifts the risk within an A/E contract to the State from the hired design team. Senate Bill 368 limits the State's ability to be indemnified in only certain instances. Indemnification is already required in purchase orders over \$25,000.

It is important to note that indemnity is a negotiated provision that is available to the State, it is a legal and equitable remedy, and when negotiated it will alleviate the State from having to pay out claims or damages that were not the State's fault but the fault of a consultant, contractor or other party. In addition, DGS' current A/E contracts do not have an indemnification clause, except for instances involving patents, copyright, and records. Consequently, DGS did not have an indemnification clause in its prior A/E contracts and there have not been any issues with the A/E's nor with the A/E's securing insurance or bonding.

For additional information, contact Ellen Robertson at 410-260-2908.

