ACEC

American Council of Engineering Companies
Maryland

February 17, 2020

Re: Response to Letter of Opposition from Attorney General
Subj: SB 368 Courts – Prohibited Indemnity and Defense Liability Agreements

On behalf of the American Council of Engineering Companies/MD (ACEC/MD) I wish to respond to the letter of opposition from the Attorney General.

The Attorney General (AG) begins by lamenting that the legislation would limit the liability of the design professional (i.e. Engineer) in a contract dispute to the design professional's "Negligent Performance" and "Breach of Performance" - as if they should also be liable for the errors and omissions of others.

This claim is uninformed and unfair. Insurance policies available for design professionals do not provide the same liability coverage as do those of building contractors and the desire of the State to require the design professional to sign a contract including a clause that requires them to cover the State's costs and legal fees upfront, BEFORE the courts establish fault, is asking them to assume a liability for which they are not insured.

The two examples provided by the AG where the state filed for damages against two architects is clearly not on point. SB368 readily acknowledges that design professionals will need to assume responsibility to indemnify and pay legal costs for any damages attributed to their negligent performance. In the case examples provided by the AG, that is exactly what occurred, and a careful reading of this bill confirms that this is what would be expected if SB 368 were enacted.

Lastly, we dispute the AG's position that these "are not contracts of adhesion" - definition: *a legally binding agreement between two parties to do a certain thing, in which one side has all the bargaining power and uses it to write the contract primarily to his or her advantage.*

The State admits that the contracts in question include clauses that REQUIRE the design professional to assume the liability to pay the indemnity and legal costs of the State on claims where the design professional was not the proximate cause. The refusal to sign such a contract leaves the design professional, whose livelihood depends on the acceptance of these contracts, without the needed income. Who could deny this constitutes being pressured, and if you agree, is it not a contract of adhesion?

In our view, the final paragraph of the letter gives the impression that the primary motivation for the AG's opposition is the State's wish to retain the advantage it holds over the design professional with these contract provisions. It also mentions that design professional contracts might potentially be "lucrative" (i.e. profitable) and that also seems to justify shifting the State's insurance liability to the design professional, even if these costs may not be covered by the design professional's insurance policy.

The AG's letter may be responsive to the concerns expressed by State agencies regarding SB 368 it is inaccurate in places, lacking in perspective, unaware of pertinent insurance coverage, and unwilling to admit the existing practice that requires contractors to acquiesce to the inclusion of certain inequitable terms in state procurement agreements before they are allowed to sign a contract.

We would appreciate your careful review of these comments.

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