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TO: The Honorable Luke Clippinger
Chair, Judiciary Committee

FROM: The Office of the Attorney General

RE: HB 681 – Courts – Prohibited Indemnity and Defense Liability Agreements
(OPPOSE)

The Office of the Attorney General urges this Committee to issue an unfavorable report on HB 681. If enacted, this legislation would eliminate all but two causes of action, negligent performance or breach of contract, that Maryland might seek to bring against architects, certified interior designers, landscape architects, professional engineers, or professional land surveyors with whom it contracts. The bill would make indemnity clauses in government contracts that bind government contractors “against public policy and . . . void and unenforceable.” See Section 5-401(a)(5).

In two cases recently handled by the Office’s Contract Litigation Unit, the State was fully indemnified by the project architect or the architect’s errors and omissions insurer for damages resulting from errors in building design and, in the one case, ambiguous drawings. In one of those matters, the architect failed to prepare design drawings that complied with the applicable code requirements for the building’s seismic loading. The building’s contractor submitted claims totaling nearly \$1.7 million for delay and direct costs as a result of those errors and ambiguities, and the architect paid \$350,000 directly to the contractor to resolve the matter. In the other, the project architect’s structural engineer discovered, after contact award to the building contractor, that certain structural changes should have been made during the final check of the contract’s structural drawings before bid but were overlooked and not incorporated into the final contract drawings issued for bid. In that case, the project architect and structural engineer paid \$163,000 directly to the contractor in order to resolve the matter. Liability in these matters would be less clear and more susceptible to challenge if HB 681 were to become law.

Proponents of HB 681 suggest that various Maryland Departments require procurement contracts to include clauses binding architects and engineers, among others, to indemnify the State for misconduct, negligence, or breaches that neither the architects nor engineers committed. In their view, the legislation is intended to ensure that public procurement contracts do not alter or elevate the legal liability of architects and engineers with respect to their performance of professional services for public clients. However, Maryland's requests for proposals (RFPs)—regardless of Department—are not contracts of adhesion. No business entity is forced to bid on Maryland RFPs, nor, upon bidding, are they forced to enter into contracts. Providing professional services to the State can prove lucrative. Knowing this, Maryland is best served by insisting upon contracts that best protect its interests. Legislating to eliminate potential causes of action against architects and engineers, among others, is not in Maryland's best interest. Therefore, for all of the foregoing reasons, the Office of Attorney General urges an unfavorable report on HB 681.

cc: Members of the Judiciary Committee