

27 March 2023

Delegate Joseline A. Pena-Melnyk  
Chair, Health and Government Operations Committee  
Room 241  
House Office Building  
Annapolis, Maryland 21401

Re: Letter of Concern Senate Bill 773  
State Procurement – Liquidated Damages – Policies and Requirements

Dear Chair Pena-Melnyk and members of the Health and Government Operations Committee:

On behalf of AIA Maryland and the nearly 2,000 Architects we represent, we express our concern of this bill that provides for the inclusion and use of liquidated damages provisions in procurement contracts, including professional service contracts with Architects or Engineers, as specifically defined under SB 773, Section 15-113 (D)(I), (II) and (III). AIA Maryland agrees and supports procurement and contract strategies that provide incentive for efficient, effective, and accountable performance on behalf of the State of Maryland. In fact, part of the services that Architects and Engineers render on behalf of the State of Maryland is to assist in the oversight of Contractors, subcontractors, vendors, and material suppliers with respect to their obligations on all construction contracts, including schedule.

While the use of liquidated damages is commonplace with contractors, architectural and engineering design professional services do not customarily lend themselves to strict schedules. Architects and engineers, as design professionals, provide an intellectual service. The design services that architects and engineers regularly perform do not provide a tangible product, nor do they perform a physical task akin to contractors. During the proposal and contract negotiation stages, it is impossible to know precisely how much time we will need to complete our engineering and architectural professional services in accordance with the Professional Standard of Care. Moreover, architects and engineers who perform professional design services do not have control over the responsiveness of the owner, the contractor or applicable public agency staff, and the regulatory review schedules. It is unreasonable, therefore, to expect engineering and architectural professionals to accept liability for delays in the completion of our design services.

Liquidated damages impose an increased risk not covered by professional liability coverage. All professional liability insurance policies exclude coverage for penalties and fines and any type of liability assumed by contract that is not the result of our professional negligence. Since the inclusion of liquidated damages in engineering and architectural professional service contracts is not covered by insurance, it may preclude Maryland's architects and engineers from obtaining any professional liability coverage for a given project. Therefore, many architects and engineers, especially small business enterprises, in recognition of the increased risk and burden not covered by professional liability insurance, may consider not pursuing

state projects. Furthermore, current state procurement requests for proposals and state contracts require professional liability insurance for all professional services. Since liquidated damages are not covered by professional liability insurance policies, the burden would unreasonably be placed upon the architect and engineer.

For these reasons, including a liquidated damages clause in architectural and engineering professional service contracts would be a serious deterrent for many architects and engineers. This would negatively affect Maryland's ability to engage architects and engineers for professional services. We therefore respectfully ask your committee to reconsider the inclusion of architects and engineers in SB 773.

Sincerely



Daniel L. Bailey, AIA  
Director and Past President