Testimony SB 56 Courts - Prohibited Indemnity and
Uploaded by: Chad Faison
Position: FAV

ACEC
American Council of Engineering Companies
Maryland

SB 56 Courts – Prohibited Indemnity and Defense Liability Agreements

SUPPORT

Hon. William Smith, Chair
Senate Judicial Proceeding Committee
2 East Miller Senate Office Building
Annapolis, MD 21401

Hon. Jeff Waldstreicher, Vice Chair
Senate Judicial Proceeding Committee
2 East Miller Senate Office Building
Annapolis, MD 21401

Chair Smith:

Vice Chair Waldstreicher:

My name is Chad Faison, Executive Director of The American Council of Engineering Companies/MD (ACEC/MD).

ACEC/MD is 90 multi-sized consulting engineering firms located throughout the state, serving both the public and private sectors. Many of our members are engaged in the design of our public water and wastewater systems, bridges, highways, building structures and environmental projects. 40% of ACEC/MD's members are certified small, minority or women-owned businesses. Member firms employ approximately 7,000 employees statewide.

Design professionals (architects, engineers, land surveyors) should not be asked to indemnify or defend another party for losses for which they are not responsible and cannot obtain insurance protection. Unfortunately, some public agencies and private business entities will include indemnification clauses in their contracts that require a design professional to indemnify them beyond what the professional liability insurance will cover. When design professionals, including small, minority and women owned firms, refuse to agree to these provisions, they are not selected for these contracts.

The fundamental purpose of this bill is fairness, right now design professionals are being asked to defend public and private entities, in addition to their own defense, against third party claims before there is a determination of proximate cause that would indicate that the design professional has committed an error. The costs of these additional defense costs can be staggering and must be paid by the design professional, not their liability insurance policy. The liability insurance will only cover legal costs for the negligent errors and omissions of the design professional and not for the defense costs of others until the design professional is determined to be at fault.

The amendments in SB 56 will preclude the assignment of liability to design professionals for injuries or damages when they are not the proximate cause; however, they do not inhibit the filing of claims, or limit the reasonable liability for any claim for which they are responsible, nor would it reduce the awards payable to any claimant.

Design professionals are willing to assume liability that can be attributed to their fault but have genuine concerns when contracts require indemnification or a duty to defend claims when they are not the proximate cause of the loss, damage, or expense.

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SB 56 Courts – Prohibited Indemnity and Defense Liability Agreements

Sections 5-401 of the law applies only to construction related activities. As the bold wording in sub-sections (a) (1) and (2) indicates, it applies to the same subject matter as HB 256.

> **§ 5-401.** Certain construction industry and motor carrier indemnity agreements prohibited.
> **(a) (1)** A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relating to **architectural, engineering, inspecting, or surveying services**, or the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, including moving, demolition, and excavating connected with those services or that work, **purporting to indemnify the promisee against liability for damages** arising out of bodily injury to any person or damage to property **caused by or resulting from the sole negligence** of the promisee or indemnitee, or the agents or employees of the promisee or indemnitee, **is against public policy and is void and unenforceable**.
>
> **(2)** A covenant, a promise, an agreement, or an understanding in, or in connection with or collateral to, a contract or an agreement relating to **architectural, engineering, inspecting, or surveying services**, or the construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, or an appliance, including moving, demolition, and excavating connected with those services or that work, purporting to require the promisor or indemnitor **to defend or pay the costs of defending the promisee** or indemnitee against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting **from the sole negligence of the promisee** or indemnitee, or the agents or employees of the promisee or indemnitee, **is against public policy and is void and unenforceable**.

SB 56 is seeking to expand this protection to address what is the most common problem with a contract clause that requires the design professional to assume liability when they are not the probable cause of the loss, and the owner/payor may not be the sole responsible party.

A favorable vote on SB 56 would be appreciated.

SB56 West FAV.pdf
Uploaded by: Christopher West
Position: FAV

Chris West
Legislative District 42
Baltimore and Carroll Counties

Judicial Proceedings Committee

THE SENATE OF MARYLAND
Annapolis, Maryland 21401

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February 7th, 2023
Senate Judicial Proceedings Committee
The Honorable William C. Smith, Jr.
2 East Miller Senate Building
Annapolis, Maryland 21401

Re: Senate Bill – 56 – Courts – Prohibited Indemnity and Defense Liability Agreements

Dear Chairman Smith and Members of the Committee,

In a construction project, there are generally numerous contracting parties. There is an owner, the engineering firm, occasionally an architect, the prime contractor, various subcontractors, and other professionals. When an accident occurs resulting in significant losses, the responsible party and or its insurance carrier is normally held responsible and must pay for the damages.

Let me illustrate this principle with a hypothetical: A professional engineering firm enters into a contract with the Maryland Department of Transportation to do the design work for a bridge over the Baltimore Beltway. The bridge is now under construction. A concrete mixer is backing into the work area for the bridge construction and runs over one of the construction workers. Under normal circumstances, the construction worker would file lawsuits against all parties that might have been responsible for the accident. Named defendants would include the concrete mixer company, the company which hired the flagman who failed to yell "Stop", possibly other subcontractors, the prime contractor and of course the owner. One party who would not normally be sued in this scenario would be the engineering firm which designed the bridge. This is because the bridge design had nothing to do with the accident.

This bill is necessary because in certain situations the owner of the land is so dominant that it can insert into its contract with the engineering firm a provision stating that the design professional would indemnify the owner for all of the damages and expenses associated with a loss on the project irrespective of the fact that the design professional firm, in this case the engineering firm, was not the proximate cause of the loss. So, in the case of the concrete mixer accident, the indemnification provision would force the engineering firm to pay all of the damages even though it had nothing to do with the accident.

Of course, each design professional firm has its own insurance, but insurance companies decline to write policies with design professionals providing for the insurance companies to pay for losses that were not proximately caused by the design professional firm. This is because, while the insurance company can assess the risk that its insured will cause an accident, due to its past experience with the design professional firm, the insurance company has no experience with

others on the job site and has no way to quantify the risk that other companies on the site will act in a negligent fashion.

Fortunately, contracts containing such clauses are not customary but some Maryland State procurement contracts and some other contracts used by very large and powerful construction companies insert such clauses into their contracts with engineering firms and architectural firms. These are effectively contracts of adhesion because the design professional firm knows that if it wants the work, it will have to sign an unfair contract.

Very large engineering firms and architectural firms may have the resources to take the risk that are associated with these contracts, but for smaller design professional firms, including most minority-owned firms, signing a contract containing such an indemnity provision is, in effect, a "bet the company" decision because if something should go wrong on the job, even though the design professional played no role in the accident, the damages could be so great as to put the design professional firm into bankruptcy, If the small firm wants the work, it would have to place the very existence of the company at risk by signing a contract containing such an indemnification clause.

One obvious by-product of such indemnification clauses is to deter small companies from bidding on the job. The fewer the bidders, the higher the winning bid will be. Further, those design professional firms willing to bid on such a contract will necessarily try to quantify the extra risk they are taking due to the indemnification clause and will submit higher bids for the work than would have been the case if the contract had no contained such an indemnification clause.

Current Maryland law provides that in an architectural or engineering contract purporting to indemnify the other party to the contract for damages arising due to the "sole negligence" of the other party is against public policy and is void and unenforceable. Senate Bill 56 adds language to the existing statute stating that a provision in an architectural or engineering contract requiring the design professional to indemnify the other party to the contract against loss is void and unenforceable unless the fault of the design professional is the proximate cause of the loss. Simply stated, under SB 56, the design professional can only be required to indemnify the other party to a contract if the fault of the design professional is the cause of the loss but not if the design professional was not the cause of the loss.

So Senate Bill 56 ensures that small construction contractors aren't footing the bill for accidents they did not cause.

I appreciate the committee's consideration of Senate Bill 56 and will be more than happy to answer and follow-up questions the committee may have.

SB 0056 AIAMD Ltr Spprt.pdf
Uploaded by: Laurence Frank
Position: FAV

AIA Maryland

28 January 2023

The Honorable William C. Smith, Jr.
Chair of the Judicial Proceedings Committee
2 East
Miller Senate Office Building
Annapolis, Maryland 21401

Re: Letter of Support for SB 0056
Courts – Prohibited Indemnity and Defense Liability Agreements

Dear Chairman Smith and members of the Judicial Proceedings Committee:

On behalf of AIA Maryland and the nearly 2,000 Architects we represent, we ask for your support of this bill to prohibit contract provisions in contracts for professional services between design professionals and their clients that requires the design professional to indemnify or hold harmless certain parties unless the design professional is at fault for causing the loss, damage, or expense indemnified; prohibiting provisions in contracts with a design professional for professional services that requires the design professional to defend certain parties against liability or certain claims.

Other states have found this type of provision is against public policy. Some units of state government have amended their contracts to preclude this type of language. This type of contract language often places design professionals in a position where they must defend a client regardless of their responsibility for a potential claim, and in some cases where they are not the party at fault.

We support this because we believe that this legislation provides for more equity in the design professionals contract with the various public, quasi-public and private clients who we serve throughout the state.

Further we believe this will help level the field for our MBE members and small firm colleagues as these indemnity and defense liability requirements are typically passed thru agreements from prime to consultants. This pass thru extends the unfair burden from the prime design professional to their consultants. This results in the onerous nature of these provisions being placed upon MBE and other firms who are not have the resources needed to meet these requirements.

AIA Maryland and its membership encourages steps to improve the quality of Maryland's built environment, eliminating these types of contract provisions are in the interest of good public policy. AIA Maryland is happy to support this bill.

Sincerely,

Laurence A. Frank, AIA
Director, Past President, AIA Maryland

AIA Maryland
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Annapolis, MD 21401

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sb56test - Courts – Prohibited Indemnity and Defen

Uploaded by: Marcus Jackson

Position: UNF

Associated Builders and Contractors, Inc.

Maryland Joint Legislative Committee

The Voice of Merit Construction

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FEBRUARY 7, 2023

TO: JUDICIAL PROCEEDINGS COMMITTEE

FROM: ASSOCIATED BUILDERS AND CONTRACTORS

RE: S.B. 56 – PROHIBITED INDEMNITY AND DEFENSE LIABILITY AGREEMENTS

POSITION: OPPOSE

Associated Builders and Contractors (ABC) opposes S.B. 56 which is before you today for consideration. The bill proposes certain amendments to Section 5-401(a) of the Courts and Judicial Proceedings Article of the Maryland Code. Among other things, the proposed amendments seek to further limit a design professional's liability for contractual defense and indemnity obligations for damages arising out of a design professional's services. In its current form, Section 5-401(a) prohibits a design contract from containing a provision that requires a design professional to defend or indemnify an indemnified party an indemnified party's sole negligence. However, S.B. 56 proposes to further limit a design professional's contractual defense and indemnity obligations.

Specifically, S.B.56 would make void and unenforceable any contract provision that requires a design professional to indemnify and defend an indemnified party for damages arising out of the design professional's work, unless the design professional "is the proximate cause of the loss, damage, or expense[.]" As currently written, S.B. 56 does not comport with applicable Maryland law concerning negligence. In fact, Maryland courts have held that there may be more than one proximate cause of a harm. Yet, S.B. 56 refers to "the proximate harm" in the singular form, which suggests that a design professional would not have any indemnification or defense obligations unless the design professional was the sole proximate cause of the harm. In other words, if there were two or more proximate causes of the harm, then the design professional would have not defense or indemnity obligations.

Moreover, S.B. 56 applies to all design professional services contracts. The proposed amendments would allow a design professional to skirt responsibility for its errors, omissions, and/or breaches of contract if some other action or omission contributed to the harm. This could leave contractors and owners, such as the State of Maryland and its municipalities, left holding the bag for a design professional's

actions or omissions. If the State believes there is a compelling reason to further limit a design professional's liability to the State, its municipalities, or other Maryland owners and contractors, then a more appropriate course of action would be to limit a design professional's indemnity and defense obligations to the extent caused by the design professional. However, further limiting a design professional's liability could have unintended consequences, such as promoting an inferior product because the risk to the design professional is limited.

On behalf of the over 1,500 ABC members in Maryland, we respectfully request an unfavorable report on S.B. 56.

Marcus Jackson, Director of
Government Affairs

SB0056.pdf
Uploaded by: Mike Zaloudek
Position: UNF

I am opposed to SB 0056. There are several reasons why gun manufacturers should not be held liable for criminal acts committed with firearms. Firstly, it is the responsibility of the individual who possesses the firearm to use it legally and safely. The manufacturers have no control over how the firearms are used once they are sold to the end-user. Secondly, holding manufacturers liable for criminal acts committed with firearms could lead to a decrease in the availability and affordability of firearms for law-abiding citizens, as manufacturers may choose to cease operations or significantly increase prices due to increased legal liability. Thirdly, existing laws, such as the Bureau of Alcohol, Tobacco, Firearms, and Explosives regulations, already place significant restrictions and obligations on manufacturers, such as ensuring that firearms are not sold to prohibited individuals. Fourthly, holding manufacturers liable for criminal acts could set a dangerous precedent in which other industries, such as the automotive or pharmaceutical industries, could be held liable for the illegal or harmful use of their products. In conclusion, the primary responsibility for criminal acts lies with the individuals who commit them and not with the manufacturers of the tools used in those acts
I urge you to vote unfavorable on SB0056
Mike Zaloudek
Severna Park, MD

SB0056-JPR-UNF.pdf
Uploaded by: Nina Themelis
Position: UNF

BRANDON M. SCOTT
MAYOR

Office of Government Relations
88 State Circle
Annapolis, Maryland 21401

SB 56

March 7, 2023

TO: Members of the House Judiciary Committee

FROM: Natasha Mehu, Director of Government Relations

RE: Senate Bill 56 – Courts – Prohibited Indemnity and Defense Liability Agreements

POSITION: OPPOSE

Chair Smith, Vice Chair Waldstreicher and Members of the Committee, please be advised that the Baltimore City Administration (BCA) **opposes** Senate Bill (SB) 56.

The bill amends current prohibitions against indemnity agreements in the Court and Judicial Proceedings Art. Sec. 5-401 by adding a paragraph that declares void and unenforceable provisions requiring design professionals to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees or indemnitees or any other person against loss, damages or expenses unless the fault of the design professional or it's derivative parties is the proximate causes of the loss, damage or expense indemnified.

It also declares provisions requiring design professionals to defend a promisee and their independent contractors, agents, employees, or indemnitees against liability or claims for damages or expenses, including attorney fees, alleged to be caused in whole or in part by the professional designer's own negligence or its derivative parties' negligence, whether the claim is alleged or brought in tort or contract, to be against public policy and void and unenforceable.

The City spends millions each year on construction projects and hires many "design professionals" such as architects and engineers. This bill expands current law-making indemnification and hold harmless provisions void unless the City can prove that the design professional's negligence was the proximate cause of the damages. In addition, the bill declares all duty to defend provisions void and unenforceable. The provisions of this

bill are clearly contrary to "the public policy of freedom of contract" in Maryland. *Adloo v. H.T. Brown Real Estate, Inc*., 344 Md. 254, 259 (1996).

Analysis

In the scenario for a typical case, the City is the defendant because, as land-owner, it owes a duty to the third-party plaintiff who is the injured party. The City's contractor, the design professionals, who are present or in control of the location, owe no duty to Plaintiff. Part of the consideration for the contract is the protection provided by the indemnification clause. The City's standard indemnity clause provides as follows:

The Contractor shall indemnify, defend, and hold harmless the City, its elected/appointed officials, employees, agents, and volunteers from any and all claims, demands, suits, and actions, including attorneys' fees and court costs, connected therewith, brought against the City, its elected/appointed officials, employees, agents, and volunteers, arising as a result of any direct or indirect, willful, or negligent act or omission of the Contractor, its employees, agents, or volunteers, EXCEPT for activities caused by the sole negligent act or omission of the City, its elected/appointed officials, employees, agents, and volunteers arising out of this Contract.

Paragraphs 4 and 5 of the legislation render the City's indemnity clause void and unenforceable. The City would always bear the burden of defending plaintiff's claim and would have to sue the design professional and prove that the design professional's negligence was the proximate cause of plaintiff's injury. Instead of assisting counsel provided by the design professional's insurer in defense of the claim, we would have to prove plaintiff's case for them against design professional. The City would run the risk of alienating design professionals because we would have to sue them. The design professionals possess the evidence and have operational control of the City's premises with ability to prevent negligent conditions and are uniquely positioned to assist in the defense of claims.

Paragraph 6 does not appear to make sense. It seems to suggest that there are some types of "enforceable" indemnity or hold harmless agreements. The previous provisions of the bill, however, state that all such provisions are void and unenforceable.

The proposed legislation restricts the City's ability to contract; makes the design professional and City antagonists in all third-party claims; requires that the City prove a plaintiff's case against the design professional, relieves the party in the best position to defend the case of the obligation to defend and indemnify. The lobbyists are denying the City as the customer who pays the design professional of the benefit of the bargain (the indemnity clause).

This bill is clearly not in the City's best interests and exposes it to liability that the City currently is shielded from by indemnification provisions in its contracts.

For these reasons, the BCA respectfully request an **unfavorable** report on SB 56.

'23 SB 56 Indemnity LOI JPR 2-7-23.pdf
Uploaded by: Devin Neil
Position: INFO

Wes Moore
Governor

Aruna Miller
Lt Governor

Maryland
DEPARTMENT OF
GENERAL SERVICES

Atif Chaudhry
Secretary

Nelson E. Reichart
Deputy Secretary

BILL: **Senate Bill 56**
Courts - Prohibited Indemnity & Defense Liability Agreements

COMMITTEE: Senate Judicial Proceedings

DATE: February 7, 2023

POSITION: Letter of Information

The Department of General Services provides the following comments to the Judicial Proceedings Committee in reference to Senate Bill 56 Courts – Prohibited Indemnity and Defense Liability Agreements.

DGS is a control agency responsible for Design Professional procurements. Senate Bill 56 shifts the risk within an Architectural or Engineering (A/E) contract from the hired design team to the State. The bill results in limiting the State's ability to seek indemnification in only certain cases. Indemnification is already required in purchase orders over $25,000 and is a negotiated provision that the State has available to it. Indemnification is a legal and equitable remedy that, when negotiated, will alleviate the State from having to pay out claims or damages that were not the State's fault but the fault of the consultant/contractor/other party. The Department's current A/E contracts do not have an indemnification clause except for instances involving patents, copyrights and records.

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

2023-02-07 SB56 (Letter of information).pdf
Uploaded by: Hannibal Kemerer
Position: INFO

ANTHONY G. BROWN
Attorney General

CANDACE MCLAREN LANHAM
Chief of Staff

CAROLYN A. QUATTROCKI
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

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(410) 576-6584

February 2, 2023

TO: The Honorable Will Smith Jr.
Chair, Judicial Proceedings Committee

FROM: Hannibal G. Williams II Kemerer
Chief Counsel, Legislative Affairs, Office of the Attorney General

RE: SB 56 – Courts – Prohibited Indemnity and Defense Liability Agreements
(Letter of Information)

The Office of the Attorney General ("OAG") provides this letter of information on Senate Bill 56.

Senate Bill 56 shifts the risk within an Architectural or Engineering("A/E") contract from the hired design team to the State. The OAG has consistently opposed this and similar bills because they may have a significant operational effect on State agencies and increase State expenditures. *See e.g.*, Letters in Opposition to HB 79 (2022); HB 213 (2021); SB 368 (2020); and HB 452 (2019) (all attached). Notwithstanding the past oppositions and continuing concerns, the Office of the Attorney General pledges to work with the bill sponsors to try and come up with a workable bill.

cc: The Honorable Chris West and Committee Members

This bill letter is a statement of the Office of Attorney General's policy position on the referenced pending legislation. For a legal or constitutional analysis of the bill, Members of the House and Senate should consult with the Counsel to the General Assembly, Sandy Brantley. She can be reached at 410-946-5600 or sbrantley@oag.state.md.us

BRIAN E. FROSH
Attorney General

ELIZABETH F. HARRIS
Chief Deputy Attorney General

CAROLYN QUATTROCKI
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

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January 19, 2022

To: The Honorable Luke Clippinger
Chair, Judiciary Committee

From: Hannibal G. Williams II Kemerer
Chief Counsel, Legislative Affairs, Office of the Attorney General

Re: HB0079(SB0161) – Courts – Prohibited Indemnity Agreements and Defense Liability Agreements – **Letter of Opposition**

The Office of the Attorney General urges the Judiciary Committee to unfavorably report House Bill 79.

House Bill 79 shifts the risk within an Architectural or Engineering("A/E") contract from the hired design team to the State. The bill limits the State's ability to seek indemnification in only certain instances. Indemnification is already solely required in purchase orders over $25,000. Indemnity is a negotiated provision that the State has available to it and is a legal and equitable remedy that, when negotiated will alleviate the State from having to pay out claims or damages that were not the State's fault, but the fault of the consultant/contractor/other party. In addition, the Department of General Services' ("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. Because the Contract Litigation Unit within our Office represents and handles claims for DGS, HB 79 would, if passed, negatively impact that unit.

For all of the foregoing reasons, the Office of the Attorney General urges the Committee to unfavorably report House Bill 79.

cc: Delegate Cardin, Delegate Atterbeary, and Committee Members

BRIAN E. FROSH
Attorney General

ELIZABETH F. HARRIS
Chief Deputy Attorney General

CAROLYN QUATTROCKI
Deputy Attorney General

STATE OF MARYLAND
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January 20, 2021

TO: The Honorable Luke Clippinger
Chair, Judiciary Committee

FROM: The Office of the Attorney General

RE: HB 213 – Courts – Prohibited Indemnity and Defense Liability Agreements – **Letter of Opposition**

The Office of the Attorney General urges this Committee to issue an unfavorable report on HB 213. 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* § 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 for 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 213 were to become law.

Proponents of HB 213 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 213.

cc: Members of the Judiciary Committee

BRIAN E. FROSH
Attorney General

ELIZABETH F. HARRIS
Chief Deputy Attorney General

CAROLYN QUATTROCKI
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

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February 12, 2020

TO: The Honorable William C. Smith, Jr.
Chair, Judicial Proceedings Committee

FROM: The Office of the Attorney General

RE: SB 368 – Courts – Prohibited Indemnity and Defense Liability Agreements
(OPPOSE)

The Office of the Attorney General urges this Committee to issue an unfavorable report on SB 368. 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 handled by the Office's Contract Litigation Unit several years ago, the State was fully indemnified by the project architect for 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 SB 368 were to become law.

Proponents of SB 368 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 SB 368.

cc: Members of the Judicial Proceedings Committee

BRIAN E. FROSH
Attorney General

ELIZABETH HARRIS
Chief Deputy Attorney General

CAROLYN QUATTROCKI
Deputy Attorney General

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STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

WRITER'S DIRECT DIAL NO.
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February 19, 2019

The Honorable Shane Pendergrass, Chair
The Honorable Joseline A. Peña-Malnyk, Vice Chair
Health and Government Operations
Room 241
House Office Building
Annapolis, Maryland 21401

Re: HB 452 – Procurement Contracts – Architectural and Engineering Services – Indemnity Clauses (OPPOSE)

Dear Delegates Pendergrass and Pena-Malfiyk:

The Office of the Attorney General opposes House Bill 452. 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 contract 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 452 were to become law.

Yours truly,

Hannibal G. Williams II Kemerer
Chief Counsel for Legislative Affairs

cc: Committee Members