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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

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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

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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

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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

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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