

March 17, 2023

The Honorable Luke Clippinger
Chair, House Judiciary Committee
Room 101, House Office Building
Annapolis MD 21401

Re: Letter of Opposition – House Bill 256 – Courts – Prohibited Indemnity and Defense Liability Agreements

Dear Chair Clippinger and Committee Members:

The Maryland Department of Transportation (MDOT) respectfully opposes House Bill 256 and offers the following information for the Committee’s consideration.

House Bill 256 would prohibit any contractual provision that would require a State A&E consultant to: 1) defend the State; and 2) indemnify or hold the State harmless unless the consultant’s actions were the “proximate cause” of the loss.

The potential consequences of House Bill 256 include: 1) requiring the State to assume the defense of claims based on the consultant’s errors that the consultants are now obligated to defend; and 2) the increased likelihood that the consultants and/or their insurers will attempt to escape their indemnity obligation based on allegations that the State’s supervision/review/approval of the consultant’s work (or the actions of others) also contributed to the loss and therefore, the consultant’s fault was not the “proximate cause” of the loss.

At present, these “duty to defend” and indemnification contractual provisions are standard in MDOT’s A&E contracts with design professionals such as architects, engineers, surveyors, etc. These provisions provide protection for the State in the event of claims or injuries resulting from the work of consultants. If these provisions are eliminated from MDOT’s contracts the risk of loss in such cases will be transferred to the State from design professionals and, while the additional cost to the State is difficult to quantify, the costs would be significant in the event of a catastrophic loss to and/or involving transportation infrastructure, especially if impacting State structures such as bridges, tunnels, highways, airport terminals, runways and berths. Additionally, the State may need to purchase additional insurance to provide coverage for the additional claims/liability that would otherwise be covered by the “duty to defend”/indemnification provision, and/or MDOT’s insurance premiums may increase.

The Maryland Department of Transportation respectfully requests the Committee grant House Bill 256 an unfavorable report.

Respectfully submitted,

Pilar Helm
Director of Government Affairs
Maryland Department of Transportation
410-865-1090