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**TO:** The Honorable Shane E. Pendergrass  
Chair, Health & Government Operations Committee

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

**RE:** HB1353: Omnibus Procurement Reform Act ('OPRA') of 2022

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The Office of the Attorney General urges an unfavorable report of HB 1353, Delegate Wilson's bill to significantly revamp Maryland's procurement law.

House Bill 1353 will—for the first time in Maryland procurement law history—require procurement officers to “expeditiously disclose . . . the bid prices or financial proposals, including unit prices” “unless it is determined that disclosure would be inconsistent with the purposes and policies of § 11-201(a) of this Division II.” Proposed § 13-202(d)(3); and Proposed § 17-903(3). Such unit price transparency between market competitors can lead to price fixing and collusion that harms consumers.<sup>1</sup> Additionally, unit pricing is considered confidential commercial information that is currently protected under the Public Information Act.<sup>2</sup>

Beyond the antitrust implications inherent in HB 1353, there are other red flags. This legislation makes it more difficult for State and county procurement officers to “cancel an invitation for bids, a request for proposals, or other solicitation;” or to “reject all bids or

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<sup>1</sup> See e.g., *In re Broiler Chicken Antitrust Litigation*, 290 F.Supp.3d 772, 781 (N.D. Ill. 2017) (refusing to dismiss antitrust claims where “Plaintiffs allege that Defendants communicated their conspiracy to restrain production and inflate prices in part through an entity called Agri Stats.”)

<sup>2</sup> See *Amster v. Baker*, 453 Md. 68, 81 (2017) (quoting *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992); see also, e.g., *Environmental Technology, Inc. v. EPA*, 822 F. Supp. 1226, 1228-29 (E.D. Va. 1993) (unit price information voluntarily provided by government contractor to procuring agency was “confidential” and not subject to disclosure under FOIA, where information was of a kind that contractor would not customarily share with competitors); *Allnet Comm. Services, Inc. v. FCC*, 800 F. Supp. 984, 990 (D.D.C. 1992) (proprietary cost and engineering data voluntarily provided by switch vendors to telecommunications companies under nondisclosure agreements were confidential under FOIA).

proposals.” Proposed § 13-206(b) (state procurement units); and Proposed § 17-904(a) (governing county procurement units). As the offeror in these procurements, the State and/or County should have an inalienable right to withdraw the offer unless and until it has accepted a bid. It is bad public policy to encumber the State in potential litigation before there was ever a meeting of the minds.

House Bill 1353 flips the burden of proof in bid protests by requiring the procuring unit—not the bid protester—to prove “by clear and convincing evidence, that the action is fiscally necessary or consistent with the purposes and policies of § 11-201(a) . . . .” That high burden is typically on the bid protestor, not the State.

Finally, HB 1353 could, if enacted, depart from current law by requiring the State (or a county) to pay a prevailing bid protestor’s “attorney’s fees, fees for expert witnesses, and fees for technical consultants.” Proposed § 13-206(c)(2); and Proposed § 17-904(b)(2). These provisions could prove exceedingly costly to Maryland and her counties if boutique law firms specializing in bid protests take up this specialized practice.

For the foregoing reasons, the Office of Attorney General urges an unfavorable report of HB 1353.

cc: Sponsor & Members of the Health & Government Operations Committee