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MEMORANDUM OF SUPPORT

BILL: S.6906 (Ranzenhofer)

SUBJECT: Reforms Unfair Contract Clauses on Public Work

DATE: April 29, 2016

The Associated General Contractors of New York State, LLC (AGC NYS) the leading statewide trade association representing the construction industry strongly supports S.6906 (Ranzenhofer), which amends the public authorities law, the general municipal law, the public service law and the state finance law, in relation to notice of claim provisions in public works contracts.

For the past twenty years, AGC NYS has provided the construction industry with pre-bid reviews of bidding documents as to their consistency with standards of equity, industry practice and law. AGC NYS supports clear, concise and equitable bidding and contract documents to the benefit of all parties involved: the public owner, contractor, design professional, and most importantly, the taxpayer.

In recent years, more state and local agencies and authorities are stipulating unfair contract notice of claim provisions that include forfeiture language which waives the contractors' right to file a claim. Examples of unfair provisions include: a comment in a project meeting is sufficient notice to start a timely notice of claim; detailed submission of all documentation and justification within 21 days for recognizing the event leads to a potential claim; and the Department (Transportation) may have actual notice of the facts and circumstances which comprise such dispute and is not prejudiced by said failure. These types of exculpatory clauses are unfair and prejudicial thereby stripping a contractors' legal right to file a claim.

In 2008, Governor David Paterson and the Legislature enacted a law (Chapter 388, Laws of 2008) that prohibited insurers from denying coverage for claims based on the failure to provide timely notice unless the insurer has suffered prejudice as a result of the delay. Under this law, the insurers rights would not be deemed prejudiced unless the failure to timely notice materially impairs the ability of the insurer to investigate or defend a claim.

Senate bill 6906 mirrors Chapter 388, Laws of 2008 by allowing contractors to prove their claims and allows the state and local agencies and authorities to defend against unjust claims or to claim material prejudice when appropriate. The contractor's right to additional time or money should not be unfairly waived by mistakes made in the claims process unless it can be shown that these mistakes prejudiced the public owner's ability to manage and defend the claim.

AGC strongly supports and urges the swift passage of S.6906.

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