Testimony_T Frascarella_SB 189 Courts – Prohibited
Uploaded by: Frascarella , Tony
Position: FAV

ACEC

American Council of Engineering Companies
Maryland

SB 189 Courts – Prohibited Indemnity and Defense Liability Agreements

SUPPORT

Chairman Smith, Vice Chair Waldstreicher, and members of the Judicial Proceedings Committee. My name is Tony Frascarella, Executive Vice President at Century Engineering, headquartered in Hunt Valley, Maryland. I am appearing here today as President of the **American Council of Engineering Companies of Maryland** in support of Senate Bill 189.

For the record, ACEC/MD is made up of 90 multi-sized consulting engineering firms located throughout the state serving both the public and private sectors. Many of our firms are engaged in the design of our public water and wastewater systems, bridges, highways, building structures and environmental projects. 45% of ACEC/MD's members are certified small, minority or women-owned businesses. Member firms employ approximately 7,000 employees statewide.

Design professionals should not be asked to indemnify or defend another party for losses that the designer did not cause, cannot insure against and were caused by factors beyond the designer's control. Unfortunately, some public authorities and private business entities are still putting indemnification clauses in their contracts that require a design professional to indemnify above and beyond what the design professionals' 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 against third party claims before there is a proximate determination that the design professional has committed an error. The costs of such defense can be staggering and come out of the design professional's pockets, not their professional liability insurance policy. The reason being the professional liability insurance will only cover legal costs to the extent caused by the negligent errors and omissions of the design professional and does not provide defense for its client.

The amendments in SB 189 will preclude the assignment of liability to design professionals for injuries or damages for which they are not the proximate cause; however, they do not inhibit the filing of claims, or limit the reasonable liability of those 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 for which they are not the proximate cause of the loss, damage or expense.

A favorable vote on SB 189 would be appreciated. Thank you for allowing me to testify today and we will be happy to try to answer any questions you may have.

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Testimony of CBIZ - SB189 Courts - Prohibited Inde

Uploaded by: Hraber, Michael

Position: FAV

CBIZ Insurance Services, Inc.
9755 Patuxent Woods Drive, Suite 200
Columbia, MD 21046

January 18, 2021

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

Re: SB 189 / HB 213
Prohibited Indemnity and Defense Liability Agreements
Indemnity Clauses

Dear Senator Smith,

I am an insurance agent in Columbia, Maryland representing hundreds of architects and engineers throughout the state. I write to you to in support of the above referenced bills and to explain how the insurance policies of architects and engineers work with respect to indemnification clauses in contracts.

The above referenced bills would eliminate two onerous burdens for design firms with respect to indemnification clauses. These burdens relate to certain coverage gaps in the insurance programs of the design firms. The first gap is that the duty to defend is not covered by the general liability or professional liability policies carried by these firms. The second gap is that insurance will only cover an indemnification obligation to the extent that damages are caused by the negligence of the design firm.

It is very common for private developers and local municipalities in Maryland to require indemnification for these uninsured exposures in their contracts. In the absence of insurance coverage for these obligations, design firms are forced to either not bid on the projects, or to take the risk that they could have to pay these costs themselves. This increases the financial uncertainty for all design firms and in particular puts an undue burden on small and minority-owned businesses. These coverage gaps can result in hundreds of thousands of dollars of expenses, or more, for the design firms. While larger firms may be able to withstand these kinds of losses, smaller firms face an existential threat to their business.

These contracts very often are not between two parties with equal bargaining power, but rather between a large owner client and a relatively small design firm. Frequently the owners offer the contracts on a take it or leave it basis. This might be acceptable if there were a reliable way for the design firms to transfer the risk through insurance, but unfortunately the insurance market does not adequately support coverage for these risks.

It is widely understood in the insurance industry that professional liability policies for design firms do not cover a duty to defend an indemnitee when an insured party agrees to such a provision in a contract. It is common under commercial general liability (CGL) policies to cover this exposure for contractors and other types of vendors, and the way this happens is the addition of the indemnitee as an additional insured under the indemnitor's policy. The unique issue which design firms face is that the

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insurance companies universally exclude claims arising out of professional services when they issue a CGL policy for a design firm. The policy which covers the design firm's professional services is their professional liability insurance.

Professional liability insurance policies for design firms do not cover the duty to defend. Professional liability may cover the reimbursement of a claimant's defense costs, but that would only occur **after** negligence is established by a court or a settlement is agreed to among the parties involved in a claim. The vast majority of professional liability policies for design firms do not allow additional insureds, and they all have exclusions similar to the one shown below:

> A. THIS POLICY DOES NOT APPLY TO:
> 4. Contractual Liability
> That part of any CLAIM based upon or arising from liability of the INSURED assumed under any contract or agreement.
> This exclusion does not apply to liability for DAMAGES arising from a WRONGFUL ACT for which the INSURED would have been liable for in the absence of such contract or agreement.

In general, if a design firm agrees to a duty to defend in an indemnification clause, any claim by an indemnitee for an immediate defense would trigger the contractual liability exclusion. This is clearly an uninsurable exposure under the standard insurance policies carried by an overwhelming majority of design firms. There have been some efforts in recent years by a very small number of insurance companies to cover contractual defense obligations through the purchase of yet another insurance policy with limited coverage, or through dubious policy wording that appears to cover the exposure but in reality may not properly cover it. This has been an extremely limited offering that could quickly disappear if the carriers decide to stop offering the coverage.

If a design firm signs a client's indemnity that is not limited to the firm's negligence (holding the client harmless from "*any* act" or for "*all* claims arising from the project," for example), they are accepting more liability that the law would otherwise require—and this obligation would also trigger the contractual liability exclusion discussed above. It is clearly an uninsured exposure for a design firm to agree to an indemnification which is not limited to the AE firm's own negligence or that of their subconsultants. There is no coverage available under the CGL policy for this exposure, nor is there any other policy available in the insurance market for design firms to cover this risk.

I strongly feel that it is in the public's best interest for the obligations of design firms under their contracts to be fully covered by their insurance policies. I hope that this information is helpful and would invite any additional questions that you may have on this topic.

Respectfully,

Michael T. Hraber CPCU, RPLU
Vice President - CBIZ Insurance Services, Inc.
Phone: 443-259-3244 | Email: mhraber@cbizinsurance.com

Chimere L. SB 213 Testimony January 2021.pdf
Uploaded by: Lesane-Matthews, Chimere
Position: FAV

STRAUGHAN ENVIRONMENTAL

January 18, 2021

RE: Senate Bill 213

Good Afternoon. More than 40% of ACEC/MD's member firms are either Small or Minority Owned Firms. I work for a small, woman-owned business in Howard County, established in 1996. Over the past 18 years, I have had the pleasure of witnessing and helping to grow my company from 15 to over 80 diverse employees. The majority of our work is located within Maryland, and we are committed to our mission, which is advancing sustainable and resilient communities. My firm provides a variety of professional services, either a prime on smaller contracts or as a valued subconsultant on others.

As a small business, we are disproportionately affected by contract provisions that require us to assume an uninsurable liability to defend unnamed parties in a "Duty to Defend, clause" in order to bid on an otherwise profitable contract.

These contracts present an ominous choice, either turning away work or taking on this uninsurable risk that could mean going bankrupt. A company of my size cannot reasonably take on an inequitable level of liability, indemnity, and defense costs for things that we did not cause and are beyond our control.

We provide high quality professional services and want to make sure the citizens of Maryland continue to enjoy this high quality of service. If firms like mine, and the dozens of others doing business in Maryland, continue to have to make the aforementioned choice, I am afraid the quality of services will be impacted. Because more stable firms, like mine could cease to exist, leaving these services to less stable firms that are willing to assume the uninsurable risk.

Like larger firms, we are proud of the professional services we provide and completely stand behind the technical design work we perform. We remain committed to continue to provide our clients, partners, and the citizens of Maryland the highest quality professional services.

Sincerely,

Chimere Lesane-Matthews
Deputy Director of Environmental Planning
Straughan Environmental, Inc.

Testimony SB189 Courts - Prohibited Indemnity and

Uploaded by: Osborne, J B

Position: FAV

ACEC

American Council of Engineering Companies
Maryland

SB 189 Courts – Prohibited Indemnity and Defense Liability Agreements

SUPPORT

ACEC/MD is a nonprofit association headquartered in Baltimore with over 90 multi-sized consulting engineering firms located throughout the state serving the public as well as private sectors. Forty five percent of ACEC/MD's members are certified minority or women-owned firms or small businesses. Member firms employ approximately 7000 employees and are responsible for the design of most of the area's infrastructure, environmental and building construction.

ABOUT THE BILL: After a claim is adjudicated, the insurance policy of the responsible party is normally expected to pay for the indemnity and defense costs. If there are multiple responsible parties, the insurers representing each party will normally negotiate an equitable distribution of the claim costs.

The members of ACEC/MD do not believe that expecting a design professional (*i.e. engineering firm*) to pay all the indemnity and the defense costs of other parties in claims, when they bear no responsibility and are not the proximate cause of the injury or loss, should be considered an equitable allocation of risk.

SB 189 is needed because contracts for design professionals often include provisions that require design professionals to assume the liability to indemnify and pay the defense costs of others prior to and without any finding of fault on the part of the design professional. When design professionals, including small, minority and women owned firms, refuse to agree to these provisions, they are not selected to bid on those contracts.

Attached is an exhibit that explains why insurance underwriters are unwilling to pay for claims and legal expenses that are not attributed to some fault on the part of policy holders. When a design professional agrees to a contract with the provision in question, they are exposed to significant uninsured liability. This liability can adversely affect the profitability and solvency of a small firm.

The amendments in SB 189 will preclude the assignment of liability to design professionals for injuries or damages for which they are not the proximate cause; however, they do not inhibit the filing of claims, or limit the reasonable liability of those 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 for which they are not the proximate cause of the loss, damage, or expense.

However, if proximate cause is attributed to the design professional, they must and are willing to assume the liability to indemnify the claim and pay the appropriate defense costs.

A favorable vote on SB 189 would be appreciated.

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Senator West - SB189 – Courts – Prohibited Indemni

Uploaded by: West, Christopher

Position: FAV

Chris West
Legislative District 42
Baltimore County

Judicial Proceedings Committee

Vice Chair, Baltimore County
Senate Delegation

THE SENATE OF MARYLAND
Annapolis, Maryland 21401

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February 2, 2021

Senate Judicial Proceedings Committee
The Honorable William C. Smith, Jr.
2 East Miller Senate Building
Annapolis, Maryland 21401-1991

RE: SB 189 – Courts – Prohibited Indemnity and Defense Liability Agreements

Dear Chairman Smith and Members of the Committee:

I am pleased to introduce Senate Bill 189.

In connection with a construction project, there are generally numerous contracting parties. There is the owner, the contractor, the architect, the engineer, subcontractors and other professionals. When an accident occurs resulting in significant losses, the responsible party and/or its insurance carrier is normally expected to pay for the damages. Where there are multiple defendants, there may be multiple insurers. In this situation the insurers will usually negotiate an equitable allocation of the losses, or a court will ultimately decide which party is liable.

But there are situations in which the owner of the project or the prime contractor is so dominant that it can force the architect and the engineer associated with the project to execute contracts containing an onerous provision requiring the design professional firm to indemnify the owner or the prime contractor, as the case may be, for all of the damages and expenses associated with the loss, irrespective of the fact that the design professional firm was not the proximate cause of the loss. Of course, the design professional firm has its own insurance, but the insurance companies issuing insurance to design professionals customarily refuse to reimburse them for any indemnification payments to the owner in such situations because the losses were not proximately caused by the design professionals. So the design professionals in these situations end up shouldering the burden of paying all of the losses resulting from an accident, including all of the attorney's fees associated with the trial of the case, even though the design professionals were not the proximate cause of the loss.

Fortunately, contracts containing such clauses are not customary. But some Maryland State procurement contracts and some other construction contracts used by very large construction companies contain such indemnification provisions. These are virtually contracts of adhesion because the design professional firm knows that if it wants the work, it will have to sign an unfair contract.

Now let me discuss Senate Bill 189. Maryland law currently provides that a provision 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. Maryland law also currently provides that a provision in an architectural or engineering contract purporting to require the design professional firm to pay for the costs of defending the other party to the contract against liability for damages resulting from the ***"sole negligence"*** of the other party is against public policy and is void and unenforceable.

Senate Bill 189 just 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. In other words, under the new language added by Senate Bill 189, the design professional can only be required to indemnify the other party to a contract if the fault of the design professional is ***the proximate cause*** of the loss but not if the design professional was not the proximate cause of the loss.

Finally, Senate Bill 189 adds a provision dealing with the obligation of the design professional firm to pay the attorney's fees and other defense costs of the other party to the contract attributable to an allegation of liability. It provides that the design professional will not have to pay for such costs until such time as a determination is made that the fault of the design professional is ***the proximate cause*** of the defense costs. At that point, the design professional will have to indemnity the other party to the contract for all reasonable attorney's fees and other defense costs.

I urge a favorable report on Senate Bill 368.

SB0189-JPR-OPP.pdf
Uploaded by: Mehu, Natasha
Position: UNF

BRANDON M. SCOTT
MAYOR

Office of Government Relations
88 State Circle
Annapolis, Maryland 21401

SB 189

February 2, 2021

TO: Members of the Senate Judicial Proceedings Committee

FROM: Natasha Mehu, Director of Government Relations

RE: Senate Bill 189 – 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 189.

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.

We respectfully request an **unfavorable** report on Senate Bill 189.

MTBMA & MAA Testimony_SB 189_Infomational.pdf
Uploaded by: Clark, Rachel
Position: INFO

MTBMA
MARYLAND TRANSPORTATION
BUILDERS AND MATERIALS ASSOCIATION

MARYLAND ASPHALT ASSOCIATION
SINCE 1954

Senator William C. Smith, Chair
Judicial Proceedings Committee
2 East Miller Office Building
11 Bladen Street
Annapolis, Maryland 21401

INFORMATIONAL

January 29, 2021

RE: SB 189 – Courts – Prohibited Indemnity and Defense Liability Agreements

Dear Chairman Smith and Members of the Senate Judicial Proceedings Committee:

The Maryland Transportation Builders and Materials Association ("MTBMA") and the Maryland Asphalt Association ("MAA") collectively represent tens of thousands of Marylanders who operate in the areas of transportation construction, production and engineering. Together, for nearly 100 years, these organizations have served as the voice of the transportation construction industry. The mission of both MTBMA and MAA is to encourage, develop, and protect the prestige of the transportation construction and materials industry in Maryland by establishing and maintaining respected relationships with federal, state, and local public officials. We proactively work with regulatory agencies and governing bodies to represent the interests of the transportation industry, and also advocate for adequate state and federal funding for Maryland's multimodal transportation system.

Our members have some questions related to this bill. Please see the following below:

1. Under the proposed law, wouldn't the design professional have no duty to defend promises if there are allegations that they in any way caused the loss?
2. Wouldn't this law limit the owner's ability to re-allocate risk from the design professional to the contractor in the event of a design-bid-build contract?
3. For design-build contracts where the owner signs a contract with a contractor, who then hires the design professional, won't the restrictions imposed by the proposed law impact the contractor's ability to shift risk to the design professional, increasing the risk to the contractor in most cases?
4. In summary, this legislation is not generally favorable to contractors or those contracting with design professionals, and it is impossible to quantify the impact of such legislation at this time. If this law is passed, there is potential for an increase in contractors' liability.

We appreciate you taking the time to address these questions.

Sincerely,

Michael Sakata
President & CEO, MTBMA

Marshall Klinefelter
President, MAA

2021 SB 189 LOI Indemnification 2-2-21.pdf
Uploaded by: Robertson, Ellen
Position: INFO

Larry Hogan
Governor

Boyd K. Rutherford
Lt Governor

Maryland
DEPARTMENT OF GENERAL SERVICES

Ellington E. Churchill, Jr.
Secretary

Nelson E. Reichart
Deputy Secretary

OFFICE OF DESIGN, CONSTRUCTION & ENERGY

BILL: **Senate Bill 189** – Department of General Services – Courts - Prohibited Indemnity & Defense Liability Agreements

COMMITTEE: Senate Judicial Proceedings

DATE: February 2, 2021

POSITION: Letter of Information

Upon review of Senate Bill 189 – Courts – Prohibited Indemnity and Defense Liability Agreements, the Department of General Services (DGS) provides these comments for your consideration.

DGS is a control agency responsible for Design Professional procurements. Indemnification is already required in purchase orders over $25,000. Indemnity is a negotiated provision that the State has available to it and which is a legal and equitable remedy that, when negotiated, will alleviate the State from having to pay out claims or damages that were not inured to the State (not the State's fault) but the fault of the consultant/contractor/other party. DGS' current A/E contracts do not have an indemnification clause except for instances involving patents, copyright and records.

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

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