CBIZ Insurance Services, Inc.
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January 18, 2021

The Honorable
Luke Clippinger
Chair of the Judiciary Committee
Maryland House of Delegates
House Office Building, Room 101
6 Bladen Street
Annapolis, MD 21401

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

Dear Mr. Clippinger,

I am an insurance agent in Columbia, Maryland representing hundreds of architects and engineers throughout the state. I write to you on behalf of the American Council of Engineering Companies/Maryland (ACEC/MD) to explain how the insurance policies of architects and engineers work with respect to indemnification clauses in contracts, and more importantly how they are very different from that of construction contractors with respect to indemnification coverage.

The above referenced bills address two crucial coverage gaps in the insurance programs of design firms with respect to indemnification clauses. 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 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 insurance policy. The unique issue which design firms face is that the insurance companies universally exclude claims arising out of professional services when they issue a CGL policy for an architecture or engineering 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. Professional liability policies for design firms do not allow additional insureds, and they all have exclusions similar to the one shown below:

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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.

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 design firms. There have been some limited efforts by insurance companies in recent years to cover contractual defense obligations through the purchase of yet another insurance policy, but these are unproven products in the market that could quickly become unavailable or prove to be of little value.

The second coverage gap addressed by HB 213/SB 189 pertains to the fact that an indemnification clause must be limited to the negligence of the design firm in order for the firm's professional liability insurance to cover this exposure.

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 that additional liability is not insurable. 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.

In the absence of insurance coverage for these contractual obligations, firms are forced to either take the risk of the uninsured liability or pass on these projects. This increases the financial uncertainty for all of the firms and in particular puts an undue burden on small and minority-owned businesses. As my firm represents many of these clients, I also understand how important fostering the stability and growth of small and minority-owned businesses is to the state of Maryland. I share with the membership of ACEC/MD the sentiment that it is in the best interests of all parties for the obligations under their contracts to be 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,

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