Testimony_Sean McCone_ACEC-MD_SB 161 Courts - Proh
Uploaded by: Chad Faison
Position: FAV

ACEC

American Council of Engineering Companies
Maryland

SB 161 Courts – Prohibited Indemnity and Defense Liability Agreements

SUPPORT

Chairman Smith, Vice Chairman Moon, and members of the Senate Judicial Proceedings Committee. My name is Sean McCone, Executive Vice President at Johnson, Mirmiran & Thompson, Inc., 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 161.

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 161 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 161 would be appreciated. Thank you for allowing me to express our concerns and I will be pleased to answer questions and provide additional information.

2408 Peppermill Drive ❑ Glen Burnie, MD 21061 ❑ (850) 768-0321 ❑ acecmd@acecmd.org

Senator West - SB 161 Courts – Prohibited Indemnit

Uploaded by: Christopher West

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

Annapolis Office
James Senate Office Building
11 Bladen Street, Room 303
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Chris.West@senate.state.md.us

District Office
1134 York Road, Suite 200
Lutherville -Timonium, MD 21093
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January 26, 2022
Senate Judicial Proceedings Committee
The Honorable William C. Smith, Jr.
2 East Miller Senate Building
Annapolis, Maryland 21401

Re: SB 161 – Courts – Prohibited Indemnity and Defense Liability Agreements

Dear Chairman Smith and Members of the Committee,

In connection with a construction project, there are generally numerous contracting parties. There is an owner, prime contractor, architect, 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. So if a subcontractor causes an accident resulting in personal injuries the damages are shouldered by the subcontractor or the insurance company.

But there are situations in which the owner of a project or the prime contractor is so dominant that it can force the other professionals associated with the project to execute contracts containing an onerous provision requiring the much smaller 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 a loss on the project irrespective of the fact that the design professional firm was not the proximate cause of the loss. So in the case of the accident caused by the subcontractor, the indemnification provision would force the design professional to pay the damages even though it had nothing to do with the accident.

Of course, the design professional firm has its own insurance, but insurance companies issuing insurance to design professionals refuse to reimburse the design professionals for any indemnification payments 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 from an accident, including all of the attorney's fees associated with the case, even though the design professionals were not the 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 de-facto contracts of adhesion because the design professional firm knows that if it wants the work, it will have to sign an unfair contract.

Current Maryland law provides that 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. Senate Bill 161 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. Simply stated, under SB 161, the design professional can only be required to indemnify the other party to a contract if the fault of the design professional is the cause of the loss but not if the design professional was not the cause of the loss.

Senate Bill 161 ensures that small construction contractors aren't footing the bill for accidents they did not cause.

I appreciate the committee's consideration of Senate Bill 161 and will be more than happy to answer and follow-up questions the committee may have.

Testimony_Sean McCone_ACEC-MD_SB 161 Courts - Proh
Uploaded by: Dennis Simpson
Position: FAV

ACEC

American Council of Engineering Companies
Maryland

SB 161 Courts – Prohibited Indemnity and Defense Liability Agreements

SUPPORT

Chairman Smith, Vice Chairman Moon, and members of the Senate Judicial Proceedings Committee. My name is Sean McCone, Executive Vice President at Johnson, Mirmiran & Thompson, Inc., 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 161.

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 161 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 161 would be appreciated. Thank you for allowing me to express our concerns and I will be pleased to answer questions and provide additional information.

2408 Peppermill Drive ❑ Glen Burnie, MD 21061 ❑ (850) 768-0321 ❑ acecmd@acecmd.org

Letter_Support SB 161 Courts Prohibited Indemnity
Uploaded by: J B Osborne
Position: FAV

CBIZ Insurance Services, Inc.

January 26, 2022

The Honorable Will Smith
Chair, Judicial Proceedings Committee
Maryland Senate
Miller Senate Office Building, 2 West
Annapolis, MD 21401

SUPPORT: SB 161 Courts Prohibited Indemnity and Defense Liability Agreements

Dear Senator West:

I am the Senior Vice President with CBIZ Insurance 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 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 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.

CBIZ Insurance Services, Inc.

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. Most professional liability policies for design firms do not allow additional insureds, and they all have exclusions like 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 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 believe 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,

Arthur Ebersberger
Senior Vice President - CBIZ Insurance Services, Inc.
Phone: 410-404-4991 | Email: aebersberger@cbizinsurance.com

SB0161 AIAMD Ltr of Support.pdf
Uploaded by: Sandi Worthman
Position: FAV

AIA Maryland

17 January 2022

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

Re: Letter of Support for SB 0161
Courts – Prohibited Indemnity and Defense Liability Agreements

Dear Chairman Smith and members of the Judicial Proceedings Committee:

On behalf of AIA Maryland and the nearly 2,000 Architects we represent, we ask for your support of this bill to prohibit contract provisions in contracts for professional services between design professionals and their clients that requires the design professional to indemnify or hold harmless certain parties unless the design professional is at fault for causing the loss, damage, or expense indemnified; prohibiting provisions in contracts with a design professional for professional services that requires the design professional to defend certain parties against liability or certain claims.

Other states have found this type of provision is against public policy. Some units of state government have amended their contracts to preclude this type of language. This type of contract language often places design professionals in a position where they must defend a client regardless of their responsibility for a potential claim, and in some cases where they are not the party at fault.

We support this because we believe that this legislation provides for more equity in the design professionals contract with the various public, quasi-public and private clients who we serve throughout the state.

Further we believe this will help level the field for our MBE members and small firm colleagues as these indemnity and defense liability requirements are typically passed thru agreements from prime to consultants. This pass thru extends the unfair burden from the prime design professional to their consultants. This results in the onerous nature of these provisions being placed upon MBE and other firms who are not have the resources needed to meet these requirements.

AIA Maryland and its membership encourages steps to improve the quality of Maryland's built environment, eliminating these types of contract provisions are in the interest of good public policy. AIA Maryland is happy to support this bill.

Sincerely,

Laurence A. Frank, AIA
Director, Past President

AIA Maryland
86 Maryland Avenue
Annapolis, MD 21401

T (410) 263-0916

aiamd.org

2022-01-26 SB 161 (Oppose).pdf
Uploaded by: Hannibal Kemerer
Position: UNF

BRIAN E. FROSH
Attorney General

ELIZABETH F. HARRIS
Chief Deputy Attorney General

CAROLYN QUATTROCKI
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.

WRITER'S DIRECT DIAL NO.

410-576-6584

January 26, 2022

To: The Honorable William C. Smith, Jr.
Chair, Judicial Proceedings Committee

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

Re: SB0161 (HB0079) – Courts – Prohibited Indemnity Agreements and Defense Liability Agreements – **Letter of Opposition**

The Office of the Attorney General urges the Judicial Proceedings Committee to unfavorably report Senate Bill 161

Senate Bill 161 shifts the risk within an Architectural or Engineering("A/E") contract from the hired design team to the State. The bill limits the State's ability to seek indemnification in only certain instances. Indemnification is already solely required in purchase orders over $25,000. Indemnity is a negotiated provision that the State has available to it and is a legal and equitable remedy that, when negotiated will alleviate the State from having to pay out claims or damages that were not the State's fault, but the fault of the consultant/contractor/other party. In addition, the Department of General Services' ("DGS") current A/E contracts do not have an indemnification clause except for instances involving patents, copyright, and records; consequently, DGS did not have an indemnification clause in its prior A/E contracts and there have not been any issues with the A/E's. Because the Contract Litigation Unit within our Office represents and handles claims for DGS, SB 161 would, if passed, negatively impact that unit.

For all of the foregoing reasons, the Office of the Attorney General urges the Committee to unfavorably report Senate Bill 161.

cc: Senator West & Committee Members

SB161-JPR-OPP.pdf
Uploaded by: Natasha Mehu
Position: UNF

BRANDON M. SCOTT
MAYOR

Office of Government Relations
88 State Circle
Annapolis, Maryland 21401

SB 161

January 26, 2022

TO: Members of the Senate Judicial Proceedings Committee

FROM: Natasha Mehu, Director of Government Relations

RE: 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 161.

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 161.

SB 161_MAA_UNF.pdf
Uploaded by: Rachel Clark
Position: UNF

MARYLAND ASPHALT ASSOCIATION
SINCE 1954

January 26th, 2022

Senator William C. Smith, Chair
Judicial Proceedings Committee
2 East, Miller Senate Office Building
Annapolis, MD 21401

RE: SB 161 – Courts – Prohibited Indemnity and Defense Liability Agreements – OPPOSE

Dear Chair Smith and Members of the Committee:

The Maryland Asphalt Association is comprised of 18 producer members representing more than 47 production facilities, 24 contractor members, 24 consulting engineer firms and 41 other associate members. We proactively work with regulatory agencies to represent the interests of the asphalt industry both in the writing and interpretation of state and federal regulations that may affect our members. We also advocate for adequate state and federal funding for Maryland's multimodal transportation system.

SB 161 expands the prohibitions against agreement clauses in construction contracts to prohibit the inclusion of indemnification or hold harmless clauses and provisions requiring a design professional to defend parties against liability unless the design professional is at fault for causing the loss, damage, or expense indemnified, by showing proximate cause.

We have serious concerns with the protections this bill would provide to design professionals, and the additional liability it creates for contractors. As you are aware, our industry works hand in hand with professional engineers. While at this present time we are opposed to SB 161, we would happily agree to meeting with the Sponsor as well as all interested stakeholders to figure out the best path forward to ensure everyone is properly protected.

We look forward to discussing this issue further and to a peaceful resolve.

Thank you,

G. Marshall Klinefelter

Marshall Klinefelter
President
Maryland Asphalt Association

SB 161_MTMBA_UNF.pdf
Uploaded by: Rachel Clark
Position: UNF

MTBMA
MARYLAND TRANSPORTATION BUILDERS AND MATERIALS ASSOCIATION

January 26th, 2022

Senator William C. Smith, Chair
Judicial Proceedings Committee
2 East, Miller Senate Office Building
Annapolis, MD 21401

RE: SB 161 – Courts – Prohibited Indemnity and Defense Liability Agreements – OPPOSE

Dear Chair Smith and Members of the Committee:

The Maryland Transportation Builders and Materials Association ("MTBMA") has been and continues to serve as the voice for Maryland's construction transportation industry since 1932. Our association is comprised of 200 members. MTBMA encourages, develops, and protects the prestige of the transportation construction and materials industry in Maryland by establishing and maintaining respected relationships with federal, state, and local public officials.

SB 161 expands the prohibitions against agreement clauses in construction contracts to prohibit the inclusion of indemnification or hold harmless clauses and provisions requiring a design professional to defend parties against liability unless the design professional is at fault for causing the loss, damage, or expense indemnified, by showing proximate cause.

We have serious concerns with the protections this bill would provide to design professionals, and the additional liability it creates for contractors. As you are aware, our industry works hand in hand with professional engineers. While at this present time we are opposed to SB 161, we would happily agree to meeting with the Sponsor as well as all interested stakeholders to figure out the best path forward to ensure everyone is properly protected.

We look forward to discussing this issue further and to a peaceful resolve.

Thank you,

Michael Sakata
President and CEO
Maryland Transportation Builders and Materials Association

'22 SB 161 DGS LOI Indemnity JPR 1-26-22.pdf
Uploaded by: Ellen Robertson
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 THE SECRETARY

BILL: **Senate Bill 161** – Department of General Services – Courts - Prohibited Indemnity & Defense Liability Agreements

COMMITTEE: Senate Judicial Proceedings

DATE: January 26, 2022

POSITION: Letter of Information

Upon review of Senate Bill 161 – 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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email: Ellington.Churchill@maryland.gov
email: Nelson.Reichart@maryland.gov
TTY users 1-800-735-2258