



Associated Builders
and Contractors, Inc.

**Maryland Joint
Legislative Committee**

The Voice of Merit Construction

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FEBRUARY 7, 2023

TO: JUDICIAL PROCEEDINGS COMMITTEE
FROM: ASSOCIATED BUILDERS AND CONTRACTORS
RE: S.B. 56 – PROHIBITED INDEMNITY AND DEFENSE LIABILITY AGREEMENTS
POSITION: OPPOSE

Associated Builders and Contractors (ABC) opposes S.B. 56 which is before you today for consideration. The bill proposes certain amendments to Section 5-401(a) of the Courts and Judicial Proceedings Article of the Maryland Code. Among other things, the proposed amendments seek to further limit a design professional's liability for contractual defense and indemnity obligations for damages arising out of a design professional's services. In its current form, Section 5-401(a) prohibits a design contract from containing a provision that requires a design professional to defend or indemnify an indemnified party an indemnified party's sole negligence. However, S.B. 56 proposes to further limit a design professional's contractual defense and indemnity obligations.

Specifically, S.B.56 would make void and unenforceable any contract provision that requires a design professional to indemnify and defend an indemnified party for damages arising out of the design professional's work, unless the design professional "is the proximate cause of the loss, damage, or expense[.]" As currently written, S.B. 56 does not comport with applicable Maryland law concerning negligence. In fact, Maryland courts have held that there may be more than one proximate cause of a harm. Yet, S.B. 56 refers to "the proximate harm" in the singular form, which suggests that a design professional would not have any indemnification or defense obligations unless the design professional was the sole proximate cause of the harm. In other words, if there were two or more proximate causes of the harm, then the design professional would have not defense or indemnity obligations.

Moreover, S.B. 56 applies to all design professional services contracts. The proposed amendments would allow a design professional to skirt responsibility for its errors, omissions, and/or breaches of contract if some other action or omission contributed to the harm. This could leave contractors and owners, such as the State of Maryland and its municipalities, left holding the bag for a design professional's

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actions or omissions. If the State believes there is a compelling reason to further limit a design professional's liability to the State, its municipalities, or other Maryland owners and contractors, then a more appropriate course of action would be to limit a design professional's indemnity and defense obligations to the extent caused by the design professional. However, further limiting a design professional's liability could have unintended consequences, such as promoting an inferior product because the risk to the design professional is limited.

On behalf of the over 1,500 ABC members in Maryland, we respectfully request an unfavorable report on S.B. 56.

Marcus Jackson, Director of
Government Affairs

