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Judicial Proceedings Committee

THE SENATE OF MARYLAND
Annapolis, Maryland 21401

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February 7th, 2023
Senate Judicial Proceedings Committee
The Honorable William C. Smith, Jr.
2 East Miller Senate Building
Annapolis, Maryland 21401

Re: Senate Bill – 56 – Courts – Prohibited Indemnity and Defense Liability Agreements

Dear Chairman Smith and Members of the Committee,

In a construction project, there are generally numerous contracting parties. There is an owner, the engineering firm, occasionally an architect, the prime contractor, various subcontractors, and other professionals. When an accident occurs resulting in significant losses, the responsible party and or its insurance carrier is normally held responsible and must pay for the damages.

Let me illustrate this principle with a hypothetical: A professional engineering firm enters into a contract with the Maryland Department of Transportation to do the design work for a bridge over the Baltimore Beltway. The bridge is now under construction. A concrete mixer is backing into the work area for the bridge construction and runs over one of the construction workers. Under normal circumstances, the construction worker would file lawsuits against all parties that might have been responsible for the accident. Named defendants would include the concrete mixer company, the company which hired the flagman who failed to yell "Stop", possibly other subcontractors, the prime contractor and of course the owner. One party who would not normally be sued in this scenario would be the engineering firm which designed the bridge. This is because the bridge design had nothing to do with the accident.

This bill is necessary because in certain situations the owner of the land is so dominant that it can insert into its contract with the engineering firm a provision stating that the design professional would indemnify the owner for all of the damages and expenses associated with a loss on the project irrespective of the fact that the design professional firm, in this case the engineering firm, was not the proximate cause of the loss. So, in the case of the concrete mixer accident, the indemnification provision would force the engineering firm to pay all of the damages even though it had nothing to do with the accident.

Of course, each design professional firm has its own insurance, but insurance companies decline to write policies with design professionals providing for the insurance companies to pay for losses that were not proximately caused by the design professional firm. This is because, while the insurance company can assess the risk that its insured will cause an accident, due to its past experience with the design professional firm, the insurance company has no experience with

others on the job site and has no way to quantify the risk that other companies on the site will act in a negligent fashion.

Fortunately, contracts containing such clauses are not customary but some Maryland State procurement contracts and some other contracts used by very large and powerful construction companies insert such clauses into their contracts with engineering firms and architectural firms. These are effectively contracts of adhesion because the design professional firm knows that if it wants the work, it will have to sign an unfair contract.

Very large engineering firms and architectural firms may have the resources to take the risk that are associated with these contracts, but for smaller design professional firms, including most minority-owned firms, signing a contract containing such an indemnity provision is, in effect, a "bet the company" decision because if something should go wrong on the job, even though the design professional played no role in the accident, the damages could be so great as to put the design professional firm into bankruptcy, If the small firm wants the work, it would have to place the very existence of the company at risk by signing a contract containing such an indemnification clause.

One obvious by-product of such indemnification clauses is to deter small companies from bidding on the job. The fewer the bidders, the higher the winning bid will be. Further, those design professional firms willing to bid on such a contract will necessarily try to quantify the extra risk they are taking due to the indemnification clause and will submit higher bids for the work than would have been the case if the contract had no contained such an indemnification clause.

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 56 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 56, 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.

So Senate Bill 56 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 56 and will be more than happy to answer and follow-up questions the committee may have.