ACEC
American Council of Engineering Companies
Maryland

HB 256 Courts – Prohibited Indemnity and Defense Liability Agreements

SUPPORT

Chairman Clippinger, Vice Chairman Moon, and members of the House Judiciary Committee,

My name is Chad Faison, Executive Director of The American Council of Engineering Companies/MD (ACEC/MD).

ACEC/MD is 90 multi-sized consulting engineering firms located throughout the state, serving both the public and private sectors. Many of our members 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 (architects, engineers, land surveyors) should not be asked to indemnify or defend another party for losses for which they are not responsible and cannot obtain insurance protection. Unfortunately, some public agencies and private business entities will include indemnification clauses in their contracts that require a design professional to indemnify them beyond what the 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, in addition to their own defense, against third party claims before there is a determination of proximate cause that would indicate that the design professional has committed an error. The costs of these additional defense costs can be staggering and must be paid by the design professional, not their liability insurance policy. The liability insurance will only cover legal costs for the negligent errors and omissions of the design professional and not for the defense costs of others until the design professional is determined to be at fault.

The amendments in HB 256 will preclude the assignment of liability to design professionals for injuries or damages when they are not the proximate cause; however, they do not inhibit the filing of claims, or limit the reasonable liability for any claim for which they are 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 when they are not the proximate cause of the loss, damage, or expense.

(more)

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Sections 5-401 of the law applies only to construction related activities. As the bold wording in sub-sections (a) (1) and (2) indicates, it applies to the same subject matter as HB 256.

> **§ 5-401.** Certain construction industry and motor carrier indemnity agreements prohibited.
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> **(a) (1)** A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relating to **architectural, engineering, inspecting, or surveying services**, or the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, including moving, demolition, and excavating connected with those services or that work, **purporting to indemnify the promisee against liability for damages** arising out of bodily injury to any person or damage to property **caused by or resulting from the sole negligence** of the promisee or indemnitee, or the agents or employees of the promisee or indemnitee, **is against public policy and is void and unenforceable**.
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> **(2)** A covenant, a promise, an agreement, or an understanding in, or in connection with or collateral to, a contract or an agreement relating to **architectural, engineering, inspecting, or surveying services**, or the construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, or an appliance, including moving, demolition, and excavating connected with those services or that work, purporting to require the promisor or indemnitor **to defend or pay the costs of defending the promisee** or indemnitee against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting **from the sole negligence of the promisee** or indemnitee, or the agents or employees of the promisee or indemnitee, **is against public policy and is void and unenforceable**.

HB 256 is seeking to expand this protection to address what is the most common problem with a contract clause that requires the design professional to assume liability when they are not the probable cause of the loss and the owner/payor may not be the sole responsible party.

A favorable vote on HB 256 would be appreciated.

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