

HOUSE BILL REPORT

SHB 1559

As Amended by the Senate

Title: An act relating to indemnification agreements involving design professionals.

Brief Description: Limiting indemnification agreements involving design professionals.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Haigh, Dammeier and Goodman).

Brief History:

Committee Activity:

Judiciary: 1/9/12, 1/19/12 [DPS];

Ways & Means: 2/1/12, 2/6/12 [DPS(JUDI)].

Floor Activity:

Passed House: 3/1/11, 98-0.

Floor Activity:

Passed House: 2/14/12, 98-0.

Senate Amended.

Passed Senate: 2/28/12, 45-1.

Brief Summary of Substitute Bill

- Limits the enforceability of indemnification agreements, including the duty and cost to defend, between public agencies and professional service entities.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Shea, Assistant Ranking Minority Member; Eddy, Hansen, Kirby, Klippert, Nealey, Orwall, Rivers and Roberts.

Staff: Edie Adams (786-7180).

HOUSE COMMITTEE ON WAYS & MEANS

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: The substitute bill by Committee on Judiciary be substituted therefor and the substitute bill do pass. Signed by 27 members: Representatives Hunter, Chair; Darneille, Vice Chair; Hasegawa, Vice Chair; Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Dammeier, Assistant Ranking Minority Member; Orcutt, Assistant Ranking Minority Member; Carlyle, Chandler, Cody, Dickerson, Haigh, Haler, Hinkle, Hudgins, Hunt, Kagi, Kenney, Ormsby, Parker, Pettigrew, Ross, Schmick, Seaquist, Springer, Sullivan and Wilcox.

Staff: Kristen Fraser (786-7148).

Background:

Indemnity provisions in contracts require one party (the indemnitor) to pay the other party (the indemnitee) for any losses the indemnitee may suffer during performance of a contract. Indemnity provisions also may impose a duty on the indemnitor to defend the indemnitee in any action brought against the indemnitee related to performance under the contract.

Currently, the law limits the enforcement of indemnification clauses in contracts relating to construction, maintenance, or other work on any structure, project, development, or improvement attached to real estate. In these contracts, a clause that indemnifies against liability for damages caused by or resulting from the sole negligence of the indemnitee is void. A clause that indemnifies against liability for damages caused by or resulting from the concurrent negligence of the indemnitee and indemnitor is enforceable only to the extent the indemnitor is negligent and only if specifically and expressly provided for in the agreement.

A chapter of law governs the procurement of professional services by agencies, including requirements relating to providing advance notice and standards for contract negotiations. "Professional services" means architectural, landscape architectural, engineering, and land surveying services. Agencies governed by these provisions are state and local agencies and special districts.

Summary of Substitute Bill:

The provision restricting the enforceability of indemnification agreements in construction-related contracts is amended to specify that indemnification includes the duty and cost to defend.

Limitations are placed on the enforceability of indemnification agreements in contracts between agencies and professional service entities under the chapter governing public agency contracts for architectural, landscape architectural, engineering, and land surveying services (design professionals). "Agency" means state and local agencies and special districts.

A contract term requiring a design professional to indemnify an agency for claims against the agency, including the duty and cost to defend, is enforceable only with respect to the negligence, recklessness, or willful misconduct of the design professional, or those for whom the design professional is legally responsible. This provision does not limit the liability of a design professional for patent or copyright claims that arise from the performance of professional services under the contract or agreement.

The restrictions on the enforceability of indemnification agreements relating to construction contracts and design professionals cannot be waived or modified by contractual agreement apart from the exemption permitted under current law relating to the Industrial Insurance Act.

EFFECT OF SENATE AMENDMENT(S):

The Senate amendment adds design professional contracts to existing statutory restrictions on contractual indemnification agreements, rather than creating alternative standards governing the enforceability of indemnification agreements in design professional contracts. The Senate amendment applies to all contracts for design professional services, whereas the Substitute House bill applies to only public agency contracts with design professionals.

Under the Senate amendment, the following restrictions are placed on indemnification agreements in contracts for design professional services:

- a clause that indemnifies against liability for damages resulting from the sole negligence of the indemnitee is unenforceable;
- a clause that indemnifies against liability for damages resulting from the concurrent negligence of the indemnitee and indemnitor is enforceable only to the extent of the indemnitor's negligence.

In contrast, the Substitute House bill provided that indemnification agreements in contracts between public agencies and design professionals are enforceable only to the extent of the negligence of the design professional or those for whom the design professional is legally responsible.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony (Judiciary):

(In support) This bill addresses the unfair practices of public agencies in forcing design professionals to pay damages and defend suits absent any determination of negligence by the design professional. The proposed substitute attempts to address concerns by clarifying that the bill does not apply to design-build contracts and that agents or employees of design professionals are also covered. The bill does not prevent anyone from suing for breach of contract and it doesn't impact the liability of design professionals for sub-consultants.

The bill is limited to public sector contracts because that is where we encounter the problem. We don't see these unfair indemnification clauses in private contracts. This tactic is not an appropriate risk shifting mechanism. Design professionals can't insure against this risk and it is difficult to build this risk into the project price. Design professionals have personal liability insurance, but those policies do not cover anything but negligence claims against the

design professional. The public policy in the law is that we will require an entity to indemnify another entity only for its own negligence.

(With concerns) There are still numerous concerns with the bill. It continues to prevent indemnification for the acts of a design professional's sub-consultants or agents and where a sub-consultant's employee is injured during the work. It also creates a problem with the waiver of liability for worker's compensation claims. In addition, the bill does not allow an owner to require indemnity from the design professional for claims resulting from his or her breach of contract. Design professionals should not be carved out for special rules.

The language in the statute governing contractors works fine as it currently exists. We have concerns with the proposed changes in this part of the bill and what they might mean for contractors.

(Opposed) This bill severely limits how agencies negotiate contracts with private entities. The statute being amended was developed to cover all entities involved in construction-related projects. This bill singles out design professionals as a special class with super protection that is not given to any other entity involved in a project. The language of the bill does not allow indemnification for the negligence of sub-consultants.

The ability to require a duty to defend in contracts is important to public agencies. We can't establish negligence on the part of the design professional before the case proceeds so we won't be able to bring them into the case. Agencies don't have the experience or expertise to defend the suit. The bill will result in everyone pointing fingers at each other, rather than working as a team to defend and settle the suit. Agencies hire the consultants for their expertise and we need to know they will do the job we hire them to do.

Staff Summary of Public Testimony (Ways & Means):

(In support) Design professionals should not have to sign contracts that are not insurable. Errors and omissions insurance policies will not cover items that are outside the control of the design professional. One bad contract can bankrupt a firm. The bill is a matter of fairness and sharing the risk—indemnification agreements should assign risk appropriately. Design professionals have worked with local governments to change unreasonable indemnification clauses, and we came to the Legislature for a consistent statewide solution. The changes proposed here are modeled on California law. The issue is generally with local government and not the Department of Transportation or state agencies. This bill will have no effect if contracts with public agencies are fair and reasonable. This bill will not affect private contracts.

(With concerns) The bill does not fully address the liability of subcontractors. A third-party claim can arise from a breach of a contract that does not rise to the level of negligence.

(Opposed) This is a shift of liability to the government. Risks within the scope of the professional's work should be on the professional. Using negligence as the trigger is a problem—must a court find negligence before the duty to defend applies? Most of the time the government and the professional are on the same side in a third-party claim. The government becomes the first line of defense. Other insurance products are available to

cover this risk. This does not protect those who are harmed; it protects the design professional. Other states have seen a shift of defense costs from the government to the contractor. This causes governments to incur defenses for outside counsel. The bill interferes with cities' ability to negotiate with design professionals and will make services more expensive.

Persons Testifying (Judiciary): (In support) Cliff Webster, Architects and Engineers Legislative Council; Stan Beck and Michael Olson, American Council of Engineering Companies of Washington; and Peter Rasmussen, American Institute of Architects, Washington Council.

(With concerns) Charlie Brown, Puget Sound School Coalition; Larry Stevens, Mechanical and Electrical Contractors; and Pasco Bakotich, Washington State Department of Transportation.

(Opposed) Brian Enslow, Washington Association of Counties; and Phil Prettman, Pierce County.

Persons Testifying (Ways & Means): (In support) Cliff Webster, Architects and Engineers Legislative Council; Mike Slater, McGranahan; Stan Bowman, American Institute of Architects; and Van Collins, Washington Construction Industry and Associated General Contractors.

(With concerns) Pasco Bakotich, Washington State Department of Transportation.

(Opposed) George Walk, Pierce County; Maura Donoghue, City of Seattle; Scott Thomas, City of Burlington; and Candice Bock, Association of Washington Cities.

Persons Signed In To Testify But Not Testifying (Judiciary): None.

Persons Signed In To Testify But Not Testifying (Ways & Means): None.