

HOUSE BILL REPORT

EHB 1559

As Passed House:
March 1, 2011

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

Brief Description: Limiting indemnification agreements involving design professionals.

Sponsors: Representatives Haigh, Dammeier and Goodman.

Brief History:

Committee Activity:

Judiciary: 2/10/11, 2/17/11 [DP].

Floor Activity:

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

Brief Summary of Engrossed Bill

- Limits the enforceability of indemnification agreements between public agencies and design professionals to the negligence, recklessness, or willful misconduct of design professionals.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 13 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Chandler, Eddy, Frockt, Kirby, Klippert, Nealey, Orwall, Rivers and Roberts.

Staff: Kelly Pfundheller (786-7289).

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.

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

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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. Currently, there are no specific limitations on the enforceability of indemnification agreements between public agencies and design professionals.

In the laws relating to contracts for architectural and engineering services, "agency" means both state and local agencies and special districts.

Summary of Engrossed Bill:

The bill places limitations on the enforceability of indemnification agreements between agencies and architects, landscape architects, engineers, or land surveyors (design professionals).

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. A design professional does not bear the responsibility of paying for the costs of damages resulting from a third party's actions that are not connected with the design professional.

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.

Appropriation: None.

Fiscal Note: Not requested.

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

Staff Summary of Public Testimony:

(In support) This bill is important because design professionals are being forced to pay for damages related to third party negligence. Indemnification agreements are uninsurable for design because insurance companies will not expand coverage to include the negligence of third parties. The insurance company will review the contract to determine if there is an indemnity clause, and then the company will deny insurance coverage on that basis. Therefore, the design professional bears the entire financial burden. This can be devastating for smaller design businesses.

Unlike construction businesses, these types of clauses are impracticable for design professionals because they do not have control over construction worksites. Design professionals will support their work product and take responsibility for their own mistakes, but indemnification agreements force professionals into defending an agency for someone else's actions. Furthermore, these terms are only in the contract because professionals are

unable to adequately bargain with public agencies. The agencies maintain a take it or leave it attitude, and a design professional will sign the contract and bear an uninsurable risk in order to stay in business.

Design professionals should be able to achieve fairness in contracts with the government. Otherwise, the government is sending a poor message to businesses in Washington. While businesses have been solving this problem on a county-by-county basis, this bill provides a statewide solution.

(Opposed) None.

Persons Testifying: Cliff Webster and Jay Soroka, Architects and Engineers Legislative Council and American Council of Engineering Companies of Washington; and Stan Bowman, American Institute of Architects Washington Council.

Persons Signed In To Testify But Not Testifying: None.