



METROPOLITAN  
TRANSPORTATION  
COMMISSION

Agenda Item 9a

Bay Area Metro Center  
375 Beale Street  
San Francisco, CA 94105  
TEL 415.778.6700  
WEB www.mtc.ca.gov

## *Memorandum*

TO: Legislation Committee

DATE: June 3, 2016

FR: Executive Director

W. I. 1131

RE: SB 885 (Wolk): Construction Contracts: Indemnity

### **Background**

SB 885 (Wolk), sponsored by the American Council of Engineering Companies, attempts to reduce design professionals' legal exposure to claims related to work that they performed but in which they are not specifically named in a lawsuit. Commencing with contracts entered into on or after January 1, 2017, the bill provides that a design professional shall only have the duty to defend him or herself from claims and lawsuits that arise out of, pertain to, or relate to, the negligence, recklessness, or willful misconduct of the design professional. This bill states that all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any such contract that purport to require a design professional to defend claims against another party shall be unenforceable. The bill would require the public agency to assume the obligation and financial responsibility for defending the claim and then pursue reimbursement, unless the design professional agrees to cover some of the defense expenses while the case is pending.

**Recommendation:** Oppose

### **Discussion**

According to the Senate Judiciary Committee's analysis of the bill, SB 885 would potentially allow design professionals to avoid defense costs in certain types of lawsuits involving mixed claims against multiple parties. For instance, the bill would likely exclude design professionals from participating in the defense of lawsuits against "other persons or entities," even if such a suit involved claims relating to the design professional's work or conduct. The analysis points out that design professionals, unlike other litigants, would have no duty to contribute toward defense costs while such a suit is pending, and no duty to reimburse the defendant for legal costs if the suit results in a defense verdict.

According to the California Special Districts Association (CSDA) and the Self Help Counties Coalition, which oppose the bill along with dozens of other public agencies and associations, SB 885 fundamentally shifts private sector risk to the taxpayer, significantly increasing public sector legal costs. CSDA states:

"SB 885 forces taxpayers and ratepayers to front the legal costs for the private sector, even for claims where the design professional is ultimately deemed to be 100 percent at fault. Requiring the public agency to defend the actions of the design professional creates a "reimbursement only" process that results in the public agency defending the actions of


the design professional and shouldering upfront all of the associated costs. The public agency would then have to seek reimbursement from the design professional, to the extent the design professional is found negligent, once a settlement is reached or the claim is fully litigated and a court or arbitrator renders a final decision. This process not only requires a public entity to front the costs for a private entity, it also creates conflict within the public-private partnership, effectually eliminating the incentive to work together towards a swift settlement.”

As stated above, the bill allows for a design professional to mutually agree with a public agency to reimburse defense costs while a case is ongoing. However, the bill also states that a design professional still has the responsibility to pay a “reasonable allocated share” of the defense costs with respect to claims relating to its work while a case is ongoing. These provisions are ambiguous and raise questions about how such amount would be determined prior to a case’s conclusion.

In summary, because SB 885 largely shifts to the public sector responsibility for defending against legal claims related to work performed by design professionals (unless the design firm is specifically party to the suit) staff recommends an oppose position on the bill. If there are problems with the status quo that expose design professionals to costly liability for which they cannot obtain insurance, a remedy to this problem should be pursued in a manner that maintains agreements to defend as an option.

**Known Positions**

See attached

  
Steve Fleming

SH: rl

**Attachments**

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**Bill Position as of 5/27/2016**

**Organizations on Record in Support of SB 885 (Wolk)**

American Council of Engineering Companies of California (source)  
American Institute of Architects, California Council  
American Society of Landscape Architects, California Council  
Associated Transportation Engineers  
California Department of Insurance  
California Land Surveyors Association  
California Professional Association of Specialty Contractors  
California Society of Professional Engineers

Geoprofessional Business Association  
Lexington Insurance Company  
Monterey Peninsula Chamber of Commerce  
Salinas Valley Chamber of Commerce  
Structural Engineers Association of California  
Travelers

Plus 274 engineering and architectural firms

*(See Senate Judiciary Committee analysis of 5/3/16 for a complete list.)*

**Organizations on Record in Opposition of SB 885 (Wolk)**

Associated General Contractors of California  
Association of California Healthcare Districts  
Association of California School Administrators  
California Association of Joint Powers Authorities  
California Association of School Business Officials  
California Building Industry Association  
California Legislative Conference of the Plumbing, Heating and Piping Industry  
California School Boards Association  
California Special Districts Association  
California State Association of Counties  
California State Council of Laborers  
California State University  
California Transit Association  
California-Nevada Conference of Operating Engineers

Coalition for Adequate School Housing  
Community College Facility Coalition  
Construction Employers' Association  
League of California Cities  
Los Angeles Unified School District  
National Electrical Contractors Association  
Northern California Allied Trades  
Northern California Power Agency  
San Diego Association of Governments  
Self-Help Counties Coalition  
Southern California Contractors Association  
State Building and Construction Trades Council  
Urban Counties of California

Plus 121 local Agencies and Special Districts  
*(See Senate Judiciary Committee analysis of 5/3/16 for a complete list.)*