



METROPOLITAN
TRANSPORTATION
COMMISSION

Agenda Item 4b

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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 Heminger

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.)*