



SUPPORT FAIR PUBLIC WORKS CONTRACTS

PLEASE SUPPORT EHB 1559

(Sponsors: Reps. Haigh, Dammeier & Goodman)

Background

Design professionals (architects, engineers, landscape architects & land surveyors) purchase Errors & Omissions insurance. This insurance provides protection for the firm and its clients against damages, liabilities, and costs as a result of the design professional's negligence.

Frequently, public agencies include overly broad indemnification clauses that require the design professional to indemnify, defend, and hold harmless the local public entities against damages, liabilities, and costs *not* caused by the design professional.

Unanimous Support in the House in 2011

In 2011, EHB 1559 passed the House of Representatives unanimously, 98-0.

Broad Indemnification Clauses are Uninsurable

The overly broad indemnity clauses for actions that are beyond the control of the design professional are uninsurable and expose the design professional to personal liability for the negligence or fault of others.

Because the overly broad indemnity clauses are uninsurable and, most likely, not collectable, the local public agency enters into a contract with a false sense of protection that will only result in litigation and not insurance coverage. This would leave the agency vulnerable to cover any damages resulting from the project.

An agency is much better off having contract provisions which can be covered by insurance. A properly insured contract guarantees protection for the architect and the client in the event of a lawsuit. Proper contract provisions also allow the agency to properly allocate risks.

This is a Problem Unique to Public Contracts

Many public agencies use their superior bargaining position during contract negotiations, adopting a "take it or leave it" stance, to require design professionals to indemnify the public agency for actions that are beyond the responsibility and control of the design professional. EHB 1559 will stop this practice.

In the private sector, both sides are motivated to resolve contract disputes. This results in proper allocation of risk and compensation. However, in public contracts, there is no incentive for public agencies to negotiate this provision.

EHB 1559 Restores Balance to Public Contracts

This bill allows design professionals to indemnify, defend, or hold harmless local public entities only from "liabilities, damages, losses, and costs, including, but not limited to, reasonable attorney's fees, to the extent caused by the negligence, recklessness, or willful misconduct of the design professional."

In short, the design professional will be responsible for their errors and mistakes. But, they will not be held liable for mistakes made by contractors or others not under the control of the design professional.

KEY POINTS

- *Passed the House unanimously in 2011, 98-0.*
- *Design professionals' insurance only covers their own negligence.*
- *Overly broad contract requirements are uninsurable and unfair to design professionals..*
- *Uninsurable contracts leave public agencies with a false sense of protection.*
- *EHB 1559 restores balance, limiting design professionals' liability to their own actions.*

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