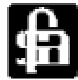

Senate Fiscal Agency
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BILL ANALYSIS

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House Bill 5656 (Substitute H-1 as reported without amendment)
Sponsor: Representative Chris Ward
House Committee: Government Operations
Senate Committee: Economic Development, Small Business and Regulatory Reform

Date Completed: 11-30-04

RATIONALE

When an architect or engineer enters into a contract with the Department of Management and Budget (DMB), he or she must sign the DMB's standard Professional Service Contract. This contract contains a clause that, in effect, holds the architect or engineer liable for any negligence in the performance of the professional service, unless the State itself was solely negligent. (The contract language is quoted below, in **BACKGROUND**.) According to people in the architectural and engineering profession, this language requires them to assume the risk for the negligence of any other party, including the State, even if the architect or engineer is not negligent. As a result, many firms evidently do not submit proposals for State projects, because they are unwilling to assume this risk. In addition, insurance coverage for this type of liability apparently is not available. Although the design firms do carry malpractice insurance, that coverage is limited to a firm's own failure to meet the standard of care; it does not apply to the firm's liability for another party's negligence.

It has been suggested that more architectural and engineering firms would submit proposals to the State, and the State would have a better pool of firms to contract with, if an architect's or engineer's liability were limited to his or her degree of fault.

CONTENT

The bill would amend the Management and Budget Act to prohibit the Department of Management and Budget from requiring an architect, professional engineer, or contractor with whom it enters into a contract to assume any liability or indemnify the State for any amount greater than the architect's, professional engineer's, or contractor's degree of fault.

The bill would define "contractor" as a person who provides an improvement to real property pursuant to a contract with the owner or lessee of the property.

Proposed MCL 18.1237c

BACKGROUND

The DMB's Professional Service Contract contains the following indemnification language:

"The Professional agrees to be responsible for any loss or damage to property or injury, damage or death to persons due to the negligent performance of the professional service of this Contract, and further agrees to protect and defend the State against all claims or demands of every kind involving allegations of such negligent performance and to hold the State harmless from any loss or damage resulting from any errors, omissions or negligent acts in the performance of the professional services of this Contract. Such responsibility shall not be construed as liability for damage caused by or resulting from the sole negligence of the State, its agents other than the Professional, or its employees."

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The DMB's Professional Service Contract essentially makes an architect or engineer the surety for the entire contract even if someone else, including the State, is 99% at fault. The economic climate in the State and pressures to reduce costs already make it very difficult for design firms to compete in Michigan, and they will not submit proposals if the risk of liability is too great. Due to the indemnification clause in the DMB's Professional Service Contract, combined with the unavailability of insurance, a reported one-third of the architectural and engineering firms in Michigan do not submit proposals for State projects.

If and when the contract clause is triggered, it can exacerbate the litigation among the parties. In theory, the design firm or its insurer would pay the indemnification and the matter would be resolved. In practice, however, an insurer typically will not decide what it will or will not cover until after the standard-of-care issue has been decided. Then, more litigation will result if the State tries to collect damages from the firm for liability that the insurer will not cover. In some cases, the State reportedly uses the indemnification clause as leverage to persuade the firm to settle.

By limiting an architect's or engineer's liability to his or her own degree of fault, the bill would improve the climate for architectural and engineering firms to practice in Michigan. More firms would welcome the opportunity to submit proposals for State projects. Although the DMB presently may have numerous firms to choose from, it does not necessarily have the best pool of applicants if one-third of Michigan's firms are not submitting proposals. The bill would improve conditions not only for the design firms but also for the DMB and, ultimately, the taxpayers.

Opposing Argument

According to representatives of the DMB, based on advice from the Attorney General's office, the State is obligated to include the indemnification clause in its Professional Service Contract because of Public Act 165 of 1966 (MCL 691.991). Under this Act, an agreement in a contract related to the construction, alteration, or maintenance of a building is unenforceable if it purports "…to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees…". In other words, one party cannot agree to indemnify another party who is entirely at fault. This statute was enacted when Michigan law provided for joint and several liability, which meant that one party could be required to pay the entire amount of a damages award, if the damages could not be collected from other negligent parties. Thus, if the State as well as other parties are negligent under a contract, the DMB's indemnification clause protects the State (and the taxpayers) from having to pay the entire amount of damages.

Furthermore, 1995 amendments to the Revised Judicature Act (RJA) eliminated joint and several liability in most cases. Section 6304 of the Act now states, "[A] person shall not be required to pay damages in an amount greater than his or her percentage of fault…" (MCL 600.6304). In an action seeking damages for personal injury, property damage, or wrongful death involving fault of more than one person, this section requires a judge or jury to determine the "percentage of the total fault of all persons that contributed to the death or injury, including the plaintiff…, regardless of whether the person was or could have been named as a party to the action". The court then is required to award damages based on that determination.

If architects and engineers wish to change the indemnification clause, perhaps repealing the 1966 statute would be more effective than enacting the proposed language.

Response: Section 6304 of the RJA requires fault to be allocated "*unless otherwise agreed by all parties to the action*" (emphasis added). Thus, under the DMB Professional Services Contract, an architect or engineer still can promise to indemnify the State for the entire amount of damages resulting from other parties' negligence. Even if Public Act 165 of 1966 were repealed, the DMB could continue to include the indemnification clause in its contract. Enacting the bill would ensure that the liability of architects, engineers, and other contractors was limited to their degree of fault.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Bill Bowerman

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.