

Legislative Analysis



EXPAND ANTI-INDEMNIFICATION STATUTE: CONSTRUCTION CONTRACTS WITH PUBLIC ENTITIES

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House Bill 5466

Sponsor: Rep. Kurt Heise

Committee: Judiciary

Complete to 5-9-12

A SUMMARY OF HOUSE BILL 5466 AS INTRODUCED 3-13-12

The bill would expand the anti-indemnification statute to apply to certain clauses in construction contracts with public entities.

BACKGROUND INFORMATION

"Indemnify" means to secure or guarantee against any loss or damage that another might suffer. For example, in an auto insurance policy, the policy owner is "indemnified" against loss or damage in the event of an accident. The insurance company, and not the policy owner, would pay for the damages to the vehicle or for any property damage or injury to another person to the extent covered under the policy.

In the construction trades, where the risk for things to go awry is inherent, indemnity clauses are used in contracts to assign risk should damage or injury occur. An indemnity clause will typically identify the party owing indemnity (e.g., the contractor, subcontractor, etc., bearing responsibility to pay for damages), to whom it is owed (the party that is being held harmless if a loss occurs), and the types of losses covered (e.g., damage to structures, injuries to persons, legal fees).

However, under Michigan law, a negligent party cannot use an indemnity clause in a construction contract to shift all obligations for which it is wholly responsible to another party. This is known as an "anti-indemnification statute." If a contract contains a clause (also known as an "agreement") that is prohibited under the anti-indemnification statute, the clause or agreement is considered to be against public policy and is void and unenforceable.

CONTENT OF THE BILL

The bill would amend Public Act 165 of 1966, the anti-indemnification statute. Under the bill, an agreement between a public entity and a contractor would be against public policy and would therefore be void and unenforceable if both of the following requirements were met:

- The agreement was in, in connection with, or collateral to a contract for the design, construction, alteration, repair, or maintenance of a structure. This would include associated moving, demolition, or excavating.
- The agreement would require the contractor to do any of the following:
 - Defend a party other than the public entity from claims; and/or,
 - Assume any liability or indemnify (hold harmless) the public entity for any amount greater than an amount calculated based on the degree of fault of the contractor.

The bill would specify that it would not affect the application of the governmental immunity act, Public Act 170 of 1964 (MCL 691.1401-691.1419)

The bill would also revise the title to the act. Instead of "[a]n act to invalidate certain requirements for indemnity in the construction industry," the title would read, "[a]n act to invalidate certain requirements for indemnity in agreements relative to the design, construction, alteration, repair, or maintenance of buildings, structures, appurtenances, appliances, or infrastructure."

The bill would also revise and update the current anti-indemnification provision for clarity, include "design" as one of the activities and "infrastructure" as one of the projects for which the anti-indemnity statute would apply, and define certain terms.

Current provision. Currently, a covenant, promise, agreement or understanding in, or in connection with, or collateral to, a contract or agreement relative to the construction, alteration, repair, or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting 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 promise or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

Revised provision. The bill would revise the above provision to instead specify that an agreement is against public policy and is void and unenforceable if both of the following requirements are met:

- The agreement is in, in connection with, or collateral to a contract for the design, construction, alteration, repair, or maintenance of a structure, including associated moving, demolition, or excavating.
- The agreement would indemnify a party to the agreement against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of that party or his or her agents or employees.

Definitions. "Contractor" would mean an architect; professional engineer; surveyor; or a person who, under a contract with the owner or lessee of real property, provides an improvement to real property.

"Structure" would mean an appliance, appurtenance, building, infrastructure, or other structure.

"Public entity" would mean all of the following:

- The State of Michigan, any public body corporate in the state, and any nonincorporated public body of the state. This would include, but not be limited to, a city, village, township, county, school district, intermediate school district, or authority or an institution of higher education described in or established under Section 4, 5, 6, or 7 of Article VIII of the State Constitution (the state colleges, universities, junior colleges, and community colleges).
- Any agency of an entity described above.
- Any employee or other agent of an entity described above including, but not limited to, a construction manager retained by the entity.

MCL 691.991

FISCAL IMPACT:

A fiscal analysis is in process.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.