



● **Board of Directors**
Communications and Legislation Committee

7/13/2010 Board Meeting

8-5

Subject

Express opposition to SB 972 (Wolk, D-Davis) regarding indemnity: design professionals

Description

SB 972 (Wolk), ([Attachment 1](#)), would prohibit public agencies contracting with design professionals from requiring these design professionals, as part of their indemnification obligations, to assume the immediate defense of a claim of liability arising out of, pertaining to, or related to their negligence, recklessness or willful misconduct in the performance of their professional services. Design professionals include architects, landscape architects, professional engineers and professional land surveyors. A design professional would only be liable for defense costs if adjudication determines that the liability was caused by the design professional, in which case the design professional would only be responsible for the proportionate share of these costs based on the actual liability assigned to that person or firm. Those in support of the bill contend that a design professional individual or firm should not be required to assume defense costs before they have been found to be at fault, although in other situations, indemnifying parties are responsible for assuming the immediate defense of claims.

It is recommended that Metropolitan's Board of Directors express its opposition to this bill because it has the net effect of shifting to taxpayers and rate payers legal defense costs that should be borne by the private design professional consulting firms performing the work and their insurance carriers. It is believed that, in the circumstance of public agency projects, the parties to design professional contracts should be given the freedom to allocate responsibilities, and insurance obligations, as they see fit. This bill would preclude the parties from negotiating for the protection of indemnification, with the provision of legal defense upon the occurrence of a claim, for this type of work, even where the public agency is willing to pay additional amounts for this protection. Further, because a formal finding of negligence or intentional misconduct would be a prerequisite for the public agency to receive indemnity from the consulting firm or its insurance carrier under SB 972, the consulting firm or its insurance carrier may be less likely to accept a pre-trial settlement of a claim.

This bill has been opposed by numerous public agencies and groups, including the League of California Cities, the California State Association for Counties, Los Angeles Unified School District, California Special Districts Association, California Association of Joint Power Authorities, Associated General Contractors of California, Riverside County Schools Advocacy Association, Coalition of Adequate School Housing, Regional Council of Rural Counties, the California States Association of Counties Excess Insurance Authority and many water districts throughout the state.

Policy

Metropolitan currently has no specific policy relative to the indemnification that Metropolitan can receive from others. Staff's rationale to oppose SB 972 is that it increases Metropolitan's risk in design contracts and limits Metropolitan's freedom to contract by limiting the terms that can be included in contracts with design professionals.

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA because it involves continuing administrative activities, such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). In addition, where it can be seen with certainty that there is no possibility that the proposed action in question may have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061(b)(3) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to CEQA pursuant to Sections 15378(b)(2) and 15061(b)(3) of the State CEQA Guidelines.

CEQA determination for Option #2:

None required

Board Options

Option #1

Adopt the CEQA determination and authorize the General Manager to express Metropolitan’s opposition to SB 972.

Fiscal Impact: Unknown

Business Analysis: If the bill is passed, a potential shift of costs to public agencies.

Option #2


Take no position on SB 972.

Fiscal Impact: Unknown

Business Analysis: If the bill is passed, a potential shift of costs to public agencies.

Staff Recommendation

Option #1


Linda Waade
Deputy General Manager, External Affairs

7/1/2010
Date


Jeffrey Knightlinger
General Manager

7/1/2010
Date

Attachment 1 – SB 972 (as amended 6/23/10)

AMENDED IN ASSEMBLY JUNE 23, 2010

AMENDED IN SENATE MAY 12, 2010

AMENDED IN SENATE APRIL 5, 2010

SENATE BILL

No. 972

Introduced by Senator Wolk

February 8, 2010

An act to ~~add Section 2782.85 to amend Sections 2778 and 2782.8~~ of the Civil Code, relating to indemnity.

LEGISLATIVE COUNSEL'S DIGEST

SB 972, as amended, Wolk. Indemnity: design professionals.

Existing law *contains specified rules that are to be applied in the interpretation of a contract for indemnity. Pursuant to these rules, the person that is required to provide indemnification is bound, upon the request of the person that is required to be indemnified, to defend actions or proceedings brought against the person that is required to be indemnified prior to a finding of liability. Existing law further provides, for all contracts, and amendments to contracts, entered into on or after January 1, 2007, with a public agency for design professional services, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting these contracts, that purport to indemnify, including the cost to defend, the public agency by a design professional against liability for claims against the public agency, are unenforceable, except for claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional.*

This bill would provide, for all contracts, and amendments to contracts, entered into on or after January 1, 2011, with a public agency, as defined, for design professional services, all provisions, clauses,

SB 972

— 2 —

covenants, and agreements contained in, collateral to, or affecting these contracts or amendments to contracts that purport to require an immediate defense under an indemnity agreement are unenforceable. The bill would provide that a design professional is not required to defend or indemnify the indemnified party unless and until the indemnified party provides a written tender of the claim to the design professional, at which point the design professional may choose to either defend the claim with counsel of its choosing or pay a reasonable allocated share of the indemnified party's defense fees and costs. The bill would allow the indemnified party to recover damages from the design professional if it fails to timely and adequately perform these duties. *This bill would provide that the obligations of a design professional to indemnify a public agency for damages determined to be caused by negligence, recklessness, or willful misconduct to be proportionate to the actual liability of the design professional. This bill would provide that if a public agency includes indemnity language in a contract for the services of a design professional, those provisions shall only be enforceable if the language of the contract is in conformance with these provisions.*

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 2778 of the Civil Code is amended to
2 read:
3 2778. In the interpretation of a contract of indemnity, the
4 following rules are to be applied, unless a contrary intention
5 appears:
6 1.—
7 (a) Upon ~~an~~ a finding of indemnity against liability, expressly,
8 or in other equivalent terms, the person *that is to be* indemnified
9 is entitled to recover upon becoming liable.
10 2.—
11 (b) Upon ~~an~~ a finding of indemnity against claims, ~~or~~ demands,
12 ~~or~~ damages, or costs, expressly, or in other equivalent terms, the
13 person *that is to be* indemnified is not entitled to recover, without
14 payment ~~thereof~~, of the underlying claims, demands, damages, or
15 costs.
16 3.—

1 (c) An indemnity *action or proceeding* against claims, ~~or~~
 2 demands, or liability, expressly, or in other equivalent terms,
 3 embraces the costs of defense against ~~such~~ *the* claims, demands,
 4 or liability incurred in good faith, and in the exercise of a
 5 reasonable discretion;

6 ~~4.~~

7 (d) The person *that is responsible for indemnifying* is bound,
 8 on request of the person *that is to be indemnified*, to defend actions
 9 or proceedings brought against the ~~latter~~ *person that is to be*
 10 *indemnified* in respect to the matters embraced by the indemnity
 11 *contract*, but the person *that is to be indemnified* has the right to
 12 conduct ~~such~~ *those* defenses, if he *or she* chooses to do so. *This*
 13 *subdivision does not apply to contracts for design professional*
 14 *services, as defined in Section 2782.8.*

15 ~~5.~~

16 (e) If, after a request for indemnification, the person *responsible*
 17 *for indemnifying* neglects to defend the person *that is to be*
 18 *indemnified*, a recovery against the ~~latter~~ *person that is to be*
 19 *indemnified* ~~suffered by him in good faith~~, is conclusive ~~in his favor~~
 20 against the ~~former~~; *person that is responsible for indemnification.*

21 ~~6.~~

22 (f) If the person ~~indemnifying~~ *that is responsible for*
 23 *indemnification*, whether ~~he~~ *is* a principal or a surety in the
 24 agreement, has not *received* reasonable notice of the action or
 25 proceeding against the person *that is to be indemnified*, or is not
 26 allowed to control its defense, judgment against the ~~latter~~ *person*
 27 *that is to be indemnified* is only presumptive evidence against the
 28 ~~former~~; *person that is responsible for indemnification.*

29 ~~7.~~

30 (g) A stipulation that a judgment against the person indemnified
 31 shall be conclusive upon the person indemnifying, is inapplicable
 32 if he *or she* had a good defense upon the merits, which by want of
 33 ordinary care he *or she* failed to establish in the action.

34 SEC. 2. Section 2782.8 of the Civil Code is amended to read:

35 2782.8. (a) For all contracts, and amendments thereto, entered
 36 into on or after January 1, 2007, with a public agency for design
 37 professional services, all provisions, clauses, covenants, and
 38 agreements contained in, collateral to, or affecting any such
 39 contract, and amendments thereto, that purport to indemnify,
 40 including the cost *and duty* to defend, the public agency by a design

SB 972

— 4 —

1 professional against liability for claims against the public agency,
2 are unenforceable, except for claims that ~~arise out of, pertain to,~~
3 ~~or relate to~~ *are caused by* the negligence, recklessness, or willful
4 misconduct of the design professional. This section shall not be
5 waived or modified by contractual agreement, act, or omission of
6 the parties. Contractual provisions, clauses, covenants, or
7 agreements not expressly prohibited herein are reserved to the
8 agreement of the parties.

9 (b) For purposes of this section, the following definitions apply:

10 (1) "Public agency" includes any county, city, city and county,
11 district, school district, public authority, municipal corporation,
12 or other political subdivision, joint powers authority, or public
13 corporation in the state. Public agency does not include the State
14 of California.

15 (2) "Design professional" includes all of the following:

16 (A) An individual licensed as an architect pursuant to Chapter
17 3 (commencing with Section 5500) of Division 3 of the Business
18 and Professions Code, and a business entity offering architectural
19 services in accordance with that chapter.

20 (B) An individual licensed as a landscape architect pursuant to
21 Chapter 3.5 (commencing with Section 5615) of Division 3 of the
22 Business and Professions Code, and a business entity offering
23 landscape architectural services in accordance with that chapter.

24 (C) An individual registered as a professional engineer pursuant
25 to Chapter 7 (commencing with Section 6700) of Division 3 of
26 the Business and Professions Code, and a business entity offering
27 professional engineering services in accordance with that chapter.

28 (D) An individual licensed as a professional land surveyor
29 pursuant to Chapter 15 (commencing with Section 8700) of
30 Division 3 of the Business and Professions Code, and a business
31 entity offering professional land surveying services in accordance
32 with that chapter.

33 (c) *A design professional that enters into a contract, which is*
34 *subject to this section, that contains an indemnity provision has*
35 *no duty to provide a defense for a claim against a public agency*
36 *for damages unless the damages are determined to be caused by*
37 *the negligence, recklessness, or willful misconduct of the design*
38 *professional.*

39 (d) *If there is an adjudication that the design professional*
40 *engaged in negligent, reckless, or willful misconduct, the design*

1 *professional's duty to indemnify the public agency for damages*
2 *or liabilities, including the cost of providing a defense, caused by*
3 *the negligence, recklessness, or willful misconduct of the design*
4 *professional shall be proportionate to the actual liability of the*
5 *design professional.*

6 *(e) If a public agency elects to include an indemnity provision*
7 *in a request for proposal, an invitation to bid, or other solicitation*
8 *document as part of the procurement of the services of a design*
9 *professional, the indemnity language of the contract shall only be*
10 *enforceable if the language is in compliance with this section.*

11 (e)

12 (f) (1) This section shall only apply to a professional service
13 contract, or any amendment thereto, entered into on or after January
14 1, 2007.

15 (2) The amendments made to this section by the bill amending
16 this subdivision shall only apply to a professional service contract,
17 or any amendment thereto, entered into on or after January 1,
18 2011.

19 SECTION 1. ~~Section 2782.85 is added to the Civil Code, to~~
20 ~~read:~~

21 ~~2782.85. (a) Notwithstanding subdivision (d) of Section 2778,~~
22 ~~for all contracts, and amendments to contracts, entered into on or~~
23 ~~after January 1, 2011, with a public agency for design professional~~
24 ~~services, all provisions, clauses, covenants, and agreements~~
25 ~~contained in, collateral to, or affecting these contracts or~~
26 ~~amendments to contracts that purport to require an immediate~~
27 ~~defense under an indemnity agreement are unenforceable, except~~
28 ~~as provided for in subdivisions (c), (d), and (e). This section shall~~
29 ~~not be waived or modified by contractual agreement, act, or~~
30 ~~omission of the parties. Contractual provisions, clauses, covenants,~~
31 ~~or agreements not expressly prohibited by this section are reserved~~
32 ~~to the agreement of the parties.~~

33 (b) For purposes of this section, the following definitions apply:

34 (1) "Design professional" includes all of the following:

35 (A) An individual licensed as an architect pursuant to Chapter
36 3 (commencing with Section 5500) of Division 3 of the Business
37 and Professions Code, and a business entity offering architectural
38 services in accordance with that chapter.

39 (B) An individual licensed as a landscape architect pursuant to
40 Chapter 3.5 (commencing with Section 5615) of Division 3 of the

SB 972

— 6 —

1 ~~Business and Professions Code, and a business entity offering~~
2 ~~landscape architectural services in accordance with that chapter.~~

3 ~~(C) An individual registered as a professional engineer pursuant~~
4 ~~to Chapter 7 (commencing with Section 6700) of Division 3 of~~
5 ~~the Business and Professions Code, and a business entity offering~~
6 ~~professional engineering services in accordance with that chapter.~~

7 ~~(D) An individual licensed as a professional land surveyor~~
8 ~~pursuant to Chapter 15 (commencing with Section 8700) of~~
9 ~~Division 3 of the Business and Professions Code, and a business~~
10 ~~entity offering professional land surveying services in accordance~~
11 ~~with that chapter.~~

12 ~~(2) “Design professional services” includes all contractual~~
13 ~~services offered or performed by a design professional.~~

14 ~~(3) “Public agency” includes any county, city, city and county,~~
15 ~~district, school district, public authority, municipal corporation,~~
16 ~~or other political subdivision, joint powers authority, or public~~
17 ~~corporation in the state. Public agency does not include the State~~
18 ~~of California.~~

19 ~~(e) A design professional shall owe no defense or indemnity~~
20 ~~obligation to the indemnified party for a claim of liability unless~~
21 ~~and until the indemnified party provides a written tender of the~~
22 ~~claim or a portion of the claim to the design professional. That~~
23 ~~written tender shall include all of the information provided to the~~
24 ~~indemnified party by a claimant or claimants relating to claims~~
25 ~~caused by the design professional’s services, and shall have the~~
26 ~~same force and effect as a notice of commencement of a legal~~
27 ~~proceeding. If an indemnified party tenders a claim subject to this~~
28 ~~section to a design professional in the manner specified in this~~
29 ~~subdivision, the design professional shall elect to perform either~~
30 ~~of the following, the performance of which shall be deemed to~~
31 ~~satisfy the design professional’s defense obligation to the~~
32 ~~indemnified party:~~

33 ~~(1) Defend the claim with counsel chosen by the design~~
34 ~~professional. If a design professional elects to defend the claim~~
35 ~~pursuant to this paragraph, the design professional shall maintain~~
36 ~~control of the defense for any claim or portion of the claim to~~
37 ~~which the defense obligation applies. The design professional shall~~
38 ~~provide written notice of its election to the indemnified party within~~
39 ~~90 days after receipt of the written tender. The defense by the~~
40 ~~design professional shall be a complete defense of the indemnified~~

1 party of all claims or portions of claims alleged to have been caused
2 by the design professional.

3 ~~(2) Pay, within 30 days after receipt of an invoice from the~~
4 ~~indemnified party, no more than a reasonable allocated share of~~
5 ~~the indemnified party's defense fees and costs, on an ongoing basis~~
6 ~~during the pendency of the claim, subject to reallocation consistent~~
7 ~~with this section, and including any amounts reallocated upon final~~
8 ~~resolution of the claim, either by settlement or judgment. The~~
9 ~~indemnified party shall allocate a share to itself to the extent a~~
10 ~~claim or claims are alleged to be caused by its work, actions, or~~
11 ~~omissions, and a share to each design professional to the extent a~~
12 ~~claim or claims are alleged to have been caused by the design~~
13 ~~professional's work, actions, or omissions, and shall allocate a~~
14 ~~share to all other parties or entities, whether or not a contractual~~
15 ~~party, who the indemnified party believes are potentially liable for~~
16 ~~the claim or claims, regardless of whether the indemnified party~~
17 ~~tenders the claim to any particular design professional, and~~
18 ~~regardless of whether that professional is participating in the~~
19 ~~defense. Any amounts not collected from any particular design~~
20 ~~professional shall not be collected from any other design~~
21 ~~professional.~~

22 ~~(d) Notwithstanding any other law, if a design professional fails~~
23 ~~to timely and adequately perform its obligations under paragraph~~
24 ~~(1) or (2) of subdivision (c), the indemnified party shall have the~~
25 ~~right to pursue a claim against the design professional for any~~
26 ~~resulting damages, as well as for interest on defense and indemnity~~
27 ~~costs, from the date incurred, at the rate set forth in subdivision~~
28 ~~(g) of Section 3260, and for the indemnified party's reasonable~~
29 ~~attorney's fees incurred to recover these amounts. The indemnified~~
30 ~~party shall bear the burden of proof to establish both the design~~
31 ~~professional's failure to meet the requirements of paragraph (1)~~
32 ~~or (2) of subdivision (c) and any resulting damages.~~

33 ~~(e) A public agency, private entity, or design professional shall~~
34 ~~have the right to seek equitable indemnity for any claim governed~~
35 ~~by this section.~~

36 ~~(f) Nothing in this section shall prohibit the parties from~~
37 ~~mutually agreeing to reasonable contractual provisions for damages~~
38 ~~if any party fails to elect for or perform its obligations as stated in~~
39 ~~this section.~~

SB 972

— 8 —

- 1 ~~(g) Nothing in this section limits, restricts, or prohibits the right~~
- 2 ~~of the indemnified party or the design professional to seek equitable~~
- 3 ~~indemnification against any entity other than the indemnified party~~
- 4 ~~or design professional.~~
- 5 ~~(h) This section shall not apply to claims that are the subject of~~
- 6 ~~subdivisions (c) to (h), inclusive, of Section 2782.~~

O