

April 21, 2023

Indemnification Reform

S.6059 (Kennedy)

Assembly Status: N/A

Senate Status: Procurement and Contracts

This bill clarifies the obligations of design professionals to indemnify public owners throughout New York State. Under the bill, professional firms would indemnify and hold clients harmless for liabilities, damages and costs arising out of negligent acts for which the design professional is legally liable and provide defense costs only where appropriate.

Architects and other licensed design professionals are increasingly being asked to sign contracts for public work which include defense and indemnification provisions that are uninsurable or extend liability beyond what the law would otherwise require. Professional liability insurance covers design professionals against injuries and damages resulting from their negligent professional acts. If a design professional signs an indemnity clause that is not limited to just their negligence, they are accepting liability beyond what the law would otherwise require under the standard of care.

Defense costs are usually expensive; often growing to be as much as, or more than, the amount in dispute. There are indemnity and defense clauses that require design professionals to be liable for negligent acts of the agency or its employees and other consultants or contractors. Certain clauses go so far as to require the design professional to be liable for alleged acts. Professional liability insurance will not cover contractually assumed liability for claims alleging fault or neglect on the design professional's part. Therefore, these defense costs must be paid out-of-pocket by the design professional. If the design professional is ultimately found not at fault, there is no recourse to reclaim these defense costs provided to the public owner or other covered party.

If a design professional opts to disclaim a defense or indemnity contract clause, more often than not, the public client will move on to the next firm willing to expose themselves to this undue risk. These clauses may seem beneficial to the public client, but in reality, the public client puts itself and the taxpayer at risk by requiring an obligation not backed by insurance. Many design professional firms do not have the resources to pay for these defense costs out-of-pocket, which may ultimately leave the public client on the hook for any uninsurable claims or costs. Design firms opting to sign contracts with these pernicious clauses expose themselves to significant risk—a risk which could prove ruinous.

AIA New York State and its 9,000-plus members SUPPORT the passage of this bill.

The American Institute of Architects New York State