

# Legislative Analysis



## LIABILITY OF ARCHITECTS, CONTRACTORS, AND ENGINEERS ON CAPITAL OUTLAY PROJECTS

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**House Bill 5656 (Substitute H-1)**  
**Sponsor: Rep. Chris Ward**  
**Committee: Government Operations**  
**First Analysis (6-8-04)**

**BRIEF SUMMARY:** The bill would prohibit the Department of Management and Budget from requiring an architect, engineer, or contractor to assume any liability, or to indemnify the state, for any amount greater than his or her degree of fault.

**FISCAL IMPACT:** The bill does not appear to have any fiscal impact.

### **THE APPARENT PROBLEM:**

When state officials at the Department of Management and Budget enter into contracts for professional services, they use standard contracts whose provisions have been approved by the Department of the Attorney General to ensure their legality and enforceability. Generally, the standard contracts contain a provision concerning indemnification—that is, the degree to which the state will be protected from loss should something go wrong. The indemnification provision establishes who, among the parties to the contract, is liable for loss.

For example, Article 6 of the standard contract used by the Michigan Department of Transportation to enter into some professional agreements with engineers who are hired to work on capital outlay projects, reads as follows:

*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 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 of damage resulting from any errors, omission or negligent acts in the performance of the services of this contract. Such responsibility should not be construed as a liability for damage caused by or resulting from the sole negligence of the state, its agent other than the professional, or its employees.*

According to committee testimony, this provision has been read by attorneys representing professional engineers to mean that the professional entering into the contract bears responsibility for any loss, unless the state is 100 percent liable for the damage.

Recently, professional engineers have been informed by Professional Concepts Insurance Agency—a firm whose specialty is insuring design engineering and architectural firms, and that underwrites insurance for 500 professional design firms in Michigan—that the

indemnification provision in the state's contract, described above, is not insurable under any professional liability insurance policy available to design professionals. According to its spokesman, Professional Concepts Insurance Agency is part of the Professional Liability Agents Network comprising 54 insurance brokers and agents throughout the country representing more than 20,000 design firms. The insurer notes that the indemnification provision is "particularly offensive and uninsurable" due to the final sentence of the provision, which the insurer interprets to mean "the department intends for the consultant to pay the entire amount of any loss that was jointly caused by the consultant and the department or other indemnities listed."

In refusing to provide insurance for the professional consultant who would be a party to such a contract, the insurer notes that "as written, the consultant is agreeing to indemnify even if only one percent at fault." The insurer argues that the contract provision should be rewritten so that "neither the department nor consultant shall be obligated to indemnify the other party in any manner whatsoever for the other party's own negligence."

Officials at the Department of Management and Budget note that state contracts are written to protect the interests of the state taxpayers. Nonetheless, in practice, professional consultants do not bear an unfair responsibility for damages, according to state officials. First, all state contracts contain 'dispute resolution' provisions which outline a protocol that is followed to ascertain each party's degree of fault, and thereby assess liability. Second, since 1996 when the concept of 'joint and several liability' was replaced in all tort actions, the state has followed the doctrine of 'modified comparative negligence.' Under that doctrine, the trier of fact—that is, the jury in a jury trial—considers the culpability of all parties involved in a matter, including the plaintiff, and adjusts the awards accordingly." Indeed, the Revised Judicature Act (MCL 600.2957) requires that "liability shall be allocated by the trier of fact, and in direct proportion to the person's percentage of fault." So, if it were determined that an engineer who brought a suit against the state were only 10 percent responsible for the damages, the amount awarded would be reduced proportionately.

While a dispute resolution process has been established, and the doctrine of liability is based upon 'modified comparative negligence,' the indemnification provision remains in the contract. Consequently, the professional consultant, as plaintiff, bears the responsibility to collect damages from the state, in the event of any bad result. Further, insurers are beginning to refuse coverage for professionals who enter into such contracts, so in the event a professional works uninsured, the state is unable to recover any of its damages.

In order to apportion the responsibility for damages equally, and in a more insurable manner, legislation has been proposed to change the indemnification provision of any state contract entered into with architects, professional engineers, and contractors.

## ***THE CONTENT OF THE BILL:***

The bill would amend the Management and Budget Act to prohibit the Department of Management and Budget, when entering into a contract with an architect, professional engineer, or contractor for a capital outlay project, capital improvement, or facility, from requiring an architect, engineer, or contractor to assume any liability or to indemnify the state for any amount greater than the degree of fault of the architect, engineer, or contractor. The bill would define “contractor” to mean a person who, pursuant to a contract with the owner or lessee of real property, provides an improvement to real property.

MCL 18.1101

## ***ARGUMENTS:***

### ***For:***

This bill would change the indemnification provision found in state contracts entered into with professional engineers, architects, and contractors. Currently, the indemnification provision holds the professional consultants liable for any bad results of the work, unless the state is 100 percent at fault. Insurers of professionals have begun to balk at underwriting potential losses of this magnitude, and some professionals say that fewer engineers, architects, and contractors will enter the bidding competitions to win state contracts, if the work they perform is not insurable. And, if there are fewer bids, project costs may rise. To solve these problems, this legislation takes a logical, reasoned approach to allocate liability, apportioning costs to the parties who are responsible.

### ***Against:***

It may be true that the indemnification provision in state contracts holds the professional consultants liable for bad results, unless the state is 100 percent at fault. However, this provision protects taxpayers from excessive claims for damages from third parties who allege injuries. Further, it does not treat professionals unfairly, for two reasons: First, in the case of disputes between the state and the professional, the contract also contains a ‘dispute resolution’ process to ascertain each party’s degree of fault, and thereby assess liability. Second, the state follows the doctrine of ‘modified comparative negligence.’ Under that liability doctrine, courts must consider the culpability of all parties—including third party plaintiffs—and adjust the awards accordingly. Finally, according to spokespeople for the Department of Management and Budget, there is no shortage of bids from professional engineers, architects, or contractors on state contracts.

## ***POSITIONS:***

Professional Concepts Insurance Agency supports the bill. (6-1-04)

The Association of Underground Contractors supports the bill. (6-1-04)

The Michigan Road Builders Association supports the bill. (6-1-04)

The American Institute of Architects, Michigan supports the bill. (6-1-04)

The American Council of Engineering Companies/Michigan, and TetraTech MPS, Inc. support the bill. (6-2-04)

The Department of Management and Budget opposes the bill. (6-1-04)

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