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SB-496 Indemnity: design professionals. (2017-2018)

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Senate Bill No. 496

CHAPTER 8

An act to amend Section 2782.8 of the Civil Code, relating to indemnity.

[Approved by Governor April 28, 2017. Filed with Secretary of State April 28, 2017.]

LEGISLATIVE COUNSEL'S DIGEST

SB 496, Cannella. Indemnity: design professionals.

Existing law provides, for all contracts, and amendments to contracts, entered into on or after January 1, 2007, with a public agency, as defined, 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.

Existing law provides, with respect to contracts and amendments to contracts entered into on or after January 1, 2011, with a public agency, as defined, for design professional services, that all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting these contracts or amendments to contracts that purport to require the design professional to defend the public agency under an indemnity agreement, including the duty and the cost to defend, are unenforceable, except for claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional. Existing law provides that all contracts and all solicitation documents between a public agency and a design professional are deemed to incorporate these provisions by reference.

This bill would instead make these provisions applicable to all contracts for design professional services entered into on or after January 1, 2018. The bill would prohibit the cost to defend charged to the design professional from exceeding the design professional's proportionate percentage of fault, except that in the event that one or more defendants is unable to pay its share of defense costs due to bankruptcy or dissolution of the business, the bill would require the design professional to meet and confer with other parties regarding unpaid defense costs. The bill would also provide for certain exemptions to these provisions.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 2782.8 of the Civil Code is amended to read:

2782.8. (a) For all contracts, and amendments thereto, entered into on or after January 1, 2018, for design professional services, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any such contract, and amendments thereto, that purport to indemnify, including the duty and the cost to defend, the indemnitee by a design professional against liability for claims against the indemnitee, are unenforceable, except to the extent that the claims against the indemnitee arise out

of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional. In no event shall the cost to defend charged to the design professional exceed the design professional's proportionate percentage of fault. However, notwithstanding the previous sentence, in the event one or more defendants is unable to pay its share of defense costs due to bankruptcy or dissolution of the business, the design professional shall meet and confer with other parties regarding unpaid defense costs. The duty to indemnify, including the duty and the cost to defend, is limited as provided in this section. This section shall not be waived or modified by contractual agreement, act, or omission of the parties. Contractual provisions, clauses, covenants, or agreements not expressly prohibited herein are reserved to the agreement of the parties.

(b) All contracts and all solicitation documents, including requests for proposal, invitations for bid, and other solicitation documents for design professional services are deemed to incorporate by reference the provisions of this section.

(c) For purposes of this section, "design professional" includes all of the following:

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

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

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

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

(d) This section shall apply only to a professional service contract, or any amendment thereto, entered into on or after January 1, 2018.

(e) The provisions of this section pertaining to the duty and cost to defend shall not apply to either of the following:

(1) Any contract for design professional services, or amendments thereto, where a project-specific general liability policy insures all project participants for general liability exposures on a primary basis and also covers all design professionals for their legal liability arising out of their professional services on a primary basis.

(2) A design professional who is a party to a written design-build joint venture agreement.

(f) Nothing in this section shall abrogate the provisions of Section 1104 of the Public Contract Code.

(g) Indemnitee, for purposes of this section, does not include any agency of the state.