

Senator Gregory S. Bell proposes the following substitute bill:

INDEMNIFICATION FOR DESIGN

PROFESSIONAL SERVICES

2009 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Gregory S. Bell

House Sponsor: _____

LONG TITLE

General Description:

This bill forbids certain indemnification provisions in contracts entered into using public funds by a state agency.

Highlighted Provisions:

This bill:

- ▶ defines "design professional" to include certain architects, engineers, and surveyors;
- ▶ forbids a design professional from indemnifying certain parties to a contract entered into by a state agency;
- ▶ provides exceptions for a design professional's negligence, wrongful conduct, or certain other conduct; and
- ▶ prohibits waiving the indemnification prohibition by contract.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:



26 72-6-107, as last amended by Laws of Utah 2008, Chapter 382

27 ENACTS:

28 63A-5-223, Utah Code Annotated 1953

29 63G-6-603, Utah Code Annotated 1953

31 *Be it enacted by the Legislature of the state of Utah:*

32 Section 1. Section 63A-5-223 is enacted to read:

33 **63A-5-223. Contracts -- Certain indemnification provisions forbidden.**

34 (1) As used in this section, "design professional":

35 (a) means:

36 (i) an architect, licensed under Title 58, Chapter 3a, Architects Licensing Act;

37 (ii) a landscape architect, licensed under Title 58, Chapter 53, Landscape Architects

38 Licensing Act; and

39 (iii) a professional engineer or professional land surveyor, licensed under Title 58,

40 Chapter 22, Professional Engineers and Professional Land Surveyors Licensing Act; and

41 (b) includes:

42 (i) a person for whom the design professional has direct or indirect control or

43 responsibility;

44 (ii) a consultant, subconsultant, or independent contractor, affiliated with the design

45 professional, whether or not that consultant, subconsultant, or independent contractor has

46 contracted directly with the design professional; or

47 (iii) an agent, employee, or other person for whom a person listed in Subsections

48 (1)(a), (1)(b)(i) or (1)(b)(ii) may be liable.

49 (2) Beginning May 12, 2009, a contract, including an amendment to an existing

50 contract, entered into under authority of this chapter may not require that a design professional

51 indemnify any other party to the contract from liability claims that arise out of the design

52 professional's services, unless the liability claim arises from the design professional's negligent

53 act, wrongful act, error or omission, or other liability imposed by law.

54 (3) Subsection (2) may not be waived by contract.

55 Section 2. Section 63G-6-603 is enacted to read:

56 **63G-6-603. Contracts -- Certain indemnification provisions forbidden.**

57 (1) As used in this section, "design professional":

58 (a) means:

59 (i) an architect, licensed under Title 58, Chapter 3a, Architects Licensing Act;

60 (ii) a landscape architect, licensed under Title 58, Chapter 53, Landscape Architects

61 Licensing Act; and

62 (iii) a professional engineer or professional land surveyor, licensed under Title 58,

63 Chapter 22, Professional Engineers and Professional Land Surveyors Licensing Act; and

64 (b) includes:

65 (i) a person for whom the design professional has direct or indirect control or

66 responsibility;

67 (ii) a consultant, subconsultant, or independent contractor, affiliated with the design

68 professional, whether or not that consultant, subconsultant, or independent contractor has

69 contracted directly with the design professional; or

70 (iii) an agent, employee, or other person for whom a person listed in Subsections

71 (1)(a), (1)(b)(i) or (1)(b)(ii) may be liable.

72 (2) After May 12, 2009, a contract, including an amendment to an existing contract,

73 entered into by a state agency may not require that a design professional indemnify any other

74 party to the contract against liability claims against the other party arising out of the design

75 professional's services, unless the liability claim arises from the design professional's

76 negligence, recklessness, or wilful misconduct.

77 (3) Subsection (2) may not be waived by contract.

78 Section 3. Section **72-6-107** is amended to read:

79 **72-6-107. Construction or improvement of highway -- Contracts -- Retainage --**

80 **Certain indemnification provisions forbidden.**

81 (1) As used in this section, "design professional":

82 (a) means:

83 (i) an architect, licensed under Title 58, Chapter 3a, Architects Licensing Act;

84 (ii) a landscape architect, licensed under Title 58, Chapter 53, Landscape Architects

85 Licensing Act; and

86 (iii) a professional engineer or professional land surveyor, licensed under Title 58,

87 Chapter 22, Professional Engineers and Professional Land Surveyors Licensing Act; and

88 (b) includes:

89 (i) a person for whom the design professional has direct or indirect control or
90 responsibility;

91 (ii) a consultant, subconsultant, or independent contractor, affiliated with the design
92 professional, whether or not that consultant, subconsultant, or independent contractor has
93 contracted directly with the design professional; or

94 (iii) an agent, employee, or other person for whom a person listed in Subsections
95 (1)(a), (1)(b)(i) or (1)(b)(ii) may be liable.

96 [~~(1)~~] (2) (a) The department shall make plans, specifications, and estimates prior to the
97 construction or improvement of any state highway.

98 (b) Except as provided in Section 63G-6-502 and except for construction or
99 improvements performed with state prison labor, a construction or improvement project with
100 an estimated cost exceeding the bid limit as defined in Section 72-6-109 for labor and materials
101 shall be performed under contract awarded to the lowest responsible bidder.

102 (c) The advertisement for bids shall be published in a newspaper of general circulation
103 in the county in which the work is to be performed, at least once a week for two consecutive
104 weeks, with the last publication at least ten days before bids are opened.

105 (d) The department shall receive sealed bids and open the bids at the time and place
106 designated in the advertisement. The department may then award the contract but may reject
107 any and all bids.

108 (e) If the department's estimates are substantially lower than any responsible bid
109 received, the department may perform any work by force account.

110 [~~(2)~~] (3) If any payment on a contract with a private contractor for construction or
111 improvement of a state highway is retained or withheld, the payment shall be retained or
112 withheld and released as provided in Section 13-8-5.

113 [~~(3)~~] (4) If the department performs a construction or improvement project by force
114 account, the department shall:

115 (a) provide an accounting of the costs and expenditures of the improvement including
116 material and labor;

117 (b) disclose the costs and expenditures to any person upon request and allow the person
118 to make a copy and pay for the actual cost of the copy; and

119 (c) perform the work using the same specifications and standards that would apply to a
120 private contractor.

121 [~~4~~] (5) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking
122 Act, the department shall establish procedures for:

123 (a) hearing evidence that a region within the department violated this section; and

124 (b) administering sanctions against the region if the region is found in violation.

125 (6) After May 12, 2009, a contract, including an amendment to an existing contract,
126 entered into by the department may not require that a design professional indemnify any other
127 party to the contract against liability claims against the other party arising out of the design
128 professional's services, unless the liability claim arises from the design professional's
129 negligence, recklessness, or wilful misconduct.

130 (7) Subsection (6) may not be waived by contract.