



## CCASLA Quarterly Report – 3rd Quarter

Indemnity Bill SB 496 Approved by the State + Governor Brown

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On April 28, 2017, Governor Brown signed SB 496 "Indemnity: Design Professionals" bill sponsored by State Senator Anthony Canella, PE (R – Ceres) establishing reasonable limits on the obligation of design professionals to defend their clients when the contract includes an indemnification clause. The bill was supported by numerous design professional associations including the California Council of the American Society of Landscape Architects (CC/ASLA), the American Institute of Architects California Council (AIACC), the American Council of Engineering Companies California (ACECC), California Geotechnical Engineering Association (CGEA) and the State Building + Construction Trades Council of California (SBCTCC).

The primary intent of the law is to establish reasonable limits on the obligation for the design professionals to defend their clients, both for most public agencies and private contracts with the exception of State of California agencies. The new law will go into effect on January 1, 2018, so contracts on or after that date will be governed by the parameters of this legislation.

The extent of the liability will be limited to the share of the defense costs to the design professionals, based on the determined involvement in the issue. The new law states *"in no event shall the cost to defend charged to the design professional exceed the design professional's proportionate percentage of fault"*.

For contracts entered into on or after January 1, 2018, SB 496 amends the California Civil Code 2782.8 and has three major changes:

- .1 Civil Code 2782.8 now applies to all contracts except those involving State of California agencies
- .2 Design Professionals can no longer be ultimately obligated to pay the indemnitees' defense costs beyond their proportionate share of fault
- .3 Design Professionals may or may not have to pay for the "up-front" duty to defend the indemnitee.

Applicable to most public and private contracts, the law revisions will not apply to the following specific conditions:

- Contracts for design professional services where a project specific general liability policy covers all design professionals for their legal liability
- A design professional who is a party to a written design-build venture agreement
- Contracts with any agency of the State of California

The web page for the new legislation is

[https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180SB496](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB496)

## **MWELo / Department of Water Resources Update**

On January 30, 2017, the initial meeting for a newly formed Stakeholder group was convened at Cal Poly Pomona by the State of California Department of Water Resources (DWR) to initiate the process of updating the Model Water Efficient Landscape Ordinance (MWELo) for the upcoming State Green 2020 document. A second meeting was held in Sacramento on April 24, 2017 for the follow up to review and discuss the survey that had been sent out previously to numerous green industry stakeholders. The survey asked a series of questions regarding the previous update to MWELo in 2015 and what concerns and / or issues have risen from that last revision. A broad representation of the green industry was either present or on conference call. Public and private sector design professionals, manufacturing, educators and landscape management / maintenance were all in attendance at these two initial meetings.

The later portion of the second meeting was to identify and set up specific sub-committees and sign up opportunities for the attendees who wanted to volunteer to participate in moving these specific topics forward. These groups include Codes and Standards Applicability, Education, Existing Landscapes, Landscape Plans, Planning, and Water Budget and Technical Standards.

With the 2015 MWELo update having been pushed through in an expedited fashion in response to the prolonged drought, and the mandate by Governor Brown to achieve a mandatory 20% use reduction, it was acknowledged by DWR Staff that it was not the ideal scenario and process for the update. On an ongoing basis, this effort will continue as this Stakeholder group revisits that version and works toward revising the specifics that need to be addressed and updated.

CCASLA will maintain our involvement in the process and keep membership apprised of the process and revisions being contemplated as a result of this effort.

Governor Brown signed [SB 496](#) into law last Friday, establishing reasonable limits on the obligation of design professionals to defend their clients.

The new law, which goes into effect for contracts signed on or after January 1, 2018, states that *“in no event shall the cost to defend charged to the design professional exceed the design professional’s proportionate percentage of fault.”*

This new limit on the defense obligation will apply to most contracts for both public and private clients. It will not, however, apply to the following:

- Contracts for design professional services where a project-specific general liability policy covers all design professionals for their legal liability
- A design professional who is a party to a written design-build venture agreement
- Contracts with any agency of the state

SB 496 was authored by [State Senator Anthony Cannella](#), PE (R – Ceres), written and sponsored by the [American Council of Engineering Companies, California](#), and supported by the AIACC, the [Structural Engineers Association of California](#), the California Council of the American Society of Landscape Architects, the [California Geotechnical Engineering Association](#), and the [State Building & Construction Trades Council of California](#).

What does SB 496 mean in the real world for architects? Some of that is unknown at this point. For example, we are uncertain if it will stop the duty to provide upfront defense costs. AIACC staff talked with attorneys who have said it both ways: It will stop the duty to provide upfront defense costs and it will not stop. On this point, time will tell.

Importantly, SB 496 does limit the amount of defense costs a design professional may have to pay. It accomplishes this important change by limiting the share of the defense costs to the design professionals share of fault. The importance of this cannot be overstated. Under current law, a design professional can have the legal obligation to provide significant

defense costs regardless of fault – the design professional, even if he or she did nothing wrong, could still have significant, and uninsurable, defense costs. With SB 496, a design professional's share of defense costs is limited to his or her share of fault, and will have no defense cost obligation if the design professional is not at fault.

Additionally, SB 496 should put the design professional in a stronger position to negotiate the defense obligation to his or her client when the call to provide defense is made.

The AIACC will prepare a more detailed issue brief on SB 496 and what it means to architects for publication later this year.

Last week with optimism we reported that the California State Assembly passed Senate Bill 496 ("SB-496") which sought to lessen the burden of indemnity provisions and the dreaded immediate duty to defend in public and private contracts involving design professionals. We are pleased to announce that on Friday April 28, 2017, Governor Jerry Brown signed the bill into law!

SB-496 modifies Civil Code section 2782.8, adding protections to private contracts entered into by design professionals after January 1, 2018. Importantly, SB-496 limits the "duty to defend" to the comparative fault of the professional in private and public contracts. Civil Code section 2782.8 previously applied to public contracts entered into by design professionals with public agencies, excluding state agencies as defined in the statute. SB-496 places private contracts and public contracts with non-state agencies on equal footing.

The practical implications of SB-496 are extremely beneficial to design professionals, especially those working primarily in the private sector. For all private contracts entered into by a design professional prior to January 1, 2018 (meaning those contracts without the protections of SB-496) that contain a provision requiring the professional to indemnify and/or defend their client, the design professional could have to pay for all of their client's attorneys' fees and costs by virtue of being sued, even if the professional was ultimately found negligent free by the trier of fact. For private and applicable public contracts entered into after January 1, 2018, with the added protections of SB-496, if the design professional is found to be 25% at fault, then the law provides that they would only be liable for 25% of the attorneys' fees and costs of a party seeking contractual indemnity and defense reimbursement. If found 0% at fault, the professional would not be responsible for any of their client's attorneys' fees or costs.

This is a significant step forward in making contracts between design professionals and owners in California both fair and insurable. This will allow for more equitable risk sharing on contracts concerning the built environment in 2018 and beyond.

California Governor Jerry Brown recently signed into law Senate Bill 496 (“SB-496”) representing a major step forward in reducing the uninsurable burden of indemnity provisions and the duty to defend for most public and private contracts signed by design professionals in California. Dealey Renton (DRA) was proud to support ACEC California as they led lobbying efforts over the past few years to enact this bill.

Historically, indemnity provisions in design professional agreements have created insurability issues as professional liability insurers are unwilling to provide coverage for the duty to defend or liabilities not attributable to negligence.

**FOR CONTRACTS ENTERED INTO, ON, OR AFTER JANUARY 1, 2018, SB-496 AMENDS CALIFORNIA CIVIL CODE 2782.8 AND CONTAINS THREE KEY POINTS:**

1. Civil Code 2782.8 now applies to all contracts (except those involving State of California entities). Indemnification clauses (public and private) are unenforceable except to the extent they arise from, pertain to, or relate to the negligence, recklessness, or willful misconduct of the Design Professional.
2. Design Professionals can no longer be ultimately obligated to pay the indemnitees’ defense costs beyond their proportionate share of fault.
3. Design Professionals may still be legally responsible to pay for the ‘up-front’ duty to defend of an indemnitee.

What is the practical impact for design professionals? Insurability of contractual indemnification clauses has been a critical risk management issue for design professionals. Civil Code 2782.8 now applies to all contracts (except for State of California entities), and indemnification obligations must be founded upon

negligence, an essential element triggering professional liability insurance coverage. Certain professional liability insurers provide coverage for an indemnitee's defense to the extent of negligence as determined by a court of competent jurisdiction. Unfortunately, we are not aware of any professional liability policy which will insure the immediate duty to defend.

As noted, SB-496 does not address the up-front duty to defend demands and therefore needs to be the subject of careful negotiation. We are hopeful that with this new law, contract negotiations will be more productive relative to this issue. The best negotiation result would be a contractual declaration that the design professional has no obligation to defend. A fallback position could be contract language clarifying a design professional's defense obligation applies only 'after the fact', for example:

*Consultant has no obligation to pay for any of the indemnitees' defense related cost prior to a final determination of liability or to pay any amount that exceeds Consultant's finally determined percentage of liability based upon the comparative fault of Consultant.*

DRA continues to work closely with professional liability insurers to modify policy language to insure indemnitee's defense costs to the extent of the proportionate negligence of the design professional. While certain insurers have already amended their policy wording, more will undoubtedly follow in the coming months.

**LASTLY, THERE ARE A FEW EXCEPTIONS CONTAINED IN SB-496:**

1. Under scenarios where a defendant(s) has gone bankrupt or dissolved the business, all parties agree to meet and confer regarding unpaid defense costs.
2. The duty and cost to defend provisions do not apply to participants of Design Build Joint Venture Agreements or to projects where an Owner Controlled Insurance Program (OCIP) provides insurance coverage for the design team.

SB-496 is a big step along the road to securing fair allocation of risk between design professionals and their clients. While other states have enacted anti-

indemnity legislation, California has long remained as one of the most difficult contract environments. DRA is pleased with this outcome and are optimistic that the passage of SB-496 will ultimately reduce design professionals' future uninsurable risk.

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