

**HB**

**151**



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**CS FOR HOUSE BILL NO. 151( )**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-FIFTH LEGISLATURE - FIRST SESSION**

**BY**

**Offered:**  
**Referred:**

**Sponsor(s): REPRESENTATIVE JOHNSON BY REQUEST**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act requiring an indemnification, defense, and hold harmless provision in**  
2 **construction-related professional services contracts of state agencies, quasi-public**  
3 **agencies, municipalities, and political subdivisions."**

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 **\* Section 1. AS 36.90 is amended by adding a new section to read:**

6 **Article 4. Required Contract Provision.**

7 **Sec. 36.90.300. Indemnification, defense, and hold harmless provision in**  
8 **certain construction-related contracts. (a) A public agency shall include in a**  
9 **construction-related professional services contract entered into by the public agency a**  
10 **provision under which the consultant agrees to indemnify, defend, and hold harmless**  
11 **the public agency from claims or liability for the negligent acts, errors, or omissions of**  
12 **the consultant. The provision must include an apportionment of the indemnification,**  
13 **defense, and hold harmless obligation on a comparative fault basis where there is joint**  
14 **liability.**

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(b) A provision that reads substantially as follows satisfies the requirement of (a) of this section:

The consultant shall indemnify, defend, and hold harmless the contracting agency from and against any claim of, or liability for, negligent acts, errors, and omissions of the consultant under this agreement. The consultant is not required to indemnify, defend, or hold harmless the contracting agency for a claim of, or liability for, the independent negligent acts, errors, and omissions of the contracting agency. If there is a claim of, or liability for, a joint negligent act, error, or omission of the consultant and the contracting agency, the indemnification, defense, and hold harmless obligation of this provision shall be apportioned on a comparative fault basis. In this provision, "consultant" and "contracting agency" include the employees, agents, and contractors who are directly responsible, respectively, to each. In this provision, "independent negligent acts, errors, and omissions" means negligence other than in the contracting agency's selection, administration, monitoring, or controlling of the consultant, or in approving or accepting the consultant's work.

(c) In this section,

- (1) "consultant" means a person who contracts with a public agency to provide professional services;
- (2) "professional services" has the meaning given in AS 36.30.990;
- (3) "public agency" means a department, institution, board, commission, division, authority, public corporation, committee, school district, political subdivision, or other administrative unit of a municipality, of a political subdivision, or of the executive or legislative branch of state government, including the University of Alaska, the Alaska Aerospace Development Corporation, the Alaska Housing Finance Corporation, the Alaska Industrial Development and Export Authority, the Alaska Energy Authority, the Alaska Railroad Corporation, and a regional educational attendance area.

# Alaska State Legislature

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*A Communication From*  
**REPRESENTATIVE BOB LYNN**  
**District 31 Anchorage**

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## FAX

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Alaska State Capitol, room 104  
Juneau, AK 99801-1182

# of Pages (including cover): 3 / 11

Phone: 907-465-4931

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Re: HB 151

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Here is some additional information that was turned in this morning on H.L. 151. This bill will be heard in House State Affairs Committee tomorrow.

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 151

1 Page 1, line 1, following "indemnification":

2 Insert ", defense,"

3

4 Page 1, line 7, following "Indemnification":

5 Insert ", defense,"

6

7 Page 1, lines 9 - 10:

8 Delete "that indemnifies the public agency and holds the public agency harmless"

9 Insert "under which the consultant agrees to indemnify, defend, and hold harmless the  
10 public agency from claims or liability"

11

12 Page 1, lines 10 - 11:

13 Delete "who contracts with the public agency to provide the professional services"

14

15 Page 1, line 12:

16 Delete "joint liability on a comparative fault basis"

17 Insert "the indemnification, defense, and hold harmless obligation on a comparative  
18 fault basis where there is joint liability"

19

20 Page 2, line 1, following "indemnify":

21 Insert ", defend,"

22

23 Page 2, line 4, following "indemnify":

1           Insert ", defend, or hold harmless"

2

3   Page 2, line 8, following "indemnification":

4           Insert ", defense,"

5

6   Page 2, line 12:

7           Delete "provision"

8           Insert "subsection"

9

10   Page 2, following line 16:

11           Insert a new paragraph to read:

12                               "(1) "consultant" means a person who contracts with a public agency

13           to provide professional services;"

14

15   Renumber the following paragraphs accordingly.

# ALASKA STATE LEGISLATURE

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REPRESENTATIVE CRAIG JOHNSON  
HOUSE DISTRICT 28

## Sponsor Statement

### House Bill 151

**An Act requiring an indemnification and hold harmless provision in professional services contracts of state agencies, quasi-public agencies, municipalities, and political subdivisions.**

HB 151 will require uniform indemnification and hold harmless provisions in professional services contracts for all public agencies within the state of Alaska.

In the last few years, there has been a significant increase in litigation related to public projects. One reaction to this trend has been for public agencies to include indemnification language in new construction projects contracts. This language insulates public agencies from liability by unfairly transferring responsibility for negligence to design consultant companies.

These indemnification clauses are typically either uninsurable or insurable only at very high cost. When a contract cannot be insured, design professionals must either accept an unduly high degree of liability or walk away from the contract. The results of this increased liability include:

- Increased costs to the design professionals (which translates into increased overall costs for public projects)
- Decreased participation from design professional companies on competitive bids for public projects (which again increases the costs of these projects)
- The elimination of many smaller local design firms due to their lack of the financial wherewithal to defend themselves from civil lawsuits, or worse, from losing a civil lawsuit that stemmed from negligence on behalf of a public agency

HB 151 prescribes uniform contract indemnification language for all state agencies and makes each party to a professional services contract financially responsible for their own liabilities and distributes joint liability on a comparative fault basis.

The question of indemnification has been addressed by the Alaska Department of Transportation, whose language has been adopted by many boroughs and agencies throughout Alaska for decades. HB 151 means to standardize their approach, and in doing so, provide a fair and equitable business climate within the State of Alaska.



Alaska Professional Design Council • PO Box 100515 • Anchorage AK 99510-0515

**Sample Indemnification clauses  
used in A/E Contracts  
by various Alaska Public Agencies**

**Alaska Department of Transportation**

Also used by

**Alaska Department of Administration  
Alaska Department of Revenue (D1.1 only) (2002)  
Alaska Railroad Corporation (D1.1 only)  
Anchorage School District (D1.1 only)  
City of Gamble (D1.1 only)**

**INDEMNIFICATION**

D1.1 The CONTRACTOR shall indemnify, hold harmless, and defend the CONTRACTING AGENCY from and against any claim of, or liability for negligent acts, errors or omissions of the CONTRACTOR under this Agreement. The CONTRACTOR shall not be required to indemnify the CONTRACTING AGENCY for a claim of, or liability for, the independent negligence of the CONTRACTING AGENCY. If there is a claim of, or liability for, the joint negligent error or omission of the CONTRACTOR and the independent negligence of the CONTRACTING AGENCY, the indemnification and hold harmless obligation shall be apportioned on a comparative fault basis. "CONTRACTOR" and "CONTRACTING AGENCY", as used within this article, include the employees, agents and other contractors who are directly responsible, respectively, to each. The term "Independent Negligence" is negligence other than in the CONTRACTING AGENCY's selection, administration, monitoring, or controlling of the CONTRACTOR and in approving or accepting the CONTRACTOR's Work.

D1.2 The CONTRACTOR shall exercise that degree of skill, care and judgment commensurate with the professional standards for the services of a similar nature. When such standards are in dispute, they shall be established by a panel of three qualified, impartial professionals objectively selected and appointed by the Appeals Officer.

D1.3 The CONTRACTOR shall correct, through re-performance at its expense, any services which are deficient or defective because of the CONTRACTOR's failure to perform said services in accordance with professional standards, provided the CONTRACTING AGENCY has notified the CONTRACTOR in writing within a reasonable time, not to exceed 60 days, of the discovery of any such deficiency during the performance of the services and within 12 months of the date of final payment under this Agreement.



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**Alaska Department of Revenue alternate (November 3, 2006)**

**RFP 2007-0600-6640 for Professional Services**

**B.1 Indemnification Obligations** The Contractor shall indemnify the State Contracting Agency, and each of its current, future and former officials, employees, representatives and agents (the "State Indemnified Parties"), and defend and save each of them harmless, from and against any and all losses, damages, liabilities, costs and expenses (including attorneys' fees and expenses) (collectively, "Losses") in connection with any and all suits, proceedings, investigations, claims or demands (collectively, "Claims") arising from or occurring as a result of: (a) the breach by the Contractor of any term or provisions of this Agreement, including the inaccuracy, untruthfulness or breach of any representation or warranty made by the Contractor in this Agreement, (b) the negligence or willful misconduct on the part of the Contractor or the Contractor Agents in performing any obligations under this Agreement; (c) bodily injury or death to persons or physical damage to personal or real property attributable to the acts or omissions of the Contractor or the Contractor Agents in performing any obligations under this Agreement; and (d) the use by the State in accordance with the terms of this Agreement of any Deliverable or Service developed and/or provided by the Contractor to the State pursuant to this Agreement, including any Claim that the use of such Deliverable or Service infringes, violates or misappropriates a third party's patents, copyrights, trade secrets, trademarks or other intellectual property rights; provided, however, that in each case (items (a) through (d) above) the Contractor shall not be obligated to indemnify the State Indemnified Parties for any Losses to the extent that such Losses arise as a result of gross negligence or willful misconduct on the part of the State Contracting Agency.

**Alaska Department of Health and Social Services  
(Provider Agreement for Individualized Behavioral Health Services)**

**INDEMNIFICATION AND HOLD HARMLESS OBLIGATION (Rev6/05)**

The Provider shall indemnify, hold harmless, and defend DHSS from and against any claim of or liability for error, omission, or negligent or intentional act of the Provider under this Agreement. The Provider shall not be required to indemnify DHSS for a claim of, or liability for, the independent negligence of DHSS. If there is a claim of, or liability for, the joint negligent error or omission of the Provider and the independent negligence of DHSS, fault shall be apportioned on a comparative fault basis.

"Provider" and "DHSS," as used within this section, include the employees, agents, or Providers who are directly responsible, respectively, to each. The term "independent negligence" is negligence other than in DHSS's selection, administration, monitoring, or controlling of the Provider and in approving or accepting the Provider's work.



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## **Alaska Native Tribal Health Consortium**

(Similar to Alaska DOT)

### **Liability and Indemnification**

Contractor shall indemnify, defend, and hold the Owner harmless from and against all liabilities, claims, penalties, forfeitures, demands, suits, judgments, expenses, attorneys' fees and losses ("claims"), including without limitation any and all claims in connection with bodily injury, including death, to persons or damage to tangible property, arising out of or related to Contractor's or subcontractor's negligent acts or omissions or breach of any term or condition of this Contract.

All actions or claims including costs and expenses resulting from injuries or damages sustained by any person or property arising from the contractor's performance of this contract which are caused by the joint negligence of the Owner and the contractor shall be apportioned on a comparative fault basis. Any such joint negligence on the part of the Owner must be a direct result of active involvement by the Owner or failure to act by the Owner.

### **Standard of Care**

Contractor shall maintain and exercise such professional expertise as is consistent with that level of care and skill ordinarily exercised by members of the profession under similar conditions, circumstances, and limitations, either in Alaska or nation-wide, whichever standard of care is higher.

## **Anchorage (Municipality)**

(Similar to Alaska DOT)

### **Section 9. Liability.**

A. The Contractor shall indemnify, defend, save, and hold Anchorage harmless from any claims, lawsuits or liability, including reasonable attorneys' fees and costs, arising from any wrongful or negligent act, error or omission of the Contractor or any subcontractor as a result of the Contractor's or any subcontractor's performance pursuant to this Contract.

B. The Contractor shall not indemnify, defend, save and hold Anchorage harmless from claims, lawsuits, liability, or attorneys' fees and costs arising from wrongful or negligent acts, error or omission solely of Anchorage occurring during the course of or as a result of the performance of this Contract.

C. Where claims, lawsuits or liability, including attorneys' fees and costs arise from wrongful or negligent act of both Anchorage and the Contractor, the Contractor shall indemnify, defend, save, and hold Anchorage harmless from only that portion of claims, lawsuits or liability, including attorneys' fees and costs, which result from the Contractor's or any subcontractor's wrongful or negligent acts occurring as a result of the Contractor's performance pursuant to this Contract.



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### **Juneau (City Borough)**

(A/E liability expansive: liable for any claim arising out of performance)

**22. INDEMNIFICATION AGREEMENT.** Consultant agrees to defend, indemnify, and hold harmless City, its employees, volunteers, Consultants, and insurers, with respect to any action, claim, or lawsuit arising out of the Consultant's performance of this Contract, without limitation as to the amount of fees, and without limitation as to any damages resulting from settlement, judgment, or verdict, and includes the award of any attorneys fees even if in excess of Alaska Civil Rule 82. This indemnification agreement applies to the fullest extent permitted by law and is in full force and effect whenever and wherever any action, claim, or lawsuit is initiated, filed, or otherwise brought against City relating to this Contract. The obligations of Consultant arise immediately upon actual or constructive notice of any action, claim, or lawsuit. City shall notify Consultant in a timely manner of the need for indemnification, but such notice is not a condition precedent to consultant's obligations and may be waived where the Consultant has actual notice.

### **Kenai Peninsula Borough**

(A/E liable for "negligent actions, errors, or omissions"; comparative fault if not covered by insurance)

#### **ARTICLE 13 INDEMNIFICATION Revised 9/30/02**

To the maximum extent allowed by law, the Consultant and all Consultant's subcontractors shall indemnify, defend, and hold harmless Kenai Peninsula Borough (KPB), and Kenai Peninsula Borough School District (KPBSD) where the contract involves KPBSD, and their assemblies, boards, officers, and employees (hereinafter Owner) for all damages of any kind or nature all costs of any kind and all attorneys' fees arising from all claims, suits, or actions of any nature that result, in total or in part, from the negligent actions, errors, or the omissions of the Consultant and/or Consultant's subcontractors and/or their officers, agents and employees in connection with this contract. Without modifying consultant's duty to defend Owner, in the event it is found that the Owner is in part responsible for any of the above-referenced damage or loss, Consultant shall only be required to indemnify Owner for the portion of fault attributed to Owner where Consultant's insurance provides coverage. Consultant and Consultant's subcontractors shall not be required to defend or indemnify Owner for damage or loss that has been found to be attributed to a contractor directly responsible to the Owner under separate written contract. Consultant shall not be required to defend and indemnify Owner where the Owner's action(s) is/are the sole cause for the damage or loss or where the damage or loss was caused by the Owner's willful misconduct.



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### **Ketchikan (City of)**

(A/E liable for "negligent acts or omissions"; comparative fault)

(2006)

**18. Hold Harmless and Indemnity.** The **OWNER**, its officers, employees and agents shall not be held liable for any claims, liabilities, penalties, fines or for damage to any goods, properties or effects of any person whatsoever, nor for any personal injury or death, caused by or resulting from any negligent act or omission of **CONSULTANT**, or by any of **CONSULTANT'S** officers, employees, agents, representatives, Consultants, or subconsultants in the performance or nonperformance of this agreement, and **CONSULTANT** further agrees to appear and defend, and to indemnify and save free and harmless the **OWNER** and its officers, employees and agents from and against any of the foregoing claims, liabilities, penalties, fines or damages, and for any cost and expense, including reasonable attorney's fees, incurred by the **OWNER**, its officers, employees or agents on account of any claim therefore, including claims by reasons of any defects in any plans, drawings, specifications, computer programs, technical reports, or other work product of **CONSULTANT** prepared for or submitted to the **OWNER** pursuant to this agreement provided said claim is not based upon a use of said plans, drawings, specifications or other work product for other than the purposes for which such data was prepared and submitted to the **OWNER**. Notwithstanding any other provision herein contained the parties hereto agree that liability (including costs of defense and attorney's fees) for claims arising from the concurrent negligence of both parties to this agreement shall be apportioned according to the respective percentage of fault attributable to each party as determined by agreement or by the tier of fact.

### **Matanuska Susitna Borough**

(A/E assumes virtually all liability)

#### SECTION 25 Defense and Indemnification

The consultant shall indemnify, defend, and hold and save the borough its elected and appointed officers, agents, and employees harmless from any and all claims, demands, suits, or liability of any nature, kind, or character, including costs, expenses, and attorney's fees. The consultant shall be responsible under this clause for any and all legal actions or claims of any character resulting from injuries, death economic loss, damages, violation of statutes, ordinances, constitutions, or other laws, rules, or regulations, contractual claims, or any other kind of loss, tangible or intangible, sustained by any person, or property arising from consultant's or consultant's officers, agents, employees, partners, attorneys, suppliers, and subcontractors' performance or failure to perform this agreement in any way whatsoever. This defense and indemnification responsibility includes claims alleging acts or omission by the borough or its agents which are said to have contributed to the losses, failure, violations, or damage. However, the consultant shall not be responsible for any damages or claim arising from the sole negligence or willful misconduct of the borough, its agents, or employees.



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**University of Alaska**  
(A/E assumes virtually all liability)

Indemnification: (Rev 2/5/04)

To the fullest extent permitted by law, the Contractor shall pay costs of defense, indemnify, and hold harmless the University, its Board of Regents, officers, and employees from and against any and all loss, expense, damage, claim, demand, judgment, fine, charge, lien, liability, action, cause of action, or proceedings of any kind whatsoever (whether arising on account of damage to or loss of property, or personal injury, emotional distress, or death) arising directly or indirectly in connection with the performance or activities of the Contractor hereunder, whether the same arises before or after completion of the Contractor's operations or expiration of this Agreement, except for damage, loss, or injury resulting from the Owner's gross negligence or willful misconduct. The provisions of this paragraph do not apply to claims that fall within coverage of the Contractor's professional liability insurance policy.

**Wasilla (City of)**  
(A/E liable for "negligent or willful acts or omissions")

**INDEMNIFICATION.**

To the fullest extent permitted by law, Contractor shall indemnify, hold harmless and defend, not excluding the City's right to participate, the City from and against all liability, claims, actions, damages, losses, and expenses, including, without limitation, reasonable attorneys' fees and costs, arising out of any alleged negligent or willful acts or omissions of Contractor, its officers, employees and agents.



# LEGAL SERVICES

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## MEMORANDUM

March 16, 2007

**SUBJECT:** Sectional summary of HB 151 requiring an indemnification and hold harmless provision in professional services contracts of state agencies, quasi-public agencies, municipalities, and political subdivisions (Work Order No. 25-LS0479\C)

**TO:** Representative Craig Johnson  
Attn: Debbie Higgins

**FROM:**  Theresa Bannister  
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

**Section 1.** Adds a new section to the chapter on public contracts.

Sec. 36.90.300(a). Requires public agencies to include an indemnification and hold harmless provision in their professional services contracts. The provision must indemnify and hold the public agency harmless for the negligent acts, errors, and omissions of the consultant. Requires the provision to apportion joint liability on a comparative fault basis.

Sec. 36.90.300(b). Provides model language for the provision required by (a). Allows a provision that reads substantially the same as the model language to satisfy the requirements of (a).

Sec. 36.90.300(c). Defines two terms for the section. Refers the definition of "professional services" to the definition in the state's procurement code. The definition of "public agency" identifies which public entities are covered by the section.

If I may be of further assistance, please advise.

TLB:med  
07-175.med

(3) "Internet or online service provider" means an interactive computer service that provides software or other material that enables a person to transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content; select or analyze content; or allow or disallow content;

(4) "mark" means a registered trademark, registered service mark, or registered domain name in an Internet website address that is owned, licensed, or lawfully used by a person doing business in this state;

(5) "pop-up advertisement" means material offering for sale or advertising the availability or quality of a property, good, or service that is displayed on a user's computer screen, without any request or consent of the user, separate from an Internet website that a user intentionally accesses;

(6) "spyware"

(A) means software on the computer of a user who resides in the state that

(i) collects information about an Internet website at the time the Internet website is being viewed in the state, unless the Internet website is the Internet website of the person who provides the software; and

(ii) uses the information collected contemporaneously to display a pop-up advertisement on the computer;

(B) does not mean

(i) an Internet website;

(ii) a service operated by an Internet or online service provider accessed by a user;

(iii) software designed and installed primarily to prevent, diagnose, detect, or resolve technical difficulties or prevent fraudulent activities;

(iv) software designed and installed to protect the security of the user's computer from unauthorized access or alteration;

(v) software or data that reports information to an Internet website previously stored by the Internet website on the user's computer, including a cookie; in this subparagraph, "cookie" means a text file that is placed on a computer to record information that can be read or recognized when the user of the computer later accesses a particular Internet website, online location, or online service by an interactive computer service, Internet website, or a third party acting on behalf of an interactive computer service or an Internet website;

(vi) software that provides the user with the capability to search the Internet;

(vii) software installed on the user's computer with the consent of the user the primary purpose of which is to prevent access to certain Internet content;

(7) "user" means the owner or authorized user of a computer. (§ 3 ch 97 SLA 2005)

### Article 12. Miscellaneous Provisions.

**Section**

900. Indemnification agreements against public policy

910. Sale or transfer of consumer electrical products

**Section**

920. Free trial period

930. Opt-out marketing plans

**Sec. 45.45.900. Indemnification agreements against public policy.** A provision, clause, covenant, or agreement contained in, collateral to, or affecting a construction contract that purports to indemnify the promisee against liability for damages for (1) death or bodily injury to persons, (2) injury to property, (3) design defects, or (4) other loss, damage or expense arising under (1), (2), or (3) of this section from the sole negligence or wilful misconduct of the promisee or the promisee's agents, servants, or independent contractors who are directly responsible to the promisee, is against public policy and is void and unenforceable; however, this provision does not affect the validity of an insurance contract workers' compensation, or agreement issued by an insurer subject to the provisions of AS 21, or a provision, clause, covenant, or agreement of indemnification

respecting the handling, containment, or cleanup of oil or hazardous substances as defined in AS 46. (§ 1 ch 155 SLA 1975; am § 6 ch 59 SLA 1986)

**Revisor's notes.** — Formerly AS 45.47.010. Renumbered in 1980.

**Opinions of attorney general.** — The apparent prohibition on indemnification agreements in con-

struction contracts found in this section will only apply when the promisee is completely negligent and seeks to hold an innocent promisor accountable. February 27, 1986 Op. Att'y Gen.

#### NOTES TO DECISIONS

**Legislative intent.** — The absence in this section of an exemption for limitation of liability clauses indicates that the legislature did not intend to allow an exemption. *City of Dillingham v. CH2M Hill N.W., Inc.*, 873 P.2d 1271 (Alaska 1994).

**The word "indemnify" as used in this section means "exempt,"** and thus this section prohibits limitation of liability clauses; absent legislative action to the contrary, such an interpretation best fulfills the legislature's express intent to prevent a party to a construction contract from bargaining away liability for the party's negligent acts. *City of Dillingham v. CH2M Hill N.W., Inc.*, 873 P.2d 1271 (Alaska 1994).

**Applicability of section.** — This section became effective on September 23, 1975, and governs contracts executed on or after that date. Contracts executed before that date are governed by the rule announced in *Burgess Constr. Co. v. State*, 614 P.2d 1380 (Alaska 1980), that an indemnity clause is effective to shift responsibility for an accident where the indemnitee is negligent and the indemnitor is not. *Stephan & Sons v. Municipality of Anchorage*, 629 P.2d 71 (Alaska 1981).

There is no indication in the text of this section itself that would indicate that the statute is intended to ban only indemnification clauses that would benefit a public promisee at the expense of a private promisor. *City of Dillingham v. CH2M Hill N.W., Inc.*, 873 P.2d 1271 (Alaska 1994).

This section applies to a clause that is questioned under this statute regardless of whether indemnification has been sought. *City of Dillingham v. CH2M Hill N.W., Inc.*, 873 P.2d 1271 (Alaska 1994).

**Section applicable to equipment leases.** — This section should be applied to void indemnity clauses in equipment lease agreements if such a legal rule would

advance the purposes of the anti-indemnity statute by inducing careful inspection and use of the leased equipment. *Aetna Cas. & Sur. Co. v. Marion Equip. Co.*, 894 P.2d 664 (Alaska 1995).

**When state is solely negligent.** — This section should come into effect only when it is determined, as between the state and contractors, that the state is solely negligent. *Rogers & Babler v. State*, 713 P.2d 795 (Alaska 1986).

**"Wilful misconduct" does not require intent to harm.** — Wilful misconduct means volitional action taken either with a knowledge that serious injury to another will possibly result, or with wanton and reckless disregard of the possible results. *Aetna Cas. & Sur. Co. v. Marion Equip. Co.*, 894 P.2d 664 (Alaska 1995).

Because the insured was found by a jury to have acted with reckless disregard of the plaintiff's interests and safety, the insured's injurious behavior is properly termed wilful misconduct. Consequently, this section forbids the indemnity the insurer seeks. *Aetna Cas. & Sur. Co. v. Marion Equip. Co.*, 894 P.2d 664 (Alaska 1995).

**Indemnity clause not invalidated.** — This section only invalidates an indemnity clause if the clause purports to indemnify the indemnitee for the indemnitee's sole negligence, and where neither part of the indemnity clause purported to indemnify the general contractor for the hospital's sole negligence, this section did not invalidate the indemnity clause in the contract between the general contractor and the hospital work site. *Hoffman Constr. Co. of Alaska v. U.S. Fabrication & Erection, Inc.*, 22 P.3d 464 (Alaska 2001).

Cited in *Deaver v. Auction Block Co.*, 107 P.3d 884 (Alaska 2005).

**Sec. 45.45.910. Sale or transfer of consumer electrical products.** (a) Unless exempted by the department under (d) of this section, a person may not sell, offer to sell, or otherwise transfer in the course of the person's business a consumer electrical product that is manufactured after August 14, 1990, unless the product is clearly marked as being listed by an approved third-party certification program.

(b) A person may not sell, offer to sell, or otherwise transfer in the course of the person's business a consumer electrical product that is manufactured before August 14, 1990, unless the product is clearly marked

(1) as being listed by an approved third-party certification program; or

(2) with a warning label that complies with (e) of this section.

(c) A person may not sell, offer to sell, or otherwise transfer in the course of the person's business a consumer electrical product that has been exempted under (d) of this section, unless the product is clearly marked with a warning label that complies with (e) of this section.

(d) If a consumer electrical product is a work of art or an item that has an unusual application that makes approval by a third-party certification program not reasonably available, the department shall upon request exempt the item from (a) of this section. The

# FISCAL NOTE

**STATE OF ALASKA**  
**2007 LEGISLATIVE SESSION**

Fiscal Note Number: HB151-DOA-RM-3-15-07  
 Bill Version: HB 151  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): 3/15/2007 Dept. Affected: Administration  
 Title: An act requiring an indemnification and hold harmless provision in state prof. serv. contracts RDU: Risk Management  
 Component: Risk Management  
 Sponsor: Representative Johnson  
 Requester: House State Affairs Component No. 71

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type-Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2007) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This legislation requires use of standard indemnity clause in "professional service" (AS 36.30.990) agreements by all public agencies as broadly defined.

The stipulated language proposed is similar to standard terms already being used for many years by state agencies protected by state's self insurance program administered by the Division of Risk Management, thereby there is no operational or financial impact.

Prepared by: J. Brad Thompson, Director  
 Division: Risk Management  
 Approved by: Kevin Brooks, Deputy Commissioner  
 Agency: Department of Administration

Phone 465-5723  
 Date/Time 3/15/07 4:00 PM  
 Date 3/15/07 5:00 PM



Alaska Professional Design Council • PO Box 100515 • Anchorage AK 99510-0515

HB 151 Comment Letter

MEMBER SOCIETIES

Alaska Society of Professional Engineers

Alaska Society of Professional Land Surveyors

American Congress on Surveying & Mapping Alaska Section

American Institute of Architects Alaska Chapter

American Society of Civil Engineers Alaska Section

American Society of Landscape Architects Alaska Chapter

Architecture/Engineering Marketing Association of Alaska

American Council of Engineering Companies of Alaska

Professional Engineers in Private Practice Alaska Chapter

American Society of Interior Designers

March 5, 2007

Representative Craig Johnson  
Chair, House Resources Committee  
Alaska State Legislature  
State Capitol, Room 126  
Juneau, AK 99801-1182

Re: House Bill 151 — Indemnification

Dear Representative Johnson:

On behalf of the Alaska Professional Design Council (APDC), I am writing to express our support of House Bill 151 and to the need for this legislation.

The Alaska Professional Design Council (APDC) is a consortium of professional societies representing architects, engineers, land surveyors, landscape architects and other design professionals. Our ten member organizations have a combined membership of over 1,500 and represent approximately 5,000 licensed professionals. APDC addresses issues of concern to the various design professions through workshops, seminars, ad-hoc committees, standing committees, and governmental task forces. APDC also receives sustaining member support from 30 Architectural and Engineering firms throughout Alaska.

Presently, public agencies in Alaska have a wide variety of indemnification requirements. This bill will standardize indemnification requirements for all Public Agencies in Alaska, make the Architects/Engineers and other professionals responsible for their "negligent acts, errors or emissions", make each financially responsible for their own liabilities, fairly apportion joint liabilities on a comparative fault basis, and defines Public Agency for purposes of this bill.

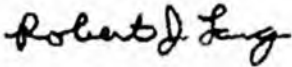
The Alaska Department of Transportation & Public Facilities (DOT/PF) has language that is generally appropriate for contract indemnification purposes. HB 151 through legislation is requiring the use of indemnification contract clauses that are in place with DOT/PF and to be consistent with all Public Agencies.

Professional Services Contracts establish the basic framework between a project owner and a design company for design services associated with a particular project. In recent years, owners of some projects, generally government and quasi-government agencies, have required designers to assume additional liability, beyond the consultant's own negligence. The net effect of this action is to reduce agency risk by insulating the agency from its own negligence. This increases the liability insurance costs to the designers and creates a contract which is not fully insurable, or in some cases asks the designers to assume liability for which no insurance is available. APDC supports legislation that would prescribe indemnification language that is uniform for all state government agencies and assigns, and that requires each party to be financially responsible for their own liabilities and to fairly apportion joint liabilities on a comparative fault basis.

APDC encourages the House of Representatives to move HB 151 forward and enact this important legislation.

Thank you for considering APDC's position on this important issue.

Sincerely,  
Alaska Professional Design Council



Rob Lang, P.E.  
President

**Alaska Society of Professional Engineers**  
**Professional Engineers in Private Practice**

750 W. Dimond Boulevard, Suite 203 Anchorage, AK 99515

March 9, 2007

The Honorable Craig Johnson,  
State Capital, Room 126  
Juneau, Alaska 99801-1182

Subject: HB No. 151

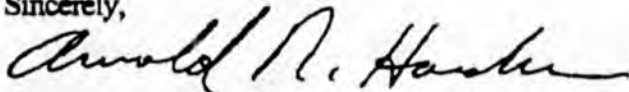
Dear Mr. Johnson:

The Professional Engineers in Private Practice is a professional society for individuals providing consulting services to private and public clients. Our members have observed a steady increase in the number of public agency professional service agreements that require design professionals to assume liability which is uninsurable. We believe that this type of professional service contract language is unfair and is not in the best interest of the public. We endorse and strongly support HB No. 151 for the following reasons.

- 1) Errors and Omissions insurance covers negligence, errors, and omissions of the professional. These policies do not cover liabilities arising due to the negligence, errors, or omissions of the Owner. As such, unfair indemnification clauses may not provide the Owner with the liability coverage that they expect.
- 2) Some professionals will not compete for projects containing unfair indemnification requirements. As a result, the most qualified professional may not be selected for some projects and this is not beneficial to the public.
- 3) Substantial time and expense is incurred by professionals and insurance companies as they review and assess the unique indemnification language contained in each professional service agreement. This raises the cost for public projects.
- 4) When a public agency shifts the liability for their actions to consultants, the public agency is likely to be less diligent and increase the likelihood of negligence, errors, and omissions. This is not beneficial to the public since there is still a negative impact to the public, regardless of who is held responsible.
- 5) In many cases when a problem arises, both the public agency and the design professional have contributed to the problem. Arbitrarily assigning liability to the design professional is unfair and may prevent the public agency from taking the appropriate counter-measures to prevent similar problems in the future.

The Professional Engineers in Private Practice believe that it is in the best interest of the public that each party in a professional service agreement be financially responsible for their own liabilities and to apportion joint liabilities on a comparative fault basis. As such, we strongly support House Bill 151.

Sincerely,



Arnold N. Harder, P.E.  
Chairperson, Alaska Chapter



**PDC INC. ENGINEERS**

March 6, 2007

The Honorable Craig Johnson  
State Capitol, Room 126  
Juneau, AK 99801-1182

Dear Mr. Johnson:

I would like to express to you my strong support for House Bill No. 151. This important legislation addresses a critical issue associated with professional services agreements between public agencies and professional design firms in Alaska, specifically, indemnification and hold harmless agreements.

There currently exists a wide disparity between the professional services agreements used by various public agencies to contract for professional design services in Alaska. Many of the agreements contain indemnification and hold harmless clauses that attempt to shift risk from the public agency to the design professional unfairly. Such clauses are typically either uninsurable or insurable only at very high cost.

Use of unfair indemnification clauses has resulted in a number of undesirable effects:

- 1) Inappropriate shift of risk to the design professional
- 2) Unfair shift of fault from the responsible party to the design professional
- 3) False sense of risk management (frequently the indemnification clauses are uninsurable, hence, no real risk protection is made available to the public agency)
- 4) Increased costs experienced by the design professional community, which ultimately translates into increased costs for the delivery of projects for the public agencies.
- 5) Fewer qualified design professionals available to provide competent services to public agencies. Responsible design professional firms cannot reasonably accept the risk and costs associated with unfair indemnification clauses.

As a design professional, I am quite willing to accept reasonable risk in the performance of our professional services, to provide protection to our clients for services rendered through responsible risk management and insurance, and to accept the responsibility for our negligent acts, errors, and omissions, should they occur. However, it is extremely difficult for us to accept the risk and liability of negligent acts, errors, and omissions that are the responsibility of other parties.

The proposed legislation would correct the current deficiencies, fairly allocate risk and responsibility in professional services agreement, and improve the delivery of professional services for public agencies in the State of Alaska.

2700 Gambell Street, Suite 500

Anchorage, AK 99503

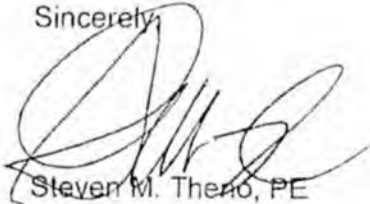
T: 907.743.3200

F: 907.743.3295

HB 151  
March 6, 2007  
Page 2

Ultimately, our mandate as design professionals is to protect the health, safety, and welfare of the public. We do so in part through the services we deliver to public agencies. This legislation helps provide an appropriate and fair framework under which we deliver those services.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Thero", written over a faint, illegible stamp.

Steven M. Thero, PE  
President  
PDC, Inc. Engineers

**DOWL**  
ENGINEERS<sup>®</sup>  
A Division of DOWL LLC

March 9, 2007  
W.O. D00001

The Honorable Craig Johnson  
Representative of the State of Alaska  
State Capitol, Room 126  
Juneau, Alaska 99801-1182

Subject: State of Alaska Department of Transportation and Public Facilities  
Indemnification clause

The Honorable Craig Johnson:

DOWL Engineers (DOWL) has been in business in Alaska for 45 years, providing professional engineering services for clients throughout the state of Alaska in both the public and private sector. We employ more than 200 people and have thriving branch offices in Kodiak, Palmer, Seattle and Tucson. DOWL firmly supports HB 151.

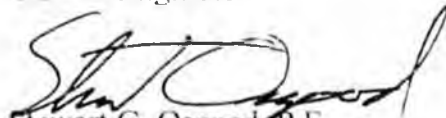
Currently, the State of Alaska Department of Transportation and Public Facilities (DOT&PF) contract language includes a "comparative fault" provision in its indemnification clause. This provision is consistent with industry standards and with what is widely considered "insurable" by Architect and Engineering (A/E) firms and their insurance companies.

While DOT&PF conforms to the latest standards, some state entities include contract language that puts the entire liability on the A/E firm regardless of the level of fault that is apportioned by the courts. This language takes all of the accountability off of the contracting agency and places it on the contractor—in effect, putting them in the role of an insurance company. Furthermore, the contract language is often non-negotiable and jeopardizes the award of the contract if the A/E firm refuses to accept the asymmetrical condition.

I have attached language extracted from the latest Engineers Joint Contract Documents Committee Standard Form of Agreement which discusses insurance guidelines and indemnification. Section 6.11.2 discusses the need to indemnify the Owner (State of Alaska) when there are costs, losses, or damages due to an engineering firm's negligent acts. Similarly, Section 6.11.3 indemnifies the engineering firm when the Owner's negligent acts cause costs, loss, or damage. It is clear HB 151 conforms to the latest national standards for contract indemnification.

Thank you for sponsoring HB 151. I think it will go a long way toward promoting accountability for those working on Alaska's important public projects. If I may be of additional assistance as this legislation goes through the committee process, please do not hesitate to call.

Sincerely,  
DOWL Engineers

  
Stewart G. Osgood, P.E.  
President

Attachment: As stated

D00001 Johnson HB151 SGO 030907 mas

"arranger," "operator," "generator," or "transporter" of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1990 (CERCLA), which are or may be encountered at or near the Site in connection with ENGINEER's activities under this Agreement.

F. If ENGINEER's services under this Agreement cannot be performed because of a Hazardous Environmental Condition, the existence of the condition shall justify ENGINEER's terminating this Agreement for cause on 30 days notice.

#### **6.11 Allocation of Risks**

##### **A. Indemnification**

1. To the fullest extent permitted by law, ENGINEER shall indemnify and hold harmless OWNER, OWNER's officers, directors, partners, and employees from and against any and all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professional and all court or arbitration or other dispute resolution costs) caused solely by the negligent acts or omissions of ENGINEER or ENGINEER's officers, directors, partners, employees, and ENGINEER's Consultants in the performance and furnishing of ENGINEER's services under this Agreement.

2. To the fullest extent permitted by law, OWNER shall indemnify and hold harmless ENGINEER, ENGINEER's officers, directors, partners, employees, and ENGINEER's Consultants from and against any and all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) caused solely by the negligent acts or omissions of OWNER or OWNER's officers, directors, partners, employees, and OWNER's consultants with respect to this Agreement or the Project.

3. To the fullest extent permitted by law, ENGINEER's total liability to OWNER and anyone claiming by, through, or under OWNER for any cost, loss, or damages caused in part by the negligence of ENGINEER and in part by the negligence of OWNER or any other negligent entity or individual, shall not exceed the percentage share that ENGINEER's negligence bears to the total negligence of OWNER, ENGINEER, and all other negligent entities and individuals.

4. In addition to the indemnity provided under paragraph 6.11.A.2 of this Agreement, and to the fullest extent permitted by law, OWNER shall indemnify and hold harmless ENGINEER and its

officers, directors, partners, employees, and ENGINEER's Consultants from and against all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) caused by, arising out of or resulting from a Hazardous Environmental Condition, provided that (i) any such cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than completed Work), including the loss of use resulting therefrom, and (ii) nothing in this paragraph 6.11.A.4. shall obligate OWNER to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence or willful misconduct.

5. The indemnification provision of paragraph 6.11.A.1 is subject to and limited by the provisions agreed to by OWNER and ENGINEER in Exhibit I, "Allocation of Risks," if any.

#### **6.12 Notices**

A. Any notice required under this Agreement will be in writing, addressed to the appropriate party at its address on the signature page and given personally, or by registered or certified mail postage prepaid, or by a commercial courier service. All notices shall be effective upon the date of receipt.

#### **6.13 Survival**

A. All express representations, indemnifications, or limitations of liability included in this Agreement will survive its completion or termination for any reason.

#### **6.14 Severability**

A. Any provision or part of the Agreement held to be void or unenforceable under any Laws or Regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon OWNER and ENGINEER, who agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

#### **6.15 Waiver**

A. Non-enforcement of any provision by either party shall not constitute a waiver of that provision, nor shall it affect the enforceability of that provision or of the remainder of this Agreement.

#### **6.16 Headings**

A. The headings used in this Agreement are for general reference only and do not have special significance.



**R&M CONSULTANTS, INC.**

9101 Vanguard Drive, Anchorage, Alaska 99507

(907) 522-1707, FAX (907) 522-3403, www.rmconsult.com

March 8, 2007

Representative Craig Johnson  
State Capitol, Room 126  
Juneau, Alaska 99801-1182

RE: HB 151, Indemnification and Hold Harmless Provisions in Professional Services Contracts

Dear Representative Johnson:

R&M Consultants, Inc. strongly supports HB 151 which will provide standard indemnification and hold harmless provisions for professional services contracts with state agencies, quasi-public agencies, municipalities, and political subdivisions. HB 151, as written, utilizes standard language found in State of Alaska Department of Transportation & Public Facilities (DOT&PF) contracts that have been used for many years.

The DOT&PF indemnification and hold harmless language provides liability and obligation on a comparative fault basis, and does not require obligation to the professional services firm for independent negligence by the owner, or a third party. The DOT&PF language does protect the owner from negligence by the professional services firm.

Many agencies have utilized the DOT&PF indemnification and hold harmless language as it is fair, has stood the test of time, and is supported by the State of Alaska.

Recently, a significant number of public agencies have been utilizing indemnification and hold harmless language that assigns liability and obligation to professional services firms for independent actions, or negligence by the owner or third parties. These clauses are uninsurable and require the professional services firm to either accept the contract with undue risk, expend time and effort to renegotiate the indemnification and hold harmless language, or walk away from the work.

As in all contracting, standard language that has stood the test of time results in less risk for all parties, and provides for a more competitive marketplace.

Thank you for sponsoring HB 151. This important legislation will be beneficial to all Alaskans.

Very truly yours,

R&M CONSULTANTS, INC.

Frank D. Rasi, P.E.  
Vice President



McCOOL CARLSON GREEN  
ARCHITECTURE • INTERIOR DESIGN • SPACE PLANNING

March 8, 2007

Representative Craig Johnson  
State Capitol, Room 126  
Juneau, AK 99801-1182

Re: HB 151

Dear Representative Johnson,

I am writing in support of streamlining and standardizing indemnification clauses as proposed in HB 151. I have practiced architecture in Alaska for more than 30 years and am a principal in the firm McCool Carlson Green in Anchorage. Most of work has been for public clients with some of our more prominent buildings being the C Terminal at Ted Stevens International Airport, the Nesbett Courthouse in downtown Anchorage and UAA's Aviation Technology Center at Merrill Field.

Through the years I have spent countless hours discussing insurance and indemnification issues with our clients and up until recently most of the public agencies we work for have been willing to include reasonable indemnification clauses in their professional services contracts. That changed recently when two of our long term clients, the Mat Su Borough and the University of Alaska issued new contract forms that included clauses that were unfair, unreasonable, inconsistent with available insurance coverage and out of step with design industry practices. These indemnification clauses attempt to shift as much risk as possible to the design professionals, making them liable for events that are out of their control and potentially unrelated to the services they provided. Some even attempt to make the design professional responsible for the negligence of the owner. The use of such one sided contract clauses does not foster the spirit of teamwork and cooperation necessary to design public projects and is bad public policy.

HB 151 suggests the state mandate standardization of these clauses in all professional services contracts with public agencies based on language currently used by ADOT/PF. While this language does not include all the provisions the insurance industry might like it strikes a fair balance between reasonable protections for the owner and the current state of design practice and insurance coverage. I encourage you to support HB151 and move it quickly through the committee process.

Sincerely,  
McCool Carlson Green Architects

Michael Carlson, AIA/CCS/NCARB  
Principal Architect

John E. McCool  
Michael P. Carlson  
Douglas G. Green

901 Photo Avenue  
Anchorage, Alaska 99503  
(907) 563-8474  
FAX (907) 563-4572  
mcg@mcgalaska.com



911 West Eighth Avenue  
Anchorage, Alaska 99501  
907.279.0543 • 800.770.0543  
Fax: 907.276.7679  
Email: tedt@tnh-inc.com

March 2, 2007

Representative Craig Johnson  
State Capitol, Room 120  
Juneau, Alaska 99801-1182

Re: House Bill No. 151

Dear Representative Johnson:

I wanted to express my thanks to you for sponsoring HB 151, a very important piece of legislation which, if enacted, will be instrumental in ensuring the future viability of our firm. As you know, Tryck Nyman Hayes, Inc. is one of the oldest (54 years) and largest of the locally owned engineering firms in Alaska. In the past few years, we have seen a dramatic increase in litigation related to public projects, which is often unrelated to the soundness of our work but we seem to be frequently drawn in and have to spend scarce resources to defend ourselves.

One of the most disconcerting recent developments is that public agencies are increasingly attempting to transfer their liability in such situations to their design consultants through new indemnification language. In the past year we have seen new and often unfair language proposed in contracts from several State entities which do not use the contract model generated by ADOT&PF. In addition, we are now seeing such language in proposed contracts from local government entities which also are not using the ADOT model. We are not able to obtain insurance for much of this transferred liability, thus requiring us to either walk away from the contract or risk the future of our firm by assuming risk for which we are not covered by insurance and could not financially defend if called upon to do so.

It is my opinion that this situation, if left unchecked, will effectively eliminate many local A/E firms in Alaska, thus reducing competition and increasing costs in the State. Your legislation is extremely important to the future of our industry in Alaska.

Sincerely,

Ted B. Trueblood, P.E.

President

Engineering

Surveying

Landscape Architecture

March 9, 2007

Representative Craig Johnson  
State Capitol, Room 126  
Juneau, AK 99801-1182

Subject: HB-151

Dear: Representative Johnson

I am writing to express my support for HB-151. Architects Alaska has been providing Architectural Design Services throughout Alaska since 1950. I personally have been practicing in Alaska for more than 26 years. We employ approximately 30 professional in 2 offices located in Anchorage and Wasilla, Alaska.

Recently, within the past 5 to 7 years, we have been experiencing more and more difficulty in negotiating fair contract language with clients, especially governmental agencies. These clients have been attempting to shift their risk unduly to the design community. Contract language requires the design team to hold the client harmless for all of the client's acts. This includes the client employees and agents. We take exception to this and consistently find ourselves in the position of negotiating this type of language out of contact(s), which is time consuming, expensive and needless to say frustrating.

First of all the design team has no control over the client's action and should not be held accountable for such acts. Secondly, this is uninsurable language. Most clients do not understand this. As requested by most government contacts, we provided professional liability insurance, which helps reduce the client's risk. However this risk is not reduced if the contact language is uninsurable.

We support HB-151. The bill language provides a more equitable share of risk to each party with regards to who has control over the firm(s), agency(s), employee(s), agent(s) or individual(s) actions.

Thank you for addressing this matter.

Sincerely;



Mark A. Kneedler, AIA  
President

900 W 5th Avenue, Suite 403  
Anchorage, Alaska 99501-2029  
(907) 272-3567  
FAX (907) 277-1732

191 E. Swanson Avenue  
Wasilla, Alaska 99654-7025  
(907) 373-7503  
FAX (907) 376-3166

**Architects Alaska<sup>®</sup>**

*An Alaskan Corporation  
Architecture  
Facility Planning  
Interior Architecture*

# Kinney Engineering, LLC

750 West Dimond Boulevard  
Suite 203  
Anchorage, Alaska 99515  
(907) 346-2373  
Fax: (907) 349-7496

March 12, 2007

The Honorable Craig Johnson,  
State Capital, Room 126  
Juneau, Alaska 99801-1182

Subject: HB No. 151

Dear Representative Johnson:

I am writing this letter to endorse and strongly support HB No. 151 for the following reasons:


- 1) Errors and Omissions insurance covers negligence, errors, and omissions of the professional. These policies do not cover liabilities arising due to the negligence, errors, or omissions of the Owner. As such, unfair indemnification clauses may not provide the Owner with the liability coverage that they expect.
- 2) Some professionals will not compete for projects containing unfair indemnification requirements. As a result, the most qualified professional may not be selected for some projects and this is detrimental to the public interests.
- 3) Substantial time and expense is incurred by professionals and insurance companies as they review and assess the unique indemnification language contained in each professional service agreement. This raises the cost for public projects.
- 4) When a public agency shifts the liability for their actions to consultants, the public agency is likely to be less diligent and increase the likelihood of negligence, errors, and omissions. This is not beneficial to the public since there is still a negative impact to the public, regardless of who is held responsible.
- 5) In many cases when a problem arises, both the public agency and the design professional have contributed to the problem. Arbitrarily assigning liability to the design professional is unfair and may prevent the public agency from taking the appropriate counter measures to prevent similar problems in the future.

Reputable engineers, architects, surveyors, and scientists are agreeable to bear responsibility for our mistakes. We maintain comprehensive and expensive errors and omissions insurance policy to protect our clients should we were to be negligent in our professional services. However, it is unfair and not in the public interest for us to accept this risk for the performance of other parties whose actions are well beyond our control.

Please contact me at (907) 344-7575, or by e-mail at [randykinney.kinnevenq@alaska.net](mailto:randykinney.kinnevenq@alaska.net) if you require additional information.

Sincerely,

Kinney Engineering, LLC



James R. (Randy) Kinney, P.E., PTCE  
Member



engineering and constructing a better tomorrow

March 6, 2007

Representative Craig Johnson  
Alaska Legislature  
State Capitol, Room 126  
Juneau, Alaska 99801-1182

**RE: Support for House Bill 151, Indemnification Standardization for Alaskan Public Agencies**

Dear Representative Johnson:

MACTEC Engineering and Consulting, Inc., is pleased to register its support in favor of House Bill 151 requiring standardized indemnification and hold harmless provisions in professional services contracts for public agencies in Alaska. Passing of this bill will benefit not only the architect-engineer (A-E) industry, but also the State, the public agencies, and the people of Alaska.

Apportionment of joint liability on a comparative fault basis provides for indemnification to the extent that the professional A-E service provider is negligent. Any non-comparative fault apportionment is simply not fair and will ultimately result in higher project costs.

Responsible professional A-E service providers carry professional liability insurance for negligent acts, errors, or omissions, so it behooves public agencies to require indemnification for those items to take advantage of the provider's insurance coverage in the event that indemnification by the provider becomes necessary. Currently several public agencies' standard contracts include indemnification terms that are not covered by professional liability insurance, and the inclusion of those terms in a signed contract can negate all professional liability coverage. Standardizing indemnification terms protects the agency and the A-E service provider.

Sincerely,

MACTEC Engineering and Consulting

A handwritten signature in black ink, appearing to read "Jason Ditsworth".

Jason Ditsworth, P.E.  
Alaska Office Manager

*WC*  
QC/TE/cc/A0253G

# MARSH

**LeAnne Boldenow**

Vice President

Marsh USA Inc.  
1031 West 4th Avenue, Suite 400  
PO Box 107502  
Anchorage, AK 99510  
907 276 5617 Fax 907 276 6292  
leanne.boldenow@marsh.com  
www.marsh.com

March 05, 2007

Representative Craig Johnson  
State Capital, Room 126  
Juneau, AK 99801-1182

**Subject: House Bill 151**  
**Design Professional Contractual Language**

Dear Representative Johnson

I am writing to support the efforts of the HB 151 in direct alignment with Alaska Design Professional Council (APDC). I am a member of the APDC Contract Task Force Committee. As an insurance broker representing more than thirty (30) Design Professional Firms over the past ten (10) years, I have continually reviewed poorly written uninsurable contracts released by public agencies.

It is common for onerous indemnification clauses within contracts to require the design consultant to take on liabilities that are not their typical responsibility in the design aspect of the project. Insurance can generally cover liabilities that are TORT Law and would be the firm's responsibility even if a contract was not in place. Examples of a poorly written contract language that I identify for a design professional firm are:

- "Defend the public agency for any and all claims" Design professionals insurance will provide defense when the negligent act, error or omission of the consultant's work is identified as culpable. It is typical to see a contract that does not tie the liability to negligent acts, errors or omissions.
- Reference to the design professional consultant as a "contractor", which could hold the firm to a higher standard of care to include guarantee, warranty or certification of work. Design professional standard of care is not guaranteed, warranted or certified. A design consultant's work is intellectual property vs. an actual structure that is the final work product of a contractor construction firm.
- Giving the public agency ownership of the design teams drawings and documents. As design firm provides a professional service to their clients, not a product. A design professional intent is to protect against unauthorized reuse of their drawings and specifications by others.

I believe many public agencies attempt to write one contract that fits all aspects of a building project. As referenced above, when a contract is written for a general contracting construction firm it requires broader liability that is outside the standard of care of a design professional consultant. It is unfortunate these incorrectly written indemnification clauses in contracts are

Page 2  
March 05, 2007  
Representative Craig Johnson

forced on the design professional consultants' all around the State. The release of such a poorly written contract requires a design professional consultant firm's to make a risk management decision to determine if they want to take on the liabilities outside their insurance program. There are also firms out there that do not have a full understanding of the risk they are taking undertaking with such poorly written onerous contract.

I support this bill and commend you for your support and action. Please feel free to contact me with any additional questions or concerns. Thank you for your efforts on the design professional's behalf around the State.

Sincerely,



LeAnne Boldenow, CIC  
Vice President

Cc: Boyd Moganthaler, APDC Contract Task Force



March 5, 2007

Representative Craig Johnson  
State Capitol, Room 126  
Juneau, AK 99801-1182

Via email to [Lep\\_Craig\\_Johnson@legis.state.ak.us](mailto:Lep_Craig_Johnson@legis.state.ak.us)

RE: HB-151 Indemnification Provisions in Professional Contracts

SUBJ: Please Pass HB-151; Indemnification Reform is essential

Dear Representative Johnson:

Standardization of fair and balanced indemnification requirements in public contracts is long overdue and urgently needed. The public has much to gain by the indemnification standardization offered by HB-151, and much to lose if the status quo is maintained.

No single term in a professional services contract has more impact than indemnification. A fair and balanced indemnification requirement sets a positive tone for the project that follows, and the opposite is also true. One sided indemnification provisions that add large uninsurable risks for a consultant create an awkward environment that is adverse, defensive, more expensive and less creative. Ultimately, uninsurable indemnification requirements drive good professionals from the marketplace.

Good project development and design requires very collaborative effort between owner and designer, and a great deal of effort by both parties. A professional services contract that nurtures qualities of mutual respect, fairness, open communications and the free and open exchange of ideas is the first and perhaps the most important step in establishing a cooperative relationship and a successful outcome. A contract that chills this relationship between designer and owner leads to mediocrity at best, and sets a stage for disappointment and confrontation.

Public agencies hold enormous coercive and situational power, simply by the very nature of their control of rather large design and construction budgets. Consequently, contracting public agencies are in a position to impose unfair conditions in their agreements that violate what most would consider ethical business practices and fundamental fairness. In Alaska today, some agencies demand absolution from all liability and loss, except for loss resulting from the "Owner's gross negligence or willful misconduct." This exception is virtually impossible to prove, so the consultant is effectively responsible for everything, even acts of the public agency and others completely out of the consultant's control.

Professional Liability Insurance only covers damages caused by the negligence of the insured consultant relative to the accepted professional standard of care. Nationally, the accepted professional standard of care is "the ordinary and reasonable care required and established by expert testimony of what a reasonable and prudent professional would have done under the same or similar circumstances at the same time in the same locality."

Any firm, either through ignorance or otherwise, may assume a greater responsibility or higher standard of care, but professional liability insurance (PLI) will not cover the additional liability.

**Adams, Morgenthaler and Company, inc.**  
701 East Tudor Road • Suite 250 • Anchorage, AK 99503  
fax 907-257-9191 • [info@amc-engineers.com](mailto:info@amc-engineers.com) • phone 907-257-9100

Representative Craig Johnson  
Please Pass HB-151  
March 5, 2007  
Page 2

Without PLI insurance, consultants who accept onerous indemnifications and uninsurable standards are seldom capable of honoring them, and those who accede to broad, uninsurable contractual liability requirements do so at great peril to their livelihoods. For this reason, most consultants pay close attention to indemnification clauses in contracts, and spend considerable time attempting to negotiate fair and insurable terms.

At AMC Engineers we spend at least 100 hours per year of Principal time battling draconian indemnification language. There are currently 426 licensed architect/engineer corporations in Alaska. If only one quarter (25%) of them spend as much time as we do, the cumulative impact exceeds 10,000 hours of professional time per year! Adding in the time spent by insurance companies and their legal departments, the total cost to the public is dramatic. At the current average billing rate for Principal level architects and engineers of about \$150/hour, the wasted potential of A/E firms struggling with unfair indemnification language may exceed \$1,500,000 per year. These costs are eventually passed on to the public. There is no free lunch.

Paradoxically, consultants who truly understand risk are in the best position to help the Owner's project proceed smoothly, yet typically these professionals refuse to sign onerous indemnification clauses. This leaves the Owner with consultants who are motivated to be overly conservative and employ costly "defensive design" techniques to limit their risk or somehow make themselves "judgment proof". With one-sided indemnification clauses, not only does the cost of A/E services increase but the quality of service may be reduced. It's a double whammy.

The party with the most to gain from a project is the Owner and the equitable distribution of risk should acknowledge these factors. Design professionals do not have deep pockets and should not be expected to assume all risks.

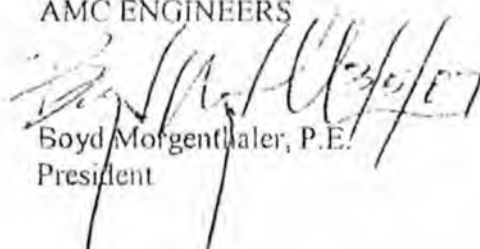
Fair practice requires that the Consultant should be responsible for their negligence, the Public Agency should be responsible for their negligence, and if there is joint negligence then the liability should be shared. Either way, the indemnification should be limited to exclude unrelated third party events.

This question of indemnification has been addressed by the State of Alaska Department of Transportation (ADOT), whose language has been adopted by many boroughs and agencies throughout Alaska for decades. HB-151 standardizes the ADOT approach. Even though the precise ADOT language is less than perfect, it is an excellent model to emulate. The language of HB151 retains the true essence and spirit of the current ADOT language.

Thank you for your efforts on behalf of the professional architects, engineers, and land surveyors, and the general public in Alaska. HB-151 is important legislation that will benefit all Alaskans.

Sincerely,

AMC ENGINEERS

  
Boyd Morgenthaler, P.E.  
President



**ENVIRONMENTAL ENGINEERING, HEALTH & SAFETY**  
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Juneau: 119 Seward Street #10, 99801, 907 586 6813 Fax: 586-6819  
Fairbanks: 2400 College Rd, 99709 907 452 5688 Fax: 452 5694  
info@nortechengr.com www.nortechengr.com

March 2, 2007

Representative Craig Johnson  
Chair, House Resources Committee  
Alaska State Legislature  
State Capitol, Room 126  
Juneau, AK 99801-1182

Re: House Bill 151 — Indemnification

Dear Representative Johnson:

On behalf of myself and **NORTECH**, I am writing to express our support of House Bill 151 and to the need for this legislation.

Presently, public agencies in Alaska have a wide variety of indemnification requirements. This bill will standardize indemnification requirements for all Public Agencies in Alaska, make the Architects/Engineers and other professionals responsible for their "negligent acts, errors or emissions", make each financially responsible for their own liabilities, fairly apportion joint liabilities on a comparative fault basis, and defines Public Agency for purposes of this bill.

The Alaska Department of Transportation & Public Facilities (DOT/PF) has language that is generally appropriate for contract indemnification purposes. HB 151 through legislation is requiring the use of indemnification contract clauses that are in place with DOT/PF and to be consistent with all Public Agencies.

Professional Services Contracts establish the basic framework between a project owner and a design company for design services associated with a particular project. In recent years, owners of some projects, generally government and quasi-government agencies, have required designers to assume additional liability, beyond the consultant's own negligence. The net effect of this action is to reduce agency risk by insulating the agency from its own negligence. This increases the liability insurance costs to the designers and creates a contract which is not fully insurable, or in some cases asks the designers to assume liability for which no insurance is available. **NORTECH** supports legislation that would prescribe indemnification language that is uniform for all state government agencies and assigns, and that requires each party to be financially responsible for their own liabilities and to fairly apportion joint liabilities on a comparative fault basis.

We encourage the House of Representatives to move HB 151 forward and enact this important legislation. Thank you for considering our position on this important issue.

Sincerely,

John Hargesheimer, PE, CIH,  
President



March 2, 2007

Representative Craig Johnson  
State Capitol, Room 126  
Juneau, Alaska 99801-1182

RE: HB151

Dear Representative Johnson:

Thank you for your time and efforts for introducing HB151 to the Legislature. A base line of understanding of indemnification is crucial to the community of Alaskan Architects and Engineers and all the various public agencies that utilize those professional services. Currently I believe there is a great deal of misunderstanding among public agencies and an increasing trend to attempt to contractually transfer undue and uninsurable responsibilities to the private sector.



There are industry standard contracts available in the marketplace that have achieved significant scrutiny and mutual acceptance by representatives of Owners, Project Managers, Architects, Engineers and Contractors, all involved in the Construction Industry and these have been time tested in courts of law. Never-the-less we are finding more and more public agencies developing their own contract form and we are seeing an increasing effort to escape their own liability and pass it on to the design professionals. Often times the language is so onerous that it extends our liability far beyond that which we can obtain professional liability insurance. This ultimately defeats their end goal because most design professionals are small businesses with limited resources. If the professional is not covered by insurance then the agency is left with no security or means of resource to cover an unfortunate liability. At best, they will capture what limited resources the firm may have and likely drive them out of business whereas with an equitable contract there may have been insurance available (which is required in all public contracts I have seen). So, the irony is that the agencies mandate the professional purchase liability insurance at great cost and then force them to sign a contract with an indemnification clause that may be specifically excluded in the insurance coverage.

ARCHITECTURE  
PLANNING  
INTERIORS  
DEVELOPMENT

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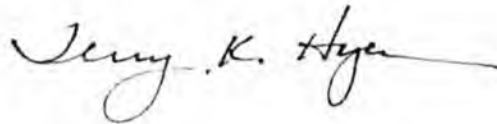
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Representative Johnson  
March 2, 2007  
Page 2

Fundamentally the State should support fairness and equity in public contracts such that the parties to the contract are responsible for their actions. HB151 will help ensure that equitable treatment will prevail.

I welcome any questions or support I may offer in this pursuit.

Sincerely,  
ECI/Hyer, Inc.



Terry K. Hyer, AIA

TH/snf





March 2, 2007

Representative Craig Johnson  
State Capitol, Room 126  
Juneau, AK 99801-1182

RE: HB151

Dear Representative Johnson;

I am writing in support of House Bill 151 whose purpose is to bring equity to the question of Indemnification and Hold Harmless clauses that state agencies, quasi public agencies, municipalities and other political subdivisions use.

What this bill seeks to remedy is the situation where the consultant will be held to defend an owner unless the alleged liability is based upon the sole negligence of that owner. This is uninsurable by the Consultant, and few if any of Alaska's design professionals have the financial resources to self insure this risk.

Fair practice should be implemented here. The consultant should be responsible for his negligence, the owner responsible for their negligence, and if there is joint negligence then the liability should be shared. Either way, the indemnification should be limited to exclude unrelated third party events.

As a small, employee owned Alaskan business I can tell you that we are not in a financial position to take on full liability and hold harmless the state agencies that we wish to work for. Nor will our insurance company permit it.

This bill, modeled on the language use by the State of Alaska DOT, seeks to do just that.

I urge your support for this bill.

Sincerely,  
EHS-Alaska, Inc.

A handwritten signature in cursive script, appearing to read "Robert A. French".

Robert A. French, P.E.  
Principal-in-Charge

**ENGINEERING, HEALTH & SAFETY CONSULTANTS**

March 1, 2007

Representative Craig Johnson  
Alaska State legislature  
House of Representatives  
Juneau, Alaska

RE: HB 151, Indemnification for Professional Services Contracts

Dear Craig:

We would like to express our support of prescribing uniform contract indemnification language for all state agencies within the state of Alaska. We have experienced first hand difficulties in conducting negotiations of contracts which contain uninsurable contract clauses.


Several state agencies have recently issued contracts which have been found to be uninsurable. When a contract cannot be insured, should a claim arise the state ends up without restitution and a local business will very likely end up liquidated.

A uniform state-wide professional services contract will save the state and the industry time and resources and is just plain good business practice. There are industry standard contracts available that have been tested nationally and locally and have withstood scrutiny from both sides of the table.

We urge the legislature to hear and ultimately to pass HB 151, to provide a fair and equitable business climate within the State of Alaska.

Sincerely,  
ECI/Hyer, Inc.

Terry Hyer  
Brian Meissner  
Mary G. Knopf



ARCHITECTURE  
PLANNING  
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March 7, 2007

Representative Craig Johnson  
State Capitol, Room 126  
Juneau, AK 99801-1182

Subject: HB 151 – Contractual Indemnification

Dear Mr. Johnson:

The purpose of this correspondence is to share my support with respect to proposed HB 151 with respect to Contractual Indemnification Language.

As a practicing Engineer and business owner, I feel that it is important for contracts between the State and Professional Service providers to be fair to both parties. In addition, contract provisions need to be reasonably insurable by our insurance providers without excessive costs that will eventually trickle down and be paid for by the public.

Thank you for your work on the proposed bill.

Sincerely,

A handwritten signature in black ink, appearing to be 'C. Hay', written in a cursive style.

Calvin C. Hay, P.E.  
5520 E. 112<sup>th</sup> Avenue  
Anchorage, AK 99516

cc: Senator Con Bunde  
cc: Representative Bob Lynn  
cc: Representative Ralph Samuels

Shawn Florio, P.E.  
2020 Shore Drive  
Anchorage, Alaska 99515

March 8, 2007

Representative Craig Johnson  
State Capitol, Room 126  
Juneau, AK 99801-1182

RE: HB151 – Contractual Indemnification

Representative Johnson:

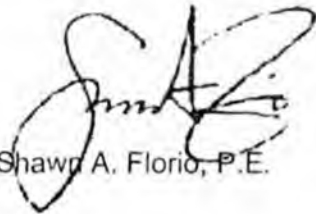
Thank you for sponsoring HB151. Although I am writing on my own behalf as a licensed engineer in the State of Alaska, I am familiar with the subject as the immediate past president of the Alaska Professional Design Council (APDC). For your reference, APDC is a consortium of professional societies that represents approximately 5,000 licensed architects, engineers, land surveyors, landscape architects and other design professionals.

Over the past few years, my involvement with APDC has exposed me to requests by owners of some projects – many times government agencies – to contractually indemnify uninsurable risks to design professionals. Many times these risks are uninsurable by the designer or his/her firm since the risk is beyond their own limit of negligence. This places the design professional in the precarious position of having to confront their client during contract negotiations with the issue, or alternatively assuming the uninsurable liability.

I support HB151 in its current form. HB151 provides uniform language for all state agencies and requires each party to be financially responsible for their own liabilities and fairly apportions joint liabilities on a comparative fault basis.

Thank you for your efforts.

Respectfully,



Shawn A. Florio, P.E.

---

**From:** John Crittenden [jcrittenden@architectsalaska.com]  
**Sent:** Friday, March 02, 2007 4:44 PM  
**To:** Rep. Craig Johnson  
**Subject:** HB 151

Representative Johnson

I support this contract language. It will help to clarify responsibilities, and to clarify how indemnification clauses are supposed to work. Many contracting agencies attempt to put in clauses that try to avoid any responsibility for errors on the part of the contracting agency. This is a goose and gander issue. Please try to get this passed.

John Crittenden

John Crittenden AIA, Principal

**Architects Alaska**<sup>®</sup>  
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jcrittenden@architectsalaska.com

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3/3/2007

March 7, 2007

Representative Craig Johnson  
State Capitol, Room 126  
Juneau, AK 99801-1182

Subject: HB 151 – Contractual Indemnification

Dear Mr. Johnson:

The purpose of this correspondence is to share my support with respect to proposed HB 151 with respect to Contractual Indemnification Language.

As a practicing Engineer and business owner, I feel that it is important for contracts between the State and Professional Service providers to be fair to both parties. In addition, contract provisions need to be reasonably insurable by our insurance providers without excessive costs that will eventually trickle down and be paid for by the public.

Thank you for your work on the proposed bill.

Sincerely,

A handwritten signature in black ink, appearing to be 'C. Hay', written in a cursive style.

Calvin C. Hay, P.E.  
5520 E. 112<sup>th</sup> Avenue  
Anchorage, AK 99516

cc: Senator Con Bunde  
cc: Representative Bob Lynn  
cc: Representative Ralph Samuels

# ALASKA STATE LEGISLATURE

Interim:  
716 West 4<sup>th</sup> Avenue, Suite 640  
Anchorage, Alaska 99501  
(907) 269-0200  
FAX (907) 269-0204  
Rep\_Craig\_Johnson@legis.state.ak.us



Session:  
State Capitol, Room 126  
Juneau, Alaska  
99801-1182  
(907) 465-4993  
FAX (907) 465-3872

REPRESENTATIVE CRAIG JOHNSON  
HOUSE DISTRICT 28

## MEMORANDUM

TO: Representative Bob Lynn, Chairman  
House State Affairs Committee

FROM: Representative Craig Johnson 4

DATE: March 8, 2007

RE: Hearing Request for HIB 151, Indemnification and Hold Harmless

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I respectfully request a hearing in the House State Affairs Committee for House Bill 151, "An Act requiring an indemnification and hold harmless provision in professional services contracts of state agencies, quasi-public agencies, municipalities, and political subdivisions."

Attached is a packet of information for HIB 151. This includes the current version of the bill, the sponsor's statement, and other information relevant to the bill.

If you have any questions or need additional information, feel free to contact me or my aide, Debbie Higgins, at extension 3715.

Thank you for your consideration.