

FILED

State of Arizona
Senate
Forty-second Legislature
Second Regular Session
1996

**Jane Dee Hull
Secretary of State**

CHAPTER 195

SENATE BILL 1207

AN ACT

AMENDING SECTIONS 32-1159, 34-226 AND 41-2501, ARIZONA REVISED STATUTES;
AMENDING TITLE 41, CHAPTER 23, ARTICLE 6, ARIZONA REVISED STATUTES, BY ADDING
SECTION 41-2586; RELATING TO INDEMNITY AGREEMENTS IN CONSTRUCTION AND
ARCHITECT-ENGINEER CONTRACTS.

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Legislative intent

3 It is the intent of the legislature to assure that the doctrine of
4 several liability applies to all personal injury and property damage claims
5 against any party to a contract or subcontract for the design or construction
6 of public works performed for a public entity covered by this act.

7 Sec. 2. Section 32-1159, Arizona Revised Statutes, is amended to read:

8 32-1159. Indemnity agreements in construction and architect-
9 engineer contracts void; definitions

10 A. A covenant, clause or understanding in, collateral to or affecting
11 a construction contract or architect-engineer professional service contract
12 that purports to indemnify, ~~or~~ TO hold harmless OR TO DEFEND the promisee
13 FROM OR against liability for loss or damage resulting from the sole
14 negligence of the promisee or ~~his~~ THE PROMISEE'S agents, employees or
15 indemnitee is against the public policy of this state and is void.

16 B. Notwithstanding subsection A, a contractor who is responsible for
17 the performance of a construction contract may fully indemnify a person for
18 whose account the construction contract is not being performed and who, as
19 an accommodation, enters into an agreement with the contractor that permits
20 the contractor to enter on or adjacent to its property to perform the
21 construction contract for others.

1 C. THIS SECTION APPLIES TO ALL CONTRACTS ENTERED INTO BETWEEN PRIVATE
2 PARTIES. THIS SECTION DOES NOT APPLY TO:

3 1. AGREEMENTS TO WHICH THIS STATE OR A POLITICAL SUBDIVISION OF THIS
4 STATE IS A PARTY, INCLUDING INTERGOVERNMENTAL AGREEMENTS AND AGREEMENTS
5 GOVERNED BY SECTIONS 34-226 AND 41-2586.

6 2. AGREEMENTS ENTERED INTO BY AGRICULTURAL IMPROVEMENT DISTRICTS UNDER
7 TITLE 48, CHAPTER 17.

8 ~~C~~ D. In this section:

9 1. "Architect-engineer professional service contract" means a written
10 or oral agreement relating to the design, ~~of~~ DESIGN-BUILD, CONSTRUCTION
11 ADMINISTRATION, STUDY, EVALUATION OR OTHER PROFESSIONAL SERVICES FURNISHED
12 IN CONNECTION WITH any ACTUAL OR PROPOSED construction, alteration, repair,
13 maintenance, moving, demolition or excavation of any structure, street or
14 roadway, appurtenance or other development or improvement to land.

15 2. "Construction contract" means a written or oral agreement relating
16 to the construction, alteration, repair, maintenance, moving, demolition or
17 excavation or other development or improvement to land.

18 Sec. 3. Section 34-226, Arizona Revised Statutes, is amended to read:

19 34-226. Indemnity agreements in construction and
20 architect-engineer contracts void; definitions

21 A. A covenant, clause or understanding in, collateral to or affecting
22 a construction contract OR SUBCONTRACT or architect-engineer professional
23 service contract OR SUBCONTRACT ~~which~~ THAT purports to indemnify, ~~or~~ TO hold
24 harmless OR TO DEFEND the promisee OF, FROM OR against liability for loss or
25 damage resulting from the ~~sole~~ negligence of the promisee, ~~his~~ OR THE
26 PROMISEE'S agents, employees or indemnitee is AGAINST THE PUBLIC POLICY OF
27 THIS STATE AND IS void.

28 B. ~~Nothing contained in this section shall prevent~~ NOTWITHSTANDING
29 SUBSECTION A, a contractor WHO IS responsible for the performance of a
30 construction contract OR SUBCONTRACT ~~from~~ MAY fully ~~indemnifying~~ INDEMNIFY
31 a person, firm, corporation, state or other agency for whose account the
32 construction contract OR SUBCONTRACT is not being performed ~~but~~ AND who, as
33 an accommodation, enters into an agreement with the contractor ~~permitting~~
34 ~~such~~ THAT PERMITS THE contractor to enter ~~upon~~ ON or adjacent to its property
35 ~~for the purpose of performing such~~ TO PERFORM THE construction contract OR
36 SUBCONTRACT for others.

37 C. In this section:

38 1. "Architect-engineer PROFESSIONAL SERVICE contract OR SUBCONTRACT"
39 means a written or oral agreement relating to the design, ~~of~~ CONSTRUCTION
40 ADMINISTRATION, STUDY, EVALUATION OR OTHER PROFESSIONAL SERVICES FURNISHED
41 IN CONNECTION WITH any ACTUAL OR PROPOSED construction, alteration, repair,
42 maintenance, moving, demolition or excavation of a structure, ~~highway~~ STREET
43 OR ROADWAY, appurtenance or other development or improvement to land.

1 ~~D. 2. In this section~~ "Construction contract OR SUBCONTRACT" means
2 a written or oral agreement relating to the construction, alteration, repair,
3 maintenance, moving, demolition or excavation ~~of a structure, highway,~~
4 ~~appurtenance~~ or other development or improvement to land.

5 Sec. 4. Section 41-2501, Arizona Revised Statutes, is amended to read:
6 41-2501. Applicability

7 A. This chapter applies only to procurements initiated after January
8 1, 1985, unless the parties agree to its application to procurements
9 initiated before such date.

10 B. This chapter applies to every expenditure of public monies,
11 including federal assistance monies except as otherwise specified in section
12 41-2637, by this state, acting through a state governmental unit as defined
13 in this chapter, under any contract, except that this chapter does not apply
14 to either grants or contracts between this state and its political
15 subdivisions or other governments, except as provided in article 10 of this
16 chapter. This chapter also applies to the disposal of state materials.
17 Nothing in this chapter or in rules adopted under this chapter shall prevent
18 any state governmental unit or political subdivision from complying with the
19 terms and conditions of any grant, gift, bequest or cooperative agreement.

20 C. All political subdivisions and other local public agencies of this
21 state may adopt all or any part of this chapter and the rules adopted
22 pursuant to this chapter.

23 D. The Arizona board of regents, the legislative and judicial branches
24 of state government and the state compensation fund are not subject to the
25 provisions of this chapter except as prescribed in subsection E of this
26 section.

27 E. The Arizona board of regents and the judicial branch shall adopt
28 rules prescribing procurement policies and procedures for themselves and
29 institutions under their jurisdiction. The rules must be substantially
30 equivalent to the policies and procedures prescribed in this chapter.

31 F. The Arizona state lottery commission is exempt from the provisions
32 of this chapter for procurement relating to the design and operation of the
33 lottery or purchase of lottery equipment, tickets and related materials. The
34 executive director of the Arizona state lottery commission shall adopt rules
35 substantially equivalent to the policies and procedures in this chapter for
36 procurement relating to the design and operation of the lottery or purchase
37 of lottery equipment, tickets or related materials. All other procurement
38 shall be as prescribed by this chapter.

39 G. The Arizona health care cost containment system administration is
40 exempt from the provisions of this chapter for provider contracts pursuant
41 to section 36-2904, subsection A and contracts for goods and services
42 including program contractor contracts pursuant to title 36, chapter 29,
43 articles 2 and 3. All other procurement, including contracts for the

1 statewide administrator of the program pursuant to section 36-2903,
2 subsection C, shall be as prescribed by this chapter.

3 H. Arizona industries for the blind is exempt from the provisions of
4 this chapter for purchases of finished goods from members of national
5 industries for the blind and for purchases of raw materials for use in the
6 manufacture of products for sale pursuant to section 41-1972. All other
7 procurement shall be as prescribed by this chapter.

8 I. Arizona correctional industries is exempt from the provisions of
9 this chapter for purchases of raw materials and supplies to be used in the
10 manufacture of products for sale entered into pursuant to section 41-1622.
11 All other procurement shall be as prescribed by this chapter.

12 J. The state transportation board and the director of the department
13 of transportation are exempt from the provisions of this chapter OTHER THAN
14 SECTION 41-2586 for the procurement of construction or reconstruction,
15 including engineering services, of transportation facilities or highway
16 facilities.

17 K. The Arizona highways magazine is exempt from the provisions of this
18 chapter for contracts for the production, promotion, distribution and sale
19 of the magazine and related products and for contracts for sole source
20 creative works entered into pursuant to section 28-1883, subsection A,
21 paragraph 5. All other procurement shall be as prescribed by this chapter.

22 L. The secretary of state is exempt from the provisions of this
23 chapter for contracts entered into pursuant to section 41-1012 to publish and
24 sell the administrative code. All other procurement shall be as prescribed
25 by this chapter.

26 M. The provisions of this chapter are not applicable to contracts for
27 professional witnesses if the purpose of such contracts is to provide for
28 professional services or testimony relating to an existing or probable
29 judicial proceeding in which this state is or may become a party or to
30 contract for special investigative services for law enforcement purposes.

31 N. The head of any state governmental unit, in relation to any
32 contract exempted by this section from the provisions of this chapter, has
33 the same authority to adopt rules, procedures or policies as is delegated to
34 the director pursuant to this chapter.

35 O. Agreements negotiated by legal counsel representing this state in
36 settlement of litigation or threatened litigation are exempt from the
37 provisions of this chapter.

38 P. The provisions of this chapter are not applicable to contracts
39 entered into by the department of economic security with a provider licensed
40 or certified by an agency of this state to provide child day care services
41 or with a provider of family foster care pursuant to section 8-503 or 36-554,
42 to contracts entered into with area agencies on aging created pursuant to the
43 older Americans act of 1965, 42 U.S.C. section 3001, as amended, or to
44 contracts for services pursuant to title 36, chapter 29, article 2.

1 Q. The department of health services may not require that persons with
2 whom it contracts follow the provisions of this chapter for the purposes of
3 subcontracts entered into for the provision of the following:

- 4 1. Mental health services pursuant to section 36-189, subsection B.
5 2. Services for the seriously mentally ill pursuant to title 36,
6 chapter 5, article 10.
7 3. Drug and alcohol services pursuant to section 36-141.
8 4. Domestic violence services pursuant to title 36, chapter 30,
9 article 1.

10 R. The department of health services is exempt from the provisions of
11 this chapter for contracts for services of physicians at the Arizona state
12 hospital.

13 S. Contracts for goods and services approved by the fund manager of
14 the public safety personnel retirement system are exempt from the provisions
15 of this chapter.

16 T. The Arizona department of agriculture is exempt from this chapter
17 with respect to contracts for private labor and equipment to effect cotton
18 or cotton stubble plow-up pursuant to rules adopted under title 3, chapter
19 2, article 1. On or before September 1 each year, the director of the
20 department of agriculture shall establish and announce costs for each acre
21 of cotton or cotton stubble to be abated by private contractors.

22 U. The state parks board is exempt from the provisions of this chapter
23 for purchases of guest supplies and items for resale such as food, linens,
24 gift items, sundries, furniture, china, glassware and utensils for the
25 facilities located in the Tonto natural bridge state park.

26 V. The state parks board is exempt from the provisions of this chapter
27 for the purchase, production, promotion, distribution and sale of
28 publications, souvenirs and sundry items obtained and produced for resale.

29 Sec. 5. Title 41, chapter 23, article 6, Arizona Revised Statutes, is
30 amended by adding section 41-2586, to read:

31 41-2586. Indemnity agreements in construction and architect-
32 engineer contracts void; definitions

33 A. A COVENANT, CLAUSE OR UNDERSTANDING IN, COLLATERAL TO OR AFFECTING
34 A CONSTRUCTION CONTRACT OR SUBCONTRACT OR ARCHITECT-ENGINEER PROFESSIONAL
35 SERVICE CONTRACT OR SUBCONTRACT THAT PURPORTS TO INDEMNIFY, TO HOLD HARMLESS
36 OR TO DEFEND THE PROMISEE OF, FROM OR AGAINST LIABILITY FOR LOSS OR DAMAGE
37 RESULTING FROM THE NEGLIGENCE OF THE PROMISEE OR THE PROMISEE'S AGENTS,
38 EMPLOYEES OR INDEMNITEE IS AGAINST THE PUBLIC POLICY OF THIS STATE AND IS
39 VOID.

40 B. NOTWITHSTANDING SUBSECTION A, A CONTRACTOR WHO IS RESPONSIBLE FOR
41 THE PERFORMANCE OF A CONSTRUCTION CONTRACT OR SUBCONTRACT MAY FULLY INDEMNIFY
42 A PERSON, FIRM, CORPORATION, STATE OR OTHER AGENCY FOR WHOSE ACCOUNT THE
43 CONSTRUCTION CONTRACT OR SUBCONTRACT IS NOT BEING PERFORMED AND WHO, AS AN
44 ACCOMMODATION, ENTERS INTO AN AGREEMENT WITH THE CONTRACTOR THAT PERMITS THE

1 CONTRACTOR TO ENTER ON OR ADJACENT TO ITS PROPERTY TO PERFORM THE
2 CONSTRUCTION CONTRACT OR SUBCONTRACT FOR OTHERS.

3 C. IN THIS SECTION:

4 1. "ARCHITECT-ENGINEER PROFESSIONAL SERVICE CONTRACT OR SUBCONTRACT"
5 MEANS A WRITTEN OR ORAL AGREEMENT RELATING TO THE DESIGN, CONSTRUCTION
6 ADMINISTRATION, STUDY, EVALUATION OR OTHER PROFESSIONAL SERVICES FURNISHED
7 IN CONNECTION WITH ANY ACTUAL OR PROPOSED CONSTRUCTION, ALTERATION, REPAIR,
8 MAINTENANCE, MOVING, DEMOLITION OR EXCAVATION OF A STRUCTURE, STREET OR
9 ROADWAY, APPURTENANCE OR OTHER DEVELOPMENT OR IMPROVEMENT TO LAND.

10 2. "CONSTRUCTION CONTRACT OR SUBCONTRACT" MEANS A WRITTEN OR ORAL
11 AGREEMENT RELATING TO THE CONSTRUCTION, ALTERATION, REPAIR, MAINTENANCE,
12 MOVING, DEMOLITION OR EXCAVATION OR OTHER DEVELOPMENT OR IMPROVEMENT TO LAND.

13 Sec. 6. Joint legislative study committee on liability in
14 public works design and construction contracts

15 A. The joint legislative study committee on liability in public works
16 design and construction contracts is established consisting of the following
17 members:

18 1. Three members of the senate appointed by the president of the
19 senate, not more than two of whom shall be members of the same political
20 party. The president shall designate one member as cochairman.

21 2. Three members of the house of representatives appointed by the
22 speaker of the house of representatives, not more than two of whom shall be
23 members of the same political party. The speaker of the house of
24 representatives shall designate one member as cochairman.

25 B. The committee shall evaluate and make recommendations on the
26 following:

27 1. Methods to establish a risk finance and transfer program to provide
28 liability coverage for this state and political subdivisions of this state
29 and architects, engineers, contractors and subcontractors engaged in the
30 design and construction of public works projects.

31 2. Methods to reduce the cost of construction of public works through
32 the use of risk pooling, market leverage opportunities, reductions in
33 transaction costs, alternative dispute resolution and improving and expanding
34 loss and accident prevention efforts by public and private sector
35 participants in public works construction and design projects.

36 3. Methods to provide the public sector, including this state and
37 political subdivisions of this state, and architects, engineers, contractors
38 and subcontractors with adequate insurance and liability coverage, including
39 limits of coverage and comprehensive coverage to adequately protect the
40 interests of both public and private sector participants in public works
41 design and construction projects.

42 4. Methods to encourage both public and private sector participants
43 in public works construction projects and to reduce loss experience records,
44 to encourage reductions in program costs for risk management and to explore

1 alternatives to traditional means of insuring professional registrants and
2 contractors licensed under title 32, Arizona Revised Statutes.

3 5. Methods to encourage and to maximize opportunities for minority and
4 women-owned businesses and for small private sector participants by reducing
5 or eliminating liability and risk transfer cost and availability problems,
6 and to provide better methods of administration, claims management, loss
7 prevention and safety on public works construction projects.

8 6. Methods to establish cooperation between public and private sector
9 participants by encouraging partnering programs to reduce cost, improve
10 quality and safety and improve loss prevention on public sector design and
11 construction projects.

12 C. The committee may establish working groups of interested persons
13 to assist the committee in making evaluations and recommendations.

14 D. The department of administration and legislative staff shall
15 provide technical assistance and staff support to the committee.

16 E. The committee shall submit a final report containing the
17 committee's findings and recommendations, including proposed legislation
18 implementing such recommendations, to the president of the senate, the
19 speaker of the house of representatives, and the governor on or before
20 December 1, 1996.

21 Sec. 7. Saving clause

22 This act does not affect contracts or agreements entered into before
23 the effective date of this act.

24 Sec. 8. Delayed effective date

25 Sections 1, 2, 3, 4, 5 and 7 are effective from and after June 30,
26 1998.

27 Sec. 9. Delayed repeal

28 Section 6 of this act is repealed from and after January 1, 1997.

APPROVED BY THE GOVERNOR APRIL 16, 1996.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 17, 1996.