



# Associated Subcontractors of Massachusetts, Inc.

One Washington Mall, 5th Floor, Boston, MA 02108

TEL: 617-742-3412 • FAX: 617-742-2331

E-Mail: mail@associatedsubs.com • Web: www.associatedsubs.com

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## Testimony in Support of S.1406

### AN ACT TO LIMIT INDEMNITY AND INSURANCE RESPONSIBILITY

### FOR GENERAL CONTRACTORS AND SUBCONTRACTORS IN CONSTRUCTION WORK

Before the Joint Committee on State Administration and Regulatory Oversight

June 18, 2009

S.1406 brings fairness to construction contracts by prohibiting indemnity and insurance clauses that force any parties to pay for injury or damage they did not cause.

#### **BACKGROUND: Current industry practice, and the need for corrective legislation:**

In construction contracts today, general contractors increasingly require subcontractors to indemnify and insure them against all claims for injury or damage, even if some or most of the injury or damage was caused by the general contractor and not by the subcontractor. In other words, the subcontractor is forced by contract to pay for the general contractor's negligence.

The present law, c. 149, §29C, was intended to remedy this inequity. It prohibits any contract provision requiring a subcontractor to indemnify another party for injury or damage not caused by the subcontractor. Unfortunately, the courts have construed it so narrowly that it now prohibits indemnification only where the injury or damage was not caused in any way by the subcontractor. Under the present rulings, as long as the subcontractor is at least 1% responsible, he can be obligated to defend and reimburse a general contractor who is 99% responsible – a situation inherently unfair.

#### **REMEDY: S.1406 corrects this fundamental inequity in three ways:**

- 1) **It restores the statute to its original intent** and offsets the court decisions that weakened it. Specifically, it prohibits provisions in construction contracts that force a subcontractor to indemnify any other party to the contract (e.g., a general contractor) and pay the costs for injury or damages caused by that other party's negligence. In technical terms, it limits any indemnification obligation only to the proportional extent the negligence of the indemnitor (or its agents or employees) proximately caused the injury or damage.
- 2) **It extends similar protection to general contractors** so that they are not forced by contract to indemnify an owner or any other party and pay for injury or damage caused by that party's negligence. It makes every party to the construction contract who contributes to injury or damage share proportionately in the costs.
- 3) **It adds protection against unfair insurance requirements** and prevents any party from circumventing the ban on unfair indemnity clauses by requiring another party to provide "additional insured" coverage that will pay for the first party's negligence.

**Like the present statute, however, S.1406 does NOT affect responsibility to plaintiffs.** Under the principle of joint and several liability, each and every party who contributes to the injury or damage remains 100% responsible to the plaintiff, and the plaintiff may collect 100% of the damages from any one of them. The bill does not change the rights of injured plaintiffs. It only changes how the responsible parties agree by contract to share the costs (or reimburse each other) after the plaintiffs have been paid.

**Concerns expressed by opponents of the measure are unfounded:**

Opponents will say that the free market works fine for settling payment responsibility between the parties. In fact it does not. Construction contracts are not contracts between equal parties, as the legislature itself recognized in passing c.149 §29C. The party giving the contract always has greater leverage, and uses it to shift risk and responsibility down the tiers to the subcontractors, through indemnity and insurance clauses. This is standard industry practice, and subcontractors do not have the negotiating leverage to overcome it.

Opponents also say that a proportional system would be unprecedented. This is not true. It is what was contemplated by the Legislature in enacting c.149 §29C. Otherwise, there would be no need of the statute.

Finally, opponents say the courts would be clogged with litigation as parties argue over degree of fault, depriving injured claimants of speedy payment in the process. In point of fact, the cases will go to court anyway, since contractor negligence of 50% or more must first be established for a plaintiff to win damages. The litigation does not slow down payment to plaintiffs in any way. If contractor negligence is established, the plaintiff may then collect in full from any of the responsible parties. Litigation to determine the proportional degree of negligence and re-allocation of costs among the responsible parties takes place after the plaintiff has been paid.

**In sum, S.1406 restores fairness to Massachusetts indemnity law, in keeping with the intent of c.149 §29C.** It is also consistent with similar statutes in other states, as well as provisions of the American Institute of Architects (AIA) contracts, which are recognized as the industry standard. S. 1406 is long overdue, and we urge the Committee to give it a favorable report.

Respectfully,

Monica Lawton, CEO  
Associated Subcontractors of Massachusetts  
617-742-3412  
mlawton@associatedsubs.com

The Associated Subcontractors of Massachusetts, Inc. (ASM), founded in 1950, is a statewide trade association representing specialty contractors and suppliers in the commercial construction industry. Members include over 400 companies, both large and small, union and open shop, who together employ over 25,000 workers on private and public building construction in the Commonwealth.