**DATE: June 14, 2016**

**TO: The Honorable Mark Stone, Chair, Assembly Judiciary Committee**

**The Honorable Don Wagner, Vice Chair, Assembly Judiciary Committee**

**Members, Assembly Judiciary Committee**

**FROM: Air Conditioning Sheet Metal Association (ACSMA)**

**Associated General Contractors (AGC)**

**California Association of Sheet Metal and Air Conditioning Contractors, National Association**

**California Building Industry Association (CBIA)**

**California Chapters of the National Electrical Contractors Association (NECA)**

**California Legislative Conference of the Plumbing, Heating and Piping Industry (CLC)**

**California –Nevada Conference of Operating Engineers**

**California State Association of Electrical Workers**

**California State Council of Laborers**

**California State Pipe Trades Council**

**Construction Employers Association (CEA)**

**Northern California Allied Trades (NCAT)**

**Sheet Metal Workers**

**Southern California Contractors Association (SCCA)**

**State Building and Construction Trades Council of California**

**United Contractors (UCON)**

**Wall And Ceiling Alliance (WACA)**

**RE: SB 885 (Wolk) - Oppose**

On behalf of the above-referenced construction organizations, which are comprised of a significant number of all commercial, industrial and highway contractors and subcontractors in California, and the labor organizations they partner with, we are writing to convey our continued opposition to SB 885, as amended.

As with 2010’s SB 972, sponsors of this bill contend that they are pursuing this measure because their errors and omissions policies do not provide coverage for the defense of claims against other persons and other entities involved in construction projects. This assertion ignores several facts; 1) the underlying claims often relate to design professionals but cannot be brought against them directly, 2) eliminating defense obligations for design professionals’ increases costs for project owners and contractors, and 3) it is questionable public policy to reduce defense obligations for one party due to a purported defect in the insurance market.

Recent amendments do nothing to resolve the afore-mentioned issues, as they simply provide that the exemption from having to provide a defense does not apply if there is a general liability policy in place that covers defense obligations, or if the design professional is party to a design build contract. The fundamental problem with the bill remains intact; design professionals want to avoid having to provide a defense based on a claimed lack of insurance.

Under current practice, when a party brings suit against a project owner for what they contend is an issue related to project design; the project owner will tender a defense obligation to the design professional and the contractor. This joins the design professional to the claim and starts the defense expenses. Because defense costs start accruing immediately there is an inherent interest in expediting the claims resolution process. In fact, in UDC-Universal Development, L.P. v. CH2M Hill, 181 Cal. App. 4th 10, 23 (2010), the Court of Appeal applied an existing statute (Civil Code Section 2778) and a Supreme Court case (Crawford) that construed the general rules applicable to indemnity, and held that design professionals are subject to the same duties as anyone else who signs an indemnity agreement. However, according to the bill’s proponents, because the claim was brought against the project owner, versus the design professional, insurance will not cover the cost to defend the owner and as such the design professional should not have to bear any of the defense costs until the conclusion of the suit. We question the accuracy of this claim and whether or not costs associated with providing a defense for a design professional’s negligent acts would in fact be losses that would be payable under a design professional’s error and omissions insurance, provided they have sufficient coverage.

Pursuant to this measure, the design professional would have no duty to defend claims against other persons or entities until the design professional’s degree of fault was as determined by a court or through arbitration; this would place all of the defense obligations on the contractor. It would effectively require owners and others to take the design professional all the way through trial just to get defense fees and costs reimbursed, which would result in additional un-reimbursable recovery costs. To the extent that a design professional was not involved in the defense it is unclear how forthcoming they would be with necessary documents related to the claim since they would have no skin in the game.

In addition, SB 885 jeopardizes delivery of needed public works projects. Shifting the costs of defense obligations to public entities and contractors will result in delays and increased costs in project delivery. These negative impacts on public works projects will likely lead to a reduction of infrastructure construction with no reduction in costs to the taxpayers. This will impact employment of construction workers. If contractors are forced to shoulder the costs of litigation in these cases they will have less capital available to bid on new projects that would employ construction workers.

SB 885 would adversely impact project owners, contractors, subcontractors, construction industry employees and ultimately taxpayers, whose costs will likely go up as a result of the claims delays. Further, SB 885 does nothing to resolve the purported insurance issue. Instead, it simply gives design professionals a free pass based on their assertion that they can’t purchase insurance to cover what may in fact be their own negligence.

It is for the reasons above that these groups must respectfully oppose this measure.