

**Testimony:**

Devon Seal, PE, President  
Ohio Society of Professional Engineers

**To:**

Ohio House Civil Justice Committee  
The Honorable Steve Hambley, Chair

**Date: June 2, 2020**

**Regarding:**

House Bill 159, Indemnity Provisions in Professional Design Contracts  
Related to Public Improvements

Chairman Hambley, Vice Chair Patton, Ranking Member Brown, and members of the House Civil Justice Committee. I am Devon Seal, president of the Ohio Society of Professional Engineers (OSPE), the single most powerful voice representing professional engineers in Ohio.

Thank you for allowing me the opportunity to testify in support of House Bill 159, which deals with the regulation of indemnity provisions in professional design contracts related to public improvements.

**On June 21, 2019, the OSPE Board of Directors voted unanimously in support of House Bill 159, and the effort to standardize indemnity provisions in professional design contracts related to public improvements.**

I am a registered professional engineer (PE) in Ohio, and work for an employee-owned engineering and architecture consulting firm, Gresham Smith. My firm regularly competes for contracts for public improvement projects and is subject to the indemnity provisions in these contracts.

In Ohio, indemnity provisions in public improvement projects are not standardized, and requirements may vary significantly depending on the project and public entity. Indemnity provisions may contain language that presents a significant risk to design professionals. It is not unusual to find contracts that stipulate: "Consultant shall defend public entity against any claim related to the Project and indemnify public entity for all costs, losses, and damages arising out of Consultant's services." Such contractual terms require the design professional to indemnify and defend the public agency against third party claims, whether or not the design professional is found to be liable pursuant to a lawsuit.

Indemnity provisions like this are a significant risk to design professionals and do not provide added security to the public entity for several reasons:

1. The design professional has the unfair responsibility to indemnify the client for claims arising from aspects of the project that are beyond the design professional's control.
2. Professional liability insurance only covers claims that result from the design professional's tortious conduct. Contractual terms that require the design professional to defend the public entity – or to indemnify the public entity from claims *beyond* the design professional's proportionate liability – expose the design professional to financial risks beyond their insurance coverage. Indemnifying a public entity for claims beyond insurance coverage can be extremely expensive, significantly impact the design professional's bottom line, and may put the design professional out of business, resulting in the public agency not receiving indemnity from the claim.
3. Design professionals must weigh the benefits of providing engineering services for the public against the risk of a claim that would not be covered by insurance. This puts small businesses – often local, women-owned, or minority-owned businesses – at a disadvantage. Smaller firms often operate paycheck to paycheck. They may not be able to assume the risk of indemnifying a public entity from a claim not covered by insurance. This results in less competition for public improvement projects. So, in the end, the public loses out.
4. To effectively compete for projects with onerous indemnity provisions, design professionals must include a calculation for the claim risk, which results in higher project fees.

House Bill 159 narrows, but does not eliminate, the obligation of design professionals to indemnify a public entity to liabilities resulting from the design professional's negligent acts, errors or omissions. House Bill 159 requires fair, proportionate, liability for design professionals. This will reduce risk for design professionals bidding on public improvement projects, leveling the playing field for small businesses, increasing competition, and lowering costs.

To date, at least eleven other states – including Indiana, Michigan, and Minnesota – have enacted statutes that are similar to House Bill 159.

The Ohio Society of Professional Engineers supports House Bill 159, and the effort to standardize indemnity provisions in professional design contracts related to public improvements.