



AMERICAN COUNCIL OF ENGINEERING COMPANIES  
*of Ohio*

**Testimony of  
Beth Easterday, President  
American Council of Engineering Companies of Ohio  
to the  
House Civil Justice Committee  
regarding House Bill 159  
April 30, 2019**

Chairman Hambley, Vice Chair Patton, Ranking Member Brown, and members of the committee. I am Beth Easterday, President of the American Council of Engineering Companies of Ohio. I am here today to offer our support for House Bill 159.

For the record, my association is made up of 130 engineering firms, located all over the state of Ohio, many of which are engaged in the design of our public water and wastewater systems, bridges, highways, building structures and systems and environmental projects. My members are made up of large international firms, down to small firms under 10 employees. In fact, over 50% of ACEC Ohio's membership is made up of small engineering consulting businesses under 50 employees.

Design professionals, as a matter of basic fairness, should not be asked to indemnify and/or defend another party for losses that the designer did not cause, cannot insure against and were caused by factors beyond the designer's control. Unfortunately, some public authorities are still putting indemnification clauses in their contracts that require a design professional to indemnify above and beyond what the design professionals' professional liability insurance will cover. Above and beyond the standard of care or professional negligence.

The fundamental purpose of this bill is fairness, right now design professionals are being asked to defend public entities against third party claims before there is a determination that the design professional has committed an error. The costs of such defense can be staggering and come out of the design professional's pockets, not their professional liability insurance policy. The reason being the professional

liability insurance will only cover legal costs to the extent caused by the negligent errors and omissions of the design professional and does not provide defense for its client.

This bill narrows the statute --does not eliminate-- the obligation a design professional must shoulder to indemnify a public entity to just those situations where the design professional has been found to have committed an error. The bill will help engineering consulting companies and architectural firms by providing clarity and certainty that indemnification of third party claims will not be a part of entering public authority contracts.

To date, eleven states (Arizona, California, Colorado, Florida, Georgia, Indiana, Kansas, Maryland, Michigan, Minnesota and Montana) have enacted statutes such as HB 159.

ACEC Ohio appreciates your consideration of the bill today. Thank you for allowing me to testify, I will be happy to try to answer any questions you might have.

  

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**K.E. McCartney & Associates, Inc.**  

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*Engineers • Planners • Surveyors*

April 25, 2019

The Honorable Steve Hambley, Chair  
Ohio House Civil Justice Committee  
77 South High Street, 11<sup>th</sup> Floor  
Columbus, Ohio 43215

Dear Honorable Hambley:

Please accept this letter in support of House Bill 159 “Fairness in Public Contracts”. For the engineering industry, this Bill represents fairness. Currently, design professionals are asked to defend public entities against third party claims BEFORE there is a determination that the design professional has done anything wrong. The defense cost against such a claim can be extremely expensive and is not covered by professional liability insurance, with the result being an out of pocket expense for the designer. For small firms under 50 employees this type of financial impact could potentially threaten their ability to stay in business. I don’t think it is anybody’s intent to drive small firms out of Ohio, we therefore need to narrow the obligation a design professional must should to indemnify a public entity. House Bill 159 will do just that by holding firms liable when they have been found to have committed an error, again as a matter of fairness.

KEM is an Ohio born firm, founded 40 years ago. We bleed scarlet and gray and have always taken responsibility for our work. I am simply asking that we not be asked to defend and indemnify another party for losses that we did not cause, for which we cannot insure, and were caused by factors beyond our control. Again, not to beat the proverbial dead horse, but it is truly a matter of fairness.

For these reasons, we ask that you help with the passage of House Bill 159.

Sincerely,  
**K.E. McCARTNEY & ASSOCIATES, INC.**



Brian P. McCartney, P.E., P.S.  
President

cc: ACEC Ohio  
Representative Romanchuck



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April 29, 2019

The Honorable Steve Hambley, Chair  
Ohio House Civil Justice Committee  
77 South High St., 11<sup>th</sup> FL  
Columbus, OH 43215

Re: House Bill 159 "Fairness in Public Contracts"

Dear Representative Hambley:

We are reaching out to you, as a member of ACEC Ohio, in support of House Bill 159, which would regulate the use of indemnity provisions in contracts related to public improvements. Here are some of the reasons why this bill is important to SME.

1. The fundamental purpose of this bill is FAIRNESS. Right now, design professionals are being asked to defend public entities against third party claims BEFORE there is a determination that the design professional has committed error.
2. The costs of such defense can be staggering and are beyond the control of the design professional. These defense costs would come out of the design professionals' pocket, and not from their professional liability insurance policy. Just like the presumption of innocence, a design professional should not be presumed responsible for a cost without a determination of wrong-doing.
3. Design professionals' professional liability insurance will only cover legal costs to the extent caused by the negligent errors and omissions of the design professional. A design professional's professional liability insurance policy does not provide defense for its clients.
4. Many of the design firms being required to sign these contracts are small Ohio-based companies and risk losing business if they refuse to accept an onerous indemnity obligation or in the alternative, take the work and subsequently have to pay for defense, even if they are found to have NOT been negligent.
5. ACEC Ohio is asking that the statute narrow (not eliminate) the obligation a design professional must shoulder to indemnify a public entity to just those situations where the design professional has been found to have committed an error.
6. The bill will help engineering consulting companies and architectural firms by eliminating unpredictable expenses, providing clarity and certainty when entering public contracts.

7. To date, eleven (11) states (Arizona, California, Colorado, Florida, Georgia, Indiana, Kansas, Maryland, Michigan, Minnesota, & Montana) have enacted statutes such as House Bill 554.

In summary, design professionals are required by common law to bear responsibility for damages caused by their own professional negligence. They carry professional liability insurance that will pay injured parties for precisely such damages. Moreover, Ohio public agencies currently have the authority to determine how much coverage must be carried by engineers and architects seeking to enter into agency contracts.

Design professionals, as a matter of basic fairness, should not be asked to indemnify and/or defend another party for losses that the designer did not cause, cannot not insure against, and were caused by factors beyond the designer's control.

Sincerely,

**SME**

Brendan Lieske, PE  
Project Engineer



April 26, 2019

Honorable Steve Hambley  
Ohio House of Representatives  
Riffe Center  
Columbus, OH 43215

**AIA Ohio**  
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Dear Representative Hambley :

The Ohio Society of the American Institute of Architects would like to support passage of HB 159 which for public improvements would relieve architects from being asked to defend a third-party claim before there is a determination that the design professional has committed an error.

The costs of such defense can be well beyond the control and the means of the design professional...especially retired design professionals. Just like the presumption of innocence, a design professional should not be presumed responsible for a cost without a determination of wrong-doing.

Sincerely,

A handwritten signature in black ink, appearing to read "Kate Brunswick".

Kate Brunswick, CAE, Hon. AIA  
Executive Vice President