

RE: Ohio Senate Bill 262 – Show Your Work

Good afternoon Chairwoman Roegner, Vice Chair Gavarone, Ranking Member Blackshear, and honorable members of the Senate General Government Committee.

My name is Phil Truax, and I am a construction attorney in private practice in the Greater Cleveland area. I have practiced law in Ohio for 20 years, representing primarily contractors, subcontractors, and material suppliers, as well as owners and design professionals. My clients range from mom-and-pop shops with a small handful of employees and pieces of equipment, to construction managers and specialty trades earning hundreds of millions of dollars in annual revenue. Many of our clients perform both public work and private commercial work here in Ohio.

I'm grateful for the opportunity to appear before you today in support of Senate Bill 262. Many public entities in Ohio -cities, villages, townships, counties, and state agencies- elect to use standard industry construction contract forms when soliciting bids for public improvement projects, with the intention of using these forms as the controlling contract for the project after the bid is selected. Examples include contract forms offered by the AIA and ConsensusDocs, and perhaps to a lesser extent, the EJCDC and the Design-Build Institute of America.

Sometimes a public owner uses an unmodified standard form, one that is prepared 100% by, say, the AIA. Other times, the standard form is modified in some way – some far more substantially than others. Typically, when the public entity's legal counsel, law director, or architect modifies portions of the standard form, those modifications are represented in redline form, with notes in the margins to reflect changes to the standard form. This is done *automatically* when using the editable version of the AIA's standard form contracts, and the same can be said for other industry organizations' forms. In that way, any private business examining the proposed contract form for bid can observe whether and how the public owner has changed the contract form's language. Most of the time, those changes are for the benefit of the public owner, and not the bidding contractors.

But like with most other aspects of business and in every day life, there are some involved in public construction who do not engage in fair play. They do not "show their work" in changing language in the standard form agreements. By changing these widely-used forms without highlighting the changes made -or even just indicating that some changes were made- private business bidding on these contracts can be, and in fact are, misled into believing that they are bidding on a standard form agreement.

I've experienced this many times with our clients. They bid on a public project in which the governing contract was an AIA contract form, and because there were no redlines or marginal notes on the public contract that was part of the bid solicitation, they assumed the contract was a standard A133 Standard Form of Agreement Between Owner and Construction Manager, with a standard set of A201 General Conditions for Construction. But after some

thing had gone wrong and/or a dispute arose between the client and the public owner, only then does it become apparent (through legal review) that the contract forms were actually NOT the standard forms, but a substantially modified version with key provisions changed for the benefit and protection of the owner – and to the detriment of the contractor. And by then, of course, it is too late. Because in public construction, a contractor who bids on a public construction contract is deemed to have “negotiated the contract” by reviewing and bidding on the published contract form.

One could say that a contractor needs to be more careful in bidding on public work, and/or should engage legal counsel to review the bid documents before submitting a bid. But that ignores widely-used industry custom which has existed and been practiced for decades. Even as a construction lawyer, when I see an AIA or ConsensusDocs contract form that is neither redlined nor reflects marginal notes, my first impression is that the form is an unmodified contract form. Contractors even more so reach that conclusion, and take it a step further by proceeding with their binding bid proposal for the public contract in question. Observing an industry form with redlines and comments, on the other hand, is a signal that the contract form is not an industry standard form of agreement, and a more detailed review is required.

From my stand point, SB 262 is a common sense, no-downside solution to unscrupulous acts in the public construction industry. It acknowledges that popular industry standard forms are frequently used, that most contractors and bidders expect any changes to those forms be highlighted in order to promote honesty and transparency, and that a failure to highlight such changes (whether intentionally or not) imposes an unfair and unreasonable result upon a contractor who thinks he or she entered into contract with far different language than he or she thought when they agreed to submit their bid.

I urge the General Assembly members to adopt SB 262, and require Ohio’s public entities to “show their work” in altering industry standard construction contract forms that they intend to use for their public improvement project. Thank you for your time and consideration on this important legislation. Chairwoman Rogener, I would be happy to answer any question that you or the committee members may have.