

Testimony:

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To:

Ohio House Civil Justice Committee
The Honorable Brett Hillyer, Chair

Date: September 28, 2021

Regarding:

Senate Bill 56, Indemnity Provisions in Professional Design Contracts
Related to Public Improvements

Chairman Hillyer, Vice Chair Grendell, Ranking Member Galonski, and members of the House Civil Justice Committee. I am Devon Seal, past 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 Senate Bill 56, which deals with the regulation of indemnity provisions in professional design contracts related to public improvements.

On March 19, 2021, the OSPE Board of Directors voted unanimously in support of Senate Bill 56, 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 have experience working with firms that compete for public improvement projects which are subject to indemnity provisions in the 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.

Senate Bill 56 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. Senate Bill 56 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 Senate Bill 56.

The Ohio Society of Professional Engineers supports Senate Bill 56, and the effort to standardize indemnity provisions in professional design contracts related to public improvements.