SPONSOR TESTIMONY HOUSE BILL 554

Chairman Butler, Vice Chair Lanese, Ranking Member Boggs, Thank you for the opportunity to present sponsor testimony on HB 554, that is intended to clarify the indemnity provisions in contracts entered into by professional consulting engineers.

Engineers and architects are licensed by the state of Ohio and the practice of these professions, like others, is regulated by the state. Because of the special status conferred on these professions, common law in Ohio and every other state makes those who practice this profession liable for any damages they cause to others if they practice negligently.

There is no ambiguity in this regard. If you, as licensed professional, harm another by engaging in negligent practice, you are liable. This is why nearly all engineers and architects (referred to collectively in the Ohio Revised Code as "design professionals") carry professional liability insurance. Indeed, Ohio law requires that engineers and architects who seek to design public works projects must carry professional liability insurance (ORC 153.70).

Despite the fact that public agencies in Ohio are insured against any damages caused by the malpractice of engineers or architects who design their public works projects, some state and local agencies force design professionals to sign contracts that saddle them with liability far in excess of what common law – and fairness – requires.

This unfair risk shifting generally manifests itself in public agency contract clauses relating to "indemnification." (The term indemnification essentially means to stand in the shoes of someone else, or to assume a risk that otherwise would rightfully belong to another.)

Typically, these unfair indemnification clauses require the design professional to indemnify and defend the public agency, "against any and all claims connected with the performance of services under this agreement . . .."

The problem with such a "broad-form" indemnification requirement is that it effectively makes the engineer or architect liable for the cost of any claim related to a project he/she designed, regardless of whether he/she was to blame for the problem that led to the claim.

If the design professional has accepted such an indemnification requirement, he/she is faced with the bizarre scenario of having to retain an attorney to mount a defense on the agency's

behalf, even before it has been established that he/she has any legal liability for the claim.

To make matters worse, professional liability insurance only covers claims caused by the negligent conduct (malpractice) on the part of the engineer or architect. So the unfortunate result of agreeing to such an indemnification clause is that the engineer or architect is financially exposed personally for the cost of claims that were not of his or her making.

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

Moreover, this bill is entirely necessary in order to prevent the use of overbroad indemnity clauses to end-run our hard-won tort reform statutes that created a statute of repose. Under today's law, an engineer or architect is not liable in tort for negligence for more than ten years after completion of the public improvement. We made this decision – and it has been upheld by the Ohio Supreme Court – to make clear that injuries occurring later than that are due to defective maintenance, not defective design. However, when local governments use overbroad indemnity clauses, they resurrect the architect-engineer's liability beyond the ten year statute of repose as a matter of contract law, thus frustrating the public policy of our state.

To date, eleven (11) states (Arizona, California, Colorado, Florida, Georgia, Indiana, Kansas, Maryland, Michigan, Minnesota, & Montana) have enacted statutes that permit public agencies to include language in their contracts that requires design professionals to indemnify the agency for damages attributable to the negligence, reckless or intentional wrongful conduct by the design professional. These same statutes specifically prohibit agencies from requiring that design professionals indemnify public agencies for claims that are not attributable to negligent, reckless or intentional wrongful conduct on the part of the design professional. This is what HB 554 is intended to do in Ohio Revised Code.

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, in Ohio public agencies have the authority to determine how much coverage must be carried by engineers and architects

seeking to enter into agency contracts.

However, design professionals, as a matter of basic fairness, should not be asked to contractually 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.

I appreciate your consideration of House Bill 554, and will be happy to answer any questions from the committee.