Proponent Testimony
Senate Bill 95

Jenn Klein
President, Ohio Chemistry Technology Council

Before the Senate Energy and Natural Resources Committee

Chairman Balderson, Vice Chairman Jordan, Ranking Member O'Brien, and members of the committee thank you for the opportunity to testify today on Senate Bill 95 (SB 95), legislation that makes common sense improvements as to how scarce state resources are spent on critical infrastructure. Ensuring Ohioans and engineers have access to a broad range of products when constructing and maintaining this important infrastructure will allow state resources to be spent in an efficient, effective manner.

As way of background on the chemical industry, Ohio is the sixth largest chemical manufacturing state in the U.S. and we directly employ over 43,500 Ohioans, making it the second largest manufacturing sector in the state. The industry's average wage in Ohio is over $80,500 generating over $3.5 billion in payroll. Every year our industry makes $1.1 billion in capital investments in Ohio, and exports over $6.5 billion in products.

The chemical industry converts basic raw materials such as oil, natural gas, air, water, metals and minerals to produce more than 70,000 different chemicals. These chemicals are used to produce plastics, synthetic fibers, lightweight automobile parts, fertilizers, cosmetics, household materials, computers, and many more products. In fact, 96% of all manufactured goods are touched by the business of chemistry.

Members of OCTC play an important role in multiple areas of water infrastructure. Our members make chlorine, water filtration and treatment technologies, orthophosphates that prevent corrosion, additives for concrete pipes, coatings, sealants, and plastic that is wrapped around iron pipes to reduce corrosion. Our members also make the basic plastic resins used in polyvinyl chloride (PVC), polypropylene (PP), and high density polyethylene (HDPE) pipes. We believe that all products should compete and selection should be based on what product

or products best suit each project. We support legislation that allows for open competition and a level playing field allowing the best product to be chosen for each project.

To be clear, SB 95 is explicit in NOT directing any one product to be used. It simply requires that when state money is being spent, an engineer has the ability to use his or her professional training to evaluate all products they know are appropriate. A public authority then must consider the engineer's professional opinion. At no point does OCTC want to impede or direct the decisions that an engineer may have when determining which products are appropriate for a project. Rather, OCTC supports a level playing field for all appropriate materials.

In fact, we are crafting an amendment intended to address concerns we have heard during deliberations in the House on the companion legislation, HB 121, from the engineering community to make it clear that we want them in charge. We have shared this amendment with interested parties in an effort to address their concerns and, to date, we have not heard a single response from parties regarding this amendment.

Right now a level playing field does not exist in Ohio for all products used in wastewater and drinking water projects. Over 1/3 of Ohioans live in jurisdictions that limit the use of all appropriate materials for water and wastewater projects. As subsequent witnesses will testify, limiting the choice of products raises the cost of projects significantly, and unnecessarily. Opening up this market to competition will strengthen Ohio communities and their engineers by allowing them to determine the most appropriate material.

According to the American Society of Civil Engineers (ASCE), the state of Ohio needs $12.2 billion in investments in drinking water infrastructure and $14.58 billion in wastewater infrastructure over the next 20 years. That is a total of nearly $27 billion. The ASCE points out that there are 240,000 water mains break in the US every year (660 per day) and that aging pipes are wasting 14-18% of each day's treated water.

You may have heard that this legislation will increase litigation because open competition will result in more bids, therefore, more losers. Last year alone Ohio received $56 million in grants and loans for water infrastructure projects from the U.S. Department of Agriculture's Rural Development program, which requires open competition for piping materials. All told, since 2013 Ohio has received more than $149 million and has not experienced even a single legal challenge to date. As you may have seen, the Buckeye Institute recently looked into this claim and found it to be false. The Buckeye Institute in fact pointed out that county engineers are immune from lawsuits when replacing or repairing waterlines. If you need an additional authority on the subject I have attached an exhaustive memorandum from Vorys, Sater, Seymour and Pease law firm explaining in detail how the legislation does not endanger engineers from a liability standpoint and promotes open competition.

Passing SB 95 will allow all of Ohio's communities to enjoy the benefits of open competition. It will ensure that Ohio's taxpayers' dollars are spent in an efficient, effective manner. Finally, it will ensure

that those Ohioans employed by chemical companies who supply this industry are not unduly burdened by outdated regulations limiting the use of their products.

Thank you for the opportunity to provide proponent testimony on SB 95. I am happy to answer any questions you may have.

THE BUCKEYE INSTITUTE

# The Buckeye Institute Policy Brief

## Competition Saves Taxpayer Money on Water and Sewer Line Repair

**Daniel J. Dew, Legal Fellow**

### Introduction

Last year, the toxic, undrinkable water in Flint, Michigan and Sebring, Ohio made national headlines and focused needed attention on the country's aging water and sewer lines.[1] Every mile of America's 1.2 million miles of water supply mains will suffer a break roughly every six years, and given the age and disrepair of much of this infrastructure many state and local governments will need to fix and replace miles of water lines—and soon.[2]

Taxpayers, of course, foot the bill for infrastructure repair, and replacing water and sewer systems is extraordinarily expensive. Regrettably, local ordinances often limit competition on public infrastructure construction and repair contracts, which then spikes the already high costs even further.[3] An ordinance in Columbus, Ohio, for example, requires all water pipelines to be built with a more expensive material. Nearby Delaware County, Ohio, on the other hand, has no such requirement, preferring an open bid process that creates competition among various material providers. By limiting competition and effectively mandating a self-imposed monopoly, Columbus taxpayers paid nearly $100,000 more per mile of pipe than their neighbors in Delaware County.[4]

Ohio's General Assembly may soon prohibit Ohio localities from imposing monopolistic requirements when spending state dollars on projects. If local politicians want to require spending more of their local revenues for inferior products or workmanship, then they can face the local voters at the next election. But when local governments spend state dollars on local projects the state can and should require localities to spend state funds efficiently and wisely. The fiscally prudent policy under consideration in the Statehouse would require county engineers to consider any bid that uses safe and structurally sound materials when state funds are spent on local projects.

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[1] Lucy Westcott, "**With Lead in the Water, Could Sebring, Ohio Become the Next Flint?**", *Newsweek*, Jan. 27, 2016.
[2] Charles Fishman, "**13 Things You Probably Don't Know About the US Water System**," *National Geographic*, Aug. 12, 2014.
[3] Bonner R. Cohen, ***Seizing the Initiative: How States Can Help Themselves in Rehabilitating Underground Water Infrastructure***, American Legislator, April 2, 2015.
[4] BCC Research, ***Comparison of Water Main Pipeline Installation Lengths and Costs in Ohio***, Feb. 25, 2016.

## Competition Protects Taxpayers

Free competitive markets raise quality and lower prices. When governments impose regulations and ordinances that give any business or industry a competitive advantage, they negate the market incentives for industries to lower costs and provide better products.

Competitive bidding for public projects functions no differently. Businesses should make their best proposal for the work required, and the government should select the bid providing the best value for the taxpayers. The best value may not always be the cheapest bid, but taxpayers can make government officials explain the selection and justify the cost. Indeed, Ohio recognizes the value of competitive bids and state law requires government contracts be open to competitive bidding in most situations.[5] As the Ohio Supreme Court has explained, competitive bids on government projects "protect the taxpayer, prevent excessive costs and corrupt practices, and provide open and honest competition in bidding for public contracts."[6]

Monopolistic ordinances and requirements have the opposite effect. When, for instance, localities are forced to use union labor on public projects, taxpayers pay the price. Locally mandated Project Labor Agreements (PLA) often stipulate that any contractor whose bid is accepted agrees to follow union-dictated practices, which forecloses competition from non-union shops and thereby increases construction costs 12-18 percent.[7] Similar competition-killing policies plague the nation's water pipeline projects. Some local governments have limited market competition for water and sewer line materials. As noted, Columbus, Ohio, for example, paid $97,680 more per mile of pipe than Delaware County by requiring all pipe to be made of a more expensive material rather than allow competitive bids using other materials.[8]

By closing the door on open competition, municipalities risk over-paying for products and labor both now and in the future—just as more and more of the nation's water pipelines are in critical need of repair. Communities may soon face the unwelcome, but avoidable choice of paying too much for waterline repairs or finding their tap water undrinkable.

## Let the Professionals Do Their Jobs

Competitive bids on public infrastructure and waterline projects help ensure that local officials are empowered to do their jobs for the communities they serve. County engineers, for example, should be authorized to decide which materials and which designs are best for any given community project. But local ordinances that limit competition or require certain materials on certain projects artificially restrict the options available to the professionals. Instead of allowing the professional engineers to design and engineer as necessary, professional politicians—pretending to know better than the experts—too often take it upon themselves to foreclose construction and design options through local ordinances and regulations that may or may not be in the best interest of the project or community.

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[5] OHIO REV. CODE ANN. § 307.86.
[6] *Cementech v. City of Fairlawn*, 109 Ohio St. 3d 475, at 477.
[7] Tom Lampman, ***One Step to Restore Competition to Public Works Bidding***, The Buckeye Institute, April 21, 2015.
[8] BCC Research, ***Comparison of Water Main Pipeline Installation Lengths and Costs in Ohio***, Feb. 25, 2016.

In the waterline repair context, some opponents of competitive bidding worry that open bids may make county engineers liable for not selecting the lowest bidder or for any failure resulting from their selections of non-traditional pipe materials. Both concerns are misplaced.

Engineers may worry that absent a restrictive ordinance, the county may be required to choose the lowest bid. But that is not the case. Ohio law instructs that contracts be awarded to the "lowest and *best* bidder."[9] Thus, if, in the engineer's professional opinion, the lowest bid is not also the best bid, the engineer may legally select the better product or service even at the higher price.[10] Furthermore, should an engineer violate a competitive bid statute, the Ohio Supreme Court has held that "the rejected bidder cannot recover its lost profits as damages"[11] and the engineer may not be held personally liable. Indeed, county engineers enjoy immunity from suit when replacing or repairing waterlines. In 2012, the Ohio Supreme Court held that construction or replacement of a sewer and water system is a government function for which political subdivisions—such as county engineers—may not be sued.[12]

Contrary to the concerns of some anti-competition advocates, county engineers and other professionals should be empowered by state and local authorities to do their jobs and perform their roles in a free and open market, free from political influence that would artificially limit engineering and construction options available to the professionals.

**Helping Spend State Tax Dollars Wisely**

Elected officials have a duty to spend tax revenues wisely and efficiently. When the state sends its tax dollars to local governments for local projects, the state legislature should require common sense practices to keep state taxpayers from subsidizing local government waste. One such practice, for example, would require local officials to consider all bids proposing safe materials for any project paid for with state funds. Fiscal responsibility demands it.

Some may fear that such a requirement would violate local home rule, but Ohio law already requires competitive bidding on any project more than $50,000.[13] Thus, requiring consideration of all safe materials on projects using state dollars is actually more consistent with home rule authority than the current competitive bidding statute. Under the proposed policy, local governments could still limit materials for projects that only spend local tax revenues.

[9] OHIO REV. CODE ANN. § 735.05 (Emphasis added).
[10] *Danis Clarkco Landfill Co. v. Clark County Solid Waste Management Dist.*, 73 Ohio St. 3d 590, at 603.
[11] *Cementech v. City of Fairlawn*, at 477.
[12] *Coleman v. Portage County Eng'r*, 133 Ohio St. 3d 28, at 33-36.
[13] OHIO REV. CODE ANN. § 307.86.

## Conclusion

As communities and local governments take steps to address their aging water and sewer lines, they would do well to learn from the painful lessons of Flint, Michigan and Sebring, Ohio. And as they look to repair and replace expensive infrastructure, local leaders should avoid ordinances and regulations that needlessly limit competition, flexibility, and the know-how of the trained professionals tasked with fixing the problems. Instead, localities should consider all materials deemed safe for water supply lines, and should encourage cost-saving competition among suppliers and contractors as they safeguard taxpayer dollars against waste, fraud, and abuse.

## About the Author

Daniel J. Dew is the legal fellow at The Buckeye Institute's Legal Center. In this capacity, Dew focuses on legal policies that promote freedom and the public good.

An expert on criminal justice reform, Dew has worked on policies that increase Ohioans' safety, makes the criminal justice system fairer, and saves taxpayer dollars. Dew was a leading voice in reforming Ohio's civil asset forfeiture policies and worked closely with Ohio's Criminal Justice Recodification Committee on developing proposals to reform the state's criminal code.

Prior to his position at Buckeye, Dew was a visiting legal fellow at the Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies and an associate attorney at Ford, Gold, Kovoor & Simon. He also represented energy companies in contract negotiations.

Dew earned his law degree from Cleveland Marshall College of Law, and his undergraduate degree from Utah State University.

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August 28, 2017

Ms. Jenn Klein
President
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Re: H.B. 121, Proposed Ohio Revised Code § 153.75

Dear Ms. Klein:

**Executive Summary**

The above-captioned proposed legislation should have no impact on the potential liability of engineers in Ohio and may promote greater competition consistent with Ohio's public bidding statutes.

**Factual Background**

There is pending in the Ohio General Assembly proposed legislation with respect to Chapter 153 of the Ohio Revised Code (the "Proposed Legislation") that would prohibit local governments in Ohio from excluding piping materials for public water or wastewater projects where the materials have been approved by a Professional Engineer (a "P.E."). The Proposed Legislation reads, in pertinent part:

> A public authority shall not prohibit a piping material that is deemed appropriate by the professional engineer from consideration in the construction, development, maintenance, rebuilding, or improvement of a water or waste water project that is funded in whole or in part with state funds.

On behalf of the Ohio Chemistry Technology Council (OCTC), we have been asked for an opinion on whether the Proposed Legislation will have an impact on the potential civil liability of a P.E. in Ohio, and secondarily on the potential liability of local governments in Ohio, and whether it will create new channels of bid protests. The plastic piping materials produced by OCTC member companies are tested and certified according to recognized national standards

including American Society of Testing Materials ("ASTM") standards, American Water Works Association ("AWWA") standards and National Science Foundation ("NSF") standards.

**Summary**

The Proposed Legislation should have no impact on the potential liability of a P.E. in Ohio. Under both existing law and the Proposed Legislation, a P.E. is not liable for specifying a piping material unless the P.E. has prior notice of the material's unsuitability for use in the specific application. The common avenues by which a P.E. typically specifies pipe materials – with prior approval from the authority having jurisdiction or with documentation and certification from the pipe manufacturer – continue to protect a P.E. from liability under the Proposed Legislation. Thus, a P.E. continues to not be liable where the pipe materials have been approved for use by the authority having jurisdiction unless the P.E. has notice that the material is not appropriate due to the specific conditions of the use. Likewise, a P.E. continues to not be liable for relying on the pipe manufacturer's documentation and certification, where the authority having jurisdiction has not previously approved the pipe material, unless the P.E. has prior notice of the material's unsuitability.

Although the Proposed Legislation creates a new statutory basis under which liability of a government entity may be found where the government fails to act in compliance with the new legislation, it should not increase channels of bid protest available to disappointed bidders, and it should not increase the local government's potential liability. Instead, the Proposed Legislation should decrease the local government's potential liability and should promote greater competition, which is the objective of Ohio's competitive bidding statutes.

**Engineer Liability**

The fundamental duty of care for an engineer in Ohio is defined by the Restatement as that "normally possessed by members of that profession":

> Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

Restatement 2d Torts § 299A. In defining a "profession or trade," the restatement commentary specifically includes "engineers":

> b. Profession or trade. This Section … applies to any person who undertakes to render services to another in the practice of a profession, such as that of … engineer. …. This Section states the

> minimum skill and knowledge which the actor undertakes to exercise, and therefore to have. If he has in fact greater skill than that common to the profession or trade, he is required to exercise that skill ….

Restatement 2d Torts § 299A. Courts in Ohio have applied this framework to both architects and engineers. Crowninshield/Old Town Community Urban Redevelopment Corp. v. Campeon Roofing and Waterproofing, Inc., Nos. C-940731, C-940748, 1996 WL 181374, *4 (Ohio App. 1st Dist. April 17, 1996) (architects); Cincinnati Gas & Electric Co. v. General Electric Co., 656 F. Supp. 49, 62 (S.D. Ohio 1986) (engineers).

"Malpractice" standards do not apply to design professionals in Ohio. Hocking Conservancy District v. Dodson Lindblom Assoc., Inc., 62 Ohio St. 2d 195 (1980). Likewise, under Ohio law, the design professional is not subject to "strict liability" for systems that fail unless the design professional has specifically agreed to such liability. "The [design professional's] undertaking, however, in the absence of a special agreement, does not imply or guarantee a perfect plan or satisfactory result, but he is liable only for failure to exercise ***reasonable*** care and skill." Crowninshield (architects); City of Cincinnati v. Stanley Consultants, Inc., No. C-830815, 1984 WL 6597, *4 (Ohio App. 1st Dist. November 7, 1984) (engineers). Instead, basic negligence principles apply.

Compliance with published codes, standards and regulations helps shield a P.E. from liability unless the P.E. has notice that the code, standard or regulation is inadequate for the specific situation.

> Where a statute ... or regulation is found to define a standard of conduct for the purpose of negligence actions, ... the standard ... is normally a minimum standard .... This ... minimum does not prevent a finding that the reasonable [person] would have taken additional precautions**.**

Restatement 2d Torts § 288C, comment a.

As in any garden-variety negligence action, where the P.E. *does not have notice* that injury may result from a design, the P.E. cannot be held liable. Delta Fuels, Inc. v. DLZ Ohio, Inc., 2016-Ohio-970, ¶¶ 80-84, 87 (Ohio App. 6th Dist.).

**Relevant Standards**

As relevant here, water and waste water piping materials are not specified with particularity under the "10-State Standards," the standards most widely adopted by local

governments for water and waste water systems in Ohio and the Great Lakes region. Instead, using waste water systems as an example:

> Any generally accepted material for sewers may be given consideration, but the material selected should be adapted to local conditions, such as: character of industrial wastes; possibility of septicity; soil characteristics; exceptionally heavy external loadings, abrasion, corrosion, or similar problems.

Recommended Standards for Wastewater Facilities, 2014 Ed., § 33.7. The 10-State Standards recognize ASTM standards as establishing acceptable criteria for plastic pipe. Id.

As noted above, the piping materials produced by OCTC member companies and their customers are tested and certified in accordance with these nationally recognized standards. Where ASTM standards have not yet been developed, the 10-State Standards direct the P.E. to the pipe manufacturer for documentation and certification of the pipe's suitability:

> For new pipe materials for which ASTM standards have not been established, the design engineer shall provide complete pipe specifications and installation specifications developed on the basis of criteria adequately documented and certified in writing by the pipe manufacturer to be satisfactory for the specific detailed plans.

Recommended Standards for Wastewater Facilities, 2014 Ed., § 33.7.[1]

Thus, all the avenues by which an Ohio P.E. may specify piping material (i.e., from a list approved by the local authority, reliance on national standards, or reliance on manufacturer's specifications and certifications) shield the P.E. from liability, with or without the Proposed Legislation. The Proposed Legislation does nothing to increase the P.E.'s potential liability or undermine the P.E.'s defenses against liability.

[1] Note that the Ohio EPA maintains a list of pre-approved pipe specifications for wastewater systems that specifies applicable ASTM and AWWA standards. See http://www.epa.ohio.gov/portals/35/pti/OhioEPAPipeSpecList.pdf. Likewise the City of Columbus has adopted standard construction and material specifications for plastic pipe used in water and wastewater systems, and maintains an "Approved Materials List." See https://www.columbus.gov/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=48140. This list, again, relies primarily on specified ASTM standards. 2012 City of Columbus Construction and Material Specifications ("CCMS") at § 720.01 et. seq. For materials not on Columbus' list, "complete shop drawing submittals are required in accordance with the procedures detailed in the CCMS." See https://www.columbus.gov/WorkArea/DownloadAsset.aspx?id=2147489294. Those procedures rely on testing in accordance with "applicable ASTM and/or AASHTO Specifications." CCMS § 720.04

**Potential Liability of Government Entity**

Government entities in Ohio are generally required to award contracts for public improvements based on either the "lowest responsive and responsible" bidder or the "lowest and best" bidder. O.R.C. §§153.52, 307.86, 307.90. A bidder is responsive if the bidder's proposal responds to bid specifications in all material respects and contains no irregularities or deviations from the specifications which would affect the amount of the bid or otherwise give the bidder a competitive advantage. O.R.C. §9.312(A). For the irregularity or deviation to be substantial enough to not be responsive, it must affect the amount of the bid and must give the bidder an advantage or benefit not allowed to other bidders. Wilson Bennett, Inc. v. Greater Cleveland Regional Transit Auth., 67 Ohio App.3d 812, 819 (Ohio App. 8th Dist. 1990).

If a court is asked to review a government's decision not to award a public works contract to the lowest bidder, the court can only overturn the decision if it finds that the government has abused its discretion. Cedar Bay Construction, Inc. v. City of Fremont, 50 Ohio St.3d 19 (1988). Abuse of discretion "connotes more than an error of judgment; it connotes an unreasonable, unconscionable, or arbitrary decision." Id. The general rule is that "public officers, administrative officers, and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have performed their duties and not to have acted illegally but regularly and in a lawful matter. All legal intendments are in favor of the administrative action." Id.; see also State ex rel. Shafer Volvo v. Turnpike Commission, 159 Ohio St. 581, 590 (1953). It is thus very difficult to overturn a government's decision in a bid award.

Plans and specifications for public improvements must be clear and unambiguous so that all bidders are on equal footing when submitting their bids. Plans and specifications satisfy competitive bidding requirements "if they convey to the bidder sufficient knowledge upon which to base a definite bid." See Ampt v. City of Cincinnati, 6 Ohio N.P. 208, 214 (C.P. 1899). If plans and specifications are not clear and unambiguous, any resulting contract may be declared illegal. See, e.g., State ex rel. Hoeffler v. Griswold, 35 Ohio App. 354 (Ohio App. 10th Dist. 1930) (holding that the state must "apprise prospective contractors of that which they might reasonably be expected to do"); 1997 Op. Att'y Gen. No. 97-006, at *6 ("In order to put all bidders on equal footing, it is essential that the specifications on which bids are to be submitted be sufficient to inform all bidders as to the matter for which, and the bases upon which, the contract will be awarded.").

Nonetheless, asking for alternatives in bids is acceptable so long as "the specifications [are] accurate and complete as to each alternative." Rewco, Inc. v. City of Cleveland, 89 Ohio Law Abs. 248 (C.P. 1961). Moreover, a public owner "must use reasonable efforts to secure competitive bidding which must be open everyone" and, therefore, "should make an effort to select types or categories of specifications that will encourage submission of bids from a large pool of potential bidders." 1997 Op. Att'y Gen. No. 97-006, at *6, 8.

The Proposed Legislation does nothing to give advantage or benefit to one bidder over another and instead encourages submission of bids from a large pool of potential bidders, thereby creating no new channels of bid protests. Instead, by eliminating the local government's ability to prohibit alternative materials that have been deemed acceptable to the engineer, the Proposed Legislation may, in fact, decrease the potential liability of the local government entity by removing government-imposed impediments on bids.

Finally, under both existing Ohio law and the Proposed Legislation, a local government is generally required to suspend and rebid projects subject to a valid bid dispute, and if it fails to do so, it may be liable for the disappointed bidder's cost of preparing its bid. Specifically, when a rejected bidder establishes that a government entity violated competitive-bidding laws in awarding a public-improvement contract, that bidder may recover reasonable bid-preparation costs as damages if that bidder promptly sought, but was denied, injunctive relief and it is later determined that the bidder was wrongfully rejected and injunctive relief is no longer available. Meccon, Inc. v. Univ. of Akron, 126 Ohio St.3d 231, 2010-Ohio-3297 (syllabus).

The opinions expressed herein assume the proper application by a judicial or administrative body of (a) the principles of statutory interpretation and (b) precedential Ohio case law and Ohio Attorney General opinions. They are based upon the information provided, the Proposed Legislation as currently drafted and research and analysis as of the date of this letter, and are subject to change if new or additional information is provided, the Proposed Legislation changes or if there are changes in Ohio common law or statutory law.

Very truly yours,

Allen L. Rutz

ALR/csp