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Representative Stephen D. Hambley, District 69
The Ohio House of Representatives
133rd General Assembly
77 S. High Street, 11th Floor
Columbus, Ohio 43215

Re: House Bill 159

Dear Representative Hambley:

I am an attorney licensed to practice in the state of Ohio. I practice throughout the state representing architects, landscape architects, engineers, and surveyors. The majority of my practice is dedicated to representing design professionals, and I have been involved in litigation in all manner of cases regarding both public and private improvement projects. I also represent national insurers of architects and engineers and I have lectured and presented seminars to designers on the subjects of construction documents, the qualifications-based selection process, and risk allocation. I have authored articles and newsletters focusing on liability issues that affect the practice of architecture and engineering. I am a member of the Central Ohio Chapter of COGENCE Alliance, a partnership of owners, architects, engineers, and contractors dedicated to improving the industry and project delivery. I have represented some of the largest design firms in Ohio, as well as the single practitioner. It is my privilege to also represent ACEC of Ohio.

One of the largest areas of exposure for designers pertains to indemnity provisions inserted into contracts by owners/developers. Indemnity provisions designers and their insurers bring to my attention on a regular basis are fraught with unfair obligations; obligations that masquerade as indemnity which in reality revise a designer's standard or care. In my experience representing designers throughout the state, it is often the case that public improvement contracts impose onerous first-party indemnification obligations that are used both prior to litigation and in litigation to unfairly strong-arm settlement contributions from designers, even where they are not at fault and did not cause the public authority's damages. These first-party indemnity provisions increase exposure and costs of defense such that fault becomes a secondary consideration. Worse still, terms and provisions of public improvement contracts are not typically subject to negotiation. Generally speaking, designers have neither the luxury nor the leverage to negotiate the scope of indemnity obligations in public improvement contracts.

House Bill 159 evens the playing field for design professionals by ensuring that the indemnification obligations imposed upon design professionals in public improvement projects are fair. Its intent is to return indemnity provisions in public work contracts to its common law definition, requiring a design professional to indemnify the public authority for its proportionate share of fault in causing damages to third-parties to a public improvement project. In that manner, it furthers the well-established public policy of R.C. 2305.31, the anti-indemnity statute, by ensuring that indemnity provisions in public improvement contracts are fair and balanced, while not diminishing the public authority's ability to recover against at-fault design professionals for breach of contract and indemnification where the design professional is at fault and has caused the public authority damages.

As you may recall, I presented proponent testimony in support of House Bill 159 when the bill was last heard on April 30, 2019. Since that time, I have met with several interested parties, including local government groups and three state agencies, the Ohio Department of Transportation, the Ohio Facilities Construction Commission, and the Ohio Turnpike & Infrastructure Commission, to discuss the proposed legislation and better understand the concerns these groups had with some of the proposed language of the bill. I believe the version of the bill you have before you responds to the primary concerns that were expressed by these entities during the Interested Party meetings.

The dash-4 version of the bill addresses four primary concerns: 1) in lines 49-58, language was added to clarify that the bill does not preclude a public authority from suing a designer for breach of contract; 2) in lines 96-101, language was added to include indemnity for damages or loss relating to infringement of intellectual property; and 3) in lines 102-103, language was added to include reasonable attorney's fees, costs and expenses as part of any "liabilities" arising under an indemnity obligation to the public authority or indemnified party. Other changes from the prior version of the bill were designed to make the intent of the bill clearer.

Again, House Bill 159 is about fairness. It is not fair to impose first-party indemnification obligations on designers that significantly increase exposure and costs of defense regardless of the designers' fault in contributing to the public authority's damages. This bill still allows public authorities to include indemnity provisions in public improvement contracts. It simply limits the designer's liability to its proportionate share of any damages or loss that may result when problems arise on a project. That is only fair, and that is the primary issue this bill is trying to address.

Thank you for taking the time to consider this correspondence in support of House Bill 159. I am happy to answer any questions you may have.

Very truly yours,

/s/ Frederick T. Bills
Frederick T. Bills

FTB/nnw