



March 22, 2021

Senator Floyd Prozanski  
Senator Kim Thatcher  
Senator Michael Dembrow  
Senator Sara Gelser  
Senator Dallas Heard  
Senator Dennis Linthicum  
Senator James Manning, Jr.  
Oregon State Legislature  
900 Court Street NE  
Salem, OR 97301

Subject: Design Professional Support for Senate Bill 213 to Amend ORS 30.140

Dear Senators,

Senate Bill 213 (SB213) will correct the unfair obligation imposed on professional design firms like Akana to be subject to the Duty to Defend provision included in public and private construction agreements. Passage of SB213 will alleviate the onerous terms that require design professionals to be responsible to defend an owner or other party against claims asserted by a third party and be held liable for attorney fees incurred to defend claims, even if the design professional is not negligent and before fault is even determined.

This duty to defend clause is not fair, equitable, or inclusive.

Akana is a qualified Native American-owned small business and state-certified small, disadvantaged business enterprise (DBE) based in Portland, Oregon. We specialize in project management, quality assurance, quality control, design and constructability review, and feasibility analysis for public infrastructure projects. Akana has been in business for three decades and we've grown to about 90 employees. Like other small and historically underutilized businesses, Akana is unable to absorb the risk associated with the Duty to Defend obligation. The clause impacts our ability to compete for certain projects, many of which are with governmental agencies.

Professional Liability Insurance provides coverage only for negligence of the insured party. This leaves Akana directly exposed to litigation expenses, thereby places us in an untenable position. Those large businesses that can afford the defense obligation are those with the

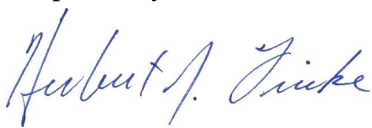
power to force the provision on their subconsultants, and neither the agency nor the prime contractor is incentivized to settle claims since under the terms of the Duty to Defend provision, the design professional holds the obligation to pay for legal fees regardless of its role in the claim.

A project where Akana was unfairly required to absorb costs occurred when we used a dynamic model to calculate coordinates for slopes at various intervals to layout grading for a parking lot. The owner's construction contractor didn't follow Akana's model. They assumed the slopes were linear and estimated intermediate points for grading without checking with Akana, and this threw off the slopes significantly. The owner took issue with the contractor and demanded Akana "take care of the problem." Even though the problem was due to the contractor's failure, Akana reworked the slopes for the entire parking lot to avoid litigation. We were concerned about the defense obligation owed under the contract with the contractor because we would have been forced to defend the contractor against the owner. We were concerned about our ability to recover uncapped defense costs even though we could prove that Akana was not actually liable. No matter what, we would have lost even when we should have won so we took on considerable engineering expense to reperform acceptable work just to avoid the lawsuit.

As a small Native American-owned business, we already face obstacles that make it difficult to compete in the public sector marketplace. Bringing down this barrier is only a matter of fairness, and it will enable small and disadvantaged businesses to continue to participate in Oregon's design professional marketplace.

Thank you for your consideration to pass the -2 amendment to Senate Bill 213.

Respectfully,



Herb Fricke, President

