ACEC Oregon

AMERICAN COUNCIL OF ENGINEERING COMPANIES OF OREGON

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Testimony to the
Senate Committee on Judiciary & Ballot Measure 110 Implementation
In Support of SB 213

March 22, 2021

Good morning Chair Prozanski, Vice Chair Thatcher and members of the Senate Committee on Judiciary and Ballot Measure 110 Implementation. My name is Alison Davis representing the American Council of Engineering Companies of Oregon (ACEC Oregon). ACEC Oregon is a trade association established in Oregon in 1956. I am writing today to strongly support the -2 amendment to Senate Bill 213.

Senate Bill 213 will bring fairness to professional services contracts by ending the inclusion of duty to defend clauses in public and private agreements. This duty to defend clause is onerous as it requires the design professional be responsible to defend an owner or other party against claims asserted by a third-party even if the design professional is not negligent. This duty to defend clause is not fair, equitable or inclusive.

This requirement in professional services contracts is not fair to design firms of any size, but it is especially damaging to emerging and small businesses that typically don't have the ability to advocate against these contract requirements. We find these duty to defend clauses to be a major deterrent to compete for certain projects, many of which are with governmental agencies.

Some FAQs to make the case for the passage of SB 213:

What is the intent of SB 213?

The intent of the bill is that all parties engaged in a dispute would pay their own attorney's fees until a dispute is resolved, whether in litigation or a settlement agreement. In no way is the design professional attempting to absolve themselves of their responsibility of defending the design and their proportionate share of the liability.

What is the duty to defend and why do design professionals (engineers, architects, and land surveyors) care?

Indemnity provisions are found in almost all contracts between a design professional and the client. These provisions typically include a duty to defend obligation which requires the design professional to pay the up-front attorney's fees associated with defending the claim or lawsuit which arises out of the design professional's performance. This duty to defend is an up-front obligation that occurs before the design professional has been determined to be negligent or to what proportionate extent the design professional is negligent. Professional liability insurance does not cover the up-front defense costs and only provides coverage to the extent of the design professionals negligence; therefor any up-front defense costs are paid directly by the firm. This is potentially fatal to professional services firms.

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Does the proposed language limit the liability of design professional's and place the burden on other participants in a construction agreement to defend the design professionals own negligent conduct?

The intent of SB 213 is to make the design professional responsible for the harm *that it causes*, in proportion to the design professional's negligence for the harm *that it causes*. SB 213 would void provisions in construction agreements that make a design professional responsible for harm *that it does not cause*. SB 213 fairly provides that if a design professional is 50 percent at fault for harm, and others (owner, general contractor, subcontractor, material supplier) are also 50 percent at fault for the harm, then the design professional can only be required by a construction contract to pay damages and defense costs in proportion to the design professional's fault. The intent is that all parties would pay their fair share so that other participants are not burdened with another parties' responsibility.

In addition, most construction defect claims include the design professionals, who are defendants, and active litigants/participants, in a dispute. Nothing in SB 213 protects or prevents design professionals from participating in litigation, bars claims against design professionals, or changes Oregon law in any way regarding holding design professionals responsible for harm caused by their negligence. Liability is not established by allegation, by accusation, or by one party's subjective determination of another party's fault. Liability is established by agreement ("yes, I did it" or "let's compromise and settle this"), or by resort to binding dispute resolution (trial or arbitration). "Innocent until proven guilty" applies in business disputes as well. SB 213 does not shield design professionals from liability, it fairly confirms how the design professional's liability is established (which is no different than how liability is established for an owner, general contractor, subcontractor, or material supplier).

Does the proposed language unfairly limit the design professional's exposure to litigation costs including attorney's fees?

SB213 does not shield or limit the design professional's exposure to litigation costs, including attorney's fees, for defending itself from a claim. In fact, this is the "American rule" that each party bears the cost of their own defense. SB 213 fairly provides that a design professional cannot be required by a construction contract to pay another party's attorney's fees and litigation costs before it is determined whether the design professional has any responsibility for the claim that caused that other party to incur attorney's fees and litigation costs.

Unlike owners and contractors, design professionals carry professional liability insurance which provides coverage for the negligent acts, errors or omissions of the design professional. Professional liability insurance includes coverage for defense costs, but only to the proportionate extent of the design professional's negligence. It does not provide coverage for up-front defense costs of others and it does not provide coverage for defense costs when the design professional is not at fault. It does however provide for the reimbursement of defense costs, from the first notice of claim, incurred by others to the proportionate extent of the design professional's negligence.

How does the duty to defend impact design professionals and what is the risk associated with executing an agreement that contains this obligation?

Design professionals carry professional liability insurance which provides coverage for the negligent acts, errors or omissions of the design professional. The professional liability policy also provides for coverage of the defense costs, but only to the proportionate extent of the design professional's negligence. When a business executes an agreement that defines the defense obligation outside of the insurable definition of professional liability, that business must make a business decision on whether they can take on that uninsurable risk. The impact is that numerous businesses are making decisions to not participate in agreements that require a design professional to pay for the up-front defense costs of others when it is not covered by insurance. This has a financial impact on small and minority businesses who have less ability to take on the risk of the uninsured up-front defense liability and potentially limits opportunities for small business and diminishes competition.

We respectfully ask this committee to support the -2 amendment to SB 213 and send this bill to the Senate floor. This is good business policy that will assist firms across the state in being able to engage in construction projects, including many government-funded projects, by removing this onerous duty to defend clause.

Thank you for your service and we are happy to be a resource if you have additional questions.

Sincerely,

Alison Davis
Executive Director