



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

Hearing  
March 22, 2021

Good morning Chair Prozanski, Vice Chair Thatcher and members of the Committee. For the record, my name is Larry Fox representing DOWL, LLC a 420-person multi-discipline consulting engineering firm. We have been in business in Oregon since 1966 and employ a staff of 138 in six offices in Oregon. I am also the current president of the American Council of Engineering Companies, who, along with the American Institute of Architects, have introduced SB213. ACEC Oregon is a professional association of 110 member firms and nearly 4,000 employees. I am here today to strongly support the -2 amendments to Senate Bill 213.

Senate Bill 213 will bring fairness and equity to professional services contracts between owners and design professionals by ending the inclusion of up-front duty to defend clauses in both public and private agreements. Duty to defend clauses that require first-dollar defense of another party prior to professional negligence being established are not fair, equitable or inclusive, and cause great harm to design professionals. This is a contract issue, not an insurance policy issue.

As the COO of my company I am faced every day with the decision to either “bet the farm” by signing a contract that includes uninsurable contractual liability for duty to defend, or else forgo the project and potentially not have enough work to keep my staff gainfully employed. While my company is large enough to potentially accept this self-insured liability, small and minority-owned design firms cannot afford to take that risk and these onerous contract terms become a barrier to their businesses’ ability to thrive and grow.

We have been asked about the need for SB 213. What is the problem it is fixing. While we don’t have a specific business disaster in Oregon to point to, SB 213 will ensure we don’t. We consider the bill as an inoculation against the potential business devastation that has befallen other design firms in other states. We seek your support to ensure catastrophic failure does not happen here. Similar legislation has been passed in both liberal and conservative states in the past several years. It is just good policy.

We have met with multiple stakeholders in the past three months to work towards consensus on SB213 including ODOT, AGC, OCAPA, LOC, Special Districts and the trial lawyers. While we have not succeeded at reaching consensus, I believe we have educated the stakeholders on why this legislative fix is needed, and we have submitted the -2 amendments in response to the feedback we heard in those meetings.

You may hear from opponents of SB213 that design professionals are trying to get out of their responsibility to defend their design. This is not true. We are simply trying to tie our liability for defense

costs to our proportional liability for the issue. This is simply about fairness. Everyone should be responsible for their own defense costs relative to their proportional liability, but only after that liability is determined.

You may hear from opponents of SB213 that design professionals are trying to create exalted status for ourselves that puts us at an advantage in contract negotiations and assignment of risk. This is not true. Design professionals are already in a different category than construction contractors in that claims against us fall under professional liability versus commercial general liability insurance. Professional liability insurance pays defense costs only to the extent of established negligence, not first-dollar defense costs. Our bill will actually level the playing field for design professionals who are currently at a disadvantage in being able to negotiate onerous duty to defend clauses out of contracts.

You may hear from opponents of SB213 that this is an insurance issue and that we should get the insurance industry to fix this versus changing the indemnity statute. Looking to the insurance industry to solve this issue is not a feasible solution for a couple of reasons; 1) commercially viable duty to defend policies for professional liability do not exist in the marketplace; and 2) if such policies existed they would be so cost prohibitive that our clients would not want to pay for them. 27 states across the country have passed similar duty to defend statutes to solve this problem for design professionals. If an insurance solution were available that would not have been necessary.

I am pleased that our coalition of supporters includes businesses across Oregon, several of whom have written letters of support that are part of the record. I want to point out two letters. The first from the Oregon Association of Minority Entrepreneurs who, historically, have been extremely limited with their endorsement of specific legislation. OAME is a tireless supporter of minority businesses getting a fair opportunity. Their philosophy of Everybody's In, Nobody's Out is a perfect metaphor for SB 213. I would also like to point out the TriMet statement of support and their commitment to a fair and equitable contracting system for business, especially small business in Oregon.

My colleagues testifying this morning will provide additional context to the statements I have made here this morning.

In closing, I respectfully ask this committee to support the -2 amendments to SB 213 and send this bill to the Senate floor. SB213 is good for business and it is good for Oregon relative to promoting fair and equitable practices in public and private contracting.

Thank you and we look forward to your questions.