CITY OF
PORTLAND, OREGON
OFFICE OF THE CITY ATTORNEY

Robert L. Taylor, City Attorney
1221 SW 4th Avenue, Suite 430
Portland, Oregon 97204
Telephone: (503) 823-4047
Fax: (503) 823-3089

February 8, 2024

Senate Committee on Judiciary
Oregon State Capitol
900 Court St. NE
Salem, OR 97301

Re: Senate Bill 1575

Dear Chair Prozanski and Members of the Committee:

Thank you for the opportunity to give comments on proposed Senate Bill 1575 (the "Proposed Bill"). The City is concerned that this bill would unnecessarily transfer risk of defective design from design professionals to the government and the public.

The Proposed Bill would preclude contractual language requiring the design professional to defend and indemnify a contracting agency prior to liability being established. In other words, design professionals would not need to indemnify or defend contracting agencies for design defects until ***after*** a legal determination that the design defect was attributable to the design professional. This change in policy would fundamentally shift the risk of liability for defending construction design defect claims from the design professional to the contracting agency. This is an abnormal assumption of risk because the contracting party who is able to mitigate the risk is generally the one who assumes the risk. Here, the risk of defective design claims is best born by the designers: designers can mitigate against litigation risk by designing projects without defects.

Assume that a completed structure (for example, a bridge) shows signs of failure a few years after construction, and the bridge needs to be fixed; or even worse, assume the bridge fails and hundreds of people die or are injured. More likely than not, the contracting agency had nothing to do with the structure's failure. Either the structure was designed wrong by the design professional, or the contractor built it wrong. Under the Proposed Bill, the contracting agency will need to defend against the hundreds of tort claims.

Currently, contracting agencies ask for defense and indemnity from both the contractor and the design professional. And for good reason: the contracting agency did not draft the plans and specifications or build the project. So the contracting agency can rightly shift the burden of the dispute to the two responsible parties to best capable of defending against those claims: the contractor who built the structure (and its performance bond surety and insurance carrier) and the design professional who designed it (and its insurance carrier). But SB 1575 would change that balance. Instead of the design professional defending its own design (or claiming responsibility for it), contracting agencies would be carry that burden. That is not good public policy. The fight should be between the people who are responsible: the contractor who built the structure and the design professional who designed it.

If the Proposed Bill passes, the City foresees that the following consequences that will likely result:

1. Massively increased litigation costs for contracting agencies: Because contracting agencies could not require design professionals to defend and indemnify until after liability was established, contracting agencies would have to bear the brunt of up-front litigation costs. Moreover, the SB 1575 could tacitly force contracting agencies to pay for the defense of design professionals because the Proposed Bill states that the design professional is not liable for costs until fault is determined. This is a massive windfall to design professionals.
2. Less incentive for design professionals and their insurers to work towards remedies: If design professionals do not have to defend and indemnify contracting agencies, they will have less incentive to resolve problems earlier and avoid litigation. Similarly, design professional's insurers will be able to deflect participation and will be less likely to meaningfully engage in litigation because their responsibility will not arise until after litigation or settlement.
3. Design Professionals would obtain significant power over contracting agencies' settlement negotiations: Contracting agencies may want to settle out a case with a contractor rather than proceed to litigation, especially if it appears that the contractor was not at fault. If a design professional disagrees with the contracting agency's preferred settlement decision, the design professional may refuse to pay those settlement costs because the design professional will not be responsible until liability is determined. This could result in contracting agencies paying out settlements for design defects to mitigate risk or move a project forward, or alternatively litigating cases that could be settled to ensure that a design professional pays for their share of fault.
4. Design professionals can choose not to design public improvements: Design professionals can avoid doing on work public contracts and do work in the private sector, where these risks can be negotiated between the parties. Curiously, this statute does not prohibit indemnity in those settings.
5. Defense and indemnity costs are more easily born by design professionals: Design professionals can increase their pricing to contracting agencies to account for the additional insurance costs for defense and indemnity. Those can then be charged back to the contracting agency through billable rates. As it stands, design professionals are already including these additional costs in their pricing to contracting agencies because they currently have the responsibility to defend and indemnify. Alternatively, contracting agencies have essentially no power to mitigate against the unknown risks of design defects, given that they don't develop the design. Indemnity is the way contracting agencies protect the public.

While the City certainly can empathize with design professionals that seek to minimize their litigation costs, the City believes the sounder public policy is to allow contracting agencies to include these indemnity clauses in their contracts. Design professionals already have

additional statutory protections under ORS 31.300 that require claims against them to include a certification that an expert is willing to testify that the design professional failed to meet the standard of care, and they have a truncated statute of limitations in ORS 12.135. Accordingly, the City opposes SB 1575.

The City would be happy to attend a round table to discuss these or other concerns with the Proposed Bill or is available to further discuss or testify on this matter as may be needed.

Very truly yours,

Macaen Mahoney
Deputy City Attorney
Portland Office of the City Attorney
Construction