



AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Ohio

**Testimony of
Beth Easterday, President
American Council of Engineering Companies of Ohio
to the
House Civil Justice Committee
regarding House Bill 159
April 30, 2019**

Chairman Hambley, Vice Chair Patton, Ranking Member Brown, and members of the committee. I am Beth Easterday, President of the American Council of Engineering Companies of Ohio. I am here today to offer our support for House Bill 159.

For the record, my association is made up of 130 engineering firms, located all over the state of Ohio, many of which are engaged in the design of our public water and wastewater systems, bridges, highways, building structures and systems and environmental projects. My members are made up of large international firms, down to small firms under 10 employees. In fact, over 50% of ACEC Ohio's membership is made up of small engineering consulting businesses under 50 employees.

Design professionals, as a matter of basic fairness, should not be asked to indemnify and/or defend another party for losses that the designer did not cause, cannot insure against and were caused by factors beyond the designer's control. Unfortunately, some public authorities are still putting indemnification clauses in their contracts that require a design professional to indemnify above and beyond what the design professionals' professional liability insurance will cover. Above and beyond the standard of care or professional negligence.

The fundamental purpose of this bill is fairness, right now design professionals are being asked to defend public entities against third party claims before there is a determination that the design professional has committed an error. The costs of such defense can be staggering and come out of the design professional's pockets, not their professional liability insurance policy. The reason being the professional

liability insurance will only cover legal costs to the extent caused by the negligent errors and omissions of the design professional and does not provide defense for its client.

This bill narrows the statute --does not eliminate-- the obligation a design professional must shoulder to indemnify a public entity to just those situations where the design professional has been found to have committed an error. The bill will help engineering consulting companies and architectural firms by providing clarity and certainty that indemnification of third party claims will not be a part of entering public authority contracts.

To date, eleven states (Arizona, California, Colorado, Florida, Georgia, Indiana, Kansas, Maryland, Michigan, Minnesota and Montana) have enacted statutes such as HB 159.

ACEC Ohio appreciates your consideration of the bill today. Thank you for allowing me to testify, I will be happy to try to answer any questions you might have.



K.E. McCartney & Associates, Inc.

Engineers • Planners • Surveyors

April 25, 2019

The Honorable Steve Hambley, Chair
Ohio House Civil Justice Committee
77 South High Street, 11th Floor
Columbus, Ohio 43215

Dear Honorable Hambley:

Please accept this letter in support of House Bill 159 “Fairness in Public Contracts”. For the engineering industry, this Bill represents fairness. Currently, design professionals are asked to defend public entities against third party claims BEFORE there is a determination that the design professional has done anything wrong. The defense cost against such a claim can be extremely expensive and is not covered by professional liability insurance, with the result being an out of pocket expense for the designer. For small firms under 50 employees this type of financial impact could potentially threaten their ability to stay in business. I don’t think it is anybody’s intent to drive small firms out of Ohio, we therefore need to narrow the obligation a design professional must should to indemnify a public entity. House Bill 159 will do just that by holding firms liable when they have been found to have committed an error, again as a matter of fairness.

KEM is an Ohio born firm, founded 40 years ago. We bleed scarlet and gray and have always taken responsibility for our work. I am simply asking that we not be asked to defend and indemnify another party for losses that we did not cause, for which we cannot insure, and were caused by factors beyond our control. Again, not to beat the proverbial dead horse, but it is truly a matter of fairness.

For these reasons, we ask that you help with the passage of House Bill 159.

Sincerely,
K.E. McCARTNEY & ASSOCIATES, INC.



Brian P. McCartney, P.E., P.S.
President

cc: ACEC Ohio
Representative Romanchuck



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April 29, 2019

The Honorable Steve Hambley, Chair
Ohio House Civil Justice Committee
77 South High St., 11th FL
Columbus, OH 43215

Re: House Bill 159 "Fairness in Public Contracts"

Dear Representative Hambley:

We are reaching out to you, as a member of ACEC Ohio, in support of House Bill 159, which would regulate the use of indemnity provisions in contracts related to public improvements. Here are some of the reasons why this bill is important to SME.

1. The fundamental purpose of this bill is FAIRNESS. Right now, design professionals are being asked to defend public entities against third party claims BEFORE there is a determination that the design professional has committed error.
2. The costs of such defense can be staggering and are beyond the control of the design professional. These defense costs would come out of the design professionals' pocket, and not from their professional liability insurance policy. Just like the presumption of innocence, a design professional should not be presumed responsible for a cost without a determination of wrong-doing.
3. Design professionals' professional liability insurance will only cover legal costs to the extent caused by the negligent errors and omissions of the design professional. A design professional's professional liability insurance policy does not provide defense for its clients.
4. Many of the design firms being required to sign these contracts are small Ohio-based companies and risk losing business if they refuse to accept an onerous indemnity obligation or in the alternative, take the work and subsequently have to pay for defense, even if they are found to have NOT been negligent.
5. ACEC Ohio is asking that the statute narrow (not eliminate) the obligation a design professional must shoulder to indemnify a public entity to just those situations where the design professional has been found to have committed an error.
6. The bill will help engineering consulting companies and architectural firms by eliminating unpredictable expenses, providing clarity and certainty when entering public contracts.

7. To date, eleven (11) states (Arizona, California, Colorado, Florida, Georgia, Indiana, Kansas, Maryland, Michigan, Minnesota, & Montana) have enacted statutes such as House Bill 554.

In summary, design professionals are required by common law to bear responsibility for damages caused by their own professional negligence. They carry professional liability insurance that will pay injured parties for precisely such damages. Moreover, Ohio public agencies currently have the authority to determine how much coverage must be carried by engineers and architects seeking to enter into agency contracts.

Design professionals, as a matter of basic fairness, should not be asked to indemnify and/or defend another party for losses that the designer did not cause, cannot not insure against, and were caused by factors beyond the designer's control.

Sincerely,

SME

Brendan Lieske, PE
Project Engineer



April 26, 2019

Honorable Steve Hambley
Ohio House of Representatives
Riffe Center
Columbus, OH 43215

AIA Ohio
17 S. High Street, Suite. 200
Columbus, OH 43215

(614) 221 0338

www.aiaohio.org

Dear Representative Hambley :

The Ohio Society of the American Institute of Architects would like to support passage of HB 159 which for public improvements would relieve architects from being asked to defend a third-party claim before there is a determination that the design professional has committed an error.

The costs of such defense can be well beyond the control and the means of the design professional...especially retired design professionals. Just like the presumption of innocence, a design professional should not be presumed responsible for a cost without a determination of wrong-doing.

Sincerely,

A handwritten signature in black ink, appearing to read "Kate Brunswick".

Kate Brunswick, CAE, Hon. AIA
Executive Vice President

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COMPANIES

Testimony in Support of HB 159 – Fairness in Public Contracts

Chairman Hambley, Vice Chair Patton, Ranking Member Brown, thank you for the opportunity to present proponent testimony on HB 159. My name is Robert Gavin, Risk Manager with Oswald Companies. Oswald represents over 700 Ohio architectural and engineering firms (A/E) for their professional liability insurance needs and is the largest insurance agency representing the A/E profession in Ohio. I've spent 35 years in the legal and insurance world of the A/E profession. We strongly believe HB 159 – Fairness in Public Contracts is a positive step for both the Ohio A/E profession and Ohio public entities for the reasons stated below. But first, the Ohio A/E profession truly is comprised mostly of small businesses. The average Ohio A/E firm consists of about 10-15 employees. More than 1/3rd of our A/E clients consist of 10 employees or less. Revenue is relatively small and profit margins are thin, 10% would be considered by many to be a good year. Firms are thinly capitalized. They have no measurable assets other than used office furniture and equipment.

Because of the nature of the A/E “business” it is vitally important not only to the A/E firm but also to their public client and Ohio taxpayers that any agreement be insurable under the A/E professional liability policy. If a claim is not insurable under the professional liability policy, it is unlikely the client will be compensated for damages. The A/E professional liability policy provides coverage for damages claimed against an A/E to the extent those damages arise from the failure of that A/E to meet its professional standard of care, i.e. professional negligence. It is customary for a client to require the A/E to maintain professional liability insurance and to insist on a contractual indemnity from the A/E. A huge and financially dangerous disconnect, to both the public client and the A/E, occurs when the client insists on a contractual indemnity that unfairly imposes contractual liability on the A/E and is not insurable under the very professional liability insurance the client requires of the A/E.

In no way is the A/E profession trying to avoid responsibility for damages caused by their professional negligence. But the A/E profession should not be held responsible for a greater share of damages than that caused by the A/E's negligence. Some erroneously believe imposing such unfair and uninsurable indemnities on the A/E somehow saves the public entity money by lowering that entities insurance costs. That belief is unfounded. From an actuarial standpoint it is impossible for an insurance underwriter to gauge any purported costs savings accruing from unfair contractual provisions imposed upon the A/E profession. In fact, far from saving the Ohio public entity money these unfair provisions impose higher costs on those entities. Professional liability insurance carriers view public projects in Ohio as a higher risk because of poor claims experience on those projects. This poor claim experience leads to higher professional liability insurance premiums to the A/E profession who in turn pass these costs onto their clients.

Page 2
Oswald Testimony
April 30, 2019

The other, often not talked about, result of such uninsurable contractual indemnity provisions is that a very large percentage of Ohio A/E firms will not pursue public projects because of the uninsurable nature of those contracts. They cannot take the financial risk of doing so because they cannot risk paying for damages they didn't cause and for which they cannot buy insurance. This result negatively impacts the public because it significantly reduces competition. We all understand greater competition results in lower costs to the consumer as well as a greater variety of design options the consumer can choose from.

Thank you for the opportunity to present our opinions on this bill. We hope, not only for the Ohio A/E firms and the employees they employ, but also for the taxpayer at large, that HB 159 – Fairness in Public Contracts Indemnity is passed as it currently reads. I'll be happy to try and answer any questions you may have.

Frederick T. Bills
614.280.1142
FBills@westonhurd.com

April 30, 2019

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

STATEMENT IN SUPPORT OF HB 159

Chairman Hambley, Vice Chair Patton, Ranking Member Brown, and members of the committee, 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 projects. I have lectured and presented seminars to designers on the subject of construction documents 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 also represent many of the national insurers of architects and engineers. I have represented some of the largest design firms in Ohio, as well as the single practitioner.

The practice of architecture or engineering is a very competitive practice. The great majority of designers do not have the luxury of being in such a niche practice that they are pursued by owners. Rather, regardless of how skilled or proficient a design firm may be, it finds itself in a very competitive arena. As such, they are vulnerable to unfair contracts in order to secure work. This should never be the case if the project is a public improvement.

One of the single largest areas of exposure for designers pertains to indemnity provisions inserted into contracts by owners/developers. Private contracts are a matter of negotiation. This is not true of public projects. Indemnity provisions design firms and their insurers bring to my attention are fraught with unfair obligations. Provisions that masquerade as indemnity that in reality revise a designer's standard of care are common. Both local and State level public authorities have created contract provisions that tie the designer to a level of perfection or near perfection. Perfection is not the industry standard of care, and for good reason. Plans and specifications always leave room

for interpretation for builders and allows for project flexibility. But, when onerous indemnity provisions require near perfection by the designer, breach results in an obligation to pay all costs, attorneys' fees, and expenses to the public authority, regardless of whether the designer violated the industry standard of care. This results in harmful outcomes industry-wide, as such provisions may not be covered by insurance, leaving the design firm with large exposure that may not be covered by assets, greatly impacting the long term success of the firm, while leaving the public authority with damages which may not be recoverable.

It is time for this to be addressed and House Bill 159 is the correct vehicle to do so. The proposed Bill does not prohibit indemnity provisions in public improvement contracts. Rather, it focuses on fairness, restricting the scope of indemnity to its traditional legal concept, and imposing upon designers indemnification obligations only for their proportionate share of the tortious conduct at issue. House Bill 159 will be a boon for designers, while having minimal impact on public authorities. It deserves broad support.

Very truly yours,

Frederick T. Bills

FTB/nnw

cc: Rep. Thomas F. Patton, District 7
Rep. Richard D. Brown, District 20
Beth Easterday