

## OHIO'S ANTI INDEMNITY IN PUBLIC PROJECT CONTRACTS WITH DESIGN FIRMS BECOMES LAW

March 2023

Weston Hurd LLP worked closely with the [American Council of Engineering Companies of Ohio \(ACEC Ohio\)](#) to draft legislation limiting the scope of contractual indemnification against design professional firms in public improvement contracts. [Senate Bill 56](#) became law effective March 14, 2023, enacting §153.81 of the Revised Code to regulate the use of indemnity provisions in contracts with professional design firms for public improvement projects.

ACEC Ohio recognized the unfair bargaining position of professional design firms when it came to public improvement projects. Local municipalities had been inserting broad indemnification provisions in contracts with professional design firms for public projects, and other local governments and state agencies were considering similar provisions in their public contracts. ACEC Ohio decided to engage and advocate for clarifying these broad indemnification provisions.

ACEC Ohio worked with Representative Bill Seitz to introduce Ohio House Bill 554 (131st General Assembly), which became Senate Bill 56 (134th General Assembly) sponsored by Senator Bill Blessing, to address a cascading problem for design firms practicing in the public improvement arena. As a result of ACEC Ohio's efforts, public entities can no longer insert broad indemnity provisions in contracts with designers for public projects. Although indemnity provisions are not eliminated by §153.81 of the Revised Code, they are limited in scope to what is reasonable and insurable.

### **How it works:**

The legislation affects the scope of indemnification provisions which may be included in public improvement contracts in four important ways:

1. Indemnification is limited to third-party claims. Traditionally, the concept of contractual indemnity was to protect a party from incurring losses and expenses to third-party claims caused by the negligence of another party to the contract. Today, the concept has expanded. It is common to see contractual provisions obligating a professional design firm to indemnify against first-party claims (first-party claims are claims by the owner for their own damages that are not resulting from claims of third parties). The new law limits indemnification to claims of third parties. It significantly limits the scope of indemnification provisions that were commonly seen in public improvement contracts. See R.C. §§153.81(A)(1)(a) – (A)(2)(a) and R.C. §153.81(E)(2).
2. Indemnification is limited to the proportionate share of the contracting professional design firm and its consultants' tortious conduct, as defined under Ohio's apportionment statute. Ohio's anti-indemnity statute, R.C. §2305.31, renders void terms of an indemnity provision in a construction contract in which the indemnitee attempts to shift responsibility for its negligence to the indemnitor. Such terms are void and unenforceable as a violation of public policy. R.C. §2307.23 provides the procedural mechanism of apportioning liability for determining joint and several liability among several parties and any contributory fault of a plaintiff. The new law limits the scope of a professional design firm's obligation to indemnify the public

- authority to its proportionate share of the tortious conduct proximately causing the third-party claim for which the public authority is seeking indemnity. See R.C. §153.81(A)(1)(b).
3. Indemnification is limited to claims, damages, or loss, including reasonable attorney fees, costs, and expenses. Ohio follows the American Rule, which states that parties to litigation are to pay for their own attorneys' fees unless there is a specific exception to the rule that applies. However, Ohio courts have consistently held that statutory recovery of attorney fees is only available where the statute specifically authorizes their recovery.
  4. The new law allows the professional design firm contracting with the public authority to include sub-contract provisions that create the same indemnification obligations in scope with its consultants. As such, the new law creates a mechanism by which the contracting professional design firm may protect itself from exposure to the tortious conduct of its consultants in proportion to the limits of the indemnification obligations allowed for under R.C. §153.81(A)(1). See R.C. §153.81(A)(2)(a).



#### **About the Author**

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