

January 22, 2020

Ted Waugh
Assistant General Counsel
American Chemistry Council
700 Second St., NE
Washington, DC 20002

Re: Local Water Project Legislation

Dear Ted:

This letter addresses whether House Bill (HB) 4043 poses potential for liability of Oregon Professional Engineers (PEs) or local governments.

Short Answer

HB 4043 will not affect the potential liability of Oregon engineers or municipalities. The proposal could also promote increased competition consistent with Oregon's competitive bidding statutes.

Summary of HB 4043

HB 4043 would prohibit local governments, contracting agencies, and contract review boards from prohibiting or restricting the use of pipe or piping materials for a water project if the project was funded, at least in part, by State funds and:

The pipe or piping materials meet current standards or performance specifications of:

- (A) ASTM International;
- (B) The American Water Works Association;
- (C) The American National Standards Institute;
- (D) NSF International; or
- (E) A licensed professional engineer.”

Summary of Effects on Potential Liability

HB 4043 will not lead to increased liability of Oregon PEs or municipalities. Nothing in the proposed bill changes the negligence standards for actions against PEs, nor does it change the process by which unsuccessful bidders may challenge a government’s decision not to award a public contract to the bidder.

Engineer Liability under Common Law

Malpractice actions against engineers are based on negligence. *Pacific Form Corp. v. Burgstahler*, 263 Or 266, 310, 501 P2d 308 (1972). In an ordinary negligence claim, “a plaintiff must establish that the defendant’s conduct created a foreseeable and unreasonable risk of legally cognizable harm to the plaintiff and that the conduct in fact caused that kind of harm to the plaintiff.” *Sloan on behalf of Estate of Sloan v. Providence Health System-Oregon*, 364 Or 635, 643, 437 P3d 1097 (2019). However, where the parties have a “special relationship,” the nature and scope of the duty owed by the defendant can be defined by that relationship. *Id.* Engineers have such a special relationship with their clients. *Abraham v. T. Henry Const., Inc.*, 230 Or App 564, 570-71, 217 P3d 212 (2009). If an engineer’s contract with its client “incorporates a general standard of skill or care to which the [engineer] would be bound, independent of the contract, the [engineer] may be liable in tort” if his or her work falls below that standard of care or skill. *Conway v. Pacific University*, 324 Or 231, 239, 924 P2d 818 (1996). In situations where the special relationship does not define the scope of the engineer’s duty owed to the client, the scope will be based on “common law principles of reasonable care and foreseeability of harm.” *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 336 Or 329, 342, 83 P3d 322 (2004).

Nothing in HB 4043 changes the professional standard of care for PEs in Oregon or otherwise alters what a plaintiff must prove in a tort claim against a PE. Accordingly, HB 4043 will not affect the potential liability of PEs in Oregon.

Relevant Regulatory Standard

The Oregon Administrative Rules (OAR) currently provide standards for the construction of new public water systems and for major additions or modifications to existing public water systems. For example, for public drinking water systems: “Only materials designed for potable water service and meeting NSF Standard 61: Drinking Water System Components – Health Effects or equivalent shall be used in those elements of the water system which are in contact with potable water.” OAR 333-061-0050 (1)(e).

The rules add that “[c]onstruction may deviate from the requirements of this section provided that documentation is submitted, to the satisfaction of the [Oregon Health] Authority,

that the deviation is equal to or superior to the requirements of this section.” OAR 333-061-0050(1)(h).

For wastewater facilities, the Oregon Department of Environmental Quality (DEQ) guidance provides that the Design Engineer is responsible for selecting pipe material for the project, subject to approval of the owner. Piping and valves shall be in accordance with AWWA standards. Oregon Standards for Design and Construction of Wastewater Pump Stations, at p. 13. The Guidelines for Sewer Pipelines also refer to ASTM and AWWA standards. OAR 340-052-0020, Appendix A, at p. A-9.

Thus, all avenues by which an Oregon professional engineer may specify piping material (approval by the owner, reliance on national or international standards) practically shield the professional engineer from liability, with or without HB 4043. HB 4043, therefore, does nothing to increase the professional engineer’s potential liability or undermine the professional engineer’s defenses against liability.

Potential Liability of Government Entity

Oregon state law provides that public improvement contracts must (with some exceptions) “be based on competitive bidding.” ORS 279C.300. The purpose of requiring competitive bidding “is to safeguard public funds and prevent favoritism, fraud and extravagance in their expenditure.” *Twohy Bros. Co. v. Ochoco Irrigation Dist., Crook County*, 108 Or 1, 29, 210 P 873 (1922) (internal quotation marks omitted). Unsuccessful bidders can file a lawsuit seeking to require the contracting agency to comply with public contract laws. ORS 279C.460. Oregon municipalities can have their own public contracting laws. The City of Portland, for example, has a set of ordinances governing the award of municipal contracts. See Portland City Code § 5.34.010 *et seq.* Unsuccessful bidders can file a protest with the City. Portland City Code § 5.34.730.

HB 4043 would not affect municipal or public official liability.¹ Unsuccessful bidders will still be able to challenge, under state or local law, the rejection of their bids, just as before. And the grounds for challenging the government’s decision will remain the same. HB 4043 just limits the ability of municipalities to restrict or bar the use of certain piping in a water project. It does nothing to change the competitive bidding process itself.

¹ If a municipality passes an ordinance that is directly contrary to LC 3301 (e.g., an ordinance that states the city will not accept any bid for a municipal contract if the bid would include the use of a particular type of pipe, even though the pipe meets ASTM International standards), the municipality could be sued to enjoin enforcement of the ordinance. However, that is true virtually any time a municipality passes an ordinance that expressly violates a state statute. More to the point, we do not believe LC 3301 would change the standards for when a lawsuit or bid protest could be filed by an unsuccessful bidder, nor do we believe that it would lead to increased litigation as long as the municipality is complying with the law.

Ted Waugh
January 22, 2020
Page 4

Even if someone could bring an action based on the prohibitions set forth in HB 4043 (which again, we do not believe they could, other than as described in footnote 1), the local government and local government employees could be protected by the discretionary immunity statute, ORS 30.365(6)(c). That statute “immunizes public bodies and their officers, agents and employees from civil liability for conduct that is the result of a choice among competing policy considerations, made at the appropriate level of government.” *Robbins v. City of Medford*, 284 Or App 592, 597, 393 P3d 731 (2017) (internal quotation marks omitted).

We also believe it is important to note that HB 4043 would encourage competition by preventing local governments from engaging in anti-competitive behavior (e.g., passing an ordinance that prohibits the use of certain piping on a water project, even though the piping meets ASTM International standards, thus limiting the universe of the number or types of bids that could be submitted). Accordingly, HB 4043 would further the “policy of the State of Oregon” that public contracts “must be based on competitive bidding.” ORS 279C.300.

Conclusion

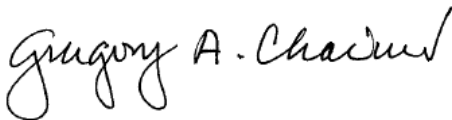
As discussed above, we do not believe HB 4043 will affect the potential liability of Oregon PEs or local governments.

The opinions expressed in this letter are based on HB 4043 as currently drafted, and research and analysis as of the date of this letter. The opinions are subject to change if new or additional information is provided, if the bill changes, or if other applicable law changes.

Very truly yours,

Davis Wright Tremaine LLP

Davis Wright Tremaine LLP



Gregory A. Chaimov

Blake J. Robinson