

SB 213 Talking Points

By: Herb Fricke

Good morning Chair Prozanski, Vice Chair Thatcher, and other Senators of this committee.

My name is Herb Fricke, President of Akana a Native American – owned small architecture/engineering firm based in Portland, OR. I am a member of the Three Affiliated Tribes of Fort Berthold, ND. My tribe is Arikara. Though our tribe is located in North Dakota, mine is one of many tribes represented in Portland and Oregon and I have lived here since the early 90's. I am a civil engineer by background and started my own consulting engineering business in 2003. In 2011, Akana was form by merging my firm with Cooper Zietz Engineers, which was established in 1990 and owned by another Native American Fred Cooper. Some of you may know Fred. We have since grown to 90 employees strong and offer engineering services in several disciplines. Our clients include tribes, the City of Portland, Metro, TriMet, and the Federal government.

I am testifying in support of the 2 amendment to Senate Bill 213.

Duty to Defend

- Is an onerous obligation that either:
 - Causes prices to increase
 - Reduces competition because small consultants cannot absorb the risk and will avoid projects with defense obligations
 - Limits opportunities for small business, in particular women and minority businesses
 - Causes design professionals to settle marginal or dubious claims because it is cheaper than paying defense for the upstream party
- The indemnity defense obligation is not generally covered by E&O insurance
 - In my experience, Akana cannot insure for an indemnity defense obligation because this is excluded by our carriers.
 - This leaves Akana directly exposed to litigation expenses.
 - This is an undesirable outcome and possible dealbreaker, because if Akana is directly sued for an error or omission in its professional service, its insurance will pay for Akana's defense—just not the defense of others.
- Unfairly punishes small businesses—usually in those cases where a large or very large firm forces down the provision
 - That is, the very companies that can afford the defense obligation are those with the power to push the risk to those who cannot.

Example

- *Quil Ceda Creek Casino:*
 - Relevant project information:
 - Part of the project was to layout the grading for a parking lot. We used a dynamic model to calculate the slopes. While the model gave coordinates at various intervals, the slopes were not linear between the model points.
 - The problem: The contractor, not understanding that the slopes were not linear, estimated intermediate points for its grading without checking with Akana. This threw off the parking lot slopes quite a bit.
 - The owner took issue with the contractor who demanded we “take care of the problem”
 - The solution: At considerable engineering expense to Akana, we reworked the slopes for the entire parking lot.
 - Though we avoided a lawsuit, it was unfair to Akana because we worried about the defense obligation owed under the contract with the contractor.
 - Even though the problem was not with Akana’s work, we would have been forced to defend the contractor against the owner.
 - Worse, we would not have been able to recover the defense costs from the contractor when we showed that Akana was not actually liable
- We would lose no matter what, even when we would have won.

In Closing

- To have fair resolution, the Duty to Defend obligation should not be allowed.
- Often and usually liability is not clear upfront in cases of alleged professional negligence—each party should pay their proportionate share.
- Out of fairness, the upstream party’s insurance should pay for the defense and this would be the case if there were no indemnity defense obligation
- The playing field should be leveled for the betterment of our small businesses, especially minority and women owned businesses, and frankly for Oregon!

As a Native American, we make decisions from the perspective that looks forward seven generations. So while it has been difficult to accept Duty to Defend provisions because it could result in the bankruptcy of my firm, hopefully the passage of this bill will benefit businesses such as mine for many generations to follow me.

I have submitted written testimony and would appreciate you taking your time to read it. Thank you for your consideration of our position and for your support of small and socioeconomically disadvantaged businesses.