



CITY OF
PORTLAND, OREGON

GOVERNMENT RELATIONS

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Senator Floyd Prozanski, Chair
Senate Judiciary and Ballot Measure 110 Implementation Committee
900 Court Street NE, HR A
Salem, OR 97301

Dear Chair Prozanski and Members of the Committee,

We write to express concerns with SB 213 as introduced, as this bill would unnecessarily transfer risk of defective design from design professionals to contracting agencies and the public. The proposed –2 amendments, unfortunately, don't solve for our concerns.

Public improvements are one of the fundamental services that the government provides. Taxpayers and ratepayers pay taxes and fees in order to have access to roads, fresh drinking water, sewers systems, parks, and other infrastructure improvements. In turn, the government and public agencies have a responsibility to ensure that projects are built well and at the least cost to the contracting agency (See ORS 279C.305). To that effect, public improvements are solicited based on a set of plans and specifications that are designed and stamped by a licensed professional engineer for a project.

For many public improvements, contracting agencies seek outside design professionals to draft quality plans and specifications. Indeed, contracting agencies procure design professionals "on the basis of the consultant's qualifications for the type of professional service required" (ORS 279C.110(1)). The government's screening procedures during solicitation ensure that the selected design professionals have, among other considerations, "specialized experienced, capabilities, and technical competence" to design a project and a positive record of past performance (ORS 279C.110(3)). Moreover, because of the importance of procuring the most competent design professional for a job, pricing policies for design professionals can only be considered "after the contracting agency has selected a consultant" (ORS 279C.110(1)). In other words, Oregon statutes implicitly recognize the importance of good design to ensuring the public receives a quality public improvement at a low price.

A further benefit of contracting agencies procuring both the design and the construction of a project is that the government and public agencies insulates itself from liability for defective construction or design. If there is a problem with the construction of the project, the contractor should be liable. If there is a problem with the design of a project, then the design professional should be responsible. To that end, contracting agencies

often include provisions in their contracts with design professionals that require the design professional to indemnify and defend the contracting agency from any negligent design. This is good public policy because it ensures that the design professional, not the government or public agency, defends against defective design claims from contractors for their own design.

SB 213 would impact the ability of contracting agencies to insulate themselves from a contractor or other third party's design defect claims. The bill language would preclude contractual language that requires 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. The contracting agency would need to establish design professional negligence prior to the design professional putting any money towards a disputed claim, despite the fact that the design professional designed the project.

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, placing further burden on taxpayers and ratepayers. Moreover, SB 213 would essentially force contracting agencies to pay for the defense of design professionals because the amendment to ORS 30.140(4)(b) states that the design professional is not liable for costs until fault is determined.

While we understand that design professionals are seeking to minimize their litigation costs, the City believes the better public policy is to allow contracting agencies to include these clauses in their contracts. We're available to discuss further our concerns with this proposed legislation.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric Noll". The signature is fluid and cursive, with the first name "Eric" and last name "Noll" clearly distinguishable.

Eric Noll
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