SERA

ARCHITECTURE
URBAN DESIGN + PLANNING
INTERIOR DESIGN

Testimony to the

Senate Committee on Judiciary

In Support of SB 848

February 28, 2023

My name is Joseph Pinzone, AIA NCARB representing SERA Architects Inc., a 100% employee-owned architecture firm. We have been in business in Oregon since 1968 and employ 180+ people.
I am writing today to strongly support Senate Bill 848.

Senate Bill 848 will bring fairness to professional services contracts by ending the inclusion of duty to defend clauses in public and private agreements. This duty to defend clause is onerous as it requires the design professional be responsible to defend an owner or other party against claims asserted by a third-party ***even if the design professional is not negligent***. This duty to defend clause is not fair, equitable or inclusive and is uninsurable.

This requirement in professional services contracts is not fair to design firms of any size, but it is especially damaging to emerging and small businesses that typically don't have the ability and/or resources to advocate against these contract requirements. We find duty to defend clauses to be a major deterrent to compete for certain projects, many of which are with governmental agencies.

Our firm's experience with defense has been challenging:

1. We have been asked to defend an Owner in a payment dispute between a subcontractor and a general contractor which had nothing to do with our services.
2. We have been asked to defend an Owner against damage claims from a general contractor for errors and omissions of a surveyor hired by the Owner and as the result we did not have any way to control, supervise or review the Scope of Work.

These are just two of the examples of how this clause is used in an unfair way to extort a defense for unscrupulous clients. The upfront Duty to Defend also has the following negative impacts on architectural and engineering firms:

1. When a client asks for an upfront duty to defend without any real determination of fault, there is no limitation on what a client could spend defending that claim – essentially an open checkbook. The architect or engineer is effectively barred from any ability to monitor, limit or manage defense costs of any kind.

2. An upfront duty to defend is uninsurable. Both private and public entities use these types of clauses all the time. If a small, minority, disadvantaged firm is unable to negotiate these out of the contracts and has to take the project on to stay alive; there will not be any insurance to cover what would otherwise be an insurable claim. If they are unable to pay the claim out of their own pocket; which most firms would not be able to do, and the insurance company denies the claim – which it is likely to do; the prime professional requirement of protecting public's health, safety and welfare will have failed. No one would be served. Said another way, eliminating the upfront duty to defend is in the public's interest.
3. Almost all architect and engineer insurance policies are considered eroding policies. That is, any money spent defending a claim reduces the amount of available insurance to settle the claim. The upfront duty to defend has the effect of reducing, or eliminating, available insurance proceeds (if any coverage even exists) prior to the architect or engineer even having a chance to defend themselves or learning exactly what their negligence was/is.

We respectfully ask this committee to support SB 848. Passing this bill would eliminate bad and unfair contract practices and ensure everyone involved in a project pays their fair share of legal expenses. This isn't about shirking responsibility – it's about ensuring fairness so everyone is paying their own way and adequately protected by their insurance.

Thank you for your public service and we are happy to be a resource if you have additional questions.

Sincerely,

Joseph Pinzone AIA, LEED AP, NCARB
Managing Principal
SERA Architects, Inc