



Oppose Senate Bill 848: Construction Agreement Liability Shifts

Extends indemnification provisions in construction agreements and unfairly shifts liability.

Background

The Oregon Association of County Engineers and Surveyors (OACES), an affiliate of the Association of Oregon Counties (AOC), represents Oregon's 36 county public works agencies and road departments across the state and provides a forum to share best practices and overcome challenges. County roads are a critical component of Oregon's integrated road system and are responsible for over 60% of Oregon's non-federal road network, over 32,000 total miles, and over 3,400 bridges.

Indemnity is the transferring of risk. Indemnity provisions are commonplace in construction contracts among owners, design professionals, general contractors, sub-contractors and material suppliers. Indemnity contract provisions allow parties to manage risk associated with a construction project. Currently, Oregon law prevents one party to a construction contract from passing their own negligent conduct on to another, but allows the parties to a construction agreement to require the negligent party to defend their own conduct in litigation. This is a fair outcome for all parties in a construction contract.

Problem

This bill changes the ability of contractors and owners to negotiate duty to defend provisions in their contracts with Design Professionals. If passed, this bill would remove the ability of parties to contract the upfront legal costs of design professionals. The practical implication of this change will be to require contractors and owners to defend the liability of design professionals until a case is concluded. This is an unfair shifting of the legal burden.

Particularly egregious is that the contractors and owners will be required to front the cost for the design professionals' attorneys' fees. While the bill does allow for the other parties to recover the proportional amount of attorneys' fees at the end of the legal proceeding, the upfront costs for these fees could be substantial. The design professionals should be responsible for the costs to defend themselves against claims from the beginning and other parties to a construction agreement should be able to require this in their contracts.

The bill's changes are particularly problematic in today's construction market. Removing design professionals from contract provisions that assign risk is problematic in an era where construction design goals are fluid and not just about fitness, durability, and aesthetics, but entail energy efficiency, carbon reduction, and environmental ratings of buildings. Indemnity

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provisions are becoming more important as design professionals attempt to accomplish other societal goals for owners. Freedom to contract risk is ever more important in today's construction environment. SB 848 would preclude those considerations to the detriment of all parties.

Solution

In an attempt to deal with insurance coverage and availability issues, which is the real problem, the design professionals instead are placing the burden of liability on other parties to the contract. A solution must put every party to the contract on even footing for contract agreements. Therefore we oppose SB 848. County road officials are appreciative of the time and effort put into this process, and we look forward to continuing this conversation to find collaborative approaches and sustainable solutions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tom Fellows".

Tom Fellows

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