February 6, 2024

Senate Judiciary Committee

RE: Support for Senate Bill 1575

Dear: Committee

My name is Don Sowieja, representing myself as an Oregon Registered Architect, and Ankrom Moisan Architects, located in Portland, Oregon. I am writing today to strongly support Senate Bill 1575.

Oregon professional service contracts often require design professionals including engineers, architects, surveyors, landscape architects, planners, and others to defend others for legal claims or damages even though the design professional is not responsible. This "duty to defend" language is legally problematic, expensive and a barrier to entry for many small, emerging, women and minority owned businesses, and is uninsurable by professional liability insurance carriers.

Businesses purchase liability insurance to protect themselves from legal harm. However, there is limited professional liability insurance available to engineers, architects and land surveyors that covers the legal expenses for others involved in construction projects. This leaves Oregon's design professionals stuck in an unfair situation with no way to protect themselves other than to unfairly assume the risk and hope for the best or forgo designing projects. Often, design firms do make the tough decision to walk away from contracts, but they cannot walk away every time. When designers are compelled to sign these agreements, they are committing their business assets to pay these costs, regardless of fault. Because these risks are significant, and potentially catastrophic, the result is fewer firms seeking such work and diminished competition. Other states, including California, Colorado, Utah and Washington, have laws stating a design professional will only be responsible for defense costs to the proportionate extent of their liability or fault and Oregon should follow suit.

SOLUTION:

In the proposed legislation, engineers, architects and land surveyors cannot be made to "defend" an owner or any other party against claims asserted by a third party. This bill will remove the contractual risk of design firms spending huge sums to defend against third-party claims unless the liability or fault of the designer is first established. Upon a determination that the designer was negligent, the damages caused by that negligence, including the owner's or another party's attorneys' fees and costs, can then be paid by the designer's professional liability insurer. This isn't about shirking responsibility – it's about ensuring fairness so everyone is paying their own way and adequately protected by their insurance.

The proposed bill will ensure fairness by:

1. Requiring each party to a construction contract be responsible for their own negligence or fault. This means parties will pay damages based on the actual liability, rather than mere alleged liability.

2. Ensuring whichever party is negligent would be able to purchase the proper insurance. This is not the case today and results in high-risk contract provisions that are unreasonable and uninsurable.

3. Allowing all design companies, small and large, to compete on an even playing field. This is not the case now as the contractually imposed duty to defend is a major prohibitive factor for many emerging, women and minority owned businesses considering construction projects.

Sincerely,

Don Sowieja, AIA, NCARB