



AMERICAN COUNCIL OF ENGINEERING COMPANIES OF OREGON

*Since 1956*

*“The Engineers”*

Testimony Presented to the  
Senate Committee on Judiciary  
In Support of Senate Bill 1575  
February 8, 2024

Good afternoon, Chair Prozanski, Vice Chair Thatcher, and members of the Senate Judiciary committee. My name is Tonya Finley, and I am the President for the American Council of Engineering Companies-Oregon. As a professional association, ACEC advocates and supports legislation for fair business practices in our industry as well as legislation that makes good business sense. This bill does just that – it makes good business sense – it removes a contractual and financial barrier for our members and other design professionals to participate in public agency contracting. I am testifying today in support of SB 1575 to prohibit duty to defend clauses in public agency contracts for design professionals. This is our priority legislation as it will provide a level playing field for all design professionals to participate in public agency projects thereby ensuring the best designers for our scarce and valuable public works funds.

For background, I have spent nearly 35 years of my career in contract management including dealing with the issues presented by the duty to defend obligation in indemnity provisions. As a contract manager, the teams that I have worked with have been tasked to negotiate fair and reasonable terms and conditions as well as confirming that our agreements are insurable. Design professionals are not asset driven firms, and we depend on our insurance to protect us should a claim arise, specifically, our professional liability insurance, which is unique to licensed professionals. This type of insurance provides coverage to defend the company carrying the insurance as well as defending the design. But what it doesn't do - is defend other parties until it has been determined that we are at fault. This means that if designers are contractually required to defend our clients, we must pay out of our own pockets. This is unfair because we have this obligation regardless of our fault.

We recognize the problems inherent in duty to defend clauses and always work to negotiate with our clients to eliminate this contract clause. But unfortunately, this reasonable request seldom works. Since we are nearly always unsuccessful when negotiating with a public agency, we have three choices when a contract is presented to us with a duty to defend clause:

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- 1 – Accept the proposed terms and sign the contract knowing it is uninsurable and “bet the farm” with a very distressing risk/reward ratio;
- 2 – Attempt to negotiate out the duty to defend responsibility, which is rarely successful, or;
- 3 – Decline the acceptance offer and walk away from the project, which, unfortunately, is what numerous firms continue to do as you can see in the various testimonies that have been submitted online.

This clause puts all design firms regardless of size in a difficult business position but it is magnified for our small firms because it exposes the personal assets of the owners of these small companies. The health of the small companies is important for our economy. The small consultants employ Oregonians, which in turn impact the economy positively by living, buying, and paying taxes in Oregon. These consultants are vital to our community. It is advantageous for our clients to write an insurable contract so that the insurance policy, and the healthy claim limits therein, respond as they should when such a claim occurs but if the design professional signs a duty to defend clause there is no insurance to cover it. As you well know, defense costs are expensive and only getting more expensive with time. Defense costs are substantial to all size firms, but this lack of insurance exposure to a small business influences whether a small business chooses to conduct work with a public agency. It also impacts the ability for large firms to meet the small business subcontracting goals that have been established by the public agency.

There are several testimonials that have been provided by our member firms that demonstrate the financial harm of covering the defense costs when the design firm hasn't done anything wrong except sign a contract with this provision and I'm sure there are many more stories that could be told.

Design professionals are not trying to shirk their responsibility. We will engage our legal counsel to defend the design, but each party should pay for their own legal fees until it has been determined who and to what extent each party is at fault. Once this determination has been made, the client will be reimbursed for their defense costs to the proportionate extent that the design professional was at fault unless settled otherwise.

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This bill isn't asking you to do anything that has not been done in many other states. ACEC National continues to support legislation such as this and has even developed You Tube videos to promote the education of this issue as well as providing a solution to this unfair contracting. The solution is - passing legislation to prohibit this unfair contracting provision since public agencies are unwilling to negotiate the terms and conditions of their contracts. Currently over 20 states have adopted some version of this bill to restrict or ban the up-front duty to defend clauses and the number keeps growing. Our neighboring west coast states that already have similar legislation include California, Arizona, Utah, Colorado, New Mexico and Washington. All of these states are united in seeing the unfairness of these clauses and are providing the opportunity for all design professionals, both small and large, to compete for public agency projects.

As we begin to look ahead to the design and construction of the priorities of Oregonians, this legislature, and Governor Kotek, - including housing, the Interstate Bridge Replacement, continued federal funds from the Infrastructure Investment and Jobs Act (IIJA), we will need all the Oregon firms, both large and small, to participate in the public agency contracts associated with improving Oregon's infrastructure. We want all firms to have the ability to participate in these projects and many other public contracting projects. To do so, we need to pass this important legislation to provide that opportunity.

We look forward to working with this Committee to pass this fair contracting bill to ensure the best use of our public resources.

Thank you for your service and I am more than happy to be a resource if you have additional questions.

Sincerely,



Tonya Finley, MBA, CPCM, CFCM  
ACEC Oregon Board President