

April 19, 2021

Senator Nathan H. Manning, District 13
The Ohio Senate
134th General Assembly
Senate Building
1 Capitol Square
Columbus, Ohio 43215

Re: Proponent testimony in support of Senate Bill 56

Dear Chairman Manning:

I am an attorney licensed to practice in the state of Ohio. I practice throughout the state representing architects, landscape architects, engineers, and surveyors. The majority of my practice is dedicated to representing design professionals, and I have been involved in litigation in all manner of cases regarding both public and private improvement projects. I also represent national insurers of architects and engineers, and I have lectured and presented seminars to designers on the subjects of construction documents, AIA Standard Form Contracts, the qualifications-based selection process, and risk allocation. I have authored articles and newsletters focusing on liability issues that affect the practice of architecture and engineering. I am also a member of the Central Ohio Chapter of COGENCE Alliance, a partnership of owners, architects, engineers, and contractors dedicated to improving the industry and project delivery. I have represented some of the largest design firms in Ohio as well as the single practitioner.

One of the largest areas of exposure for designers pertains to indemnity provisions inserted into contracts by owners/developers. Indemnity provisions designers and their insurers bring to my attention on a regular basis are fraught with unfair obligations; obligations that masquerade as indemnity which in reality revise a designer's standard of care. In my experience representing designers throughout the state, it is often the case that public improvement contracts impose onerous first-party indemnification obligations that are used both prior to litigation and in litigation to unfairly strong-arm settlement contribution from designers even where they are not at fault and did not cause the public authority's damages. These first-party indemnity provisions increase exposure and costs of defense such that fault becomes a secondary consideration. Worse still, terms

and provisions of public improvement contracts are not typically subject to negotiation. Generally speaking, designers have neither the luxury nor the leverage to negotiate the scope of indemnity obligations in public improvement contracts. Where contract negotiations turn in a public improvement project, the public authority may simply move to the next ranked design firm from the qualifications-based selection process.

Senate Bill 56 resolves the first-party indemnification problem by ensuring that any indemnity obligation imposed upon design professionals in a public improvement project is fair. Importantly, the intent of the Bill is not to remove a public authority's ability to require indemnity from designers, but to return indemnity provisions in public work contracts to its common law scope, requiring a design professional to indemnify a public authority for its proportionate share of fault in causing damages to third-parties to a project. In that manner, it furthers the well-established public policy of R.C. 2305.31, the anti-indemnity statute, by ensuring that indemnity provisions in public improvement contracts be fair and balanced, while not diminishing the public authority's ability to recover against at-fault design professionals for breach of contract or indemnity where a design professional is at fault and has caused the public authority damages to a third party.

I have been involved in some form or another with this piece of legislation for the last four years, and we have worked with interested parties during that time to refine and clarify the Bill's scope to the satisfaction of all parties. In the end, Senate Bill 56 is about fairness. It is not fair to impose first-party indemnification obligations on designers that significantly increase their exposure and costs of defense regardless of fault in contributing to the public authority's damages. Senate Bill 56 still allows public authorities to include indemnity provisions in public improvement contracts, but simply limits a designer's liability to its proportionate share of any damages or loss that may result when problems arise on a project. That is only fair, and that is the primary issue this bill is trying to address.

Thank you for taking the time to consider this testimony in support of Senate Bill 56. I am happy to answer any questions you may have.

Very truly yours,

/s/ Frederick T. Bills
Frederick T. Bills