



ALEX A. DALLMAN

STATE REPRESENTATIVE • 41ST ASSEMBLY DISTRICT

Testimony in Favor of Assembly Bill 514

Assembly Committee on State Affairs

November 1st, 2023

Thank you, Chairman Swearingen and committee members, for allowing me to testify before you concerning Assembly Bill 514, which ensures that contracts between design professionals and public entities include only reasonable and insurable clauses. I would also like to thank Senator Wimberger for his leadership on this legislation.

Design professionals, which include engineers, architects, land surveyors, and interior designers, are typically required under **public** contracts to indemnify, hold harmless, and defend their client, which may be the state or other local governing body. In these public contracts, private sector design professionals must defend the public sector governing body against all losses and expenses, including liability costs and attorney's fees, for any claim or suit brought against that governing body. 'Duty to Defend' clauses force design professionals to pay for defense costs up front, and out of pocket, through contractual authorization.

As a matter of basic fairness, design professionals should not be asked to compensate and defend a public client for claims or losses that they did not cause, cannot insure against, or were caused by factors beyond their control. Under the bill, design professionals would continue to indemnify their client for their own failure and mistakes, but not the mistakes of others.

Right now, duty to defend requirements are putting our local firms across the state at a high risk of bankruptcy because there is no way to insure against these claims. In order to address one-sided contract clauses, AB 514 provides that design professionals must only indemnify a public entity in situations where the professional has been found liable for their negligence. Significantly, contracts for services would continue to include a reasonable and insurable standard of care for professional services.

This commonsense bill will protect our private sector design professionals from being unfairly burdened by our government. This bill will create more fair contracts between the public and private sectors and will encourage a process that is more principled and honest.

Thank you again, Chairman Swearingen, for the opportunity to testify before this committee today and I would be happy to answer any questions you may have.



STATE SENATOR

Eric Wimberger

DISTRICT 30

State Senator Eric Wimberger

Testimony before the Assembly Committee on State Affairs

Re: prohibiting certain indemnification provisions in contracts relating to design professional services.

Thank you Representative Swearingen and committee members for holding a hearing today on Assembly Bill 514 that makes important changes to protect contractors that work with the State of Wisconsin.

Under current law, engineers, architects and other design professionals who work on state projects have a duty to indemnify, hold harmless, and defend the state against all losses and expenses, for any claim or suit brought against the state. This includes claims or losses they did not cause, cannot insure against, or were caused by factors beyond their control. 'Duty to defend' makes it incredibly expensive for contractors to work with the state due to contractual obligation to pay for defense costs up front. This causes qualified builders to shy away from taking contracts given by state agencies.

AB 514 would protect contractors from being forced into unfair legal terms with the state and only make contractors pay for suits they are found liable for. As a matter of fairness, the state should not be shifting this legal burden to anyone beyond the responsible party. By passing this bill the state will not only protect the professionals who help improve our state but increase the number of small and medium-sized businesses willing to compete for state contracts. Currently fear of being held liable for a loss they didn't cause contractors to charge extremely high rates to the state to compensate. Assurance that the state will only hold contractors liable for their own mistakes will lower the cost of doing business and save the state money.

By passing AB 514 and eliminating the 'duty to Defend', we level the playing field for smaller businesses and create a more competitive bidding environment that saves taxpayers money. Please join me in support of this bill.

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Thank you, Chairman Swearingen and members of the committee, for the opportunity to testify today. My name is Chris Klein and I am President & CEO of ACEC WI, the American Council of Engineering Companies of Wisconsin. I am here today representing Wisconsin Professional Engineering companies and to express our strong support for AB 514.

ACEC WI represents 85 member firms in the state with 168 offices and more than 4,500 employees. Our member firms consist of thousands of professionals engaged in the full spectrum of engineering services from structural, civil, mechanical, and electrical engineering, to surveying and mapping.

Engineers design solutions to the challenges we face. They keep people safe; they make the air we breath and the water we drink cleaner; they provide buildings that shelter and roads that connect. Professional engineers in Wisconsin design systems that protect our water resources. We design facilities that provide flood protection and those used to store, distribute and treat water. We design transportation systems including highways, bridges and airports. We design wind and solar energy development, electrical transmission and distribution, dams and hydroelectric engineering. We design both public and private buildings, whether it's schools, hospitals, military buildings, sports stadiums or corporate offices.

Unfortunately, many of the contracts to provide these services have become critical issues for engineering firms. Both broad-form indemnification and duty to defend clauses pose a significant risk to the firm and could result in unfair damages.

As a design professional in Wisconsin, our contracts with public clients often require us to indemnify the client. Indemnifying simply means to compensate the client for a loss. Reasonable indemnification requires the design professional to compensate the government for a loss due to our negligence. That is reasonable to be included in contracts. Unreasonable indemnification would be compensating the client for a loss when we did nothing wrong or even for someone else's negligence. That should not be allowed in contracts. This legislation will provide us the protection we need.

Even more unfair, are duty to defend clauses. A government contract shouldn't require a design professional to pay the legal expenses to defend them when the professional did nothing wrong. This bill will provide us the fairness we deserve when working on public contracts.



As design professionals, we are required by law to bear responsibility for damages caused by our own professional liability and negligence. We carry professional liability insurance that can compensate injured parties for such damages. Our professional liability insurance will not cover costs for indemnification beyond our negligence. So public contracts shouldn't require it.

As a matter of fairness, we should not be asked to indemnify and defend a public client for claims and/or losses that we did not cause, cannot insure against, and were caused by factors beyond our control.

This legislation is supported by the American Council of Engineering Companies of Wisconsin, the American Institute of Architects of Wisconsin, the Wisconsin Land Surveyors, the American Association of Interior Designers, the International Interior Design Association and the Associated Builders and Contractors of Wisconsin.

Thank you again for the opportunity to testify before you today and I look forward to working with Chairman Swearingen and other committee members on this legislation moving forward.

Chris Klein, President & CEO

American Council of Engineering Companies of Wisconsin

FACT SHEET



PROTECT ENGINEERS

MAKE INDEMNIFICATION AND DUTY TO DEFEND CLAUSES FAIR



BACKGROUND

Design professionals are typically required by public contracts to indemnify, hold harmless, and defend its client against all losses and expenses, including liability costs and attorney's fees, for any claim or suit brought against the client.

As a matter of fairness, design professionals should not be asked to indemnify and defend a public client for claims and/or losses that they did not cause, cannot insure against, and were caused by factors beyond their control.



WATCH AND LEARN

Scan the QR codes to watch two brief videos outlining the dangers of broad form indemnification and duty to defend for engineers.



VIDEO

Dangers of Broad Form Indemnification



VIDEO

Dangers of Duty to Defend



SOLUTION

Support legislation that will narrow, not eliminate, the obligation design professionals have to indemnify a public entity to only situations where the professional has been found liable related to their negligence.



AMERICAN COUNCIL OF ENGINEERING COMPANIES OF WISCONSIN

ACEC Wisconsin members develop innovative solutions that increase our state's economic growth and improve communities.

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LEGISLATIVE AFFAIRS DIVISION

11/01/2023

Honorable Members of the Committee on State Affairs,

I am submitting a statement on behalf of the City of Milwaukee and the Legislative Affairs Division regarding Assembly 514. The City has taken a position to oppose the bill based on the recommendations of the City Attorney's Office and the Department of City Development.

It has been advised that the legislation is drafted more broadly than necessary to address the stated aim (no way for contractors to insure against indemnification/duty to defend provisions). It is accurate/fair to state that a design professional can't obtain *professional liability* insurance insuring for anything except *negligence*, however, the City requires indemnification (and proof of insurance to back up that obligation) for other liability (auto/general liability).

Therefore, the exception that allows the City to require indemnification for losses proximately caused by the negligent performance of design services to the extent it does not exceed the proportion of a loss provides some measure of protection, is more narrow than it needs to be (it could simply be limited to negligence and still be insurable) and is also problematic for the City because it requires an actual finding of negligence (full adjudication on the merits) in order for the City to be protected.

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As for the provision in the bill prohibiting the City from requiring a defense, it should be noted that status under a policy of insurance as an additional insured provides that entity with a defense under a policy.

As for that portion of the bill that prohibits a provision requiring the architects and engineers to defend the City, while it would not typically be an issue with regard to a design professional's *professional liability* policy (the City does not seek to be added as an additional insured to such policies and therefore would not seek a defense under them), the City does require it be added as an additional insured to other sorts of policies (auto, general liability, etc.), and the City should be provided a defense under these policies in the event of a claim. It's unclear if the bill would limit the operation of the defense afforded by the additional insured provisions in a policy of insurance.

Thank you for your time and consideration.