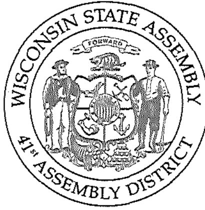

ALEX A. DALLMAN

STATE REPRESENTATIVE • 41ST ASSEMBLY DISTRICT

Testimony in Favor of Assembly Bill 514

Senate Committee on Transportation and Local Government

December 5th, 2023

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

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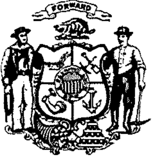
Rep.Dallman@legis.wi.gov



STATE SENATOR
Eric Wimberger
DISTRICT 30

State Senator Eric Wimberger
Testimony before the Senate Committee on Transportation and Local Government
Re: prohibiting certain indemnification provisions in contracts relating to design professional services.

Thank you Senator Tomczyk and committee members for holding a hearing today on Assembly Bill 514. This legislation makes important changes to protect contactors that work with the State of Wisconsin, while also aiming to save taxpayers money.

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 the 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, contractors charge extremely high rates to the state to compensate for the fear of being held liable for a loss they didn't cause. 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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(608) 266-5670 • (800) 385-3385
Sen.Wimberger@legis.wi.gov

ACEC
Wisconsin

December 5, 2023

Thank you, Chairman Tomczyk 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 client 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.

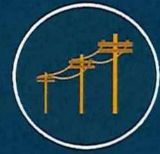
This legislation is supported by the American Council of Engineering Companies of Wisconsin, the American Institute of Architects of Wisconsin, the Wisconsin Land Surveyors, the American Association of Interior Designers, the International Interior Design Association and the Associated Builders and Contractors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

Thank you again for the opportunity to testify before you today and I look forward to working with Chairman Tomczyk 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.

Chris Klein | 608.257.9223 | chris@acecwi.org | www.acecwi.org

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Testimony in Opposition/Requesting Amendment Change to Assembly Bill 514
Senate Committee on Transportation and Local Government

Thank you, Chairman Tomczyk and Honored Members of the Committee, for hearing the concerns of villages and cities across the state regarding Assembly Bill 514. The League represents over 600 villages and cities across Wisconsin. Our members are strongly opposed to the bill, and we have amendment language that will protect communities and taxpayer dollars.

AB 514 as written will open every village and municipality in the state to lawsuits. Incidents happen, and when they do, municipalities are currently able to stay out of costly, taxpayer-funded litigation. This bill changes that and subjects every village and city in the state to litigation, bringing local governments into the courtroom and costing taxpayer-resources of time and money. We know that this was not the intention of the bill authors or the cosponsors.

We do have amendment language, one simple sentence, that will protect our communities and taxpayers while also preserving the intent of the bill: *(3)c) Where the state or a political subdivision and a private entity performing design professional services expressly agree in the civil contract to waive this section.*

This amendment ensures that the Legislature is not favoring private industry over hard-working taxpayers and allows taxpayer-funded municipalities the freedom to negotiate important contract terms.

Design firms enter into these same contracts every day with the private sector, and local governments should have this ability as well. These firms make profits; local governments do not, and they need the ability to be wise stewards of taxpayer dollars. We are sure that the Legislature's intent is to not step in and tip the scales in favor of a private industry over local governments and taxpayers.

Negotiating these terms is important in that our local governments trust the professionals to provide excellent services in building fire stations, water utilities, stormwater pipes, public works facilities, and more. When something goes wrong, the for-profit businesses providing the services should be the parties responsible.

This bill will affect every village and city in the state, and it will have an extremely detrimental impact on our small communities who do not have the legal counsel or resources to be able to handle the consequences of this legislation.

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When incidents happen (deaths, injuries, bridge collapses, window leaks, explosions, water pipe breaks, flooding, etc.), lawsuits are filed. One municipality had an incident happen, and the litigation has been ongoing for five years. There isn't a municipality in the state that should be subject to five years of taxpayer-funded litigation, simply for approving a project.

Another unintended consequence is that the bill will create a liability gap in state and federally funded contracts that municipalities will now be required to fill, costing taxpayer dollars.

The free market should be allowed to work without government intervention. It is working in the private sector, and it should continue to work in the public sector as well. We kindly request the simple, one-sentence amendment change that will preserve the legislative intent of the bill, keep our communities protected, and preserve taxpayer dollars.

Thank you.

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**Amendment Language Needed
for Assembly Bill 514**

The League of Wisconsin of Municipalities, representing over 600 villages and cities, kindly requests the following simple amendment sentence to AB 514:

(3)c) Where the state or a political subdivision and a private entity performing design professional services expressly agree in the civil contract to waive this section.

<u>This amendment:</u>

-Protects taxpayer dollars

-Allows the free market to work, without government intervention

-Saves villages and cities from financial devastation

-Allows villages and cities the same negotiating rights as the private sector

-Protects communities from irreversible, unintended consequences

-Ensures private industry is not favored over hardworking taxpayers

-Ensures the Legislature is not getting involved in private negotiations

-Looks out for the smalls (small villages and cities; average size in WI is 1500)

-Is voluntary for both parties

-Ensures taxpayer dollars are not subject to costly, time-consuming litigation

CITY OF MANITOWOC

WISCONSIN, USA

www.manitowoc.org

December 4, 2023

Honorable Members of the Committee on Transportation and Local Government:

On behalf of the City of Manitowoc, please do not advance AB 514. This legislation dramatically undercuts a basic legal right: the right of parties to freely contract with one another. In this specific instance, the proposed legislation would erode the right of municipalities to freely contract for provisions to protect local taxpayers. As a result, taxpayer will be left unprotected and they will see their taxes rise. AB 514 **is a tax increase** on everyone living in a Wisconsin town or city.

Sometimes it is necessary to raise taxes (to build a police station). Sometimes it is arguably desirable to raise them (to build a new baseball stadium). Here, the increase is "justified" so design professionals do not have to defend their work product. The burden of shoddy workmanship should not be borne by the taxpayer. The State of Wisconsin generally understands this. Whenever the City receives a Harbor Assistance Grant, for example, the State requires the City to indemnify it – this is true for countless projects in countless scenarios. Why one narrowly tailored profession should be granted a measure of immunity from the rules that everyone else is subject to is difficult to ascertain. Thankfully, you are in a position to oppose this legislation and we hope that you will do so.

Thank you for your time and attention to this matter. Should you have any questions or comments regarding the content of this letter, please feel free to reach out to me at your convenience.

Very Truly Yours,

Eric G. Nycz
City Attorney

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Assembly Bill 514 Testimony in Opposition
Senate Committee on Local Government and Transportation

The City of Eau Claire opposes Assembly Bill 514 because it shifts the professional and financial responsibility of a business or individual to the Wisconsin taxpayers. Design professionals are specifically trained, and in many cases licensed, for the job they are contracted to perform. They are experienced commercial market participants capable of negotiating fair contracts in good faith with the state and municipalities. Far from protecting the public, the bill would shift responsibility from those design professionals most in a position to avoid harm and liability to our residents and taxpayers. In the event the design professional makes an error that injures someone or causes expense to the state or a city, it should be the design professional and their insurer that bear the cost to respond to the claim and remedy any wrong. Indemnity clauses are negotiated provisions common to contracts. They are sought to ensure professional service delivery and financial responsibility is known, reliable, and held by the party most is a position to avoid harm. Separating design professionals from full responsibility for their work places an undue risk, both personal and financial, upon residents of Wisconsin.

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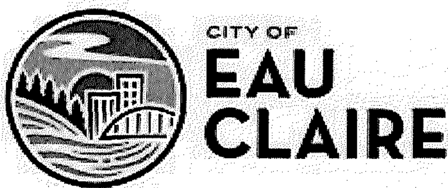

Testimony in Opposition to Assembly Bill 514
Senate Committee on Transportation and Local Government

I represent the City of West Bend, the City of Hartford and the Village of Newburg. I am extremely concerned about the provisions of AB 514 and the restrictions it places on municipal contracting. The "design professionals" included in AB 514 are not covered by the requirements of Sec. 62.15, Wis. Stats., which means that there are no statutory requirements to let the contract to the lowest responsible bidder. This distinction is important because it means that "design professionals" have the ability to negotiate with municipalities regarding indemnification requirements, even after a bid opening. I have negotiated indemnification clauses on multiple occasions and the usual compromise is to either agree on reasonable limits for the indemnification based on the type of work performed or to agree to an increased price to account for any increased costs associated with the design professional's insurance.

There are several significant concerns that I have for my clients:
1- Restricting the ability to negotiate for indemnification exposes the City to potential liability where it may not otherwise exist.
2- Many smaller municipalities do not have in-house attorneys or even regular outside counsel, by removing contractual provisions requiring defense by a negligent design professional, small municipalities will incur substantial legal expenses without any way to recoup costs. This would be inconvenient for Madison and Milwaukee, it would be disastrous for Washington County communities like Newburg and the Town of Trenton.
3- This bill will not eliminate the indemnification requirement, it will just change the manner in which work is done. By eliminating these requirements, it makes it more advantageous for municipalities to work through a third party who can require indemnification or to require more public projects be performed by developers which will negatively affect economic growth.

I want to provide a specific example recent example from West Bend. West Bend recently designed a PFAS remediation facility. Given the potential liability associated with PFAS contamination and the potential for federal environmental litigation - including a potential class action - there could be extreme liability and defense costs for the City if we could not require reasonable indemnification language.

Finally, I find the proposed legislation to be against free market economics. The freedom to contract is a central tenet of our economy. This restriction singles certain professions out and restricts the municipality's ability to negotiate the best deal for the citizens of the State.

Ian Prust
City Attorney for West Bend and Hartford
Village Attorney for Newburg

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BENJAMIN T. CROCKETT
ADAM J. MEYERS

STEPHEN J. CENTINARIO, JR.
MICHAEL J. MORSE
JAMES P. WALSH

Testimony Against Assembly Bill 514
Relating to: prohibiting certain indemnification provisions in contracts relating to design professional services

December 5, 2023

Thank you Chairman and Members of the Senate Committee on Transportation and Local Government,

As to Assembly Bill 514, the League of Wisconsin Municipalities thanks you for the opportunity to voice opposition to this Bill. Joining in this request is the League's hundreds of cities and villages in this state and their municipal risk insurance pool, the League of Wisconsin Municipalities Insurance (LWMMI). Further joining this request is Wisconsin Municipal Insurance Company whose membership comprises twenty members — three cities including Madison, LaCrosse and Eau Claire; fifteen counties including Kenosha County, Dane County, Waukesha County and Brown County, among others; and two special-use districts, the Green Bay Brown County Stadium District and Southeast Wisconsin Professional Baseball District.

Before I proceed, let me introduce myself. I am one of the Managing Partners of Municipal Law & Litigation Group in Waukesha, Wisconsin. I have been in practice since 2001 and focus exclusively in the legal areas of municipal law and defense of municipalities in litigation. Since 1984, our firm has devoted itself to representing only local governments and their elected officials and employees. We have grown to represent over 60 municipalities of all sizes (towns, villages, cities and counties), their elected and appointed officials, employees and their municipal insurance pools throughout Wisconsin and primarily in Southeastern Wisconsin.

Indemnification can be a cumbersome legal concept to understand for many, including even for some trained in law. It is about liability shifting. It is an important feature of American common law that typically populates in contracts. The purpose of indemnification is intended to reduce the overall potential liability of one party (the indemnitee) by shifting liability to the party who bears responsibility (the indemnitor).

What might be easier to understand is this: just about every private contract, as well as government contract, has indemnification terms therein. In other words, indemnification clauses do not populate solely in contracts with local governments; they populate in contracts entered into by State agencies and private parties as well as contracts between two private parties. Whether it is a private local property owner entering into an agreement with a private design professional service to change or expand their residential or commercial building, a private landowner selling their land to a private developer for development of a shopping mall or big box store, or a private business entering into a technology service agreement with a technology company to ward off internet threats, there is likely indemnification terms in that agreement.

Because indemnification agreements are ubiquitous, it should come as no surprise that local governments, school districts and their insurers equally seek indemnification terms in their contracts. They do this when it comes to everything from development of a new building to the provision of or delivery of services in the community by professional companies. There are two reasons public entities seek this.

Foremost, they are seeking to protect the public taxpayer. When a County Board, City Council, Village Board or Town Board enters into an agreement to have professionals build their new building or provide water and sewer infrastructure services, the governing body seeks to protect the local taxpayers by making sure that anything which goes wrong does not fall to the local taxpayer to foot the bill. After all, that is the whole point of indemnification under common law principles; it's a basic principle of law that shifts liability to a tortfeasor from a party that is being sued despite its lack of negligence. If the local government is going to be sued for that project or service for some technical or strategy reason, yet does not have fault for the losses, the community taxpayers should be protected through indemnification clauses that shift the liability to the proper responsible party.

Secondly, most local governments are not in the business of being contractors, engineers, architects or other professional service providers. The governing body enters into these agreements with private professional firms. They are the professionals. We are hiring them to professionally design, engineer or provide other services. The means, methods and control are typically up to them. Because local governments rely on them, it should come to nobody's surprises that design professional services find working with local governments highly lucrative and important to their business. The projects are economically important to design professional services, and the government pays its bills.

While the Bill may have had a laudable intention to make sure indemnification clauses do not impose risk transfer beyond the actual negligence of the design professional services, the League of Wisconsin Municipalities and many other local government interests believe the Bill has gone too far and needs to be reconsidered. The general prohibition on indemnification clauses gets the Bill off to the wrong start because it does not adequately address how ubiquitous indemnification is in contracts, it treats local governments less well-off, and it fails to address the taxpayer protection and

other goals served by indemnification clauses. Indeed, the general prohibition's intent in the Bill is undercut by the fact that the Bill specifically allows indemnification terms with the federal government or for reckless, wanton and/or intentional misconduct. In other words, when something goes amiss, the public taxpayer is only protected if the federal government was doing the work or for reckless, wanton and/or intentional misconduct by the design professional service. But, for example, the federal government is not going to be the one building the new Village library, designing the new County administration building or providing the City with technology services to make sure internet hackers do not steal personally identifiable information in City records or data. Nor is it likely that any professional business is going to engage in acts or omissions that could be considered reckless, wanton and/or intentional misconduct.

Opposition also exists with the Bill's effort to create an exception for instances in which a private entity's indemnification obligation is limited to losses that are proximately caused by the negligent performance of design professional services by the private entity and do not exceed the proportion of loss caused by that negligent performance. Such exception is a laudable goal, but it already exists in law. To legislate it at the State level on the heels of the general prohibition only begs the question whether the Legislature really needs to legislate here and whether this Bill needs to be sent back to committees for further analysis and consideration. Indemnification terms are typically drafted and construed by courts to accomplish only fair and just indemnification obligations tied to losses that do not exceed the proportion of loss caused by the negligent party. State legislation is not needed.

It is unclear whether the Bill ever grappled with any of these considerations or considered whether there Bill comfortably fits with legislative power and aligns with other laws, including whether the Bill is in harmony with Wisconsin Statute 895.447. That statute says any provision to limit or eliminate tort liability as part of or in connection with any contract relating to the construction, alteration, repair or maintenance of a building, structure, or other work related to construction, including any moving, demolition or excavation, is against public policy and void. Indemnification is uniquely a feature of tort liability. One might question whether Section 895.447 would allow by contract or statewide legislation the outlaw of indemnification terms that seek to do just that – limit or eliminate tort liability by making sure such liability falls correctly to the responsible party, not the taxpayer.

The opposition is keenly aware and concerned that this Bill, if it becomes law, will be expanded beyond design professional services in the future. Contracts and their terms should be left to the free marketplace. Concerns that small business design professional services need to be protected from indemnification terms do not tell the whole story. Whether the firm is large, small or family operated, these contract terms populate in their contracts when they do work for private parties. There is no reason private parties should be protected through contractual liability transfer, but public taxpayers should be on the hook for financial losses because the Legislature created an imbalance under this Bill. Moreover, these design professional services, again large or small, want the public work

because the local government pays their bills. If they want the promise of doing business with local governments and the fact that local governments timely make their contractual payments, all of which flows from the wellspring of taxpayer dollars, then they should reciprocate and protect those taxpayers when their work causes losses.

On behalf of the aforementioned interested parties, including the League of Wisconsin Municipalities, they strongly urge committee members to vote against AB514. Thank you for your time today. I would be happy to answer any questions.

Yours Very Truly,
MUNICIPAL LAW & LITIGATION GROUP, S.C

Remzy D. Bitar

Remzy D. Bitar

Assembly Bill 514 Testimony in Opposition
Senate Committee on Transportation and Local Government

The City of Waukesha opposes Assembly Bill 514. State and local governments negotiate contracts with design professionals to protect our taxpaying citizens. We do not require contract provisions arbitrarily just to be oppressive to design professionals, we require them because we are the only parties to the contracts that are looking out for the best interests of our citizens. We enjoy good working relationships with the architects, engineers, and other professional consultants we work with, and we want them to be successful in order that our public projects are successful. We routinely compromise on points in order to have fair contracts, because it's not in the best interest of our taxpaying citizens to have a contentious, oppressive relationship with our consultants. AB 514 appears to be primarily of benefit to the insurance companies that insure design professionals.

We are concerned about the representations that have been made to the Assembly about the bill by its proponents. In testimony, proponents have stated that currently, design professionals are liable for all losses and expenses for any claim brought against the state or local government. The desired implication is that design professionals are liable for lawsuits that are completely unrelated to the design professionals' work. Clearly, that would be unfair, but it is not presently the case. We require indemnification and defense clauses in our contracts because when we contract with any outside entity, we are not signing up for additional risks or assuming responsibility for any expense other than the specific work we are contracting for. Bringing on additional liability over and above the budgeted contract amount for the project would be irresponsible to our taxpayers who would ultimately foot the bill. We are closely responsible to our taxpayers and constituents, and we work on their behalf, and not to protect the financial interests of our consultants and their liability insurance companies.

The characterization in testimony that contract provisions designed to protect the public and our taxpayers cause design consultants to be "unfairly burdened by our government" reveals a fundamental lack of understanding how local governments work, and is offensive to those of us who work hard to protect our taxpayers. It's incredible that this statement was made by a representative member of our government.

Professional design contracts present different issues and challenges with each job, they are not cookie-cutter templates. AB 514 proposes to take away our ability to negotiate contracts that are tailored to specific jobs and their individual circumstances. It unnecessarily restricts our ability to adapt our contracts to specific needs at the local

level, where we understand the local circumstances and can best tailor contracts to suit our needs. AB 514 incorrectly assumes that design professionals are unable to protect their own interests in negotiating contracts and require state government intrusion on their behalf.

Subsection (3) of proposed §443.20 creates an exception to the indemnification prohibition for losses proximately caused by the "negligent performance of design professional services." That sounds fair, but imagine that a design professional comes onto a work site in a truck to perform an inspection and strikes and kills a worker. That act would not be "negligent performance of design professional services," that would be negligent operation of a motor vehicle. That is not a liability that the taxpayers of a city intend to assume when the city enters into a contract with an engineering firm, but it would be illegal for us to include a provision indemnifying the city from such liability. There is no logical, moral, or economic justification for that. It benefits only the design professional's insurer.

The exceptions in subsection (3) also apply only to indemnification in subsection (2)(a), and not to duty to defend in subsection (2)(b), so local governments can't require defense even when the liability arises from performance of design professional services. Not only is there no rational basis for this distinction, it will conflict with the terms of insurance policies that provide for defense, especially when the local government is an additional insured.

AB 514 is a thinly-disguised attempt to transfer economic responsibility from the insurers of design professionals to taxpayers, and it should not become law.

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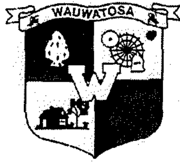

CITY OF WAUWATOSA
Office of the City Mayor
7725 W. North Avenue
Wauwatosa, WI 53213

December 5, 2023

Written Statement of
Wauwatosa Mayor Dennis McBride
Regarding 2023 AB 514

To Senate Transportation and Local Government Committee:

I am writing to express my concerns regarding the provisions of 2023 AB 514, as amended. The bill attempts to interfere with the right of contract, in a manner which could specifically harm taxpayers at the state and local level. It provides special treatment to design professionals which are unlike exemptions provided to any other parties in contracts with state or local governments.

The bill's terms would shift the risk associated with design professional services to taxpayers, by limiting the indemnification and defense terms protecting local governments from the improper or inappropriate acts of parties with whom they have entered into an arm's-length contract. These risks are most appropriately borne by those who have the ability to protect themselves by obtaining insurance in fulfillment of contractual obligations, not by shifting the risks, costs and burdens to those who are harmed by their actions.

While the amendment to the bill has alleviated some language concerns regarding insurance, it does not address the bill's fundamental flaw of shifting risk from design professionals to the taxpayers for whom they are providing their services. I ask that you oppose this bill in order to protect local governments and their taxpayers who contract with design professionals.

Testimony in Opposition to Assembly Bill 514
Senate Committee on Transportation and Local Government

I understand that 2023 Assembly Bill 514, if adopted, would limit the enforcement of contract provisions between a municipality and a private firm engaged in design professional services, including architects, engineers, and surveyors, which provisions would require the design professional to indemnify or defend the municipality for losses arising from their work. Frankly, it is difficult to understand the need for this prospective law. I have worked in municipal government in Wisconsin for more than 25 years, including 18 years in the City of Racine City Attorney's Office. In my experience, design professionals who work with municipal government are sophisticated professionals who are more than capable of negotiating the terms of a contract with a municipal government. They certainly are not in need of this sort of externally-mandated protection. Further, in every case, it is appropriate to allow municipalities and design professionals to determine between themselves the terms of any service agreement based upon the specific needs of any project.

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December 7, 2023

To: Senate Committee on Transportation and Local Government
Re: Opposition to SB 491/AB 514
From: Mayor Satya Rhodes-Conway, City of Madison

Thank you for the opportunity to submit testimony in opposition to Senate Bill 491 on behalf of the City of Madison. As a policy matter, the City has deep concerns about limiting local governments' ability to negotiate contracts that meet their needs and protect local taxpayers.

It is important to understand what is and is not at issue in this bill. The bill does not present a question of fairness or answer whether one party should be forced to bear responsibility for something it had nothing to do with. The question this bill presents is whether design professionals need special legal protection beyond what they can negotiate in the free market through contracting: whether the state should step in and give them rights that other contracting parties do not have. We believe the answer is no.

Generally speaking, state law leaves parties free to negotiate the terms of contracts as they see fit. When state law does step in to dictate contract terms, it is to protect a smaller or less sophisticated party, such as in consumer protection laws. Here, there is no such disparity, and in fact it is likely the reverse. While the larger municipalities like Madison and Milwaukee may have attorneys on staff who can negotiate contract terms, the majority of local governments have few resources like these. It is unclear why engineers need statutory protection from negotiating contract terms with these communities.

When contracting for design services, municipalities are acting as market participants, not regulators. Designers are not forced to contract with municipalities and are not forced to accept particular contact terms. If something goes wrong on a construction project, there will be a question of whether it was due to faulty design, faulty construction or some other cause. At a minimum, shouldn't the parties to the contract be free to negotiate who will bear that cost? More to the point, why should municipalities alone be prohibited from bargaining a contract that allocates that risk?

The basic issue here is whether designers and local governments should be free to negotiate and contract like any other private party, or whether design professional corporations deserve special state protection in the contracting process. I would urge you on behalf of the City not to disadvantage state and local governments, and to reject this bill.

Satya Rhodes-Conway
Mayor