



AMERICAN COUNCIL OF ENGINEERING COMPANIES  
*of Ohio*

**Testimony of  
Beth Easterday, President  
American Council of Engineering Companies of Ohio  
to the  
House Civil Justice Committee  
regarding House Bill 554  
May 16, 2018**

Chairman Butler, Vice Chair Lanese, Ranking Member Boggs, and members of the committee. I am Beth Easterday, President of the American Council of Engineering Companies of Ohio. I am here today to offer our support for House Bill 554.

For the record, my association is made up of 130 engineering firms, located all over the state of Ohio, many of which are engaged in the design of our public water and wastewater systems, bridges, highways, building structures and systems and environmental projects. My members are made up of large international firms, down to small firms under 10 employees. In fact, over 50% of ACEC Ohio's membership is made up of small engineering consulting businesses under 50 employees.

Design professionals, as a matter of basic fairness, should not be asked to indemnify and/or defend another party for losses that the designer did not cause, cannot insure against and were caused by factors beyond the designer's control. Unfortunately, some public authorities are still putting indemnification clauses in their contracts that require a design professional to indemnify above and beyond what the design professionals' professional liability insurance will cover. Above and beyond the standard of care or professional negligence.

The fundamental purpose of this bill is fairness, right now design professionals are being asked to defend public entities against third party claims before there is a determination that the design professional has committed an error. The costs of such defense can be staggering and come out of the design professional's pockets, not their professional liability insurance policy. The reason being the professional

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liability insurance will only cover legal costs to the extent caused by the negligent errors and omissions of the design professional and does not provide defense for its client.

This bill narrows the statute --does not eliminate-- the obligation a design professional must shoulder to indemnify a public entity to just those situations where the design professional has been found to have committed an error. The bill will help engineering consulting companies and architectural firms by providing clarity and certainty that indemnification of third party claims will not be a part of entering public authority contracts.

To date, eleven states (Arizona, California, Colorado, Florida, Georgia, Indiana, Kansas, Maryland, Michigan, Minnesota and Montana) have enacted statutes such as HB 554.

ACEC Ohio appreciates your consideration of the bill today. Thank you for allowing me to testify, I will be happy to try to answer any questions you might have.

## **Statement is Support of HB 554 – Fairness in Public Contracts**

Chairman Butler, Vice Chair Lanese, Ranking Member Boggs, thank you for the opportunity to present proponent testimony on HB 554. My name is Robert Gavin, Risk Manager with Oswald Companies. Oswald represents over 600 Ohio architectural and engineering firms (A/E) for their professional liability insurance needs and is the largest agency representing the A/E profession in Ohio. I've spent 35 years in the legal and insurance world of the A/E and related disciplines. We strongly believe HB 554 – Fairness in Public Contracts is a positive step not only for the A/E profession but for all Ohio public entities for two distinct reasons that will be examined. But first, the A/E profession truly is comprised mostly of small businesses. The average A/E firm consists of about 10-20 employees. More than 1/3<sup>rd</sup> (~ 200) of our A/E clients consist of 10 employees or less. There are relatively few large A/E firms. Revenue is relatively small and profit margins are thin, 10% would be considered by many to be a good year. Firms are thinly capitalized. They have no measurable assets other than used office furniture and equipment.

Because of the nature of the A/E “business” it is vitally important not only to the A/E firm but also to their client that any agreement be insurable under the A/E professional liability policy. If a claim is made against an A/E the overwhelming odds are it will be a professional liability claim. If the claim is not insurable under the professional liability policy, it is unlikely the client will be compensated for damages. It is customary for the client to require the A/E to maintain professional liability insurance. It is also customary for the client to insist on a contractual indemnity from the A/E. A huge and financially dangerous disconnect, to both the client and the A/E, occurs when the client insists on a contractual indemnity that is not insurable under the very professional liability insurance the client also requires.

The A/E professional liability policy, with very limited exceptions, only provides coverage for damages claimed against an A/E to the extent those damages arise from the failure of that A/E to meet its professional standard of care, in other words professional negligence. It is not uncommon for Ohio public entities to insist upon contractual indemnities that far exceed this and that are in fact quite uninsurable under the very professional liability policy the public entity requires of the A/E. We believe the public taxpayer is done a huge disservice when this occurs because the professional liability policy is usually the only source of funding for a claim.

The other, often not talked about, result of such uninsurable contractual indemnity provisions is that a large percentage of A/E firms will not pursue public projects because of the uninsurable nature of those contracts. They cannot take the financial risk of doing so. This result negatively impacts the public because it significantly reduces the pool of well qualified A/E firms willing to pursue public projects. This is an unquantifiable but certainly negative result of an uninsurable indemnity provision.

Thank you for the opportunity to present our opinions on this bill. We hope, not only for the Ohio A/E firms and the employees they employ, but also for the taxpayer at large, that HB 554 – Fairness in Public Contracts Indemnity is passed as it currently reads. I'll be happy to try and answer any questions you may have.

May 15, 2018

Representative Jim Butler, District 41  
The Ohio House of Representatives  
132<sup>nd</sup> General Assembly  
77 S. High Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215

Re: House Bill 554

STATEMENT IN SUPPORT OF HB 554

Dear Representative Butler,

I am an attorney licensed in State of Ohio. I practice throughout the State of Ohio representing architects, landscape architects, engineers, and surveyors. For over thirty years, I have represented designers in litigation in all manner of cases regarding both public and private projects. I have lectured and presented seminars to designers on the subject of construction documents and risk allocation on numerous occasions. I am the author of many articles and papers primarily focusing on liability issues that affect the practice of architecture and engineering. I also represent most of the national insurers of architects and engineers. I represent some of the largest design firms in Ohio as well as the single practitioner.

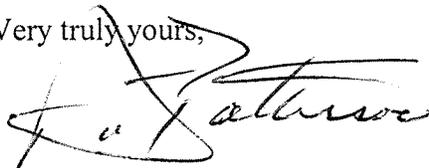
The practice of architecture or engineering is a very competitive practice. The great majority of designers do not have the luxury of being in such a niche practice that they are pursued by owners. Rather, regardless of how skilled or proficient most design firms are they find themselves in a very competitive arena. As such, they are vulnerable to unfair contracts in order to secure work. This should never be the case if the project is a public project.

One of the single largest areas of exposure for an architect or engineer pertains to indemnity provisions inserted into contracts by owners/developers. Private contracts are a matter of negotiation. This is not true of public projects. Indemnity provisions design firms and their insurers bring to my attention are fraught with unfair indemnity obligations. Indemnity provisions that masquerade as indemnity in reality revise the designers standard of care are common. Both local and State level public authorities have created contract provisions, which tie the designer to a level of perfection or

near perfection, which is not the industry standard of care. More importantly, if the onerous indemnity provision is breached the design firm is obligated to pay all costs, attorney fees, and expenses to the public authority regardless of whether the designer violated the standard of care widely accepted in the industry. The indemnity provisions being required by public authorities may not be covered by insurance leaving the design firm with a large exposure that greatly impacts the long term success of the firm.

It is time for this to be addressed. This bill is the correct vehicle.

Very truly yours,

A handwritten signature in black ink, appearing to read "David T. Patterson". The signature is written in a cursive style with a large, sweeping initial "D".

David T. Patterson

DTP/nnw

cc: Rep. Kristin Boggs, District 18  
Rep. Laura Lanese, District 23  
Beth Easterday



Honorable Jim Butler  
Chairman House Civil Justice Committee  
Ohio House of Representatives  
Riffe Center  
Columbus, OH 43215

May 11, 2018

**AIA Ohio**  
17 S. High Street, Suite. 200  
Columbus, OH 43215

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[www.aiaohio.org](http://www.aiaohio.org)

Dear Chairman Butler:

The American Institute of Architects- Ohio would like to support passage of HB 554 which for public improvements would relieve architects from being asked to defend a third-party claim before there is a determination that the design professional has committed an error.

The costs of such defense can be well beyond the control and the means of the design professional... especially retired design professionals. Just like the presumption of innocence, a design professional should not be presumed responsible for a cost without a determination of wrong-doing.

Sincerely,

A handwritten signature in black ink, appearing to read "David W. Field".

David W. Field, CAE, Hon. AIA  
Executive Vice President

KEM

K.E. McCartney & Associates, Inc.

*Engineers • Planners • Surveyors*

May 7, 2018

Representative Jim Butler  
Chair of the Ohio House Civil Justice Committee  
77 S. High Street, 13th Fl.  
Columbus, OH 43215

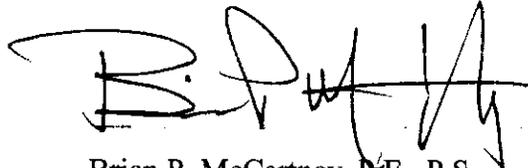
Dear Representative Butler:

Please accept this letter in support of House Bill 554 "Fairness in Public Contracts". For the engineering industry, this Bill represents fairness. Currently, design professionals are asked to defend public entities against third party claims BEFORE there is a determination that the design professional has done anything wrong. The defense cost against such a claim can be extremely expensive and is not covered by professional liability insurance, with the result being an out of pocket expense for the designer. For small firms under 50 employees this type of financial impact could potentially threaten their ability to stay in business. I don't think it is anybody's intent to drive small firms out of Ohio, we therefore need to narrow the obligation a design professional must shoulder to indemnify a public entity. House Bill 554 will do just that by holding firms liable when they have been found to have committed an error, again as a matter of fairness.

KEM is an Ohio born firm, founded 40 years ago this year. We bleed scarlet and gray and have always taken responsibility for our work. I am simply asking that we not be asked to defend and indemnify another party for losses that we did not cause, for which we cannot insure, and were caused by factors beyond our control. Again, not to beat the proverbial dead horse, but it is truly a matter of fairness.

For these reasons, we ask that you help with the passage of House Bill 554.

Sincerely,  
K.E. McCARTNEY & ASSOCIATES, INC.



Brian P. McCartney, P.E., P.S.  
*President*

Cc: ACEC Ohio  
Representative Romanchuck

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May 9, 2018

Representative Jim Butler  
Ohio House Civil Justice Committee  
77 S. High Street, 13<sup>th</sup> Fl.  
Columbus, Ohio 43215

Re: House Bill 554 "Fairness in Public Contracts"

Dear Representative Butler:

We are reaching out to you, as a member of ACEC Ohio, in support of House Bill 554, which would regulate the use of indemnity provisions in contracts related to public improvements. Here are some of the reasons why this bill is important to SME.

1. The fundamental purpose of this bill is FAIRNESS. Right now, design professionals are being asked to defend public entities against third party claims BEFORE there is a determination that the design professional has committed error.
2. The costs of such defense can be staggering and are beyond the control of the design professional. These defense costs would come out of the design professionals' pocket, and not from their professional liability insurance policy. Just like the presumption of innocence, a design professional should not be presumed responsible for a cost without a determination of wrong-doing.
3. Design professionals' professional liability insurance will only cover legal costs to the extent caused by the negligent errors and omissions of the design professional. A design professional's professional liability insurance policy does not provide defense for its clients.
4. Many of the design firms being required to sign these contracts are small Ohio-based companies and risk losing business if they refuse to accept an onerous indemnity obligation or in the alternative, take the work and subsequently have to pay for defense, even if they are found to have NOT been negligent.
5. ACEC Ohio is asking that the statute narrow (not eliminate) the obligation a design professional must shoulder to indemnify a public entity to just those situations where the design professional has been found to have committed an error.
6. The bill will help engineering consulting companies and architectural firms by eliminating unpredictable expenses, providing clarity and certainty when entering public contracts.

7. To date, eleven (11) states (Arizona, California, Colorado, Florida, Georgia, Indiana, Kansas, Maryland, Michigan, Minnesota, & Montana) have enacted statutes such as House Bill 554.

In summary, design professionals are required by common law to bear responsibility for damages caused by their own professional negligence. They carry professional liability insurance that will pay injured parties for precisely such damages. Moreover, Ohio public agencies currently have the authority to determine how much coverage must be carried by engineers and architects seeking to enter into agency contracts.

Design professionals, as a matter of basic fairness, should not be asked to indemnify and/or defend another party for losses that the designer did not cause, cannot not insure against, and were caused by factors beyond the designer's control.

Sincerely,

**SME**

Brendan Lieske, PE  
Project Engineer

