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Testimony in Support of SB 56 – Fairness in Public Contracts

Chairman Manning, Vice Chair McColley, Ranking Member Thomas, thank you for the opportunity to present proponent testimony on SB 56. My name is Robert Gavin, Risk Manager with Oswald Companies. Oswald Companies is based in Cleveland, Ohio with offices throughout the State and is among the largest privately held insurance agencies in the nation. The business unit I work in, Design & Construction, has over 35 professionals dedicated solely to the design profession and construction industry. We represent over 700 Ohio architectural and engineering firms for their professional liability insurance needs and represent by far the largest number of Ohio design professionals of any insurance agency. I have spent nearly 40 years in the legal and insurance world of the design profession. We strongly believe SB 56 – Fairness in Public Contracts is a positive step for the Ohio taxpayer, Ohio public entities and the Ohio architectural and engineering professions for the reasons stated below.

Because of the nature of the architectural and engineering “business” it is vitally important not only to the design firm but also to their public client and Ohio taxpayers that any agreement be insurable under the professional liability policy required by the public entity. If a claim is not insurable under the professional liability policy, it is unlikely the public entity will be compensated for damages in the event of a significant claim. The architectural and engineering professions are made up of mostly of small businesses. The average Ohio A/E firm consists of less than 10-15 employees. More than 1/3rd of our architectural and engineering clients have 10 employees or less. 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.

The professional liability policy required of the design firms by public entities provide coverage for damages claimed to the extent those damages arise from the failure of that architect or engineer to meet its professional standard of care, i.e. professional negligence. It is customary and perfectly reasonable for a public entity to require the design firm to maintain professional liability insurance and to insist on a contractual indemnity from those design firms. A huge and financially dangerous disconnect, to both the public client and the design firm, occurs when the public entity insists on a contractual indemnity that unfairly imposes contractual liability on the design firm and is not insurable under the very professional liability insurance the public entity requires of the design firm.

In no way are Ohio design professionals trying to avoid responsibility for damages caused by their professional negligence. But the architect or engineer should not be held responsible for a greater share of damages than that caused by their negligence. Some erroneously believe imposing such unfair and uninsurable indemnities on the design firm somehow saves the public entity money by lowering that entities insurance costs. That belief is unfounded. From an actuarial standpoint it is impossible for an insurance underwriter to gauge any purported costs savings accruing from unfair contractual provisions

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imposed upon the A/E profession. In fact, far from saving the Ohio public entity money these unfair provisions impose higher costs on those entities. Professional liability insurance carriers view public projects in Ohio as a higher risk because of poor claims experience on those projects. This poor claim experience leads to higher professional liability insurance premiums to the A/E profession who in turn pass these costs onto their clients.

The other, often not talked about, result of such uninsurable contractual indemnity provisions is that a very large percentage of Ohio architectural and engineering firms will not pursue public projects because of the uninsurable nature of those contract indemnities. They cannot take the financial risk of doing so because they cannot risk paying for damages they didn't cause and for which they cannot purchase insurance. This result negatively impacts the Ohio taxpayer because it significantly reduces competition. We all understand greater competition results in lower costs to the consumer as well as a greater variety of design options the consumer can choose from.

Thank you for the opportunity to present our opinions on this bill. We hope, not only for the Ohio taxpayer and public entities involved in design and construction projects, as well as the Ohio design firms and the employees they employ, that SB 56 – Fairness in Public Contracts Indemnity is passed as it currently reads. I'll be happy to try and answer any questions you may have.