

SB 213

Fair Contracting – Duty to Defend in Professional Service Contracts

Oregon professional service contracts often require design professionals including engineers, architects, surveyors, landscape architects, planners, and others to defend or indemnify others for legal claims or damages even though the design professional is not responsible. This “duty to defend” language is legally problematic, expensive and a barrier to entry for many small, emerging, women and minority owned businesses, and is uninsurable by professional liability insurance carriers.

Even though design professionals may carry general liability insurance, most of their activities are professional acts which are covered by their professional liability insurance. However, for the professional liability insurance to apply, the alleged negligent act must arise out of the professional services being provided.

Professional services contracts in Oregon are not insurable with the onerous requirement to defend and indemnify the owner for all fees and costs. But in many cases, firms are compelled to accept the duty to defend contract language or the client will seek another firm. Often, design firms do make the tough decision to walk away from contracts, but they cannot walk away every time. The risks are significant, and the result is fewer firms seeking such work and diminished competition.

In the construction context, indemnification agreements typically provide that an indemnitor will be responsible for the legal liabilities, costs, expenses, etc. incurred by an indemnitee that arise from, relate to, or are in any way connected with the indemnitor’s work or services, **regardless of the fault of the designers.**

SOLUTION

In SB 213, design professionals cannot be made to “defend” an owner or any other party against claims asserted by third parties against those owners and other parties. This bill will include public and private contracts and remove the risk of design firms spending huge sums to defend against third-party claims unless the negligence of the designer is first established. Upon a determination that the designer was negligent, the damages caused by that negligence, including the owner’s attorneys’ fees and cost, are paid by the designer’s professional liability insurer.

SB 213 will ensure fairness by:

1. Requiring that each party to a construction contract be responsible for their own negligence or fault. This means that parties will pay damages to others based on the actual liability of the paying party
2. Ensuring that whichever party is negligent would be able to purchase the proper insurance in the market for their part of the project. This is not the case today for design professionals and results in high-risk contract provisions that are unreasonable and unmanageable and are uninsurable under professional liability insurance.
3. Allowing all design companies, small and large, to be able to compete on an even playing field. This is not the case now as duty to defend is a major prohibitive factor for many small businesses considering construction projects.

