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Bill Analysis

Version: As Introduced

Primary Sponsor: Sen. Blessing

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SUMMARY

- Authorizes a public authority to include, in a public improvement contract, a requirement that a professional design firm providing professional design services indemnify the public authority and its officers and employees with regard to liability to a third party stemming from those services.
- Authorizes a public authority and professional design firm to include, in a public improvement subcontract, a requirement that a professional design subcontractor providing professional design services indemnify the public authority and professional design firm with regard to liability stemming from those services.
- Stipulates that such a requirement of indemnity is to take no form other than what is prescribed in the bill.
- Provides that the indemnification provisions do not prohibit either of the following:
 - A public authority from bringing a damages action against a professional design firm for breach of the public improvement contract or of the professional standard of care;
 - A professional design firm from bringing a damages action against a subcontracted design firm for breach of the subcontract or of the professional standard of care.
- Authorizes a public improvement contract to require an insurance policy as a form of indemnification.
- Stipulates that the inclusion of such a requirement to indemnify is not to be construed as a waiver of immunity from liability under the Political Subdivision Tort Immunity Law or the Workers' Compensation Law.
- Stipulates that such indemnification does not extend to liabilities that would otherwise be barred for timeliness.

- Specifies that a provision in a contract between a public authority and the federal government prevails over a conflicting provision in the bill to the extent of such conflict and that all other provisions of the bill not in conflict apply.
- Expands the definition of “injury” to include injury, claims, damages, or loss arising from or related to the infringement of intellectual property.

DETAILED ANALYSIS

Public improvement contracts

The bill authorizes a “public authority” to include, in a “public improvement contract,” a requirement that a “professional design firm” providing “professional design services” indemnify the public authority with regard to liability for injury or death to a third party proximately caused by those services. The indemnity would apply to any work, services, studies, planning, surveys, or preparatory work completed by the professional design firm in question. In addition, the officers and employees of the public authority would be indemnified under the bill. As used in the bill, “public authority” includes the state, a state institution of higher education, a county, township, municipal corporation, school district, or other political subdivision, or any public agency, authority board, commission, instrumentality, or special purpose district of the state or of a political subdivision.¹ (See “**Definitions.**”)

The bill specifies that such indemnity would only apply insofar as the professional design firm or any consultant, subcontractor, or other entity used by the firm was found to be liable pursuant to a lawsuit only for the proportionate share of the tortious conduct.² In other words, if a person was injured in relation to a public improvement, that person sued the public authority that owned the improvement, and the professional design firm was found to be 10% at fault, then the design firm would be required to indemnify the public authority in question for 10% of the damages.

Finally, the bill prohibits a public authority from requiring indemnification in any manner other than what is prescribed under the bill.³

Subcontracts

The bill extends the authority for public authorities and professional design firms to require indemnification to subcontractors providing professional design services. This authority functions with regard to subcontractors in the same manner as it does to primary professional design firms.⁴

¹ R.C. 153.81(A)(1)(a) and (E)(5) and R.C. 153.65, not in the bill.

² R.C. 153.81(A)(1)(b) and R.C. 2307.23, not in the bill.

³ R.C. 153.81(A)(1)(c).

⁴ R.C. 153.81(A)(2).

Civil actions for damages not prohibited

The above indemnification provisions do not prohibit either of the following:⁵

- A public authority from commencing a civil action for damages against a professional design firm for breach of the public improvement contract or for breach of the professional standard of care;
- A professional design firm from commencing a civil action for damages against a subcontracted professional design firm for breach of the professional design services subcontract or for breach of the professional standard of care.

Policy of insurance

The bill allows the public authority to require that the indemnification take the form of an insurance policy, as appropriate.⁶

Waiver of immunity

The bill stipulates that exercising the authority granted under the bill is not to be construed as waiving the immunity provided under the Political Subdivision Tort Immunity Law and the Workers' Compensation Law.

The bill also stipulates that two Workers' Compensation Law provisions, R.C. 4123.80 and 4123.35, control over the bill's provisions. R.C. 4123.80 stipulates that an agreement entered into by an employee cannot waive that employee's rights to workers' compensation, except in certain situations. The reference to R.C. 4123.80 appears to be a drafting error and should be a reference to R.C. 4123.82, which generally voids contracts that undertake to indemnify an employer against loss or liability for the payment of workers' compensation. R.C. 4123.35(O) cross-references to R.C. 4123.82.⁷

Barred claims

The bill stipulates that the indemnification provided for under the bill does not apply to claims that would otherwise be barred under various statutes of limitation or repose. In other words, a professional design services firm would not be liable for claims for damages made after the appropriate window for making such claims had expired.⁸

Conflicts with federal contracts

The bill specifies that any provision of the bill that is found to be in conflict with any provision of a contract between a public authority and the federal government, then the

⁵ R.C. 153.81(A)(3).

⁶ R.C. 153.81(B).

⁷ R.C. 153.81(D)(1) and R.C. 4123.35 and 4123.80, not in the bill.

⁸ R.C. 153.81(D)(2).

provision of the bill is not to apply insofar as it is in conflict. In such a scenario, all other provisions of the bill would apply.⁹

Definitions

The bill makes the following definitions:¹⁰

“Injury” means all of the following:

- Bodily injury to a person;
- Sickness or disease of a person;
- Injury to or destruction of tangible property of a third party to the public improvement;
- Injury, claims, damages, or loss arising from or related to the infringement of “intellectual property.”

“Intellectual property” means any invention, discovery, work of authorship, creative work, or architectural work that may be subject to protection under federal or state patent, copyright, trademark, or trade secret laws.

“Liabilities” means claims, damages, or loss, including reasonable attorney’s fees, costs, and expenses.

“Professional design firm” means any person legally engaged in rendering professional design services.

“Professional design services” means services within the scope of practice of a registered architect, landscape architect, or professional engineer or surveyor.

“Public improvement contract” means any contract that is financed in whole or in part with money appropriated by the General Assembly, or that is financed in any manner by a contracting authority, and that is awarded by a contracting authority for the construction, alteration, or repair of any public building, public highway, or other public improvement.

HISTORY

Action	Date
Introduced	02-09-21

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⁹ R.C. 153.81(C).

¹⁰ R.C. 153.81(E) and R.C. 153.03 and 153.65, not in the bill.