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Bill Analysis

Version: As Introduced

Primary Sponsor: Rep. 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.
- 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 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.

Detailed Analysis

Overview

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

Policy of insurance

The bill allows the public authority to require that the indemnification take the form of an insurance policy. It also allows requiring either of the following types of designations within the policy as a way of meeting the indemnification requirement:

- The designation of an additional person as a named insured on a general liability insurance policy;
- The designation of an insured on an automobile insurance policy provided in connection with a professional design services contract or subcontract.⁵

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 Workers’ Compensation Law.

¹ R.C. 153.81(A)(1)(a) and (E)(4) 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).

⁵ R.C. 153.81(B).

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. 4123.82.⁶

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.⁷

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 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.⁸

Definitions

The bill makes the following definitions.

"Automobile insurance policy" means an insurance policy delivered or issued in Ohio or covering a motor vehicle required to be registered in Ohio that:

- Provides automobile bodily injury or property damage liability, or related coverage, or any combination thereof;
- Insures as named insured, any of the following:
 - Any one person;
 - A husband and wife resident in the same household;
 - Either a husband or a wife who reside in the same household if an endorsement on the policy excludes the other spouse from coverage under the policy and the spouse excluded signs the endorsement.
- Does not cover garage, automobile sales agency, repair shop, service station, or public parking operation hazards;
- Is not issued under an assigned risk plan.

"Injury" means all of the following:

⁶ R.C. 153.81(D)(1) and R.C. 4123.35 and 4123.80, not in the bill.

⁷ R.C. 153.81(D)(2).

⁸ R.C. 153.81(C).

- Bodily injury to a person;
- Sickness or disease of a person;
- Injury to or destruction of tangible property, other than the work itself,⁹ of a third party.

“**Liabilities**” means claims, damages, or loss, including reasonable 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.¹⁰

Comment

It is unclear what is actually being referred to with the term “the work itself.” It is possible that this refers to the public improvement in question when the public improvement is owned by a third party.

History

| Action | Date |
|------------|------------|
| Introduced | 03-21-2019 |

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⁹ See Comment.

¹⁰ R.C. 153.81(E) and R.C. 153.03, 153.65, and 3937.30, not in the bill.