

New Ohio Law Impacting Indemnity in Public Works Design Contracts

By Lisa M. Burleson

On December 13, 2022, Governor DeWine signed into law Ohio Senate Bill 56, entitled, “Regulate indemnity clause - certain professional design contracts.” The law went into effect just a few weeks ago, on March 14, 2023. The new law is codified at Ohio Rev. Code Ann. § 153.81.

Major provisions of the new law, applicable to Ohio public schools, include:

- If a professional design firm provides work, services, studies, planning, surveys, or preparatory work in connection with a public improvement, a public authority may require, via a provision in a public improvement contract or subcontract, that the professional design firm indemnify the public authority and its officers and employees for liabilities the public authority, officer, or employee incurs for the death of or injury to a third party that is proximately caused by the provision of the work, services, studies, planning, surveys, or preparatory work.
- The term “injury” under the new law is defined as:
 - 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.
- The indemnification shall only be for the liabilities incurred from the proportionate share of the tortious conduct, as determined pursuant to section 2307.23 of the Revised Code (which addresses determining percentage of tortious conduct attributable to party in civil tort action) of the professional design firm or any consultant, subcontractor, or other entity used by the professional design firm, in performing under the public improvement contract.
- Any other form of indemnification provision in a public improvement contract or subcontract between a public authority and a professional design firm is not permitted.
- Similar provisions apply to professional design services subcontracts entered into in connection with a public improvement, whereby any subcontracted professional design firm may be required to indemnify both the public authority and the professional design firm that executed the subcontract for liabilities incurred for death or injury to a third party that is proximately caused by the subcontractor’s performance under the subcontract. The same proportionate share rules apply as per section 2307.23 of the Revised Code. Professional design firms are prohibited from requiring any other provision in a subcontract entered into in connection with a public improvement on the subject of indemnity as pertaining to the professional design firm or the public authority.
- Public authorities may still commence civil actions for damages against a professional design firm for breach of contract or for breach of professional standard of care.

- Public authorities may still require insurance coverage, as appropriate, in a public improvement contract with a professional design firm, to meet the indemnification described in the new law.
- Including an indemnification provision in a public improvement contract with a professional design firm is not to be construed as waiving the immunity afforded to the public authority under the Political Subdivision Tort Immunity Law.

Currently, contracts between public authorities and professional design firms typically include indemnification clauses. The extent of the indemnification clause provisions typically seen in contracts between public authorities and professional design firms varies, but in some contexts, the provisions can be interpreted as requiring the professional design firm to hold the public authority harmless for any tort liability that arises from the contract, regardless of the proportion of fault assigned to the professional design firm. This will no longer be the case under the new law, which limits indemnification to only the professional design firm's proportionate share of tortious conduct. This change in Ohio law may create additional exposure for Ohio public schools to liability for death, injury, or property loss for work under a professional design contract, for which the school district may have previously been entirely held harmless.

If you have any questions or concerns about how these provisions may affect you, please contact any of the listed Roetzel attorneys.

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