



March 19, 2021

Representative Jamie Becker-Finn
Chair, House Judiciary Finance and Civil Law Committee
559 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155

Subject: H.F. 803

Dear Chair Becker-Finn and Members of the Judiciary Finance and Civil Law Committee,

We appreciate working with the bill author and stakeholders on this issue and will continue to do so as the bill progresses. We are writing today to share our concerns with H.F. 803. The bill reduces the protections to public owners in construction contracts by rendering certain types of indemnity provisions unenforceable. At the same time, it allows the indemnity provision if it is in favor of the contractor.

- The bill alters long-standing methods of allocating risk on construction projects by transferring the responsibility from the party executing the work to the party contracting for the work to be completed. It may force public project owners to incur the expense of defending claims that should properly be defended by the prime contractor. If a public project owner is sued, and attempts to tender the claim to the prime contractor, the prime may refuse the tender and the public owner would be forced to litigate a case all the way to a verdict in an attempt to determine fault. This will occur even though the contractor's insurer would likely cover the cost of a defense. Where the project owner usually has little if any involvement in the events giving rise to the claim in a construction project, it is unfair to limit the owner's ability to tender the defense of the claim.
- The word "defend" has not been part of the state's anti-indemnity law because the duty to defend has historically been understood as broader than the duty to indemnify. The law is well-intentioned in attempting to tie defense to fault, but the reality is that when a lawsuit is filed, fault may not be entirely clear, and therefore the defense should be handled by the party that is most likely at fault.
- Since recovery of attorney fees will depend on establishing fault, it will likely cause more construction lawsuits and it will likely reduce chances of settling a construction lawsuit before a trial, resulting in increased costs to the taxpayers for public projects.

- Project-specific insurance is needed by some public agencies because of the unique work done on that project. For example, the Minnesota Department of Transportation requires commercial general liability insurance but generally does not require builders risk insurance for horizontal construction, whereas builders risk insurance is critical for vertical construction. In addition, project-specific insurance ensures that coverage limits aren't watered down by claims on other projects. The First Engrossment wouldn't allow for the flexibility that project owners need when deciding how to insure projects.

This bill is a substantial change from current law and practice. We are concerned that the increased costs of public contracting will ultimately impact taxpayers. Thank you for the opportunity to share our concerns. The public owner representatives will continue our ongoing discussion with the other stakeholders and keep working in good faith to find a solution.

Sincerely,



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Commissioner
Department of Administration



Margaret Anderson-Kelliher
Commissioner
Minnesota Department of Transportation



Irene Kao
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