SB 1575 FAQ

Consultant's duty to defend a public body
for consultant's professional negligence made unenforceable

What is SB 1575?

SB 1575 amends ORS 30.140 and makes unenforceable any contractual provision that requires a consultant to defend (the "duty to defend") a public body against claims for professional negligence relating to the consultant's professional services ("architectural, engineering, photogrammetric mapping, transportation planning or land surveying services" ("A&E Services") or "Related services," ("Related Services") as those terms are defined in ORS 279C.100) – unless the provision is limited according to the "except to the extent" requirements of SB 1575.

What does SB 1575 apply to and when is it applicable?

Applies to A&E Services and Related Services contracts entered into or renewed (i.e. amended for extension of time or reinstatement) on or after January 1, 2025, and on or before December 31, 2034.

UNDERSTANDING INDEMNIFICATION PROVISIONS AND SB 1575

What is indemnification and what is the impact of SB 1575?

Indemnification provisions in a contract require the Indemnitor (the person obligated to indemnify the other party to the contract) to pay for claims asserted by a third-party against the Indemnitee (the person protected by the indemnity obligation, which, in our State contracts is the State of Oregon and the State Agency that enters into the contract).

"Hold harmless" provisions require that the Indemnitor also pay for any litigation costs and expenses associated with a third-party claim that are incurred by the Indemnitee, and that are in addition to the amount of the third-party's claim.

"Defense" obligations in a contract are in addition to the indemnification and hold harmless provisions and involve the affirmative obligation of the Indemnitor to retain qualified legal counsel to defend the Indemnitee in any legal proceedings filed by a third party against the Indemnitee that arise out of the services/work/actions of the Indemnitor under the contract.

The key operative provisions of SB 1575 – which are included under new subsection (4) of ORS 30.140 and located in Section 1 of SB 1575 – apply only to contract provisions that involve the "duty to defend" a public body. These "duty to defend" restrictions provide that the public body may not require in a contract with a person or entity providing A&E Services or Related Services that the person or entity "defend" the public body against a claim for professional negligence and relating to the A&E Services or Related Services provided by the person or entity. However, SB 1575 includes exception language to this general prohibition. The exception provides that defense provisions are permissible to the extent that the person or entity's liability or fault has been determined through adjudication, alternative dispute resolution or settlement agreement, and in an amount that does not exceed the proportionate fault of the person or entity.

Note: SB 1575 does not limit a consultant's duty to defend in cases of general negligence or other liabilities.

Note: SB 1575 does not apply to contracts that do not involve A&E Services or Related Services, where Professional Liability insurance could still be included.

DUTY TO DEFEND – CONSULTANT LIABILITY (GENERAL AND PROFESSIONAL)

Are there situations where a consultant retains responsibility to defend a public body?

Yes. SB 1575 does not limit a consultant's duty to defend in cases of general negligence or liabilities. In addition, SB 1575 does not apply to contracts that do not involve A&E Services or Related Services, where Professional Liability insurance could still be included.

INDEMNIFICATION LANGUAGE FOR A&E SERVICES AND RELATED SERVICES CONTRACTS

What actions should be taken?

Update the indemnity provision within A&E Services and Related Services contracts that will be entered into or renewed (i.e. amended for extension of time or reinstatement) on or after January 1, 2025, and on or before December 31, 2024.

14. INDEMNITY.

a. CLAIMS FOR OTHER THAN PROFESSIONAL LIABILITY. Consultant shall indemnify, defend, save, and hold harmless the State of Oregon, the Oregon Transportation Commission and its members, the Department of Transportation, their officers, agents and employees from any and all claims, suits, actions, losses, liabilities, damages, costs and expenses, including attorney fees, of whatsoever nature, resulting from or arising out of the acts or omissions of Consultant or its subcontractors, or their respective agents or employees, under the Contract.

b. CLAIMS FOR PROFESSIONAL LIABILITY. To the fullest extent permitted by law, and except to the extent prohibited under ORS 30.140(4), Consultant shall indemnify, defend, save, and hold harmless the State of Oregon, the Oregon Transportation Commission and its members, the Department of Transportation, their officers, agents and employees from any and all claims, suits, actions, losses, liabilities, damages, costs and expenses, including attorney fees, arising out of the professionally negligent acts, errors or omissions of Consultant or its subcontractors, or their respective agents or employees, in the performance of Consultant's professional services under the Contract.

c. INDEMNITY FOR INFRINGEMENT CLAIMS. Without limiting the generality of Section 14.a or 14.b, Consultant expressly agrees to indemnify, defend, save and hold harmless the State of Oregon, the Oregon Transportation Commission and its members, the Department of Transportation and their agencies, subdivisions, officers, directors, agents, and employees from any and all claims, suits, actions, losses, liabilities, damages, costs and expenses, including attorney fees, arising out of or relating to any claims that Consultant's Services, the Work Product or any other tangible or intangible items delivered to Agency by Consultant that may be the subject of protection under any state or federal intellectual property law or doctrine, or Agency's use thereof, infringes any patent, copyright, trade secret, trademark, trade dress, mask work, utility design, or other proprietary right of any third party; provided, that state shall provide Consultant with prompt written notice of any infringement claim. Provided, however, Consultant shall not be obligated to indemnify, defend, save and hold harmless the state and agency under this Section 14.c, based solely on the following: Consultant's compliance with Agency specifications or requirements, including, but not limited to the required use of tangible or intangible items provided by Agency.

d. DEFENSE QUALIFICATION. Notwithstanding Consultant's foregoing defense obligations, neither Consultant nor any attorney engaged by Consultant shall defend any claim in the name of the State of Oregon

or any agency of the State of Oregon, nor purport to act as legal representative of the State of Oregon or any of its agencies, without the prior written consent of the Oregon Attorney General. The State of Oregon may, at any time at its election, assume its own defense and settlement in the event that it determines that Consultant is prohibited from defending the State of Oregon, or that Consultant is not adequately defending the State of Oregon's interests, or that an important governmental principle is at issue or that it is in the best interests of the State of Oregon to do so. The State of Oregon reserves all rights to pursue any claims it may have against Consultant if the State of Oregon elects to assume its own defense.

e. AGENCY'S ACTS OR OMISSIONS. This Section 14 does not include indemnification by Consultant of the State of Oregon, the Oregon Transportation Commission and its members, the Department of Transportation and its officers agents and employees, for the acts or omissions of the State of Oregon, the Oregon Transportation Commission and its members, the Department of Transportation and its officers agents and employees, whether within the scope of the Contract or otherwise.

THIRD-PARTY CLAIM PROCESS

How does a third-party provide notice of a claim?

Notice of a claim made against a state of Oregon agency or an officer, employee, or agent of a state of Oregon agency should be directed to the Department of Administrative Services (DAS) Risk Management. Do not accept notice of a claim on behalf of DAS Risk Management.

How is a third-party claim processed?

Notice of Claim: Upon receiving notice of a claim, DAS Risk Management collaborates with the state agency involved to investigate and evaluate the claim.

Claim Management: DAS, through its Risk Management division, has exclusive authority to manage claims against the state, and against the officers, employees and agents of the state that arise out of the tort liability of the public body and its officers, employees and agents acting within the scope of their employment or duties and within the scope of ORS 30.260 to 30.300 (ORS 278.120).

Tender Claim: If a claim is covered by insurance other than the state's Insurance Fund, DAS Risk Management will tender defense of the claim to the insurer, including the consultant's insurer (ORS 278.120). This means that if a claim is filed against a state agency due to the actions of its consultant, DAS Risk Management will tender the claim to the liable party and their insurer. However, with the passage of SB 1575, this no longer includes tendering the defense of the claim for professional negligence relating to the consultant's professional services, requiring the state to defend itself in such cases.

Investigation: If a claim is not covered by insurance, other than the state's Insurance Fund, or if the tender is rejected, DAS Risk Management will conduct an investigation to determine whether the claim is meritorious and comes within the provisions of ORS 30.260 to 30.300 (ORS 278.120).

Defense: If a claim is found to be meritorious and aligns with ORS 30.260 to 30.300, then DAS Risk Management, the state agency and the Attorney General will defend the claim. If a claim is deemed not meritorious or does not align with ORS 30.260 to 30.300, then the state agency and Attorney General will undertake the defense of the claim.

Recoup Defense Expenses: SB 1575 mandates that consultants are responsible for reimbursing the public body for any defense costs incurred, in proportion to the consultant's fault as determined by adjudication, alternative dispute resolution or settlement agreement.

BUDGET CONSIDERATIONS – STATE INSURANCE FUND AND AGENCY BUDGET

If the state is responsible for defense how are defense costs covered?

State of Oregon's Insurance Fund: If a claim is found to be meritorious and aligns with ORS 30.260 to 30.300, then the state's Insurance Fund will cover the defense of the claim. If a payment is made out of the Insurance Fund to or for a state agency for any loss covered by the Insurance Fund, DAS Risk Management will subrogate, to the extent of the payment, to the rights of the state agency against any person or other entity legally responsible in damages for the loss (ORS 278.052).

Agency Budget: If a claim is deemed not meritorious or does not align with ORS 30.260 to 30.300, then the state agency's budget will cover the defense of the claim. The state agency is responsible to seek reimbursement for any defense expenses incurred, in proportion to the consultant's fault as determined by adjudication, alternative dispute resolution or settlement agreement.

What are the risks?

Exposure: The state of Oregon's Insurance Fund or state agencies will face the following risks:

1. Front defense costs until fault is determined and state is reimbursed:
    a. Unfunded liability: The state of Oregon's Insurance Fund and state agencies do not have a designated budget to cover this exposure.
    b. Opportunity costs: Agency budgets are intended to help an agency in achieving its goals in serving Oregon and its citizens. Funds used for defense costs divert resources away from these objectives.
    c. Duration of claim: The length of time for resolving these types of claims is unknown.
2. Seek reimbursement for defense costs incurred, proportional to consultant's fault:
    a. Insurance limits and other resources: If the consultant's Professional Liability insurance limits are exhausted and consultant lacks resources to cover the defense costs, the state may not be able to recover the full amount of incurred defense costs.
    b. Agency biennium risk charges: Any defense costs not recovered by the state's Insurance Fund will be charged to state agencies through the Agency Biennium Risk Charges.
    c. Budgetary loss: Any defense costs not recovered by a state agency will result in a budgetary loss.

DOCUMENTATION AND TRACKING - ACTION

Should state agencies keep documentation on claims made against a consultant and the state agency regarding professional negligence related to the consultant's professional services?

Yes. It is crucial for state agencies to document all information related to claims and collaborate with the state agency contract administrator named in the contract. This documentation will support the state agency's defense. Additionally, maintaining accurate records of attorney fees will be valuable when requiring the consultant to cover costs and expenses incurred by the state agency up to the consultant's proportionate fault. Remember that records protected by attorney-client privilege may be exempt from disclosure under the Public Records Law. Be sure to review the Public Records and Meetings Manual and consult with an attorney.

Should state agencies track claims?

Yes. Tracking claims information, as seen in the FAQ below, is essential for state agencies to understand the exposure and impact of SB 1575. With SB 1575 set to sunset January 1, 2035, it is important to provide data and insights to state legislators of the impact to state agencies, Oregonians and taxpayer dollars.

What type of information should state agencies track?

State agencies should track the following information in relation to the claim:

1. Date of claim notice
2. Name of consultant
3. Contract number related to the claim
4. Execution date of the contract
5. Expiration date of the contract
6. Defense cost incurred by the state Insurance Fund
7. Defense cost incurred by the state agency budget
8. Total defense cost incurred by the state
9. Date of fault determination (by adjudication, alternative dispute resolution or settlement)
10. Proportion of fault assigned to consultant
11. Date of reimbursement for defense cost incurred by state
12. Total amount of defense costs reimbursed
13. Defense costs absorbed by the state (total defense costs incurred by the state minus reimbursed costs)

DISPUTE RESOLUTION / ERRORS AND OMISSIONS CLAIMS PROCESS

Should state agencies retain dispute resolution and errors and omissions claims process language within its A&E and Related Services contracts?

Yes. It is crucial for state agencies to include dispute resolution and errors and omissions claims process (if applicable) language in their contracts. This language, mutually agreed upon by both parties, fosters a positive relationship between the state agency and the consultant. It establishes a clear and thoughtful process for resolving issues, helping both parties save time and money while avoiding prolonged litigation.