February 16, 2023

Senator Jen McEwen, Chair
Senate Labor Committee
3217 Minnesota Senate Building
Saint Paul, MN 55155

Subject: S.F. 754

Dear Chair McEwen and Members of the Labor Committee,

We appreciate working with you and stakeholders on S.F. 754 and will continue to do so as the bill progresses. We are writing today to share our concerns with S.F. 754. The bill reduces the protections to public owners in construction contracts by rendering certain types of defense provisions unenforceable.

- Unlike the duty to indemnify, which is based on a finding of liability, the duty to defend arises because a claim is made. Because this bill fails to account for this key difference, it transfers responsibility for defending claims from the party executing the work to the party contracting for the work. It may force public project owners to expend valuable public resources 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 upon the mere assertion it is not at fault, thereby forcing a public owner 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 defending that claim. Because the project owner usually has little if any involvement in the events giving rise to the claim in a construction project, it is unfair and wasteful 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 under the law the duty to defend has historically been held to be broader than the duty to indemnify. The law is well-intentioned in attempting to tie defense burdens 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 who is most likely at fault based upon the nature of the claim asserted.

- 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 taxpayers for public projects.

- The removal of language concerning “project-specific” insurance weakens a project owner’s ability to tailor insurance coverage to a specific 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, projects have very specific risks and the inability to tailor insurance coverage means that projects may have uninsured risks, which at best would delay recovery for injured parties and at worst could threaten small businesses with liability that could drive them out of business.

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,

Alice Roberts-Davis
Commissioner
Department of Administration

Nancy Daubenberger, P.E.
Commissioner
Minnesota Department of Transportation

Brooke Bordson
Intergovernmental Relations Representative
League of Minnesota Cities

Rick King
Chair
Metropolitan Airports Commission

Matthew Massman
Executive Director
Minnesota Inter-County Association

Emily Murray
Transportation & Infrastructure Policy Analyst
Association of Minnesota Counties