



Minnesota SUBCONTRACTORS Association

2013 MN ANTI-INDEMNITY ACT

MINNESOTA LEGISLATURE CLOSES THE “INSURANCE LOOPHOLE” IN ANTI-INDEMNITY ACT.

On May 24, 2013, Governor Dayton signed into law an amendment to the Minnesota Anti-Indemnity Act, Minn. Stat. §337.01, *et seq.*, which closes the “insurance loophole” to the Anti-Indemnity Act by rendering void and unenforceable a provision typically found in subcontracts that requires a subcontractor to provide insurance coverage to the general contractor, owner or design professional for the negligence or intentional acts or omissions of any of those parties. By way of example, the Minnesota AGC Standard Subcontract currently contains an indemnity and insurance provision which will be illegal for contracts signed on or after August 1, 2013 to the extent the subcontractor is required to indemnify and insure the general contractor against the general’s own negligence.

Since 1983, the Anti-Indemnity Act, Minn. Stat. §337.02, has provided that a clause in a construction contract which requires one party to indemnify another for the other’s own negligence is unenforceable. However, Minn. Stat. §337.05, created a “loophole” by allowing a contract provision that required one party to buy insurance for another’s own negligence. This “loophole” came to swallow the rule as owners and contractors routinely required subcontractors to add them as an “additional insured” on their liability insurance policy. The effect of this requirement was to make the subcontractor’s insurance primary for all claims, including claims that the owner or contractors were independently negligent, thereby shifting the cost of these claims to the subcontractor and its insurer.

Effective for contracts signed on or after August 1, 2013, the amendment specifically makes this insurance requirement illegal and unenforceable to the extent it seeks coverage for the contractor or owner’s own fault. The amendment, however, contains certain exceptions which allow a provision that requires a party to provide or obtain workers' compensation insurance, construction performance or payment bonds, or project- specific insurance, including, builder's risk policies or owner or contractor-controlled insurance programs or policies, and allows “Additional Insured” coverage for vicarious liability claims.

The purpose of the amendment, and the Anti-Indemnity Act, is to make each participant in a construction project financially responsible for its own negligent acts or omissions and the damages caused thereby.

Some practical implications of this change to MN Statute 337 for MSA members to consider:

1) The final version of the bill provides that it is “effective August 1, 2013, and applies to agreements entered into on or after that date.” Provisions of those contracts that have already been signed or that are signed before the end of July with the terms will remain valid and



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enforceable. In short, this does not get you out of existing obligations to indemnify/insure a general contractor for the general contractor's own negligence.

2) New versions of the AGC standard form subcontract agreement will likely be available and come into use in the industry in the upcoming months.

3) Members should review their own customized contracts to make sure they comply with this new law as well.

4) The new law also still allows for provisions that require the subcontractor to provide or obtain insurance coverage for the general contractor's vicarious liability, or liability imposed by warranty, arising out of the acts or omissions of the subcontractor.

5) The new statute still allows for some types of normal construction insurance indemnification provisions, such as provisions that require a party to provide or obtain workers' compensation insurance, construction performance or payment bonds, project-specific insurance including, without limitation, builder's risk policies or owner or contractor-controlled insurance programs or policies.

6) The indemnity and insurance provisions remain among the most important, complicated and least understood provisions of construction contracts. In any construction contract review MSA members should, of course, first look at the payment provisions.

If the Payment Provisions are acceptable, members should next turn their attention to the Indemnification and Insurance provisions and make sure that those terms are understood and comply with the law.

Finally, MSA members should make sure that your Insurance Program provides coverage that complies with the scope of the demands made in the Indemnification and Insurance contract provisions.

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