

Subcontractors seek ‘level playing field’

‘Broad form’ indemnity clauses make them liable for others’ negligence

BY BRIAN JOHNSON
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Minnesota subcontractors are looking for a legislative fix for what they say is a growing concern: being held responsible when other contractors mess up on a construction project.

At issue are “broad form” indemnity clauses, which are typical in Minnesota construction contracts. In a nutshell, the clauses can hold one party responsible for another party’s negligence.

Essentially, subcontractors have to go along with those provisions or they probably won’t get the job, said Michael Schmaltz, executive director of the American Subcontractors Association (ASA) of Minnesota.

The Minnesota chapter of the ASA says the practice creates an unfair playing field for contractors, raises their insurance costs and increases unnecessary litigation.

Schmaltz said his organization is working with legislators to introduce a bill that would change a state law that allows the practice.

The issue is also playing out before the Minnesota Supreme Court.

“The fundamental position for subcontractors is that we are just looking for a fair playing field, a level playing field,” Schmaltz said. “... We don’t want to be forced to assume liability for the actions of others.”

Others say broad form indemnity makes sense because, among other things, it doesn’t require competing or duplicative insurance coverage.

“Let’s say there’s an accident on a project, and someone sues the general contractor and the subcontractor for causing it. Isn’t it better to have just one insurance company step up and take care of it, rather than two that are fighting each other to figure out who is really responsible?” said Robert Huber, shareholder with the Minneapolis-based law firm Leonard Street and Deinard.

Broad form indemnity is not a new practice in the construction industry, and the Minnesota Legislature has weighed in on it before.

In 1984, the Legislature passed a law that prohibits the transfer of liability for negligent acts from one party to another. However, the law allows parties to purchase insurance for the benefit of others.

In other words, “you can’t agree to indemnify someone for their own negligence, but you can purchase insurance for them,” Huber said.

Subcontractors say that’s a “loophole” in the law that they would like to eliminate.

ASA-Minnesota is working with legislators to introduce a bill that says such contract provisions are “against public policy” and are “void and unenforceable.”

The Minnesota chapter of the American Council of Engineering Companies (ACEC) pushed for similar legislation last year. In ACEC’s case, the legislation was specifically limited to design and engineering professionals.

For people in that industry, there’s no insurance available that allows them to indemnify others, said David Oxley, executive director of ACEC-Minnesota. In the subcontractors’ case, the insurance is expensive but available, he said.

“They can get it, but it is a burden to get it,” he said.

ASA-Minnesota says the current situation results in higher insurance costs, unnecessary litigation and lower profits for subcontractors. The group says it also promotes unsafe job site practices.

The issues are laid out in the case of Engineering & Construction Innovations Inc. v. L.H. Bolduc Co. and Travelers Indemnity Co. of America.

According to court documents, Bolduc was working as a subcontractor for Engineering and Construction Innovations (ECI) on a construction project in White

THE CASE

\$32,000

Amount subcontractor Bolduc Co. received for general contractor ECI’s project

\$235,000

Amount ECI spent on repairs to pipeline

\$202,000

Amount the appeals court said Bolduc and its insurer had to reimburse even though Bolduc wasn’t at fault

Indemnity

Subcontractors seeking legislative fix, waiting for court ruling

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Bear Lake, White Bear Township and Hugo.

The project paid Bolduc about \$32,000. As part of the contract, Bolduc was required to obtain extra insurance that covered ECI.

In 2007, ECI discovered damage to a pipeline that was laid as part of the project. ECI repaired the \$235,000 worth of damage and asked for reimbursement from Bolduc and its insurance provider, Travelers.

A jury ruled that Bolduc was not at fault and not responsible for the damages.

On appeal, the Minnesota Court of Appeals agreed that Bolduc wasn't at fault but found the defendant liable for about \$202,000 because Bolduc's and Travelers' obligations under the insurance "were not limited to damage attributable to Bolduc's negligence."

The Minnesota Supreme Court is expected to rule on the case later this year, Schmaltz said. ASA-Minnesota weighed in

with a "friend of the court" brief in support of Bolduc.

In its brief, ASA suggests that the court should require indemnity clauses to be stated in "plain English" so tradespeople know what they are getting into. "The court should end the practice of lawyers drafting indemnity clauses using convoluted legalese that the typical tradesperson cannot understand," the brief noted.

Schmaltz said the issue is not isolated to the Bolduc case. Subcontractors have observed many situations where they or their insurance provider have had to "carry the cost of someone else's negligence on the job."

Broad form indemnity disputes typically involve subcontractors and general contractors, but that's not always the case.

Dean Thomson, a shareholder with Fabyanske, Westra, Hart & Thomson, said the ECI-Bolduc case, for example, involved two subcontractors.

Thomson likened broad form indemnity

to no-fault insurance. It's a product that insurance providers have chosen to offer, he said, and some people take advantage of it.

The question is, at what point should the Legislature get involved and say "certain things can be negotiated, but others can't?" he said.

Schmaltz says it's a question of fairness. He said he has talked to people in other industries about "how this works" in the construction industry. "They are absolutely dumbfounded. It makes no sense to them whatsoever. ... It needs to be fixed."

