Minnesota
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Association

Minnesota Subcontractors Association

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Indemnification Reform Update

The Minnesota Subcontractors Association (MSA), leading 20 construction trade associations, worked hard for and saw enacted a major indemnification reform during the 2013 legislative session.

The bill amended Minnesota Statute 337.05 (also known as the Anti-Indemnity Statute), making long needed changes to the law governing Minnesota construction contracts. It clearly states that a provision that requires a party to provide insurance for the other party's own negligence or fault is against public policy and is void and unenforceable. This is a major improvement for subcontractors and the construction industry.

This new law strongly reaffirms preexisting legislative intent expressed in 337.02. It declared that indemnification agreements for another party's own negligence are illegal and unenforceable. The reform of 337.05 removes the "insurance loophole" in addition to clearly stating the policy.

This change in the law creates fundamental fairness by allocating risk to the responsible party. With knowledge of that risk, parties can bid on a job with increased certainty. This will lead to improved competition and a healthier overall construction industry.

Unanimous votes in both the House and Senate obscure the effort it took to get the bill through. Most people believed that no reform of the statute was possible. Some industry members preferred the old way of doing things and negotiated hard to protect the status quo in each step of the legislative process. Those negotiations resulted in clarifications as well as the language addressed below. Without those negotiations, the bill would not have reached the legislative floor and subcontractors would still be required to indemnify owners and general contractors for their negligent acts.

Questions and Concerns about the New Law

The impact this law will have on the construction industry is all-encompassing; consequently many construction attorneys have weighed in on the reform and have expressed opinions and concern with some of the new language in 337.05. Those concerns include:

1. **Vicarious Liability** - Prior to this reform, the law allowed third parties (owners and general contractors) to require the subcontractor to take on full financial responsibility for all fault, even the sole or partial fault of a third party. Under the new law, the owner or general contractor can still require status as an additional insured on the subcontractor's policy, but only to the extent of the subcontractors fault.
   The legislature did not intend for, nor did subcontractors ask to avoid proportionate responsibility for their own fault.

2. **Project Specific Insurance** - 337.05 Section 1, Subd 1. (c) Paragraph (b) "does not affect the validity of a provision that requires a party to provide or obtain ....project specific insurance, including without limitation, builders risk policies or owner or contractor-controlled insurance programs or policies."

OCIP, CCIP and Builders Risk policies allow a single insurer to assume the risk for all participants involved in a project. It was not the intent of the amendment to render these programs illegal. Any attempt to interpret the term "project specific" to reopen the insurance loophole, is overbroad and clearly in conflict with the intent of the law.

The amendment is a fundamental and major improvement to the construction contract environment. Those who had an indemnification "advantage" in the past may try to preserve it by utilizing the language referenced above. Any such utilization overreaches, defies common sense and is an attempt to circumvent legislative intent.

The "Easy Button"

A common frustration with technology, red tape etc. is being used by a prominent national supply company to get customers to come to them for a simple, trouble-free answer to their problems (referred to as the "Easy-Button"). The reform bill was not meant to be an "easy-button" answer to all indemnification questions. The law was sponsored to create basic fairness, and it does that. Risk transfer provisions in construction contracts are often the most difficult to understand. Disputes often end up before lawyers and the courts for resolution. The easy (and smart) answer remains the same as before, see your attorney and insurance professional when you come up against hard to understand risk transfer provisions.

To assume that all indemnification issues are now resolved would be naive. People will continue to make mistakes and people will continue to try to avoid the consequences of those mistakes. Issues will wind up before the courts but when they do, it will be in a much improved environment. Subcontractors are now on a much more level playing field.