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Update on MN Anti-Indemnity Law & Insurance - June 24, 2014

by [cwest2](#)

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As a Minnesota construction contractor, you are no doubt aware of the change in Minnesota anti-indemnity law for construction contracts signed as of 8/1/13. We are sending this letter to provide you with our current observations related to the insurance industry's response to this statute amendment.

In brief, MN Statute 337 was amended to prohibit an upper-tier contractor from requiring insurance from lower-tier contractors that indemnify upper-tier contractors for claims involving their "sole negligence". There are certain, limited exceptions to this provision, but these exceptions do not affect the traditional approach to purchasing insurance.

Over the past 10 months, Minnesota contractors have been amending their subcontract agreements in an effort to comply with the new law. Some of these updated contracts include language requiring the lower-tier contractor to pay for the cost of "defense" to the upper-tier contractor in the event of a claim, including circumstances where the upper-tier contractor is ultimately found to be solely negligent. This separate and specific demand for "duty to defend" language creates the possibility of additional financial risk for the lower-tier contractor, with or without the financial back-stop of insurance coverage.

In recent response to the "duty to defend" requirement, the Minnesota Subcontractors Association has been working for an amendment to the law at the MN State legislature. The proposed amendment would specifically prohibit "duty to defend" construction contract provisions for another party's negligence. A conference committee at the State legislature heard testimony on this amendment in early May, and decided not to approve the amendment at this time.

To better understand how the insurance industry is responding to the 8/1/13 law and "duty to defend" contract language, we have contacted a number of prominent construction-focused insurance companies for their coverage position. Currently, the universal response from the insurance industry can be summarized as noncommittal. Insurance companies, unclear about the effect of the 8/1/13 statute language, are not willing to make a coverage determination until specific circumstances involving these provisions are presented in a claim and, if necessary, tested in the courts.

Evolving provisions of construction agreements, such as this separate "duty to defend" language, add to an already complex set of legal and insurance issues such as risk transfer, indemnification, defense and insurance obligations between upper-tier and lower-tier contractors. Continued focus on strong risk management and worker safety cannot be overstated. In addition,

contracts signed prior to 8/1/13 should be reviewed for “sole negligence” provisions that are still required for a specified period of time into the future.

Kraus-Anderson Insurance will continue to monitor insurance industry response to the Minnesota Anti-Indemnification law change. Any significant developments will be communicated to you as quickly as possible. Meanwhile, we anticipate a continued trend of new contract language with similar defense cost requirements. As such, we strongly recommend that you seek legal advice on any new contract requirements you may encounter.

Please contact your Kraus-Anderson Insurance service team with any questions or comments.

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