

TEXAS LEGISLATURE TACKLES ANTI-INDEMNITY

This legislative session the Texas legislature tackled “anti-indemnity” provisions. Over the past two decades, owners and general contractors began placing very onerous indemnity requirements on the subcontractors. The contracts included provisions that required subcontractors to indemnify the owners and general contractors even if it was the owner’s or general contractor’s fault.

Originally the anti-indemnity bill was a stand alone bill. The bill was supported by a number of subcontractor associations. The intent of the original bill was to eliminate “broad form” indemnity. In the prior legislative session, the bill went through a number of changes and was eventually part of Senate Bill 555. Unfortunately, the bill got bogged down and never got voted on. In this legislative session, some of the prior supporters of the bill withdrew their support and the bill floundered; however, at the 11th hour it got attached to the Consolidated Insurance Program bill and was passed. You can find the bill in Chapter 151 of Title 2 of the Texas Insurance Code.

The original Consolidated Insurance Program bill was designed to legislate the limits and length of insurance coverage and various other things related to consolidated insurance programs, wrap-ups, and owner or contractor controlled insurance programs. All that is left from the original Consolidated Insurance Program (“CIP”) bill is that there will now be 3 years of completed operations coverage. Eventually, the CIP bill ended up being a vehicle to get the anti-indemnity bill passed. Since the anti-indemnity bill is part of the CIP, in all likelihood there will be arguments that the new anti-indemnity provisions only apply to consolidated insurance programs. This will be an issue for the Courts to decipher.

The new law reads as follows:

... a provision in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable as against public policy to the extent that it requires an indemnitor to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier. *See Tex. Ins. Code §151.102.*

This provision makes broad forms of indemnity void and unenforceable, however, there are exceptions. It doesn’t prohibit all indemnity just broad form indemnity. In addition, the bill prohibits provisions which require the purchase of additional insurance coverage if the scope of the coverage would be prohibited in an indemnification agreement. Essentially, owners and general contractors can no longer require subcontractors to indemnify the owner or general contractor for their own negligence and can no longer

require the subcontractors to purchase insurance coverage for the owner or general contractor's negligence.

The exceptions to anti-indemnity provisions are as follows: (a) construction contracts for municipal public work projects; (b) a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier; or (c) single family dwellings, duplexes, townhomes or land development directly related thereto.

The anti-indemnity provisions are not intended to (a) exclude a cause of action for breach of contract or warranty that exists independent of indemnity obligations; (b) indemnity provisions contained in loan and financing documents, other than construction contracts to which the contractor and owner's lender are parties; (c) general agreements of indemnity required by sureties as a condition of execution of bonds for construction contracts; and (d) mineral agreements. There are additional exclusions not listed.

The anti-indemnity provisions cannot be waived by contract or otherwise.

A careful review of the indemnification provisions of your contracts needs to be done. If broad form indemnifications are included, they should be revised to conform to the new law.

The changes in law made by this Act apply only to an original construction contract with an owner of an improvement or contemplated improvement that is entered into on or after January 1, 2012. If entered into prior to January 1, 2012, the anti-indemnity statutes do not apply.

Note: Credit for some of this information goes the teleseminar conducted by Lee H. Shidlofsky entitled The New Anti-Indemnity Legislation and its Impact on Contracting, Construction & Insurance.

THIS INFORMATION IS MEANT TO GENERALLY BRING YOUR ATTENTION TO THE NEW ANTI-INDEMNITY STATUTE. EACH SET OF FACTS MUST BE ADDRESSED ON ITS OWN. YOU ARE ADVISED TO SEEK LEGAL COUNSEL REGARDING THE NEW LAWS.

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