CONSTRUCTION

ARIZONA LEGISLATURE ADDS NEW LIMITS ON INDEMNIFICATION IN PUBLIC CONSTRUCTION CONTRACTS

by Stephen E. Richman and Denise H. Troy

For many years, the Arizona Little Miller Act and the Arizona Procurement Code (A.R.S. § 34–226 and A.R.S. § 41-2586, respectively) prohibited a party from being indemnified, held harmless or defended to the extent of its own negligence. This prohibition applied to an owner, design professional, contractor or subcontractor agreement relating to a public works project. Any agreement that attempted to provide indemnity for an indemnified party's own negligence was deemed to be void because it was contrary to public policy. Under these statutes, each party was required to be responsible for its own negligence.[1]

Although there was a limit on the ability to transfer risk of party's own negligence, the public works statutes did not prohibit the party providing the indemnity from naming the indemnified party as an additional insured. The result was that even though indemnity for negligence could not be directly provided by a contractual provision, the party downstream might be required to provide insurance coverage for such negligence with a proper additional insured endorsement. Thus, for example, even if the contract general conditions stated that the indemnity obligations of the contractor do not apply to any claims "arising from the negligent acts or omissions" of the owner, if the insurance provision required the owner to be named as an additional insured under the contractor's liability policy, the owner would be insured for its own negligence by the contractor.

The Arizona legislature recently revised the Little Miller Act and the Procurement Code statutes to address the insurance issue and to otherwise strengthen the anti-indemnity public works provisions. The new law (which goes into effect on September 13, 2013 and only applies to contracts entered into after that date) bars insurance for the prohibited areas of indemnification (which are expanded to include recklessness and intentional wrongdoing, in addition to negligence). The new legislation also broadens the definition of design professionals. It also prevents cities, towns or other political subdivisions from enacting laws that would override the limitations on indemnities. The bill also broadens and makes more explicit the prohibition against any requirement to indemnify (and to hold harmless, to defend and to insure) with respect to subcontractors.

The most significant change appears to be the proscription against insurance for any of the prohibited areas of indemnification (principally negligence). The new law will alter the manner in which additional insured endorsements are handled. That is, public owners may no longer require general contractors to name them as an additional insured for purposes of "avoiding" the prohibitions, and general contractors will no longer be able to require subcontractors to name them as additional insureds. It is unclear whether being named an additional insured can still be required but be limited only to the insuring party's negligence.

[1] The prohibitions do not apply to contracts between private parties, where the only limitation is being indemnified for a party's sole negligence.

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