

February 14, 2023

Chair Michael Nelson
State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155

Dear Chair Nelson and members of the Committee,

The Minnesota Council on Latino Affairs (MCLA) supports H.F. 865/ S.F. 754. We respectfully request your support on this important bill to ensure fairness for Minnesota's small businesses.

Currently Minnesota Statutes Chapter 337 establishes that a Subcontractor is not liable for the damage caused by a General Contractor. However, it has become common practice in Minnesota for General Contractors to contractually require subcontractors to “defend” the General Contractor in such disputes, requiring subcontractors to pay for legal defense costs and/or buy insurance to cover the General Contractors’ legal fees, even when the responsibility for the negligence falls on the General Contractors and not the Subcontractor. This is called “the duty to defend.”

When working as Subcontractors, many companies are required to sign construction contracts with duty-to-defend terms. Duty-to-defend terms requires the Subcontractor to pay for the legal costs of the General Contractor regardless of fault, cost of defense, or issue being litigated. The Subcontractor must pay the legal costs incurred by the General Contractor even when the costs are incurred due to the negligent conduct of the General Contractor, whether or not these costs are covered by applicable insurance. Subcontractors are obligated to enter into these unfair contracts or walk away from the deal.

This practice is unfair as it passes down an unwarranted burden onto smaller construction businesses. These provisions are common, and the terms are often non-negotiable. Small contractors entering these contracts often put themselves at significant risk. Even when small businesses attempt to negotiate, these clauses put them in a position of having to choose between accepting additional negotiation cost or facing the risk of colossal liability in the event that something goes wrong on the project that is outside of their control. These practices increase costs and risks for small businesses, decrease profitability, and create additional barriers for small business, businesses owned by economically and historically disadvantaged groups, who are underrepresented in the construction sector.

Under H.F. 865/ S.F. 754, only the negligent party would have to pay and insure their own legal fees. By adding the word “defend” to the definition of “indemnification agreement”, this bill closes the loophole that permits a negligent party to require another party to pay/insure their legal fees (Minnesota Statutes Chapter 337.01).

Increasing contracting opportunities for disadvantaged businesses, particularly those owned by people of color, is a necessary step in creating a more equitable economy. Non-negotiable duty-to-defend contract terms creates barriers for small businesses, thereby hurting our economy and workforce. Thus, we believe that the allocation of risk should be equitable, and that all parties should be held responsible for their own negligence. Ensuring basic fairness to Minnesota construction contracts will help small businesses, businesses owned by economically disadvantaged and historically disadvantaged groups, and workers across the state.

We are grateful for your time and attention to this request. Should you have any questions, please contact Nicauris Heredia Rosario directly.

Sincerely,



Rosa Tock
Executive Director



Nicauris Heredia Rosario
Legislative and Policy Director