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A Discussion of Current Laws, Regulations and Practices for All Participants in the Construction Industry

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Ohio Utility Protection Law Undergoes Significant Changes

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On December 20, 2012, Governor John Kasich signed Substitute House Bill Number 458 into law. This new law, which goes into effect on March 27, 2013 (just in time for the beginning of the construction season), makes significant changes to how contractors, project owners and utility owners must act to protect underground utilities during the design and construction of projects involving excavation.

Breaking Down the Barrier Between Public and Private Projects

The most radical provision in the new law is to strike from ORC 3781.27 the language exempting the more detailed sections of utility protection law (ORC 3781.27-32) from public projects, which were formerly exclusively governed by ORC 153.64. However, ORC 153.64 still exists and there are still some key differences between it and ORC 3781.25-32. For instance, ORC 153.64 still requires utility owners on a public project to indicate "the approximate depth" at which a utility was installed, while the new law seems like an attempt to dilute a utility owner's responsibility for marking depth on private projects. And ORC 153.64 still grants a contractor specific damages when a project owner fails to comply with the law.

Contractor Premarking

Now under ORC 3781.29(D), prior to calling in a request for marking, the excavator must premark the excavation area with white paint, flags, stakes or other approved methods. But the excavator is exempt from this requirement in any of the following situations:

1. When "the utility can determine the precise location, direction, size, and length of the proposed excavation" based on the information given by the excavator. But this puts the excavator in a catch-22 because the statute clearly requires that the excavation markings be made *before* the ticket is called in, and to determine if the description is good enough, clearly the ticket needs to be called in already. Perhaps the best practice will be for the excavator to simply mark the excavation area, especially when considering that irrespective of timing, it is the utility owner who gets to make the decision whether the ticket is clear enough without the marking.
2. When "the excavator and the affected utility have had an on-site, preconstruction meeting for the purpose of premarking the excavation site." As with any other construction meeting, whenever a contractor wishes to use this option, it should take great care to document the meeting and distribute minutes with an opportunity for all attendees to comment on the minutes.
3. "The excavation involves replacing a pole that is within five feet of the location of an existing pole."
4. "Premarking by the excavator would clearly interfere with pedestrian or vehicular traffic control." The statute does not indicate who gets to make the call regarding the interference — the utility owner or the contractor.

Large Projects

Previously, ORC 153.64(C) required utility marking to stay approximately two days ahead of excavation. Now, that language has been removed. Instead, under ORC 3781.28, "if an excavation will cover a large area and will progress from one area to the next over a period of time," the excavator is *required* to give *written notice* of its work, including scheduling information. Once a marking schedule is agreed to, then the "marking and notification requirements" of ORC 3781.29(A)(1) no longer apply. One problem with this is that ORC 3781.29(A)(1) includes no direct notification requirements for the excavator — it deals solely with a utility owner's obligation to mark its utilities within 48 hours of

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notice. Moreover, the new statute does not define "large area" or "a period of time," nor does it seem to appreciate the scheduling complexities of many projects and how schedules often change. Regardless, it is in the interest of both the contractor and the utility owner to memorialize the marking schedule with some type of formal acknowledgement.

Positive Response System

ORC 3781.26(D) now requires each utility owner that is a member the Ohio Utility Protection Service (OUPS) to participate in an automated "positive response system" whereby through OUPS, a utility owner is required to communicate directly to an excavator whether there is a conflict between the proposed work and the utility owner's infrastructure. Still, perhaps as a backup, under ORC 3781.29(A)(1), if the utility owner makes no marks within 48 hours, then "the utility is deemed to have given notice that it does not have any facilities at the excavation site." The positive response system is also the utility owner's opportunity to inform the excavator that "the markings may not be accurate." ORC 3781.29(A)(1).

Trenchless Technologies

Trenchless technologies have come a long way since Ohio's utility protection statutes were first put in place back in 1982 and 1989. Now, trenchless technology is specifically addressed by the new law. Under ORC 3781.30(B), every time the trenchless work crosses an existing utility, the existing utility must be "exposed . . . in a nondestructive manner to the installation depth of the new facility."

For parallel existing utilities, the existing utility must be exposed at the beginning and end of the trenchless work, except when the new work is within the "tolerance zone" (i.e. 18 inches) of the existing utility. In that case, the existing utility must be exposed every 100 feet.

Excavator Training

Now, under ORC 3781.261, any excavator, contractor or utility owner that uses OUPS must be trained in underground utility protection. But it suffices to simply be a member of OUPS or a "statewide association representing excavators," contractor or utility that provides training in underground utility protection.

Design Tickets

The role of OUPS and its member utilities during the design phase of a project has frequently been a source of confusion. It has not been uncommon for a designer to simply call in a ticket and then transfer the field markings onto the plans. That practice has now been codified, along with an alternative method. Both ORC 153.64(B)(2) and ORC 3781.27(C) give the option of either having the utilities marked in the field (presumably for later transfer onto plans) or having utility owners provide digital or paper drawings that are drawn to scale and include locatable items like poles, pedestals, curbs, sidewalks and pavement edges. That statute is not absolutely clear, however, on whose choice it is — the designer's or the utility owner's:

> If requested by the developer or the designer employed by the developer, each utility shall do one of the following in order to comply with the notification requirements . . .: [Mark in the field or provide plans.]

The Question of Depth

One of the most vexing questions has always been to what extent the utility owner must indicate the depth of its facility when responding to a ticket request. As mentioned above, ORC 153.64 still requires utility owners on a public project to indicate "approximate depth." For private projects, the requirement was never expressly codified, but one Ohio Court of Appeals has read the requirement into the private project statute. Now, the language that the Court of Appeals relied upon in ORC 3781.29(A)(1), (i.e. "the approximate location") has been stricken. And ORC 3781.29(B) has been changed to read (with new words underlined):

> Unless a facility actually is uncovered or probed by the utility <u>or excavator</u>, any indications of the depth of the facility shall be treated as estimates <u>only</u>.

This seems like an effort to relieve utility owners from responsibility for giving exact depths, but the courts will be the ultimate authority on whether the effort went far enough.

Conclusion

Utility protection during construction, especially in congested urban areas, has always been problematic. Even with a detailed statutory scheme buttressed by plenty of case law, there have always been great differences of opinion among project owners, utility owners and contractors regarding who is responsible for what. No doubt that will continue to be the case as the stakeholders work out the bugs in this new law.

Sitework Contractor Awarded Lost Profits for Developer's Breach

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Recently, the Sixth Appellate District confirmed that a failure to communicate can constitute a breach of contract and held that the injured contractor was entitled to recover costs, overhead expenses and other consequential damages in addition to lost profits or expectancy interest for such a breach.

In *Top Notch Excavating, LLC v. Peterman*, 2012 Ohio 5266 (Ohio Ct. App., Erie County Nov. 9, 2012), a contractor entered into a contract to do excavation and installation of storm and sanitary sewers and related work for a developer. The contract listed the price of the work, but the developer agreed to pay for materials over and above the contract price. The developer also agreed to pay an additional amount, to be determined as necessary, for rock excavation work.

The work began and the developer made the first two requested payments, which were reimbursements for items not included in the amount of the contract. The developer then refused to make the next requested payment. The contractor provided documentation and sought payment as requested under the contract, in person and by fax. The developer refused to make the requested payment and stopped responding to the contractor's request. The contractor did not complete any more work on the project and the parties went to trial, each claiming that the other had breached the contract.

The trial court issued a decision that the developer breached the contract by refusing to communicate with the contractor or make payments as the contract required and awarded the contractor damages for the full amount of the contract as well as costs for materials and excavation work.

On appeal, the court noted that where only one party has materially breached a contract, the nonbreaching party is entitled to recover restitution or damages for its expectation interest. Thus, the measure of damages for a breach of contract is the sum of the actual and incidental or consequential losses from the breach, with any cost that the nonbreaching party avoided by not having to perform on the contract subtracted out.

The court held that the trial court's award of lost profits or expectancy interest was supported by the evidence and therefore proper. But the court held that this awarded amount was improper to the extent that it did not account for the expenses such as costs and overhead the contractor would have incurred to finish the project, or other consequential damages. Because the trial court should have conducted a hearing to determine the damages and should have taken these expenses into consideration, the court remanded the case for such a hearing.

The Sixth Appellate District Court of Appeals Rejects Purported Pay-if-Paid Provision

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When a contractor enters into a contract with a subcontractor, the contractor may attempt to shift certain risks to the subcontractor through provisions within the subcontract. One risk contractors often attempt to shift to subcontractors is the risk of owner nonpayment. The intent of such a provision, commonly called a "pay-if-paid" provision, is to shift the risk directly to the subcontractor if the owner does not pay for the services.

A "pay-if-paid" provision provides that the contractor is only obligated to pay the subcontractor upon receipt of payment from the owner. Although different language is used to accomplish this shift of risk, contracts often include language making payment a "condition precedent" to payment by the contractor. A "pay-if-paid" provision may significantly affect a subcontractor's right to bring a claim against the contractor for nonpayment.

Alternatively, a "pay-when-paid" provision does not pass all of this risk on to the subcontractor. A "pay-when-paid" provision deals with the timing of payment. It provides that the subcontractor will be

paid within a specified time of receiving payment or within a reasonable time of requesting payment.

Absent a "pay-if-paid" or "pay-when-paid" provision, the risk of owner nonpayment is solely a risk the contractor assumes. This concept is based on the premise that the contractor is in the best position to assess the owner's ability to pay and to minimize that risk.

In *Transtar Electric, Inc. v. A.E.M. Electric Services Corporation*, Sixth Appellate District Court of Appeals No. L-12-1100, December 14, 2012, the Sixth Appellate District Court of Appeals recently held that a provision in a subcontract did not contain adequate language to show that the contractor and subcontractor intended to shift the risk of owner nonpayment to the subcontractor.

In *Transtar*, a contractor and its subcontractor entered into a subcontract containing the following language:

> The Contractor shall pay to the Subcontractor the amount due [for work performed] only upon the satisfaction of all four of the following conditions: (i) the Subcontractor has completed all of the Work covered by the payment in a timely and workmanlike manner, * * * (ii) the Owner has approved the Work , * * * (iii) the Subcontractor proves to the Contractor's sole satisfaction that the Project is free and clear from all liens * * * and (iv) the Contractor has received payment from the Owner for the Work performed by Subcontractor. RECEIPT OF PAYMENT BY CONTRACTOR FROM OWNER FOR WORK PERFORMED BY SUBCONTRACTOR IS A CONDITION PRECEDENT TO PAYMENT BY CONTRACTOR TO SUBCONTRACTOR FOR THAT WORK. (Emphasis sic.)

The contractor argued that this contract language was a "pay-if-paid" provision. After performing work on the project, the subcontractor invoiced the contractor for its services. The contractor, however, only paid a portion of the subcontractor's invoice because the contractor had not received full payment from the owner. The contractor did not dispute that the subcontractor performed the work or the amount of the invoice. The contractor, however, relied on the contract's provision that payment from the owner was a "condition precedent" to payment by the contractor to support its position that it was not contractually obligated to pay the full amount.

The subcontractor, however, argued that the alleged "pay-if-paid" provision was actually a "pay-when-paid" provision that did not relieve the contractor from its obligation to pay.

The big issue before the court was to determine the meaning of the contract and, therefore, the intent of the parties in using the provision at issue. In making its decision, the court determined whether the language used was clear and unambiguous. Any ambiguity in the language will result in the provision being interpreted as a "pay-when-paid" provision.

The court, finding that the provision at issue was in fact a "pay-when-paid" provision, relied not only on other state courts' general disfavor of "pay-if-paid" provisions, but also on Ohio case law requiring unequivocal terms dealing with the possible insolvency of the owner instead of general language providing that payment will be received after provided by the owner.

The court stated that the use of words "condition precedent," while helpful, was not enough on its own to create a "pay-if-paid" provision because the words in this contract were not sufficiently defined to "impart that both parties understand that the provision alters a fundamental custom between a general contractor and a subcontractor." Because the court did not consider the language used in this contract to be enough to clearly and unambiguously show the intent of the parties to transfer the risk of owner nonpayment to the subcontractor, the court determined that it could only be a "pay-when-paid" provision requiring that the contractor pay its subcontractor within a reasonable time.

The court found fault with a recent case from the Tenth Appellate District Court of Appeals, *Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Inc.*, 196 Ohio App.3d 784, which held that a subcontract similar to the *Transtar* subcontract was sufficiently unambiguous to qualify as "pay-if-paid." The Supreme Court of Ohio may need to have the final say on the matter to ensure uniformity in the law across the entire state.

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