skellengerbender

ATTORNEYS

PACIFIC NORTHWEST DESIGN PROFESSIONAL LEGAL UPDATE

WASHINGTON OREGON ALASKA IDAHO

Spring 2013

DESIGN AND CONSTRUCTION ATTORNEYS

WILLIAM J. BENDER
wbender@skellengerbender.com

JEFFREY C. GRANT
jgrant@skellengerbender.com

HILLARY A. MADSEN
hmadsen@skellengerbender.com

KARA R. MASTERS
kmasters@skellengerbender.com

PETER A. OFFENBECHER
poffenbecher@skellengerbender.com

LINDSEY M. PFLUGRATH
lpflugrath@skellengerbender.com

TERENCE J. SCANLAN
tscanlan@skellengerbender.com

ALAN D. SCHUCHMAN
aschuchman@skellengerbender.com

Skellenger Bender, PS
1301 Fifth Avenue, Suite 3401
Seattle, Washington 98101

206.623.6501
www.skellengerbender.com

Washington's New "Call Before You Dig" Law And Design Professionals

By Terence J. Scanlan and Kara R. Masters, Esqs.

Recent amendments to Washington's Underground Utility Damage Prevention Act will greatly increase risks for many Design Professionals.

Claims arising from damage to underground utilities during construction are all too common and often expensive. A minor misstep in excavation can sever electrical service, cause fires in electrical equipment, interrupt telephone and other data service, damage underground pipelines and cause enormous property damage, if petroleum or gas lines are compromised. Hazardous materials can also be released, causing substantial environmental damage.

Inevitably, whenever extensive property damage, injuries or loss of life occur, anyone involved in the project becomes a potential target for claims. These new amendments increase these risks for Design Professionals.

How does the Act apply to Design Professionals?

"Excavators"

Some Design Professionals function directly as "excavators," as broadly defined in the Act. An "excavator" is any person engaging directly in excavation. "Excavation" is broadly defined to include any operation in which earth, rock or other material, on or below ground, is "moved" or otherwise "displaced" by any means.

There are only limited exceptions to this broad definition of "excavation." Digging less than 12 inches within a utility easement or less than 20 inches outside a utility easement is excluded, but most everything else is included.

Design Professionals engaging in site explorations, such as digging test pits, drilling, probing or sampling, may fall within this broad definition of "excavator."

If the Design Professional subcontracts for drilling, test pit excavation, etc., there should be a clear delineation of responsibility for compliance with the Underground Utility Damage Protection Act in the subcontract.

Likewise, any Design Professional functioning as part of a design-build team may be included within the scope of this Act.

Recommendations:

- Understand if any of your activities fall within the broad definitions of "excavator" and "excavation." If so, instruct all personnel on the requirements imposed by the Act.

Washington's New "Call Before You Dig" Law And Design Professionals
(CONTINUED)

- If your firm is performing "excavation," we recommend that all personnel be provided with a checklist covering all the steps and requirements imposed by the Act. These checklists should be specific to the excavation services to be provided. Your attorney can review your checklists to ensure they conform with the requirements of the law.
- Pay careful attention to the allocation of scopes of work in design-build arrangements. If you are providing design services only, be sure compliance with this Act is allocated directly to the party or parties performing construction services.

"Preparing Contract Documents"

The Act requires project owners to "indicate in bid or contract documents the existence of underground facilities known by the project owner to be located within the proposed area of excavation."

Project owners usually contract with Design Professionals to investigate the existence of underground facilities and to include these features in design baseline documents. Lead design firms often subcontract this work to sub-tier Design Professionals on the design team.

But the Act does not stop there. An underground facility not identified in plans and specifications is deemed by this law to be a differing site condition.

If an underground facility is damaged and the damage is a consequence of a failure to fulfill **any** obligation under the Act, including failing to indicate the underground facilities on plans and specifications, the party failing to fulfill the obligation may be liable.

It is not hard to envision the following scenario: The owner contracts with the Design Professional to prepare the plans and specifications, including identifying and indicating the existence of underground facilities. The Design Professional misses something and the excavator damages an unmarked utility. The owner will undoubtedly claim that the buck stops with the Design Professional.

The Act also prohibits risk-shifting clauses that attempt to shift the liability in any manner from the party assigned the liability under the law. Thus, assuming an owner (through its Design Professional) failed to indicate an underground facility and a construction contractor then damaged the facility, the owner cannot rely on any risk-shifting clause in the construction contract that shifts the burden to the contractor. The contractor would have a differing site condition claim under this law against the owner, and the owner, in turn, could allege that the owner's exposure on the claim was the fault and responsibility of the Design Professional, who failed to depict the underground facility in the first place.

Recommendations:

- Design Professionals should be aware that the duty to locate subsurface utilities is vested in the owner and only assumed by the Design Professional by contract. If such assumption occurs, the Design Professional must realize it has now assumed a statutory obligation.
- All design personnel need to be trained in the importance of investigating, locating and accurately describing all underground facilities that might be exposed to "excavation" during construction.
- Design Professionals must be aware of the limitations on their knowledge of subsurface conditions, and are well-advised to note what conditions or facilities may exist but cannot be identified with certainty due to the limitations of technology, access, etc.
- In drafting contract terms for the owner, Design Professionals need to be cognizant of the unique differing site condition requirements for underground utilities and the limitations imposed on risk-shifting clauses that seek to pass all responsibility to locate underground utilities on to the contractor. Although this section of the law is untested, we assume these risk-shifting clauses will probably not be enforceable in Washington.

Washington's New "Call Before You Dig" Law And Design Professionals
(CONTINUED)

Reporting, Notice and Marking Requirements:

The Act has many reporting, notice and marking requirements "excavators" must follow. These cover processes from the preliminary marking of excavation limits to obtaining utility specific markings before digging, maintaining the marks during the project and providing notice to utilities and the Utility and Transportation Commission in the event of any damage.

Recommendation:

- Especially on projects with significant risk of damage to underground utilities, consider requiring "excavators" to make a formal submittal of their procedures for compliance with the reporting, notice and marking requirements imposed by this law. If nothing else, this submittal process will alert contractors to the procedures that must be followed.

Extent of the Risk of Damage:

The scope of this law is much broader than simply digging a trench or pit and then encountering an "underground facility." Under the Act, "damage" includes the **"substantial weakening of lateral support of an underground facility, penetration, impairment or destruction of any underground protective coating, housing or other protective device** … to the extent the owner of the affected facility operator determines that repairs are required." (Emphasis added.)

This section is undoubtedly the result of recent cases where damage to the coatings and/or cathodic protection for petroleum pipelines has lead to corrosion and subsequent catastrophic failure. However, the section is broad enough to cover a host of familiar risks, including damage to utilities on adjacent properties from deep excavations, damage from installation of tie-backs and soldier piles, etc.

Recommendation:

- When work will occur near an existing facility or utility, if the Design Professional is performing excavation itself, consult with the facility owner for information specific to the integrity and safeguarding of that facility or utility.

Penalties and Damages:

The Act imposes strict liability: "If an underground facility is damaged and such damage is the consequence of the failure to fulfill an obligation under this chapter, the party failing to perform that obligation is liable for *any damages*." "Any damages" include reasonable attorneys' fees for the prevailing party; if the failure happens to be willful or malicious, which includes failing to self-report, the Act imposes treble damages for repair and re-location costs.

Act imposes clear and specific obligations, including, but not limited to, the following:

- Giving two to ten days' notice before excavation;
- Marking the excavation area with white paint prior to calling for locates;
- Maintaining the excavation marks for the shorter of 45 days or until the work is done;
- Holding construction until all known facilities are marked or the utility provides information about unlocatable facilities.

It is easy to see how a claim for strict liability could be made for any one of a number of alleged "omissions" of these many duties.

Conclusion

It is hard to fault the legislature for attempting to strengthen this Act in the aftermath of recent catastrophic accidents to underground utilities during construction. However, this Act imposes new burdens on those involved in construction, including Design Professionals.

Washington's New "Call Before You Dig" Law And Design Professionals

(CONTINUED)

We urge Design Professionals to carefully consider how their work is impacted by these requirements and to develop responsive approaches to avoid these new liability exposures.

Each firm may want to review its scope of work with its counsel to develop work-specific checklists for compliance with the requirements of this Act.

This paper is a publication of Skellenger Bender, PS, and summarizes general legal information, including recent developments. This general information is neither legal advice nor tax advice. No action should be taken on the basis of this paper without legal and/or tax advice based on your specific circumstances. For further information, please contact Kara Masters at 206.387.4720.

ABOUT THE AUTHORS

Terence J. Scanlan and Kara R. Masters are shareholders in the firm.

ALAN D. SCHUCHMAN JOINS SKELLENGER BENDER

Alan joins the firm after 7 years as Corporate Counsel for Claims and Litigation for global engineering and construction firm CH2M Hill, Inc. and 7 years in the Labor and Employment group of Holland & Hart, LLP in Denver, Colorado.

While with CH2M HILL, Alan managed claims and litigation worldwide involving alleged professional negligence, personal injuries and fatalities, various torts, breach of contract claims, mechanics liens, terminations, administrative complaints, OSHA citations, and various other claims. Additionally Alan provided training on issues of risk, change management and avoidance of disputes.

While in private practice Alan focused on the representation of local, national and international clients in state and federal litigation, jury and bench trials, arbitrations, administrative proceedings, and mediations, involving contract, lease and other commercial disputes, insurance coverage disputes, common law employment claims, Title VII, FMLA, FLSA, NLRA, ADA, ERISA, restrictive covenants, misappropriation of trade secrets, labor campaigns and disputes, wage and hour law matters, unemployment claims, personal injury, negligence, premises liability, construction litigation, First Amendment litigation, and more. He also spent significant time counseling clients, including drafting policies and contracts/agreements and training on Human Resource issues.

Alan is admitted to practice in the federal and state courts of Colorado with admission to Washington and Oregon pending.

Throughout his career Alan has been a frequent author, presenter and trainer on the avoidance of risk for engineering/construction firms and human resource issues.

UPCOMING PRESENTATIONS AND SEMINARS BY SKELLENGER BENDER

WSBA-CLE: 11th Annual Ethics in Civil Litigation Institute, 04.19.13. Jeffrey C. Grant will address the topic of Recent Ethics Cases and Trends, including recent opinions and other developments in ethics law.