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MEMORANDUM

TO: Mike Nystrom
Glenn Bukoski

FROM: Eric Flessland

DATE: June 21, 2016

RE: Contractual specifications imposing cost to relocate utilities on Contractors

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K&R provided two examples of contract specifications that generally state the contractor is responsible to relocate all existing underground facilities which reasonably may be expected in the project site, regardless of whether or not such utilities are shown on the plans. Such work shall be incidental to major items of construction. There is no separate pay item for utility relocation. The Contractor is expected to include the cost of such relocation in its bid, yet remain competitive in pricing. K&R asked four questions:

1. Is this legal to shift the risk and even unknown risk to the contractor?
2. Doesn't the utility have to move if they are in the municipalities ROW?
3. How should we proceed with current contracts?
4. What should MITA do to make the membership aware of such specs if they are legal?

As to the first question, I am unaware of any statute expressly prohibiting such risk transfer, and thus the contract provisions are not "illegal." However, there are some statutes that imply such a risk transfer is unenforceable because they violate public policy. For instance, exculpatory clause and disclaimers as to the accuracy of the subsurface conditions represented in the contract documents are not enforceable because they violate the public policy embodied in the Differing Site Condition statute. If the contractor encounters conditions in the field that differ materially from the contract indications, the Legislature has determined the governmental owner assumes the risk the construction may cost more. The owner is required to equitably adjust the contract sum when, for instance, undisclosed utilities conflict with the work and cause the contractor to incur greater construction costs. Following that logic, the portion of the specifications that requires K&R to locate and to move undisclosed utilities at its expense is contrary to the Differing Site Conditions clause, and would likely be ruled unenforceable in those situations. Similarly, the municipality is required under the MISS DIG Act to pull tickets during the design phase, and locate existing utilities on its drawings submitted to contractors. The municipality arguably violates that section when it requires the contractor to locate and to move utilities not disclosed on its plans.

Whether the municipality can contractually require the contractor to move, at its expense, disclosed utilities is not easily or susceptible of short, quick responses. There are at least three

sources that can provide guidance in answering this question together with caselaw relating to these areas of analysis:

(i) the franchise agreement and/or other agreement between the utility and the municipality;

(ii) a grant of authority given by a municipality; or

(iii) statutory provisions governing a municipality's right to require the relocation of utility facilities and the common law rule relating to utility relocation;

1. <u>Restrictions under Franchise Agreement</u>

Franchise Agreements in General - A utility company acquires its location in a public road by permission of the State through the grant of a franchise by the State, or by a municipality, as a subdivision of the State. A franchise grant typically permits the utility company to use, but not hold fee title in, the land on which it places its facilities. However, rights come in different forms. Although a utility company may use the public way because it serves a public interest, the utility company's interest in the public way is subordinate to the public's enjoyment of it. Courts have held a utility company is permitted to locate its lines within the public right of way as a use ancillary to the principal and primary use of the right-of-way by the public. Although there is some authority to the contrary, the prevailing view in most jurisdictions is that a franchise conferred by the State on a public utility is not entitled to compensation under contract law (through exercising a utility company's rights under the franchise agreement) or the law of eminent domain for any losses or expenses it may sustain in the removal and relocation of facilities. If the utility company expressly or implied agreed to pay for relocating its facilities, the municipality is not at risk for the cost of such relocation. The question arises, in that situation, whether an owner may shift a risk to the contractor that the municipality did not have at the outset.

Review of specific franchise agreement - The first place to look for authority regarding relocation of utility lines is the franchise agreement between the utility (or most likely its predecessor) and the municipality. The franchise agreement governs a utility company's right to operate within the municipality. If the predecessor to the utility company entered into a franchise agreement with the municipality to provide for the installation and operation of the utility system within the municipality, that would not be unusual. If there is a specific provision in the franchise granting the municipality the power to demand that the lines be relocated, there is express authority to back up a municipality's request that a utility relocate its lines. Unfortunately for our analysis, we can assume that typically there are probably no provisions relating to the subject of relocating lines mentioned in franchise agreements. It is likely that the franchise agreement was entered into many years ago and the thought of relocating underground lines may not have even been contemplated by the parties. If the original franchise agreement does not expressly permit the municipality to order underground relocation or provide for who would be responsible if relocation of lines is necessary, further inquiry is needed.

2. <u>Municipal Grants of Authority to Operate Utility Services</u>

Municipal Grants - Another source of information relating to the powers and limitations placed on utility companies may be in a general or specific grant to utility companies by a municipality. A typical municipal grant will apply to all telephone, telegraph and electric light companies. It may provide, in part, that the location of conduits in the streets shall not interfere with any sewers previously constructed, and in case it is necessary after the laying of such conduits to construct or repair sewers, the company has no right to interfere with such subsequent work but

will remove its conduits to such places as determined by the department in charge of the work so as not to interfere with any work that may be done by the municipality in the streets.If the road widening was performed to facilitate the repair of sewers or or to lay or repair water pipes, then it would seem that the utility may be responsible for the cost of relocation of its lines.

3. <u>Statutory Provisions and Common Law Relating to Utility Relocation</u>

Because of various federal and state polices dating back numerous decades, many municipalities enacted ordinances that required the utility companies to relocate buried facilities at the companies' expense when it was in the public interest, and the direction was a reasonable exercise of the police power. If the municipalities that have these specifications previously enacted such an ordinance, one could argue the specification violates the ordinance and is unenforceable. K & R should review the ordinances.

The majority of states follow the common law rule that a utility must relocate facilities that are on public highways at its own expense when such relocation is necessary in the exercise of a municipality's police power to protect the public health, safety, or convenience. There is a U.S. Supreme Court decision in 1983 directly on point. Absent specific legislative action, courts are reluctant to overturn the common law on costs-allocation in this area.

Until recently, Michigan clearly followed this common law principle. The Michigan Constitution provides local units of government the authority to reasonably control their rights-of-way. Const. 1963, art. 7, § 29. Michigan courts have long held that the right of reasonable control includes the right to order a utility to move its facilities to another location at the utility's expense. However, the Michigan Supreme Court recently held that the Public Service Commission has jurisdiction to determine who is responsible to pay for undergrounding overhead power lines, and that a City may not enact an ordinance that conflicts with that authority. I have not researched whether the Public Service Commission has enacted similar rules for relocating existing underground utility lines that conflict with new construction (as distinguished from burying overhead power lines in new conduit). If such rules exist, one could argue the legislative acts creating the PSC and bestowing rule making authority upon the PSC supplants the common law. This research, and the constitutional analysis, would be an extensive undertaking, and we have not undertaken that task without express direction from MITA.

It should also be noted a bill has been proposed in the Michigan House of Representatives. House Bill 5016 was introduced in 2015, and it would have legislatively mandated that state or local agencies give advanced notice to the utilities (up to 1 year advanced notice possibly) whenever new construction or work would necessitate those utilities being moved. If they did not give that advance notice, then the state or local agency would have to pay half (50%) of the expenses to move the utilities. If they gave that notice, the utility companies had to pay the expenses.

This proposed Bill did not pass and is not binding or governing law. So, in a way, it is not directly relevant to our research. However, the very fact this bill was proposed appears to be proof that the Utility Companies, not the municipalities, must pay the expenses for moving the utilities. One Summary of the Proposed Bill stated that "Under Michigan law, when a utility's facilities are within the right-of-way by permit, the highway agency typically does not pay for relocation. The department or a local road agency only pays for utility relocation when the utility has an easement or actual ownership of the property on which its facilities are placed. While highway agencies typically do not pay for utility relocation costs, except under circumstances described above, utilities typically do not pay for occupying public highway rights-of-way.

Utilities benefit from this free use of the public right-of-way that would otherwise be very costly to purchase."

This, again, supports the idea that the municipality, in the clauses in question, is shifting a risk to the contractor that the municipality does not itself even hold. The municipality is essentially protecting the utility companies to the cost and detriment of the Contractor, which will ultimately increase the costs to the taxpayers as contractors have to factor those costs into their contracts and bids.

Turning directly the K&R's third questions, MITA should not provide K&R legal advice and business strategy. Such advice could render the Association liable for practicing law without a license. MITA could provide K&R a copy of the recommendations in this memorandum. As to specific strategy on the contracts where K&R apparently assumed the risk, it should consult its attorneys on the specific legal analysis and strategy each contract warrants. Last, I am unaware of whether these contractual clauses are isolated to two projects, or are wide-spread and becoming an imminent threat to the industry. If MITA believes the industry could be at risk, then a more detailed and thorough analysis of Michigan common and statutory law would be warranted before a proper remedy strategy could be fashioned.