

# Lake County Contractors Association Professional Practice Report

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## e-Signatures

By Bill Zeigler, Zeigler Associates, Ltd.

In June this year, Congress almost unanimously passed, and President Clinton signed, the 'Electronic Signatures in Global and National Commerce Act,' S. 761, or the E-Sign Act [ESA], giving electronic signatures the same legal standing as 'wet' signatures heretofore required for business-to-business and business-to-consumer transactions. The wave started forming in the mid-90's as states started passing a wide variety of their own electronic commerce procedural laws with different applicants, security level requirements and forms of signature objects.

Three years in the making, S. 761 addressed consumer fraud concerns along the way. Certain transactions, including utility cut-offs and eviction notices, family law proceedings and wills and codicils must still be signed and delivered in paper form. The law takes effect October 1, 2000 and intends to ensure that contracts over the Internet are as enforceable as paper signatures and across all 50 state lines. And of course national boundaries will become the next step. On August 16 this year, Germany signed their own e-Sign law which Economics Minister Mueller says; "will allow a range of transactions to be performed by computer which previously weren't allowed and also make it unnecessary to keep paper copies of these documents". Electronic record keeping requirements become effective March 1, 2001. The Act also validates contracts between 'electronic agents' such as the automatic programs used by online merchants. This will speed transactions and simplify the agreement process for those deals offered and accepted online, probably expanding the offering as sellers and providers become more comfortable and experienced with the process and that the terms are binding. Almost everyone has performed an online transaction covered by this bill. And have agreed to lengthy contract conditions with the click of a mouse which, in the definitions of S. 761, constitutes a signature. Less likely, you have received a document transmitted 'signed' by the sender with an encoded 'object' only attachable by one party. But this is coming.

Electronic signatures can be digitized images of a signature or more likely, for a time, they will appear as arcane embedded encrypted codes. Usually these 'objects' are inserted into a document by password and attempt to prevent alteration or unintended use. Programs can detect changes to the original image and alert subsequent readers to that effect - some software stores the original signature along with the pressure and speed with which it was created. The new law also addresses other technologies - electronic signatures may range from coded passwords to fingerprints and retinal scans as long as authentication can be achieved (ENR, 6/26/00, p.11). For contractors, William Dean, contracts administrator with the Clark Construction Group in Bethesda MD says that trust and the bond of verbal commitment is still very important - the contractor that attempts to deny obligation based on no original signature doesn't survive long.

The law will affect the landscape in other ways. Certain encryption companies will get a boost as the demand immediately appears for methods to protect and authenticate annotated objects on electronic documents and places on the screen. In another area, a company called Arcanvs has patented a process to allow notaries to

witness the application of an electronic signature. Another boost will be in the 'biometrics' industry. As online and electronic verification increases, so will the technology to use finger/faceprints, retinal scans, etc. In essence, the ability to secure the identity of a signer and sender will theoretically be enhanced as the technology is put in place. With the proper technology, which already exists, it can be demonstrated that electronic signatures are much harder to corrupt or forge than wet signatures. The risk comes from not employing these protections like safety belts or hard hats or passwords.

Still, forgery warnings are being issued in advance of watching e-Signatures put into practice. The ESA currently prohibits states from requiring a digital signature, but more generally allows any "electronic sound, symbol or process" such as pressing a touch-tone phone key to agree. The requirements for a copy of the contract that has been agreed to are minimal or lacking in many circumstances that offer an opportunity for review and consideration.

Technology challenges do exist. The digital signature development companies use of 'public key infrastructure' or PKE. None of these operate with the others, which limits an online provider to customers that have and use the signature product they have installed on their site. There is also a speed penalty for PKE based transactions. According to Larry Zanger, Head of the Information Technology and Electronic Commerce Practice Group at McBride Baker and Coles, There will need to be standardization here too before e-signatures have a measurable impact on e-Commerce. What e-Commerce related article would be complete without at least one link? Here's one by the McBride law firm which has compiled a detailed analysis of each state's e-Commerce laws and every country that has passed or considered such laws: <http://www.mbc.com>.

Good or bad by all accounts ESA may not prompt an immediate revolution in the way business is transacted, soon enough the impact will be dramatic.

### **Differing Site Conditions Bill Becomes Law**

By Jim Dash, Rosenthal & Shanfield, with acknowledgment to my partner, Greg Meeder

In performing construction work, a contractor sometimes encounters unforeseen site conditions. Whether the unexpected condition is manmade (*i.e.*, an illegal underground dump or an old foundation) or naturally occurring (*i.e.*, excess rock or soil not disclosed by borings), such conditions can impact the time and/or the cost to perform certain types of work.

Effective December 3, 1999, the Public Construction Contract Act became law. The Act inserts into contracts for improvements exceeding \$75,000 with many units of local government (the Metropolitan Water Reclamation District is a major exception) a "differing site conditions" clause, whether or not such a provision is contained in the contract.

The inserted clause establishes an administrative procedure for the resolution of disputes where the physical condition of the site:

- (a) is materially different than that indicated in the contract; or
- (b) is unknown or unusual and is not ordinarily encountered when performing the type of work covered by the contract.

Upon discovery of such a condition, and before further disturbing the physical condition of the site, a contractor that provides proper written notice triggers a process that requires a subject governmental unit to make an “equitable adjustment” to the contract.

General contractors and subcontractors on public projects should consult their legal advisor to discuss the applicability and effect of this clause from the initial bidding process forward.