



# American Subcontractors Association

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## **Excavating Subcontractors Have a Nondelegable Duty to Call Kansas One Call**

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In the recent case of *Double M. Construction, Inc. v. State Corp. Comm'n*, 202 P.3d 7 (Kan. 2009), the Kansas Supreme Court made an unprecedented decision to hold excavating subcontractors fully responsible for calling Kansas One Call prior to digging in or near utility lines, even in those cases where the subcontract expressly required the general contractor to make the call to Kansas One Call.

More specifically, an excavation subcontractor was hired to dig a trench near a utility line. The subcontractor's contract with the general contractor required the general contractor to call Kansas One Call to determine the presence of existing utility lines before the subcontractor began digging the trench. The contractor contacted Kansas One Call, as it was required to do, and Kansas One Call informed the contractor that all facilities would be marked by October 3, 2006. The contractor directed the subcontractor to begin trenching on September 29, 2006, and the subcontractor did so without first contacting Kansas One Call prior to commencing its work. The subcontractor hit a high-pressure natural gas transmission line. The escaping gas ignited and killed an employee of the subcontractor.

The Kansas Corporation Commission entered an order finding the subcontractor at fault and assessing a \$25,000 penalty. The District Court affirmed, and the Kansas Supreme Court transferred the appeal directly to its docket.

In a unanimous decision, the Kansas Supreme Court affirmed the Commission's imposition of liability upon the subcontractor, because the subcontractor failed to contact Kansas One Call before commencing its excavation work. Relying on the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 *et seq.*, which governs the procedures for excavating in areas containing underground natural gas pipelines, the Court held that the subcontractor is clearly an "excavator" within the meaning of the Act. In reaching this decision, the Court further relied upon K.S.A. 66-1803, which provides: "An excavator shall not engage in excavation near the location of any underground facility without first having ascertained, in the manner prescribed in this act, a location of all underground facilities in the proposed area of the excavation." The court found that, under the plain meaning of the statute, the subcontractor did not comply with its statutory duty and the Commission properly imposed penalties upon it.

Despite the fact that the general contractor had called Kansas One Call prior to the subcontractor commencing its work and the fact that the parties' required the general contractor, and not the subcontractor, to make that call, the Supreme Court held that the subcontractor was wholly at fault. According to the Court, when a statute governs a

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particular situation, contractual arrangements – such as the parties' written agreement to delegate to the general contractor the duty of calling Kansas One Call – do not apply.

It is important for a subcontractor to review its contract, to fully understand the roles, responsibilities and duties of each party as described in the contract, and to know and understand how applicable laws might modify or impact any duties the parties have attempted to contractually delegate to others. Indeed, simply because a contractual provision places the duty upon another party to do or to refrain from doing an act or task, such as making a telephone call to Kansas One Call, does not mean the subcontractor ultimately will not be held liable or responsible if that act or task is not performed.