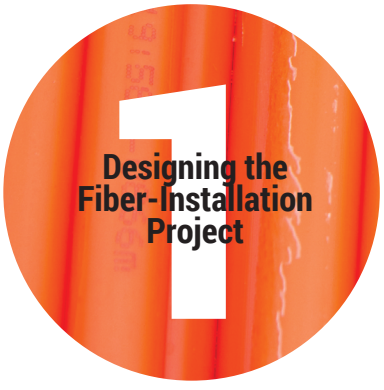

TOP
10

● BY DAVID R. COOK

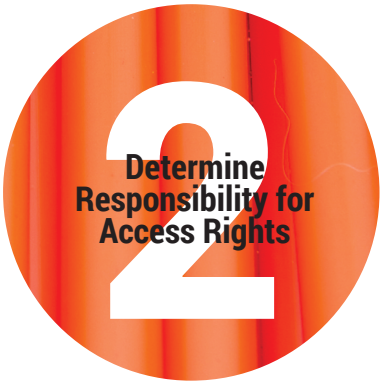
More and more rural telcos are installing fiber to their customers. But what do telcos need to know when they engage midsize to large licensed construction companies to install fiber lines? ● According to the "NTCA 2015 Broadband/Internet Availability Survey Report," 74% have a long-term fiber deployment strategy, and 49% are already serving fiber to the home. With such growing interest in fiber installation, now is a good time for rural broadband companies to assess their associated policies, practices and contracts. ● While many rural telcos have the capability to install fiber with their own staff, many others do not, and they must hire third-party fiber installers. Either way, many of the following considerations are equally applicable to in-house projects. Furthermore, in-house engineers will play a significant role in any fiber-installation project.

Considerations of Fiber Installation Contracts



To design a project, telcos may use in-house engineers, outside engineering firms or even design-build fiber installers. When designing projects in-house, the rural telco is generally assuming the design risk, but this risk could be minimized by customized contract provisions.

The design should take into account the project objectives; type of cable being installed and its physical and operational parameters (for example, NECA/FOA 301 identifies several physical and operational parameters.); and property access restrictions, among other factors.



Conflicts frequently arise from disputes over access rights, whether from easements, licenses or implied rights. It is important, therefore, to specify who is responsible for obtaining the necessary access rights.

Most telcos have easements with their customers, and they will assume responsibility for procuring access rights. Yet more and more utilities are discovering that either their existing easements do not cover fiber or customers are more likely to object to additional installations on their property. (Times have surely changed since in the early 1950s.)

3 Select the Best Installer

With the growth in fiber installation, rural telcos will usually find more options in selecting a fiber installer. Telcos should consider the following factors: price; experience and history of performance; access to labor; financial stability and ability to offer bonds or other performance security; certifications and licenses; and preauthorization by applicable agencies and authorities.

Rural telcos should also consider implementing a competitive bidding or proposal system. These systems are intended to obtain the best price and keep the process fair.

4 Determine the Compensation

Methods to compensate a fiber installer include lump sum, cost-plus, cost-plus with a guaranteed maximum price, unit pricing and others. These options have pros and cons based on the project specifics. Whatever method is chosen, it should be clearly set forth in the contract.

5 Clearly Define the Scope of Work and End Product

A fiber-installation contract should specify, with as much particularity as possible, what the telco wants. At a minimum, each contract should incorporate the applicable design and drawings; specify the type of cable and materials; define any standards and specifications, including manufacturer specifications; establish any sourcing requirements, such as Buy American; require testing and any repairs and adjustments necessary to pass any testing; and finally, require all documentation necessary for maintenance, repairs and future locate requests. If the telco will provide materials, the contract should specify when risk of loss transfers to the installer and should require return of any unused materials.

6 Address the Possibility of Changes and Unforeseen Conditions

Because the project design cannot account for all conditions, the contract should permit the telco to order changes in the work, or even to terminate the contract altogether. These clauses are called change-order clauses and termination-for-convenience clauses, and they should each address the effect on the installer's compensation. A similar clause in many contracts is an unforeseen-site-conditions clause, which addresses the impact of conditions not reasonably expected in the site, such as unsuitable soils or rock.

As an example, existing facilities unknown to the designing engineer, or simply mislocated by a facility's owner, may conflict with the projected fiber path or aerial attachment. A telco may choose to simply adjust the path by issuing a change order rather than attempt to navigate around the conflicting facility. (Not all facility owners keep meticulous documentation or carefully locate their facilities, and in some instances it can be best to avoid them.)

7 Set the Timeline

Customers want their high-speed internet yesterday. Rural telcos should require installation within a time frame set forth in a project schedule and should consider imposing liquidated damages, which sets a daily rate for each day of delay.

At the same time, if the installer is delayed by the telco or others, such as by defective design or by inadequate access rights, the installer likewise may assert a claim for delay damages. To minimize such risk, the contract could include a no-damages-for-delay clause. When enforceable, these clauses prevent the installer from seeking delay damages from the telco, though a time extension may be required.

8 Set the Standard for Performance and Testing

Fiber installers must take care to properly store, handle and install fiber. Optical fibers are sensitive to dirt and debris and should not be exposed to harsh conditions and other damages. Even before installation, the fiber should be tested to ensure it is not defective.

The contract should expressly require installers to comply with all applicable standards and to maintain all licenses, permits and certifications, whether set by the telco itself or governing agencies and authorities. For instance, NECA/FOA 301 is a common industry standard that establishes safety protocols; best practices for installation, handling and storage; and testing procedures. The contract should also include a warranty provision that guarantees the materials installed and installation itself comply with all

Are You RUS-Compliant?

Rural telcos that borrow or receive funds from the Rural Utilities Service (RUS) should also check applicable RUS regulations affecting fiber installation. Among other things, these regulations require standard forms and set minimum performance specifications and requirements for fiber testing, splicing, materials quality and plant measurement.

applicable standards, and which obligates the installer to repair or replace any nonconforming materials or work.

To ensure the installer's timely and proper performance, telcos may require performance and payment bonds or other forms of performance security, such as letters of credit and parent company guaranties.

9 Allocate the Risks

A core feature of any contract is the ability to allocate risk among the parties. Fiber-installation contracts are certainly no exception. Perhaps the most susceptible area for risk is damage to persons or property during installation. Court cases over the past few decades are replete with examples of fiber installers causing damage to other underground facilities or being injured themselves when attaching to live power poles. Thus, it is important to address these risks in the contract.

To allocate risks, fiber-installation contracts require the installer to maintain adequate levels of insurance with only the appropriate endorsements. They also include indemnity provisions, which require the installer to defend and reimburse the telco for any damages caused by the installer to third parties. There are many other provisions designed to allocate losses, so an attorney should always review the contract—ideally in collaboration with a telco engineer.

10 Follow Laws and Regulations

Finally, it goes without saying that the contract should include a comply-with-all-laws provision. The fiber installer should comply with all safety laws, wage-and-hour laws, licensing requirements, statutory minimum insurance, workers' compensation laws, tax laws, dig and locate laws, hazardous material laws, environmental laws, and transportation and traffic laws, among others. If any violations occur, telcos will quickly learn the importance of their risk allocation provisions. ●

David R. Cook is an attorney in Atlanta who practices in cooperative law and taxation; construction law; and general business, commercial and corporate law. Contact him at cook@ahclaw.com.