A SUB’s PRIMER ON ASBESTOS

How to Avoid the Dangerous Legal Pitfalls

While many specialty and interior subcontractors have heard a great deal about the dangers of asbestos, few understand the legal problems that face them in this area. These problems are not restricted to asbestos abatement contractors! Unless a contractor who is involved in interior work understands the dangers of asbestos, and what to do if it is encountered before or during a job, the contractor’s employees, the owner, tenants and even the public stand to be injured or damaged. This adds up to legal liability, possible violation of the law, and the potential for loss of insurance coverage and bonding.

Asbestos-containing materials have been widely used in building construction throughout the United States over a long period of time. Asbestos-containing materials are not clearly marked as such, and are contained in many products. They are known by different trade names, and the presence of asbestos in a building is not always evident. Thus, the need for awareness is great.

Building owners and managers may have a responsibility to take affirmative steps to inspect for asbestos in buildings. Legally, building owners and management will be held to a standard of exercising reasonable care in the inspection of a building for asbestos-containing materials. However, there is a great deal of ignorance in this area, and contractors who are not engaged in asbestos abatement and removal may nonetheless come across asbestos containing products in their work of bidding process. Despite the publicity over asbestos, many owners and architects and other professionals involved in building renovation fail to anticipate the presence of asbestos in biddings, or its need for removal. Thus, the interior contractor must be on the lookout for asbestos containing materials. For buildings built prior to 1975-77, asbestos containing material is commonly found on steel support beams and columns, in air handling rooms, in machinery rooms as pipe and boiler insulation, and on ceilings, floors and walls. Thus, buildings in which work is to be one should be inspected, and inspections should also include areas above suspended ceilings and boiler rooms. Inspections in all areas should be conducted extremely carefully. Settled asbestos fibers may be resting on the upper surface of ceiling panels or pipes, and if disturbed, fibers will be released into the air. The person inspecting the area should wear an effective respirator; if the overhead space is part of the air circulation

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system, the system should be turned off and the ceiling should be inspected when no one else is present. If the asbestos material is friable (in other words, if it may be crumbled, pulverized, or reduced to powder by hand pressure) the fibers may be easily dislodged and become airborne. When the material is friable, people are then exposed to the risk of breathing asbestos fibers.

In connection with the inspection, building construction records should be checked to determine if asbestos containing materials were specified; however, consulting construction records should never take the place of a visual inspection, since materials may have been substituted during the progress of the work. Also, subsequent renovation and remodeling projects may have resulted in asbestos containing materials being added or removed.

If the presence of asbestos is suspected, the material should be sampled and analyzed. Friable material should always be sampled and analyzed. It is critical that the sampling procedure be correctly performed and that the analysis is accurate. An incorrect result could lead to an erroneous conclusion being reached regarding the presence of asbestos, and corrective action being taken when none is necessary, or no action being taken when hazardous material and a hazardous situation is in fact present.

If asbestos material is discovered and exposure at hazardous levels is occurring or is likely to occur, the owner or the building manager must then assess the need for corrective action and select the most appropriate corrective action. During this analysis, temporary measures may be necessary or desirable. However, once asbestos has been identified in a building, any abatement or removal activity, even if temporary, must be conducted with the strictest of caution. In some cases, the risk of exposure can be reduced by altering existing operation and maintenance procedures that could cause the release or spreading of asbestos fibers. All necessary maintenance and renovation in affected areas should be scheduled when there are no people in the area, and procedures should be instituted to reduce the level of any exposure. For example, it may be necessary for maintenance workers to be provided with effective respirators. While exposure can be reduced through these measures, they do not provide an elimination of the risk.

It is important that all contractors, owners and consultants be aware of existing regulations. Both EPA and OSHA have regulations which cover the removal, encapsulation and enclosure of asbestos materials, and worksites. Some state and local governments also have regulations which may be applicable, and other federal regulations may also come into play (such as the OSHA construction standards). Current regulations govern worker safety, agency notification, respiratory standards, disposal, medical precautions, reporting and other items. Corrective measures must of course be taken in compliance with existing regulations. Further, current regulations may not be comprehensive or strict enough, and may not reflect the current state of the art. It is thus important to not only be familiar with
existing regulations, which are minimum standards, but also with the state of the art for such work. Government agencies generally have offices which will provide technical assistance to contractors and owners who discover the existence of asbestos. Contractors who are not in the asbestos abatement and removal business, must nevertheless be knowledgeable enough about asbestos regulations so that they do not inadvertently mishandle asbestos if they should encounter it.

An initial question arises as to how to bid and enter into a contract on a project where asbestos may be present in order to avoid responsibility for handling asbestos which is discovered.

An Illustrative Example . . .

You are a subcontractor preparing to submit a bid for interior renovation on a private school built in the 1960s. In reviewing the plans and specifications you see no reference to asbestos, and no reference to the need for removal or abatement of same. Being a prudent contractor, however, you call the architect and inquire as to whether there is any asbestos in the building. The architect states that he does not believe that any asbestos exists in the building, but that there would be no problem with your taking exception to any asbestos abatement and removal since the project is a private school, and “there are no regulations dealing with asbestos in private schools.”

In determining your response to this situation, it is important to remember that as a general rule, the scope of a sub-contractor’s work should be very carefully defined so that all parties understand what is included and what is not included in the scope of work. The clause in the proposal and in the contract describing the work to be performed must be precise. Otherwise, the subcontractor may have to perform work which was not contemplated when the job was bid or negotiated. Subcontractors should be very careful to ascertain that there are no ambiguous or dragnet clauses that would require the performance of any work other than that specifically included in the subcontractor’s bid.

In connection with the issue of the scope of work, an owner may attempt to shift the risk of undiscovered
asbestos onto the contractor or sub-contractor by providing a site investigation clause. Such form clauses often provide as follows:

By executing the Contract, the Contractor represents that he has visited the site and familiarized himself with the work and the conditions under which the work is to be performed.

Where such language is present, the contractor should be careful to check the contract documents before bidding to see if there is a “changed-conditions” or “differing-site-conditions” clause which provides protection to the contractor if physical conditions are encountered at the site which differ from those originally contemplated in the plans and specifications. The purpose of changed-conditions clause is to eliminate from a contractor’s price contingent costs which the contractor would otherwise include in its bid to guard against increased costs of performance due to the discovery of conditions differing from those described in the contract. This kind of clause would apply, for example, to asbestos which had not been discovered during the pre-bid inspection. As an interior contractor, you would not want to be responsible for asbestos abatement when this is not even an area of your expertise.

The changed-conditions clause is calculated to be of benefit to both the owner and the contractor. It benefits the contractor because it eliminates the risk of increased cost of performance due to unknown or differing physical site conditions. The owner benefits because he pays for these increased costs of performance only in the event that the contractor actually encounters changed or differing site conditions. Without the changed-conditions clause, a contractor ordinarily would increase the estimate to compensate for added hazards or work which might be encountered, and the owner would pay the contractor’s increased lump-sum price even if the site conditions subsequently proved to be normal. Even more dangerous, however, is the situation where the contractor has not included such contingencies in its bid, and finds itself unable to recover for the extra work. This can cause the contractor to default, or be pressured into doing less than acceptable work. In these cases, not only has the owner not been able to transfer this risk, but it has also set into motion a set of circumstances where the hazardous conditions are not abated or removed.

A typical changed-conditions clause provides for two kinds of unknown physical conditions: those which are not as originally represented on the plans and specifications, and those encountered which are generally not recognized as inherent in the particular type of work. Under these circumstances, the contractor would have to show, for example, that during performance of the contract asbestos was discovered which was not originally represented as existing. As with any other changed-condition, the contractor should notify the owner before disturbing the conditions in order to give the owner the opportunity to determine what to do about the condition.

Contractors performing contracts which are not anticipated to require
asbestos abatement and removal should specifically protect themselves from the possibility of encountering asbestos materials. A changed-conditions clause would generally apply to concealed or unknown conditions in an existing building, as well as to subsurface conditions. Contractors who are bidding on work in buildings where the potential for encountering asbestos is great may want to include specific language in their bid or contract to eliminate asbestos abatement or removal from the contractor’s scope of work. The following language could be used for this purpose:

Contractor’s scope of work shall not include the identification, detection, abatement, encapsulation or removal of asbestos, or products or materials containing asbestos or other hazardous substances. In the event the contractor encounters any such products or materials in the course of performing its work, contractor shall have the right to discontinue its work and remove its employees from the project until such products or materials, and any hazards connected therewith, are abated, encapsulated or removed or it is determined that no hazard exists (as the case may require), and contractor shall receive an extension of time to complete its work hereunder and compensation for delays encountered as a result of such situation and correction of same. Of course, contractors must make sure that language of this type complies with the requirements of the scope of work and is not in conflict with any other provisions of the contract or specifications.

As another circumstance, interior contractors often do work in follow-up to an asbestos abatement and removal project. In this instance, the contractor must be familiar with asbestos in order to bid, schedule and perform the work safely. An interior contractor who is not engaged in asbestos abatement and removal work may nonetheless be placed in a position where it must make a decision whether to engage in work or an asbestos project or whether to bid on projects on which asbestos abatement or removal is a part.

More Illustrative Examples . . .

Example 1
You are an interior subcontractor, reviewing specifications for work on a project where an asbestos abatement and removal contractor will precede your work. The specifications and contract documents provide that you will replace ceiling tiles in specified areas and damaged ceiling tiles in other areas “as necessary,” demolish and reinstall wall assemblies in certain areas and repair damaged areas in other areas “where necessary,” and provide and install lighting fixtures and ensure that all light fixtures are operational, with the ability to subcontract portions of the electrical work if desired. You make an inspection of the project prior to asbestos removal and note the specific areas where work is required and damaged areas which appear to be in need of repair. Existing lighting fixtures appear to be in good to excellent condition. How do you bid?

Example 2
You are an interior subcontractor who has been awarded a contract for installation of new ceilings, light fixtures, insulation, and flooring, in follow-up to an asbestos abatement project. You receive a call from the general contractor informing you that you can start work in certain areas of the building in which the abatement has been performed. However, there are other work areas where abatement work is still on-going. What do you do?

Example 3
You are an interior subcontractor who does not perform asbestos removal work. On occasion, however, it is necessary to cut and patch pipe insulation on areas which have been fireproofed previously. Also, occasionally, an owner or general contractor will ask you to apply an en-
capsulation material to deteriorating pipe insulation or fireproofed areas.

Example 4
You are an interior subcontractor, but are bidding on an entire package of renovation work in a building where asbestos containing materials are present. The work and the specifications include asbestos abatement and removal, but the specifications and contract documents provide that this work can be subcontracted by the contractor who obtains the work for the entire project. You decide to bid the project as prime contractor, and request quotes from asbestos abatement and removal subcontractors for that portion of the work.

The Answers . . .
All of these situations involve the potential for unanticipated additional work, the need for protection, liability for work outside of the contractor’s area of expertise, jeopardy to insurance coverage and bonding and potential liability to third parties. Example 1 provides for an indefinite scope of work, since it is not known how much damage may be done by the asbestos removal contractor. In Example 2, the subcontractor must be sure that the ongoing work will not jeopardize its employees’ safety. In Example 3, it is likely that the cutting and patching often involves direct contact with asbestos containing materials. In Example 4, the prime contractor is nevertheless responsible for even the asbestos removal work.

Contractors in situations such as those described above must therefore be knowledgeable not only about asbestos itself, and all government regulations in the area, but must also make sure that insurance coverage will not be jeopardized, that contracts and relationships with asbestos abatement and removal subcontractors are structured to provide protection against potential liability, and that all legal requirements for all work performed are met. A contractor who intends to subcontract out asbestos abatement and removal work must realize that it is responsible for the work of the subcontractor. Most owners will not allow a contractor to disclaim responsibility for portions of the work performed by its subcontractors. With that in mind, a contractor who engages a subcontractor to perform asbestos abatement and removal work must be very careful in its selection of a subcontractor and its supervision of that subcontractor’s work.

While it may be necessary in some of these circumstances to undertake preliminary measures with properly trained and supervised staff, complete asbestos corrective measures entail a high degree of risk of exposure to workers involved in the area and to persons who may be in the building. It is extremely important that all persons involved in asbestos abatement be specially trained in this area, or the risk may very well increase rather than decrease through disturbance of the
asbestos containing materials. Therefore, it is extremely important that a contractor make certain that its employees or supervisors are aware of the possibility for the presence of asbestos, and that any subcontractors who are hired are qualified to work with asbestos containing materials. The contractor should require that the subcontractor demonstrate familiarity with regulations in this area, provide evidence of procedures to comply with applicable regulations, and provide evidence that the subcontractor and its personnel have attended training and safety courses dealing with asbestos abatement and removal. The subcontractor should also be required to give references, and the types of projects in which it has been involved. The type and magnitude of the current project should be consistent with prior work. All references should be carefully checked and documented.

The contractor should also be familiar with all EPA, OSHA, and state and local regulations affecting work with asbestos materials and the particular work to be undertaken. The subcontractor in certain cases may contact the governmental agencies with jurisdiction over asbestos removal activities for assistance prior to beginning performance of the project and to give all required notices. Evidence of notification should be obtained and retained.

In order to protect the interior contractor, contract specifications and documents should be prepared with the assistance of competent professionals and legal counsel, and adherence by the abatement subcontractor to all regulations or other stricter precautionary measures is mandatory. Strict compliance with the contract requirements by constant supervision and enforcement is extremely important. Legal advice must be sought by the prime contractor to properly structure relationships with the abatement subcontractors, in order to achieve the greatest amount of protection against liability for the actions of this subcontractor.

The prime contractor should also insist on proof of adequate liability and property damage insurance which covers the work. All insurance policies should be examined, and not merely insurance certificates. Performance and material and labor payment bonds should also be considered. In addition, the subcontractor should be able to demonstrate that it has adequate workers compensation coverage.

Perhaps the only method of providing some protection from liability is to take careful, reasonable steps to approach the potential problems, choose competent professionals and contractors, and be protected by insurance. Further, for the interior contractor’s protection, the contractor must remain part of the process to assure that activities are correctly performed. Only by being aware of the responsibilities in this area can the interior contractor be sure that the proper response is being formulated.