

OSBORN

Asbestos Abatement Contractor Agreements

From National Insulation and Abatement Contractors' Outlook Magazine, July 1989

John E. Osborn and Paul R. Schreyer

The ideal asbestos abatement contractor agreement is one that fairly and adequately apportions the risks associated with an abatement project among the various parties involved with the work. For one reason or another, this result is seldom reached. Building owners and their consultants are persistent in their attempts to shift unlimited responsibility to the asbestos abatement contractor. It is unlikely that this will change in the near future. Therefore, asbestos abatement contractors must recognize the particularly onerous contract language which poses the greatest threat to their continued success. This article highlights some of those unmanageable contract provisions and suggests language which may protect the contractor against other risks which should more appropriately be borne by a different party.

The Scope of Work

It is essential that all construction contracts have a well-defined scope of work. This rule is especially true with regard to asbestos abatement contracts. A good scope of work clause for an asbestos abatement project will do two things. First, it will locate, describe, and quantify all asbestos-containing material (ACM) in the building or facility. And, second, it will identify the response action required to be taken with respect to each item of ACM so designated.

If the owner's consultant has prepared a report that contains the necessary information, this report should be incorporated by reference into the contractor's agreement and attached as a rider. If the consultant's report does not contain all the necessary information, for example, the appropriate response action with respect to a particular item of ACM, the report should still be incorporated into the agreement by reference, but the missing information must be furnished elsewhere in the contract documents.

Under no circumstances should a contractor agree to remove all asbestos within a given structure. It should be the responsibility of the owner to discover the presence of asbestos and to determine the corresponding response action. If the owner is unwilling to provide the information necessary for the contractor to accurately price the work, the contractor should think very seriously about not taking the job.

It is a good idea to list those items of work that are specifically excluded from the contractor's scope of work. This added language could go a long way in avoiding potential disputes. For example, if the contractor will not have responsibility for disconnecting and reconnecting permanent power supplies, telephone systems, or

computer systems, this should be spelled out in the scope-of-work clause. A well-defined scope of work clause may also prevent the owner from requiring the contractor to perform extra work at no additional cost.

Governing Laws and Regulations

Many construction contracts contain a clause that requires the contractor to follow all federal, state, and local laws, regulations, rules, and ordinances that relate to the work of the contractor. For asbestos abatement contractors, this clause could mean disaster.

The contractor must be careful to identify those laws and regulations that are to govern the work. The contractor should only agree to follow those laws and regulations that concern the manner and method of performance, which are in effect and are actively being enforced at the time the contract is executed.

Limiting the requirements that the contractor must follow to those governing the manner and method of performance will prevent the owner from forcing the contractor to comply with regulatory requirements directed at the owner. For instance, if a local law requires the owner to notify the city department of environmental protection of the removal and disposal plan, the clause set forth above would prevent the owner from claiming that the notification requirement is the responsibility of the contractor, because such a notification requirement does not affect the contractor's manner and method of performance.

In addition, it is important that the contractor only agree to follow those laws and regulations that are in effect and are actively being enforced at the time the contract is entered into. It is no secret that the federal, state, and local laws and regulations in this industry are changing rapidly. Some laws and regulations are not enforced immediately upon adoption. By specifying the body of laws and regulations which will apply to the contract, the contractor is better able to price the work. Also, if the laws and regulations change after execution of the contract, requiring the contractor to follow more stringent job procedures, the contractor should be entitled to additional compensation from the owner.

It is also important for the contractor to make sure that the specifications are consistent with the governing laws and regulations. Any discrepancies should be resolved prior to executing the contract. If the owner requests the contractor to follow higher standards than those required by the applicable laws and regulations, the different standards must be clearly identified in the contract documents.

Start and Completion Times and Dates

Because many abatement projects are carried out under stringent time restrictions, the contract documents should set forth precisely the time in which the contractor must perform the work. If, for example, a removal job is to be performed on a weekend, the contract should state that the contractor shall begin work at a certain time on Friday and finish by a certain time on Sunday or Monday. Although this clause might appear to work against the contractor, in fact, it works to the contractor's advantage.

By defining the time within which the contractor must perform the work, the contract implicitly requires that the owner give the contractor access to the work area for the defined period of time. If the owner fails to

make the building available to the contractor as scheduled, the owner has breached the agreement, and the contractor should be able to recover damages occasioned by the breach.

Start and completion times and dates will also assist the contractor in determining his potential liability with respect to a liquidated damage clause. A typical liquidated damage clause provides that if the contractor is not finished with the work by a certain day, a stated sum will be assessed for each day past the scheduled completion date on which the work remains incomplete. As a general rule, liquidated damage clauses are enforceable. Therefore, the contractor must be certain that he can finish the work within the time period set forth in the contract. If not, the bid price should be increased to account for the possible assessment of liquidated damages.

Any benefits that the contractor may receive from a clause defining the time period within which the work is to be performed can be nullified by a contract provision which (1) allows the owner to suspend the contractor's performance, or (2) prevents the contractor from recovering damages for delays in performance which are caused by the owner or the owner's consultant.

For example, suppose a contractor has agreed to remove a designated amount of ACM in an industrial facility, and the contract provides that the work is to be performed during a particular week when the facility is shut down. If the contract provides that the owner can suspend the contractor's performance or contains a no damage-for-delay clause, the owner could reschedule the work with impunity. If the work is delayed for a period of months and, during the delay, new regulations are enacted that require the contractor to adhere to more stringent standards, the contractor may have to bear the cost of complying with the new requirements. In addition, the contractor might incur substantial remobilization costs each time the owner suspends or delays the work.

Access to the Work

Although defining access to the work area in terms of time is important, it is not by itself sufficient to ensure that the contractor will be free from obstacles during performance. The contract must also address such matters as who is responsible for moving furniture and office machines, disconnecting and reconnecting power systems, telephone systems, and computer systems, and providing temporary electricity and water.

In addition, if the contractor requires the use of a freight elevator to perform the work, the owner should guarantee that the contractor will have uninterrupted use of an elevator. If local union rules demand that the elevator be run by a union operator, then the contract should spell out who is responsible for hiring the operators and who is to pay for their services.

If the contractor will require space outside the building or facility for placing a dumpster or loading and unloading equipment and supplies, the contract should state that the owner will provide such a designated location.

Permits, Notification, And Recordkeeping

Each abatement project is governed by a labyrinth of federal, state, and local permitting, notification, signage, and recordkeeping requirements. The contractor's agreement should specifically address these requirements and clearly set forth who is responsible for complying with each one.

Many regulations identify the party responsible for complying with a particular requirement. New York State regulations, for example, mandate that the contractor keep for a period of 40 years a detailed record of the name and location of the project, the persons who worked on and supervised the project, the quantity of ACM involved in the project and the sites at which ACM was deposited, together with a variety of additional information.

When a regulation definitively states that either the contractor or the owner is responsible for compliance therewith, then a contract provision requiring the contractor to comply with those laws and regulations presently in effect and actively being enforced at the time the contract is executed is enough to clearly delineate responsibility among the parties. However, where a law or regulation does not assign responsibility for compliance to one particular party, or where the parties wish to alter the statutorily assigned responsibilities, care must be taken that the contract documents accurately reflect the agreement reached between the owner and the contractor.

Indemnification

The indemnification clause can be a major stumbling block in the owner-contractor negotiations. A provision requiring the contractor to indemnify the owner against any loss, damage, or expense relating to the contractor's performance, whether or not caused in whole or in part by the owner, is not uncommon.

Fortunately for contractors, many states have passed legislation that prevents an owner from being indemnified for losses occasioned by the owner's sole negligence. Where the loss is caused by the acts or omissions of both the owner and the contractor, however, some states allow the owner to obtain indemnification from the contractor for the full amount of the damage.

Each contractor must determine how much risk he is willing to take. The contractor must also factor into the decision the inability to control the owner's actions. The contractor's ability to minimize his risk decreases proportionately with the inability to control the activities and circumstances that may cause damage or loss. Ideally, the contractor should only be required to indemnify the owner from loss, damage, or expense directly caused by the contractor's breach of contract or negligence.

Time Limits For Consultant Response

Because of the time restrictions involved in the performance of many abatement projects, it is essential for contractors to receive a prompt response from the owner's consultant. The contract should specifically

require the owner's consultant to be available for consultation with the contractor and require the consultant to render a decision within a given time.

The degree to which the consultant must be available and the time within which he must respond to inquiries are dependent on the time frame for completing the work. If the contractor is performing a removal job in an office building which is to begin Friday afternoon and end Sunday evening, the contract should provide that the owner's consultant will be available 24 hours a day and will respond definitively to questions

within several hours. If the project is to be performed over several months, however, the consultant's obligations with respect to availability and response time could be less stringent.

Limit Contractual Liability

Abatement contractors must be aggressive in attempting to limit their contractual liability for risks over which they cannot exert control. Contractors should attempt to exclude or limit the application of onerous contract clauses and should also be as clear and precise as possible in drafting a contract which adequately reflects the work they are to perform. As a practical matter, contractors will not obtain all the protections discussed in this article. As to those contingencies which remain in the contract following negotiations, however, the contractor should evaluate each contingency and price the work accordingly. Where the owner includes a copy of the proposed agreement as part of the bid documents for competitively bid work, the contractor's bargaining power is more limited, and contingencies must be priced prior to submitting the bid.

As an industry group, asbestos abatement contractors should attempt to convince owners and their consultants that the various risks associated with an abatement project should be apportioned among the parties according to the principle that a particular risk should be assumed by the party in best position to identify, quantify, and control that risk.