

OSBORN

Reduce Mold Risks by Prodding Subs to Prevent Water Intrusion

***Contractor's Business Strategist*, February 2002, John E. Osborn, Esq. and Frank M. Gallo, P.E. assisted in co-authoring this article.**

More and more building owners and occupants around the country are suing general contractors and construction managers because of mold. They claim that mold in their buildings is causing a wide range of ailments, including eye or nose irritation, asthma, headaches, fatigue, sore throat, skin rashes, and even cancer. Owners and occupants say that water intrusion during construction caused the mold. And it's a legitimate claim. If porous building materials like sheetrock or cellulose ceiling tiles get and stay wet, microbiological growth of mold can reach levels of concern within 24 to 48 hours, says Francis M. Gallo, an expert on indoor air quality and mold issues.

The key to protecting yourself from potential lawsuits over mold is to prevent water intrusion and mold growth in the first place. But preventing water intrusion can be difficult, especially if multiple subcontractors are working for you on a project, says Gallo. You need to get your subs to sequence and coordinate their work so that water doesn't get into the building. And if the building's interior does get wet, you want subs to work together to dry it out immediately to prevent mold growth.

One way to prod your subs to prevent water intrusion, and to protect yourself if it does occur, is to include a clause in your subcontracts that shifts the risk of water intrusion and mold to your subs—and away from you—if they're responsible for the water intrusion, says John E. Osborn, an environmental and construction attorney. The clause should make subs responsible for sequencing, coordinating, and protecting the work during construction. If they fail to do this, the clause should also make them responsible for the costs to remediate (that is clean up and repair) any damage, and for other costs you incur as a result. A Model Contract Clause that you can use appears at the bottom of the page.

[CM Owes \\$14.2 Million to County for 'Sick Building Syndrome'](#)

A Florida construction manager (CM) got hit with hefty damages because of poor coordination among its subs, which led to mold growth and "sick building syndrome." The CM had a contract with a Florida county to build a new courthouse. The contract gave the CM complete oversight and control of the project, including responsibility for selecting all subs, and supervising, coordinating, managing and inspecting their work.

After county employees began working in the courthouse, county officials complained to the CM about window and exterior wall leaks, mold growth, and excessive humidity. County officials then learned that the courthouse had sick building syndrome. They evacuated it and hired a remediation firm to make repairs. The

county sued the CM, claiming that it had failed to properly supervise construction, which resulted in shoddy workmanship and extensive damage.

The appeals court ruled that the CM owed the county \$14.2 million. There was sufficient evidence to show that construction defects caused the moisture problems, that toxic molds infested the courthouse as a result, and that the CM's subs caused the defects. Even though the county couldn't prove the exact amount of its costs that were attributed to the CM's poor management, its evidence gave a "reasonable basis" for the amount awarded, the court said [Centex-Rooney Constr. Co., Inc. v. Martin County.].

What the Clause Should Say

To help you avoid footing big bills for problems relating to water intrusion, you can use a subcontract clause like our Model Contract Clause. Like our clause, your clause should:

Obligate subs to sequence, coordinate, and protect the work. Your clause should say that subs are obligated to sequence and coordinate their work with that of other contractors and subs on the project to prevent weather damage and water intrusion, says Osborn. The clause should also require the subs to protect their own and others' work and materials at the project from weather damage and water intrusion [Clause, par. a].

Most subcontracts already include clauses that require subs to coordinate and protect the work, but the model clause draws attention to that responsibility in relation to water intrusion. This helps to keep a sub from avoiding responsibility for water intrusion prevention by claiming that it's another sub's responsibility, says Osborn.

Make subs responsible for remediation costs. If water intrusion occurs because a sub failed in its obligation to sequence, coordinate, and protect the work, your clause should say that the sub is responsible for the cost of remedying any damage that results [Clause, par. b.]. This makes the sub who was responsible for the water intrusion liable for the cost of removing any mold or wet materials, and redoing the work.

For example, suppose you must rip out and replace damp drywall, ceiling tiles, carpet, or other interior work because they were damaged during construction by leaky pipes. And the leaks occurred because a sub didn't meet its obligation to coordinate the work. The sub will have to pay for the remediation work.

Require subs to pay for mold testing before and after remediation. If there's water intrusion because a sub didn't meet its obligations, you'll probably need to test for mold. But testing for mold can be very expensive. So your clause should also make the subs responsible for the cost to test the area both before and after mold or conditions causing the mold are removed or corrected, says Osborn [Clause, par. b.].

Say sub must indemnify you. The sub should also indemnify you—that is, compensate you—for damages you suffer and legal costs you must pay as a result of the water intrusion. That includes your costs due to damage to the building or injury to the occupants. It also includes any other damages that are a consequence of the water intrusion, such as evacuation and relocation of the building occupants during remediation [Clause par. c].

What if Sub Balks

If a sub balks when it sees this clause, explain that the clause doesn't increase its requirement to coordinate and protect the work. It simply spells out the sub's responsibility in relation to water intrusion. It makes the sub responsible for water intrusion caused by its failure to sequence and coordinate its work, or to protect its work and that of other contractors, and the project's interior, from weather damage.

Your subs may also be afraid that they'll get stuck if the water intrusion occurs because of a design failure. Point out that as long as they take steps to prevent water from entering the building, they won't be responsible.

Model Clause

Make Subs Responsible for Water Intrusion and Remediation

This model Contract Clause was prepared by construction and environmental attorney John E. Osborn. It shifts responsibility for water intrusion and the mold problems that may result to your subs if they fail to protect the work during construction. Include this clause in either the "Coordination" or "Protection of the Work" clause of your subcontracts.

Paragraph a requires the sub to sequence, coordinate, and protect the work from weather and water intrusion. Paragraph b says that the sub is responsible for the costs of remedying damages caused by water infiltration, and paragraph c spells out what damages the sub must indemnify you and the owner for.

Protection From Water Intrusion

a. Sub's Obligation to Sequence, Coordinate, Protect Work. The subcontractor's obligation hereunder to sequence and coordinate its work with the work of other contractors includes sequencing and coordinating its work to protect the work of other contractors and the project's interior from weather damage and water intrusion. The Subcontractor's obligation hereunder to protect the work includes protecting its own work and materials as well as the work and materials of other contractors and the project's interior from weather damage and water intrusion.

b. Responsibility for Water Intrusion. In the event that water intrusion occurs from weather or any other cause due to Subcontractor's failure to carry out its obligations in paragraph a, Subcontractor shall be responsible for the cost to remedy all damages caused thereby, including but not limited to testing and remediation of mold and toxic substances before and after remediation occurs.

c. Agreement to Indemnify. To the fullest extent permitted by law, Subcontractor agrees to defend, indemnify, and hold harmless the General Contractor (its affiliates, parents, and subsidiaries) and the Owner from and against all claims, demands, liabilities, interest, losses, damages, fines,

penalties, attorney's fees, costs, and expenses of whatsoever kind or nature, including property damage and personal injury to any and all persons relating to or arising out of the water intrusion.

What Causes Mold During Construction?

Molds are naturally occurring, airborne organisms that grow in indoor and outdoor environments. During construction, mold spores can easily enter a building's envelope. Moisture and the organic material in many construction materials provide a suitable environment for mold growth. For example, *Stachybotrys chartarum* (also known as *S. atra*) is a greenish black mold that grows on wet sheetrock and cellulose tiles.

To prevent mold, you need to make certain that none of your subs allow water to infiltrate the building during construction, so that the building's envelope maintains its integrity. You also need to ensure that work gets done in a sequence that prevents water from infiltrating, says mold expert Francis M. Gallo. It's especially critical to properly sequence the installation of doors, doorjamb, windows, and parapet elements, such as caps, flashing, caulking, waterproofing membranes, roofing systems, and related components. Improper sequencing of any of these components can result in significant water intrusion that's likely to lead to mold. For example, if you take off a roof and don't immediately put down a roof membrane, rain may infiltrate the building.

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Strategist Sources

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