A Contractor's Guide to Asbestos

Don't expose your crew and customers to health hazards, and yourself to lifelong liability.

by Gerald L. Wykoff

The remodeler contracted to redo the interiors of four adjacent shops in a small shopping center. Among the many routine tasks involved was removing the ceiling and changing the air-delivery system.

A pre-bid visit to the shopping center turned up nothing unusual. The 1972 structure featured the usual technology then in use, including a drop ceiling under an open plenum through which the mechanical system supplied air.

Within two days after starting the job, though, the contractor discovered that he faced a serious problem—one he hadn't anticipated or covered in his original bid. As soon as his employees ripped out a few ceiling panels, they ran smack into the worst kind of asbestos-exposure problem.

The ceilings in the plenums had been fireproofed with asbestos-containing materials—and the asbestos was still in place. Friable asbestos dust had been blown all over the place. *(Friable* means that a material can be easily crumbled and reduced to powder.) The clear, immediate need was for an asbestos-abatement contractor, not a remodeling contractor.

The remodeler followed his lawyer's advice: Pull your workers off the job, notify the owner of the asbestos, and don't do anything until the problem is abated.

Like many other specialty contractors, the shopping-center remodeler had been aware of the asbestos threat. In the last half-dozen years, it has been almost impossible to avoid the near-hysteria over the material. The contractor's problem, though, was that he was only vaguely familiar with the legal implications swirling around asbestos.

Today, remodeling contractors should become educated about asbestos, and implement a company self-protection strategy. They must know what actions to take if asbestos is encountered before or during a project. Otherwise, they are headed for legal liability, possible law violations, and the potential loss of bonding and insurance coverage.

Legal responsibility concerning asbestos remains a murky area. The managers and owners are responsible for inspecting and abating asbestos in their properties, and they can be held strictly accountable. But that doesn't assure that your workers won't be exposed once they begin work—even if the building has undergone asbestos-abatement work. Therefore, you should become knowledgeable about asbestos and how to avoid its health and legal consequences.

Where to Start

A subcontractor's strategy should begin at the pre-bid stage. On any job where asbestos might be involved, a thorough, careful inspection of the property is a must. Inspect suspended ceilings, the upper surfaces of boilers, pipes, equipment cabinets, joists—anywhere dust can settle.

Dust often contains friable asbestos that can be released into the air by the slightest disturbance. The person doing the pre-bid inspection should therefore wear an approved respirator. Also, the mechanical system should be turned off to avoid sending particles airborne.

Review building construction records to determine if the specs called for products containing asbestos. Keep in mind that change orders, substitutions, or rehab work could have introduced the material later on.

When you suspect asbestos, have the material analyzed by a laboratory. Accurate analyses are vital: an incorrect report can open the door to legal liability or may lead to costly abatement work that isn't needed.

What if hazardous levels of asbestos are found? That's really a question for the building owner or manager to resolve—or to pass off onto an unsuspecting contractor with some clever contractual clauses.

With asbestos, only three options exist: 1) remove the asbestos, 2) encapsulate the asbestos, or 3) erect a barrier to seal off the asbestos. Both OSHA and the EPA have strict regulations covering the options, and many state and local governments also have their own regulations. If you have any questions about your responsibility, call one of the EPA or OSHA agencies that provide technical assistance to contractors or owners with asbestos problems.

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Narrowing the Scope of Work

Once you've reviewed the building's plans and specs, talked to the architect and made your own inspection, the next step should be to pin down the scope of the work. Make sure you carefully define your work-scope clause so that everyone knows *precisely* what work is expected of your company.

Be on the lookout for any ambiguous or dragnet clauses that might obligate you to do work other than what is specifically included in your bid. And watch out for tricky site-investigation clauses. They read something like this:

> By executing the contract, the Contractor represents that it has visited the site and familiarized itself with the work and the conditions under which the work is to be performed.

If you see language like that in the proposed contract, look for a differing-site-conditions or changed-conditions clause [see the Legal Column, Sept. 1986]. If it's missing, insist on its inclusion.

Such a clause will protect you if physical conditions at the site differ from those upon which you based your bid. A changed-conditions clause relieves the contractor from costs that arise should actual site conditions differ from those described in the contract: for example, asbestos that wasn't discovered during the pre-bid inspection.

If asbestos is discovered, notify the owner immediately. It then becomes the owner's responsibility to determine the course of action. You might want to

include language in the contract that totally eliminates asbestos abatement or removal from your scope of work. Lloyd Fox, chief legal counsel for the Asbestos Abatement Council (AAC) suggests this:

> Contractor's scope of work shall not include the identification, detection, abatement, encapsulation or removal of asbestos or similar hazardous substances. In the event that 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 no such products or materials, nor any hazard, exist (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 course, Fox emphasizes, contractors must make sure that the language does not conflict with any other provisions of the contract.

To Do or Not to Do

A renovation contract may include work that follows earlier asbestos abatement. In such situations, you must decide whether to accept the work at all. To go ahead with the bidding opens the door to a somewhat unpredictable managerial environment. Yet to refuse the job may not be a luxury you can afford.

Here are a few examples that AAC attorney Lloyd Fox uses to dramatize the difficulties involved in renovation work these days:

Case One: You've just reviewed the specs for a project where asbestos removal will precede your work. In specified areas, you are to remove and replace the partitions, and you are to repair damage in other areas "where necessary." The contract also calls for you to provide and install air-supply ducts where needed, and tie them in to the building's HVAC system, with the right to subcontract portions of the mechanical work.

How do you bid?

Case Two: As an interior subcontractor, you have just been awarded a contract to follow up on an asbestos-removal project at a private school. The work involves flooring, re-insulating, adding new partitions, and repairing a suspended ceiling.

The architect wants you to start work immediately in one section of the school although asbestos removal is still going on in another area. The architect assures you that your asbestos liability would be virtually nil because "there are no regulations dealing with asbestos in private schools."

Do you begin the job?

Case Three: On a current job, you must cut and patch asbestos pipe insulation in areas that previously have been fireproofed. The owner has also requested that you encapsulate certain sections of asbestos insulation that have deteriorated to the point where they could discharge asbestos particles.

What do you do?

Case Four: It's a big renovation job on an apartment building. The owner wants you to bid both the renovation and asbestos abatement—as the prime contractor. The specs and contract documents allow you to subcontract the abatement work. The owners, understandably, want single responsibility on the job.

Do you bid the job?

Each of the above jobs has a common thread: the contractor must bid work outside his normal expertise. Yet each job is full of dangers in insurance liability, bonding, and third-party responsibility.

In Case One, the major problem is the indefinite scope of work. The contractor just doesn't know what or how much damage will be inflicted by the removal team.

In Case Two, the subcontractor will have to convince his insurance company that the ongoing work will not jeopardize his employees' safety. (This could take extraordinary persuasion, because many insurance companies are now refusing to involve themselves at all with asbestos.)

The idea that you don't have a liability problem because the school is private is ludicrous. It's true that federal regulations don't extend to private schools, but your legal responsibility doesn't end because of that.

As for Case Three, look out! Your employees will be directly involved with asbestos. That means liability (including long-term liability, where employees can sue for damage to their health 15 or 20 years later) is in full force. Without proper health safeguards for your employees, you are in big trouble. As one lawyer pointed out,

With asbestos, only three options exist: 1) remove the asbestos, 2) encapsulate the asbestos, or 3) erect a barrier to seal off the asbestos.

Many insurance companies are now refusing to involve themselves at all with asbestos.

"Even if one of your employees kicks...a chunk of asbestos-containing material, you have potential liability."

In Case Four, you, as prime contractor, will have as much responsibility as if your own crew were removing the asbestos. You will have contractual responsibility, and thus *legal* responsibility (although the removal subcontractor still bears legal responsibility for his own employees; nothing can void that). It behooves the prime contractor to be extremely careful in selecting a sub.

Finding a Specialist

Asbestos-abatement work is demanding. The contractor needs training and certification and must, in turn, assure that each worker is well trained. In a number of well-publicized incidents, ill-trained abatement crews left buildings with higher—and more dangerous—asbestos-particle counts than originally existed.

Insist that an abatement contractor demonstrate familiarity with regulations, provide evidence that he and his crews are trained and certified, supply references for the type of project under consideration, and offer proof of bonding and adequate liability and property-damage insurance that *covers asbestos-abatement work.*

And read the insurance policy. Many asbestos-abatement contractors have trouble getting asbestos coverage so they offer any old liability policy. Often, they "forget" to tell their insurance company that they are performing asbestos-abatement work. You can imagine how delighted the average insurer is to learn about that later. Any way you look at it, it's fraud, and the insurer usually is relieved of legal responsibility.

Contract documents should be carefully prepared, preferably with the help of a lawyer. When a damage suit occurs, it's often a class-action suit and the lawyers for the plaintiff customarily cite every possible job exposure. By structuring an appropriate legal relationship with the abatement contractor, these dangers can largely be negated.

The only real insurance, though, is to approach the task professionally from the pre-bid stage on—and to demand strict compliance with the contract through proper supervision and enforcement. ■

Gerald L. Wykoff is executive editor of Asbestos Abatement *magazine.*

What It Is/What It Does

—Gerald L. Wykoff

Asbestos is a generic name applied to a wide variety of naturally occurring mineral silicates. It was once heralded as a "miracle product" in construction because its fibers are noncombustible, durable, and flexible. They resist wear, possess high tensile strength, good thermal and electrical insulating properties, and have moderate-to-good chemical resistance. Furthermore, the fibers can be packed, woven, or sprayed.

Until about 1975, asbestos was used extensively in building construction. Its major uses were: fireproofing on steel support beams and columns and in air-handling rooms, insulation on pipes and boilers, and fireproofing and soundproofing on ceilings.

It was also commonly found in textured wall coatings and in floor tiles, acoustical ceiling tiles, and roofing products. Many of the sprayed-on textured wall and ceiling materials contained asbestos fibers because they were so effective at binding the material together while keeping it pumpable.

Other uses were found for asbestos back then—even fireproof curtains—and not all of these uses are evident. Keep in mind that most pre-1975 buildings contain some asbestos.

Asbestos maintained its status as the construction industry's miracle mineral until 1965, when Dr. Irving Selikoff released the findings of a study relating cancer death to asbestos exposure among 1,522 insulation workers.

Selikoff's study showed that 90 percent of the workers with more than 40 years in the industry displayed abnormalities including skin growths, asbestosis (a deadly scarring of lung tissue), mesothelioma (a particularly vile, quick-killing form of cancer), and other related cancers.

By 1973, asbestos had been banned from most construction uses. By the end of the '70s, the asbestos-abatement movement was getting into full swing.

Once the potential dangers of asbestos were spelled out, a regrettable level of hysteria ensued, especially concerning asbestos in schools. Now, as calmer minds prevail, people are recognizing that not all in-place asbestos is, in itself, deadly, and that as long as particles are not being released into the air, removal is not always justified.

Although asbestos is used in some 3,000 commercial, public, and industrial applications, it is estimated that 85 to 92 percent of end-product uses have effectively immobilized the asbestos fibers by mixing them into a strong binder, e.g. cement, plaster, or asphalt. ■