

When Hidden Conditions Are Hazardous Materials

by Quenda Behler Story

Suppose your crew starts excavation on a new job, and they uncover yellow canisters with skulls and crossbones on them. You don't know what's in them because you can't interpret the chemical notations, but it looks bad. What do you do?

What you cannot do is send somebody over with a shovel to rebury the canisters. Why not? Handling and disposing of hazardous waste is a highly regulated activity.

It would be tempting to look the other way and rebury the stuff. After all, you didn't put it there — why should you have to take a bunch of grief over it? Well, among other reasons, if you handle it wrong, you could be looking at fines, liability, and even jail time.

You have to report your discovery, and when you do, all kinds of inspectors are going to show up on your job and are likely to shut it down. The best you can hope for is that the delay won't be too long and that you won't be hurt financially.

The Right Contract Language

So will the day you find hazardous material be the worst day of your business life? Not necessarily. Except for the special handling and disposal laws, the problems associated with hidden hazardous materials are the same problems you have with any hidden condition.

Your contracts should include a "hidden conditions" clause that covers the extra costs of delay and the cost to handle, remove, or mitigate the problem.

The hidden conditions clause in your contract should also say that hidden conditions that could not have been discovered by inspection prior to the start of the job will require a change order. Why a change order? Well, the liability and trouble associated with mitigating the problem could be so great that you don't want to go any further with the job.

For example, if inspectors come in and shut your job down because you have discovered leaking barrels of dioxin, it would be impossible for you to finish on time for reasons that are totally out of your control.

You may also be able to make use of a doctrine called Mutual Mistake, in which a situation that was unknown to both contracting parties has impacted the contract. Or you might be able to claim Fraud in the Inducement if you could prove that the property owner knew or had reason to suspect that hazardous material was present and didn't tell you about it.



What's Hazardous?

The authorities aren't kidding when they say they want you to follow the rules about handling hazardous materials. Are you going to wait to learn about this until you find a barrel full of poison? I hope not.

Remember that the definition of hazardous material includes a lot of

things found on job sites, such as buried oil tanks, asbestos, lead paint, pesticides, wood preservative, and paint. Most of this stuff is not labeled with a skull and crossbones and is not as toxic as the material in the yellow canisters. Still, you have to handle it in accordance with the hazardous waste regulations.

Cover-Up Consequences

A lot of things can go wrong if you try to cover up hazardous materials.

Legal Defenses

If your contract doesn't mention hidden conditions or hazardous materials at all, you can still pass along the extra charges, provided it's not a fixed-price job. But let's pretend your situation is even worse, and that there's a completion date in the contract. Now is it the worst day of your business life? Again, not necessarily; there are legal doctrines that might help. Impossibility is a valid defense with contract obliga-

Say the canisters leak and some of the material gets on the guy with the shovel. If that causes him to develop medical symptoms, even if they're nothing more than a lingering rash, you may owe him considerably more than worker's compensation.

Say you manage to rebury the canisters without any immediate problems. If the stuff leaks into the groundwater later, the authorities are going to be looking for someone to pay for the cleanup and to make an example of. You handled it last, so you're the person they're going to choose.

And you could go to jail. That's what happened to a contractor and his site manager in Louisiana. Their crew found some corroded canisters with skulls and crossbones on them. The contractor didn't hide or dispose of the canisters; he just told the crew to move

them out of the way. The problem is, it's against the law to ignore hazardous materials.


He left the canisters lying around, and someone stole them. A third person died after coming in contact with the material in the canisters. The contractor and site manager were found guilty of felonies. From reading the case, I suspect they would have been found guilty even if the thief had been the one who died. That's because no matter how much you might wish otherwise, you cannot execute someone for stealing from your job site. Theft is not a capital crime.

If You Find Something

First of all, you should have a hazardous materials handling policy in place for your employees and subs before you find any mysterious barrels.

Consider adding a rider or special pollution or hazardous materials insurance policy, especially if you're working on brownfield job sites.

If you discover hazardous materials, report them to the police or fire department right away; then call your lawyer. Next, get out a still or video camera and start taking pictures. This is the single most important thing you can do to protect yourself.

Whatever you do, don't mess with or dispose of any materials you encounter without knowing what they are. When in doubt, contact a licensed hazardous waste specialist. 

Quenda Behler Story has practiced and taught law for over 25 years and is the author of The Contractor's Plain-English Legal Guide (<http://www.craftsman-books.com>).