Litigation Pertaining to Asbestos Contracting

***Differing Site Condition Claims*, John Wiley & Sons, 1992. By John E. Osborn**

Section 13.1 Asbestos Abatement Examples

Strategies set out by owners and property managers most often determine whether and to what extent there will be a contest over differing site conditions.

Even before a minute of analysis goes into the planning of a project, the budget and the experience of the owner, together with the time schedule within which the asbestos abatement work must be completed, will help foretell whether the owner is likely to face a claim for differing site conditions. If the owner wants the job done cheaply, is in a rush, and is ignorant of the risks involved in asbestos abatement, there is a very good chance that a pattern leading to a differing site conditions claim will be set early on.

Following are three examples that illustrate changed conditions or differing site conditions claims that could have been avoided or limited. The remainder of the chapter provides an agenda for avoiding these expensive pitfalls.

Example 1

A 12-story office building is about to be demolished so that the owner can construct a new building on the property. A great deal of attention has been placed upon the new structure, and a schedule for demolition, construction, and occupancy has been set.

Now the focus is on demolition. Under local governmental requirements, the asbestos in the building must be removed before demolition. The owner hires an environmental consultant who will design the asbestos abatement, make an award to the asbestos abatement contractor, and oversee contract administration for the abatement.

The owner urges the environmental consultant to undertake the project on a *turnkey* basis, in which the consultant takes full responsibility for the completion of the abatement, from design through final sign-off.

The compensation for the entire project is to be included in the bid the consultant places along with the contractor. The owner expects the contractor to be a subcontractor to the consultant.

The consultant refuses to enter an agreement to act as a turnkey contractor for the entire project and enters a contract with the owner under which the consultant will design and administer the abatement project. The consultant also agrees to assist the owner in choosing an abatement contractor.

The consultant advises the owner that a mere visual inspection of the premises, which might be adequate in a renovation project, is not good enough here, as every bit of asbestos (which could be left alone if this were a renovation) will be found as the building is being torn down. Clearly, the cost and delay will be greater if the asbestos is found during the job rather than pre-bid.

The consultant explains that destructive testing must be undertaken. (Destructive testing is the process of spot checking by taking apart the building components to determine conditions present. It can be done in preparation for demolition, renovation, or construction.) Reluctantly, the owner agrees to the additional expense for this testing, but only to the extent of examining "typical conditions" on each floor. A design is developed based upon the typical conditions, and the work is opened for bids.

The bid is awarded to an asbestos abatement contractor on a lump-sum price, and the contractor begins work. As soon as the abatement is begun, it is clear that in the building, which had been occupied by many different types of business tenants over the years, had no such thing as "typical conditions." On some floors, the tenants had removed the vinyl asbestos floor tile and replaced it with carpeting; on other floors, the vinyl asbestos tile had been covered with carpet. On some floors, the column covers had been taken apart and asbestos pipe covering had been removed, while on other floors the asbestos pipe covering remained. On some floors, no asbestos ceiling tile was evident, as it had been covered by other ceiling tile without asbestos, while on other floors, the asbestos-containing ceiling tile had been removed before the new tile was installed.

As it is discovered that, in each instance, conditions are not as "typically" shown on the contract drawings, the project is stopped, and a meeting is called to discuss how much additional compensation the contractor is to receive for abating the asbestos it has located that is beyond what was anticipated.

The contract provided that the contractor was entitled to be paid additional amounts if changed conditions were encountered. Ultimately, extra compensation was agreed to, and the asbestos abatement was completed. Although the price paid to the contractor was reasonable, the owner did not have the advantage of the bargain prices it would have received as a part of a lump-sum bid.

How the problem could have been avoided.

The owner could have derived a better bargain had it chosen to investigate the premises further. This would have required further payment to the environmental consultant, probably including destructive testing on

each floor. This way, the contract documents would have been complete, and the contractor's original price would have been complete.

Another solution owners sometimes choose is to include a clause making the contractor responsible for changed conditions when encountered.

This approach is always a problem, as it will cause the contractor to build in a continge..ncy to cover unknowns. If the changed condition is significant enough, the owner may have no choice but to make additional payment to the contractor to avoid pushing the contractor into default or bankruptcy.

Example 2

A company is about to refinance its corporate headquarters, move out of New York, and then rent out the office space in that headquarters. Before the refinancing can take place, the lender for the company requires that a Phase I site assessment (a preliminary survey of site conditions that does not include probing into building components) take place and that any asbestos in fair or poor condition be removed.

The company's finance director negotiates the agreement with the environmental consultant to perform the Phase I assessment, and provision for destructive testing on floors 2, 11, 12, 22, 34, and 37 is made. The areas for destructive testing are set by the finance director, who indicates that they should provide a "representative sample" of the building conditions (but in fact they were chosen to keep the consultant from finding asbestos).

Once the visual inspection is complete, the environmental consultant writes a report that is used as a basis for obtaining a bid from an asbestos abatement contractor. The study, which becomes a part of the bid documents in its entirety, shows that it is only in certain portions of the structure that spray-on fireproofing is found in the building, and that there is no asbestos pipe covering on the heating piping that serves the building.

A contractor is retained based upon a lump-sum price to "remove all asbestos" in the building. The bid is based upon the findings of the consultant rather than on a full set of plans and specifications.

Once work is begun on the spot removals indicated to be necessary in the report, it becomes clear that there is spray-on fireproofing throughout the building and that the heating pipes, except on certain recently renovated floors, have asbestos-containing pipe covering.

The contractor and owner meet to resolve how to proceed. Although the negotiations progress in a reasonable fashion, the price is no bargain for the owner.

How the problem could have been avoided.

Once again, a greater investment in the efforts of the environmental consultant would have allowed the owner to obtain a more accurate bid. In both cases, had the owner kept better records on the 'as-built' conditions of the building and disclosed these records to the consultant, there would have been no changed condition claim.

Example 3

A financial institution is eager to set up a center that will serve as a flagship for marketing a new financial product. An elaborate retail storefront operation will be built in a prime location to house this effort.

Although the institution already occupies the space to be used for the new center, regulations governing asbestos were instituted since the date of the last renovation. A filing must be made before further renovation is undertaken, certifying that the asbestos will be removed as part of the work.

Speed is critical in this process: the center must be opened within three months to confide with advertising during the tax season, when the product will be sold. To further complicate matters, the company does not want to close the site's retail use until a week before the asbestos abatement is to take place. This is significant because, although the asbestos consultant has access during off hours for visual inspection, there is no opportunity for the abatement contractor to do destructive testing before the bid. A lump-sum agreement is preferred because management has a set budget for the entire renovation. Although the contractor's bid must come in well before the existing use of the space ceases and the contract calls for the contractor to be fully familiar with the premises and to "visit the site" beforehand, this clause is not meaningful because the contractor is not provided access at all during the bid period. Also note that the retail space is located in an arcade/terminal structure that is below grade at one end of the retail space.

The lump-sum bid comes in from the four contractors solicited. The bids range from a low bid of $800,000 to a bid of $1,250,000. The project is commenced by the low bidder on a fast-track schedule and is just as abruptly stopped when (1) ducts above the space are found to be covered with asbestos; (2) a wall built over 100 years ago has holes in it that allow air to escape to the street (the wall is also covered by asbestos); and (3) trestles that compose part of the below-grade portion of the premises are partially coated, apparently inadvertently, with spray-on fireproofing and must be abated (which will be a slow and expensive process).

Negotiations take place to determine the pricing for the newly discovered components of the project. Once again the contractor and owner resolve the issue and the project is kept on target.

How the problem could have been avoided.

Further owner expenditures on the environmental consultant investigation and better owner research of its own records would have saved a significant amount of expense. Hasty planning required to keep a project on schedule and acceleration of the work are costly items.

Section 13.2 Defining the Claim: Responsibility and Liability

A developer once said, "Building a high rise, once you have done one, is not a challenge; you tell me how many floors, and I can tell you how much it should cost. It is really just 'cookie cutter' work."

This is certainly not the case in renovation work. As urban areas have embarked upon restoring office buildings, housing stock, zoos, airports, skating rinks, train stations, and brownstones, the cost of doing so has been almost impossible to determine. One cannot know the result of a few hundred years of use, interim renovation, weathering, and decay unless the building is torn down and thoroughly checked.

Even the seasoned architect or engineer has learned not to speculate about the condition of the structural beams or the steel girders that have not been seen by anyone still living. The plans that show what is inside or behind a wall also may be outdated or inaccurate, if they can be found at all.

Issues of responsibility and liability make estimating the asbestos project even more of a problem. Among the architect, the owner, the general contractor, the environmental consultant, and the demolition contractor, no one wants to admit responsibility for overseeing the asbestos abatement. In some cases, regulatory constraints that must be met in connection with abating asbestos may dictate who will take on overall responsibility for the task. However, in other instances no one person is clearly in charge of asbestos abatement. This can present the biggest problem for all concerned.

This reluctance to take on responsibility for asbestos abatement is fairly recent. In the mid 1980s, there was an initial surge of interest in becoming an asbestos abatement contractor because the profit margin was seen

to be substantial. As the construction industry has become more familiar with asbestos management, profit margins have narrowed, and the willingness to take risks has dwindled.

For the architect, errors and omissions (malpractice) insurance specifically excludes environmental risks. The design professional or environmental consultant who is eligible for errors and omissions insurance for the asbestos project can purchase it, although it is expensive.

Generally, in the beginning, when it came to asbestos abatement, the major participants in the construction process – design professionals, construction managers, and contractors – lacked expertise and insurance. Although risk management experts would certainly have advised against it, some entrepreneurs nevertheless were willing to perform asbestos abatement in exchange for the promise of a hefty profit margin.

Overall there is a lack of standards for those who design, perform, and monitor asbestos abatement projects.

Environmental consultant. Other than training courses and certifications required by the federal, state, and local governments, the threshold knowledge, training, and experience of those who design and monitor abatement projects varies widely. The environmental consultant may range from the very inexperienced hygienist to the seasoned engineer.

Although it may be possible to tell the difference, even seasoned owners will have trouble distinguishing among different levels of experience, education credentials, and price. As discussed in Section 13.7, it is clear that a lack of standards leads to unevenness when it comes to estimating the asbestos abatement project or even developing a consistent understanding of what is involved in the project.

Asbestos abatement contractor. There is simply no standardization of credentials that helps the owner choose an asbestos abatement contractor. Often the owner will simply advertise for bids and award the project to the low bidder.

Due to health and safety concerns unique to environmental work, it is imperative that careful underwriting be done before an asbestos abatement contractor is chosen. Although at one time it was difficult to ascertain the track record or stability of a company, this should no longer be the case.

There are many distinctions that go beyond the basics. The basis for comparing abatement contractors may be their dissimilarities. Some began as insulation contractors, demolition contractors, general contractors, or drywall or carpentry contractors. Some started with absolutely no background in construction.

A complicated renovation project involving abatement requires an abatement contractor with an in-depth background in demolition and drywall work. In an abatement project involving removal of asbestos pipe covering which is to be followed by recovering, an abatement contractor with experience in insulation work may be best. Certainly, the estimate should be more reliable if the abatement contractor is aware of the next step. It may also serve the owner to award the drywall work to the same contractor.

Owner. The disparity in environmental consultants and contractors is magnified by the disparity among those owners who hire them. Of course, there is no conceivable guideline for ownership of property. There are those owners who will operate with absolutely no regard for health, safety, and environmental matters because of ignorance, concern for the bottom line, or other reasons.

Developing a list of credentials including education, industry experience, representative clients, and violations (or lack thereof) for each of the three entities discussed – owner, environmental consultant, and abatement contractor – should help determine whether a project will face a differing site conditions claim.

The profile of the owner may be the most enlightening and the hardest one to compile, as the owner is not bidding on projects or marketing its abilities to manage a facility. Following is a list of relevant questions to answer about the owner and its premises:

1. Are there accurate and up-to-date as-built drawings of the premises?

2. What are the qualifications, experience, and training of the managers of the facility? What is the level of staffing?

3. Is the facility to be abated in good physical condition as to long-term maintenance? Is it clear of debris? Are the elevators in good working order? Are there staging areas for abatement work? Are there elevators that will be available for use during the project? What is the condition of the electrical system? Is there an ability to turn off or disconnect the electricity during asbestos abatement work?

4. Is the owner or are the facilities managers forthcoming in answering questions? Are they responsive and cooperative on the walk-through?

With built-in complications inherent in the asbestos abatement process and a wide disparity among the participants, it is no wonder that there are few asbestos abatement projects without a basis for some differing site conditions claim.

Section 13.3 Factors Leading to Claims

The prevalence of subjective factors in asbestos abatement work leads to differing site conditions claims. Determining what the experienced, prudent contractor would have known is hard to judge.

Probably the worst case scenario is one in which the owner is unsophisticated, is looking to cut corners, and therefore hires only a minimal amount of consultant assistance and aims to retain a "cheap" contractor. In this instance, consultant assistance and aims to retain a "cheap" contractor. In this instance, it is an open issue as to what constitutes a changed condition. The contractor walked onto the job without a clear delineation of what the conditions were at the premises because the consultant was only paid a minimal amount to draw up the abatement plan and to allow the owner to merely comply with regulatory requirements. Subject to contract provisions and the provable state of knowledge of each of the parties, virtually every unknown in this case turns into a differing site conditions claim for the contractor.

Differing owner knowledge is critical and may be as follows:

1. The owner knows and the contractor does not know of the condition: when the condition is encountered, the owner must pay the contractor, even in the face of an exculpatory clause.

2. The owner does not know and the contractor does not know of the condition: when the condition is encountered, the owner will have to pay unless there is an exculpatory clause that provides otherwise.

3. Variations of these circumstances occur when the owner should have known or the contractor should have known.

Although differing site conditions claims in asbestos abatement are most closely associated with changes in perceived conditions at the site, changed conditions can relate to factors other than those immediately at hand.

Regulatory environmental changes. As environmental regulations change rapidly, the cost of performance of asbestos abatement work can be dramatically altered midstream. The vigor or the prevalence of enforcement of existing laws and regulations can also change, increasing the cost of performance. An example is a regulatory requirement that a contractor use transfer stations for the asbestos waste, assuming that the requirement was not being enforced at the time of the contract signing but is being enforced at the time of performance. If the fee of the transfer station was not included in the bid, it is not clear whether the contractor will be able to get the owner to pay. A careful review of contact clauses and the knowledge of each party will have to be made.

Changes in availability of waste disposal sites. Localities rebelling against taking disposal of environmental waste and limited capacity of disposal sites may lead to a dramatic and unexpected increase in cost to the contractor for disposal. This eliminates the contingency that the abatement contractor will build into the bid to cover the risk of liability or unexpected cost increases attendant to disposal of asbestos waste.

Changes in labor arrangements. Labor relations can always cause problems in the construction industry, and asbestos abatement projects are no different. There is no perception that because the trades performing abatement work operate under the cover of darkness (often literally at night or on weekends or inside containment areas) and they often are on and off the project before following trades arrive, they can use nonunion labor on an otherwise union project.

If this is discovered, there will often be pressure on the owner to make sure that the abatement contractor uses union labor. Most often the standard construction contract includes a clause making the abatement contractor responsible for harmony of labor relations, and the contractor will be forced to pay additional increments due for union labor.

Although owners have been known to be sympathetic to the plight of the contractor in this circumstance, concessions will most often be voluntary and only partial. Other owners may justifiably believe that the contractor's assumptions in estimating labor for a lump-sum bid are not the owner's concern. Although there are contractors who disagree, this is not a true differing site conditions claim.

Negative air patent restrictions. Those in the asbestos abatement industry must be aware that GPAC, Inc. licenses contractors to use the patented negative air system. The patent provides a broad scope of protection for asbestos abatement using the application of negative pressure and filtration of air by the use of negative air machines. Since its issuance in 1986, the patent has repeatedly been challenged and issues contesting the validity of the patent are currently pending before federal district courts in North Carolina, Delaware, and Washington, D.C. In an effort to enforce its patent, GPAC, Inc. has embarked on a campaign to force contractors to obtain a license before employing the system. It has also notified building owners and even consultants about the existence of the patent. In order to protect themselves, Mississippi and New Jersey have implemented policies requiring that bidders either hold a license from GPAC or agree to indemnify the public entity from any potential infringement claims.

Until the courts determine the validity of the patent, contractors, builders, and consultants must remain wary. In order to minimize potential liability from patent infringement claims, legal counsel should be sought in drafting bids and contracts involving asbestos abatement.

Patent requirements. With the issue of the GPAC patent having been contested in the courts, its importance cannot be minimized. If the contract is signed without any regulatory or contractual

responsibility for use of patented equipment, will the contractor prevail in its attempt to recover for the cost of complying with the license fees to use the patented equipment if the holder of the patent requires it after the date the contract is signed? Is the answer affected if the patented equipment must be used to comply with regulatory requirements? Is the answer affected if the patented equipment is not required by regulators but the use of any other acceptable method will cost the contractor double the money?

It seems appropriate that if the design calls for a proprietary item to be used and it has not been disclosed that the item is patented, the contractor should not be required to bear the cost of defending a lawsuit and paying a settlement or judgment in relation to an infringement suit or for additional license or royalty fees. However, if the contractor has utilized a patented item on its own, then the contractor might be expected to bear that cost.

The contractor should indemnify and hold harmless and pay the cost of defense of the owner and environmental consultant if they are sued for patent infringement when the contractor has chose the patented equipment.

Owner interference. The asbestos abatement project is especially susceptible to disruption and massive additional cost if the owner does not fully cooperate and "clear the way" for the contractor's performance. The failure of these obligations may be considered a changed condition entitling the contractor to be paid more. Some of the owner's shortcomings in this area include:

1. **Failure to provide access.** This may be particularly costly even in the short term, and the owner's responsibilities may be significant. For example, the owner may have been required to provide contractor access to tenant space by providing notice to tenants to vacate their space during a weekend or after-hour period when the contractor would be working. If the contractor shows up but the owner forgot to notify tenants and the contractor is not able to work that night or that weekend, the cost could be very considerable.

2. **Decision making of the owner/consultant.** If the decision-making process of the owner or its consultant is slow and holds up the contractor's performance, the contractor could be entitled to compensation. This is particularly the case when the contractor is working overnight or over a weekend and is unable to reach a representative who is authorized to make a decision.

3. **Use of elevators.** If the contractor's bid is predicted upon using the elevators and the stairways must be used to carry out debris, this may entitle the contractor to be paid more. This issue should be addressed pre-bid.

4. **Water supply.** If the contractor is promised in the contract that it will be allowed to use water supplied by the owner and then is required to run temporary water lines, the contractor may be entitled to additional payment.

5. **Electricity.** In a fairly common problem in renovation and abatement, before the abatement is undertaken, it is assumed that the building power can be used for the contractor's equipment. If once the job is begun the power must be shut off, the contractor may be entitled to compensation for supplying temporary power and power lines. The abatement contractor may be the one to discover this, as it is the first one with access to the site. This must be addressed in the contract.

6. **Use of staging areas.** Of paramount importance on the abatement project is where the asbestos that is being removed can be placed. If there is no temporary staging area, cost implications could be severe.

7. **Failure to provide information.** When the bid documents provide that the contractor will be given "as builts" of the area being abated, the failure of the owner to do so may later bring about a

claim by the contractor for additional compensation. It would appear that the failure to provide consultant reports when they have been promised may also lead to a claim for changed conditions.

Section 13.4 Contract Clauses: How They Can Help or Hurt

The quality of the contract documents, from the boilerplate to the significant business terms to the technical specifications, really sets the pattern for the project. The abatement project, especially a costly one done under tight time constraints, demonstrates the huge dollar amount attributable to each misstep in contract documents.

If the owner makes an improvident choice in environmental consultants, the owner may end up paying for that poor choice over and over: in price, in schedule, and in lost revenue when the project does not get completed on the following clauses should be included in the business terms of the contract documents and carefully tailored to the project time.

The qualified and experienced environmental consultant will see to it not only that the contract documents protect the owner, but also that the owner has attended to the basics and that the contract documents are clear to the bidders. This approach should provide (1) a way of obtaining the best bids for the owner, as the contractors will not be required to build in a contingency for potential misunderstandings in scope or intent, and (2) protection against being required to pay differing site conditions claims later.

Scope of work. There is no doubt that the scope of work clause is the most important clause. It is clearly within the capability of the environmental consultant and the owner to draft this clause properly if they have done an adequate investigation of the site before writing it.

The owner can make foolish choices and use the scope of work clause as an attempt to prevent the contractor from getting paid for changed conditions if they are encountered. An example of such a clause is:

The Owner's Consultant has prepared a survey report which has been delivered to the Contractor. The Contractor acknowledges that the survey report has been received and reviewed. The Contractor shall remove *all Asbestos Containing Material in the building.* The Consultant's survey report is dated August 17, 1991 and identifies the Asbestos Containing Material anticipated to be encountered.

This clause causes trouble because it intends to obligate the contractor to take responsibility for asbestos removal beyond that which may have been contemplated by the consultant or the owner. It would appear to take the pressure off the consultant or owner to have found the areas where the asbestos existed.

It is likely that the court would construe this clause against the owner, especially if the asbestos is found in a wholly different area of the building than that shown on the abatement plan. However, the contractor should not feel comfortable relying on the equity of a court or the owner when seeking to obtain additional deserved compensation.

The good scope of work clause, together with well-defined plans and specifications, does two things:

1. It locates, describes, and quantifies all asbestos-containing material (ACM) in the building or facility.

2. It identifies the response action required to be taken for each item of ACM so designated.

Compliance with all laws. Defined correctly, a change in laws, regulations, or their enforcement, after a lump-sum asbestos abatement project has begun, will be deemed a differing site condition for which the contractor will receive additional compensation. Defined improperly, any such change will be a cost the contractor must bear.

A standard clause that is not helpful states:

The Contractor shall give notices and comply with all applicable laws, ordinances, rules, regulations and lawful orders of public authorities.

In order for the contractor to be protected by the clause, the following language must be added: "in effect and being enforced at the time of the signing of this agreement."

Sequencing of the work, suspension and damages for delay. Lump-sum contracts for asbestos abatement may also include the following troublesome clauses:

The Contractor shall perform the Work in such order and sequence as directed by the Owner or the Owner's Consultant.

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The Owner may, without cause, order the Contractor, in writing, to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

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The Contractor agrees to make no claim against the Owner for damages for delay or interference in the performance of this Agreement occasioned by any act or omission to act of the Owner or any of its representatives or for any other cause whatsoever, and agrees that any such claim shall be fully compensated for by an extension of time to complete the Work as provided herein.

On the asbestos abatement project, there can be no doubt that signing an agreement containing these clauses gives the owner carte blanche to disrupt, fail to give information, and fail to follow up on information and decision making. If faced with a decision as to whether to sign or lose the opportunity to do the job, it may be best to forgo the job. If a contractor does sign a lump-sum contract with these clauses, it may lose a substantial sum when a differing site condition arises.

Contractor obligation to visit site. Many contracts contain a clause stating that the contractor has visited the site, has examined it before placing his bid, and is fully familiar with it. This type of clause may rule out a differing site conditions claim, although the courts will surely construe it against the owner if given the opportunity to do so. If the contract is negotiated, this clause should be clarified.

What is not clear is whether the contractor's inspection of the site includes any destructive testing or taking of samples. The clause should state the nature of the actual examination undertaken or required to be undertaken.

Differing site conditions clause. The following site investigation clause indicates that the full risk of a changed condition is on the contractor:

The Contractor represents that it has had the opportunity to examine and has examined carefully the plans and specifications and the contract and has acquainted itself with the conditions of the Work site: and that it has made all investigations essential to a full understanding of the difficulties which may be encountered

in the performance of the terms of this agreement. The contractor will, regardless of any such conditions which may exist at the site of the project or its surroundings, assume complete responsibility for completion of the project under any such conditions which may exist at the site of the project or its surroundings and all risks in connection therewith. In addition thereto, the contractor represents that it is qualified fully and able to complete the project in accordance with the terms of the contract and within the specified time.

On the other hand, paragraph 4.3.6 from the AIA General Conditions of the Contract for Construction, AIA Document A201, 1987 edition, specifically allows for recovery for changed conditions claims.

When no asbestosis anticipated. Article 10 of AIA Document A201's General Conditions of the Contract for Construction, 1987 edition, includes a series of provisions that attempt to place the responsibility for detecting and dealing with asbestos on the owner.

The Engineers' Joint Contract Documents Committee (EJCDC) Standard General Conditions of the Construction Contract 1910-8 (1990) goes further than the AIA in affording protection to the contractor who does not anticipate finding asbestos. The applicable provisions read:

1. OWNER shall be responsible for any Asbestos, PCBs, Petroleum, Hazardous Waste or Radioactive Material uncovered or revealed at the site which was not shown or indicated in the Drawings or Specifications or identified in the Contract Documents to be within the scope of the Work and which may present a substantial danger to persons or property exposed thereto...

2. CONTRACTOR shall immediately: (i) stop all Work in connection with such hazardous condition and in any area affected thereby...CONTRACTOR shall not be required to resume Work in connection with such hazardous condition or in any such affected area until after OWNER has obtained any required permits related thereto and delivered to CONTRACTOR special written notice...

3. If after receipt of such special written notice CONTRACTOR does not agree to resume such Work based on a reasonable belief it is unsafe, or does not agree to resume such Work stoppage under such special conditions, then Owner may order such portion of the Work that is in connection with such hazardous condition or in such affected area to be deleted from the Work.

Section 13.5 Avoiding Differing Site Conditions Claims

The primary way that an owner can avoid differing site conditions claims is not by drafting a better contract or hiring a better lawyer, but by doing its job better. The effect of a changed condition on the progress and cost of an abatement project may depend upon the owner's asbestos management philosophy. One of the most compelling arguments in favor of *total* asbestos removal is that it eliminates potential lawsuits and shields against future exposure. Although medical risk from low-level exposure may be extremely small, it is not nonexistent, as there is no minimum threshold for mesothelioma,an asbestos-associated cancer of the mesotheliam or chest cavity lining.

Although a worker who mined, manufactured, or installed asbestos is open to significantly greater risk, office workers' lawsuits are more than just a theoretical possibility. In *Layne v. GAF Corp.*,(4) an officer worker who was employed from 1973 to 1985 as a word processor in a federal office building containing asbestos recovered from an asbestos manufacturer after she developed mesothelioma.(5)

Section 13.6 Analysis of Damages

Differing site conditions claim analysis and litigation, because it most often does not derive from a clear record, relies on careful review of contemporaneous records and the testing of witnesses' memories. Both liability and damages issues are decided in this fashion.(6)

Before the work begins, it may be possible to determine an acceptable formula by which the contractor will be paid if it is to remove more asbestos than is anticipated by the original contract or if the project is held up and the contractor, while doing the same work, will have to be at the job for longer. These suggestions apply to any construction project but become more essential in the asbestos abatement context because of the speed at which the contractor is working and the significant amount of labor expended each day.

The acceptable unit prices should be placed right in the contract so the parties can avoid the wrenching process of computing costs if doing so becomes necessary.

Types of damages the parties should be concerned with include:

1. Labor (extended, additional, idle, or escalated)
2. Material (additional or escalated)
3. Supervision in the field (field overhead) (extended or escalated)
4. Supervision from the home office (home office overhead) (extended, additional, idle, or escalated)
5. Equipment (extended, idle, or escalated).

If there is no predetermined unit price, it will be necessary to review records that show the increased costs of performance of the work and impact costs for the delay and disruption of other work activities resulting from the condition.

The records that must be reviewed are those showing the extent and rate of production for work activities affected by the condition and documenting crew and equipment usage in performing the work.

The factual confusion that can result from an asbestos differing site conditions claim is illustrated in *Universal Contracting & Brick Pointing Co. v. United States*.(7) In the *Universal* case, the court found that material issues of fact precluded summary judgment on the contractor's claim for extra compensation on (1) the claim that the owner furnished defective specifications; (2) whether presence or asbestos and glue constituted differing site conditions; and (3) whether the owner had superior knowledge of presence of asbestos and glue in the paint system.

Count III of the contractor's complaint alleged that, in performing the contract, the contractor encountered asbestos on the exterior walls of the buildings, which constituted a differing site condition under the terms of the contract, and that this condition was not discoverable through a reasonable site inspection.

The contract contained a clause covering differing site conditions, which stated in relevant part:

a. The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of:

1. subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or

2. unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract.(8)

The contractor claimed that the presence of asbestos in the buildings satisfied the elements of either differing site condition category. With respect to category 1, the contractor argued that the contract documents indicated that the contractor would be required to remove paint, not asbestos, in performing the contract, and that the contract gave no indication that such a latent physical condition as asbestos would be encountered beneath the layers of paint. The contractor contended that the site conditions, as indicated at several places in the contract documents, gave rise to a permissible inference that only paint would be encountered during contract performance.

With regard to category 2, the contractor argued that asbestos is not a material ordinarily encountered in paint removal contracts, and that no other contractor at the site encountered this type of material

In *Owners Realty Management Construction Corp. v. Board of Education*,(9) at the request of the architect and assistant supervisors, the contractor, under protest, removed asbestos in the owner's schools from areas the contractor claimed were outside the scope of the contract.

The contractor's summary judgment motion was denied because there were triable issues of fact as to whether the work ordered by the owner's representatives constituted such an extraordinary demand that there "could be no reasonable doubt that [the demand] exceeded the obligations of the contract and that a refusal to comply with it would not work a breach of contract."(10)

The court concluded that the asbestos removal performed by the contractor at the owner's representatives' directions was "so preposterous, so manifestly beyond the limits of the agreement, as to suggest a threat to the public interest."(11)

In a 1990 case, a contractor was performing under a temperature and humidity control contract for rehabilitation work in the main branch of the New York Public Library at Fifth Avenue and 42nd Street in Manhattan. Eight months after work began, the owner (the city of New York) for the first time said that the insulation surrounding some existing piping and ductwork was composed of hazardous asbestos, which would have to be removed.(12)

After extensive negotiations and correspondence, the contractor refused to undertake the work in compliance with a change order issued by the city because the work to be completed pursuant to the change order exceeded the 5-percent limit,(13) funding had not been approved, and the city would not hold the contractor harmless from any asbestos-related claims.

The city defaulted the contractor. The lower court held that the contractor was in default and that the surety had waived the claim that the asbestos removal change order constituted a material change of the contract by negotiating the price of the work with a subcontractor and submitting an estimate of the cost of the work on the change order.

The appellate court decided that the contractor and surety could relitigate the default and were not barred by res judicata for the default proceeding.

Tuscaloosa City Board of Educ. V. American/Owens, Inc.(14) involved litigation over the method of dispute resolution. Under the contract, American/Owens agreed to remove asbestos-containing material from

buildings owned by the board of education for a lump sum, subject to additions and deductions provided for in the contract.

The contract provided that "any dispute, claim or question concerning the interpretation of meaning of the Contract Documents, or concerning a breach of the Contract, shall be submitted to the Director and his decision shall be final and binding on the parties to the Contract."(15)

After beginning the work, American/Owens reported to the board that the quantity of asbestos to be removed from the buildings exceeded the amount it expected to find based on drawings and specifications made by the architect employed by the board, and that the work would be done as an extra item not within the contract.

When the board refused to pay for extra work, a hearing before the director of the State Building Commission was convened, at which the board argued the director lacked jurisdiction to resolve the controversy. Thereafter, the director entered an order requiring payment of the additional amount demanded by American/Owens.

The board filed a declaratory judgment action, claiming that the dispute was not subject to resolution by the director on the basis that only disagreements over "contract provisions" were within the settlement authority of the director.

The court found the contract provisions to contain inconsistent or unclear provisions that the arbitrator interpreted in resolving the dispute. These contract provisions are worthy of note here as a lesson for owners who wish to avoid a costly dispute resolution process by focusing, up front, on contract drafting. The contract provisions were:

> **Scope of Work**
>
> The contractor will be responsible for the removal of all friable asbestos in student occupied areas, including, but not limited to, that covered in the base bid. In the event there is a question as to whether material is friable, or whether the area is student occupied, the architect/engineer will make the final decision.
>
> ***
>
> **Changes in the Work**
>
> The Owner may at any time make changes in the Work by changes in the Drawings and Specifications of the Contract and within the general scope thereof. Changes will be in the form of a Contact Change Order based upon a written request of the Owner and a written proposal of the Contractor. All Change Orders will require consent of Surety by endorsement of the Change Order form. In making any change, the charge or credit for altering, adding to or deducting from the Work shall be determined by one of the following methods selected by the Owner:
>
> ***
>
> **Claims for Extra Cost or Extra Work**
>
> If the Contractor claims that any instructions by drawings or otherwise are not in accordance with the Contract Documents, and involve extra cost under the Contract, he shall give the Architect and the Director written notice thereof within ten (10) days after receipt of such instructions, and in any

> event before proceedings to execute the work and the procedure shall then be as above under [the Changes in Work section]. Otherwise no claim will be considered.(16)

The case of Castle Construction Co./Tuskegee Lumber Co. v. Owens & Woods Partnership(17) demonstrates the treatment of the encountering of asbestos after a renovation has begun.

Castle Construction Company/Tuskegee Lumber Company (Castle) entered a contract to renovate and modernize the Central City Housing Project in Birmingham, Alabama, owned by the Housing Authority of the Birmingham District (HABD).

Castle suspended work when unanticipated asbestos was encountered in each of the buildings being renovated. Castle advised the architect that delay would result. The architect responded by changing the project specifications to provide for the asbestos removal, and the owner, the architect, and the contractor agreed to two change orders that afforded the contractor with the direct costs of the asbestos removal.

After the completion of the project, the contractor presented a claim for delay costs suffered in addition to the direct costs for the asbestos removal. When HABD denied the claim, the contractor sued for breach of contract.

The contractor sought increased costs it suffered as a result of the asbestos-related delay, plus similar costs its subcontractors incurred.

The court stated:

> The discovery of asbestos was clearly a 'latent defect' as defined in the contract, and the change orders entered into between HABD and Castle compensated Castle and its subcontractors for the additional labor and materials required for its removal. Accordingly, we also hold that Castle is not entitled to delay or disruption damages from HABD or Owns and Woods on behalf of its subcontractors.(18)

The contract provisions in this case were as follows:

> Changes in the Work
>
> 8(b) Any change in the work shall be ordered and the adjustment of the contract price or time shall be determined by one of the following methods: Method 1 – Adjustment before Performance...Method 2 – Adjustment after Performance...The Contractor shall keep an accurate current account of such work and present it in such form, and substantiated by such supporting papers as the Architect may require. Upon completion and determination of the cost, a Change Order shall be issued establishing the increase or decrease in the contract price or contract time...
>
> 8(e) The cost shall include all direct and necessary production costs of the work itself...
>
> 9(b) Should the Contractor encounter subsurface or latent conditions at the site materially differing from those provided for in this Contract, or unknown physical conditions differing from those inherent in work of the character provided in this Contract, he shall promptly, and before such conditions are disturbed, notify [the Owner] in writing...

9(e) If, on the basis of available evidence, [the Owner] determines that an adjustment of the contract price or time is justifiable, the procedure shall then be as provided herein for 'changes in the work.'(19)

Section 13.7 Strategy for Contract Administration and Claim Management

Owner's Strategy

The owner's claims prevention and claims management strategy must start on the first day of ownership of the building. The owner must develop a comprehensive plan to manage asbestos. The owner's asbestos management program, if set up properly, becomes the owner's contract administration and claims management program. Whenever a move is made in the interior of the building containing asbestos which is being maintained in place, the owner's overall asbestos management plan must be consulted.

1. In developing an asbestos management policy, owners should follow these 10 steps:

2. Take a detailed inventory of all asbestos in the building, its condition, and what is being done about it. Keep this inventory updated, and make sure it is reviewed before any renovation is undertaken. If sued, the building owner is not "off the hook" merely because the owner did not know of an asbestos problem; the building owner is held to the standard of "what a reasonably prudent owner in the locality should have known under the circumstances."(20)In current terms, there is much the owner "should have known" about asbestos.

3. Once an inventory shows the presence of asbestos, prepare a written operations and maintenance (O&M) plan, and make sure that all relevant personnel are familiar with it. Make sure that the O&M plan is kept up-to-date.

4. Hire a facilities management staff carefully and make sure they are fully aware of all aspects of asbestos maintenance and removal. Make sure they attend formal training on an ongoing basis.

5. Set up a consistent and well-organized recordkeeping system relating to asbestos management, and monitor it to assure that it is being followed.

6. Formulate a written plan for addressing emergencies relating to in-place asbestos (such as a burst heating pipe or a water leak), and make sure that facilities management personnel are fully trained in these procedures. It is important that emergencies be addressed promptly and thoroughly and that proper contemporaneous documentation be kept. The 24-hour phone numbers of the asbestos management team should be made available to facilities management personnel and executive level personnel and the owner's engineer, lawyer, and publicist. It is important that a chain of command be identified and that a coordinator be appointed for this important function.

7. Develop a hands-on program; know firsthand the quality of the asbestos management program. Do not rely solely on the advice of others. If you are an owner or an executive of the owner, know all of the facts and ask questions.

8. Do not rely on insurance. Expense, policy limits, sunset clauses, exclusions, the claims-made nature of coverage, the long-delayed manifestation of asbestos-related liability, and questionable long-term stability of insurance companies preclude such reliance. If an abatement is being conducted, make

sure that the contractor obtains asbestos coverage on an occurrence basis from a stable and rated insurer.

9. Do not rely on contract clauses that purport to provide protection. Indemnity clauses or other assurances provided by prior owners, abatement contractors, transporters, or others are only as good as their future solvency. However, even though it is not a complete answer, make sure that proper protection is obtained when a purchase, sale, or lease is entered or when an abatement contractor is hired.

10. Worry about where removed asbestos is being disposed. If the asbestos is removed and improperly disposed, the owner may be sued to clean up the

The *Science Magazine* article, in its section entitled "Public Policy," stated:

The available data and comparative risk assessments indicated that chrysotile asbestos, the type of fiber found predominantly in U.S. schools and buildings, is not a health risk in the non-occupational environment. Clearly the asbestos panic in the U.S. must be curtailed, especially because unwarranted and poorly controlled abatement results in unnecessary risks to removal workers who may develop asbestos related cancers in later decades.(26)

Based on this information, these headlines appeared:

"Study Opposes Removal of Asbestos"

"Health Risks of Asbestos Downplayed"

"Risk Is Seen in Needless Removal of Asbestos"

"Health Experts Say Billions May Be Wasted by Removing Banned Insulation Material"

The building owner should not change the long-range asbestos policy set out in the "Ten Asbestos Commandments." Unless asbestos has become airborne through use or one is about to disturb it, there is no requirement that an owner remove it. In fact, the Environmental Protection Agency (EPA) has issued guidelines encouraging owners to set strategies to manage asbestos in place by using operations and maintenance (O&M) plans.(27)

Probably imprudently, "in-place" legislation, which would have required asbestos inspections in buildings, was shelved, locally in cities such as New York, and in Congress. These laws did not require removal of asbestos. Their purpose was to "create a level playing field" for building owners and to endorse a "responsible asbestos policy" to which owners should adhere. They would simply have required that the buildings be inspected to see if there was an asbestos problem, and if there was a problem, that a solution be formulated and implemented.

Note that when a 1988 study was conducted by the city of New York of 900 buildings there, 84 percent had asbestos in poor or fair condition. Whether there is a statutory requirement or not, the building owner is responsible for properly managing the asbestos in place or for removing it. The study further showed that two-thirds of all buildings in New York City contained asbestos containing

Section 13.8 Alternative Dispute Resolution Contractor's Strategy

The contractor's strategy, of course, is not set from a s early a point as that of the owner. Although the owner has been able to plan and prepare its approach from the time the building was owned, the contractor most often starts planning at the time it bids on the contract. Most often, the contractor is not able to set the contract terms and may not, in the case of a sealed bid, be able to negotiate them. In addition, there may be a number of clauses that will prevent the implementation of a successful strategy for obtaining prompt payment on a differing site conditions clause.

The contractor's leverage is never greater than when the owner needs the contractor. The owner needs the contractor *before* it has fully performed and *before* it becomes easy to kick the contractor out and bring in another one.

It is clear that the clause requiring the contractor to keep working while a dispute on changed conditions is resolved is harmful to the contractor's leverage rights. If the owner must face a situation in which job progress is affected, the owner will "light a fire" under the contractor because the contractor will be in default and the owner will be able to bring in a replacement if the contractor fails to continue.

Leverage is a tricky mechanism, and it is not a good part of contractor strategy for the contractor to walk off the job or to suspend work in the face of a clause that calls for its continued work during the resolution of a dispute.(31) If enough money is involved, there must be an interim solution of some sort if the contractor is to keep meeting payroll.(32) Perhaps there is a way for the contractor to obtain payment to the extent the owner feels appropriate and to reserve the right to sue for the rest later. It is to be expected that if an interim payment is to be made by the owner, that the owner will expect a full release for that item; that is the owner's use of his leverage – after all, the contractor needs the payment now and maybe to get it he will take less.

Section 13.8 Alternative Dispute Resolution

Many differing site conditions claims involving management of asbestos have been settled without resort to litigation, perhaps because of both owners' and contractors' relative inexperience in asbestos abatement. The reason could, of course, simply be that owners would prefer not to see themselves locked in disputes over their environmental problems in a public forum.

The 1980s saw the passage of a massive volume of new asbestos-related legislation and regulations and the development of common law doctrines that broaden existing areas of legal responsibility relating to asbestos.

As a result, for the 1990s, the federal and state courts are in for an onslaught of new cases, including asbestos changed conditions cases. Many of them, in volume of documents, complexity of legal and factual issues, number of witnesses, and number of parties involved, will resemble antitrust, construction contract, and other large and protracted commercial litigation that already confounds the courts.

Clearly, the alternatives to the time-consuming and costly conventional means of dispute resolution may be welcome in this heavily regulated industry. Alternative dispute resolution (ADR) has been used with great success in commercial and contractual disputes.(33) It is clear that with the heavy docket of the courts, commercial litigation will take many years to reach trial, although 90 to 95 percent of all lawsuits are settled

before trial. The goal, then, must be to replicate, at an earlier stage, the same types of dynamics that are present on the courthouse steps.(34)

Proponents argue that ADR has many advantages:

1. It accelerates the dispute resolution process, which allows the parties to focus on their interests rather than on the procedural strategy of the case, and provides "a day in court," allowing for advocacy and emotional outlets.

2. It assures the involvement of executives early in the process.

3. It avoids the need to educate a judge or jury.

4. It can better protect confidentiality.

5. It avoids acrimony that often accompanies litigation and allows for business relationship between the parties to continue.

In a situation in which the parties enter a contract with each other, such as one between an owner and asbestos abatement contractor, it is appropriate to specify, in the contract itself, the procedure under which any disputes between the contracting parties are to be resolved. Even though some parties feel there could not possibly be a problem and are unwilling to give attention to the inclusion of an ADR clause in their

agreement, others, who have seen the economy created through the use of ADR, are now including ADR in the contract documents.

Certainly it is never too late to use ADR at any point, especially in cases that have been at an impasse after a number of years of traditional litigation. Impasse can arise from personality conflicts between counsel, poor communications between parties, inflexible negotiating postures, or difficult policy or internal political reasons.

The parties can rest assured that the court will encourage their use of ADR. In fact, the courts have increasingly suggested resort to ADR, especially in connection with technically complex issues that the court is ill suited to address.

In contractual relationships, the method of dispute resolution can be a point of negotiation along with the other terms of the agreement. Approaches to certain recurring problems can be fashioned (such as scope of work disputes, evaluation of undisclosed conditions claims, and interpretation and application of government regulations).

There appears to be no single universal process that will work for every dispute. A number have been used, including:

1. **Mediation:** Facilitates settlement by use of a neutral party who has no power to make binding decisions, but who may schedule and structure negotiations, act as a catalyst between the parties, focus the discussions, aid communications, and serve as an assessor and not a judge of the positions of the parties.

2. **Arbitration:** Employs a neutral party to hear all or a portion of the factual, legal, or policy issues in a case and make binding decisions. Arbitration is generally less formal than court proceedings, as discovery is, in theory, severely restricted and the rules of evidence are not strictly followed.

3. **Fact finding:** Uses a neutral third party with industry expertise to narrow factual issues. The process can be either binding or nonbinding, and the parties, if they so choose, can treat the decision on the issues of fact as admissible in subsequent proceedings.

4. **Minitrial:** Permits parties to present their cases (or portions of their cases) to principals who have authority to settle the dispute. Following the presentation, the principals continue negotiations with the aid of the third party who has acted as the minitrial judge.(35)

5. **Settlement judge:** Involves the participation of judges of the court hearing the case who are not involved in any aspect of the litigation. The settlement judge hears the positions of the parties and offers suggestions as to the reasonable compromises in light of the judge's' evaluation of likely outcomes.

6. **Summary jury trial:** Involves an abbreviated trial before a jury assembled by the parties to get a sense of the amount likely to be awarded after a full trial. The decisions of the summary jury are advisory only.

No matter what type of lawsuit is at hand on an asbestos abatement project, it is likely to include the analysis of voluminous technical evidence. Therefore, exploration of ADR is wise. The alternative is waiting years for a resolution, with perhaps the same result, after expending tens and perhaps hundreds of thousands in attorneys' fees and court costs and an equally large amount of time. Under these circumstances, ADR becomes an attractive option.