

Architects and Design Professional's Hidden Liability
Hazardous Materials in Construction – Condensed Version

Overview

Architects, Project Designers, and Engineers – “Design Professionals” typically disclaim liability from exposure to hazardous materials encountered in Construction Projects. Historically the parties involved in a construction project, from Architect, to the Design Professional, to the Construction Manager strive to shift liability for these materials on a project to the Owner, the Owner's Consultants, and the Contractors. Such a strategy, often used in the past, is no longer reliable.

The handling of asbestos, lead, mercury, PCBs, silica, and even mold during any construction project is not construction work, per se. It is hazardous materials work, with completely different liability issues. Companies involved in any facet of a demolition/renovation project that fail to grasp this fact potentially expose themselves to litigation from injured parties as a result of contact (real or perceived) with hazardous materials. Design Professionals may likely misjudge their legal and regulatory exposures regarding projects that may involve the handling or disturbance of hazardous materials. Regardless of project language in Agreements with Owners relating to hazardous materials liability, Design Professionals may still be held accountable in legal and regulatory exposures created by the handling or disturbance of hazardous materials on a project. By not having the protection that was intended, the Design Professionals also carry an uninsured risk.

This paper, the first in a series of white papers, is directed toward Design Professionals relative to projects involving the handling or disturbance of hazardous materials and how they can reduce this liability exposure to the greatest extent possible. The following topics are discussed within the body of this paper:

- Regulatory Liability
- Uninsured Risk
- Solutions for reducing Liability and controlling cost

Regulatory Liability

Because previously installed hazardous materials in a Building may be disturbed during the course of reconstruction, it becomes incumbent upon project Design Professionals to take steps to ensure that a design team is assembled that can address those materials properly early on in the project design. By doing so, the Design Professional provides a value added service to clients with a way to properly estimate and control the cost of handling these materials. Regulatory misconceptions regarding hazardous materials liability have caused many Design Professionals to believe they can avoid liability by not addressing the hazardous materials issues on their projects. Consequently, they often decide to not include Hazardous Materials Consultants on their Project Teams. Design Professionals have a Regulatory responsibility to ensure that materials being disturbed on their projects are handled properly, and this necessitates the inclusion of a qualified Hazardous Materials Consultant on the design team.

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Please note the following definition from Cal/OSHA's Asbestos in Construction regulation – 8 CCR 1529(q):

*“Asbestos consultant” means any person who contracts to provide professional health and safety services relating to asbestos- containing construction material as defined in this subsection, which comprises 100 square feet or more of surface area. The activities of an asbestos consultant include building inspection, abatement project design, **contract administration**, sample collection, preparation of asbestos management plans, clearance monitoring, and supervision of site surveillance technicians as defined in this subsection.”*

This definition appears to require the presence of an Asbestos Consultant on the Project Team for every project where the asbestos work conducted exceeds 100 square feet. Design Professionals can be held responsible on projects they design, draw, or specify work that disturbs asbestos-containing materials or other hazardous materials and a consequent nuisance or contamination occurs. The only way to control this form of liability is to:

- a) ensure that a thorough inspection for hazardous materials has been conducted and that any hazardous materials that may be disturbed are clearly indicated; and
- b) fully document that the work was conducted in accordance with the specifications and in a legal and safe manner.

This often becomes an issue on projects where partial removal of hazardous materials is conducted. Even on projects where specifications are written to assure the safe and legal handling of hazardous materials, if any hazardous materials are left in place during the renovation or demolition activities, then all the issues and types of liability previously discussed continue to exist. Not only that, there are hazard communication and construction regulations that require all contractors working in areas where hazardous materials remain to be notified of their existence and specific locations. In addition, these workers must also be “awareness trained” on the hazards involved.

Uninsured Risk

Design Professionals typically don't maintain insurance for hazardous materials exposure, because most Professional General Liability insurance policies typically contain pollution exclusions. This exclusion eliminates coverage for any liability associated with most hazardous materials, including those not addressed in the specifications for the project. Commercial Professional General Liability policies can be endorsed to include pollution coverage. Insurance Company Underwriters in this area of risk typically won't offer pollution coverage unless a case is made that the Design Professional can manage their pollution liability exposures well. This means that they need some staff with environmental science and engineering skills and experience. But for the most part, pollution is excluded in General Liability policies.

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The responsibility for proper handling of the hazardous materials during construction, renovation, and demolition projects is the responsibility of the entire Project Team. Not addressing the hazardous material activities in project specifications increases the Design Professional's potential liability. There is no way to avoid or transfer the liability that comes with the disturbance of hazardous materials. Without adequate Pollution Coverage all Design Professionals have a significant potential exposure.

The Solution

We are not trying to suggest that Design Professionals start addressing the handling of asbestos, lead, mold, and other hazardous materials directly themselves. However, no renovation or demolition project should be conducted without a Hazardous Material Consultant involved in some capacity early on in the design process. Therefore, when Design Professionals have projects that involve the handling of hazardous materials, the best way to reduce exposure to liability is by bringing subject matter experts (Hazardous Materials Consultants) onto the design team to develop contract documents (specifications and drawings) which adequately address the hazardous materials. In fact, having a competent consultant on board as early as the conceptual design phase can help the team avoid costly pitfalls by noting hazardous materials early in the design, and potentially suggesting ways to avoid their disturbance, thus providing cost-efficient alternatives that can help a project's budget. Even on projects where the Building Owner has his own Hazardous Materials Consultant, the Architect should at least ensure the information provided by the Building Owner is thorough and sufficient for the project at hand. The only way to do this is to have a competent Hazardous Materials Consultant on the Project Team.

For a more thorough discussion on the topics raised in this condensed version of the white paper *Architects and Design Professional's Hidden Liability Hazardous Materials in Construction*, please see full version available in the Practice Tools section of the AIACC's website or visit hazmanage.com.