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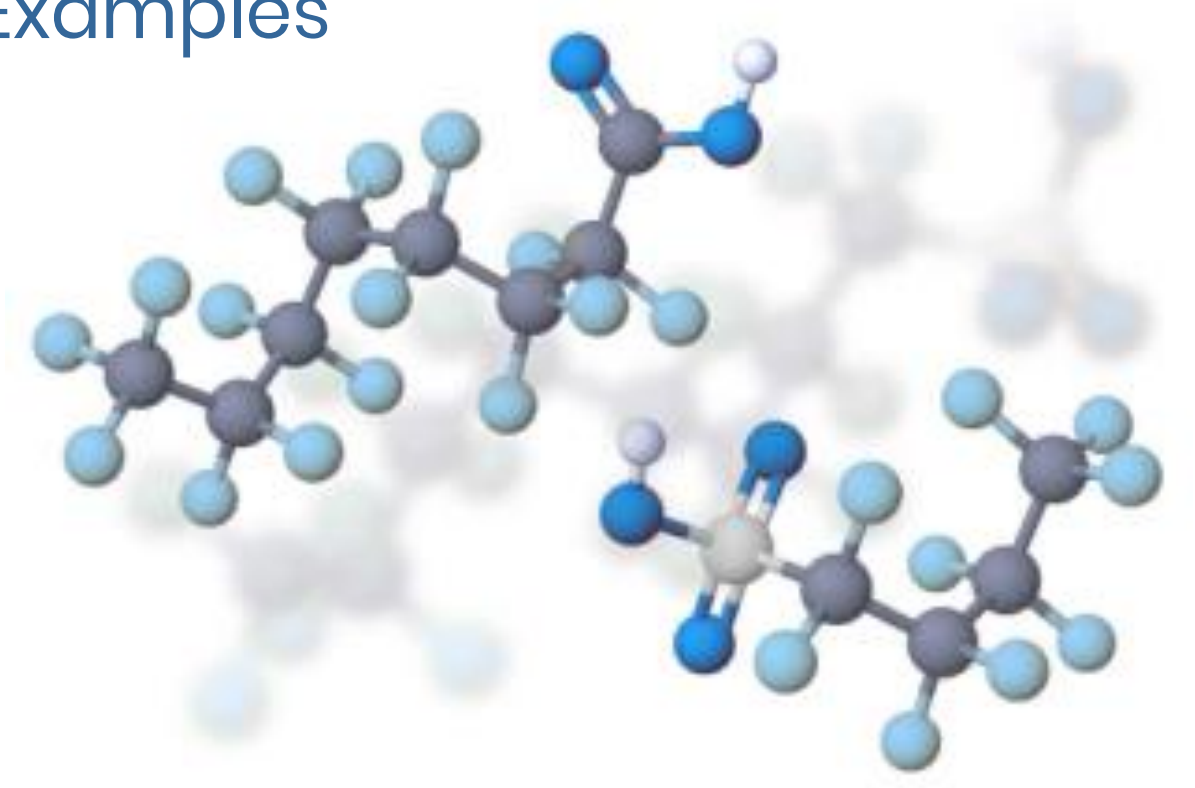
AGC THE CONSTRUCTION ASSOCIATION

PFAS

Contract Language Examples



Supplement to the AGC 2025 “General Contractors: Questions and Considerations Related to PFAS” available at no cost from the AGC of America website at go.agc.org/pfas.

SPECIAL NOTE ON THIS SUPPLEMENT

This document is a supplement to the Associated General Contractors of America (AGC) 2025 "General Contractors: Questions and Considerations Related to PFAS" available at no cost from the AGC of America website at go.agc.org/pfas. We recommend you start with the questions and consideration document for an introduction to PFAS and discussion of potential implications for construction projects during pursuit and pre-construction/design and execution including disposal.

SUPPLEMENT PURPOSE & DISCLAIMER – THIS DOCUMENT IS NOT LEGAL ADVICE

AGC of America intends this supplement to help construction companies understand the contractual risks associated with the known or unknown presence of per- and polyfluoroalkyl substances (PFAS) on jobsites. The document uses real world examples of contractual language to promote awareness of potential risk to the contractor.

This document is provided for informational purposes only and for issue-spotting; it is not designed to provide legal advice. It is not an exhaustive treatment of the subject that it covers. PFAS is a dynamic area of regulation and law; this document reflects information available at the time of publication. Contractors should consult with their respective legal counsel, insurers, and technical experts regarding site-specific risks and obligations.

The Associated General Contractors of America, Inc. assumes no liability for reliance on the contents of this document. The examples included in this document are provided solely and exclusively for instructional purposes.

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INTRODUCTION

Per- and polyfluoroalkyl substances (PFAS) are long-lasting chemicals found in everyday products across all areas of the economy. PFAS may be present on construction sites, including those for utilities, airports, highways, military base projects, and environmental cleanup jobs. Depending on the siting and past use, other types of projects may be impacted as well.

The regulatory framework for PFAS is evolving rapidly at the federal and state level. Currently, the construction industry does not have clear compliance or management directives and limited to no risk-sharing in contracts.

KEY CONTRACT SECTIONS THAT MAY ADDRESS PFAS AND HAZARDOUS SUBSTANCES

PFAS concerns can arise in several areas of a contract—even when PFAS are not specifically named. The following sections commonly contain terms that may shift PFAS-related risk, responsibility, or cost.

1. DEFINITION OF HAZARDOUS MATERIALS (INCLUDING PFAS)

Look for how the contract defines "Hazardous Materials," "Hazardous Substances," "Contaminants," or "Pollutants."

- **Why it matters:** If PFAS are not expressly included, they may fall into a gray area until formally listed under applicable law. Some contracts already include "emerging contaminants" or "PFAS" within their definitions, which may expand contractor responsibility for discovery, handling, cleanup, or disposal.
- **Practical tip:** Confirm whether the definition is limited to legally listed materials or includes broader "potentially harmful" substances. (Note: U.S. EPA regulates hazardous substances under Superfund and hazardous wastes under the Resource Conservation and Recovery Act. Currently, PFOA and PFOS are regulated under Superfund.) Also be aware of applicable state laws that may apply as some states have promulgated regulations.

2. HAZARDOUS WASTE MANAGEMENT/ENVIRONMENTAL PROTECTION

Look at whether the contract contains specific obligations for identifying, handling, and disposing of hazardous substances.

- **Key questions:**
    - Who must conduct testing and obtain approvals?
    - Who hires and pays for hazardous materials consultants or subcontractors?
    - Are cost and schedule impacts compensable?
    - Who is responsible for regulatory reporting?

3. DIFFERING SITE CONDITIONS (CHANGING CONDITIONS)

*This clause often determines whether the contractor **is entitled to additional time and/or money** if PFAS or other contamination is encountered.*

- **Risk point:** Many public contracts now exclude contamination from the differing site conditions clause, placing full responsibility on the contractor. Additionally, depending on the location, PFAS may not count as a differing site condition, if PFAS are not considered unforeseeable and unusual for the project location and project work.
    - Does the contract say that 'Contractor cannot rely on environmental or geotechnical reports'?
    - Are there Phase I and Phase 2 site assessments?
    - Consider whether or not the owner is testing for PFAS. The owner may not allow the contractor to test and/or may not have time to do that pre-bid. If the contractor is then responsible for disposal, it opens up questions about liability for arranging and transporting the waste.
        - If not allow to test, consider adding a section or addendum that states what reports and testing results were provided to the contractor and what testing was allowed or not allowed.

4. MATERIALS AND SUBSTANCES BROUGHT ONSITE

Some contracts may prohibit or restrict bringing materials containing hazardous substances onto the site.

- **PFAS tie-in:** If certain construction products (sealants, coatings, fire-suppressants) contain PFAS (regulated or as prohibited by the contract), the contractor may need owner approval

or substitution. (Note: Other countries may not have the same restrictions on PFOA and PFOS in materials as the United States does.) Make sure that any owner approval is in writing and added to the contract through a change order or something comparable.

5. WARRANTIES AND REPRESENTATIONS

Owners may require contractors to warrant that materials and work are free of hazardous substances.

- **PFAS implication:** Such warranties can expose contractors to post-completion liability if PFAS are later detected in building materials or systems. (See note above about out-of-country materials.)
- **Consider:** If such a warrant is required, then ensure that it is as limited as possible. This can be done by specifying that materials have been deemed free of hazardous substances, as defined on "X" date and by "X" supplier.

6. INSURANCE AND INDEMNIFICATION

Environmental liabilities may also be governed by insurance and indemnity clauses.

- **Consider:** Whether pollution liability insurance must cover PFAS; whether indemnity extends to newly regulated substances. Depending on the situation, PFAS may be covered under professional liability insurance or pollution insurance; however, check the terms of your coverage. Some carriers may exclude PFAS.
- **Consider:** Price adjustment clauses, which allow for changes in the agreed-upon price of goods or services based on specific conditions. This could also be used to address statutory changes in the classification of PFAS.

7. WORKER AND ENVIRONMENTAL EXPOSURES

Owner may require contractor to design worker exposure controls and/or conduct testing, sampling and monitoring at their own expense.

- **Consider:** Whether the contract shifts responsibility to the contractor to design worker exposure controls and pay for all testing, sampling, monitoring, analysis, treatment, and disposal costs— based on an assumption that contamination exceeds regulatory levels— without corresponding cost or time relief.

CONTRACT LANGUAGE EXAMPLES

The following examples come from real contracts and provide the opportunity for education and awareness. AGC modified the examples to remove any project identifying information.

DEFINITION OF HAZARDOUS MATERIALS (INCLUDING PFAS)

Example 1: Broad Definition Including PFAS

"Hazardous Materials" means any and all materials (including substances, chemicals, compounds, mixtures, products, byproducts, biologic agents, living or genetically modified materials, wastes, pollutants and contaminants), that (a) are listed, classified, characterized, identified, regulated or for which there are standards of conduct pursuant to Laws; (b) have the potential to harm, endanger, or cause injury to human health, natural resources or the environment; and/or (c) are petroleum products and their derivatives, asbestos-containing material, lead-based paint, polychlorinated biphenyls, urea formaldehyde, per- and poly-fluoroalkyl substances (so-called "PFAS"), or viral, bacterial or fungal material.

> [Note: Defining PFAS as a Hazardous Material means that the Contractor normally cannot use it and needs to get explicit permission before using on site – notwithstanding, Contractor still remains liable for its presence, use, and clean-up.]

Example 2: Regulatory Definition of Hazardous Materials or Waste

"Hazardous Materials or Waste: Hazardous materials or waste include but are not limited to explosives, compressed gas, flammable liquids, flammable solids, combustible liquids, oxidizers, poisons, radioactive materials, corrosives, etiologic agents, and other material classified as hazardous by 40 CFR 261, or applicable state and federal regulations."

> [Note: This type of regulatory definition ties contract responsibilities to federal and state hazardous waste classifications and may exclude unlisted emerging contaminants unless specifically added.]

HAZARDOUS WASTE MANAGEMENT/ENVIRONMENTAL PROTECTION

The following examples illustrate how contracts can shift environmental management and cost responsibility to the contractor.

Example 3: Contractor Duties for Hazardous Materials Management

"7.1.1.1 Except as otherwise provided in this Section 7.7.1, Design-Builder shall, as part of the D&C Work, perform, or cause to be performed, all Hazardous Materials Management required in connection with the Project in accordance with applicable Law, Governmental Approvals, the approved Environmental Protection Program, and all applicable provisions of the DBC Documents."

Example 4: Contractor Hires Environmental Consultants

"7.1.1.3 Design-Builder shall obtain Developer's approval of one or more independent hazardous material consultants (the "Hazmat Consultant") that will perform assessments of any Hazardous Materials encountered in connection with the Project, the Site or the D&C Work."

"7.1.1.6 Following Developer's approval of the Remediation Plan, Design-Builder shall obtain a minimum of two bids to complete the Hazardous Materials Management defined in the Remediation Plan. Design-Builder shall provide Developer with copies of all bids received. Design-Builder acknowledges that the firm completing the Hazardous Material Management pursuant to this Section 7.7.1.6 shall be deemed a Design-Builder-Related Entity."

> [Note: The concern is that the owner may refuse to test for PFAS, even if the environmental consultants recommend testing, and if the contractor tests and finds it—what then are the responsibilities/liabilities?]

Example 5: Contractor Hires the Subcontractors

"The Contractor's geotechnical engineer shall review all available geotechnical information provided in the Contract package and become familiar with the soil and site conditions at the project site by visiting the site. During the site visit and in subsequent phases of the project, the Contractor shall examine and/or verify the information provided and obtain any additional information to complete the design and construction of the project. **The Contractor remains solely responsible and liable for design sufficiency and should not depend on reports provided by the [Government] as part of the contract documents.**"

Example 6: Reimbursement and Cost Responsibility Clauses

"12.2.4 Costs and Delays. Except for Owner Release(s) of Hazardous Materials, except as set forth in Sections 12.2.3 and 12.3 and without limiting Owner's role or responsibilities set forth in Section 12.2.5, **Contractor shall not be entitled to any compensation due to increased costs or delays associated with the discovery, handling, storage, removal, remediation, transport, treatment or disposal of Hazardous Materials**, including contaminated groundwater, encountered in construction of the Project or Utility Adjustments."

"Reimbursement for Certain Costs. Owner shall compensate Contractor for 100% of Contractor's reasonable, out-of-pocket costs and expenses directly attributable to the handling,

transport, removal and disposal of Pre-existing Hazardous Materials encountered by Contractor. **The foregoing notwithstanding, none of the following costs and expenses shall be chargeable to Owner** under this Section 12.3.2: (i) costs and expenses to the extent **attributable to Contractor Releases of Hazardous Materials** or Owner Releases of Hazardous Materials (without prejudice to any rights in respect of a Compensation Event under clause (j) of the definition of Compensation Event); (ii) **delay and disruption costs and expenses**; (iii) costs and expenses that **could be avoided** by the exercise of commercially reasonable efforts to mitigate and reduce cost; and (iv) Contractor's administrative and overhead expenses arising out of or relating to "Pre-existing Hazardous Materials" . . . **Contractor shall have the burden of proof as to any Hazardous Materials not identified as being present."**

DIFFERING SITE CONDITIONS

These examples show how site contamination—such as undisclosed PFAS—may or may not qualify as a differing site condition.

Example 7: Concealed Conditions and PFAS Discovery

"4.3.5 Claims for Concealed or Unknown Conditions: Concealed or unknown physical conditions include utility lines, other man-made structures, storage facilities, Pollutants and Pollutant Facilities, and the like, but do not include conditions arising from Contractor operations, or failure of Contractor to properly protect and safeguard subsurface facilities. Concealed conditions also include **naturally-occurring** soil conditions **outside the range of soil conditions** identified through geotechnical investigations, but do not include conditions arising from groundwater, rain, or flood.

> [Note: Studies in New England states have shown PFAS at concentrations above regulatory levels in natural/undisturbed soils.]

4.3.5.1 If conditions are encountered at the site which are Underground Facilities or otherwise concealed or unknown conditions which differ materially from:

4.3.5.1.1 those indicated by the Contract; or

4.3.5.1.2 conditions which Contractor could have discovered through site inspection, geotechnical **testing, or otherwise**;

then Contractor will give written notice to City Engineer no later than five days after Contractor's first observation of the condition and before condition is disturbed. Contractor's failure to provide notice constitutes a waiver of a Claim.

4.3.5.2 City Engineer will promptly investigate concealed or unknown conditions. If City Engineer determines that conditions at the **site are not materially different** and that no change in Contract Price or Contract Time is justified, City Engineer will notify Contractor in writing, stating reasons. If City Engineer determines the conditions differ materially and cause increase

or decrease in Contractor's cost or time required for performance of part of the Work, City Engineer will recommend an adjustment in Contract Price or Contract Time, or both, as provided in Article 7.

> [Note: Consider a scenario where the contractor finds evidence that a PFAS facility or source is nearby that was not identified in the contract documents, but PFAS is found onsite.]

. . .

4.3.6 Claims for Additional Cost . . .

4.3.6.2 No increase in Contract Price is allowed for delays or hindrances to the Work, except for direct and unavoidable extra costs to Contractor caused by **failure of the City to provide information** and services, or to make land and materials available, when required of the City under the Contract. Any increase claimed is subject to the provisions of Section 4.4 and Article 7.

. . .

8.2 Delays and Extension of Time

8.2.1 Contractor may request extension of Contract Time for a delay in performance of work that arises from causes beyond control and without fault or negligence of Contractor. Examples of these causes are … discovery of Pollutants or Pollutant Facilities at the site."

> [Note: This provision allows schedule relief but may limit compensation for delay costs. It also demonstrates concern of missed historic uses and background conditions.]

8.2.2 For any reason other than those listed in Section 4.3.6.2, if the Contractor's work is delayed in any manner or respect, the Contractor shall have no claim for damages and shall have no right of additional compensation from the City by reason of any delay or increased expense to the Contractor's work, except for an extension of time as provided in this provision.

8.2.3 Contractor may request an extension of Contract Time for delay only if:

8.2.3.1 delay is caused by failure of Subcontractor or Supplier to perform or make progress; and

8.2.3.2 cause of failure is beyond control of both Contractor and Subcontractor or Supplier.

8.2.4 Claims relating to Contract Time must be made in accordance with Paragraph 4.3.7.

8.2.5 Claims for extending or shortening Contract Time are based on written notice promptly delivered by the Party making Claim to other Party. Claim must accurately describe occurrence generating Claim, and a statement of probable effect on progress of the Work."

Example 8: Differing Site Conditions Excluded from Relief

"11.04 Differing Site Conditions. CONTRACTOR agrees and warrants that it will make no claim against OWNER or ENGINEER for an extension of Contract Time or an increase in Contract Sum for differing site or subsurface conditions if, in the prosecution of the Work, the actual site or subsurface conditions encountered do not conform to those conditions shown in the Contract Documents, soils reports made or prepared by or on behalf of OWNER or ENGINEER, or to those actual site or subsurface conditions indicated by excavation, test excavation, test procedures, borings, explorations, or other subsurface excavations, whether made or prepared by OWNER, ENGINEER, or CONTRACTOR. OWNER AND ENGINEER MAKE NO WARRANTIES, EITHER EXPRESSED OR IMPLIED, CONCERNING THE JOB SITE OR SUBSURFACE CONDITIONS. No verbal agreement or conversation with OWNER or ENGINEER before or after the execution of this Contract, shall affect or modify any of the terms or obligations herein contained. Neither the Contract Sum nor the Contract Time shall be increased by reason of differing site conditions. Failure to show facilities on the Drawings, or to show them in their exact location, shall not be considered a differing site condition under this provision."

> [Note: This represents a high-risk clause where PFAS contamination discovered onsite is fully borne by the contractor. Also, note that PFAS will not demonstrate visual or odor qualities, so their presence will not be demonstrated through observation alone.]

MATERIALS AND SUBSTANCES BROUGHT ONSITE

Example 9: Owner Responsibility and Testing Provisions

"Notify the Engineer immediately when a visual observation or odor indicates that materials on sites owned or controlled by the Department may contain hazardous materials. Except as noted herein, the Department is responsible for testing, removing, and disposing of hazardous materials not introduced by the Contractor. The Engineer may suspend work wholly or in part during the testing, removing, or disposing of hazardous materials, except in the case where hazardous materials are introduced by the Contractor."

> [Note: This language is preferable because it directs the contractor to stop work and notify the Owner and the Owner takes responsibility.]

WORKER AND ENVIRONMENTAL EXPOSURES

Example 10: Requires Contractor to Design Worker Exposure Controls Absent Regulatory or Other Guidelines

"The Contractor should assume concentrations of PFAS in soil and groundwater exceed commercial/industrial levels. The Contractor shall design worker personal protective equipment (PPE) and processes to protect workers from exposure to contaminants in soil and groundwater. The Contractor shall conduct environmental air monitoring for volatile organic compounds (VOCs) when performing excavation activities or conducting work within excavations. Environmental air monitoring shall monitor the breathing zone of workers within or in the immediate vicinity of excavations and shall be performed in accordance with EM 385-1-1."

Example 11: Requires Contractors to Cover Unknown Quantities of Contaminated Materials without a Baseline

"… any water removed from dewatering activities should be considered impacted for the contaminants of concern present in groundwater within IRP, is also located within 500 feet of IRP Site. Therefore, any water removed from dewatering activities should also be considered impacted for the contaminants of concern present in groundwater within IRP Site."

. . .

"Prior to designing an on-site treatment system(s), the Contractor will be required to collect representative groundwater samples from each hangar, under sustained pumping conditions, to evaluate physical, biological, and geochemical attributes of the aquifer. The data collected will be used designing an on-site treatment system(s) for treating dewatered groundwater. Groundwater extracted during sustained pumping, or as a result of dewatering must be contained and analyzed for VOCs, total Resource Conservation Recovery Act (RCRA) metals plus iron, and PFAS, at the Contractor's expense, by a Department of Defense (DoD) National Environmental Laboratory Accreditation Program (NELAP)-certified laboratory via USEPA Methods 8260B and 6020B and 1633, respectively. PFAS analysis should be performed by a DoD NELAP-certified laboratory that is able to achieve a detection level below the current USEPA Maximum Contaminant Levels (MCLs) as outlined in Attachment. The Contractor will be responsible for collecting and analyzing groundwater for any additional parameters needed for designing an on-site treatment system(s) capable of treating contamination to concentrations below the current USEPA MCLs, complying with the State water quality standards and anti-degradation provisions, and meeting all requirements of the permit(s). Additional sampling and analysis will be conducted at the Contractor's expense, by a DoD NELAP-certified laboratory. The Contractor shall utilize the services of a qualified

environmental professional to collects groundwater samples. The Contractor shall provide the results of laboratory analysis for interpretation prior to any action.

> If the test results are above or the USEPA MCLs for groundwater the contaminated groundwater and must be transported offsite for disposal/treatment at the Contractor's expense; or on-site treatment is an option with coordination within accordance with federal regulations. In addition, the Contractor must coordinate with for signatures on the non-hazardous waste profiles/manifests that are required for transport."