

ENVIRONMENTAL CONTAMINATION: WHAT GENERAL CONTRACTORS NEED TO KNOW

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Environmental Contamination: Preplanning Helps General Contractors Address Environmental Issues.

Advanced planning allows general contractors to address environmental issues efficiently before those issues arise and to avoid project delays and litigation.

What Types of Environmental Issues Can Be Addressed During Preplanning? The first step during preplanning is to determine if known environmental issues exist at the site. Environmental issues can include the presence of such items as asbestos, lead-based paint, or contaminated soil. If known environmental issues exist, general contractors should work with facility representatives to determine who will be responsible for various aspects of managing waste generated during the project. If there are no known environmental issues, preplanning allows general contractors and facility representatives to develop contingency plans should environmental issues subsequently arise.

Other environmental issues that should be addressed during preplanning include determining who is responsible: (1) as the “generator” of any project-related waste; (2) for complying with environmental reporting obligations; (3) for decontamination issues; (4) for health and safety compliance, including the use of personal protective equipment (PPE); and (5) for mandatory training requirements.

a. Who Accepts Responsibility for Generated Waste? The waste “generator” is the person whose activity first “produces” a waste. If a general contractor excavates contaminated soil during a plant expansion or demolishes an existing structure, both the facility owner and the general contractor could legally be responsible for complying with any applicable generator requirements. Assigning responsibility prior to generating waste clearly delineates each party’s obligations and creates an effective mechanism to properly manage the waste. If the general contractor assumes responsibility, it must, among other things: (1) have mechanisms in place to determine if the waste is regulated under one of several regulatory programs; (2) ensure appropriate containers are available to hold the waste; (3) locate an appropriate treatment or disposal facility; (4) arrange for transportation of the waste; and (5) complete applicable paperwork.

b. Who Will Ensure Reporting Obligations Are Met? Reporting and response obligations for contamination, spills, or leaks arise under a variety of state and federal laws, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (generally applies to the release of hazardous substances at or above their “reportable quantities” over a 24 hour period); the Emergency Planning and Community Right to Know program (includes reportable spills under CERCLA and spills of extremely hazardous substances at or above regulatory thresholds); the Underground Storage Tank (UST)

program (applies to spills associated with regulated USTs); and state spill reporting requirements that vary widely from state-to-state. Often, notification is triggered by a variety of factors including the type and quantity of material released. The general contractor and other responsible parties should determine in advance who will assume responsibility for determining if reporting is required and providing required reports.

c. Other Preplanning Considerations. Other issues that should be addressed through preplanning include equipment decontamination; training; and health and safety issues, such as the use of personal protective equipment (PPE). If contamination is discovered while performing activities, the equipment used for that activity (e.g., backhoes that excavated contaminated soil) may need to be decontaminated to prevent contaminating other areas. Preplanning also includes making provisions for managing waste resulting from decontamination activities.

General contractors must know if their employees have the appropriate training to work with contaminated materials and may need to develop a site-specific Health and Safety Plan. OSHA’s Hazardous Waste Operations and Emergency Response regulation applies to certain clean-up activities and includes detailed training requirements. If your employees do not have the necessary training and the site is determined to be “contaminated,” the general contractor may need to retain a qualified subcontractor to clean up the contamination.

Finally, site contamination may require general contractors to comply with additional health and safety requirements, such as the use of PPE by potentially exposed workers. For example, if the on-site contamination could generate harmful vapors or dusts, employees may need to use respiratory protection. In addition, workers may need to use other types of PPE, such as chemical resistant gloves, boots, and clothing, if their activities could result in exposure to contaminated materials. In each instance, procedures must be established to decontaminate or otherwise manage contaminated PPE.

If you have any questions or would like additional information on Superfund, hazardous waste, or Brownfields, please contact the author of this article, Michael T. Scanlon, Esq., Barnes & Thornburg, at (317) 231-7387 or via e-mail at michael.scanlon@btlaw.com.

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