



## ASBESTOS REGULATORY CLARIFICATIONS

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Toxic Substances Control Division

ARC – 015

June 2002

### Subject:       The Role of a General Contractor in a Renovation or Demolition Project

#### **BACKGROUND**

The Texas Department of Health (TDH) seeks to clarify the role that a general contractor or other agent chosen by a building owner, may play in a renovation (asbestos abatement) project or in a demolition project. TDH rescinds its previous version of ARC – 015 issued in November 2001, which restricted the role of the general contractor acting on behalf of a building owner.

#### **RESPONSE**

TDH interprets its existing rules to allow a building owner to retain an agent of its choosing (i.e., a general contractor, architect, property manager, etc.) to contract with any asbestos licensee on behalf of the building owner subject only to three limitations in the *Conflicts of Interest* section below.

Whether using an agent or contracting directly with licensees, the building owner *retains the primary responsibility for the presence, condition, disturbance, renovation, demolition, and disposal of any asbestos encountered in the construction, operations, maintenance, or furnishing of that building or facility...*[25 TAC §295.34(b)]. The building owner, therefore, retains responsibility for most acts or omissions committed by the agent and should use care in selecting an agent who will ensure that the building owner's responsibilities are performed in accordance with the Texas Asbestos Health Protection Rules (TAHPR). The public building owner may not insulate itself from liability for violations of TAHPR through the use of a general contractor or other agent. TDH will pursue violations of TAHPR against the public building owner regardless of the contractual relationships between the parties.

Not all violations of TAHPR are pursued against the building owner. Appropriately licensed individuals must perform all asbestos related activities. TDH will enforce rule violations against a licensee when the violations committed fall under the responsibilities of the licensee as described in the TAHPR.



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## DISCUSSION

### TDH Interpretation of Existing Rules

TDH interprets 25 TAC §295.37(a) to allow the building owner's agent to hire the air monitor. It interprets the requirement that monitoring *shall be performed by a person under contract to the public building owner* (emphasis added) to allow a building owner to contract with the air monitor through an agent.

- 25 TAC §295.37(a) *Independent third-party air monitoring. Third-party area monitoring and project clearance monitoring for airborne concentrations of asbestos fibers during an abatement project shall be performed by a person under contract to the public building owner to collect samples by and for the owner of the public building being abated.*

TDH interprets 25 TAC §295.34(d)(1)-(2) to allow the building owner's agent to contract with the abatement or O&M contractor. It interprets the requirement that the *building owner may hire* (emphasis added) an abatement contractor to allow a building owner to hire contractors through an agent.

- 25 TAC §295.34(d) *Asbestos control and abatement. A public building owner has the following options for managing the asbestos found in his/her buildings.*

*(1) Building owners may hire a licensed abatement contractor to conduct asbestos abatement; or*

*(2) Building owners may hire or retain a licensed asbestos abatement contractor or a licensed asbestos Operations and Maintenance (O&M) contractor to conduct small-scale, short-duration activities or cleanup affecting asbestos...*



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TDH interprets 25 TAC §295.47(a)(1) to allow the building owner's agent to hire the consultant.

- 25 TAC §295.47(a)(1) *...If hired to perform the asbestos project management by the building owner, the consultant is responsible to ensure proper procedures are used from the time of the arrival of the abatement contractor on site through the completion of the removal of the containment and the departure of the contractor from the project site.*

TDH interprets 25 TAC §295.61(b) to allow notification to be submitted by the building owner or other agent. The current rule requires that in a public building the task may be delegated in writing to an abatement contractor or consultant. This rule will be amended to require that delegation to any other agent must also be in writing. In the meantime, TDH encourages all building owners who delegate this task to do so in writing. Contractors, consultants, and agents who accept this delegation also sign the notification as **Building Owner/ Operator or delegated Consultant/Contractor**. By signing as such, the responsibilities for the accuracy and timeliness of the notification are conveyed to the person accepting the delegation.

- 25 TAC §295.61(b), *...in a public building, this task may be delegated to a licensed asbestos abatement contractor or consultant in writing.... In a demolition where a licensed abatement contractor or consultant are not required, the task may be delegated to the demolition contractor.... The facility owner, and the person to whom the task of notification has been delegated, are jointly and severally responsible for the accuracy and timeliness of the notification.*

TDH interprets 25 TAC §295.61(b) to allow the notification fee to be paid by a person other than the building owner; however, the responsibility for ensuring the fee is paid timely cannot be delegated to another party. Failure to pay the fee within the prescribed time limit subjects the building owner to a violation of TAHPR.

## Conflicts of Interest Prohibited by TDH Rules

A building owner or its agent, including a general contractor, may hire any asbestos licensee except in three circumstances.



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1. A consultant may not hire an abatement contractor in accordance with 25 TAC §295.37(b).
  - 25 TAC §295.37(b) ***Licensee conflict of interest. Any person licensed according to these sections to perform asbestos inspections or surveys, write management plans, or design asbestos abatement projects shall not also engage in the removal of asbestos from those buildings, except for subsection (c) of this section. It is a conflict of interest for an individual instructor to train himself/herself in order to qualify for a license, or for an individual to give himself/herself a physical in order to qualify for a license.***

The purpose of this rule is to ensure that the consultant does not have a profit motive when reviewing an abatement project. There is a limited exemption for municipalities as stated in 25 TAC §295.37(c).

- 25 TAC §295.37(c) ***Municipalities exemption. Municipalities are exempt from the conflict of interest requirement only for the purpose of retaining a licensed person who may perform asbestos inspections and surveys, write management plans, design abatement projects and abate asbestos from the same building or facility. This exemption does not include air monitoring or abatement project clearance procedures which includes performing visual inspection and air samples for clearance in accordance with §295.58(i)(3) of this title (relating to Operation: General Requirements) which shall be performed by an independent third party who is not an employee of the municipality.***
2. A consultant may not be hired by an abatement contractor in accordance with 25 TAC §295.37(b).

The purpose of this rule is to ensure that the consultant can independently evaluate the abatement contractor's work by not working directly for him.

The exception to the rule is that a consultant may be hired by a building owner when the building owner is acting as the abatement contractor on its own building.



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If no exception was allowed, it would prevent the building owner from hiring the consultant required to design an abatement project above a certain size in accordance with 25 TAC §295.34(g). The exception also established that a building owner may conduct asbestos abatement projects if it obtains a contractor's licenses. An exception is required to permit both rules to operate.

- 25 TAC §295.34(d)(4) ***Building owners may conduct asbestos abatement projects, including asbestos O&M activities, if they obtain an asbestos abatement contractor's license, as set forth in §295.45 of this title (relating to Licensure: Asbestos Abatement Contractor).***

3. An abatement contractor may not hire an air monitor in accordance with 25 TAC §295.37(a).

The purpose of this rule is to ensure that the air monitor can independently evaluate the abatement contractor's work by not working directly for him. However, there are two exceptions to this rule.

The first exception to the rules is that an abatement contractor may hire an air monitor to conduct OSHA personal air samples.

- 25 TAC §295.37(a)(1)... ***this restriction in no way applies to personal samples taken to evaluate worker exposure, as required by the Occupational Safety and Health Administration (OSHA) regulations;...***

The second exception is that a building owner, who is also the abatement contractor doing work in its own building, may hire an air monitor.

- 25 TAC §295.37(a)(3) ... ***those who are licensed to perform asbestos abatement for their own account in their buildings shall employ an independent third-party air monitor for the purpose of obtaining area monitoring and final clearance.***

If no exception were allowed, the building owner could not obtain the required clearance samples needed to conclude an abatement project.



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These prohibited conflicts could, in some circumstances, limit the ability of the building owner's agent to hire certain licensees. An agent such as a general contractor or architect, who works as a licensee on a project may not be able to hire other licensees if prohibited by the conflicts listed above. For example, if a general contractor were also the abatement contractor, it could not hire the air monitor or the consultant without subjecting the consultant to a violation of 25 TAC §295.37(b). The building owner or another agent would have to hire the air monitor and consultant. If an architect were the consultant, it could not hire the abatement contractor. The building owner or another agent would have to hire the abatement contractor.

## National Emissions Standards for Hazardous Air Pollutants (NESHAP)

Under the federal NESHAP the general contractor or other agent may assume any of the responsibilities or requirements of the facility/building owner because the definition includes a person that controls or supervises the project.

## **FREQUENTLY ASKED QUESTIONS**

1. Can a general contractor or other agent hire the asbestos contractor or the asbestos consultant/project designer?

Answer: Yes, the general contractor or any other agent can hire any licensees on behalf of the owner for a project in a public building, a federal facility or an industrial facility. Public building owners may structure their renovation and demolition contracts in accordance with customary construction practices and law, subject to the limitations TAHPA listed under the ***Conflicts of Interest*** section. The building owner, however, retains primary responsibility for the project.

2. Can a general contractor or any other agent bid for an asbestos related activity?

Answer: A contractor or any other agent may solicit and gather bids for work to be performed in a public building from any and all TDH licensed asbestos professionals. If a general contractor submits a bid to work as a licensee on a project, however, he may jeopardize his ability to hire other asbestos licensees as limited by TAHPR. See ***Conflicts of Interest*** section.



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3. Can a general contractor or any other agent notify TDH on behalf of the owner regarding abatement or demolition of a public building?

Answer: Yes. TDH plans to amend its rules to make this clear. In the interim, it encourages the building owner to delegate that authority in writing to the general contractor. Under current rules, the building owner must delegate the authority in writing to an abatement contractor or licensed asbestos consultant for an abatement project in a public building.

4. Can a general contractor notify TDH on behalf of the building owner regarding abatement or demolition of a federal facility or an industrial facility?

Answer: Yes. No delegation is required under NESHAP, which governs these types of facilities.

5. Can a general contractor or any other agent pay a notification fee to the department?

Answer: Yes. No delegation is needed in writing although the responsibility for the fee remains with the building owner under 25 TAC §295.61(j)(4).

6. What is meant by “most” as indicated in the Response section of this clarification, *(t)he building owner, therefore, retains responsibility for most acts or omissions committed by the agent?*

Answer: The Asbestos Program has historically permitted the notification responsibilities, specifically timeliness and accuracy, to be delegated to a licensee. By virtue of this clarification, we are expanding this capability to owner’s agent. Under these circumstances, if a licensee or agent submits a notification that is late or inaccurate, the program shall issue an alleged Notice of Violation (NOV) to the licensee or agent that signed the notification, not the building owner.





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Conversely, the Asbestos Program maintains that the building owner retains responsibility for the hiring licensed professionals, having a survey done before renovating, and paying the fee on time. If an agent is allowed to perform these duties on behalf of the building owner and they violate the TAHPR with respect to these duties, the building owner gets the NOV.

Agree to form and substance

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