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## ACCESSING SAFETY KNOWLEDGE (ASK) SHEET: *RIGHTS AND RESPONSIBILITIES ON AN UNSAFE JOBSITE*

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ASA-HC's "How To Handle an Unsafe Jobsite" ASK sheet reviews some of the concerns and practical recommendations for responding to unsafe jobsite conditions from the perspective of a subcontractor who notices another contractor performing work unsafely. This ASK sheet, will review the legal ramifications, which arise primarily from three sources: (1) your contract, (2) the "common law" of negligence, and (3) OSHA or other safety regulations. The rules from these different sources occasionally conflict with each other, but in most cases, the recommendations offered last month are the safest practices from a legal perspective.

The first place to look is your contract. It establishes the law that applies to your work for that project. Most contracts prohibit violations of OSHA and other safety regulations, but are usually one-sided, making the subcontractor obligated to the general contractor ("GC"), but not vice-versa. You should negotiate for these "conduit" clauses to be mutual, with rights and obligations running both ways. Your contract may list the circumstances under which you can stop work. Subcontractors should negotiate to include rules for dealing with the discovery of hazardous substances and other safety risks. AIA and the ConsensusDocs both include helpful hazardous materials provisions. Without such clauses, stopping your work may place you in breach of your contract because you did not "diligently prosecute" your work, couldn't finish within the contract time, or because stoppage of your work delayed others.

Fortunately, Texas law recognizes an implied obligation by the GC to coordinate the work of various trades and not to actively interfere with contractual performance. Knowingly allowing conditions that prevent safe performance of someone else's work may be considered a form of active interference. Providing written notice to the GC can help to set-up your claim that the GC actively decided to allow others to interfere with your work.

Under the "common law" (law imposed by court decisions), you can be held liable for "negligence" if your failure to exercise ordinary care foreseeably causes property damage, injury or death. "Ordinary care" is defined as "failure to do what a reasonably prudent person or company would do in the same or similar circumstances." In Texas, this duty only applies to a contractor who has exercised control or has the right to control the circumstances that created the accident. Several factors, including the terms of your contract, affect whether you have enough control to be held liable. Because the question of control is often uncertain, you should do what is reasonable under the circumstances, which usually means giving notice to those you believe are the cause or in control, and sometimes means removing your workers from the zone of danger, or stopping work.

OSHA issues citations with monetary penalties for violation of their standards. It has been OSHA's practice to cite any employer who created, controlled or who could correct a hazardous condition, as well as any employer whose employees are exposed to the zone of danger. Even though the federal court of appeals with jurisdiction over Texas does not enforce OSHA's "multi-employer" policy, OSHA assess penalties against the "controlling employer", even if another contractor exposed its employees or created the hazard. Regardless, it is a valid defense that you lacked the means to correct the hazard (based on contractual, physical or monetary constraints) and took realistic measures to abate the hazard. If the creating or controlling contractor doesn't abate the problem after you have complained to them, then you've received proof that the ability to complain didn't give you sufficient means to correct the hazard. Therefore, the most realistic possible means will often be to barricade or somehow separate your workers from the zone of danger, and at-least threaten to stop work.