

0080409 Prosecution and Progress – Contaminated Materials.  
COMMENTS FROM INTERNAL/INDUSTRY REVIEW

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Comment: (3-17-11) Looks to be a simple grammatical correction ... we should handle this as a typo.

Response: No action taken.

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Chris Sweitzer

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Comments: (3-29-11) In the last two paragraphs, suggest replacing "Such indemnification agreement..." with either "This indemnification agreement..." or "Such an indemnification agreement..." for grammar and readability reasons.

Response: *As written is grammatically correct and has been vetted by General Counsel's Office. Will leave as written.*

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Comments: (4-15-11) In the fifth paragraph of the proposed spec, a change has been proposed to change the wording from "The Department may agree to hold harmless and indemnify . . . ." to "The Department agrees to hold harmless and indemnify . . . ." I recommend that this proposed change not be made.

The current spec provides that if contaminated materials or pollutants were unknown or not reasonably discoverable, the Department may indemnify, thus removing or mitigating disagreements between contractor and Department over whether or not a condition was unknown or not reasonably discoverable since the decision ultimately remains with the Department as to whether to indemnify. If the proposed change is adopted, and there is a disagreement as to whether a condition was unknown or not reasonably discoverable, the Department loses control over the ultimate resolution of the disagreement, and probably would be more amenable to a more expensive resolution.

In addition, the current spec also incentivizes the Contractor to be more careful and vigilant to avoid completely areas involving pollutants or contaminants, and maintain a higher standard knowing that the Department, in its discretion, may not indemnify where foresee ability is a close call.

Response: *Through discussions with the Surety Industry, the Department agreed to make this revision to hold harmless or indemnify a contractor if an unknown contaminate is discovered on a project. Regarding the incentive to the contractor to be more careful, that still exists and is addressed in the final paragraph of this section which says the indemnification does not apply if the conduct of the contractor affects the contaminated areas. Will leave revision as drafted.*

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Pat McCann

Comments: (4-26-11) District 4 Construction offers the following comments:In the second to last paragraph, suggest we clarify what damages we will indmenify.I assume you mean any damages

directly related to uncovering of the hazmat.

*Response: Correct – is only for damages associated with discovering or encountering  
contaminates or hazardous materials.*

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