

I. Executive Summary

This document was prepared by the Law Office of Adele Adele L. Abrams PC (the Firm) on behalf of the Precast/Prestressed Concrete Institute (PCI). This document contains draft model contract language that addresses the issue of total dust and respirable crystalline silica dust present on Construction Projects. This request arose from the recent PCI crystalline silica program which involved, in part, taking samples of PCI member's employees and subcontractor employees working on third party Construction Projects. The sampling results indicated that Construction Project dust not generated by a PCI member could cause overexposures to the PCI member's employees and to subcontractors that they utilize.

Thus, PCI is taking a proactive approach to address the responsibility of controlling total dust and respirable crystalline silica on Construction Projects. This is important since, at multi-employer worksites, OSHA can enforce standards in tandem against the controlling contractor, creating employer, exposing employer, and correcting employer. To ensure the proper allocation of responsibilities between the multi-employers on a Construction Project, the proposed contract language should be included in contracts regarding the various relationships including (1) Erector and Project Constructor (aka General Contractor/Controlling Entity/Entity in Charge); (2) Producer and Project Constructor; and (3) Producer and Erector.

II. ANSI A10.33 – Source of Consistency

The model contract language is consistent with the safety and health approach taken in the ANSI A10.33 national consensus standard for multi-employer construction worksites. This document provides an industry accepted framework and in many cases is incorporated into construction documents.

The following terms are used throughout this document recognizing that other ways to define these terms may be used in the PCI member companies' contracts.

Construction Project. The construction project encompasses all activities performed for a construction owner in fulfillment of a contract. Project documents typically describe the scope of the construction project and define the related project tasks.

Owner. The legal entity entering into the contract with the project constructor for completing all work contained in the project documents.

Project Constructor. The entity responsible for supervising and controlling all construction work performed on the project as specified in the project documents. The project constructor may also be referred to as the prime contractor, the construction manager, or the general contractor.

III. Contract Language for Different Contracting Party Relationships

In discussions with PCI staff, Producers and Erectors, it is clear that they use various contract forms and clauses and reference documents for their Construction Projects. The following documents were reviewed for this project:

- Precast/Prestressed Concrete Institute – Contract Clause recommendations
- American Subcontractors Association – Consensus Document 750
- American Institute of Architects – Document A401
- ANSI A10.33 – American National Standard Construction and Demolition Operations – Safety and Health Program Requirements for Multi-Employer Projects
- Individual company customized contracts derived over time

Regardless of the specific contract used to control the parties' obligations, the following model language is recommended. Commentary is also provided to put the contract language in context. This document does not provide model indemnity clauses since PCI has already done so in its contract clause document.

Note- This contract language can be modified by any PCI Member who works on construction sites with similar contract terms as that of an erector (ex. patchers, grouters, caulkers, etc.)

A. Erector and Project Constructor

The Project Constructor shall be responsible for controlling dust (which may include respirable crystalline silica) on a Construction Project regardless of its source(s) including, but not limited to, windblown onto the site, generated by truck and equipment travel regardless of who is operating the truck or equipment, or generated by other parties. This Subcontractor (Erector) shall only be responsible for control of dust generated by the performance of its work activities such as cutting, sawing, drilling, grinding, attaching, patching or altering the precast.

This Subcontractor shall have the right to stop work and restrict access to the affected area(s) under the applicable OSHA standard if it can demonstrate, through appropriate monitoring devices or other methods, that the dust being generated is or is anticipated to be in excess of OSHA requirements related to total dust or respirable crystalline silica.

Any civil penalties imposed by OSHA or other regulatory bodies against the Subcontractor (Erector) due to non-compliance with the dust standards and due to no fault of this Subcontractor shall be the responsibility of the Project Constructor.

Commentary:

These clauses place the responsibility for dust control squarely on the Project Constructor regardless of how the dust is generated. For instance, if you have a crushing operation creating dust on the Construction Project being managed by another subcontractor near the Erector's work place, then the Project Constructor is obligated to control the dust by whatever means it decides. Also, if you have delivery trucks coming onto the Construction Project, whether they are delivering Erector's materials or general supplies, the Project Constructor is obligated to control the dust by whatever means it determines will be effective.

If a Subcontractor (Erector) is required to take the extraordinary measure of stopping work due to dust, then the Subcontractor must be able to prove the standard for total dust (15 mg/m^3), respirable dust (5 mg/m^3), or silica respirable dust (50 ug/m^3) is, or is likely to be, exceeded, and further that the excessive dust generation is due to no fault of its own. The best way to show excessive dust levels is to conduct area dust monitoring using the appropriate sampling devices. Currently, there is not a direct read instrument that can measure just silica so the typical dust pump will need to be used. The key is to show Construction Project dust is excessive and that the Subcontractor's employees could be exposed to such dust if they were to walk thru the affected area.

Any civil penalties imposed by OSHA due to the fault of others should not be paid by the Subcontractor, but should be the responsibility of the Project Constructor. Proof that the Subcontractor did not contribute to the occurrence of dust must be shown by the Subcontractor so sampling data must be gathered and it will be critical to document what controls are in use (e.g., water-integrated tools, vacuum systems).

Since obtaining sampling results can take several weeks, Erector companies also can use direct read instruments in suspected problem areas of the worksite. In order for the direct read instrument to be effective measuring respirable silica dust, the silica content of the dust sampled must be known. Thus, it is incumbent on the Erector to know the silica content of materials used on the Construction Project. The Erector can request this percentage be provided by the Project Constructor or it can take its own bulk sample of the soil and use that figure throughout the project. Either way, this will only provide an estimate of the silica content but at least will provide some understanding of the silica content such that direct read instruments can be used.

B. Producer and Project Constructor

The Project Constructor shall be responsible for controlling dust (which may include respirable crystalline silica) on a Construction Project regardless of its source(s) including, but not limited to, windblown onto the site, generated by truck and equipment travel regardless of who is operating the truck or equipment, or generated by other parties. This Subcontractor (Producer) shall only be responsible for control of dust generated by the performance of its work activities or work activities it directs through other subcontractors. These work activities may include cutting, sawing, drilling, grinding, attaching, patching or altering the precast.

This Subcontractor shall have the right to stop work and restrict access to the affected area(s) under the applicable OSHA standard if it can show, through appropriate monitoring devices or other methods, that the dust being generated is in excess of OSHA requirements related to total dust or respirable crystalline silica.

Any civil penalties imposed by OSHA or other regulatory bodies against the Subcontractor (Producer) due to non-compliance with the dust standards and due to no fault of this Subcontractor or of subcontractors it directs shall be the responsibility of the Project Constructor.

Commentary:

These clauses place the responsibility for dust control squarely on the Project Constructor regardless of how the dust is generated. For instance, if you have a crushing operation creating dust on the Construction Project, being managed by another subcontractor near the Producer's work place or its subcontractor's work place, then the Project Constructor is obligated to control the dust by whatever means it determines will be effective. Also, if you delivering trucks coming onto the Construction Project whether they are delivering Producer's materials or general supplies, the Project Constructor is obligated to control the dust by whatever means it decides.

If a Subcontractor (Producer) is required to take the extraordinary measure of stopping work due to dust, then the Subcontractor must be able to prove the standard for total dust (15 mg/m^3), respirable dust (5 mg/m^3), or silica respirable dust (50 ug/m^3) is, or is likely to be, exceeded. The best way to show excessive dust levels is to conduct area dust monitoring using the appropriate sampling devices. Currently, there is not a direct read instrument that can measure just silica so the typical dust pump will need to be used. The key is to show Construction Project dust is excessive and that the Subcontractor's employees could be exposed to such dust if they were to walk thru the affected area.

Any civil penalties imposed due to the fault of others should not be paid by the Subcontractor. Proof that the Subcontractor did not contribute to the occurrence of dust must be shown by the Subcontractor so sampling data must be gathered.

Since obtaining sampling results can take several weeks, Producer companies also can use direct read instruments in suspected problem areas of the worksite. In order for the direct read instrument to be effective measuring respirable silica dust, the silica content of the dust sampled must be known. Thus, it is incumbent on the Producer to know the silica content of materials used on the Construction Project. The Producer can request this percentage be provided by the Project Constructor or it can take its own bulk sample of the soil and use that figure throughout the project. Either way, this will only provide an estimate of the silica content but at least will provide some understanding of the silica content such that direct read instruments can be used.

C. Producer and Erector

Any civil penalties imposed by OSHA or other regulatory bodies due to non-compliance with the dust standards and due to no fault of the Producer or subcontractors (Erector) it directs shall be the responsibility of the Project Constructor.

Commentary:

This clause protects the Producer for the acts of the Erector, which is the entity on the Construction Project. If the assumed factual scenario changes, then the language above must be adapted.