



MEMO TO FILE

Unforeseen Conditions: Mold

The discovery of mold does not make you nervous, because you have a plan for that.

Mold is common. More common than mold is the customer question, pre-project, “what if you find mold?” Few things provoke homeowner anxiety more than the discovery of mold during a remodel. Yet, the building code is silent on mold – so what is a contractor to do? With no established mold standards and no established professional licensing for mold remediation, the way forward is wide open. But instead of bush-whacking your way through it, you can create a disciplined path forward by preparing a change order (an addendum to the contract) with an air-tight scope of work and legally-compliant limitation of liability clause.

When confronted with the discovery of mold, many contractors wing it. They do not know what is required of them substantively, with the mold itself, or procedurally, i.e. notifying the customer about the problem and explaining the path ahead. Contractors can distinguish themselves (and protect against liability down the road) by doing the following:

1. Perform a good-faith investigation into what may be causing the mold, knowing that mold is created by the presence of excess moisture or water (and lack of ventilation). Common culprits include a compromised shower-floor base or pan system, ice dam water infiltration into ceilings and stud bays, leaks through wall-roof intersections (lack of step flashing), and improperly installed siding and exterior trim (no header-trim drip cap, for example). Inform the customer promptly about the mold (documented with photos) and your professional opinion (but not guarantee) as to the cause. Invite them into the work area (assuming it is safe to do so) to see the mold for themselves.
2. Remind the customer that the contract has a clear, defined Unforeseen Conditions clause. The mold is an unforeseen condition. There will be choices that need to be made about how to proceed and the costs are the financial responsibility of the customer.
3. Inform the customer that there are no established limits (federal or state) on how much mold can exist before health impacts are expected. In fact, the presence of mold does not necessarily indicate a problem. Mold and mold spores are pervasive inside and outside. The building code does not address mold. In Massachusetts, mold is covered by the state sanitary code (105 CMR 410), which is enforceable by local/municipal health agents, not building

inspectors. The sanitary code applies to all residencies (including single-family, owner-occupied homes), not just rental units. The sanitary code states:

*410.500: Owner's Responsibility to Maintain Building and Structural Elements (A)
Every owner of a residence shall maintain all buildings and structural elements in compliance with accepted standards so they are in good repair and in every way fit for the intended use, including: (1) Protected from wind, rain and snow, and are watertight, free from excess moisture or the appearance of mold, and pest resistant; (...)*

(emphasis added)

This provision of the sanitary code, and the building code's silence on mold, clearly place the responsibility of remedying the mold on the homeowner. Dealing with the mold is not the contractor's responsibility. As the contractor, you obviously cannot create a condition that would result in additional excess moisture or mold, but you are not responsible for fixing an unforeseen mold issue that already exists.

4. Explain there is no federal or state licensure or certification for mold removal or mitigation. There are industry groups that offer their own certification, but that is it. EPA guidance (which is not law) states that an area of mold less than 10 s.f. is considered within the ability of homeowners to handle themselves. For areas greater than 10 s.f., it is recommended that a "professional" perform the work.

No matter who performs the mold mitigation work, the key is a change order with an air-tight scope of work and legally compliant limitation of liability clause.

1. Scope of Work. If you are doing the mold mitigation work, then with no real legal standards and no licensing, the scope of work for the mold mitigation, however simple, should follow some objective standard. A logical touchstone would be the EPA guidance and "best practices" for mold mitigation that do exist. If some other professional is doing the work, then the change order needs to note that.

If the additional work that you think is necessary to eliminate the moisture or water infiltration possibly causing the mold is not already included in the scope of work for the project at hand, then that additional work (the scope and cost of it) must be recorded in the change order.

2. Limitation of Liability. Given the insidious nature of mold, the contractor must be careful not to guarantee anything, whether it's the work dealing with the mold itself or the work needed to remedy the cause of the mold. But a no-guarantee statement is not the same as a limitation of liability. The contractor may wish to affirmatively limit their liability if mold reappears someday or even causes property damage or a health problem.

Most contractors are familiar with the adage "you can't ask a customer to waive code compliance." But given the lack of code around mold, code compliance is a moot point.

However, any liability limitation language must be printed in 12-point bold type per M.G.L. c. 143, §90, a little-known Massachusetts law concerning limitation of liability provisions in home improvement contracts. The statute is worth reviewing.

Closing thoughts:

- Be careful: some contractor general liability policies may contain exclusions for mold-related work performed by the insured contractor. If you are in a situation where the homeowner wants you to remove, repair or mitigate the mold at hand, and you are feeling uncomfortable about it for some reason, there is a good chance that you can lean on your insurance policy to pass on it and tell the customer that they need to hire someone else and to let you know when the site is ready for them to return.
- Let's say the homeowner elects to utilize a mold professional, the professionals are booking two to three weeks out and the actual work is going to take 7-10 days. Can you charge a delay fee? Probably, as long as it is clearly and conspicuously stated in the unforeseen conditions clause in your contract. But in a matter with a strong public health and safety undertone, like mold, it may not be a good look to charge fees for an otherwise minor, reasonable delay.

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