



nerej

Faulty asbestos removal draws hefty fines against contractors

March 04, 2009 - Owners Developers & Managers

Asbestos was widely used in building materials and in the construction industry until the late 1970s. There are a number of federal and state laws which regulate asbestos including the federal Clean Air Act, which defines asbestos as a hazardous air pollutant. Also, the Occupational Safety and Health Administration (OSHA) has promulgated rules governing the occupational exposure to asbestos. State and federal regulations require the identification and removal of all asbestos containing materials before the asbestos is disturbed by renovation or demolition activities. Failure to take necessary precautions can result in significant penalties at the state and federal levels, and higher clean-up, decontamination, disposal and monitoring costs.

Enforcement agencies increase fines in response to continuing noncompliance

Contractors continue to run afoul of federal and state regulations governing asbestos detection and removal from construction projects. Government enforcement agencies are taking notice and cracking down on violators by imposing increasingly severe fines to deter noncompliance. Recently, two contractors working on a property in New England were ordered to pay a combined total of \$300,000 in fines pursuant to a settlement agreement they reached with the U.S. Environmental Protection Agency (EPA) for alleged violations of the federal Clean Air Act and other federal regulations involving the improper removal and disposal of asbestos. Specific violations included failure to:

1. Thoroughly inspect the facility prior to beginning renovations;
2. notify the EPA or the delegated state authority of the renovations;
3. adequately prepare and secure the jobsite before asbestos removal;
4. properly collect and contain the asbestos for disposal;
5. correctly label containers containing asbestos as required by applicable regulations; and
6. deposit asbestos waste at a proper disposal site.

Such stringent fine amounts are becoming increasingly common.

Penalties are broad and violators face strict liability regardless of contractual limitations

Contractors, project owners and operators are warned that the scope of regulations and penalties for asbestos violations is extremely broad. Violators face both state and federal penalties. In addition to civil actions seeking to recover fines and/or obtain injunctive relief, state and federal agencies also have the power to bring criminal proceedings. Strict liability in civil cases is imposed on owners and/or "operators" (broadly defined to include, but not be limited to, building owners, contractors, subcontractors, architects, etc.) for asbestos removal violations regardless of negligence or fault, and even if they were unaware of the violation. Government agencies are not restricted to selecting the operator most closely connected with the asbestos violation. Instead, they may seek to recover against any (or all) operators in the project chain (owner, operator, general contractor,

subcontractor, architects, etc.) regardless of culpability, and notwithstanding any contractual provision which seeks to assign responsibility and/or disclaim liability related to asbestos to a third party.

Avoiding asbestos removal violations under Massachusetts law

All residential, commercial and institutional buildings are subject to federal and state asbestos regulations. All states, including Massachusetts, have enacted asbestos regulations. The Massachusetts Department of Environmental Protection (Mass. DEP) imposes certain inspection and notification requirements on owners and/or operators (as defined broadly, above).

Inspection and Notification Prior To Demolition

Massachusetts regulations require that owners and/or operators determine whether asbestos-containing materials are present at the jobsite whether or not those materials will be impacted or disturbed by the proposed work prior to conducting any renovation or demolition activity. The "person responsible" for the project must notify the Mass. DEP ten days prior to the commencement of any construction or demolition activities.

Survey requirements for asbestos containing materials

Mass. DEP regulations do not require that all demolition projects obtain an asbestos containing materials (ACM) survey; however, the regulations mandate that if asbestos is present or detected at the jobsite then the Mass. DEP must be notified and certain information and project details must be included in the notification to the Mass. DEP. The Mass. DEP will instruct the operator as to next steps, including conducting a ACM survey.

Procedures for asbestos emissions control, containment and disposal

Once asbestos has been or will be disturbed at the project, the Mass. DEP, the Dept. of Labor and Workforce Development, and OSHA have regulations for the removal, handling, containment and disposal of asbestos.

Dianne Phillips is a partner and Gina Fonte is an associate with Holland & Knight LLP, Boston, Mass.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540