Standpipe Lead Based Paint Abatement/Sandblasting: New York Supreme Court, Appellate Division Addresses Issues Arising Out of Alleged Breach of Contract for PCB Contamination

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

04/07/2025

The Supreme Court, Appellate Division of New York ("Appellate Division") addressed in an April 3rd Memorandum and Order ("Memorandum") issues arising in connection with the rehabilitation of a one-million-gallon standpipe. *See Town of Colonie, et al., v. Global Contracting & Painting, Inc*. 2025 WL 993352.

The issues addressed included whether the discovery of polychlorinated biphenyls ("PCBs") was properly addressed as required under a contract.

Global Contracting & Painting, Inc. ("Global") won a bid for a Town of Colonie ("Town") project involving various restoration tasks related to the previously referenced standpipe. The project would include sandblasting, lead based paint abatement, and painting of the interior and exterior of the standpipe.

C.T. Male Associates Engineering ("CT") served as project manager. This role is stated to have included preparation of the bid and contract documents on behalf of the Town. The terms of the contract are stated to have included when:

…Global could be held responsible for the removal or remediation of a hazardous environmental condition at the project site.

In blasting and finishing repainting the interior of the standpipe, paint chip samples tested positive for hazardous levels of PCBs. The Town was notified of the testing results and the previous transfer of the hazardous waste to a landfill was stopped. The material was returned to the worksite.

CT subsequently contacted Global and directed that the material be secured as a qualifying hazardous material. It asserted that the disposal of the paint chip waste and any necessary environmental site remediation was Global's responsibility.

Global responded that the material from the interior of the standpipe was an unanticipated environmental condition that was not expressly identified in the contract as being within the scope of work. Therefore, it asserted that the Town was responsible for remediation.

Global ceased work on the project.

The Town filed a breach of contract action against Global and its president alleging that they failed to properly address the hazardous waste as required under the contract and to timely complete the project. Global responded with a counterclaim for breach of contract based on the Town's alleged failure to accurately disclose the concentration of PCBs at the worksite and to issue change orders in accordance with the hazardous conditions discovered.

The lower court found that the PCBs were an undisclosed hazardous environmental condition. Therefore, Global was not obligated to remediate and the Town was obligated to indemnify for costs associated with the contamination. However, it also partially granted a finding that Global's right to indemnification was subject to certain limitations under the contract absent a showing of "reckless, willful, or bad-faith conduct".

The Appellate Division agreed that the terms of the contract concerning hazardous conditions present at the project site were ambiguous. The contract required Global to:

…abate lead-based paint...and PCB containing paint on all of the exterior surfaces" of the standpipe and ancillary equipment, and to comply with federal regulations "during the removal of the coating system (paint) on the exterior of the [standpipe].

Additional references regarding acceptable removal and abatement methods and requirements solely concerned the standpipe's exterior were noted. Global would not be held responsible for:

…removing or remediating any Hazardous Environmental Condition encountered, uncovered, or revealed at the [s]ite unless such removal or remediation is expressly identified in the [c]ontract [d]ocuments to be within the scope of the [w]ork.

Further, Global was permitted to rely upon the accuracy of the technical data expressly identified by the Town regarding the presence of environmental hazards.

The Appellate Division noted that Global's technical data and information provided by the Town identified low levels of lead-based paint and PCBs on the exterior of the standpipe and in the soil at the project site without reference to the standpipe's interior. Also referenced was a 2017 Health and Safety Plan and bid documents indicating that the standpipe had been repainted in 1991.

The Appellate Division found that Global met its initial burden on summary judgment as this indicated that the presence of PCBs on the interior of the standpipe was not expressly identified. In addition, it held that the Town did not contradict Global's submission but an affidavit by the Superintendent of the Latham Water District conceded that the samples had not been taken from the interior of the standpipe prior to the commencement of the project.

The Town did assert that it was nevertheless not a reasonable assumption that the interior was free from PCBs.

The Appellate Division found that the PCBs in the standpipe's interior were an undisclosed hazardous environmental condition for which Global was not responsible and the Town subject to indemnification.

In addressing the indemnification issue, the Appellate Division notes contradictory terms in the relevant provision but finds that the more specific limitations are controlling. It upholds the lower court's finding that Global's right to indemnification for damages related to the hazardous environmental condition did not extend to potential losses it might face during its work on any and all other projects on which it was engaged.

A copy of the Memorandum can be downloaded here.