U.S. Department of Homeland Security

United States Coast Guard

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United States Coast Guard
National Pollution Funds Center

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5890
8/16/2012

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4803 7612

Wakulla Homes at Tully's Corner, Inc.
[redacted]

RE: Claim Number: N10036-1713

Dear Ms. Williams:

The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on claim number N10036-1713 involving the Deepwater Horizon oil spill. Please see the enclosed Claim Summary/Determination Form for further explanation.

Disposition of this reconsideration constitutes final agency action.

[redacted]
U.S. Coast Guard

Encl: Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1713
Claimant	: Wakulla Homes at Tully's Corner, Inc.
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: $385,066.88

FACTS:

On or about 20 April 2010, the Mobile Offshore Drilling Unit Deepwater Horizon (Deepwater Horizon) exploded and sank in the Gulf of Mexico. As a result of the explosion and sinking, oil was discharged. The Coast Guard designated the source of the discharge and identified BP as a responsible party (RP). BP accepted the designation and advertised its OPA claims process. On 23 August 2010, the Gulf Coast Claims Facility (GCCF) began accepting and adjudicating claims for certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT:

On 12 March 2012, Janice Williams, on behalf of Wakulla Homes at Tully's Corner, Inc., (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking $1,103,876.28 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.[1]

From June 2008 until September 2010, the Claimant "offered modular/manufactured homes for sale in coastal Wakulla County."[2] The Claimant alleged that,

> Wakulla Homes suffered a significant loss of customers as a result of the BP Oil Spill . . . Prospective buyers believed that the coast was going to be severely impacted by oil pollution and held off on purchasing homes in Wakulla County indefinitely. Since the company had only opened its doors in late 2008, the sharp drop off in customer interest and sales was devastating.[3]

The Claimant closed its business in September of 2010 and seeks $1,103,876.28 in loss of profits damages, which includes 2010 losses, future losses and claim assessment fees.[4]

Prior to presentment of this claim to the NPFC, the Claimant presented a one-month Emergency Advance Payment (EAP) claim to the RP/GCCF, seeking lost profits damages of $20,000.00. The Claimant was assigned GCCF Claimant ID # 1147169 and the EAP claim was assigned claim # 3025.[5] This claim was paid in full in a determination dated 28 September 2010.[6]

The Claimant then presented a Third Quarter Interim Claim (ICQ32011) to the RP/GCCF, again seeking lost profits damages.[7] The ICQ32011 was assigned claim # 9430212, and was paid in the amount of $49,824.36 in a determination dated 16 December 2011.[8] In the same determination, the RP/GCCF offered the Claimant final payment in the amount of $69,824.36, which the Claimant did not accept.

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[1] Optional OSLTF Claim Form, signed on 28 February 2012.
[2] Claim background at pg. 4.
[3] Claim background at pg. 4.
[4] Claim summary at pg. 8.
[5] GCCF Claimant Status, accessed on 11 April 2012.
[6] Emergency Advance Payment Determination, dated 28 September 2010.
[7] GCCF United States Coast Guard Report, 12 April 2012.
[8] GCCF Interim Payment/Final Payment claim determination, 16 December 2011.

The NPFC denied the claim originally on April 16, 2012 because (1) prospective future damages are not compensable under OPA's loss of profits damage category, which limits potentially available compensation to "the actual net reduction or loss of earnings or profits *suffered*" [emphasis added][9]; therefore, $770,133.76 of this claim seeking to recover future losses, not incurred at the time of this claim submission, was denied; (2) the Claimant has not provided evidence to indicate that profits began to decline at a faster rate, or to prove that in spite of the decreased earnings leading up to the oil spill, earnings would have increased were it not for the oil spill; therefore, the Claimant has failed to prove that it sustained a financial loss under OPA's loss of profits damage category; and (3) that the alleged loss was not due to the injury, destruction or loss of property or natural resources as a result of a discharge or substantial threat of a discharge of oil as opposed to other economic factors affecting the company prior to the Deepwater Horizon oil spill, not due to the spill itself.

REQUEST FOR RECONSIDERATION:

On June 16, 2012, the Claimant via Taylor Accounting, LLC, sent a request for reconsideration overnight mail to the NPFC stating she would like the NPFC to reconsider her claim. The Claimant amended her sum certain on reconsideration from $1,103,876.28 to $385,066.88 withdrawing her request for future lost profits in the amount of $770,133.76. The Claimant argues that she is not in agreement with the NPFC determination that she failed to demonstrate an actual financial loss and she disagrees with the NPFC that she failed to prove any alleged loss was due to the Deepwater Horizon oil spill. She disagrees that she was not on track to reach its anticipated growth levels of 310%.

Karen Taylor, CPA, made the following arguments in the request for reconsideration. First, she disagrees with the NPFC's use of profits as an accurate indicator of growth because expenses generated in one period are recorded in the next period. Miss Taylor states the disparate timing of job income and expense recognition and the use of percentage of completion accounting makes comparing profits from one period to another almost meaningless.

Second, she states that Claimant uses the percentage of completion method of accounting and that the best indicator of growth is the number of jobs initiated because it is the quantitative measure most highly correlated to growth on a monthly basis and can be compared across measurement periods.

Third, with respect to loss of profits, Ms. Taylor argues that the NPFC is correct when it stated the Claimant's revenues received in 2010 were higher than revenues received in 2009 although the Claimant caveats that information with stating the revenue made in 2010 was generated pre-spill and that only $93,691.00 in revenue was generated after the oil spill.

Fourth, Claimant disagrees with the NPFC's reference that the Claimant failed to prove any loss was due to the Deepwater Horizon oil spill. The Claimant states the GCCF determined the Claimant did in fact suffer losses as a result of the oil spill and as such found them eligible for compensation by the GCCF. Thus, the fact that the Claimant suffered a loss as a result of the oil spill is not in question.

Finally, the Claimant argues that the NPFC erroneously concluded that the Claimant's supplier, Jacobsen Homes' denial of further inventory was the cause of the business's failure when the Claimant states in fact it was a direct result of the crippling and sudden decline in jobs due to the oil spill. The Claimant further states she has included statements from two prospective clients who backed out of pending contracts due to the oil spill. The Claimant states she has also provided a listing of deals initiated but not completed due to the oil spill.

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[9] 33 C.F.R. § 136.235.

The Claimant also provided two letters from two individuals stating they had planned to purchase property but after the oil spill, they changed their minds. The Claimant also produced a one-page document entitled "Some of the Deals lost due to oil spill" and a two-page document that reconciles revenue to the date the job was initiated.

<u>NPFC Determination on Reconsideration</u>

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. Under 33 CFR § 136.233, a claimant must establish loss of profits or impairment of earning capacity and that the loss was due to the destruction or injury to real or personal property or natural resources. The NPFC considered all the documentation submitted by the Claimant. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 CFR 136.115(d).

The NPFC performed a ***de novo*** review of the entire claim submission upon reconsideration and will address each of the Claimant's arguments below.

Wakulla Homes at Tully's Corner began operation in October 2008, conducted business for 12 months in 2009 and discontinued business in September 2010, five months after the BP oil spill. The NPFC reviewed Claimant's profits for 2008 through 2010 because the governing claims regulation found at 33 CFR §136.233(c) clearly states in relevant part ..."The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax records, financial statements, and similar documents."

Further, it must be noted that the Claimant's loss of profits is based on a projected or anticipated growth level of 310%. Thus, the NPFC reviewed the profit and loss statements provided by the Claimant to determine whether the 310% anticipated growth level was supportable. While the Claimant may not agree with the NPFC in its identification of actual profit and loss as reported in the financial documentation provided with the claim, the financial information depicting profit and loss is the most appropriate manner in determining whether a loss is proven despite the fact that the initiation process may have begun in some cases up to a year prior to making the profit.

The Claimant's financial documents are the most accurate capture of revenue and expenses which result in either a profit or loss for a given period in time. The NPFC appreciates the Claimant's lengthy discussion on disparate timing of job income and expense recognition and the use of percentage of completion accounting. The Claimant argues that 2008 should not be used for comparison purposes because it was the business start up year and the Claimant states that the NPFC should only compare January through April 2010 to the same time period in 2009 but not consider any other data from 2009 compared to 2010 because it involves the time period of the incident. The NPFC does not agree with the Claimant and has determined its comparison of 2008, 2009 and 2010 was applied appropriately in accordance with the governing claims regulation discussed previously.

While the NPFC appreciates that business initiation precedes the receipt of monetary compensation and the subsequent accounting of such transactions but that is the standard path most business transactions follow. It is not a nuance to this Claimant's business which is why Profit & Loss statements and detailed tax records are the most reliable forms of documentation for determining profit and loss across various periods of time.

As noted above, Claimant asserts that its anticipated growth was 310%; however, Claimant's supplier, Jacobsen Homes, in a note to the NPFC, states that Claimant began losing money prior to the oil spill which resulted in the supplier pulling out. As such, the culmination of data and information available to the NPFC clearly indicates that the Claimant's projected growth factor of 310% is (1) overly inflated and (2) speculative in nature and not reliable or supported by the available data since inception of the business.

Claimant presented a list of eight transactions the Claimant outlined as "Deals lost due to the oil spill;" however, this list is not persuasive because the Claimant produced no executed contracts that were canceled because of the oil spill. While the Claimant was able to identify eight entities that they were working to close a sale on, without the cancellation of an executed contract, this list only identifies parties for which the Claimant had ongoing negotiations. There is no clear evidence any one of the deals would have actually closed and produced revenue for the Claimant. Additionally, the Claimant identified each party by name but has not provided the NPFC with contact information so that the NPFC could determine what the relationship and status of negotiations were with the Claimant and the actual rationale why each of those deals did not finalize.

With respect to the two letters the Claimant provided on reconsideration from Mr. Bruce Millender and Cody Moody, the NPFC notes that the letter from Mr. Millender indicates that he was in the process of buying investment property but due to the uncertainty of the seafood production in Franklin County, he decided to wait until the market stabilizes. No executed contracts were produced from this negotiation. Additionally, Mr. Millender stated he was putting off buying investment property vice stating he was not going to buy at all therefore it would appear that this transaction has been delayed vice cancelled. Mr. Cody Moody's letter on the other hand states he did not buy due to his fear of financial instability. Mr. Moody advised that his clients were losing business which caused them to cut his services and as such, he didn't feel his client base would support the purchase of property.

The Claimant also argues that the GCCF paid her $69,824.36 in an emergency and interim payment; therefore, that is evidence that her losses were caused by the oil spill. The GCCF made payments to claimants based on its own criteria and not necessarily in accordance with OPA 90 and the associated claims regulations; therefore, the NPFC disagrees with the Claimant's rationale that losses were proven simply due to the fact that the GCCF issued payment.

Finally, the Claimant argues on reconsideration that Jacobsen Homes, supplier of inventory for the Claimant, ceased providing them inventory because of the crippling and sudden decline in jobs due to the oil spill; thus, the NPFC erroneously concluded that the supplier's denial of inventory was the cause of the Claimant's failed business. The NPFC disagrees with the Claimant on this statement. Mr. Boughton spoke with the NPFC on March 12, 2012 and was very clear when he told the NPFC that the oil spill did not help sales but that it was not the reason that the business closed when considering that the next sales group that replaced the Claimant was successful selling the same homes in the exact same location which is still in operation today.

Based on the foregoing, the Claimant has again failed to demonstrate a loss in the amount claimed and (2) the Claimant has failed to demonstrate that the alleged loss is due to injury or destruction or loss of real or personal property or a natural resource as a result of a discharge or a substantial threat of a discharge of oil.

Based on the foregoing information, this claim is denied upon reconsideration.

[redacted]

Claim Supervi[redacted]

Date of Supervisor's review: ***8/16/12***

Supervisor Action: ***Denial on reconsideration approved***

Supervisor's Comments: