

CLAIM SUMMARY / DETERMINATION FORM

Date : 8/05/2009
Claim Number : N08057-003
Claimant : Environmental Safety and Health Consulting Services, Inc.
Type of Claimant : OSRO
Type of Claim : Removal Costs
Claim Manager : [REDACTED]
Amount Requested : \$110,392.98

I. Facts

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision and discharged oil into the Mississippi River, a navigable waterway of the United States.

II. Responsible Party

American Commercial Lines LLC (ACL) owned the barge at the time of the incident and is a responsible party under the Oil Pollution Act.

III. The Claimant and the Claim

As a result of this incident, ACL utilized Environmental Safety and Health Consulting Services, Inc. (ES&H) to provide removal services.¹ In an email dated April 28, 2009, [REDACTED] Finance Manager of Gallagher Marine Systems, who was contracted by ACL, confirms there was no written contract between ACL and ES&H.² On December 15, 2008, ES&H submitted a removal cost claim to the National Pollution Fund Center (NPFC), in the amount of \$4,245,686.64.³ This total amount represents ten invoices documenting unpaid removal costs incurred by ES&H during the DM 932 oil spill incident. These costs had been presented to ACL, but had not been reimbursed following the ACL audit.

On July 29, 2009, [REDACTED] of ES&H submitted a letter to the NPFC requesting that the first invoice 1-18216, in the unpaid amount of \$110,392.98, be separated into a separate claim with a new sum certain. The NPFC complied, identifying the new sum certain of \$110,392.98 in claim number N08057-003 and moved the remaining unpaid balance of \$4,135,293.66 into claim number N08057-046 as of this date.

The NPFC sent an RP notification letter dated December 22, 2008, to Mr. [REDACTED] ACL – Vice President of Legal & Risk Management and Mr. [REDACTED] of Nicoletti, Horning & Sweeney, ACL – External Counsel. The first invoice (1-18216), which is the subject of this claim, was presented with all updated invoices to the responsible party for payment in a letter dated December 4, 2008.⁴ ES&H confirmed this by way of a letter to the NPFC dated July 29, 2009.⁵ ACL has made payments to ES&H on this invoice in the amount of \$1,604,402.98 dated August 14, 2008 and \$290,707.74 dated September 7, 2008⁶. ACL has acknowledged

¹ See POLREPs One through Twenty-one

² See email from [REDACTED] to [REDACTED] dated April 28, 2009.

³ See Claim Form, signed by Mr. [REDACTED] II, Owner/President on 12/12/08.

⁴ See ES&H letter to ACL dated December 4, 2008

⁵ See ES&H letter to NPFC dated July 29, 2009

⁶ See ACL Payment Authorization Forms – ES&H Bates Numbers 003076 and 003080.

receipt of the invoices that are subject of this claim by way of ACL's audit. (See Enclosure 1 – ACL audit). ES&H has confirmed verbally to the NPFC that all subcontractors have been paid for the services provided which are inclusive in ES&H's invoice # 1-18216.

IV. The RP Audit

During the incident, the claimant provided response resources and services to ACL. The services provided by the claimant were acknowledged by ACL designated Zone Managers, who acted as the Qualified Individual(s) (QI) representatives for ACL in various zones on given dates. Specifically, the claimant submitted daily sheets to the respective Zone Manager(s) which listed the labor and materials/equipment provided by the claimant for each day of the response in a specific zone location. The Zone Manager(s) approved the materials/equipment and labor identified on each daily by signing the document. Beneath most signatures, the Zone Manager made the notation "subject to audit."

During the response, there were no signed documents regarding negotiations or cost reductions.⁷ ES&H provided their Emergency Response Rate Schedule dated September 2007 for establishments of the rates charged.⁸ ES&H agreed to a reduced rate on boom costs if full payment was received within 30 days and not to exceed 90 days if there were disputed amounts.⁹ ACL did not honor the prompt payment agreement and since those price reductions were based on this agreement, ES&H billed the costs at the rate schedule pricing. There was also an unsigned two page document dated July 29, 2008 listing attendees from ES&H, ACL and Water Quality Insurance Syndicate (WQIS), which talked about contract rates and invoicing for the DM 932 incident. According to item seventeen of this document, these negotiations were contingent upon prompt payment.¹⁰

Having reviewed the invoices and the RP audit, the NPFC found that ACL and its auditors made initial payments on some invoices, denied amounts on some invoices and in some instances failed to provide any detailed audit information to ES&H for denied costs. It is important to note that the NPFC received this audit when the auditor for ACL responded to the NPFC's RP notification letter by way of submitting their audit results and accompanying documentation.

For the audit, the NPFC found that ACL auditors focused on whether the paperwork was complete as determined by their standards, whether the costs were properly supported in accordance with their standards, and whether the costs were operationally reasonable and necessary according to their standards. During the response, ACL held negotiation discussions with ES&H and requested special pricing reductions in exchange for prompt payment. ES&H agreed to certain price reductions in exchange for prompt payment that ACL did not honor, which resulted in the claimant presenting its claim to the NPFC. As a result of ACL not paying and/or resolving non-payment issues promptly, ES&H revised its billing as necessary so that it was in accordance with their published rate schedule. All invoices reflecting the updated published rate schedule were presented to ACL as required by regulation.

During the audit of ES&H's invoices, ACL denied ES&H's costs with little or no explanation, reason, or standard in support of the denied costs. The NPFC requested clarification of certain denial categories to understand the rationale used by ACL auditors but ACL failed to provide a responsive answer.

⁷ See email from [REDACTED] dated April 29, 2009.

⁸ See ES&H bates 002487 thru 002499

⁹ See email from [REDACTED] of ES&H to [REDACTED] of ACL (ES&H bates 002481)

¹⁰ See ES&H bates numbers 002482 and 002483

V. APPLICABLE LAW

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages. "Removal costs" are defined as "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from an incident". 33 USC § 2701(31).

Under 33 CFR. § 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, "a claimant must establish -

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC."

Under 33 CFR. § 136.205 "the amount of compensation allowable is the total of uncompensated *reasonable* removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal *activities* for which costs are being claimed must have been coordinated with the FOSC." [Emphasis added].

VI. DETERMINATION OF LOSS:

A. Overview:

1. FOSC coordination has been established under the Federal Project by way of Incident Action Plans and United States Coast Guard (USCG) Pollution Reports under Federal Project Number N08057.
2. The incident involved the discharge and continuing substantial threat of discharge of "oil" as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters.
3. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs.
4. The claim was submitted on time.
5. Presentment of costs to the RP was made by the Claimant ES&H, prior to the submission of the claim. The NPFC also made presentment of costs to the RP for which the RP responded with a copy of their complete audit for this claimant.
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the majority of all removal costs presented were for actions in accordance with the NCP and that the costs for these actions were indeed reasonable and

allowable under OPA and 33 CFR § 136.205 with the exception of denied costs itemized in Enclosure 1 – ACL audit which incorporates the NPFC audit.

B. Analysis:

NPFC CA reviewed the actual cost invoices and dailies to confirm that the claimant had incurred all costs claimed. The review focused on: (1) whether the actions taken were compensable “removal actions” under OPA and the claims regulations at 33 CFR Part 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOSC, to be consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

The Claimant ES&H stated that all costs claimed are for uncompensated removal costs incurred by the claimant for this incident for the time period of July 23, 2008 through July 27, 2008. The claimant represents that all costs paid by the claimant are compensable removal costs, payable by the OSLTF as presented by the claimant.

The Claims Manager has confirmed that the response activities performed by the claimant were signed off by the designated Zone Managers on behalf of the RP and the Unified Command in the dailies provided by ES&H and by ACL with their audit. While the Incident Action Plans (IAPs) are helpful in corroborating actions that were taking place in the field at any given point in time and were utilized as part of the adjudication process, it is important to note that every action taken during a response is not fully captured in IAP’s or Pollution Reports. The Claims Manager also cross referenced claim submission information to the USCG’s database of files that were associated with this oil spill incident and provided to the NPFC by USCG Sector New Orleans via tape.

As detailed in Enclosure (1), the NPFC reviewed the comments in the Financial Audit performed by ACL’s auditor. The NPFC denied ES&H claimed costs that lacked documentation and approved costs which were adequately documented on the signed daily reports, despite that fact that the same costs were denied by ACL in its Financial Audit. Such costs were approved over ACL’s denial in the Financial Audit because these costs had been approved by designated Zone Manager(s) for ACL when these representative(s) signed the claimant’s daily sheets. One of the main purposes of a Spill Management Team such as the appointed Zone Managers for ACL is to confirm that the goods and services billed on a given day at a given location for a given time period have actually been provided and accounted for. Moreover, because the services and materials/equipment listed on the daily sheets were provided pursuant to a published rate schedule, the NPFC further finds that ES&H has satisfied its burden of showing that the amounts claimed were reasonable and necessary. As a result, NPFC finds and approves that these costs are eligible for payment under OPA.

Despite the numerous costs denied by ACL’s auditors for personnel who worked in excess of restricted hours, the NPFC approved all costs that were signed/approved by the ACL designated Zone Manager(s), unless reduced hours were noted on the signed daily. Moreover, the NPFC obtained a statement from the FOSC, CAPT [REDACTED] which clarified that the restricted hours were “suggested” for the purpose of heat stress and safety concerns, but the monitoring and determination of actual work hours resided with the Zone Manager(s) and their sign offs on the dailies.¹¹

¹¹ See FOSC statement provided to the NPFC regarding restricted hours

During the review of Enclosure (1), the NPFC created "NPFC Denied" and "NPFC Approved" columns within the ACL audit summary page and has also created "NPFC Denied" and "NPFC Approved" columns on each of the daily sheets of the spreadsheet so that a line by line comparison and determination could be made and easily identified. The first column, labeled "NPFC Denied", holds the total denied costs for that line item, which is computed at the bottom of each daily sheet and then brought forward to the summary spreadsheet totals. The second column, labeled "NPFC Approved" holds the amounts which are adjudicated and determined as approved by the NPFC. Offsets due to discrepancies in ACL's audit spreadsheet amounted to \$.04 (number rounding and other unidentified reasons); (\$1,000.00) for ACL added per diem costs which ES&H did not bill for, and (\$2,777.73) for ACL noted overpayment on this invoice. The itemized breakdown of denied costs is addressed in the attached ACL audit identified as Enclosure 1.

The overall NPFC denial summary is as follows:

ES&H Invoice # 1-18216 - 7/23/08 - denied amount of	\$8,273.50
ES&H Invoice # 1-18216 - 7/24/08 - denied amount of	\$125.00
ES&H Invoice # 1-18216 - 7/26/08 - denied amount of	\$1020.65
ES&H Invoice # 1-18216 - 7/27/08 - denied amount of	\$3,133.50
ES&H Invoice # 1-18216 - 7/27/08 - offset amount of	(\$1000.00)

(ACL auditor added \$1,000.00 of per diem costs under H. [REDACTED], which ES&H did not bill for. No personnel were operating in this zone, this date.)

Total denied amount: **\$11,552.65**

The Claimant ES&H came into the Fund stating that ACL had paid them \$1,895,110.75. However, there were only two payments made on this invoice. A payment of \$1,604,402.98 was presented by ACL to ES&H on August 14, 2008 with an additional payment of \$290,707.74 on September 7, 2008. This totals \$1,895,110.72, which is .03 cents less than the Claimant submitted in the claim.

Accordingly, the Claimant's sum certain of \$110,392.98 minus the total amount the NPFC denied costs (\$10,532.00 personnel + \$1,020.65 equipment) plus .03 cents added to correctly identify the amount paid by the ACL, plus .01 cent in ACL audit spreadsheet rounding discrepancies equals a total of the OPA compensable uncompensated removal costs of \$98,840.37 which is due to the Claimant ES&H.

On this basis, the Claims Manager hereby determines that the claimant did in fact incur \$98,840.37 of uncompensated removal costs and that this amount is properly payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim # N08057-003 in accordance with 33 CFR 136.203 & 205.

C. Determined Amount:

The NPFC hereby determines that the OSLTF will pay **\$98,840.37** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-003. All costs claimed are for charges paid for by the Claimant for removal actions as that term is defined in OPA and, are compensable removal costs, payable by the OSLTF as presented by the Claimant.