

CLAIM SUMMARY / DETERMINATION FORM

Date : 2/26/2009
Claim Number : P05005-156
Claimant : Substructure Inc
Type of Claimant : Corporate (US)
Type of Claim : Removal Costs
Claim Manager : XXXXXXXXXX
Amount Requested : \$125,999.67

FACTS:

- 1. Oil Spill Incident:** On November 26, 2004, between 2100 and 2115 hours, the T/V ATHOS I struck a submerged anchor within Federal Anchorage# 9 on the Delaware River (also known as the "Mantua Creek Anchorage"). The Claimant alleges that the incident occurred when two tugboats began maneuvering the ATHOS I (pushing from the vessel's starboard side) toward the dock at the CITGO Asphalt Refinery Company terminal in Paulsboro, NJ. The investigation into the incident revealed that the anchor punctured the vessel's hull, rupturing the #7 port ballast tank and the center cargo tank causing an estimated 263,371 gallons of "Bachaquero crude oil" to discharge into the Delaware River, a navigable waterway of the United States.

The T/V ATHOS I is a single hull, double-sided, 37,895 gross ton oil tank vessel with a breadth of 32.2 meters or 105.6 feet. The vessel is owned by Frescati Shipping Company Limited and was managed on the date of the incident by Tsakos Shipping & Trading S.A.

As a result of the ATHOS I incident, the flood tide carried the oil up the Delaware River, past the Philadelphia Marine Center to the Tacony-Palmyra Bridge. The Coast Guard Captain of the Port, Captain Sarubbi, established a Safety Zone that extended upriver to the Tacony-Palmyra Bridge and downriver below the Athos spill site to Commodore Barry Bridge.

On November 30, 2004, the Coast Guard enlarged the Safety Zone to include the area from the Tacony-Palmyra Bridge downriver to the intersection of the Marcus Hook Range and the Bellevue Range.

- 2. Description of Removal Activities for this Claimant:** The claimant, Substructure Inc., (Substructure) was in contract with Oceanport Industries, Inc. in Claymont, Delaware to install epoxy grout jackets on their facility's 1300 foot berthing pier as well as cleaning the surface of the piles and attach a fiberglass jacket with fixed standoffs to the pile and injecting the annular space with a 3 part epoxy grout to form a monolithic structure.

As part of the work, preparing the surface correctly is important. The cleaning procedure specified for the project was SSPC-SP 7/NACE No. 4, Brush-Off Blast Cleaning. To accomplish this level of cleaning, Substructure uses a 10,000 phi water blaster for the removal of marine growth, loose coating and general cleaning. The cleaning process usually works extremely well. However, when the pier's pilings became coated with the ATHOS I oil then the cleaning technique became difficult and insufficient. The hand cleaning usually performed with a high pressure gun on previous piles became inadequate. Any trace of oil had to be completely removed prior to applying the epoxy

grout. Also any oil that would remain on the surface would ultimately act as a release agent for the epoxy. This was of great concern to the Claimant because Substructure guarantees their work for a minimum of 5-years.

Since the 10,000 psi water blaster was not adequately cleaning the piles, Substructure was forced to seek other alternatives in order to perform the cleanup in a manner that was in accordance with the Claimant's contract with the facility and also to be in compliance with the National Contingency Plan (NCP). They contacted various U.S. manufacturers of high pressure cleaning systems to see if equipment was readily available to accomplish the difficult task of removing the heavy Bachaquero crude oil from the pilings. The Claimant found that no such design was being offered to work below water or on a curved surface-like pile and that all of the options offered did not fit the parameters of cleaning the pilings successfully.

After all attempts of trying to clean the pilings; Substructure contracted with Jetstream of Houston, Texas to manufacture a 20,000 psi water blaster. Once the Claimant received the water blaster unit, further modifications had to be made to include a stainless steel volume tank and a three stage filtration system to eliminate the oil contamination in the cleaning heads, and plumbing modifications had to be made to the filtration to make the system compatible with the cleaning heads. Several modifications to the head and winch system were required for the cleaning system to reliably prepare the piles for encapsulation. Once the modifications were complete, the cleaning took nearly the same time as the original hand cleaning with a gun.

3. **The Claim:** On November 12, 2008, Substructure, submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of their uncompensated removal costs in the amount of \$126,170.69 for the services they provided regarding the ATHOS I oil spill incident. On February 25, 2009, Substructure submitted a change in their sum certain requesting, \$125,999.67.¹

The claim consists of a description of Substructure's guaranteed work, a DVD with pictures, invoices, and quotes. The NPFC's review of the actual costs focused on: (1) whether the actions taken were compensable "removal actions" under OPA and the claims regulations at 33 CFR 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 are determined to be consistent with the National Contingency Plan (NCP) or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90. A responsible party's liability will include "removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan". 33 USC § 2702(b)(1)(B).

¹ See Substructure's invoice

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil".

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".

Under 33 USC §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 USC §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

33 U.S.C. §2713(d) provides that "If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund."

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 136.105(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].

DETERMINATION OF LOSS:

A. Findings:

1. The NPFC has determined that the actions undertaken by the claimant are deemed consistent with the NCP. This determination is made in accordance with the Delegation of Authority for Determination of Consistency with the National Contingency Plan (NCP) for the payment of uncompensated removal cost claims under section 1012(a)(4), Oil Pollution Act of 1990. The location of the facility that was cleaned is within one of the ATHOS I oil spill zones as established by the FOSC.
2. The incident involved the discharge of "oil" as defined in OPA 90, 33 USC § 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. 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 costs for the actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205 with the exception of the following: (See, Enclosure 1 – Summary of Vendors)

Jetstream 4200 Waterblaster

Total Invoiced Amount: \$74,201.00

Reduced—the NPFC has reduced the original pricing by \$32,200.00 per a quote submitted by the Claimant from Boatman Industries Inc. Value of a 2005 Jetstream 325 h.p. with approximately 700 hours and in average condition. The NPFC is offering **\$42,001.00.**²

Travel

Total Invoiced Amount: \$656.24

\$37.40 is denied as mark-up and deemed unsubstantiated. The NPFC finds \$618.84 reasonable.

B. Determined Amount:

The NPFC determines that the OSLTF will pay **\$93,762.27** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim# P05005-156.

Claim Supervisor: 

for

Date of Supervisor's review: *2/26/09*

Supervisor Action: *APPROVED*

Supervisor's Comments:

² See quote submitted by Claimant from Boatman Industries Inc., dtd 1/28/09.