

CLAIM SUMMARY / DETERMINATION FORM

Date	: 03/25/2010
Claim Number	: N08057-015
Claimant	: Oil Mop, LLC
Type of Claimant	: OSRO
Type of Claim	: Removal Costs
Claim Manager	: [REDACTED]
Amount Requested	: \$579,209.16

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 (OPA).

III. The Claimant and the Claim

As a result of the incident, Oil Mop, LLC (Oil Mop or OMI), provided response services under contract with ACL.¹ On April 6, 2009, OMI submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of the cost to the bulk purchase of snare and viscous sweep from Exxon per an executed Resource Request form # 72408-251, dated July 31, 2008, which authorized the Claimant to make the purchase of the supplies for the Central Supply station.²

Summit Contracting, LLC (Summit Contracting) is a civil engineering and environmental services provider that entered into a strategic partnership with ACL in May 2007. During this incident, Summit Contracting was the prime contractor to OMI that was in charge of the Central Supply station for this incident and Oil Mop made bulk purchases for the station.

To date, the NPFC has received no audit for OMI invoice # N0808-001 from ACL. ACL sent an OMI payment status report indicating it has denied this invoice because they were waiting for a reconciliation of the inventory that remained.

The NPFC sent the Responsible Party (RP) notification letter, dated April 8, 2009 to Ms. [REDACTED], ACL – General Counsel and Mr. [REDACTED] of Nicoletti, Horning & Sweeney, ACL – External Counsel.³ The invoice which is the subject of this claim was presented to ACL via Summit Contracting as OMI's Prime contractor of the Central Supply station for payment on or about August 6, 2008.⁴

IV. The Audits

¹ See, OMI Master Service Agreement, dated July 23, 2002.

² See, Resource Request Message No. 72048-251 for 7 day Supply of Bales of Viscous Sweep and Bags of Pom Poms, signed by [REDACTED], dated 7/31/08.

³ See, NPFC letter to ACL, dated April 8, 2009.

⁴ See, OMI invoice # C0808-001 dated March 31, 2009.

During the incident, the Claimant provided response resources and services under its contract with ACL. The services provided by the Claimant were acknowledged by ACL designated Zone Managers, who acted as the Qualified Individual(s) 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 each signature, the Zone Manager made the notation “subject to audit.”

During this response incident, a process was established for paying Oil Mop’s invoices. Initially, Oil Mop submitted its invoices to ACL and in accordance with the Master Service Agreement (MSA) that was in place between Oil Mop and ACL, the MSA stated that all invoices are due fifteen (15) days from the date of the invoice, and in the event ACL disputed one or more items in an invoice, ACL shall, within ten (10) days of receipt of such invoice, notify Oil Mop *in writing* of the item or items under dispute and the reasons. The MSA stated that undisputed amounts will be paid within fifteen (15) days of ACL’s receipt.⁵ (Emphasis added).

Having reviewed the invoices, the NPFC determined that this process was not followed in accordance with the MSA. We found that ACL and its auditors made initial payments on some invoices, denied amounts on some invoices, failed to provide in some instances, any detailed audit information to OMI for denied costs and also approved payment amounts on some invoices, which, to date, have still not been paid to Oil Mop by ACL as agreed to in the MSA.⁶ It is important to note that the NPFC received this summary sheet when the auditor for ACL responded to the NPFC’s RP notification letter(s) 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 this response incident, ACL held negotiation discussions with the response contractors including the Claimant OMI and requested special pricing reductions in exchange for a prompt payment. OMI initially 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 or resolving non-payment issues promptly, OMI revised its billing so that it was in accordance with the original MSA pricing schedule between OMI and ACL. All invoices reflecting the original pricing schedule were presented to ACL as required by regulation.

During the audit of OMI’s invoices, ACL denied OMI’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 did not respond.

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 of OPA and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are

⁵ See, Master Service Agreement between American Commercial Barge Line L.L.C, and Oil Mop, L.L.C., dated July 23, 2002. American Commercial Barge Line L.L.C, is a wholly owned subsidiary of ACL.

⁶ See, ACL Summary sheet for OMI payments, provided by ██████ of ACL on 9/14/09.

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 such 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 Part 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. Overview:

1. The FOSC coordination has been established under the Federal Project by way of Incident Action Plans and United States Coast Guard (USCG) Pollution Reports.
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 OMI, prior to the submission of the claim. The NPFC also made presentment of costs to the RP and the RP has provided a complete copy of their Audit of some of the response costs presented.
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that 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.

B. Analysis:

The NPFC reviewed the actual cost invoice and executed purchase request form to confirm that the Claimant had incurred the 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 OMI stated that all costs claimed are for uncompensated removal costs incurred by the Claimant for the bulk purchase of snare and viscus sweep from Exxon which was authorized by the RP and Unified Command.⁷ The Claimant represents that all costs paid by the Claimant are compensable removal costs, payable by the OSLTF as presented by the Claimant.

The NPFC requested the Claimant perform an audit of the remaining supplies and submit that reconciled information to the NPFC for review. The NPFC also requested confirmation that the Claimant has tried to make suitable arrangements for the remaining supplies to be picked up by ACL. The Claimant has confirmed that they have advised the RP on several occasions that two roll off boxes of supplies remain staged at one of the Claimant's yards due to the fact that there is no room for delivery of these containers to ACL, the RP. To date, ACL has yet to take possession of the supplies which they are aware exist in storage at the Claimant's expense.

On this basis, the Claims Manager hereby determines that the Claimant did incur \$579,209.16 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# N08057-015.

C. Determined Amount:

The NPFC hereby determines that the OSLTF will pay **\$579,209.16** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # N08057-015. 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.

Claim Supervisor: [REDACTED]

Date of Supervisor's review: *3/31/10*

Supervisor Action:

Supervisor's Comments:

⁷ See executed Purchase Request form dated July 31, 2008 provided in the claim submission