U.S. Department
of
Homeland
Security

**United States
Coast Guard**

Director
United States Coast
Guard
National Pollution
Funds Center

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5890
7/27/2011

Sent VIA email with attachment

EIC Associates, Inc.
C/O Dennis L. Bryant, Esq.
4845 SW 91st Way
Gainesville, FL 32608-8135

RE: NPFC Claim Number: P05005-019 (Property Damage)

Dear Mr. Bryant:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number P05005-019 involving T/V ATHOS I oil-spill incident of November 26, 2004. Compensation is denied under reconsideration because the claimant has not met its burden of proving its claim.

Disposition of this reconsideration constitutes final agency action.

If you have any questions or would like to discuss the matter, you may contact me at the above address and phone number.

Sincerely,

[redacted]

Thomas S. Morrison
Chief, Claims Division
U.S. Coast Guard

ENCL: Determination Form

CLAIM SUMMARY / RECONSIDERATION:

Date:	7/27/2011
Claim Number:	P05005-019
Claimant:	EIC Associates, Inc.
Type of Claimant:	Corporate (US)
Type of Claim:	Property Damage (pile repair costs)
Claim Manager:	Mark R. Erbe
Amount Requested on Reconsideration:	$47,767.50

I. BACKGROUND:

A. Oil Spill Incident:

On November 26, 2004, the Cypriot-flagged tank vessel ATHOS I struck a submerged anchor as it approached the CITGO Asphalt Refining Company terminal at Paulsboro, New Jersey. The anchor punctured the hull causing the release of 265,000 gallons of Venezuelan crude oil into the Delaware River. The oil spill affected property and natural resources on and along the shores of the Delaware River.

To facilitate the containment and removal of the discharged oil, Captain of the Port (COTP), USCG, issued an order effective December 15, 2004 to January 15, 2005 restricting all vessel traffic on the Delaware River and establishing a temporary safety zone. 1 The Safety Zone extended from the Tacony-Palmyra Bridge to Bellevue/Marcus Hook ship range at buoy 2M (upper Delaware Bay) and from shoreline to shoreline.[2] The COTP provided all affected stakeholders the opportunity to obtain authorization for provisional access/transit on the river during the time the order was in effect. Persons seeking to transit within the Safety Zone were instructed to contact the COTP by phone or short wave radio.[3]

B. Responsible Party:

Frescati Shipping Company Limited was designated as the Responsible Party (RP) for the oil spill by the Federal On-Scene Coordinator (FOSC). After the RP categorically denied all claims under OPA claimants who were eligible could submit claims directly to the Oil Spill Liability Trust Fund through the National Pollution Funds Center.

C. Claimant:

EIC Associates, Inc. (EIC or the claimant) is a construction company headquartered in Springfield, NJ. EIC signed a one-year contract, in February 2004, to construct a new 780-foot marine terminal for the South Jersey Port Authority (SJPC). The project was referred to as the New Pier 1A Facility at Broadway Terminal, in Camden, New Jersey was within the Safety Zone.

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[1] See 33 CFR 165 Safety Zone Delaware River Federal Register/ Vol. 69, No. 247: 27 December 2004 Rules and Regulations. Rules and Regulations (3) All persons desiring to transit the safety zone must contact the COTP by telephone at (215) 271-4807 or VHF channel 13 or 16 to seek permission prior to transiting the area.

[2] See Federal Registrar/ Vol. 69 B0, 247/ Monday December 27, 2004/ Rules and Regulations

[3] 33 CFR 165 Rules and Regulations (3) All persons desiring to transit the safety zone must contact the COTP by telephone at (215) 271-4807 or VHF channel 13 or 16 to seek permission prior to transiting the area.

D. Initial Claim:

EIC argued that 15 precast concrete piles were damaged while the COTP's order restricting vessel traffic was in effect. Claimant states that all of the 21 piles that it placed in the river before the oil spill were found to have spall damage[4] and that 15 of the 21 piles sustained spall damage during freezing (air) temperatures that occurred in the area in December, after the COTP order became effective. Claimant asserts that in mid-December, while the order was in effect, (air) temperatures reached 32-degrees Fahrenheit and the entrapped water froze inside the dowel-holes. The ice expanded inside the dowel-holes and this caused the spall damage. EIC argued that if the oil spill had not happened it would have completed the piles before the freezing weather occurred in December. Completing the piles meant: inserting rebar into the dowel holes and grouting them over. Sealing the dowel-hole prevents the spall damage. The claimant asserted that the COTP's order kept it from traveling to the area and completing the piles as scheduled. EIC discovered the spall damage to the concrete piles in May 2005, four months after the COTP Order expired. Under the terms of its contract, EIC was required to repair all the pile damages. The sum certain to repair the 15 piles allegedly damaged by the COTP's order came to $47,676.50.[5]

EIC submitted weather data showing that freezing (air) temperatures occurred in the Camden area after December 13, 2004. EIC also submitted tide charts and photos of its job site. The NPFC requested that the claimant provide copies of pile inspections and its work schedule. The claimant submitted three work schedules all were dated before the oil spill. Also, EIC submitted pile driving records for the 21 piles placed in river before the oil spill.

E. Initial Claim Denial:

The NPFC denied the claim on January 14, 2008, on the grounds that the Claimant had not established that the spall damage resulted from the incident. Specifically, the Claimant had not proven, by inspection, that the piles were damaged by freezing temperatures while the COTP's order was in effect because the damage was not discovered until May 2005. The NPFC also noted that the weather data submitted by the claimant showed that December 2004 had fewer freezing days than January 2005 and that precipitation, in the form of snow and ice was greater in January 2005. Thus, the NPFC determined that the engineer's report did not conclusively establish that the damages occurred in December 2004. Finally, the claimant had not shown conclusively how 15 of the 21 piles placed in the river before the oil spill incident were damaged due to freezing temperatures when the project engineer noted two other potential causes: bad batter mix and driving stresses when installing the piles.[6]

III. APPLICABLE LAW:

Under the provisions of 33 CFR 136.115(d), reconsideration requests must be submitted in writing, include factual and legal grounds for the relief requested and be received within 60 days after the denial was mailed to the claimant or 30 days after receipt of the letter whichever date is earlier. Director will provide written notification of the decision within 90 days after receipt of the request

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[4] Spall: a small fragment or chip or scales or broken off pieces on the exterior of concrete or stone masonry due to stress from freezing and thawing temperatures. (Webster's Ninth New Collegiate Dictionary) & causes and prevention of spall www.toolbase.org

[5] Claimant's initial claim to the NPFC included components for a loss of profits (P05005-120) and uncompensated removal costs (P05005-120). These components are addressed and adjudicated separately in other NPFC determinations.

[6]

for reconsideration. This written decision is final. Failure of the Director, NPFC, to make final disposition of reconsideration within 90 days after it is received shall, at the option of the claimant any time thereafter, be deemed a final denial of the reconsideration.

IV. CLAIM on RECONSIDERATION:

Request for Reconsideration:

On February 8, 2008 the claimant requested reconsideration and a 120-day extension to submit additional documentation. On February 11, the NPFC granted the Claimant's written request for reconsideration and the 120-day extension. Then on February 15 the Claimant requested an additional 30 days time that was granted and added to the 120 days extension for a total of 150 days. The deadline for submitting documentation was June 28, 2008. The NPFC received the documentation on June 26, 2008, within the time period granted.

Documentation supporting reconsideration consisted of a letter outlining claimant's initial allegations in more detail and included a binder entitled, *"Re-submittal of claim P05005-019."* Additionally, the binder included a report by claimant's consulting engineer (EJO Engineering).

V. NPFC ANALYSIS UPON RECONSIDERATION:

Summary of Claimant's Causation Arguments upon Reconsideration:

In its reconsideration letter, EIC restates the following assertions: (a) that the oil-spill incident kept it from completing its pile driving as scheduled because of the COTP's order; (b) that the spall damage occurred when tidewaters trapped inside dowel-holes froze around December 15, 2004 when there was sustained freezing weather and 15 of the 21 piles were spalled; (c) that even if it could have foreseen unusual high tides or freezing weather the COTP's order prevented it from taking any action,[7] and (d) that that the COTP closed the river to all work and that EIC could not continue its project during the oil spill cleanup.[8]

The only information submitted on reconsideration was the Engineering Report. In the report the claimant's consulting engineer calculated that water entrapped in an encasement like the dowel holes described in EIC's drawings would freeze and the ice would expand and exert sufficient pressure to rupture the sleeves and crack the concrete.

The NPFC accepts the consulting engineer's finding that freeze and thaw of water has the potential to cause spall damage during freezing temperatures. There were freezing (air) temperatures in December 2004. However, the EJO engineer said that *"prolonged cold weather can cause spall."* From the claimant's evidence cold weather and exposure to tides continued to affect the piles until they were sealed from the effects of freezing temperatures.[9] The engineer modified her statement to say that all the spall damage would occur when the water froze.

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[7] See Section IV, Part C, paragraph 1 & 2 summary of reconsideration letter of June 16, 2008

[8] Reference Mark Erbe's e-mail March 8, 2010 re: phone conversation w/ EIC's attorney Bryant.

[9] See above, initial claim Background, Part C claimant explains that, "*the lowest point of the tub (or dolphin) is elevated approximately plus five feet within the active daily tidal cycle.*"

NPFC ANALYSIS:

The NPFC on reconsideration reviews the claim and the administrative record *de novo*. The initial determination to deny the claim dated January 14, 2008 is incorporated into this analysis.

The Claimant argues in reconsideration that if the oil spill had not happened it would have finished the pile work before freezing weather occurred on December 15, 2004.[10] After review of the administrative record and claimant's supplemental documentation the NPFC finds that the Claimant's arguments are not supported by the evidence. The NPFC accepts claimant's assertion that sustained freezing air temperatures occurred in the area on or about December 15, 2004 and further accepts the consulting engineer's calculation that ice forming inside a dowel-hole will spall concrete piles.

The NPFC addresses each of the claimant's arguments below.

First, the Claimant's assertion that it would have completed the piles before the freezing temperatures is not supported by the evidence. EIC's ***construction schedules*** that pre-date the oil spill show the Claimant planned to take 85 days for pile-driving.[11] The claimant told us that there were 423 piles for the project. EIC's ***pile driving record*** shows that EIC began pile work on November 18, 2004. By November 24, EIC completed 21 piles then, stopped work for the Thanksgiving holiday, leaving 402 piles to be placed in the river. The record shows EIC would return to work on or about November 29, 2004. The NPFC calculates 27-days between November 18 and December 15, 2004 (when freezing (air) temperatures occurred). There are 18 days beginning November 29 to December 15, 2004. The record shows that the Claimant took three days to place 21 piles (November 18, 22 & 24).[12] Looking at EIC's construction schedules the Claimant expected to complete the pile driving effort by March 21, 2005, March 26, 2005 or May 5, 2005 depending on which schedule you are referring to. The construction schedules show that the Claimant was either 74-days, 76-days or 101-days behind schedule.

Additionally, in reconsideration the claimant submitted documents showing that it planned to drive all 423 piles before inserting rebar and sealing them with grout.[13] Therefore, before the spill, EIC knew that the piles placed in the river would remain exposed to the tides and temperature until **all** 423-piles were placed in the river. It appears that EIC made a business decision to wait until all of the piles were placed in the river before sealing the dowel-holes. EIC did not provide the date when it completed the pile work. High tides and freezing weather continued into January and February 2005. Given EIC's construction schedule we find that the Claimant would know or should have known that it was going to continue installing piles during the winter weather and risking freezing weather that could damage the piles.

Therefore, the NPFC finds that even if the incident had **not** occurred in late November, the Claimant would have continued pile-driving during freezing weather. Additionally, there is no evidence to

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[10] Paragraph one in the letter asserts, *"...there were a total of 423 – 18 inch square precast concrete piles to be installed for the project..."* Paragraph two, *"After the piles were installed, EIC planned to place the reinforcing dowel in the cast in place tube and "grout-in" the permanent reinforcing bars"* letter dated November 10, 2006 from Robert Bertone EIC to NPFC [quote section II(A)]

[11] See letter of June 26, 2008 found under the heading: Construction Methodology:

[11] See three EIC construction schedules provided June 6, 2007 (Construction Schedule #1 Update November 24, 2004)

[12] See October 25, 2007 S.T. Hudson Engineers, Inc. (M. Fasnacht) pile driving records 11/18, 11/22 & 11/23/2004

[13] Paragraph two, *"After the piles were installed, EIC planned to place the reinforcing dowel in the cast in place tube and "grout-in" the permanent reinforcing bars"* letter dated November 10, 2006 from Robert Bertone EIC to NPFC.

support the claimant's assertion that it could have completed the pile work before the onset of freezing weather. Claimant only asserts that this was its intention. Despite numerous opportunities the claimant never produced any scheduling documentation to demonstrate or prove that the 15 piles in question were to be reinforced, grouted in and sealed before December 15, 2004. In fact the record reflects that EIC would not reinforce or grout in the piles until all 423 were placed in the river.

Further, even if the claimant were scheduled to seal the dowel holes at the time of the incident, the record and evidence does not support the contention that the river was literally closed by the COTP. Review and consideration of the evidence in the file clearly demonstrates that work was ongoing along the river.[14] The work included cleanup response, shipping up and down the Safety Zone and on-going marine terminal operations. Although all activities on the water had to be managed by the COTP or coordinated with the Federal On-Scene Coordinator;[15] the FOSC's record concerning response and cleanup of river front facilities clearly demonstrates ongoing efforts and success in cleaning both the Beckett Street and Broadway piers surrounding the subject work site and vessel transits to and from the area.[16] Additionally, it must be pointed out that the claimant's project engineer was trying to get the claimant back to work at the site during the early part of December.

The evidence indicates that the NPFC reimbursed the claimant for 150 hours of labor from 29 November through 13 December 2004 at the worksite.[17] The labor categories compensated included job superintendent, dock builder foreman, operator, lead engineer to dock builder. The record shows that on November 30, 2004, the claimant did in fact move a barge during the period the Captain of Port was managing traffic.[18] The claimant coordinated this barge movement with the FOSC (COTP) prior to the date (December 15) that it asserted was the first prolong freezing weather. EIC had a maintenance crew on-site to look after its equipment and barges during the work stoppage in December yet EIC did not take preventative measures to protect the 15 piles that were in the tidal zone and exposed to the elements. Thus, the record indicates that the COTP/ FOSC granted permission and lifted restrictions on vessel traffic when stakeholders requested permission and in fact granted permission for the claimant to transit the river for other purposes.

The claimant relies on an email dated October 11, 2007, from Mr. Fasnacht, the Project Engineer, saying that the spall that occurred to the 15 downriver (the south dolphin) piles was caused by freezing water in the dowels. However, in the same email Mr. Fasnacht wrote, "*Other piles on the project were damaged due to bad batter and driving stresses. The project reports were not specific since the piles were being repaired by EIC and further clarification was not needed.*" We find that without inspection of the piles in December 2004 and Mr. Fasnacht's statement that other factors could have caused the spalling, that claimant has not established that the spall damage resulted from freezing air temperatures or that it occurred in December 2004.

EIC also argues that even if could have known that high tides or freezing weather were forecasted, the COTP's order kept it from accessing the piles so it would not have been able to mitigate any potential damage.[19] EIC claims that, even if it could have anticipated high tides or freezing

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[14] See Incident Status Sheet (ICS-209) Incident Status Summary as of Close of Business 12/26.2004 showing Decon Zone NJ-2 Broadway Terminal (started 12/7/2004) Completed Decon -

[15] See photos provided by claimant dated November 30, 2004 showing cleanup workers on site

[16] See CG's Inbound/ Outbound/ Shift vessel log shows Broadway Terminal open to traffic November 29, 2004 also, see CG document showing Broadway Terminal cleaned by close of business on December 26, 2004.

[17] Reference Removal claim P05005-120 determination and accompanying spreadsheets.

[18] See Fax copy of EIC's Request for vessel cleaning 11/30/2004

[19] See Section III, Part C, paragraph 2, in recon letter June 26, 2008

conditions, it was prevented from taking action because the COTP's order restricted work on the Delaware River. We find that weather forecasts alerts for freezing (air) temperatures and daily tides reports are not difficult to find. Since claimant purports to be a marine construction company it knew or should have known that precast concrete piles had dowel-holes that were exposed to tides.[20] Claimant contradicts its letter of December 15, 2009[21], that asserts; "*unusually high and unforeseen high tides*" were the cause of water infiltrating the dowel holes in the piles.

Based on the above analysis the Claimant has not established on reconsideration that the spall damage was caused by the incident.

VI. AMOUNT: --$0 –

VII. DETERMINATION upon RECONSIDERATION:

For the reasons set forth above the NPFC determines that the claimant has not demonstrated by a preponderance of evidence that the oil-spill incident or subsequent cleanup activity caused the spall damage to 15 pre-cast concrete piles. The NPFC respectfully denies compensation upon reconsideration.

Claim Supervisor: T[redacted]
Date of Supervisor's review: 7/27/11
Supervisor Action: Denied on reconsideration Affirmed
Supervisor's Comments:

[20] See letter 11/10/2006 from Mr. Bertone EIC to NPFC

[21] [(See claimant's letter 12/15/2009) "*Even if EIC through some means could have foreseen the abnormally high tides and cold snaps it could have done nothing because the USCG Captain of the Port order prevented it* from working in the Delaware River at this time."]