

CLAIM SUMMARY / DETERMINATION FORM

Date : 7/7/2011
Claim Number : E10203-0002
Claimant : Lake Champlain Maritime Museum
Type of Claimant : Non Profit Organization
Type of Claim : Removal Costs
Claim Manager : [REDACTED]
Amount Requested : \$19,772.37

I. Facts

On November 17, 1963 the tugboat William H. McAllister sank in Lake Champlain, New York, a navigable waterway of the United States.

II. Responsible Party

McAllister Brothers Towing and Transportation Company owned the vessel at the time of the incident and is a responsible party (RP) under the Oil Pollution Act (OPA).

III. The Claimant and the Claim

The Lake Champlain Maritime Museum (LCMM) is a non-profit museum with a mission to study, preserve and share the history and archaeology of Lake Champlain. LCMM's archaeological research arm, known as the Maritime Research Institute, provides high-quality underwater cultural resource management services to the public and private sectors.

On June 13, 2011, the National Pollution Funds Center (NPFC) received a removal cost claim for \$19,772.37 from the Lake Champlain Maritime Museum, dated June 3, 2011.¹ LCMM's claim consists of a Phoenix International subcontractor invoice cost of \$19,772.37 for use of its remotely operated vehicle (ROV) and operators. These costs were originally submitted to the NPFC on January 27, 2011, but were removed by the Claimant during the course of that claim adjudication (E10203-0001) due to non-payment of the invoice. Proof of payment has now been provided for this invoice totaling \$19,772.37 - which constitutes the subject matter of this claim.

The Claimant submitted their claim to the RP in a letter dated September 15, 2010. The RP responded advising that had McAllister been able to use their own divers, as offered, they would have completed the assessment for \$18,500.00 and therefore did not see why they should pay more than that amount.² No other response was provided and the Claimant submitted their claim to the NPFC after the expiration of ninety days as required by OPA law.

The NPFC sent the RP a notification letter dated March 31, 2011, which included the costs of this claim. On April 26, 2011, they responded, asking for an additional 30 days in order to try

¹ See Optional OSLTF Claim Form signed by Ms [REDACTED] on 6/3/11.

² See, email from [REDACTED] IMC to [REDACTED] (LCMM) dated December 13, 2010.

and gain additional information they asked for. The NPFC denied this request stating that the Claimant presented their costs to the RP, and after 90 days passed without resolution, the Claimant came into the Fund, as permitted under OPA law.

IV. 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).

33 CFR 136.103 (a) states "Except as provided in paragraph (b) of this section, all claims for removal costs or damages must be presented first to the responsible party or guarantor of the source designated under § 136.305".

33 CFR 136.103 (c) states "If a claim is presented in accordance with paragraph (a) of this section and –

- (1) Each person to whom the claim is presented denies all liability for the claim; or
- (2) The claim is not settled by any person by payment within 90 days after the date upon which (A) the claim was presented, or (B) advertising was begun pursuant to § 136.309(d), whichever is later, the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

Each claim must be signed in ink by the claimant certifying to the best of the claimant's knowledge and belief that the claim accurately reflects all material facts. 33 CFR 136.150 (c).

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].

V. DETERMINATION OF LOSS:

A. Overview:

1. FOSC coordination has been established under Federal Project number E10203.
2. The incident involved a 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 is in court for the claimed uncompensated removal costs.
4. The claim was submitted within the six year statute of limitations for removal costs.
5. Presentment of costs to the RP was made by the Claimant prior to the submission of the claim. The NPFC also notified the RP of the claim submission.
6. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that some of the removal costs presented were for actions in accordance with the NCP and that the costs for these actions were reasonable and allowable under OPA and 33 CFR § 136.205.

B. Analysis:

The NPFC reviewed all of the information received by the Claimant. 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.

Phoenix International Invoice # 10063-01 - \$19,772.37

LCMM hired Phoenix International to provide ROV personnel and equipment in order to survey the William H. McAllister. The invoice breakdown is:

Personnel & Equipment

6/14/2010 Mobilization - \$5,790.00
6/15/2010 Operational Day - \$5,790.00
6/16/2010 Demobilization - \$5,790.00

Third Party Charges

P. McKibbin Expense Report - \$ 336.58
J. Schmidt Expense Report - \$1,222.66
J. Tomasi Expense Report - \$ 529.78
15% Third Party Service Fee \$ 313.35
Total Invoice Cost **\$19,772.37**

The NPFC contacted Phoenix International to ensure they received payment. Phoenix’ costs match the contract and rate schedule in all respects except that two of the three Phoenix

individuals involved in the ROV work, billed for meal costs on their expense reports that were not supported by the receipts provided. According to their contract and rate schedule, meals would be invoiced at the documented cost plus fifteen percent. Mr. Schmidt and Mr. Tomasi provided some meal receipts, but their expense reports showed a flat meal rate of \$66.00 per day and \$49.50 for three-quarters of a day. This appears to be a per diem rate, which is not justified. Page 17, section 6.13 of Phoenix' rate schedule states that "unless provided by the Client or otherwise quoted, when personnel are offshore or away from their home operating area, meals will be invoiced at our documented cost plus fifteen percent (+15%) in accordance with Section 5.2.5". Section 5.2.5 states that third party charges will be invoiced at cost plus fifteen percent. The contract between LCMM and Phoenix clearly states that all consumables and documented third party services not listed in the contract will be charged at cost plus fifteen percent. After reviewing the invoice and supporting documents provided by the claimant, the NPFC found the following concerning [REDACTED] and [REDACTED]'s meal costs:

Name	Invoiced Meals	Documented Meals	NPFC Denied Amount
[REDACTED]	\$165.00	\$42.57	\$122.43
[REDACTED]	\$173.08	\$55.20	\$117.88
Total	\$338.08	\$97.77	\$240.31

The Claimant provided proof of payment to the NPFC for this invoice. Since the subcontractor's duties were directly related to the operational dive assessment on the William H. McAllister to determine whether there was a substantial threat of oil discharging from the vessel, the NPFC finds the remainder of the costs OPA compensable. Accordingly, the NPFC has determined that the Claimant, Lake Champlain Maritime Museum has \$19,532.06 (\$19,772.37-240.31) in uncompensated removal costs for this claim.

On this basis, the Claims Manager hereby determines that the Claimant did in fact incur \$19,532.06 of uncompensated removal costs and that this amount is payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim # E10203-0002 in accordance with 33 CFR 136.203 & 205.

C. Determined Amount:

The NPFC hereby determines that the OSLTF will pay **\$19,532.06** as full compensation for reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # E10203-0002. 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: 7/7/11

Supervisor Action: *Approved*