

CLAIM SUMMARY / DETERMINATION FORM

Date : 5/23/2011
Claim Number : N08057-0100
Claimant : United States Environmental Services, LLC
Type of Claimant : OSRO
Type of Claim : Real or Personal Property
Amount Requested : \$121,023.25

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.

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.

The Claimant and the Claim:

As a result of this incident, ACL utilized the Claimant, United States Environmental Services LLC, (USES) to provide removal services.¹ The Claimant provided and deployed 24,900 feet of 18" containment boom in response to the incident at the Responsible Party's (RP) direction.² Once deployed, the boom was under the RP's control and ultimately recovered and deconned by the RP. The RP returned only 8,000 feet of the boom to USES.³ The Claimant ultimately purchased 13,200 feet of replacement 18" containment boom.⁴

On May 9, 2011, USES presented a removal cost claim to the National Pollution Funds Center (NPFC), which was reclassified as a Real or Personal Property damage claim. The claim is for reimbursement of 13,200 feet of replacement 18" containment boom.

The NPFC sent the RP a notification letter dated May 11, 2011 to Ms. [REDACTED] ACL – General Counsel and Mr. [REDACTED] of Nicoletti, Hornig & Sweeney, ACL – External Counsel.⁵

Claimant presented their costs to the RP on February 7, 2011 via USPS certified mail.⁶

¹ Agreement to Conduct Emergency Response Services, signed by Mr. [REDACTED] July 29, 2008.

² USES Daily for Friday, August 29, 2008.

³ ACL/DM 932 Incident Boom Release Form.

⁴ Invoice #34823

⁵ NPFC letter, to ACL, re: Claim No. N08057-0100

⁶ USPS Track & Confirm

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).

"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".

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 136.115(d), the Director, NPFC, will, upon written request of the claimant or the claimant's representative, reconsider any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request for reconsideration must be received by the NPFC within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier.

Under the Oil Pollution Act of 1990 (OPA), at 33 U.S.C. § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into or upon the navigable waters or adjoining shorelines or the exclusive economic zone, as described in Section 2702(b) of OPA.

The OSLTF which is administered by the NPFC, is available, pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136, to pay claims for uncompensated damages. One type of damages available pursuant to 33 C.F.R. § 136.213 is a claim for injury to, or economic losses resulting from the destruction of, real or personal property. Such a claim may be presented only by a claimant either owning or leasing the property.

Under 33 C.F.R. § 136.215(a), a claimant must establish the following:

- (a) An ownership or leasehold interest in the property;
- (b) That the property was injured or destroyed;
- (c) The cost of repair or replacement; and
- (d) The value of the property both before and after injury occurred.

Under § 136.217(a), the amount of compensation allowable for damaged property is the lesser of—

- (1) Actual or estimated net cost of repairs necessary to restore the property to substantially the same condition which existed immediately before the damage;
- (2) The difference between value of the property before and after the damage; or
- (3) The replacement value.

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 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 costs.
4. In accordance with 33 CFR § 136.101(a)(2), the claim was submitted on time.
5. Presentment of costs to the RP was made by the Claimant, USES, prior to the submission of the claim. The NPFC notified the RP of the claim.

B. Analysis:

Claimant provided Acme Products Co. invoices with proof of payment for 27,700 feet of 18" containment boom that USES had purchased in 2006, 2007, and 2008 as evidence of the age of the boom. This was required since the boom's age needed to be established in order to determine its depreciated value.⁷ Also, claimant provided a statement that they store their boom at ambient temperature, protected from the weather either in warehouses or on trailers with a cover.⁸

The NPFC contacted Acme Product Co. (Acme) to inquire about shelf life of the boom and provided USES' description of how the boom is stored when it is not deployed. A Representative of Acme replied to the NPFC's inquiry and stated that the storage method described eliminates the most harmful element on boom which is long exposures to sunlight and that the boom purchased in the years denoted (2006, 2007, and 2008) would have a shelf life beyond 10 years.⁹

Claimant provided Acme invoices with proof of payment for 13,200 feet of replacement boom.¹⁰ These invoices encompass the Claimant's sum certain plus 15% mark up which equates to \$121,023.25. Additionally, the Claimant provided a signed daily that states they had 24,900 feet of 18" containment boom on scene in the Management zone on May 29, 2008.

According to the ACL/DM 932 Incident Boom Release Forms, provided by the claimant, only 8,000 feet of 18" boom was returned to USES out of the 24,900 feet of deployed boom, leaving 16,900 feet of boom.¹¹ Out of the 16,900 feet of boom, 3,750 feet belonged to Lawson Environmental¹² which left a total of 13,150 feet of boom not returned to the Claimant. Since 13,150 feet of boom was not returned to the Claimant, the NPFC had no

⁷ Acme Products Co. invoice #32461 with ck # 01512, invoice #32515 with ck# 016069, invoice #32525 with ck# 016557, invoice# 32566 with ck# 017738, invoice # 32776 with ck# 021473, invoice #33233 with ck# 030894, invoice #32965 with ck# 024726, invoice #33425 with Ck# 034079, invoice #33450 with ck# 035189.

⁸ Email from claimant to NPFC, dated May 12, 2011.

⁹ Email from Acme boom to the NPFC, dated May 13, 2011.

¹⁰ Acme invoices # 34823 with check #063506.

¹¹ ACL/DM 932 Incident Boom Release Forms.

¹² Email from Claimant to NPFC dated May 16, 2011.

choice but to deduct 50 feet of boom from the claimed amount of 13,200 feet of 18" boom (13,200' - 50' = 13,150') therefore 13,150 feet multiplied by \$7.75 per unit¹³ equals \$101,912.50 (13,150' x \$7.75 = \$101,912.50). Then the NPFC had to deduct \$12.50 from the freight charges as the boom was shipped per pound. The \$12.50 was derived from the total freight charges claimed in the amount of \$2,967.31 divided by 13,200 feet which equals .22480 cents (13,200' ÷ \$2,967.31 = .22480 ¢). Then the NPFC took 13,150 feet of boom not returned to Claimant and multiplied that number by .22480 cents which resulted in \$2,954.81 in freight charges (13,150' x .22480 ¢ = \$2,956.12) which brings a total amount of \$104,867.31 for the 13,150 feet of boom (\$101,912.50 [total boom] + \$2,954.81 [freight] = \$104,867.31) not returned to the Claimant.

For the 13,150 feet of boom, the NPFC has applied a 30% depreciation or \$30,573.75 reduction to the replacement cost based on age. The NPFC came to this depreciation by looking at a combination of when the boom was purchased, how the claimant stores the boom when not deployed, use during other spills, and shelf life.¹⁴ According to the ACL/DM 932 Incident Boom Release Forms, the 8,000 feet of boom returned to the Claimant was deemed, "serviceable" by the Decon Manager, therefore the NPFC finds it reasonable that all 13,150 feet of boom was in serviceable condition when being deployed for service in this incident. Because the boom used during the ACL/DM 932 incident was not that old, the NPFC finds 30% depreciation as reasonable and therefore approves **\$71,338.75** in depreciated boom costs for the 13,150 feet of the unreturned and claimed boom.

The NPFC finds \$2,954.81 in freight charges for 13,150 feet of boom reasonable and therefore approves **\$2,954.81** in freight/shipping.

Accordingly, the NPFC has determined that the USES 15% markup or \$15,785.64 (on 13,200' of boom) is denied, as markup costs are not applicable in real or personal property claims. Also, on Page 15 of 16, Section D, in the USES Rate Schedule, it states... "Equipment damaged beyond economical repair, and not the fault of USES, will be replaced at the customer's expense with no mark up."¹⁵

C. Determined Amount:

The NPFC hereby determines that the OSLTF will pay **\$74,293.56** as full compensation for 13,150 feet of boom with freight charges.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's review: *5/23/11*

Supervisor Action: *Approved*

Supervisor's Comments:

¹³ Acme invoice 34823.

¹⁴ Acme's email to the NPFC, date May 13, 2011.

¹⁵ Standard USES Rate Schedule, July 1, 2008, Version 4.01LA.