

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JEET SINGH d/b/a AMAN FOOD & GAS,)	
Petitioner,)	
)	
v.)	PCB 2023-090
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer	Melanie Jarvis
Illinois Pollution Control Board	Division of Legal Counsel
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, Petitioner's Post-Hearing Brief, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the documents described above, were today served upon the Hearing Officer and Division of Legal Counsel by electronic-mail, this 13th day of July. The number of pages of this filing, other than exhibits, is 19.

Respectfully submitted,

JEET SINGH d/b/a AMAN FOOD & GAS,
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JEET SINGH d/b/a AMAN FOOD & GAS,)
 Petitioner,)
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 v.) PCB 2023-090
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ILLINOIS ENVIRONMENTAL)
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 Respondent.)

PETITIONER’S POST-HEARING BRIEF

NOW COMES Petitioner, JEET SINGH d/b/a AMAN FOOD & GAS, pursuant to Section 101.610(k) of the Pollution Control Board’s Procedural Rules (35 Ill. Adm. Code § 101.610(k)), for its post-hearing brief states as follows:

STATEMENT OF FACTS

Jeet Singh is the operator of a convenience store that sells gasoline in Moline, County of Rock Island, Illinois, known as Aman Food & Gas. (R. at 5, 11 & 285) The property is owned by Balbir Kaur. (R. at 581) On March 3, 2014, Singh reported a release from underground storage tanks to the Illinois Emergency Management Agency, which assigned Incident Number 2014-0247 to the release. (R. at 5) Petitioner’s consultant, CW3M Company, Inc., performed release confirmatory sampling, which confirmed a new release. (R. at 5-6)

On April 17, 2014, CW3M requested an extension of the 45-day reporting period to allow time to install new tanks once the old tanks were removed, which the Agency approved. (R. at 5) A 45-Day Certification was submitted on May 2, 2014 (R. at 10), and a 45-Day Report Addendum was submitted on June 3, 2014 (R. at 1). Approximately 771 tons of contaminated backfill were excavated from the tank pit and disposed of in a landfill. (R. at 7) Samples from

the floor and sidewall of the tank were collected and analyzed for BETX and MTBE, which confirmed that the most stringent Tier 1 Clean Objectives had been exceeded for all BETX contaminants. (R. at 7) Groundwater was also believed to have come into contact with contamination. (R. at 7) The tanks were found to be in fair condition, and in consultation with the Office of the State Fire Marshal Field Specialist, Petitioner's consultant determined that overfills and piping leaks were the likely sources of the release. (R. at 6) The 45-Day Report was approved on August 29, 2014. (R. at 295)

On January 8, 2015 the Office of the State Fire Marshal issued an eligibility and deductible determination for three gasoline underground storage tanks. (R. at 284) On February 18, 2015, Aman Food & Gas submitted a billing package for early action activities. (R. at 81) *Included in the billing package was an invoice for 3,000 square feet of concrete at a cost of \$14,250.00 (\$4.75 per square foot).* (R. at 266) Petitioner reduced the reimbursement request to \$4,329.05 for 935 square feet at \$4.63 per square foot. (R. at 264-265) On July 16, 2015, the Agency rejected payment for the concrete as the concrete contractor's invoice was dated after the early action period had expired. (R. at 70)

Petitioner's consultant subsequently performed site investigation activities. (R. at 295) On November 12, 2018, Aman Food & Gas submitted a Site Investigation Completion Report. (R. at 290) The Report defined the extent of soil and groundwater contamination for the release, *except with respect to those nearby properties for which access had been denied.* (R. at 307, 326 & 327) On March 13, 2019, the Agency approved the Site Investigation Completion Report. (R. at 397)

On April 9, 2019, Petitioner submitted a Corrective Action Plan and Budget. (R. at 399)

The plan observed that soil contamination was apparent at multiple locations within the site, but concentrated in the locations where early action samples 2, 4 and 8 were taken. (R. at 410)¹ Contamination in these areas was proposed to be addressed through the use of a construction worker inhalation caution area and an 81.99 square foot engineered barrier. (R. at 410; see also R. at 437 (Proposed Construction Worker Caution Areas Map) and R. at 441 (Engineered Barrier Map) The remaining soil contamination issues would be addressed with an industrial/commercial land use restriction. (R. at 412) With respect to groundwater contamination, the plan proposed use of the City of Moline's existing groundwater ordinance, and an off-site monitoring well on neighboring property that previously declined to allow access. (R. at 411) The budget estimated the placement of 81.99 square feet of concrete, six inches in depth, would itself cost \$461.60 (\$5.63 per square foot). (R. at 453) There were additional consulting costs related to the engineered barrier as well. (R. at 458)

On August 6, 2019, the Agency conditionally approved the plan with the following two (out of four) modifications:

- 1. The proposed construction worker caution shown in Drawing 0011, should be a rectangle with identifiable points, so that the boundaries of the proposed construction worker caution can be more easily identified.**
- 2. The proposed engineered barrier shown in Drawing 0016 should be a rectangle with identifiable points, so that the boundaries of the proposed engineered barrier can be more easily identified.**

(R. at 542-543)

While the project manager's reviewer notes recommended approving the budget (R. at

¹ Two of these soil samples were taken beneath two of the tanks and the third sample was taken from the excavation wall closest to where the piping left the tank pit on the way to the dispenser pumps. (R. at 34)

536), the Agency's final decision cut \$8,958.10 from the proposed budget. (R. at 545-546)

Following the decision, Petitioner's consultant began to implement the modified *corrective action plan by initiating drilling and sampling activities.* (R. at 571 (Corrective Action Completion Report)) These activities included drilling for a sample to identify any vapor intrusion exceedances, and conducting groundwater investigation on property to the North which had previously denied access. (R. at 571) The offsite monitoring well could only be advanced about eight to nine feet due to the presence of bedrock, and an alternate location also encountered bedrock at the same depth. (R. at 571) At the same time groundwater had accumulated in the monitoring well. (R. at 571) The construction worker installation caution area and the engineered barrier were installed pursuant to the Agency's revision to make these areas more *easily identifiable.* (R. at 571) *The engineered barrier was expanded from 81.99 to 237 square feet, almost tripling the size originally proposed.* (R. at 602)

Before submitting the Corrective Action Completion Report detailing these activities, Petitioner's submitted a Corrective Action Budget Amendment on July 20, 2021, based upon prior communications between the consultant and the Agency project manager about the changes required to implement the modified Corrective Action Plan. (R. at 549) It was determined that additional reimbursement for the additional square footage of concrete for modifying the engineered barrier was not needed, but consulting costs associated with the engineered barriers were requested. (R. at 548) *On November 17, 2021, the Agency approved the Corrective Action Budget Amendment as submitted with the exception of \$3.91 in mileage for one mile of a round trip.* (R. at 556)

On August 2, 2021, the Corrective Action Completion Report was submitted. (R. at 561)

Petitioner's consultant requested issuance of a No Further Remediation letter. (R. at 574) On December 3, 2021, the Corrective Action Completion Report was rejected by the Agency with directions that the engineered barrier "be enlarged" to extend to the property line and the fuel pumps. (R. at 739) Specifically, two of the three rejection reasons stated:

2. **The Construction Worker Caution area shown on Drawing 0012A will need to be enlarged to encompass wall samples 10 and 9 along the former UST excavation and soil boring SB-2 along the eastern property boundary since the soil samples in these locations were collected at similar depth as floor samples 2 and 4 and wall sample 8.**
3. **The Engineered Barrier area shown on Drawing 0012B should be enlarged to encompass soil borings SB-1, SB-2, and SB-3 since soil samples in these locations were collected at similar depth as wall sample 8.**

(R. at 739 (emphasis added))

These denial reasons reference drawings contained in the record which show the location of the samples that needed to be addressed. (R. at 601 & 602) The Construction Worker Caution area was required to be enlarged to the foundation of the service station building to the South and to the property line to the East. (R. at 601) The Engineered Barrier was required to be enlarged to the property line to the East and to an area beneath the canopy to the South. (R. at 602)

Following discussions with the Agency project manager on February 15, 2022, Petitioner's consultant submitted a Corrective Action Budget Amendment to address the additional 1,525 square feet of Engineered Barrier to be installed. (R. at 742) The submittal included a map of the enlarged Engineered Barrier, which now would encompass soil borings SB-1, SB-2, and SB-3. (R. at 754; see also R. at 783 (same map delineating difference between the previously installed Engineered Barrier and the 1,525 square foot enlargement)) The budget estimated \$9,256.46 for enlarging the engineered barrier by 1,525.00 square feet of six-inch

concrete. (R. at 747 - 748) The submittal was certified by a licensed professional engineer. (R. at 773) On June 1, 2022, the Agency approved the Corrective Action Budget Amendment with no modifications. (R. at 755)

While awaiting the Agency's approval, Petitioner's consultant solicited concrete contractors that who might be interested in the work. (R. at 796, 797 & 802) Failing to obtain any interest, the work was put out for competitive bid with notice published in the Dispatch – Rock Island Argus. (R. at 777) On August 29, 2022, Petitioner's consultant submitted a Corrective Action Budget Amendment pursuant to the competitive bidding process. (R. at 761) The submittal requested that the budget be amended to approve the lowest bid of \$21,350.00 received from Walter D. Laud Concrete Construction (R. at 785), plus \$9,356.90 consulting costs from enlarging the engineered barrier and conducting the bidding process. (R. at 768 - 770)

The Budget Amendment was reviewed by Brad Dilbaitis, who was the not the previous project manager. (R. at 758) His notes indicate that while “the Paving Costs were bid in accordance with 734.855,” Dilbaitis concluded that “[t]he budget cannot be approved – all costs are associated with the bidding and placement of the engineered barrier – these costs were all approved in the previous budget.” (R. at 758, 760) On December 28, 2022, the Agency denied the Corrective Action Budget Amendment in its entirety, explaining in italics:

Pursuant to 35 Ill. Adm. Code 734, 840(a), payment for costs associated with concrete, asphalt, and paving installed as an engineered barrier, other than replacement concrete, asphalt, and paving, must not exceed the Subpart H maximum payment amount for four inches of asphalt. The budget proposes additional costs associated with the placement of six inches of concrete to be used as an engineered barrier. The applicable costs associated with the placement of the engineered barrier were approved in the previous budget.

(R. at 803 & 805)

On February 3, 2023, Petitioner timely filed a Petition for Review with the Pollution Control Board, which the Board accepted for hearing on February 16, 2023.

LEGAL STANDARDS AND SCOPE OF REVIEW

The Agency's refusal to approve a plan or budget may be appealed to the Board. See 415 ILCS 5/57.7(c)(4). The question posed herein is "whether the application, as submitted to the Agency, would not violate the Act and Board regulations." Metropolitan Pier & Exposition Authority v. IEPA, PCB 10-73, slip op. at 51 (July 7, 2011). "[T]he Agency's denial letter frames the issue." Evergreen FS v. IEPA, PCB 11-51, slip op. at 16 (June 21, 2012) This denial letter must explain which Sections of the Act or provisions of the regulations might be violated if the plan were approved, including "specific reasons why." (415 ILCS 5/57.7(c)(4)(A),(B), D)) Furthermore, the Agency must explain the specific type of information, if any, the applicant did not provide the Agency. (415 ILCS 5/57.7(c)(4)(C))

As to the issues identified in the Agency decision letter, Petitioner has the burden of proof in these proceedings. Evergreen FS v. IEPA, PCB 11-51, slip op. at 16 (June 21, 2012) The standard of proof in UST appeals is a "preponderance of the evidence." Id. "A proposition is proved by a preponderance of the evidence when it is more probably true than not." Id.

ARGUMENT

The United States has recently experienced economic conditions of high, sustained inflation, either caused or aggravated by a global pandemic and energy shocks from war abroad. According to the U.S. Bureau of Labor Statistics, “[o]ver the 12 months ended June 2022, the Consumer Price Index for All Urban Consumers increased 9.1 percent [which] was the largest 12-month increase since the 12-month period ending November 1981.”² Over the same period, the Bureau’s Producer Price Index for ready-mix concrete in the Midwest region rose over 10.6 percent, and if anything those costs have risen even more (over 14.4 percent) over the next twelve months.³

These developments have naturally placed pressure on the maximum payment rates in the Board’s regulations. While those regulations require annual adjustments in the maximum payment amounts based upon the Gross Domestic Product Implicit Price Deflator from the previous year, increases are lagging and capped at no more than five percent in a single year. (35 Ill. Admin. Code § 734.870)

As with most environmental regulations, however, the LUST Program provides for

² Bureau of Labor Statistics, U.S. Department of Labor, The Economics Daily, Consumer prices up 9.1 percent over the year ended June 2022, largest increase in 40 years at <https://www.bls.gov/opub/ted/2022/consumer-prices-up-9-1-percent-over-the-year-ended-june-2022-largest-increase-in-40-years.htm> (visited July 13, 2023) (Pet’s Ex. 1). “As a matter of law, it is clear that our courts will take judicial notice, and will not require proof, of periods of inflation and deflation.” Tiongco v. Bachrach, 2013 IL App (2d) 120491, ¶ 30 (taking judicial notice of BLS inflation data).

³ See Pet’s Ex 2 (PPI Commodity index for Midwest Regaion, ready-mix concrete) This data is taken from the website of the Bureau of Labor Statistics from the index page at: <https://www.bls.gov/ppi/notices/2013/ppi-introduces-regional-detail-for-ready-mix-concrete-indexes.htm> (visited July 13, 2023). The Board may take official notice of BLS inflation data. Tiongco v. Bachrach, 2013 IL App (2d) 120491, ¶ 30

circumstances when the general assumptions in the rulemaking differ from future circumstances. Unfortunately, the first safeguard is placed in the responsibility of the Illinois EPA to conduct a *triennial review of prevailing market rates and report to the Board whether the amounts are consistent with prevailing market rates.* (35 Ill. Adm. Code § 734.875) The Agency has repeatedly failed in its responsibilities to perform this obligation. However, in adopting the maximum payment amounts, the Board also “included two other avenues for reimbursement of rates . . . in addition to the maximum rates, . . . provisions to allow for competitive bidding and to account for unusual or extraordinary circumstances.” Burgess v. IEPA, PCB 15-186, slip op. at 19 (Nov. 5, 2015)

Petitioner submitted rates under the competitive bidding provisions on the grounds that “corrective action cannot be performed for amounts less than or equal to maximum payment amounts adopted by the Board.” (415 ILCS 5/57.7(c)(3)(C)) The Agency decision letter frames the issues in this appeal. Dersch Energies v. IEPA, PCB 17-3, slip op. at 10 (Aug. 11, 2022) The Agency’s denial letter does not identify any defect in Petitioner’s implementation of the competitive bidding process, cite any statute or regulation governing the competitive bidding process, or identify any information needed by the Agency in order to review the budget. See 415 ILCS 5/57.7(c)(4) (requirements for the content of a denial determination) As such, the only question potentially raised is a purely legal issue as to the availability of the competitive bidding process for the expanded engineered barrier ordered by the Agency and necessary to perform corrective action that will finally bring this remediation to an completion.

I. Competitive Bidding Pricing is Available for Installing an Engineered Barrier.

Board regulations authorize three methods for determining the maximum amounts that can be paid for tasks such as installation or replacement of pavement:

Methods for Determining Maximum Amounts. This Subpart H provides three methods for determining the maximum amounts that can be paid from the Fund for eligible corrective action costs. All costs associated with conducting corrective action are grouped into the tasks set forth in Section 734.810 through 734.850 of this Part.

(35 Ill. Adm. Code § 734.800(a)(emphasis added))

While the rates expressly listed in Subpart H are often referred to as the Subpart H rates, there are actually three equally appropriate methods for determining the maximum payments amounts: (1) presumptive amounts assigned to each task, adjusted by an annual inflation factor, (2) amounts determined by competitive bidding for one or more tasks, and (3) amounts for unusual or extraordinary circumstances. (35 Ill. Adm. Code § 734.800(a)) A distinction is drawn at the outset between the first two methods which approach costs in terms of the tasks identified in Sections 734.810 through 734.850, and the third method for which amounts may be established for unusual or extraordinary circumstances without reference to the listed tasks. Compare 35 Ill. Adm. Code § 734.800(a)(1) (“each task set forth in those Sections”) and § 734.800(a)(2) (“one or more tasks”) with § 734.800(a)(3) (no reference to tasks). In other words, competitive bidding is appropriate for situations in which the presumptive amounts for a given task do not reflect prevailing market prices at the relevant time and place, while the provision for unusual or extraordinary circumstances does not reference listed tasks, but come with the commensurate additional obligation to show that the requested costs are unavoidable, reasonable and necessary. See 35 Ill. Adm. Code § 734.860 (“Unusual or Extraordinary

Circumstances”)

As such competitive bidding is appropriate for “one or more tasks” listed in Sections 734.810 through 734.850, so long as the lowest bid for a particular task is greater than the presumptive amounts set forth in those Sections. (35 Ill. Adm. Code § 734.800(a)(2)). Pavement costs are tasks set forth in Section 734.840, and as such it was entirely appropriate to select this work for competitive bidding. (35 Ill. Adm. Code § 734.840 (“Concrete, Asphalt, and Paving; Destruction or Dismantling and Reassembly of Above Grade Structures”))⁴ Once a task from those Sections is identified, those provisions are no longer relevant or applicable to determining the maximum payment amount for bidding.

The amounts derived from competitive bidding must be performed “in accordance with Section 734.855 of this Part.” (35 Ill. Adm. Code § 734.800(a)(2)). The Agency reviewer notes expressly recognize that “the Paving Costs were bid in accordance with 734.855.” (R. at 758) No violation of Section 734.855 is identified or implicated in the Agency’s decision letter. None of the provisions cited in the Agency’s decision letter mentions competitive bidding. The intention of the competitive bidding provisions was to provide an alternative to the presumptive amounts listed in Section 734.810 through 734.850 of the Board’s regulations for the tasks identified in those Sections. As paving is unquestionably a task listed in those Sections, the costs for paving is suitable for competitive bidding and the Agency’s decision should be reversed.

⁴ Section 734.840(a) of the Board’s regulations addresses costs associated with pavement installed as an engineered barrier while Section 734.840(b) addresses costs associated with replacement of existing pavement. Here, the approved work is both installation of an engineered barrier and the replacement of existing pavement, and as such Section 734.840(b) is the more appropriate provision. (35 Ill. Adm. Code 734.840(a)) As neither references limits, let alone references the availability of competitive bidding, this distinction is immaterial.

II. The Regulatory History of the Part 734 Regulations Support Broad Usage of Competitive Bidding.

If there is any doubt that the plain language of Part 734 supports the use of competitive bidding here, then it is appropriate to look at the regulatory history that led to the creation of competitive bidding. See Arellano v. Dep't of Human Serv., 402 Ill.App.3d 665, 675 (2nd Dist. 2010) (consulting legislative and regulatory history where a regulation's plain meaning is ambiguous)

In 2004, the Agency proposed extensive changes to the Leaking Underground Storage Program, including the introduction of maximum payment amounts. Proposed Amendments To: Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732), R04-22(a) (Jan. 22, 2004) (hereinafter "R04-22(a)")⁵ At the time the rulemaking was initiated, the Agency utilized an internal rate sheet to determine the reasonableness of costs which it refused to disclose to the public. While the rulemaking was pending, the Board found the rate sheet to be an invalid rule and a Circuit Court subsequently enjoined the Agency from using it. See R04-22(a), slip op. at 1 n1 (June 3, 2004) (Board Order denying motion for emergency rule)

The maximum payment amounts proposed by the Agency and the underlying methodology were controversial and the proposed rule underwent numerous changes to attempt to address concerns raised in the proceedings. The Board recognized that testimony before the Board "demonstrated real concerns with how the rates were developed." R04-22(a), slip op. at 78 (Feb. 17, 2005) (First Notice). The Board further agreed that "the Agency's methodology for

⁵ The R04-22 proceedings were consolidated with the R04-23 proceedings which addressed the new Part 734.

determining the maximum rates is not statistically defensible.” Id. at 79. Nonetheless, the Board found the rates reasonable in light of the other alternatives available under the proposed rulemaking, in particular the new option for competitive bidding.

The initial proposed rule did not include competitive bidding, which was added by the Agency in the Third Errata Sheet. R04-22(a), slip op. at 13 (Feb. 17, 2005) (First Notice). The Agency gave extensive testimony explaining how the addition of competitive bidding would address numerous issues raised with its original proposal:

The Agency believes that the bidding process will generally improve the process of proposed rules. First, it allows an exceedance over the maximum rates if the lowest of the bids exceed those rates. Bidding will allow the rules to be responsive to site-specific conditions and cause -- that cause an increase in costs, such as greater hauling distances to landfills and higher field cost.

Second, costs based on bids will accurately reflect market price, making the rules immediately responsive to price fluctuation.

Third, there is less of a need for Agency approval of unusual and extraordinary expenses or the need to determine at what point the costs substantially exceed the maximum payment amounts. Instead, the costs can be bid out, and the lowest bid will be considered reasonable.

Fourth, there is no need to gather new information to establish a new database specifically for the purposes of determining maximum reimbursement amounts, which could be extremely burdensome to both consultants and the Agency and result in great delays in adopting these rules.

Finally, bidding will help the Agency track market rates and adjust maximum payment amounts in the rule when necessary. If we see certain costs are continually bid out and coming in higher than the maximum payment amount allowed in the rules, we will know it's time to review the rules and adjust those amounts through a rule making.

Transcript of August 9, 2004 Hearing, R04-22(a), at pp. 49-50 (testimony of Doug Clay, IEPA).

On February 17, 2005, the Board published first notice of the proposed rule:

The Board is proposing the maximum payment amounts proposed by the Agency in most cases. The Board is cognizant that the methods used to develop the rates by the Agency were not scientifically or statistically recognized methods. However, the Agency's experience in the UST program is also an element to be taken into consideration. In addition, the first-notice proposal will include provisions for bidding, extraordinary circumstances, and an annual inflation adjustment. The Board is convinced that the first-notice proposal, as a whole, will allow for reimbursement of reasonable remediation costs.

(R04-22(a), slip op. at 1 (Feb. 17, 2005) (First Notice) (emphasis added))

The presumptive amounts set forth for each task were reasonable despite concerns about their reliability precisely because these are not the sole method of determining amounts. The Agency emphasized that "the owners and operators are not constrained by the maximum rates. The owner or operator can exceed those amounts by either the bidding process or demonstrating that the site poses unusual or extraordinary circumstances." R04-22(a), slip. op. at 27 (Feb. 17, 2005) (First Notice) (emphasis added)

The reasonableness of the Subpart H maximum payment amounts were assessed based upon the totality of the alternatives available for determining the maximum payment amounts, particularly the added competitive bidding provision. The Board repeatedly referenced the bidding provisions in rejecting a wide variety of challenges. Rules would not need to require the Agency to utilize a database to collect and maintain data relevant to costs because "[t]he inclusion of competitive bidding in these new rules will allow the Agency to determine market rates based on the bids." R04-22(a), slip op. at 68 (First Notice). Greater delineation of the scope of work for lump sum rates was not necessary because there is now "a bidding process for projects that cannot be undertaken for the maximum rate in Subpart H." R04-22(a), slip op. at 78

(First Notice) Atypical situations also could be resolved either through bidding of tasks or through the “extraordinary circumstances” language. R04-22(a), slip op. at 73 (First Notice). Furthermore, understandable concerns about maximum amounts being established based upon average costs could be addressed through the “bidding process, and the unusual circumstances contingency.” R04-22(a), slip op. at 80 (First Notice).

The presumptive amounts in Subpart H have the advantage of simplicity, certainty and less cost to prepare, but the bidding method has the advantage of actually reflecting prevailing market costs. Identifying market costs ensures that a key purpose of the Underground Storage Tank Fund is achieved, which is to pay for the remediation of underground storage tank releases. (415 ILCS 5/57) Moreover, bidding provides an important function in evaluating when and how much the presumptive costs in Subpart H have departed from prevailing market conditions and must be revised through future rulemaking.

The pavement cost at issue herein are the result of price fluctuations that the incorporation of competitive bidding into the rules was intended to address. There is no reason that the numerous concerns raised in the rulemaking were not valid with respect to paving costs. If anything, given the LUST Program did not normally reimburse pavement costs at the time rates were proposed, the Agency lacked the requisite experience to be given any deference as to the costs associated with paving. See Salyer v. IEPA, PCB 98-156, slip op. at 8 (“replacement of concrete or asphalt does not generally constitute corrective action”) (Jan. 21, 1999) The regulatory history shows broad support for using competitive bidding as an alternative available whenever the presumptive costs appear insufficient. Moreover, using competitive bidding improves the LUST Program’s functionality.

III. Given the Agency's Continual Failures to Report and Update Costs, a Presumption Should Arise that Alternative Maximum Payment Amounts Are Superior.

Since March 1, 2006, when the Part 734 regulations became effective, the Agency has failed to perform its obligation to review rates every three years:

No less than every three years the Agency must review the amounts set forth in this Subpart H and submit a report to the Board on whether the amounts are consistent with the prevailing market rates. The report must identify amounts that are not consistent with the prevailing market rates and suggest changes needed to make the amounts consistent with the prevailing market rates. The Board must publish notice of receipt of the report in the Environmental Register and on the Board's web page.

(35 Ill. Adm. Code 734.875)

As mentioned in the previous section, the triennial review, along with competitive bidding, was an important component in ensuring the presumptive amounts in Subpart H would reflect prevailing market rates. In particular, the Agency testified to the Board:

Nineteenth change. In its original proposal, the Agency proposed a review -- proposed a rule to review the rules at least every two years to ensure the maximum payment amounts remain current with the prevailing market prices. In its first errata, the Agency proposed a change to this requirement to an automatic increase in the maximum payment amount each year. The Agency now proposes to add back in a mandatory review of rates to ensure that they are keeping pace with the prevailing market rates. The only difference between the language as originally proposed is that review must now be conducted every three years instead of every two years. The Agency believes that a three-year minimum is sufficient because the maximum amount will automatically be increased each year, and the Agency will be able to track market fluctuations through the bidding process.

Transcript of August 9, 2004 Hearing, R04-22(a), at pp. 52-53 (testimony of Doug Clay, IEPA)

The Burgess v. IEPA, PCB 15-186 (Nov. 5, 2015), the Agency argued that the issue was not yet ripe as the 2013 legislative changes requiring prevailing wages to be paid from the LUST Fund was relatively recent. Id. at 13. Since Subpart H maximum payment amounts had not

been amended since 2013, the Board found that “the Subpart H maximum payment amounts do not reflect prevailing wage.” *Id.* at 21.

To be clear, the submittal at issue herein did not raise any prevailing wage issues; the costs were bid because Petitioner’s consultant could not find anybody to do the work for the presumptive amounts in Subpart H. However, three events have joined to render the amounts in the 2004 rulemaking no longer reliable. The first event is that the Agency has never conducted its triennial review and reporting to the Board, an integral part of making sure the approved amounts are reasonable and reflect prevailing market conditions. The second event is that Subpart H amounts have never been modified to reflect prevailing wage laws. The third event is severe, prolonged inflation not seen in generations. Taken together, the presumptive amounts should no longer should enjoy any presumption that they reflect amounts that are reasonable, legal or available in the marketplace.

Petitioner asks the Board to exercise a presumption favoring alternative maximum payment amounts so long as they adhere to express legislative mandates which the Board cannot ignore. Relevant here is that the Illinois General Assembly promulgated detailed “minimum” requirements for a competitive bidding process. (415 ILCS 5/57.7(c)(3)(B)) As that statutory provision does not limit tasks suitable for competitive bidding, there should be no basis for rejecting the low bid procured in this matter through the competitive bidding process.

WHEREFORE, Petitioner, JEET SINGH d/b/a AMAN FOOD & GAS, prays that the Board find the Agency erred in its decision, direct the Agency to approve the budget as submitted, award payment of attorney's fees and grant Petitioner such other and further relief as it deems meet and just.

JEET SINGH d/b/a AMAN FOOD & GAS,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

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Consumer prices up 9.1 percent over the year ended June 2022, largest increase in 40 years

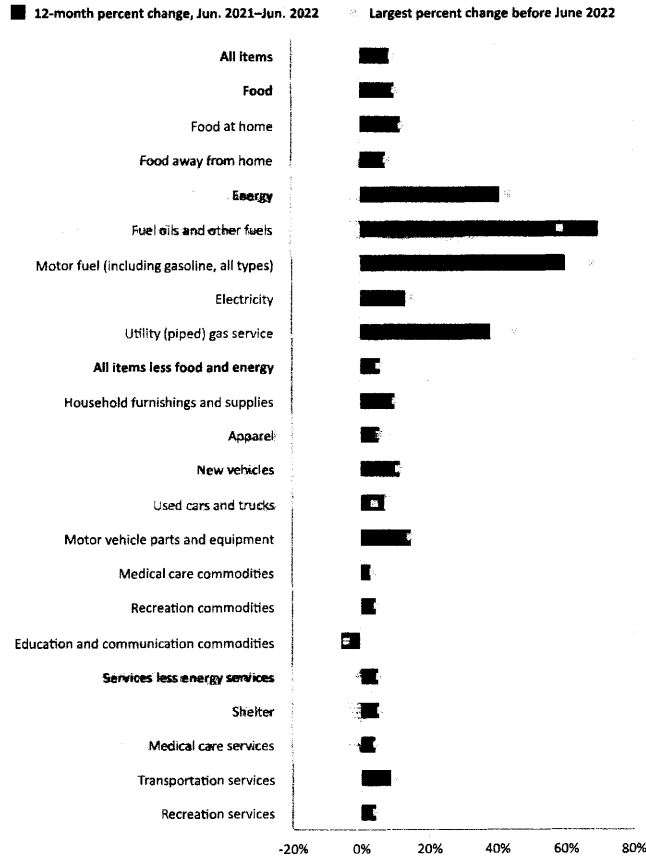
JULY 18, 2022

Over the 12 months ended June 2022, the Consumer Price Index for All Urban Consumers increased 9.1 percent. The 9.1-percent increase in the all items index was the largest 12-month increase since the 12-month period ending November 1981.

CHART IMAGE CHART DATA

Chart Image

Consumer Price Index for All Urban Consumers, 12-month percent change, by expenditure category, June 2022



Click legend items to change data display. Hover over chart to view data. Source: U.S. Bureau of Labor Statistics.



Chart Data

Consumer Price Index for All Urban Consumers, 12-month percent change, by expenditure category, June 2022

Expenditure category	12-month percent change, Jun. 2021–Jun. 2022	Largest percent change before June 2022	Month of previous largest percent change
All items	9.1%	9.6%	Nov. 1981
Food	10.4	10.5	Feb. 1981
Food at home	12.2	12.3	Apr. 1979
Food away from home	7.7	8.0	Nov. 1981
Energy	41.6	43.5	Apr. 1980
Fuel oils and other fuels	70.4	58.8	Apr. 2022
Motor fuel (including gasoline, all types)	60.2	68.2	Mar. 1980
Electricity	13.7	14.8	Apr. 2006
Utility (piped) gas service	38.4	45.3	Oct. 2005
All items less food and energy	5.9	5.5	Dec. 2021
Household furnishings and			

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PETITIONER'S EXHIBIT

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Prices for food increased 10.4 percent for the 12 months ending June 2022, the largest increase since February 1981. Prices for food at home rose 12.2 percent over the last 12 months, the largest increase since April 1979. Prices for food away from home rose 7.7 percent, the largest 12-month change since November 1981.

Energy prices rose 41.6 percent over the last year, the largest 12-month increase since April 1980. Within the energy category, motor fuel prices (which includes all types of gasoline) increased 60.2 percent over the year. Gasoline prices increased 59.9 percent, the largest 12-month increase since March 1980. Electricity prices rose 13.7 percent, the largest 12-month increase since April 2006. Natural gas (piped utility gas) prices increased 38.4 percent over the 12 months ended June 2022, the largest increase since October 2005.

Prices for new vehicles increased 11.4 percent over the year, prices for used cars and trucks were up 7.1 percent, while prices for motor vehicle parts and equipment increased 14.9 percent.

These data are from the [Consumer Price Index](#) program and are not seasonally adjusted. To learn more, see "[Consumer Price Index — June 2022](#)." Also see [more charts related to the latest Consumer Price Index news release](#).

RELATED SUBJECTS Prices

SUGGESTED CITATION

Bureau of Labor Statistics, U.S. Department of Labor, *The Economics Daily*, Consumer prices up 9.1 percent over the year ended June 2022, largest increase in 40 years at <https://www.bls.gov/opub/ted/2022/consumer-prices-up-9-1-percent-over-the-year-ended-june-2022-largest-increase-in-40-years.htm> (visited July 13, 2023).

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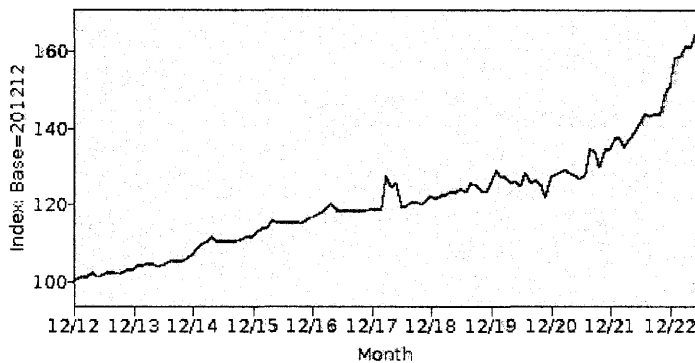
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Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2012												100.0
2013	100.7	100.9	101.1	102.1	101.0	101.5	101.9	102.1	101.7	102.0	102.9	103.0
2014	103.8	104.0	104.4	104.4	103.4	104.0	104.7	105.0	104.9	105.0	105.9	106.7
2015	108.4	109.5	109.9	111.3	110.2	110.4	110.4	110.2	110.3	110.5	111.3	111.6
2016	112.7	113.6	113.8	115.5	115.3	115.1	115.1	115.1	115.0	114.9	116.0	116.2
2017	117.1	117.4	119.1	120.1	118.0	118.0	118.0	118.0	118.0	118.0	118.0	118.6
2018	118.7	118.7	127.3	124.0	125.1	119.3	119.3	120.3	120.3	119.8	120.7	121.8
2019	121.0	122.1	122.2	123.2	123.1	123.8	123.2	125.1	124.9	123.3	123.1	125.4
2020	128.8	126.7	127.2	125.3	125.5	124.6	127.9	125.2	126.0	124.9	121.6	126.7
2021	127.4	128.1	128.8	128.0	127.1	126.3	127.711	134.265	133.570	129.357	134.421	134.159
2022	137.181	137.167	134.768	136.766	138.504	141.261	143.630	142.909	143.647	143.470	148.404	151.084
2023	158.118	158.456	161.162(P)	161.410(P)	164.412(P)	164.412(P)						

P: Preliminary. All indexes are subject to monthly revisions up to four months after original publication.

