

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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TODD'S SERVICE STATION,)
)
Petitioner,)
)
vs.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

STATE OF ILLINOIS
Pollution Control Board

PCB No. 03-2
(UST Appeal – Petition for Review and
Hearing/Appeal)

PETITIONER'S REPLY BRIEF

NOW COMES the Petitioner, Todd's Service Station, and its contractor, Midwest Environmental Consulting & Remediation Services, Inc. ("Midwest") by their attorneys, Elias, Meginness, Riffle & Seghetti, P.C., and as and for Petitioner's Reply Brief, states as follows:

ARGUMENT

I. PETITIONER'S RECITATION AND CHARACTERIZATION OF THE RELEVANT FACTS IS FAIR AND ACCURATE.

The Illinois Environmental Protection Agency (IEPA) takes great issue with Petitioner's characterization of certain statements and facts, as set forth in its Brief. However, it should be noted that Petitioner cites extensively to specific testimony of witnesses at the hearing in support of its arguments and claims. The IEPA makes no effort to cite to specific testimony or evidence which rebuts the specifically quoted testimony.

The most crucial assertions made by Petitioner are as follows:

"It is undisputed that Midwest expended at least the number of hours set forth in the amended budget (Petitioner's Exhibit 1) in order to properly complete the project. (Tr. 22-23; 38; 71; 77). It is also undisputed that these hours were reasonably necessary, and were expended at the direction of the IEPA (or, at the very least, with their full approval). (Tr. 32)."

(Petitioner's Brief, p. 7)

The testimony in support of these claims was cited to and quoted at length in Petitioner's Brief. The work performed pursuant to that budget included the TACO calculations and modeling, two Highway Authority Agreements, and the plans and budget work. (Tr. 32). Mr. Birky, an employee of Petitioner's environmental consultant, testified that he had frequent phone contact with James Malcolm of the IEPA regarding the work which was performed in the field. (Id.) The project was complicated because of the presence of fiber optic lines (which limited the locations for subsurface sampling). (Id.) Mr. Malcolm of the IEPA made the suggestion to do off-site sampling across a major roadway. (Id.) That suggestion significantly added to the cost of the project. (Tr. 36). The off-site testing and the necessity of obtaining two (2) Highway Authority Agreements were a major portion of the costs involved in this case.

Mr. Birky identified Petitioner's Exhibit 1 (which was admitted without objection) as the personnel page of the budget amendment which was submitted. (Tr. 37). He was personally involved in the preparation of that document. Mr. Birky testified that Midwest spent at least the number of hours depicted on Petitioner's Exhibit 1 in connection with the amended budget for the project in question. (Tr. 38).

Mr. Green testified as follows regarding the scope of work related to the amended budget, and the reasonableness of the amounts charged:

A. It would have been for the actual TACO and tier for closure of the site, the model and calculation, the Highway Authority Agreements, and the final closure documentation, the report to the EPA and the final reimbursement for that work.

Q. The total amount you charged for that phase of the project was \$7,483.58?

A. Yes.

Q. Has that amount indeed been paid by Todd to Midwest Environmental?

A. Yes.

Q. In your experience was \$7,483.58 a reasonable total amount to charge for the scope of work that was covered by the amended budget?

A. Yes.

Q. In your experience have you seen instances where significantly higher amounts have been charged for that type of scope of work?

A. Yes.

(Tr. 24-25).

The IEPA called only one witness to testify on its behalf at the hearing. That witness, Mr. Chappel, did not testify that the hours expended were unreasonable. With respect to the number of hours actually expended, he testified as follows:

(by Mr. Riffle)

Q. Do you have any specific evidence that the hours claimed in the amended budget were not actually expended by Midwest on this project?

A. No, I do not.

(Tr. 71).

(by Mr. Riffle)

Q. You don't know how many hours actually were expended by Midwest on this project, correct?

A. No.

(Tr. 77).

The IEPA (without any citation to the transcript) takes issue with Petitioner's claim that the reasonableness of the charges stands un rebutted. The IEPA's argument on this issue is as follows:

This is a false and, at best, misleading statement. First, there is no question but that the hours set forth in the amended budget are in dispute, as that forms the very basis for the appeal. What may be undisputed, at least from the Petitioner's perspective, is that Midwest billed the Petitioner for those hours and that Midwest claims it provided work for all those hours. However, that does not mean that the Illinois IEPA did not, and does not now, find that those hours were excessive for the work described. Also, there is clearly a question as to whether those hours were reasonably necessary. The Illinois EPA has taken the position, as memorialized in its decision of June 7, 2002 (AR, pp. 136-139), that not all of the hours included in the amended budget were reasonably necessary.

IEPA Brief, at p. 3

The fact that the IEPA “has taken the position” or “finds” that the hours submitted were unreasonable does not mean that the claim of reasonableness, as specifically testified to by two witnesses whose testimony has been deemed credible, has been properly contested or rebutted. The IEPA had every opportunity, at the hearing, to elicit testimony and introduce evidence to establish that the hours expended were unnecessary and/or unreasonable, and/or not actually expended. Once Petitioner presented credible testimony in support of its claim of reasonableness, the burden then shifted to the IEPA to rebut this claim with testimony or evidence of unreasonableness. This it did not do. There is not one single citation in the IEPA’s Brief to the hearing transcript or record which in any way establishes that the hours expended were unreasonable. Petitioner stands by its position that the reasonableness of the hours claimed has been established, and not rebutted.

II. PETITIONER SHOULD NOT BE PENALIZED FOR FOLLOWING THE SUGGESTIONS AND INSTRUCTIONS OF THE IEPA.

The IEPA goes to great lengths to argue that its employee’s “suggestions” to Mr. Birky regarding a specific course of action did not constitute pre-approval of the hours expended. While this might be technically correct, it would be an abuse of discretion for the IEPA to specifically instruct or suggest a certain course of action (such as the specific location of off-site testing, such as occurred in this case), and then determine that the hours necessarily expended in the course of following that suggestion or instruction were “unreasonable”. Moreover, there has been absolutely no showing that the off-site testing in question was not necessary.

Mr. Birky testified at length regarding the conversations between himself and Mr. Malcolm of the IEPA, and the events which led up to the off-site testing. (Tr. 33-37). Mr. Birky testified that he had several conversations with Mr. Malcolm of the IEPA regarding this project, and that Mr. Malcolm would “give me instructions on his thinking. . .” (Tr. 53).

Mr. Birky further testified as follows:

A. When we were fairly certain we couldn't get access to an area to determine that without potential damage to fiber-optic cables, we decided to move across the street.

Q. When you say we decided, can you give a little detail as to how that happened?

A. That was basically a telephone conversation that I was on site talking with James Malcolm on the phone and kind of telling him where I was at and what I was looking at there.

That's basically when he and I decided if we had to we could go across the street and obtain the Highway Authority Agreement.

Q. Was that something that he suggested or you suggested, or do you recall?

A. I think it was him, because it was -I was a little reluctant to have to go that extra step beyond what had been approved as far as the Highway Authority Agreement. I told him I really can't get access to this area, you know, comfortably anyway. He suggested I move across the street and obtain those.

Q. Did you proceed to do that?

A. Yes.

(Tr. 34-35).

The foregoing testimony stands unrebutted. The necessity of that additional work, and the fact that the hours claimed were actually performed, also stands unrebutted. Whether the actions of Petitioner's consultant were technically "pre-approved" is not the issue here. The issue is whether the Amended Budget (which contains budget amounts for the additional work "suggested" by the IEPA) was reasonable. The clear testimony in this case is in favor of Petitioner on this point.

III. THE UNREBUTTED TESTIMONY THAT THE HOURS CLAIMED WERE ACTUALLY EXPENDED, COUPLED WITH THE TESTIMONY THAT THE TASKS WERE "SUGGESTED" BY THE IEPA, IS RELEVANT TO THE DETERMINATION OF WHETHER THE HOURS REQUESTED WERE REASONABLE.

The IEPA acknowledges Mr. Chappel's testimony that he had no evidence that the hours were not expended, but then proceeds with a curious argument that the number of hours actually expended is irrelevant. The IEPA's argument in this regard is as follows:

Unfortunately for the Petitioner, the testimony cited to has no bearing on whether the hours sought for the approval were reasonable as submitted. Whether the hours were actually expended, or how many hours were actually expended, is not relevant to the decision of whether the hours presented in the budget were themselves reasonable. If Midwest had spent three times the number of hours as were presented, and provided every scintilla of evidence documenting that they had been expended, would that proof or knowledge thus result in a conclusion that the hours were reasonable? The answer is no. Even if Mr. Chappel had complete knowledge that the hours in the amended budget were actually expended, or that a greater number of hours was spent than was requested for approval, that still would not affect the decision here of whether the hours actually presented in the budget are reasonable for the tasks described.

There is evidence in the record that the tasks performed by Petitioner's consultant were necessary to accomplish closure. There is evidence that the IEPA was aware of, and in fact suggested or instructed, a particular course of action (namely, off-site testing). There is unrebutted testimony that hours even in excess of those set forth in the Amended Budget were actually expended. There is no evidence that the project (or any aspect of the project) could have been completed with the expenditure of less hours than those expended, (and/or those claimed). It is an incredibly unreasonable position for the IEPA to take that it can suggest a particular course of action, that the suggested course of action was reasonable and was actually followed, that it can know that a certain number of hours were expended in following that course of action, but it can then declare the requested hours to be "unreasonable".

IV. NO CLEARLY DEFINED STANDARD OF REVIEW FOR REVIEWING THE AMENDED BUDGET WAS APPLIED BY THE IEPA IN THIS CASE.

The IEPA cites to the applicable regulations (including 35 Ill.Admin.Code §§732.505 and 732.606) and claims that since these regulations were in force, and referenced in the Final Decision under review, there was, indeed, a clearly defined standard of review. The obvious problem with this argument is that Mr. Chappel (the person who decided to reduce the number of hours and who issued the Final Decision under consideration) (Tr. 77) testified that he did not follow any such standard in this case.

With respect to the budget review process, Mr. Chappel testified as follows:

(by Mr. Riffle)

Q. Do you have any generic rules or rules of thumb as to how much time you can approve for a particular NFR project?

A. How many hours?

Q. Right.

A. That I can allot?

Q. Right. That you would normally allot for an NFR.

A. In determining a budget submittal, the number of hours?

Q. Correct.

A. No, we don't.

Q. It's entirely subjective?

A. Correct.

(Tr. 73).

There is absolutely no citation to the above-cited provision of the Illinois Administrative Code in the hearing transcript. Rather, by Mr. Chappel's own testimony, it is clear that he made a purely subjective determination based upon no actual policy or citation of the agency or the legislature. The factors cited by Mr. Chappel make it clear that he made a purely subjective decision based on his own experience as a reviewer and also from when he was an environmental consultant. (Tr. 79). The IEPA acknowledges that "there is some subjectivity involved in reviewing a budget proposal." IEPA Brief, at p. 9. Petitioner respectfully submits that the

process employed in this case was “entirely subjective”, as specifically acknowledged by Mr. Chappel in his sworn testimony. (Tr. 73).

As previously noted, an agency’s failure to follow guidelines set by the legislature is grounds for a finding that the agency’s decision is arbitrary and capricious. 188 Ill.2d 474, 722 N.E.2d 1129, 243 Ill.Dec. 60 (1999); *see also Greer v. Illinois Housing Development Authority*, 122 Ill.2d 462, 505-06, 120 Ill.Dec. 531, 524 N.E.2d 561 (1988). That is precisely what occurred here.

V. THE HOURLY RATES SHOULD NOT HAVE BEEN REDUCED.

Petitioner presented the testimony of its experienced consultant, Mr. Green, regarding the reasonableness of the hourly rates. (Tr. 13, 23-24). The IEPA failed to produce testimony from Mr. Malcolm, the individual identified by Mr. Chappel as the person who actually made the decision to reduce certain hourly rates. (Tr. 77). Any testimony by Mr. Chappel on this issue was irrelevant hearsay, as he was not involved in the decision. (Tr. 59). The testimony of Petitioner thus stands un rebutted, at least by any competent testimony. The reduction in hourly rates should therefore be reversed.

CONCLUSION

For all of the foregoing reasons, Todd’s Service Station respectfully requests that the Final Decision be reversed or modified by increasing and accepting the budget as initially proposed, thereby allowing additional reimbursement in the amount of \$4,677.50.

Respectfully submitted,

Todd’s Service Station, Petitioner

By: 

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 25, 2003, a copy of the foregoing document was served upon each party to this case by

- Enclosing a true copy of same in an envelope addressed to the attorney of record of each party as listed below, with first class postage fully prepaid, and depositing each of said envelopes in the United States Mail at 5:00 p.m. on said date.
- Personal delivery to the attorney of record of each party at the address(es) listed below
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