

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WEBB & SONS, INC.,)
)
Petitioner,)
) PCB No. 07-24
vs.) (UST Appeal)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

NOTICE OF FILING

TO: Ms. Dorothy Gunn John Gregg Richardson
Clerk of the Board Division of Legal Counsel
Illinois Pollution Control Board Illinois Environmental Protection Agency
100 W. Randolph Street 1021 N. Grand Avenue East
Suite 11-500 P.O. Box 19276
Chicago, IL 60601 Springfield, IL 62764-9276

PLEASE TAKE NOTICE that I have today filed electronically with the Office of the Clerk of the Illinois Pollution Control Board Petitioner's Supplemental Brief In Support Of Reimbursement Of Petitioner's Legal Fees, copies of which are herewith served upon Respondent.

Respectfully Submitted

WEBB & SONS, INC.,
Petitioner

By: /S/
Jeffrey W. Tock

Dated: March 8, 2007

Jeffrey W. Tock
Harrington & Tock
201 W. Springfield Ave., Suite 601
P.O. Box 1550
Champaign, Illinois 61824-1550
Telephone: (217) 352-4167

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WEBB & SONS, INC.,)	
)	
Petitioner,)	
)	PCB No. 07-24
vs.)	(UST Appeal)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF
REIMBURSEMENT OF PETITIONER'S LEGAL FEES**

COMES NOW the Petitioner, WEBB & SONS, INC., by its attorneys, Harrington & Tock, and, for its Supplemental Brief In Support Of Reimbursement Of Petitioner's Legal Fees, states as follows:

On October 13, 2006, the Petitioner filed with the Illinois Pollution Control Board the Petitioner's Petition for Review of Illinois Environmental Protection Agency's Decision to Deny Petitioner's High Priority Corrective Action Plan Budget and, specifically, the denial by the Agency of 100% of the proposed personnel costs as set forth in the Petitioner's Corrective Action Plan Budget. The personnel section of the Petitioner's Corrective Action Plan Budget described the work proposed to be performed by twenty different individuals and contained a description of the work to be performed, the number of hours to perform the work of each individual, the rate at which each individual would be paid and the total personnel costs allocated to each such individual.

Mr. Kevin Saylor with HDC Engineering LLC testified at the hearing on December 11, 2006 that he had been the engineer for this project during a previous appeal involving the Agency's denial of proposed personnel costs. Mr. Saylor testified

that, as to that previous appeal, the Agency had requested more detailed information as to the number of hours that each person would require to perform each task. After HDC had taken the time to prepare and submit to the Agency the additional detailed information, the Agency still rejected roughly half of the requested personnel costs. As a result, the Petitioner herein filed an appeal as to the rejection of personnel costs and, as a result, obtained approval of substantially all of the personnel costs as originally proposed by HDC. (Hrg. Trans. at Pages 21-22.) It was Mr. Saylor's testimony that, based upon the prior two appeals in this case, even if he provided the additional detailed work requested by the Agency, the proposed personnel costs would still be rejected and this matter would ultimately be appealed. (Hrg. Trans. at Pages 29-30.) Consequently, appeal was taken following the initial rejection of the personnel costs portion of the Corrective Action Plan Budget.

Mr. Malcom, the IEPA project manager for Petitioner's site, testified on behalf of the Agency that he found the personnel costs for sixteen of the twenty personnel positions to be acceptable, i.e. reasonable, and which he would have approved. (Hrg. Trans. at Page 53-54.) The only personnel costs that he found to be unreasonable were for those tasks under High Priority Investigation that included reference to previous LUST appeals, which he felt was excessive, and the Scientist III under subheading CACR in the amount of \$1,136.00 which he would have reduced to \$142.00.

Following the hearing, counsel for the Petitioner prepared and filed the Petitioner's Brief in support of the appeal. The Conclusion of the Petitioner in that Brief stated as follows:

“The Corrective Action Plan Budget submitted by Petitioner did not violate the Illinois Environmental Protection Act. A determination could

have been made and should have been made by the Agency based upon the CAP and the budget that all personnel costs in Section G of the Budget were reasonable as required by statute (415 ILCS 5/57.7(c)(4)(C)) except for the Senior Project Manager, the Professional Engineer and the Engineer III under sub-heading High Priority Investigation and the Scientist III under sub-heading CACR. There is absolutely no justification to “request” (demand) an hourly breakdown of each task by each job title, except for those personnel seeking payment for previous appeals.”

Petitioner acknowledged in its Conclusion that there was insufficient information for the Agency to make a determination as to the reasonableness of the personnel costs for the Senior Project Manager, the Professional Engineer and the Engineer III under the High Priority Investigation subheading because those job descriptions included prior LUST appeals. The Petitioner’s Brief did not argue that the Agency should have determined from the face of the budget proposal that the personnel costs for the individuals whose job description included prior LUST appeals was reasonable. Similarly, the Petitioner did not argue in its Brief that the personnel costs for the Scientist III under the subheading CACR was reasonable after Mr. Malcom testified that he would have approved only \$142.00 for that work.

The Board in its Interim Opinion and Order dated February 15, 2007 concurred with the Petitioner’s Conclusion as set forth in Petitioner’s Brief that the Agency had sufficient knowledge and information to determine that the Petitioner’s personnel costs as submitted were reasonable as required by the Act except for the Senior Project Manager, the Professional Engineer and the Engineer III under the High Priority Investigation and the Scientist III under the CACR. The personnel costs approved by the Board for the sixteen positions that the Board found to be reasonable totals \$46,563.00.

Attorney's Fees

Petitioner may recover attorney's fees incurred in an appeal pertaining to corrective action under either the Act or the Administrative Code. 415 ILCS 5/57.8(l) states as follows: "Corrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under this Title unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees." 35 Ill.Admin.Code 732.606(g) states as follows: "Costs ineligible for payment from the Fund include, but are not limited to, legal defense costs including legal costs for seeking payment under these regulations unless the owner or operator prevails before the Board and the Board authorizes payment of legal fees (415 ILCS 5/57.8(l))."

The Board has previously addressed the ability of petitioners to be reimbursed for legal expenses when appealing rejections of Corrective Action Plans and Budgets by the Agency in *Illinois Ayers Oil Company vs. Illinois Environmental Protection Agency*, PCB 03-214 (August 5, 2004) and *Swift-T-Food Mart vs. Illinois Environmental Protection Agency*, PCB 03-185 (August 19, 2004). Both decisions recognize a petitioner can recover attorney's fees as a result of prevailing on the appeal of a rejection of a Corrective Action Plan and/or Budget by the Agency. In each of those cases, as in the present case, the petitioner was seeking payment under Title XVI of the Illinois Environmental Protection Act and the plain language of Section 57.8(l) of the Act allows for the awarding of legal fees.

The Petitioner did prevail before the Board in significant part. The Board reversed the Agency as to the denial in total of the personnel costs for sixteen personnel identified in the Petitioner's Corrective Action Plan Budget at a total cost of \$46,563.00.

Furthermore, as stated in the Petitioner's Brief, the Petitioner acknowledged that there was insufficient information contained within the budget proposal to determine if the personnel costs for the Senior Project Manager, Professional Engineer and Engineer III under the category of High Priority Investigation and Preliminary Costs were reasonable and did not seek to have the Board rule otherwise.

The common core of facts and the legal theory that were the basis of Petitioner's appeal are that the Agency's project managers who review proposed budgets, such as the CAP Budget submitted by Petitioner herein, have reviewed over 12,000 budget requests and have a very good understanding as to what is an appropriate range for each and every personnel cost that comprises a Corrective Action Plan Budget or any other budget related to USTs that are reviewed by the Agency. If a proposed budget contains sufficient information to allow the IEPA project manager to determine that the proposed amount for each line item is reasonable, the Agency has no authority to make demand upon a petitioner to incur additional time and expense to provide a greater level of detail than is actually necessary. In this case, Mr. Malcom proved the Petitioner's point when he testified that the proposed personnel costs for sixteen of the twenty personnel were reasonable in his opinion without the additional detailed breakdown that had been originally demanded by the Agency. "Where a plaintiff's claims of relief involve a common core of facts or are based on related legal theories, such that much of his attorney's time is devoted generally to the litigation as a whole, a fee award should not be reduced simply because all requested relief was not obtained." *Becovic vs. City of Chicago*, 296 Ill.App.3d 236, 242, 694 N.E.2d 1044, 1048 (1st Dist., 1998). The acknowledgement by Petitioner that the Agency could not determine whether or not the

proposed budget amounts for those individuals who had been involved in prior Webb appeals was reasonable without receiving additional information does not affect the amount of attorney's fees that should be awarded to Petitioner.

As noted in the Board's decision in *Illinois Ayers Oil Company vs. Illinois Environmental Protection Agency*, PCB 03-214, 415 ILCS 5/57.8(1) and 35 Ill.Admin.Code 732.606(g) involve fee shifting. The amount of fees to be awarded by the Board lies within the broad discretionary powers of the Board. *Globalcom, Inc. vs. Illinois Commerce Commission*, 347 Ill.App.3d 592; 806 N.E.2d 1194, 1214 (1st Dist., 2004). The Board's discretionary power includes a determination of the reasonableness of the requested fees. *United States Fidelity and Guaranty Company vs. Old Orchard Plaza Limited Partnership*, 333 Ill.App.3d 727, 740; 776 N.E.2d 812, 824 (1st Dist., 2002).

This Supplemental Brief includes the Affidavit of counsel for Petitioner and an exhibit to that Affidavit specifying the legal services provided by description, hour and hourly rate, all of which counsel for Petitioner believes to be reasonable.

The prayer for relief in Petitioner's Petition for Review also sought an award of the Petitioner's engineer's fees incurred in bringing the appeal. 35 Ill.Admin.Code 732.605 sets forth eligible costs for reimbursement under the Agency's Underground Storage Tank program as follows: "(a) Types of cost that may be eligible for payment from the Fund include those for corrective action activities and for materials or services provided or performed in conjunction with corrective action activities. Such activities and services may include, but are not limited to,

(15) engineering costs associated with seeking payment or reimbursement from the Fund including, but not limited to, completion of an application for partial or final payment.”

Attached hereto is the Affidavit of Michael Jones, the Chief Operating Officer of HDC Engineering LLC, in support of engineer’s fees incurred by Petitioner that are sought to be reimbursed.

Conclusion

The Petitioner respectfully requests that this Board approve reimbursements to the Petitioner in the amount of \$7,932.50 for legal fees and \$4,044.50 for engineer’s fees and order the Illinois Environmental Protection Agency to pay those amounts to the Petitioner from the LUST Fund.

WEBB & SONS, INC.,
Petitioner,

By: /S/
Jeffrey W. Tock

Dated: [March 8, 2007](#)

Jeffrey W. Tock
Harrington & Tock
201 W. Springfield Ave., Suite 601
P.O. Box 1550
Champaign, Illinois 61824-1550
Telephone: (217) 352-4167

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WEBB & SONS, INC.,)	
)	
Petitioner,)	
)	PCB No. 07-24
vs.)	(UST Appeal)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

AFFIDAVIT OF JEFFREY W. TOCK
Attorney for Petitioner

I, Jeffrey W. Tock, being first duly sworn under oath, allege and state as follows:

1. I am an attorney licensed to practice law in the State of Illinois and have continuously been so licensed since 1980.
2. I am the attorney of record for the Petitioner, Webb & Sons, Inc., in the above captioned case.
3. I have also represented the Petitioner in two previous appeals.
4. I commenced work on the present appeal on October 10, 2006 and have continued to work on this appeal since that date.
5. Attached hereto as Exhibit "A" is an accurate statement of the legal services that I have performed on behalf of Webb & Sons, Inc. in pursuing this appeal.
6. This summary accurately reflects the dates that I worked on this appeal, a brief description of the work performed, the number of hours of work that I performed on each date and the charge for my legal services derived by multiplying the number of hours worked by my hourly rate of \$190.00 per hour.
7. The hourly rate that I charge of \$190.00 per hour for the work performed on this appeal is consistent with the prevailing rates for legal services

provided in Champaign County, Illinois and is the same hourly rate that I charge all of my clients during the time period of this appeal.

The contents of this Affidavit are based upon my personal knowledge and I am competent to testify to the matters set forth herein.

FURTHER AFFIANT SAYETH NOT.

By: /S/
Jeffrey W. Tock

Dated: March 8, 2007

Subscribed and sworn before me
this ___ day of March, 2007.

Notary Public

vlb/Pleadings.jef/HDC/Webb-JWT.Aff

HDC Engineering LLC
P.O. Box 140
Champaign, IL 61824-0140

Date: 3/8/07
Atty: 08

Client No: 33553

2006	Description of Services Rendered	Hours	Amount
10/10	Prepared appeal in Webb	4	760.00
10/13	Revised and filed Webb Petition	1.5	285.00
11/08	Conf. call in HDC vs. EPA appeal in Webb; Emails with EPA, PCB	.5	95.00
12/06	Webb - conf. with Kevin Saylor re: appeal	3	570.00
12/06	Webb - legal research	2	380.00
12/08	Conf. with Mike & Kevin re: Webb	.5	95.00
12/09	Webb - legal research	2	380.00
12/10	Webb - legal research and trial prep.	7	1,330.00
12/11	Participated in Webb hearing in Springfield with Mike Jones and Kevin Saylor	6	1,140.00
12/28	Prepared brief re: Webb	10	1,900.00
12/29	Prepared brief re: Webb	5	950.00
2007			
1/02	Webb - correspondence with AG re: filing brief with PCB	.25	47.50
	Amount Due at an hourly rate of \$190.00	41.75	\$ 7,932.50

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WEBB & SONS, INC.,)	
)	
Petitioner,)	
)	PCB No. 07-24
vs.)	(UST Appeal)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

AFFIDAVIT OF MICHAEL JONES

I, Michael Jones, being first duly sworn under oath, allege and state as follows:

1. I am the Chief Operating Officer of HDC Engineering LLC, the professional engineers for Webb & Sons, Inc. in the matter of remediating contamination caused by leaking underground storage tanks ("LUST") at the Webb site in Mattoon, Illinois. HDC Engineering LLC is located in Champaign, Illinois.

2. I am also the Senior Project Manager on the remediation of the site.

3. I have been involved with the present appeal of the Agency's decision to completely reject all proposed personnel costs under the Corrective Action Plan Budget that was submitted to the Agency on August 18, 2006. The rejection by the Agency of all personnel costs under the Corrective Action Plan Budget was by letter dated September 12, 2006.

4. Mr. Kevin Saylor is a professional engineer under my supervision with HDC Engineering LLC. Mr. Saylor worked with Mr. Tock, the attorney for the Petitioner, Webb & Sons, Inc., in the preparation of the Petition for Review of the Illinois Environmental Protection Agency's decision to deny Petitioner's High Priority Corrective Action Plan Budget.

5. After the Petition for Appeal had been filed, Mr. Saylor and I worked with Mr. Tock to provide information and documents requested by Mr. Tock in preparation for the hearing on the Petition that had been filed appealing the decision of the Agency.

6. The hearing on the appeal by the Petitioner was held in Springfield, Illinois on December 11, 2006. Both Mr. Saylor and I attended that hearing at the request of the attorney since we were not certain what testimony may be provided by the Agency that may need to be responded to by me in the event that Mr. Saylor did not have the requisite knowledge for the needed response.

7. Attached to this Affidavit as Exhibits "A" and "B" are billing summaries of HDC Engineering pertaining to this appeal. Exhibit "A" is for work performed by Mr. Saylor from September 14, 2006 through October 13, 2006 pertaining to the preparation of the Petition for Review of the Agency's decision. The hours expended by Mr. Saylor are well within the range of the time necessary to prepare the information for the attorney who prepared the Petition for Review. The rate charged by Mr. Saylor is well within the acceptable rate for a professional engineer in Champaign, Illinois and within the range of rates for professional engineers approved by the IEPA.

8. Exhibit "B" contains a summary of the dates and hours of work provided by various employees of HDC Engineering concerning the preparation of background information requested by the attorney to be presented at the hearing on December 11, 2007. The hours billed for the work provided is a true and accurate statement of the time actually incurred by those employees to perform the tasks identified and the hourly rate for each such employee as set forth in Exhibit "B" is within the range set forth in the Approved Rate Schedule prepared by the Illinois Environmental Protection Agency and within the range of the charge for such work in Champaign, Illinois.

9. The statements made in this Affidavit are based upon my personal knowledge and I am competent to testify to the matters stated.

FURTHER AFFIANT SAYETH NOT.

By: /S/
Michael Jones

Dated: March 8, 2007

Subscribed and sworn before me
this ___ day of March, 2007.

Notary Public

vlb/Pleadings.jef/HDC/Webb-MikeJones.Aff

HDC ENGINEERING
201 W. SPRINGFIELD, 3rd FLOOR

P. O. BOX 140

CHAMPAIGN, IL 61824-0140

(217) 352-6976

Webb & Sons
 Attn: Joe Webb
 1201 Dewitt Avenue
 Mattoon, IL 61938

Invoice No. 20050 Rev 1
 Date 10/31/2006
 Client No. 00863.01323

For High Priority Corrective Action

Professional Services through October 31, 2006

Budget Appeal*Personnel*

Date	Title	Employee	Memo	Hours	Rate	Fee
9/14/2006	PE	Saylor	Review budget review letter, preliminary appeal plan	1.00	\$ 94.00	\$ 94.00
9/27/2006	PE	Saylor	Discuss/plan appeal with HDC management	0.50	\$ 94.00	\$ 47.00
10/10/2006	PE	Saylor	Assemble project documents for attorney	1.00	\$ 94.00	\$ 94.00
10/13/2006	PE	Saylor	Discuss/plan appeal with HDC management	0.50	\$ 94.00	\$ 47.00
						\$ 282.00

Other costs

IPCB filing fee \$ 75.00

TOTAL THIS INVOICE**\$ 357.00**

HDO ENGINEERING
 201 W. SPRINGFIELD, 3rd FLOOR
 P. O. BOX 140
 CHAMPAIGN, IL 61824-0140
 (217) 352-6976

Webb & Sons
 Attn: Joe Webb
 1201 Dewitt Avenue
 Mattoon, IL 61938

Invoice No. 20465 Rev 1
 Date 12/31/2006
 Client No. 00863.01323

For High Priority Corrective Action

Professional Services through December 31, 2006

Budget Appeal

Personnel

Date	Title	Employee	Memo	Hours	Rate	Fee
11/8/2006	PE	Saylor	Assemble project documents for attorney	1.00	\$ 94.00	\$ 94.00
11/15/2006	PE	Saylor	Assemble project documents for attorney	1.00	\$ 94.00	\$ 94.00
12/5/2006	Sr. Sci.	Walsh	Research previously approved budgets on similar projects	3.00	\$ 78.00	\$ 234.00
12/5/2006	PE	Saylor	Research previously approved budgets on similar projects	3.75	\$ 94.00	\$ 352.50
12/5/2006	Geo III	Laros	Research previously approved budgets on similar projects	4.50	\$ 84.00	\$ 378.00
12/6/2006	Sr. Sci.	Walsh	Research previously approved budgets on similar projects	3.00	\$ 78.00	\$ 234.00
12/6/2006	PE	Saylor	Research previously approved budgets on similar projects	2.00	\$ 94.00	\$ 188.00
12/6/2006	Geo III	Laros	Research previously approved budgets on similar projects	1.50	\$ 84.00	\$ 126.00
12/8/2006	PE	Saylor	Meet with PM and Attorney, prep for hearing	4.00	\$ 94.00	\$ 376.00
12/8/2007	Sr. PM	Jones	Review research, prep for hearing with PM	3.50	\$ 100.00	\$ 350.00
12/11/2006	PE	Saylor	Travel to and testify at hearing	6.50	\$ 94.00	\$ 611.00
12/11/2006	Sr. PM	Jones	Travel to and attend hearing	6.50	\$ 100.00	\$ 650.00

TOTAL THIS INVOICE

\$ 3,687.50