

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

BEVERLY POWERS, f/d/b/a)	
DICK'S SUPER SERVICE,)	
)	
Petitioner,)	
)	
vs.)	
)	PCB No. 11-63
ILLINOIS ENVIRONMENTAL)	(UST Appeal)
PROTECTION AGENCY,)	
)	
Respondent.)	

POST-HEARING BRIEF OF PETITIONER

NOW COME Beverly Powers, f/d/b/a Dick's Super Service, and her Environmental Consultant, Midwest Environmental Consulting & Remediation Services, Inc. ("Midwest"), by their attorneys, Elias, Meginness, Riffle & Seghetti, P.C., and as and for their Post-Hearing Brief of Petitioner, states as follows:

INTRODUCTION

The two issues involved in this appeal are 1) whether the Illinois Environmental Protection Agency ("IEPA") can avoid payment out of the Illinois Leaking Underground Storage Tank Fund for work which was admittedly done, on the grounds that the Petitioner's consultant, and not the Petitioner, signed the request for reimbursement; and 2) whether the budget request was reasonable. Under the unique circumstance of this case, it is respectfully submitted that denial of the budget amendment and reimbursement was inappropriate, arbitrary and capricious.

RELEVANT FACTS

Petitioner and its consultant seek payment of \$26,771.55 for work which was performed to remediate a badly contaminated property. Dick's Super Service was a d/b/a for a gentleman named Dick Powers, who passed away during the remediation of the property at issue, and Beverly Powers, his wife. The property at issue was held in joint tenancy. Dick's Super Service retained Midwest to remediate the property, and Midwest completed the task of remediating the

Property. (Transcript of Proceedings, p. 16). Midwest agreed to await payment until reimbursement was received from the Illinois Leaking Underground Storage Tank Fund. (Tr. 12). Mr. Powers passed away. The property at issue was sold to a third party. With Mr. Powers deceased, and the property sold to a third party, Mrs. Powers ceased having direct involvement with the property on a going forward basis. She gave Al Green of Midwest permission to complete the budget and reimbursement forms on her behalf (Tr. 11, 12-13). A representative of the IEPA spoke with Mrs. Powers. (Tr. 46-47). There is no evidence in the record to refute Mr. Green's claim that Mrs. Powers gave him permission to submit reimbursement requests on her behalf. Moreover, Midwest was the sole party with a financial interest in the reimbursement at that point in time.

With respect to whether the work claimed was actually performed, Michael Heaton, IEPA Project Manager for the site in question, testified as follows:

Q. And you've worked with Midwest over a pretty long period of time on this particular project; is that correct?

A. Yes.

Q. Do you have any doubt that they've actually done the work that they claimed to have done in these submittals?

A. No. That's never been in question.

(Transcript of Proceedings, p. 47, lines 17-24).

Mr. Green testified as follows regarding the work performed, and the propriety of the budget amendment, and the need for additional personnel costs:

Q. And can you go through pages of that document and just again briefly describe the work that was performed and the nature of the reimbursement that you're seeking in this case?

A. Basically, it was for the TACO investigation and calculates the modeling of the property obtaining the off-site access for the investigation, preparation of the correction action plan, the result – and the results of the investigation, the reimbursement, installing wells, survey development, sample the wells, the quarterly ground water samples that were collected, the

corrective action planning and then the PE certification of the plans and budgets.

(Transcript of Proceedings, p. 14, lines 14-24; p. 15, lines 1-2).

* * *

Q. And so all the work that was necessary to get this to where you think NFR would be appropriate has essentially been completed; is that correct?

A. Yes.

Q. And Midwest has paid all its subcontractors for this project; is that correct?

A. Yes.

Q. And Dick's Super Service or Beverly Powers owes you the money for the work that you actually did on the project; is that correct?

A. Yes.

(Transcript of Proceedings, p. 27, lines 3-13).

Mr. Heaton acknowledged that there are site specific issues and variables which would impact whether a budget, once approved, is appropriate after the entire project is complete. (Tr. p. 51). Mr. Green testified with respect to the site specific variables which were encountered on this project. (Tr. 9, 12, 14-16, 25-27).

Mr. Heaton spoke with Mrs. Powers. He testified as follows with respect to that conversation:

Q. And did Ms. Powers indicate that it was okay for Mr. Green to sign on her behalf?

A. I do not recall anything of the conversation. I just remember that I did speak with her. She was a nice lady.

Q. Do you have any notes of that conversation?

A. No, I do not.

Q. If she had said Al Green doesn't have authority, would that be a fairly noteworthy thing in your mind?

A. I would have remembered that.

(p. 46, lines 17-24; p. 47, lines 1-2, Transcript of Proceedings).

Mr. Heaton further testified as follows:

Q. Who made the decision that it wasn't appropriate for Al Green to sign these documents?

A. That would have been made by the management of the ground search tank, specifically Mike Lower.

Q. And how do you make that decision? How did you communicate that decision?

A. To me?

Q. Right.

A. He indicated since there was no documentation of who was the property owner or the owner of the underground storage tank system, that it would be a denial point because the budget was not signed by the tank owner/operator.

Q. Did anybody call Mr. Green and point that out to.

A. I don't recall any conversations.

(p. 45, lines 11-24; p. 46, lines 1-2, Transcript of Proceedings).

ARGUMENT

The IEPA would reap a windfall, and avoid payment for remediation work which was actually performed, if it is not required to honor the reimbursement requests at issue in this case.

First of all, as has been admitted by IEPA, all of the work for which reimbursement has been requested, as depicted in the budget amendment, has actually been performed. (Tr. 47). In the words of IEPA official Mr. Heaton, "[t]hat's never been in question." This stark admission should end the inquiry on this issue. Mr. Green testified that all of that work was necessary (Tr. 14-15, 27). There was no evidence presented that all of the work which was performed was not

necessary. It would be arbitrary and capricious to deny payment for work which was actually performed, with no evidence in the record that such work was not necessary.

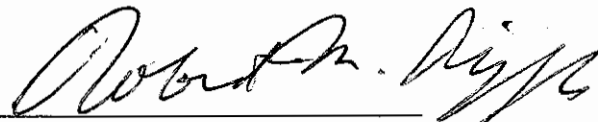
Moreover, it would be arbitrary and capricious to deny reimbursement and payment just because Midwest, and not Beverly Powers, signed the documents in question. The evidence in the record regarding how the decision was made to deny reimbursement on this ground is very telling. First, it appears that there was no established procedure in place which would support such a denial. (Tr. 45). Second, it appears that nobody called Al Green and told him of the decision to not allow Midwest to submit the documentation. (Tr. 45-46) Given the interaction between IEPA and Midwest on this Project, it would have been expected that such information would have been communicated to Midwest. Midwest performed the work, paid the subcontractors, and is entitled to be paid.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petitioner and its consultant, Midwest, should be paid \$26,771.55, representing the amount of work actually performed for which approval has been arbitrarily withheld.

Respectfully submitted,

Beverly Powers f/d/b/a Dick's Super Service,
Petitioner

By: 
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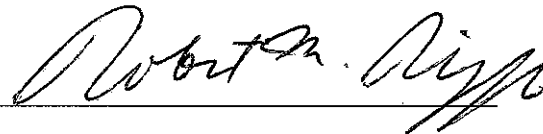
CERTIFICATE OF SERVICE

The undersigned certifies that on April 8, 2013, a copy of the foregoing document was filed electronically with the Illinois Pollution Control Board and served upon each party to this case by

X Electronic mail with a copy via United States Mail at 5:00 p.m. on said date.

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A handwritten signature in cursive script, reading "Robert M. Riffle", is written over a horizontal line.

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