

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FRIENDS OF THE ENVIRONMENT, NFP,)	
Petitioner,)	
)	
v.)	
)	PCB No. 16 – 102
ILLINOIS ENVIRONMENTAL)	(UST Appeal)
PROTECTION AGENCY,)	
Respondent.)	

NOTICE OF FILING

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board Petitioner's Motion for Summary Judgment. Copies of these documents are hereby served upon you.

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Respectfully submitted,
FRIENDS OF THE ENVIRONMENT, NFP

Dated: June 17, 2016

By: /s/William D. Ingersoll
Its Attorney

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PETITIONER’S MOTION FOR SUMMARY JUDGMENT

Petitioner, FRIENDS OF THE ENVIRONMENT, NFP, by and through its attorneys, BROWN HAY & STEPHENS, LLP, pursuant to 35 Ill. Adm. Code 100.516¹, hereby moves the Pollution Control Board (“Board”) to enter summary judgment in favor of Petitioner. Petitioner contends that there are no genuine issues of material fact and that Petitioner is entitled to judgment as a matter of law. In support of its motion, Petitioner says the following:

I. BACKGROUND

1. On November 2, 2015, the Petitioner, by its consultant, submitted its application for payment of certain early action costs from the UST Fund, which was received by the Illinois Environmental Protection Agency (“IEPA” or “Agency”) on November 9, 2015. By letter dated February 26, 2016, the IEPA issued its decision on the submittal. The Agency’s decision made five deductions from the amounts requested in the application.

2. The Petition herein was filed on April 5, 2016, accepted by the Board on April 21, 2016 and the IEPA’s Administrative Record was submitted to the Board on May 13, 2016.

¹ Hereinafter citations to the Board regulations will be made by section number only – *e.g.*, Section 100.516.

II. FACTS

3. Petitioner was the owner or operator of two underground storage tanks (“USTs”) (Tank 2 – 8,000 gallon gasoline; Tank 3 – 8,000 gallon diesel fuel) located at 3609-3623 West Harrison Street, Chicago, Illinois. The site has been assigned IEPA Bureau of Land Identification Number 0316265142. A notification of release at the site was made to the Illinois Emergency Management Agency (“IEMA”) on September 1, 2015 and was assigned Incident No. 20150966. Administrative Record, page 1². Petitioner elected to proceed as “Owner” on September 10, 2016. R.5. The Office of the Illinois State Fire Marshal (“OSFM”) issued an Eligibility and Deductibility Determination on October 20, 2015 that the tanks were eligible for reimbursement from the UST Fund, with a \$5,000 deductible. R.39 - 40. The tanks were removed on October 6, 2015.

4. Petitioner submitted an “Early Action Reimbursement Claim” on November 5, 2016 (received November 9, 2016). R.57-94. This claim was amended with information received by the IEPA on February 23, 2016. R.180-200. While not indicated as an amendment in the IEPA’s “Certificate of Record on Appeal,” additional relevant information was provided by Petitioner’s consultant by email on February 11, 2016. This information was responsive to a February 1, 2016 inquiry from IEPA. R.205-219.

5. IEPA issued its final decision on February 26, 2016, making five deductions from the claim (Item #4 is not being challenged in this matter):

1. *\$1,982.40, deduction for Backfill Costs which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they*

² Hereinafter citations to the Administrative Record will be made as “R. ___.”

may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

The Remediation and Disposal Costs request 80 cubic yards of backfill at a rate of \$24.78 per cubic yard for a total of \$1,982.40. A letter from Orvine, Inc³ indicates that the subcontractor used 32 cubic yards of existing onsite fill and 48 cubic yards of sand backfill. The application for payment does not include any purchase tickets for the sand to document how much sand was purchased but does include an invoice from Lindahl Bros. Inc. for the transportation of four loads of sand at a rate of \$200.00 per load for a total of \$800.00. Without purchase tickets for the sand it is impossible to determine the amount of sand each load contained to ensure that the transportation rate for the four loads of sand doesn't exceed the applicable/current Subpart H rate of \$24.78 per cubic yard. Please submit all backfill purchase tickets and purchase invoices for Backfill Costs to be paid.

2. *\$12,982.20, deduction for Groundwater Removal Costs which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.*

The Remediation and Disposal Costs requests the disposal of 15,455 gallons of contaminated water at a rate of \$0.84 per gallon for a total of \$12,982.20. The groundwater disposal manifest indicates that North Branch Environmental transported the contaminated water to Ortek, Inc. for disposal. The application for payment does not include an invoice from North Branch Environmental for the transportation or from Ortek, Inc. for the disposal of the contaminated water. These invoices from North Branch Environmental and Ortek, Inc. are required to document the transportation and disposal costs before Groundwater Disposal Costs can be paid.

3. *\$619.57, deduction for Drum Disposal Costs which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the*

³ Correct spelling is "Orvine."

Act.

The Remediation and Disposal Costs requests \$619.57 for disposal of one 55-gallon drum of solid waste. The drum disposal manifest indicates that North Branch Environmental transported the drum to American Waste Industries for disposal. A disposal invoice for the drum from American Waste Industries and a transportation invoice from North Branch Environmental are required to be submitted to document the transportation and disposal costs for the 55-gallon drum of solid waste before Drum Disposal Costs can be paid. Also note that the purchase cost of the 55-gallon drum was not indicated on any invoice or form.

4. Note that the \$2,903.86 deduction made in this item are not being challenged since it is a result of corrected information submitted provided by the Petitioner's consultant.
5. \$1,329.54, adjustment in the handling charges due to the deduction(s) of ineligible costs. Such costs are ineligible for payment from the Fund pursuant to Section 57.1(a) of the Act and 35 Ill. Adm. Code 734.635.

The Handling Charges were adjusted to reflect the deductions listed above. A total of \$1,185.94 in Handling Charges was approved for \$7,800.00 in UST Removal Costs and \$3,059.40 in Analytical Costs.

III. STANDARD FOR SUMMARY JUDGMENT

6. As stated by the Board in prior cases, summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358 (1998); see also 35 Ill. Adm. Code 101.516(b). When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd & Dowd, 181 Ill. 2d at 483. Summary judgment "is a drastic means of disposing of litigation," and therefore the Board should grant it only when the movant's right to the relief "is clear and free from doubt." *Id.*

IV. APPLICABLE LAW

7. Section 57.1(a) of the Act, in pertinent part as used in the Agency's decision letter, requires that site investigation activities be conducted "in accordance with the requirements of the Leaking Underground Storage Tank Program."

8. Section 57.7(c)(3) of the Act, in pertinent part as used in the Agency's decision letter, vaguely directs the Agency to determine that "the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for ... activities in excess of those required to meet the minimum requirements ..."

9. For each of the first three deductions, in addition to the Section 57.3(c)(3) reason, the IEPA asserts that the amounts are ineligible pursuant to Section 734.630(cc) as lacking supporting documentation.

10. Pursuant to Section 734.605(b), a complete application is required to include the following elements:

- 1) *A certification from a Licensed Professional Engineer or a Licensed Professional Geologist acknowledged by the owner or operator that the work performed has been in accordance with a technical plan approved by the Agency or, for early action activities, in accordance with Subpart B of this Part;*
- 2) *A statement of the amounts approved in the corresponding budget and the amounts actually sought for payment along with a certified statement by the owner or operator that the amounts so sought have been expended in conformance with the elements of a budget approved by the Agency;*
- 3) *A copy of the OSFM or Agency eligibility and deductibility determination;*
- 4) *Proof that approval of the payment requested will not exceed the limitations set forth in the Act and Section 734.620 of this Part;*
- 5) *A federal taxpayer identification number and legal status disclosure certification;*

- 6) *Private insurance coverage form(s);*
- 7) *A minority/women's business form;*
- 8) *Designation of the address to which payment and notice of final action on the application for payment are to be sent;*
- 9) *An accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed; and*
- 10) *Proof of payment of subcontractor costs for which handling charges are requested. Proof of payment may include cancelled checks, lien waivers, or affidavits from the subcontractor.*

V. ARGUMENT

11. We assume that the IEPA must contend that the ninth and/or tenth elements of a complete application regarding invoices, receipts, documentation, proof of payment *etc.* are missing or inadequate in Petitioner's application. These elements do not require the submittal of all paperwork from any and all downstream contractors. Implementation of maximum payment amounts in Subpart H was intended to streamline the process. The Board referenced testimony of Doug Clay when it first promulgated Subpart H. "The Agency believes there will be significant savings in cleanup costs with reasonable rates being established in regulations" ... and "there will be less time needed for consultants to prepare budgets and reimbursement packages and less time required for Agency review." First Notice Opinion and Order of the Board, R04-22 (Part 732), R04-23 (Part 734), at 17 (February 17, 2005). However, the Subpart H rates were determined by the Board, and as recommended by the IEPA, to be reasonable, saying, "the Board finds that the proposal will allow for reimbursement of reasonable costs for remediation of UST sites in Illinois." *Id.* at 79.

12. It is understood that Subpart H provides “maximum” amounts and if the *owner/operator* pays less, then the actual amount is paid. Here, for the disputed items, the prime contractor, Inland-Frycek, was invoiced on October 13, 2016 by the subcontractor, Orivne, for Orivne’s removal of the two tanks and the related backfilling activity and the disposal of waste liquid and a drum of waste solids. Inland-Frycek then paid Orivne by check dated October 15, 2016. R.88. Inland-Frycek then invoiced the owner, Petitioner, for the Orivne work⁴ and that of other subcontractors, plus handling charges. R.218.

13. Petitioner does not necessarily challenge the IEPA’s request for information and documents from downstream contractors, only that the lack of this information cannot support a denial. And, given how the IEPA sold Subpart H to the Board, Petitioner criticizes this practice as wasteful of time and resources for both the consultants and the IEPA. *See* the referenced excerpts from the Board’s First Notice in R04-22 and R04-23. If the subcontractor Orivne knows the Subpart H rates and agrees to perform work for those amounts, its invoice should be considered reasonable. The rules do not require the prime contractor, Inland-Frycek, to go behind the first subcontractor, Orivne, to separately negotiate with sub-sub-contractors for better rates. Clearly, Orivne could have chosen other sub-sub-contractors as it saw fit to complete the job it promised. In fact, after Mr. Frycek requested documentation as had been requested by the IEPA, Orivne responded that it supplied manifests and load tickets, but that further parts of the agreements with its sub-contractors make such agreements private. Orivne is apparently not obligated to provide all these downstream invoice and cost documents to Inland-Frycek. R.208.

14. The Board considered lack of invoices in the case of *T-Town Drive Thru, Inc. v. IEPA*, PCB 07-85 (April 3, 2008). There the Board decided in favor of the IEPA based upon a

⁴ The Orivne-invoiced activities are found in items 3 and 4 on the Inland-Frycek invoice to Petitioner.

lack of backup invoices for laboratory analytical costs that had been requested by IEPA.

However, *T-Town* presented a very different set of facts than we have. There, the T-Town prime contractor was United Science Industries (“USI”) and USI had subcontracted the laboratory work to Teklab. USI submitted Teklab analytical results, but for costs USI just provided information on the IEPA’s “Analytical Costs Form” and showed the total as invoiced to T-Town. The costs reflected Subpart H rates. The IEPA requested the backup invoices from Teklab, but they were not provided. Teklab was a direct subcontractor to USI, the prime contractor. In our case, all invoices and documentation from any subcontractor directly subordinate to Inland-Frycek have been provided.

VI. CONCLUSION

15. The IEPA has gone considerably beyond what was ever considered, let alone approved, in the regulatory proceedings that gave us Part 734. One of the main purposes was to streamline the process and make it cheaper and quicker for both the consultants and the IEPA to move LUST sites to closure. Here, the prime contractor chose one subcontractor, Orivne, to handle tank removal and related disposals. Orivne then chose North Branch Environmental to take care of waste water disposal and the disposal of one drum of waste solids. North Branch then chose Ortek as the water disposal facility (R.137-140) and American Waste Industries for the drum disposal facility (R.209). Nothing says that Orivne had to choose North Branch or that North Branch had to choose Ortek and American Waste. The IEPA’s approach would suggest it would like Inland-Frycek to make all these downstream arrangements and price negotiations rather than picking one subcontractor and letting it get the job done. This cannot be what the legislature or the Board intended.

WHEREFORE, for the reasons stated above, FRIENDS OF THE ENVIRONMENT, NFP requests that the Board grant summary judgment in its favor, reverse the Agency's determinations as to Items #1, 2, and 3 of the specified "Description of Deductions" and require approval of Petitioner's application as to those items and require the Agency to approve handling charges in Item #5 that include the revised amounts for Items #1, 2 and 3 – *i.e.*, \$2,515.49.

Respectfully submitted,
FRIENDS OF THE ENVIRONMENT, NFP

Dated: June 17, 2016

By: /s/William D. Ingersoll
Its Attorney

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CERTIFICATE OF SERVICE

I, William D. Ingersoll, certify that I have this date served the attached Notice of Filing and Motion for Summary Judgment by means described below, upon the following persons:

To: Pollution Control Board, Attn: Clerk
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