BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

T-TOWN DRIVE THRU, INC., *Petitioner,*	)	
v.	)	PCB No. 07-085
	)	(LUST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*	)	

PETITIONER'S RESPONSE TO RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to 35 ILL. ADM. CODE §§ 101.500(d) and 101.516(a), petitioner T-Town Drive Thru, Inc. ("Petitioner") submits this response to the cross-motion for summary judgment contained in the *Response to Petitioner's Motion for Summary Judgment and Respondent's Cross-Motion for Summary Judgment* ("Cross-Motion") filed by the Illinois Environmental Protection Agency ("Agency").

Argument

The Cross-Motion relies on the same record as summarized in *Petitioner's Motion for Summary Judgment* filed September 12, 2007 ("Petitioner's Motion"). However, the Cross-Motion makes several factual misstatements in characterizing that record. For example, at 2 it states that Petitioner's consultant, United Science Industries ("USI"), "sought reimbursement of $8,109.02 for analyses performed by Tek-Lab." That is not so. USI charged Petitioner $8,109.02 for a bundle of services, of which the analyses performed by Tek-Lab were only a part, and the remainder of which were performed by USI. *See* Petitioner's Motion at 12-16. Similarly, the Cross-Motion, again at 2, claims "there was no invoice in the

application . . . documenting that these costs had been billed to T-Town". Again, this is incorrect. As shown in Petitioner's Motion at 2-3, Petitioner submitted *two* invoices which it had received from USI for this work.

Next the Cross-Motion (at 3) misrepresents the rulemaking record when it contends Mr. Clay warned that the Agency would still need subcontractor invoices. When one consults the transcript cited, one learns that the comments cited arose from a question raised by one Brad Schumacher regarding a proposal that all contractors prove they had paid subcontractors (*Transcript of Proceedings Held August 9, 2004,* R04-22A (Aug. 20, 2004) at 87 (Exhibit P attached hereto). Mr. Clay agreed to respond in the afternoon. *Id.* at 88. After lunch, he offered his answer, saying proof of the amount paid to the subcontractor was necessary for proof of the contractor's handling charge (*id.* at 104-05). After Mr. Schumacher asked a follow-up question (*id.* at 105-06), Mr. Clay went on to concede, on the page immediately prior to the excerpts the Agency offers, that "to be honest, one of the reasons this provision is in there is because we received complaints from subcontractors that said I'm not getting paid" (*id.* at 107). Although the Agency thus saw requiring subcontractor information to be a way of assuring that subcontractors were being paid, on First Notice the Board limited its approval of required subcontractor data to situations where the contractor was seeking a handling charge on the subcontractor charges (*see* Exhibit Q attached hereto, at 72). And 35 ILL. ADM. CODE § 732.601(b)(10), as enacted, provided that a complete application for payment required proof of subcontractor costs *only* when handling charges were requested.

The Agency told the Board, in the very transcript at issue, that "[w]ith the new streamlining process" many documents "will no longer be submitted to the Agency", specifically citing subcontractor invoices. Exhibit N to Petitioner's Motion at 45. Moreover, it specifically cited "the difficulty of enumerating every cost that may be associated" with a task area in proposing broad, lump-sum amounts which would "streamline" the process. Exhibit G to Petitioner's Motion at 30. Yet now it suggests that every such sub-cost must be itemized, proven and added up (Cross-Motion at 3-4). The quotation from Mr. Clay is ambiguous at best, unintelligible at worst, and the example he cited ($19 per foot for drilling done by a subcontractor) is one where all the services in the Subpart H price are performed by the subcontractor (*see* 35 ILL. ADM. CODE § 732.820(a)). In such a case, the contractor is entitled to handling charges, not to compensation for its own additional services which are a part of the bundled price. The attempt to apply Mr. Clay's unclear and self-contradictory statements[1] to the current situation makes no sense in light of the Agency's many clear statements to the contrary, set forth in Petitioner's Motion at 10-11, 17-19. Proof of a subcontractor's charges is relevant only in situations where the contractor is seeking a handling charge on those charges – which is not the situation here. And merely citing language about "mandatory documents" (Cross-Motion at 3) does not turn what clearly were not regarded as "mandatory documents" into mandatory documents.

Because the services provided by Teklab are only a part of those covered

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[1] *E.g.*, "that's what we would expect *from the subcontractor*. It would be *from the consultant*" (emphasis added).

by the Subpart H lump sum, the Agency's demand for documentation of Teklab's charges and its attempt to limit reimbursement to those amounts are improper. The Agency told the Board in the rulemaking that a reimbursement application properly could include merely "an invoice with a minimum amount of information to document the costs requested for reimbursement (e.g., the task performed, the amount charged for the task, and the date the task was conducted)." *Comments of the Illinois Environmental Protection Agency,* R04-22A (Sep. 23, 2005) at 19 (Exhibit J to Petitioner's Motion). Petitioner clearly provided *more than* that here. *See* Petitioner's Motion at 2-4.

In this regard, Rezmar Corp. v. IEPA, PCB 02-91 (Apr. 17, 2003), and Malkey v. IEPA, PCB 92-104 (Mar. 11, 1993), cited in the Cross-Motion, are inapposite because both arose before the Agency and Board adopted the bundle-of-services, lump-sum approach. Case decisions cannot be divorced from the regulations being applied; if the Agency wanted to maintain the approach applied under those cases it ought not to have proposed the "streamlining" lump-sum approach. Similarly, the invocation of "generally accepted accounting practices" (Cross-Motion at 4) cannot be relied upon to require documentation of matters which the regulations, as a matter of law, have made irrelevant. If IRS regulations and an employer policy permit reimbursement for use of one's car at the rate of 30 cents a mile, "generally accepted accounting practices" do not call for the accountant to demand that the employee produce evidence he has been making timely payments on the car, changing the oil, and paying a garage for tune-ups.

Petitioner seeks only the amount that has been determined to be

reasonable by both the Board and the Agency in passing Subpart H. *See* Petitioner's Motion at 7-8, 11, 18-19. The Agency repeatedly stated that if a budget had been approved for such amounts, they would be paid upon submission of a simple invoice for same. *Id.* at 9-11, 18-19. The lump-sum bundling principle was expressly applied to analysis costs where some of the services were performed by the contractor and others by an outside lab. *Id.* at 14-15. Petitioner submits that the Agency is estopped to repeal in this underhanded fashion[2] the regulations which it insisted upon so vigorously and so long in 2004-06.

Conclusion

For the foregoing reasons and for those stated in Petitioner's Motion, petitioner T-Town Drive Thru, Inc. prays that the Board deny the Agency's Cross-Motion and grant the Petitioner's Motion for summary judgment.

October 12, 2007

T-TOWN DRIVE THRU, INC.

By: _____
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[2] The plethora of cases where the Agency has raised this issue (with an aggregate value of $145,000 and rising) demonstrates that in fact the Agency's error here is not an isolated occurrence and that a repeal of the rule is in fact being applied. See *Petitioner's Motion to Consolidate* filed herein Sept. 12, 2007.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that I served the foregoing document upon all persons entitled to same by causing copies to be deposited in the United States Post Office mailbox at 14th and Main Streets, Mt. Vernon, IL, before 6:00 p.m. this date, in envelopes with proper first-class postage affixed, addressed as follows:

Dorothy M. Gunn, Clerk
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for my handling for my time to go get those bids for the scope of work? Because I'm a person who is using a subcontractor with the indirect financial interest. I mean, how do I get paid?

A (By Mr. Clay) In that case, I think you would be entitled to that lump sum as if the owner and operator were paying for the subcontractor. And then, you know, that's sort of a business decision. That's a decision you're making, that you want, in your case, your company to do the work as opposed to the low bidder.

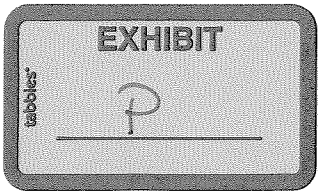
MS. DAVIS: Okay.

HEARING OFFICER TIPSORD: Go ahead.

MR. SCHUMACHER: Brad Schumacher.

QUESTIONS BY MR. SCHUMACHER:

Q I didn't get an answer. If I sent in my reimbursement claim, I am not going to have any waivers, cancelled checks, affidavit, because I haven't paid my contractor yet. So are you going to deny my claim? Or how does that work? Obviously, we're going to pay our subcontractor, but what if my terms are 90 days, I submit a claim, and you're going to not process the claim because I don't have the waivers? Or backups that I'm paying the



subcontractor?

MR. CLAY: Can I respond to that this afternoon?

HEARING OFFICER TIPSORD: Sure.

MR. CLAY: Let us discuss it.

MR. SCHUMACHER: Thanks.

HEARING OFFICER TIPSORD: Mr. Truesdale?

QUESTIONS BY MR. TRUESDALE:

Q One more question. It's related to what Mr. Goodwin talked about earlier and about the TACO.

You mentioned before, Doug, that you don't expect that there will be deed restrictions or other environmental land use controls required for sites that use the Tier 2 objectives. And Mr. Walton referred to the PNA background analysis for metropolitan areas, for instance.

What if an owner/operator did soil removal at a site after issuance of an SRN based on background PNA data, and that soil was subsequently moved to a site outside of the metropolitan area, or in a case where a Tier 2 inhalation objective was calculated based on site-specific moisture content and that soil was subsequently excavated and spreads to the soil where the physical characteristics

much they're going to force sites within that community to clean up relative to groundwater. If a community does not want to have that ordinance, and that is certainly our -- that is certainly their option. Many communities have seen that there was a benefit to having projects move forward, be cleaned up, you know, when they have that groundwater ordinance in place.

HEARING OFFICER TIPSORD: I don't think we're going to get done with the Agency. I would hope we'd get done before lunch, but it's now 12:15. We have been at it for about 2 hours and 15 minutes. So I think we need to go ahead and take a lunch break. We'll break one hour. We'll come back promptly in one hour and continue with the Agency at that time. Thanks.

(Lunch break.)

HEARING OFFICER TIPSORD: Let's go ahead and go back on the record.

Mr. Clay has indicated that they have a response to, I think, Mr. Schumacher's question. Go ahead, Mr. Clay.

MR. CLAY: Yeah. As we stated, there's

canceled checks, a waiver or affidavit would be acceptable to payment, but I mean, it's part of the handling charge. In reading the definition of handling charge, it's for interest. And so it's presumed or expected that the prime would pay their subcontractors, and reimbursement and then get reimbursed from the Agency.

So I mean, that's, you know, like I said, part of the -- in the definition of handling charges interest.

MR. SCHUMACHER: Can I?

HEARING OFFICER TIPSORD: Sure. Do you have a follow-up? Sure.

QUESTIONS BY MR. SCHUMACHER:

Q Even, say, we paid our subcontractors within 30 days. When I do the cleanup, I want to immediately submit the remediation and all the reimbursement. I don't want to wait 30 days to get a waiver of lien, you know, if I'm paying on that. Is there any way that I can go ahead and submit the claim, and is there any way that I -- say the comptroller is going to give us a check within, you know, we get the letter in a month and a half or two months, and then I have that time frame that before

I get paid, before the comptroller actually issues a check. Could I submit the waiver of liens? Because, say, you know, if it takes a hundred days to get paid, and I pay my subcontractor in 30 days or 60 days, and I can get the waiver of liens, I have that time frame to get that waiver of liens to the EPA or to somebody before the check is actually cut. That will at least show that, hey, I did pay all my subcontractor. Here's a waiver of lien. Because what I don't want to -- 30 days, I don't want to wait 30 more days to get in the line for reimbursement just for a waiver of lien.

Is there any way that we can submit them prior to getting a check? Like, would you normally do for a normal contract -- you submit your waiver of lien before the company pays you?

A Right. And I mean, basically you need to wait until you get a waiver of lien before you submit the bills. And I understand what you're saying.

But you've got to remember from the Agency's standpoint, we're dealing with thousands of these things. So you're talking another review now or at least a portion of a review to now you

submitted your waiver of liens, which you already reviewed the package and said, you know, you haven't paid your subcontractors, at least you haven't shown us that you paid your subcontractors.

And I mean, to be honest, one of the reasons this provision is in there is because we received complaints from subcontractors that said I'm not getting paid. And we said, well, let me look that up. And we looked it up and said, well, we paid the owner/operators three months ago. They are not paying the subcontractor.

Q That's not really the Agency's responsibility? It should be the contractors, it should be the consultant, it should be a contractor thing. You know, the subcontractor is not getting paid, the general, and you know, take legal action against that person. It's not --

A No, I disagree. I mean, we are to reimburse corrective action costs. If you haven't paid your sub, then you haven't incurred that cost. I mean, that's the way I look at it.

HEARING OFFICER TIPSORD: Okay.

QUESTIONS BY MR. COOK:

14. Should the Proposed Rule Require Proof of Payment to a Sub-Contractor Before Allowing Reimbursement for Handling Charges (Section 732.601(b)(10)/734.605(b)(10))?

Section 732.601(b)(10)/734.605(b)(10) as proposed requires that the application for reimbursement include proof of payment to a subcontractor when handling charges are being sought. The participants question the Agency's proposal. CW^3M noted that requiring proof of payment results in higher handling costs for the contractor and the higher costs will not be reimbursable. Tr.4 at 36-37. PIPE asserted that by definition handling charges are due to the contractor whether or not the subcontractor is paid by the contractor. Exh. 91 at 17. Furthermore, PIPE noted that even if the subcontractor has agreed to await payment until the Agency reimburses the owner or operator, the prime contractor has incurred the costs of insurance and administration of the subcontract. *Id.*

Because "of an alarming number of phone calls" to the Agency from subcontractors claiming they have not been paid, the Agency added Section 732.601(b)(10), according to Mr. Oakley. Exh. 7 at 2. Mr. Clay pointed out that cancelled checks are not the only mechanism for providing proof of payment to a subcontractor, lien waivers or affidavits from the subcontractor would be acceptable. Exh. 88 at 18. Mr. Clay testified that such proof is necessary to show that the subcontractor was actually paid and the owner or operator is therefore entitled to reimbursement for handling charges. *Id.*

The existing language in Section 732.606(ll) includes as an ineligible cost "Handling charges for subcontractor's costs when the contractor has not paid the subcontractor." The language proposed by the Agency is asking for proof that the contractor has paid the subcontractor before allowing reimbursement. The existing language provides that handling charges are only eligible reimbursement costs if the contractor *paid* the subcontractor. To the Board, it would appear that the Agency is merely requiring proof of a prerequisite which already exists. However, to allay the concerns of the participants, the Board will propose language in Sections 732.601(b)(10) and 734.605(b)(10) which reflects the Agency's position that cancelled checks are not the only mechanism for providing proof of payment to a subcontractor; lien waivers or affidavits from the subcontractor would be acceptable. Sections 732.601(b)(10) and 734.605(b)(10) will read:

> 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.

The Board invites additional comment on this language.

15. Should the Proposed Rule Delineate "Atypical" Situations in Section 732.855/734.855?

The Agency's original proposal at Section 732.855/734.855 included a provision that allowed an owner or operator to seek payment for costs which exceeded the maximum rates in Subpart H. The proposal allows for reimbursement costs which exceed the maximum if unusual or extraordinary circumstances occur. The language as originally proposed in Section 732.855/734.855 has been moved to Section 732.860/734.860.