

ILLINOIS POLLUTION CONTROL BOARD

March 16, 2010

S&D REALITY, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 09-33
)	(UST - Appeal)
ILLINOIS ENVIROMENTAL PROTECTION)	
AGENCY,)	
)	
Respondent.)	

HEARING OFFICER ORDER

On November 2, 2009, the respondent, Illinois Environmental Protection Agency (Agency), filed a motion *in limine*. (Mot.). The motion requests an order preventing Eric D. Hasman from testifying, or the petitioner presenting any other evidence concerning or related to, the August 27, 2009 report prepared by Hasman about the Underground Storage Tank (UST) site that is the subject of this appeal. Mot. at 1. *See* Attached Report. On November 16, 2009, the petitioner, S&D Reality, Inc. (S&D), filed its response. S&D requests that the Agency's motion be denied and that Hasman be allowed to testify regarding the UST site because some of the physical receipts and invoices for the work completed during the remediation project were unavailable at the time of the Agency's decision. On March 11, 2010, the petitioner filed clarification pleading that was ordered by the hearing officer.¹

For the reasons set forth below, the Agency's motion is granted.

Procedural Status of the Case

By a letter dated October 10, 2008, the Agency denied portions of S&D's request for reimbursement from the UST fund. On February 17, 2009, S&D appealed to the Board on the ground that the Agency's decisions to deny two specific portions of the request were erroneous, arbitrary and capricious. On March 5, 2009, the Board accepted the appeal for hearing.

Agency's Motion In Limine

On June 13, 2008, the petitioner submitted to the Agency an application for payment from the UST fund. The amount requested by the petitioner totaled

¹ The clarification pleading was ordered to clarify the reimbursement amount listed on the decision letter that was the subject of mathematical errors.

\$153,801.58. A \$10,000 deductible was deducted from that amount leaving \$143,801.58. S&D was reimbursed a total of \$38,240.00.

In summary, the Agency states that \$92,221.50 was not deducted because the petitioner did not have the required supporting documentation for these costs. The Agency then breaks down the amount not reimbursed. Mot. at 2-3. The Agency states that “[i]n the June 13, 2008 cover letter to the reimbursement package underlying this case, Hasman writes that a previous consultant, Courtesy Services, Inc., ‘was not able or willing to provide complete invoicing and only provided excel sheets which they stated was their invoices(s) for SD.’” *Id.* The Agency further states that in Hasman’s August 27, 2009, report he writes that “[i]t is my opinion, based upon my experience and upon a reasonable degree of geological and engineering certainty, that the above mentioned remediation was performed on the subject property and that costs for the above work, *for which the property owner does not have the physical receipts*” is \$86,694.14.² *Id.* (emphasis added).

The Agency cites Rezmar Corporation v. IEPA, PCB 02-91 (April 17, 2003) for the proposition that the burden is on applicants to demonstrate that incurred costs are properly accounted for and 35 Ill. Code 732.601(b) (9), which requires the “accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed. *See T-Town Drive Thru, Inc., v. IEPA*, PCB 07-85 (April 3, 2008). The Agency also cites to Kathe’s Auto Service Center v. IEPA, PCB 95-43 (May 18, 1995), to support its argument that the Board will not consider evidence or new information that was not before the Agency prior to its final determination. Mot. at 4. Therefore, the Agency continues, Hasman’s August 27, 2009, report could not and was not considered by the Agency in its October 10, 2008 decision and, consequently, must not be considered by the Board in this appeal. *Id.*

S&D’s Response

S&D admits that it did not and “does not have all of the physical receipts and invoices for the work completed during the remediation project.”³ Resp. at 3. Nonetheless, S&D insists that Hasman’s August 27, 2009 report should be considered as a supplement to the Agency’s October 10, 2008, decision, because it “serves the same purpose as if the receipts and invoices for all the of the costs had been submitted in the application to the Agency in the first place.” Resp. at 4.

² The Hasman report states that in his opinion, the total amount for remediation costs for which S&D does not have physical receipts is \$86,694.14. When his costs are added up, however, the total cost is \$86,694.16.

³ S&D states that the principle of its previous consultant, Courtesy Services, Inc., had a major stroke and was not able to assist in this matter. Resp. at 3

The petitioner argues that since it made a good faith effort to supply the Agency with all the documents it had prior to the Agency's October 10, 2008, decision, it "should be allowed to supplement the Record in order to clarify the issues raised by the Agency's rejection. Allowing the petitioner to do so would not undermine the role of the Agency in making these kinds of determinations in the future." Resp. at 5-6.

Discussion and Ruling

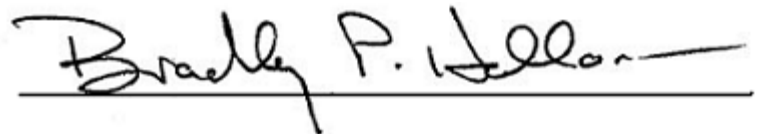
It is clear that pursuant to Board case law and Board regulations the Agency's motion must be granted. The Board's regulations require that a complete application for payment must include an accounting of all costs including invoices, receipts, and supporting documentation. Section 732.601 (b) (9). The Board will not consider new information that was not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 14. The Agency's October 10, 2008, decision letter frames the issues on appeal. See Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142, slip op. 6. (Dec. 20, 1990).

Here, S&D submitted its application for payment to the Agency on June 13, 2008. The Agency's decision letter is dated October 10, 2008. Hasman's report, addressing the nonexistent receipts, invoices and/or documentation, is dated August 27, 2009. On September 3, 2009, the Agency first learned of Hasman and his report. Mot. at 1.

The Agency did not and could not have considered the report in its decision rendered over 9 months earlier. For the above reasons, the Agency's motion is granted.

The parties or their legal representatives are directed to participate in a telephonic status conference on March 17, 2010, at 2:00 p.m. The status conference must be initiated by the petitioner, but each party is nonetheless responsible for its own appearance. At the status conference, the parties must be prepared to discuss the status of the above-captioned matter and their readiness for hearing.

IT IS SO ORDERED.



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Illinois Pollution Control Board
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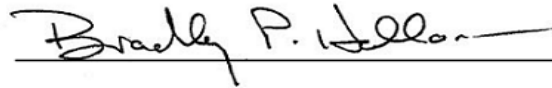
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312.814.8917

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on March 16, 2010, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on March 16, 2010:

John T. Therriault
Illinois Pollution Control Board
James R. Thompson Center
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Chicago, Illinois 60601

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

Bradley P. Halloran
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