3/2/92

STATE OF MINNESOTA
Petroleum Tank Release Compensation Board

In the Matter of the Proposed
Rules Governing the Documentations
of Reasonableness of Costs and
the Application Process.

STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION AND STATEMENT OF AUTHORITY.

Minnesota Statute Chapter 115C, the Petroleum Tank Release Clean-up Act, provides a mechanism for persons who take corrective action in response to petroleum tank releases to receive partial reimbursement for reasonable costs incurred in taking corrective action. The proposed rule changes are addressed to two separate issues, cost containment and the phased application process. The cost containment element defines and treats separately "contractor services" and professional "consultant services." With respect to both types of services, documentation of comparison of proposed prices or charges from two or more qualified providers is generally required. The portion of the rule addressed to the application process simply conforms Minn Rule pt. 2890.0090 to the 1991 statutory change which permits a phased application process.

Minn. Stat. § 115C.09, subd. 3(b) (Supp. 1991) provides:

> (b) A reimbursement may not be made from the account under this subdivision until the [Petroleum Tank Release Compensation] board has determined that the costs for which reimbursement is requested were actually incurred and were reasonable.

The Board has long perceived a need for implementation of cost containment mechanisms which would help to assure that costs incurred by applicants for which reimbursement is sought are reasonable and competitive. To that end, a committee of the Board was established in 1990 to study measures, including competitive bidding

requirements, which might be implemented. The committee held numerous public meetings in which these issues were discussed at length.

General authority to adopt rules concerning both the application process and determination of reasonableness of costs eligible for reimbursement is provided by Minn. Stat. § 115C.07, subd. 3a (1990) which provides:

> Subd. 3. Rules. (a) The board shall adopt rules regarding its practices and procedures, the form and procedure for applications for compensation from the fund, procedures for investigation of claims and specifying the costs that are eligible for reimbursement from the fund.

By laws 1991 ch. 175 § 2 enacted May 24, 1991, the legislature further provided a specific mandate to the Board to adopt rules relative to cost containment:

> (c) The board shall adopt emergency rules within four months of May 25, 1991, and permanent rules within one year of May 25, 1991, designed to ensure that costs submitted to the board for reimbursement are reasonable. The rules shall include a requirement that persons taking corrective action solicit competitive bids, based on unit service costs, except in circumstances where the board determines that such solicitation is not feasible.

Minn. Stat. § 115C.07,subd. 3(c) (Supp. 1991). On October 29, 1991, the Board adopted emergency rules addressed to that mandate. See Vol. 16, No. 25, Minn. State Reg. p. 1504.

In the process of adopting the emergency rules, and subsequent thereto in undertaking to draft permanent rules, the Board and its committee held a number of public meetings and formally solicited public comment. The resulting cost containment portion of the rules now proposed for adoption represent in part a refinement of the principles embodied in the emergency rules which addresses concerns and suggestions of the Board, staff board members and interested members of the public.

II. STATEMENT OF NEED.

Given the limited nature of the fund available for reimbursement to persons for taking corrective action and the large volume of claims submitted, it is important that measures be implemented to assist the Board and its staff in assuring that reimbursed costs are reasonable and competitively determined. The legislature, in requiring the Board to

adopt rules specifically including bidding requirements, has established, as a matter of law, the need for the portions of the rule directed to contractor bidding and competitive consultant selection. The proposed amendments to pts. 2890.0010, 2890.0075, and 2890.0090, subp. 1E, are addressed to this mandate while also clarifying the responsibility of the Board to review the reasonableness of all invoiced costs submitted for reimbursement.

In addition, the proposed amendment to pt. 2890.0090, subp. 1C, are required to make the rules comport with a 1991 statutory amendment which permits a phased application process in lieu of the previous requirement, reflected in the current rules, that a complete correction action plan be approved prior to reimbursement. See Minn. Laws 1991 ch. 175 § 4.

III. STATEMENT OF REASONABLENESS.

The general reasonableness of the requirement that an applicant obtain competing bids or proposals for corrective action work is clear. It is not possible for either the purchaser of services or the Board to judge whether costs submitted for payment or reimbursement are "reasonable" absent any comparison to other costs in the marketplace. Statutes commonly require cost comparisons for acquisition of personal property or for construction maintenance or repair of real property by government agencies. See, e.g., Minn. Stat. §§ 16B.07, 375.21, 412.311, 471.345 (1990).

In the case of "contractor services" where the work can be described in objective plans and specifications, it is reasonable for the Board to consider costs in excess of those proposed by the lowest qualified bidder to be, prima facie, unreasonable. Indeed, it is a common requirement in governmental contracting that the contract be awarded to the lowest qualified or responsible bidder. See, e.g., Minn. Stat. § 375.21, 412.311 (1990).

Much attention has been paid in the drafting process to the issue of professional "consulting services." Strong arguments have been presented to the Board in addressing the emergency rules and proposals for permanent rules that providers of services of a

professional nature cannot always be compared on price alone based upon objective specifications. The Board recognizes that in selecting a person to investigate a release, advise the tank owner and design a corrective action plan, subjective factors such as training and experience of the consultant relevant to the scope of services may need to be considered in addition to stated prices or fees. This distinction between services which may be objectively specified and evaluated and those which call for personal services involving particular skill or ability of a subjective nature is often drawn in applying competitive bidding requirements. See generally 10 McQuillin Municipal Corporations § 29.35 (3d ed.).

Even though factors other than price alone may legitimately enter into selection of a consultant, reasonable cost control requires that cost comparisons be available and that payment of higher charges be supported by good faith determination that selection of a higher priced consultant is reasonable in light of the qualifications needed to perform the needed services. Thus, in retaining a consultant, an applicant is required to consider at least two written proposals which set forth the estimated costs and qualifications of the consultants and may be required to support payment of charges which are not the lowest as justified by the qualifications of the consultant in relation to the nature of services anticipated.

The Board also recognizes that there may be circumstances in which, due to emergency or unavailability of multiple providers, it may not be feasible for an applicant to obtain bids or proposals. Thus, the Board provides for exemption in such circumstances.

Furthermore, there are situations in which parties reasonably anticipate numerous potential cleanups at various sites. It has been argued that, in such circumstances, it can be more cost effective to enter standing contracts with contractors or consultants than to let individual contracts on a job-by-job basis. If that is the case, the cost containment goals of the legislature can best be served by permitting the more economical practice. Thus, the

The changes in pt. 2890.0090, subp. 1c are reasonable inasmuch as they conform the rule to the statutory provision for a phased application process. Absent the change, the rules would continue to require a completed corrective action plan (CAP), even though the statute permits application for costs associated with soil cleanup, based on a CAP limited to soil only.

IV. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING.

Minn. Stat. § 14.115, subd. 2 (1990) requires the Board, when proposing rules which may affect small businesses, to consider the following methods for reducing the impact on small businesses:

a. the establishment of less stringent compliance or reporting requirements for small businesses;

b. the establishment of less stringent schedules or deadlines for compliance of reporting requirements for small businesses;

c. the consolidation or simplification of compliance or reporting requirements for small businesses;

d. the establishment of performance standards for small businesses to replace design or operational standards required in the rule; and

e. the exemption of small businesses from any or all requirements of the rule.

The proposed rules may affect small businesses as defined in Minn. Stat. § 14.115 (1990). As a result, the Board has considered the above-listed methods for reducing the impact of the rule on small businesses. The effect upon small business of the portion of the rule which permits phased submission of applications in accordance with the statute is in no respect adverse. It merely clarifies in rule the option to apply for reimbursement at an earlier state of cleanup than had been previously permitted.

In requiring that contracts be let upon bids or competitive proposals where feasible, the rule imposes minimal requirements upon applicants consistent with the reasonable purposes of the rule. Sound business practices would dictate that competing bids or proposals for work be solicited and analyzed in cases not exempted by the rule in any event.

In light of the need and purposes for the rule, as discussed above, neither establishment of less stringent requirements nor exemption of small businesses from its operation would be feasible or consistent with the statutory purposes furthered by the rule.

V. WITNESSES.

In support of the need for and reasonableness of the proposed rule the following witness will testify at the hearing:

Ms. Susan Bergh, Ms. Robin Hanson and Mr. Brian Ettesvald will testify to the foregoing material.

Based upon the foregoing, the proposed amendments are needed and reasonable.

Dated: 1-14, 1992.

Virginia K. Hogan

VIRGINIA K. HOGAN
Executive Director