

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Jason E. Bartley, P.G.
EDS
6637 North Sidney Pl
Milwaukee, Wisconsin 53209

Hearing # 08-32
PECFA Claim # 53086-9547-05

Proposed Findings of Fact, Conclusions of Law, and Decision

The Department of Commerce (“Department” or “Commerce”) May 12, 2008 decision provides that Environmental & Development Solutions, Inc. (EDS) is disqualified by the Department, pursuant to Wis. Adm. Code § 47.70(4), for a period of six months, from further work on a specific project, namely, the Slinger Service site (“the site”) in Slinger, Wisconsin.

Petitioner, Jason E. Bartley of EDS of Milwaukee, Wisconsin, by June 11, 2008 petition to the Department for hearing on the decision, filed a timely appeal from the Department’s Petroleum Environmental Cleanup Fund Act (PECFA) disqualification decision.

Pursuant to proper notice, a class 3 administrative hearing was held on July 8, 2008 in Madison, Wisconsin, with Steven Wickland, administrative law judge (ALJ), presiding. Following the hearing, the parties had additional time to file written comments or argument.

The issue for determination raised by the petition is: Whether the Department’s decision dated May 12, 2008 was incorrect with regard to the issue identified in Petitioner’s appeal filed with the Department on June 11, 2008.

In accordance with Wis. Stat. § 227.47 and § 227.53(1)(c) the parties to this proceeding are certified as follows:

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The June 11, 2008 order of Department Secretary Jack L. Fischer provides that the authority to issue a final decision in this matter remains with the Secretary's Department of Commerce designee.

Petitioner Jason Bartley, of EDS appeared in person and testified. State of Wisconsin Department of Commerce staff Steve Mueller appeared in person and testified for the respondent, as did Brenda Boyce, of the Department of Natural Resources (DNR).

The matter now being ready for decision, I issue the following:

Findings of Fact

1. This is an appeal filed by Jason E. Bartley of EDS of a Department decision dated May 12, 2008. The decision determined that petitioner is disqualified for a period of six months from further work at the site.
2. The appeal was received on June 11, 2008 and challenges the Department's disqualification decision. The petition requests a hearing by the Department, with petitioner seeking to have the disqualification rescinded.
3. Exhibit numbers 1 through 4, and 6 through 10 were received into evidence at hearing.
4. The site known as the Former Slinger Service Station is located at 305 East Washington Avenue in Slinger, Wisconsin. (Exhibit 8.)
5. The site was previously determined to have had a petroleum discharge that was PECFA eligible.
6. The site was classified as high-risk pursuant to Wis. Admin. Code, Chapter NR746.
7. The DNR retained jurisdiction over the investigation and remediation of the site.
8. Brenda Boyce of the DNR became the project manager of the site for the DNR.
9. Steve Mueller became the Department PECFA site reviewer for the purpose of overseeing budgeting issues and consistency with the PECFA rules found in Wis. Stat. §101.143 and Wis. Admin. Code Comm 47.
10. Ms. Boyce and Mr. Mueller jointly worked on a bid document to specify a scope of work to move the site towards closure. (Exhibit 2)
11. The bid document was published during bid round number 31 which began on April 19, 2004, and ended on June 4, 2004. (Exhibit 2)

12. At the end of the bid period, consultant K Singh and Associates was determined to have submitted the least costly qualified bid pursuant to Comm § 47.68(3). (Exhibit 3)
13. The consulting firm of Environmental Associates (EA) was hired by Joyce Weyer, site owner and the responsible party (RP) to do the specified scope of work for the amount of K Singh and Associates' bid (that is, \$5,390.00).
14. Subsequently, EA terminated the contract with the site owner when EA went out of business.
15. On June 21, 2006, Environmental & Development Solutions, Inc. ("EDS"), through its president, Richard W. Frieseke, P.E., entered into a contract with the RP stating EDS "will conduct the services outlined in the bid for a cost equal or less than the approved cost cap (\$5390) as referenced in the Wisconsin Department of Commerce bid results for Round 31 for the above reference site." They also stated "EDS will not conduct services outside the public bid scope of work. . . . Additional scopes of work required by the DNR will be bid separately and are not included in this letter." (Exhibit 4)
16. EDS sampling in September and December, 2006 convinced EDS that there was no free product on site (contrary to the bid document assumptions or concerns), the petitioner informed neither the DNR nor Commerce of any change in circumstances affecting remediation nor was a request to change the remediation approach received until Ms. Boyce received a project update letter dated from EDS dated October 8, 2007. (Exhibit 6)
17. Following receipt on October 12, 2007 of Exhibit 6, Ms. Boyce forwarded her responsive November 9, 2007 letter to the RP and to EDS, wherein she commented on Exhibit 6.

The Boyce November 9, 2007 letter enumerated the reasons why the work done did not, in her opinion, meet the requirements of the bid scope. (Exhibit 7)

18. No further work has been performed at the site by the petitioner toward completion of the specifications in the bid document (Exhibit 2) and no further correspondence as to the site has been received.

19. On May 12, 2008, legal counsel for Commerce, at the request of Mr. Mueller and his supervisor Eric Scott in consultation with Ms. Boyce, sent a certified letter to Mr. Jason Bartley at EDS informing them that EDS was disqualified from performing further work on the project site because they “failed to complete the scope of work in a bid in a timely manner” and “failed to complete a substantive portion of the defined scope of work within the corresponding portion of the reimbursement cap.” (Exhibit 8)

20. EDS appealed the Department disqualification decision by letter dated June 11, 2008.

Applicable Statutes and Administrative Rules

Wis. Stats. §292.31

(2) ENVIRONMENTAL RESPONSE RULES. The department [DNR] shall promulgate rules relating to investigation and remedial action for sites or facilities and other properties at which the air, land, or waters of the state have been affected by the discharge of a hazardous substance or other environmental pollution, including all of the following provisions:

- (a) Methods for investigating the degree and extent of contaminations for actions under sub. (3).
- (b) Methods for remedial action under sub. 3. . . .

(3) ENVIRONMENTAL REPAIR. (b) 1. DEPARTMENT AUTHORITY. The department [DNR] may take direct action under subs. 2 to 9. . .

- 2. The department may take action to avert potential environmental pollution from the site or facility.
- 3. The department may repair the site or facility or isolate the waste.
- 4. The department may abate, terminate, remove and remedy the effect of environmental pollution from the site or facility.
- 5. The department may restore the environment to the extent practicable.

Wis. Stats. § 292.93 ORDERS. The department may issue orders to effectuate the purposes of §§ 292.31 and 292.35 and enforce the same by all appropriate administrative and judicial proceedings.

Comm § 47.68(3) Competitive public bidding process.

(a) EVALUATING BIDS. . . . The department shall rank all remaining bids solely on the basis of cost, in ascending order from the least costly to the most costly. The department shall then evaluate only the bid containing the least costly proposal, to determine if all requirements of the bid specifications will be met, if the remedial strategy is appropriate to the geologic setting, and if the bid is likely to establish an amount to sufficiently fund the activities and outcome objective contained in the bid specifications. The department shall continue the evaluation process until the least costly qualified bid is identified. . . .

(7) DETERMINING THE LEAST COSTLY METHOD OF REMEDIAL ACTION, OR THE CAP FOR A DEFINED SCOPE OF WORK. . . .

(c) For occurrences under the direction of the DNR, the department and the DNR shall jointly consider the least costly qualified bid identified under sub. (3) in determining the least costly method of remedial action or the cap for a defined scope of work.

Comm § 47.69 Responsible Party's contract with a bidder.

(1) CONTRACT WITH REMEDIATION CONSULTING FIRM. (a) . . . no later than 60 days after the department issues the notification under s. Comm 47.68(7)(b) or (c), the responsible party shall execute a written contract with one of the firms that submitted a bid under s. Comm 47.68(2), to perform the work identified in the notification. . . .

(3) COMMENCING WORK. The consulting firm that executes a contract under sub. (1) shall commence the work specified therein no later than 45 days after the contract is executed.

SUBCHAPTER VI — COMPETITIVE PUBLIC BIDDING

Comm § 47.70. Monitoring the progress of the scope of work in the bid.

Comm § 47.70(1)

(1) NOTIFICATION OF PROGRESS.

Comm § 47.70(1)(a)

(a) The consulting firm holding the contract required in s. Comm 47.69 (1) (a) shall report to the department, in a format prescribed by the department, the progress toward completing the scope of work defined in the bid specifications, at each of the following points:

Comm § 47.70(1)(a)1.

1. Three months after entering into the contract.

Comm § 47.70(1)(a)2.

2. Twelve months after beginning the work in the successful bid, except as provided in subd. 6.

Comm § 47.70(1)(a)3.

3. Twelve months after submitting the previous report required under this subsection, except as provided in subd. 6.

Comm § 47.70(1)(a)4.

4. No later than 10 days after encountering a change in circumstances, as specified in sub. (3).

Comm § 47.70(1)(a)5.

5. At any other frequency directed by the department.

Comm § 47.70(1)(a)6.

6. No later than 30 days after completing the work.

Comm § 47.70 (4) DISQUALIFICATION FROM FURTHER WORK ON A PROJECT

(a) *Grounds for disqualification.* The department may disqualify any individual or firm from performing further work on a project, if the individual or firm has done any of the following:

1. Failed to complete a substantive portion of the defined scope of work within the corresponding portion of the reimbursement cap.

2. Failed to complete the scope of work in a bid in a timely manner.

Discussion

On June 11, 2008 the petitioner timely requested an administrative hearing for review of the May 12, 2008 Department decision to disqualify petitioner from further work on the site at issue. The appeal was filed on behalf of the petitioner Jason Bartley, of EDS, Milwaukee, Wisconsin.

The basis for the Department's decision, pursuant to Comm § 47.70, was EDS failure to timely complete the scope of work and EDS failure to complete a substantive portion of the work within the cost cap. (Exhibit 8, page 1.)

The disqualification decision was set as the single issue for hearing. The disqualification provisions and basis are set out in the May 12, 2008 letter:

RE: Disqualification From Bidding and Further Work on the Project
 Commerce # 53086-9547-05-A DNR BRRTS # 03-67-000972
 Slinger Service, 305 East Washington Street, Slinger

Dear Mr. Bartley:

Pursuant to Comm 47.70(4), this letter serves as notice that your firm is disqualified from performing further work on this above-captioned project because you “failed to complete the scope of work in a bid in a timely manner” and “failed to complete a substantive portion of the defined scope of work within the corresponding portion of the reimbursement cap”. You are disqualified from working on this project for a period of 6 months as specified in subsection c. Costs for any work on the occurrence during the disqualification, except as otherwise authorized by the department will not be reimbursed.

The Department’s May 12, 2008 letter (Exhibit 8) compares the work expected of EDS at the site with the Department’s view of work both completed and uncompleted by EDS on site:

Specifically, the scope of work detailed in the *Bid Document* (enclosed) included in Commerce’s public bid process, round 31 is incomplete, hence EDS has failed to complete the scope of work in a timely manner. The Bid Document states and EDS’s actions are as follows:

1. Assume 10 direct-push borings	None
2. Two to three soil samples collected from each boring	None
3. Install small-diameter monitoring wells	None
4. Calculate the current volume of petroleum-contaminated soil in excess of NR 746 Table 1 and 2 values	Absent
5. Inspect and evaluate the condition of the SVE-GWE system	Absent
6. Develop a cost comparison between “hot-spot” soil removal and additional in-situ soil and groundwater remediation	Absent (items #1 and #2 were necessary to complete this task)
7. Recover free product on a monthly basis ... (assume 6 months)	Three visits were made
8. Further evaluate potential receptors in the vicinity of the site	Partially complete
9. Collect groundwater samples from the entire monitoring well network on a quarterly basis for 6 months	12/26 (46%) samples are documented

Given the substantially incomplete work product and the determination that costs (\$1,775.15) were ineligible for PECFA reimbursement, EDS has also failed to complete a substantive portion of the defined scope of work within the corresponding portion of the reimbursement cap. (May 12, 2008 disqualification letter, Exhibit 8.)

Testimony of Jason E. Bartley. The witness is an officer of EDS, and testified as a representative of EDS, providing his testimony in narrative form. The witness stated that he graduated UW at Oshkosh in 1995 and has been in the environmental consulting field since, doing PECFA-type remediation. He focused on the exhibits brought to hearing. Exhibit 1 is the Department site data form on the site, from the Department's PECFA database, providing at page 2 a chronology of site events, beginning in 1997. Mr. Bartley believes that site activity started in 1995 with the original consultant being Environmental Associates (EA). The witness noted, under "site review data," shown on June 24, 2002, additional information, reflects the start of the process which sent the site to public bid. He notes that EA did some remediation. The property owner, Joyce Weyer, retained EA. EA in 2002 also requested additional money (cost cap) to do additional services (but subsequently went out of business).

Mr. Bartley noted that the matter was sent to bid June, 2004 (Exhibit 2). EA won the bid and contracted to do the work. The witness stated that, in June 2006, EA advised the owner that they were out of business. That month, EDS contracted with the owner to do site work. The witness noted a passage of time pertaining to work at the site, referencing a 3 ¼ -year time gap. He noted that the remedial action project was bid in June 2004 (Exhibit 2), yet EDS did not provide its documentation until October 2007 (Exhibit 2). Bartley emphasized that EDS did not know of the project until June 2006.

The overall PECFA project at the former service station dealt with underground storage tanks, their removal, followed by remediation. The project or site status (when EDS started in June, 2006) was that the scope of work for the project had been established jointly by DNR and Commerce. This scope of work went out for bid, such scope in part based on a 2002 report by

EA providing information prior to bid. Free product had been found at the site. The witness noted that free product is defined as petroleum or another contaminant is found by visual inspection.

Mr. Bartley discussed the bid document (Exhibit 2) and installing more soil probes as to evaluate presence of product and of Table 1 values (in DNR regulations, Wis. Adm. Code Chapter NR 746, used as calculated concentrations and as potential indicators for presence of free product in soil, that is, here, product trapped in soil). The witness said “this is a big portion of where we (EDS) deviated from that scope of work.” That is because, he stated, “1) you will either use additional probes to find out and define where the free product area is or 2) probes to test soil samples for presence of indicator parameters in soils as an indicator of product.” Mr. Bartley said EDS found no free product at the site when they sampled in August 2006 and December 2006. He stated that in December 2006, EDS “at that point, should have called DNR...to say we don’t have any free product at this site, we really don’t think the remaining aspects of this public bid that pertain to that are warranted. That wasn’t done. And...it certainly should of.” Had there been free product, he said that EDS would have needed to define that concern.

The EDS October 2007 report observed that free product is absent, and groundwater concentrations are decreasing. Mr. Bartley observed that this evaluation (the report) led EDS to not obtain new data, and to believe nothing but closure should be accomplished.

Mr. Bartley was aware of the bid specifications, and the cost cap of \$5,390.00, as indicated on cross examination. He acknowledged that the responsible party or RP, together with its consultant, were aware of the Department-imposed cost cap for work at a site. Upon

being retained as consultant in June, 2006 the witness said he did not check with Joyce Weyer, the RP, or her bank or the former consultant, EA, as to what money had been spent on work at the site. Thus, EDS was not aware of the initial consultant, EA, having spent funds on site work.

In August 2006, EDS determined (to its surprise) that there was no free product on site. EDS did samples in September, 2006 to check for free product, and did samples from monitoring wells in December, 2006 to confirm the absence of free product. When this discovery was made, Mr. Bartley said that the petitioner did not contact DNR to report this, although the witness acknowledged that EDS should have done so. The October, 2007 report (Exhibit 6) was primarily prepared by the witness. He acknowledged in his testimony that such report is the first official EDS notification to the DNR or Commerce that petitioner had found a different set of circumstances at the site, and therefore wanted to do work other than the scope of work. Mr. Bartley agreed that EDS had already, at the time of the report, performed other work on site, that is, EDS had already by then performed a different scope of work (as was noted in Exhibit 6).

Testimony of Brenda Boyce. Ms. Boyce graduated with a Bachelor in Science degree in geology in 1983 from the Stephen F. Austin State University, Austin, Texas. She worked for an oil and gas company for 2 1/2 years, and moved to Wisconsin in 1986, and worked for four years with a marketing firm. From 1990 until 2002, she was an environmental consultant with private firms. In 2002, she joined the Department of Natural Resources, and presently works as a hydrogeologist in the DNR Bureau of Remediation and Redevelopment Program. Her specific position is part time in two offices in Wisconsin – one with the DOT (Department of Transportation) in Waukesha and one in Milwaukee. Ms. Boyce's duties extend to helping other

state hydrologists with project work. The Department of Transportation funds the positions, but Ms. Boyce works for DNR.

Ms. Boyce said she began her responsibility for this site during 2003. She worked with Steve Mueller of Commerce to put together the specification found in the bid. She described the process when, as here, DNR is the lead agency. DNR provides a general scope of work, that is: “What we’d like to see to move the project forward to ultimately achieve closure.” From there, she said, “We submit that in an e-mail, usually to our Commerce counterpart, and then usually there’s some discussion, sometimes a meeting to discuss the scope of work, and then generally the DNR person writes up the case history summary and then the scope of work. And that is sent back and forth to Commerce, and ...eventually we work out a final draft document that the agencies agree on.”

Focus of the Bid Specification. Ms. Boyce described the site as a corner gas station, which had been redeveloped into green space, that is, a park-type development and parking lot. The previous consultant had documented that there was free product in two monitoring wells, which the witness regards as a “very serious condition.” So the bid specification focused “primarily to gain a better understanding of the extent of that free product and the degree of soil contamination in the source area.” Boyce and Mueller felt this had not been fully defined by the previous consultant. There was concern about the utility corridors or trenches and the contaminant plume migrating through those utility trenches, and potentially impacting either the private wells or becoming an exposure pathway.

The scope of work, and agency authority. DNR has authority for closure of this site and the work necessary to achieve closure, and, as Ms. Boyce noted, DNR works with Commerce,

especially on PECFA sites as costs are involved with the PECFA fund. DNR follows its own regulations in the Wisconsin Administrative Code (the NR 700 code series, the groundwater rules in Chapter NR 140, and the spill statute – Wis. Stat. § 292.11.

The Boyce November 9, 2007 letter to Joyce Weyer, site owner (with copy to Jason Bartley, EDS), replies to the EDS October 12, 2007 report, and states in pertinent part:

3. The scope of work is grossly incomplete based on the bid specifications. It is not the role of the environmental consultant to determine what parts of the scopes of work are not warranted and may be omitted. The Departments (DNR and Commerce) carefully consider the historic data collected and painstakingly negotiate the scopes of work to be included in bid specifications in order to obtain the necessary information to achieve closure on the case. Consultants may at any point during the work, contact either of the Department representatives and discuss changes in site conditions which they feel may warrant a change to the scope of work. This was not done in this case, and therefore progress on the case is further delayed. The following items were omitted from the scope of work and must be provided:
 - Install 10 Geoprobe borings with temporary wells for soil and groundwater sampling in the source area.
 - Inspect and evaluate the condition of the SVE-GWE system.
 - Develop a cost comparison between “hot-spot” soil removal and additional in-situ soil and groundwater remediation. Calculate the remaining volume of contaminant mass.
 - Evaluate potential receptors in the vicinity of the site. All private wells must be identified and the risk to them evaluated. Even though city water is provided to the area it does not necessarily mean that all historic private wells have been abandoned.
 - Evaluate risk to buried utilities. The discussion should include the depth of each utility trench in relation to the soil contamination and or groundwater contaminant plume. PID readings in storm drains/manholes do not meet this requirement.
 - Identify properties to the west of the site and determine their water source.
 - Prepare isoconcentration maps based on soil and groundwater analytical results.

The Department of Commerce will review the missing elements from the bid and determine the appropriate course of action. If you have any questions, you may contact me at (262) 574-2140. (Boyce letter, November 9, 2007, Exhibit 7; emphasis added.)

Testimony of Stephen Mueller.

Mr. Mueller is with the Department of Commerce, at its satellite office in Milwaukee, with the site review section, Bureau of PECFA, Division of Environmental Regulatory Services. He has a Bachelor of Science degree in geology (1987) and a Masters of Science in geosciences (1992), both degrees from the University of Wisconsin-Milwaukee. Mr. Mueller stated that he worked in the private sector for nine years with two different environmental consulting firms. Subsequently he has worked in the public sector, with the DNR (in remediation and redevelopment) for one year, and then from July, 2000 to the present, he has been with the Department, in the PECFA bureau.

He is familiar with this site, starting in 2003. He discussed the bid document, Exhibit 2, which sets out a scope of work toward further remediation or toward closure. Commerce and DNR worked together to develop the scope of work. The witness described the physical properties of the site. He stated that certain items needed to be completed. Free product presence was a concern, as was residual contamination within the zero to four-foot range, particularly in the public park landscape area of the site. Lab results were important to develop information on these concerns.

Exhibit 6 is the October 8, 2007 EDS letter to Brenda Boyce, providing DNR and Commerce a project update and summarizing work conducted through the public bid. Mr. Mueller said he reviewed the Brenda Boyce response of November 9, 2007. He concurred with the findings of that letter, and with her statements in the letter. Mueller testified that he formulated the May 12, 2008 Department letter (the Notice of Disqualification letter), which lists nine items to be completed by petitioner. Mueller said the items of the bid scope must still be

completed (with the exception of 5, which can be moved to the end of list, to follow completion of other items). Thus, items 1 through 4 in particular remain vital. Items 5 and 6 go together, toward the end of the list. He stated that all (i.e., 1-4 and 7-9, and well as 6) are necessary.

The witness recalled that there was an earlier claim (not currently at issue herein) submitted to the Department by EDS (on behalf of Joyce Weyer). He said that the claim included the cost of the work that EDS had completed. Mueller noted that in that claim, EDS submitted costs that met or exceeded the amount set in the public bid document and the Department claims database shows EDS submitted (looking at EDS and its subcontractors) the amount of \$6,051.91 in invoices, thus exceeding the cost cap of \$5,390.00 (Exhibit 9).

Mr. Mueller analyzed the expenditures and the work accomplished. He stated that (although the money spent exceeded the cost cap) only about 40% of the bid scope was completed by EDS. Had he reviewed the earlier claim, Mr. Mueller stated that he would have wanted a lower percentage or portion of the bid cap paid to EDS, since much of the work was not completed.

The witness commented on requirements on consultants imposed by Wis Admin Code Comm § 47.70 (Exhibit 10). He sees this rule as a method for the Department to insure that progress is made at the site and provides consequences for not proceeding in a timely manner or for failing to complete the scope of work that was publically bid. Comm § 47.40(1) provides that the consulting firm holding the contract shall report to the Department on progress toward completing the scope of work. It provides that over various time periods, a consultant must report site progress to the Department. As an example, § 47.70(1)(a)(4) requires the site

consulting firm to report to the Department “no later than 10 days after encountering a change in circumstances....”

Mr. Mueller testified that he believes that petitioner did not comply with the requirement in section 47.70(1)(a)(4) because EDS did not notify the Department of changes in circumstances within ten days as required (that is, there was no communication from EDS to the Department as to change of circumstances that would require modification of the bid cap.

Comm § 47.70(2) provides:

(2) FAILURE TO MAKE PROGRESS. If the department determines that the consulting firm is failing to make adequate progress to complete the scope of work defined in the bid specifications for an amount not exceeding the reimbursement cap determined under s. Comm 47.68 (7), the department shall so notify the responsible party and may reduce the reimbursement to accurately reflect the work completed.

Mr. Mueller also said § 47.70(2) applies, because EDS failed to make sufficient progress over a period of fifteen months, EDS only completed about 40% of the scope of work as defined in the bid specifications.

Comm § 47.70(3) provides:

(3) CHANGE OF CIRCUMSTANCES. (a) For occurrences under the direction of the department, the department may review and modify the reimbursement cap, and may reinstate the public bidding process in § Comm 47.68, based on a change in circumstances, if any of the following have occurred:

1. Substantial new contamination has been discovered on the site. Substantial contamination must increase remediation costs to either obtain closure or complete a defined scope of work. New contamination is contamination not previously identified, such as contamination in a broader area or deeper depth than previously identified.

(b) For occurrences under the direction of the DNR, the department and the DNR may review and modify the reimbursement cap, and the department may reinstate the public bidding process in § Comm 47.68, based on a change of circumstances, if any of the events in par. (a) 1 and 2 have occurred. (Emphasis added.)

Mr. Mueller testified that, because there was no communication by petitioner to the Department as to change of circumstances at the site that would require modification of the bid cap, petitioner failed to comply with Comm § 47.70(3).

In the witness' view, if the petitioner had notified the Department of the change of circumstances, the Department's options would have included modifying or reducing the scope of work, or reducing the bid cap to reflect a reduced scope of work. Or, if additional work were required, the Department could increase the cost cap, to reflect a change in circumstances. With a substantial change in circumstances, Mueller noted that an entire site project could be sent back into the bid process. Pursuant to Comm § 47.70(3), all those options are available.

Mr. Mueller noted that bids on scope of work for a certain amount of money reflect business decisions. If EDS so communicated a change in circumstances, including events concerning EA going out of business and other matters, the Department could have considered again whether the scope of work could be completed for the amount of money established. Yet, EDS never presented notice of changes in circumstances to the Department. Had EDS provided notice, then the Department could have decided, as an example, to rebid the site or to increase the bid cap for the site (had EDS provided a cost estimate with an appropriate rationale for increasing the bid cap amount). Yet, Mr. Mueller stated that EDS did not provide such information (nor did the owner, Joyce Weyer).

The witness testified as to the reason for the disqualification of petitioner for this site. He noted that the Department needed to get the attention of EDS, and to reinforce the concept that when the DNR and Commerce carefully prepare a scope of work and bid specification to move a site to closure, or to fill data gaps at the site, that consultants working on a site need to follow

that scope of work. Obviously, professional staffs at both agencies need to receive the technical and related information from the contracting consultant. He said, “You know, we’re not just establishing a pot of money to be spent any which way the consultant feels, without the approval of the agency that will eventually make the closure decision or the reimbursement decision.”

Comm § 47.70(4) (a) 1-3, and (b-c) provides:

(4) DISQUALIFICATION FROM FURTHER WORK ON A PROJECT.

(a) *Grounds for disqualification.* The department may disqualify any individual or firm from performing further work on a project, if the individual or firm has done any of the following:

1. Failed to complete a substantive portion of the defined scope of work within the corresponding portion of the reimbursement cap.
2. Failed to complete the scope of work in a bid in a timely manner.
3. Failed to meet requirements in DNR rules on the project.

(b) In making disqualification decisions under this section, the department shall only excuse failures that are shown to be due to factors which are beyond the control of a bidding individual or firm, such as a responsible party’s inability to obtain financing.

(c) *Period of disqualification.* The period of disqualification shall be 6 months for the first disqualification, 12 months for the second disqualification, and 24 months for any successive disqualification.

The witness noted that the Department disqualification decision is about the minimum punitive alternative – being for this site only -- and for a specific time period, six months. The decision was made on violating two aspects of Department rules. First, failure by the petitioner to complete a substantive portion of the defined scope of work within the corresponding portion of the reimbursement cap. Comm § 47.70(4)(a)1. Second, failure to complete the scope of work in a bid in a timely manner, Comm § 47.70(4)(a)2.

The witness agreed with the Department decision basis in terms of both reasons. Mr. Mueller commented specifically on the second basis, the untimely manner aspect. He believes

that EDS took too much time to do work at the site, stating: “Essentially, EDS took, what, fifteen months to do six months worth of groundwater monitoring and a couple of months of data evaluation and reporting.” He noted that even now, the scope of work was not complete, even as time continues to progress.

The petitioner disagreed with portions of the respondent’s position at hearing, yet, from the filing of its request for hearing, EDS appeared to acknowledge the insufficient efforts it made as a consultant on this site. The EDS petition seeks a hearing on the Department decision, and offers the petitioner’s rationale for rescinding the decision. Yet, the petition, at page 1, also acknowledges certain facts:

We concede that our communications to the DNR regarding a change in conditions at the site and subsequently our change in approach should have been timelier. However, we still believe that our approach is in the best interest of both our client and the PECFA program... While it is true that we did not conduct the scope of work exactly as presented in the bid document, we did perform additional services in lieu of those bid items that we believed to be inappropriate for the site. (Emphasis added.)

More compelling than even this admission is the comparison of tasks necessary at site and the failure by petitioner to address or complete these tasks, as well as the failure to move forward in a timely manner and a cost effective manner. This is well expressed by the testimony of Brenda Boyce and Stephen Miller, as discussed herein.

Conclusions of Law

1. Pursuant to Wis. Stat. § 101.143, the Department has primary and extensive authority for the promulgation and administration of the program for petroleum storage remedial action.
2. The findings of fact herein and the testimony taken demonstrate that the petitioner did fail to complete the scope of work tasks required at the site, as well as demonstrating a failure to complete tasks in a timely manner. The facts and testimony further demonstrate that even though petitioner did not complete the scope of work, petitioner used more than the entire bid cap. Such conduct violates the provisions of Wis. Admin. Code § 47.70, as discussed above. On that basis, the Department acted well within its authority, as applied to the facts of this case, in disqualifying the petitioner for the limited time period herein -- six months -- from work at the site specified herein.

Decision

The Department's decision herein is affirmed.

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Decision in the above-entitled matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and decision within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection you wish to make and send them to: Madison Hearing Office, Department of Commerce, PO Box 7838, Madison, WI 53707-7838. After the objection period, the hearing record will be provided to the Deputy Secretary of the Department of Commerce, who is the individual designated to make the final decision of the Department in this matter.

Steven Wickland
Administrative Law Judge
Wisconsin Department of Commerce
PO Box 7838
Madison WI 53707-7838

Dated: _____

copies to:

Jason E. Bartley, P.G.
EDS
6637 North Sidney PL
Milwaukee, Wisconsin 53209

Laura M. Varriale
Department of Commerce
201 W. Washington Ave.
Madison, Wisconsin 53707-7838

Date Mailed: _____
Mailed By: _____