

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

J. F. ALLEN CORPORATION
a West Virginia Corporation,

Plaintiff,

v.

CIVIL ACTION NO.: 14-C-1182
JUDGE KAUFMAN

THE SANITARY BOARD OF
THE CITY OF CHARLESTON,
WEST VIRGINIA, and
BURGESS AND NIPLE, INC.
an Ohio Corporation.

Defendants.

AMENDED COMPLAINT

COMES NOW the Plaintiff, J. F. Allen Corporation, by counsel, Charles M. Johnstone, II, and the law firm of Johnstone & Gabhart, LLP, and for its Complaint against Defendants, The Sanitary Board of the City of Charleston and Burgess and Niple, Inc. and states as follows:

1. Plaintiff, J. F. Allen Corporation, ("J. F. Allen") is a corporation duly organized and licensed to do business under the laws of the State of West Virginia, with its principal office located at 33 Red Rock Rd, Buckhannon, Upsher County, West Virginia 26201.
2. Defendant, The Sanitary Board of the City of Charleston, West Virginia ("CSB") is at all times relevant hereto a municipal sewer utility serving Charleston and adjacent areas of Kanawha County, West Virginia with its principal office located at 208 26th St West, Charleston, Kanawha County, West Virginia 25387.
3. Defendant, Burgess and Niple, Inc. ("B & N"), is a corporation authorized and existing under the laws of the State of Ohio, being authorized to conduct business



within the State of West Virginia, and having its principal office located at 5085 Reed Road, Columbus, Ohio 43220.

4. This Court has jurisdiction over the parties and the subject matter of this action because, among other things, the project and events giving rise to this claim took place in Kanawha County and the breaches and negligent acts occurred in Kanawha County.

FACTUAL BACKGROUND

5. On or about October 5, 2011, CSB accepted bids for Contract 10-09 - "Kanawha Two-Mile Creek Sewer Improvements - Sugar Creek Drive Sub Area." This Contract was for work including 8" and 10" gravity sewer replacement for manhole installation, house service connections and restoration of paved and non-paved areas.

6. The sewer improvements were designed by the Defendant, B & N.

7. As part of the solicitation, CSB provided construction bidders with Defendant, B & N's design, including plans, specifications, bid documents and other contract documents prepared by B & N. The information designed and prepared by B & N and provided to prospective bidders by the CSB was intended to provide a road map for contractors to be able to reasonably anticipate conditions and to be able to prepare bids for construction of the project.

8. In specific reliance upon all of the information provided by the CSB and B & N and in reliance upon its past experience, J. F. Allen submitted a bid for Contract 10-08 - "Kanawha Two-Mile Creek Sewer Improvements - Sewer Replacement Sugar Creek Drive Sub Area" in the amount of \$5,160,621.75.

9. J. F. Allen's bid was determined to be the lowest responsible, responsive bid and therefore, it was awarded the Contract.

10. The contract time commenced on or about January 3, 2013 and required that Substantial Completion be achieved within 365 calendar days making the required Substantial Completion date January 2, 2013.

11. On or about January 9, 2012, J. F. Allen commenced work. Almost immediately, J. F. Allen ran into problems including, but not limited to:

- a. Unmarked or mismarked utilities;
- b. Delays and disruptions caused by other entities; and
- c. Extra work, including temporary paving and restoration.

12. With regard to utilities to be encountered, the Contract between Allen and CSB provided that all known structures, pipelines and utilities would be indicated on the plans for the project. Further, the Contract provided that, to the extent conditions encountered in performing the work were different from those indicated on the plans, the price of performing the work would be adjusted accordingly.

13. As required by the Contract documents, J. F. Allen made appropriate advance contacts with CSB, B & N and utility owners to advise as to its upcoming work area. It was the responsibility of CSB, and/or B & N to see to it that the operators of utilities properly mark the locations of underground utilities to allow J. F. Allen to do its work without interruption. Unfortunately, lines were either unmarked or improperly marked prior to J. F. Allen's work. Consequently, and through no fault of its own, J. F. Allen struck and damaged unmarked or mismarked lines resulting in damages in the form of cost of repairs, delays and lost productivity.

14. On each occasion, the incident was conscientiously documented by both J. F. Allen and CSB's onsite representative.

15. The Contract documents are clear in requiring CSB to compensate J. F. Allen for all increased costs attributable to the encountering underground utilities that were not properly marked or accurately located in the contract documents.

16. During the course of the approximately fourteen (14) months that performed excavation work J. F. Allen suffered additional costs and delays as a result of one hundred and twenty-two (122) incidents involving unmarked or mismarked lines and utilities that were either not shown not accurately located on the plans and

contract documents. CSB and B & N had immediate notice on each occasion after the utility or line was struck as CSB or B & N directed repairs and/or work rescheduling.

17. With regard to delays and disruptions of J. F. Allen's work, the Contract between and CSB allows CSB to perform additional construction work itself or through other contractors which may affect the work of J. F. Allen. However, the Contract is clear in requiring CSB to provide written notice of such conflicting work and further that J. F. Allen be compensated for any additional costs and/or interruptions the conflicting work may cause.

18. During the course of J. F. Allen's performance of its work, and despite the fact that CSB failed to provide required notice, CSB contracted with other contractors and utility companies to perform construction and allowed those companies to work in J. F. Allen's workspace and even disturb areas already completed by J. F. Allen.

19. Although CSB obviously had full knowledge of its own decisions to allow contractors to interfere with Plaintiff's work, and despite the fact that CSB did not follow its own contractual obligation to provide notice, J. F. Allen put CSB on notice that the allowance of other contractors in its workspace was causing delays and disruption.

20. By intentionally failing to follow the express provisions of the contract regarding notice of interferences with J. F. Allen's work CSB waived the formal requirement regarding written notice of claims for extra compensation.

21. As a result of delays and interferences that were the sole responsibility of the Defendants, the commencement of paving work was delayed by several months. When J. F. Allen requested authority to perform the paving, J. F. Allen was instructed not to perform the paving until the following Spring. This decision by the Defendants was solely to benefit CSB because CSB knew that it had plans to have other construction work performed in J. F. Allen's work space during the winter months.

22. Because of CSB's decision to delay final paving, the Defendants decided to have trenches temporarily paved. Unfortunately, the Contract documents and bid schedule contained no bid item for temporary paving.

23. Rather than follow the contractually required change order process to allow J. F. Allen to bill for temporary paving, the Defendants instructed J. F. Allen to bill for the temporary paving work utilizing another bid item. As instructed, and in contravention to the formal requirements of the Contract, J. F. Allen billed for the temporary paving work using a bid item for milling. This process was directed and approved by both Defendants.

24. Unfortunately, the milling bid item which J. F. Allen was required to utilize to bill for the temporary paving was on a square yard basis. The agreement reached by and between J. F. Allen and the Defendants called for substitution of temporary paving at a thickness of three-quarters of an inch in place of the milling bid item. However, instead of three-quarters of an inch of temporary paving, at the express direction and requirement of the Defendants, J. F. Allen was ordered to and in fact did pave much larger areas than had been agreed and in thicknesses of as much as five to six inches. J. F. Allen placed much more material over a much larger area than anticipated and, therefore, a simple substitution of the temporary paving item for the milling item did not adequately compensate J. F. Allen for the extra work it was ordered to perform.

25. By orally directing, requiring J. F. Allen to perform work different from that specified in the contract documents without utilizing the formal change order process set forth in the contract documents CSB waived the formal requirement that written notice be required for changes in the work or claims for additional compensation.

26. Despite the fact that the Defendants had actual notice and were well aware that they had required J. F. Allen to install a substantially greater quantity of temporary paving than had been agreed to and, by its conduct, CSB waived the

requirement of advance written notice, J. F. Allen nevertheless provided written notice of its claim.

27. As part of any construction project, a utility contractor understands that a part of the cleanup/completion costs is restoration of areas disturbed by the project. This part of the work includes final grading, seeding and placing straw over disturbed areas. On some occasions, if homeowners with property along the construction site have demonstrable damage resulting from the work, these repairs may also be a part of the contract work. However, on this particular project, CSB and B & N allowed, and in fact encouraged, homeowners along project right-of-way to make claims for restoration costs for damages that had nothing to do with J. F. Allen's work. Instead of requiring the homeowners to provide proof of damage caused by J. F. Allen's work, CSB and B & N directed J. F. Allen to make repairs to a substantial number of homeowners properties including, but not limited to: repair/replacement of driveways; retaining walls; guardrails; road shoulders; lawn repair and landscaping improvements that were unrelated to J. F. Allen's work. None of this restoration work was required by of the contract nor was it contemplated by the parties at the time the contract was entered into. The work was performed by J. F. Allen at the direction and for the benefit of both CSB and B & N and is therefore compensable under the contract as extra work.

28. The Defendants had immediate, actual notice of the restoration claims as complaints were made by the homeowners directly to the Defendants and the Defendants, in turn, required J. F. Allen to perform this extra work although it was not required by the contract.

29. As a result of the above cited acts and omissions of the Defendants, J. F. Allen suffered lost productivity as its work to complete the project became much more difficult, labor intensive and time consuming. Nevertheless, through application of

additional resources and suffering additional costs, J. F. Allen completed its work without incident and on a timely basis.

30. As a result of the acts and omissions of the Defendants, J. F. Allen suffered substantial losses and is entitled to recover its actual losses incurred, including but not limited to, damages resulting from the loss of extra work, lost productivity, extended general conditions and overhead, interest and any other damages directly related to the breaches and negligence of the Defendants.

31. J. F. Allen gave notice of its claims despite CSB's actual notice of the claims despite CSB's waiver of contractual notice provisions.

32. At the conclusion of the project, J. F. Allen submitted a detailed Request for Equitable Adjustment ("REA") which codified all of the prior claims to assist the Defendants in calculating the amount due for extra/additional/impacted work performed. Rather than receiving, reviewing and responding to the REA as the contract requires, the Defendants, in violation of the contract, refused to accept the claim submission.

COUNT I: BREACH OF CONTRACT AGAINST DEFENDANT,
THE SANITARY BOARD OF THE CITY OF CHARLESTON, WEST VIRGINIA

33. J. F. Allen restates and re-alleges each and every allegation set forth in paragraphs 1 through 32 of its Complaint as if the same were fully set forth herein.

34. J. F. Allen has fully and faithfully performed all of its obligations under its Contract with CSB.

35. As stated above, during the course of the project, J. F. Allen incurred substantial additional and extra costs, delays and disruptions as a result of, but not limited to, the following, all resulting from the acts or omissions of the Defendants:

- a. Utility conflicts;
- b. Interference by other contractors/utilities;
- c. Loss of productivity;

- d. Extra temporary paving;
- e. Excessive restoration costs unrelated to the work;
- f. Extended general conditions; and
- g. Additional asphalt repair costs.

36. CSB breached its contractual and other obligations owed to J. F. Allen by failing and refusing to pay CSB for the additional extra costs, for the delays and disruptions and other compensable damages.

37. Specifically, CSB is in material breach of its Contract and other duties owed to J. F. Allen as a result of, but not limited to, the following:

- a. CSB has failed and refused to pay J. F. Allen for work performed pursuant to the contract;
- b. CSB has failed to provide J. F. Allen with accurate and adequate plans, specifications and contract documents relating to the work to be performed;
- c. CSB has dictated and changed the manner and method of performance contemplated by J. F. Allen when it submitted its bid;
- d. CSB has delayed, disrupted and otherwise interfered with J. F. Allen's ability to perform its contractual obligations; and
- e. CSB has failed and refused to timely respond to requests for change orders, equitable adjustments and requests for clarifications and corrections to the project plans and specifications.

38. CSB had contemporaneous actual notice of each claim of J. F. Allen and further was provided notice in accord with the Contract and/or the course of dealing by and among J. F. Allen, CSB and B & N. To the extent that any alleged notice provision set forth in the written contract was not strictly complied with, such term of the Contract was waived by CSB's actions or inactions.

39. As a direct, proximate and foreseeable result of the CSB's material breach of Contract and breach of other duties owed to J. F. Allen, J. F. Allen has suffered a substantial financial loss, including the cost of additional work performed, extra costs and delay resulting from loss of productivity and efficiency, extended overhead, changed manner and method of performance and changed sequence of work, lost profits and lost business opportunities.

COUNT II: NEGLIGENCE AGAINST DEFENDANT, BURGESS AND NIPLE, INC.

40. J. F. Allen restates and re-alleges each and every allegation set forth in paragraph 1 through 39 of its Complaint as if the same were fully set forth herein.

41. In its capacity as the design and project engineer for the Project and the owner's representative on the Project, B & N owed a duty of care to J. F. Allen to render its services including, but not limited to, design, preparation of drawings, specifications and contract documents, as well as project administration, recommending and approving payments and change order requests with the ordinary skill, care and diligence commensurate with that rendered by members of its profession in the same or similar circumstances.

42. The Defendant, B & N was negligent and breached duties owed to J. F. Allen by, among other things, the following:

- a. Failing to prepare an adequate and accurate design of the Project;
- b. Failing to prepare adequate and accurate plans, specifications and contract documents;
- c. Failing to timely and properly consider, approve and process change orders for extra and additional work performed by J. F. Allen at the direction of the Defendants, CSB and/or B & N;
- d. Failing to properly administer the Contract as the CSB's representative on the Project; and

- e. Requiring J. F. Allen to perform unnecessary and unfounded additional paving, restoration and/or repair work on residential property without approving payment therefore.

43. The Defendant, B & N's actions or inactions constitute negligence and a failure to render services with the ordinary skill, care and diligence commensurate with members of the engineering profession under similar circumstances.

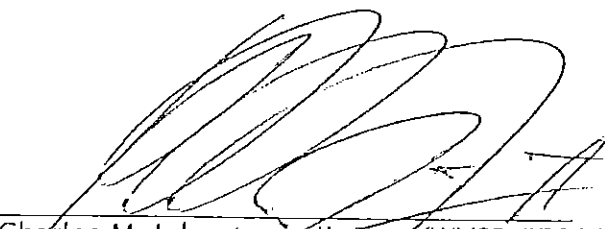
44. As a direct, proximate and foreseeable result of B & N's breach of duties owed to J. F. Allen and B & N's unjust enrichment, J. F. Allen has suffered a substantial financial loss, including the cost of additional work performed, extra cost and delay resulting from loss of productivity and efficiency, extended overhead, changed manner and method of performance and changed sequence of work, lost profits and lost business opportunities.

WHEREFORE, the Plaintiff, J. F. Allen Corporation, demands judgment against the Defendants, The Sanitary Board of the City of Charleston, West Virginia and Burgess and Niple, Inc., jointly and severally, for the additional work performed by J. F. Allen in the amount of \$1,309,943.00 or an amount that will fully and fairly compensate J. F. Allen as a result of the acts and omissions of the Defendants.

J. F. ALLEN DEMANDS A TRIAL BY JURY.

Respectfully submitted,

J. F. ALLEN CORPORATION
By Counsel:



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CERTIFICATE OF SERVICE

I, Charles M. Johnstone, II, hereby certify that I served the foregoing, "AMENDED COMPLAINT" upon the following counsel of record on the 13th day of November, 2014, by depositing a true and exact copy in the United States mail, postage prepaid, to the following addresses:

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