

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

J.F. ALLEN CORPORATION,
a West Virginia Corporation,

Plaintiff,

v.

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

Defendants.

Civil Action No. 14-C-1182
Judge Kaufman

**CHARLESTON SANITARY BOARD'S ANSWER AND
COUNTERCLAIM TO PLAINTIFF'S AMENDED COMPLAINT**

For its Answer and Counterclaim to the Amended Complaint ("Amended Complaint") filed by Plaintiff J.F. Allen Corporation ("Plaintiff" or "J.F. Allen"), Defendant The Sanitary Board of the City of Charleston, West Virginia ("Defendant" or "CSB"), by counsel, respectfully states and avers as follows:

ANSWER

1. Upon information and belief, Defendant admits the matters asserted in Paragraph 1 of the Amended Complaint.
2. Defendant admits the matters asserted in Paragraph 2 of the Amended Complaint.
3. Upon information and belief, Defendant admits the matters asserted in Paragraph 3 of the Amended Complaint.
4. In response to the allegations asserted in Paragraph 4 of the Amended Complaint, Defendant states that the matters asserted concerning the jurisdiction of the Court constitute legal



conclusions rather than allegations of fact and therefore do not require a response by way of admission or denial.

FACTUAL BACKGROUND

5. Defendant admits the matters asserted in Paragraph 5 of the Amended Complaint. By way of further response, Defendant states that the Contract referenced is a written document that speaks for itself, and for that reason, Defendant denies any attempt to characterize its terms, meaning, or legal effect.

6. Defendant admits the matters asserted in Paragraph 6 of the Amended Complaint.

7. In response to the allegations asserted in Paragraph 7 of the Amended Complaint, Defendant states that the referenced bid documents, including the "Instructions to Bidders," are written documents that speak for themselves, and for that reason, Defendant denies any attempt to characterize their terms, meaning, or legal effect.

8. In response to the allegations asserted in Paragraph 8 of the Amended Complaint, Defendant admits that Plaintiff submitted a bid for the referenced contract, which bid proposal is a written document that speaks for itself, and Defendant specifically denies the remaining allegations asserted in the referenced paragraph concerning Plaintiff's "specific reliance" on the information provided and "upon its past experience" for vagueness and for Defendant's lack of information or knowledge to form a belief as to the truth or falsity of the allegations asserted concerning Plaintiff's state of mind.

9. In response to the allegations asserted in Paragraph 9 of the Amended Complaint, Defendant admits Plaintiff's bid was accepted and that the Contract was awarded to Plaintiff.

10. In response to the allegations asserted in Paragraph 10 of the Amended Complaint, Defendant denies that the contract time commenced on or about "January 3, 2013,"

but otherwise admits the matters asserted in the referenced paragraph. By way of further response, Defendant states that the Contract referenced and its defined terms, including "Substantial Completion," is a written document that speaks for itself, and for that reason, Defendant denies any attempt to characterize its terms, meaning, or legal effect.

11. In response to the allegations asserted in Paragraph 11 of the Amended Complaint, including subparagraphs (a) through (c), Defendant states that the matters asserted constitute legal conclusions rather than allegations of fact and therefore do not require a response by way of admission or denial, but to the extent there may be factual allegations contained therein, they are denied.

12. In response to Paragraph 12 of the Amended Complaint, Defendant states that the Contract referenced is a written document that speaks for itself, and for that reason, Defendant denies any attempt to characterize its terms, meaning, or legal effect, but to the extent there may be factual allegations contained therein, they are denied.

13. Defendant denies the allegations asserted in Paragraph 13 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the "Contract documents" referenced are written documents that speak for themselves, and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

14. Defendant denies the allegations asserted in Paragraph 14 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

15. Defendant denies the allegations asserted in Paragraph 15 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

16. Defendant denies the allegations asserted in Paragraph 16 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

17. In response to the matters asserted in Paragraph 17 of the Amended Complaint, Defendant states that the Contract documents referenced are written documents that speak for themselves and for that reason, Defendant denies any attempt to characterize its terms, meaning, or legal effect. By way of further response, Defendant states that the matters asserted constitute legal conclusions rather than allegations of fact and therefore do not require a response by way of admission or denial, but to the extent there may be factual allegations contained therein, they are denied.

18. Defendant denies the allegations asserted in Paragraph 18 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

19. Defendant denies the allegations asserted in Paragraph 19 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

20. Defendant denies the allegations asserted in Paragraph 20 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

21. Defendant denies the allegations asserted in Paragraph 21 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves, and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

22. In response to the matters asserted in Paragraph 22 of the Amended Complaint, Defendant admits that trenches were paved and states that the Contract documents referenced are written documents that speak for themselves, and further, to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

23. Defendant denies the allegations asserted in Paragraph 23 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to

the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

24. Defendant denies the allegations asserted in Paragraph 24 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

25. Defendant denies the allegations asserted in Paragraph 24 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

26. Defendant denies the allegations asserted in Paragraph 26 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

27. Defendant denies the allegations asserted in Paragraph 27 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

28. Defendant denies the allegations asserted in Paragraph 28 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves, and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

29. Defendant denies the allegations asserted in Paragraph 29 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

30. Defendant denies the allegations asserted in Paragraph 30 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

31. Defendant denies the allegations asserted in Paragraph 31 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

32. Defendant denies the allegations asserted in Paragraph 32 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to

the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

**COUNT I—BREACH OF CONTACT AGAINST DEFENDANT THE SANITARY
BOARD OF THE CITY OF CHARLESTON, WEST VIRGINIA**

33. In response to Paragraph 33 of the Amended Complaint, Defendant incorporates its answers to Paragraphs 1 through 32 as if fully written herein.

34. Defendant denies the matters asserted in Paragraph 34 of the Amended Complaint.

35. Defendant denies the matters asserted in Paragraph 35 of the Amended Complaint, including subparagraphs (a) through (g), and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

36. Defendant denies the matters asserted in Paragraph 36 of the Amended Complaint.

37. Defendant denies the matters asserted in Paragraph 37 of the Amended Complaint, including subparagraphs (a) through (e).

38. Defendant denies the matters asserted in Paragraph 38 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

39. Defendant denies the matters asserted in Paragraph 39 of the Amended Complaint and demands strict proof thereof. By way of further response, Defendant states that the Contract documents referenced are written documents that speak for themselves, and to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

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

40. In response to Paragraph 40 of the Amended Complaint, Defendant incorporates its answers to Paragraphs 1 through 39 as if fully written herein.

41. In response to Paragraph 41 of the Amended Complaint, Defendant states that the allegations asserted are not directed to Defendant and further, Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations asserted, and, for that reason, Defendant denies each and every allegation set forth in the referenced paragraphs. By way of further response, Defendant states that to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

42. In response to Paragraph 42 of the Amended Complaint, including its subparagraphs (a) through (e), Defendant states that the allegations asserted are not directed to Defendant and further, Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations asserted, and, for that reason, Defendant denies each and every allegation set forth in the referenced paragraphs. By way of further response, Defendant states that to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

43. In response to Paragraph 43 of the Amended Complaint, Defendant states that the allegations asserted are not directed to Defendant and further, Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations asserted, and, for that reason, Defendant denies each and every allegation set forth in the referenced paragraphs. By way of further response, Defendant states that to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

44. In response to Paragraph 44 of the Amended Complaint, Defendant states that the allegations asserted are not directed to Defendant and further, Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations asserted, and, for that reason, Defendant denies each and every allegation set forth in the referenced paragraphs. By way of further response, Defendant states that to the extent that the allegations asserted in the referenced paragraph constitute legal conclusions rather than allegations of fact, they do not require a response by way of admission or denial.

45. In response to the "Wherefore" paragraph following Paragraph 44 of the Amended Complaint, Defendant denies that Plaintiff is entitled to any relief from Defendant.

46. Defendant denies every allegation, express or implied, in the Amended Complaint unless specifically admitted herein.

AFFIRMATIVE DEFENSES

1. Defendant affirmatively raises all available contractual defenses, rights, and remedies provided in the Contract documents and all of the terms associated therewith, which defenses are incorporated by reference herein.

2. Defendant affirmatively states that the Amended Complaint is barred, in whole or in part, because J.F. Allen's request for and the issuance of Final Payment in November 2013 constitutes a waiver of all Claims by Plaintiff against Defendant other than those previously made in accordance with the requirements of the Contract documents and expressly acknowledged by Defendant in writing as still unsettled, of which there were none.

3. Defendant affirmatively states that the Amended Complaint is barred, in whole or in part, because Defendant lacks any contractual duty to Plaintiff with respect to the delay damages alleged.

4. Defendant affirmatively states that the Amended Complaint is barred, in whole or in part, because Plaintiff failed to abide by the terms of the Contract documents and all of the terms associated therewith.

5. Defendant affirmatively states that the Amended Complaint is barred, in whole or in part, due to Plaintiff's failure to satisfy the conditions precedent for making each claim alleged, which prerequisites include: (i) prompt written notice by Plaintiff to both Defendant and the Engineer; (ii) the Engineer's determination that a change to the contract is necessary; and (iii) the issuance of a Change Order.

6. Defendant affirmatively states that the Amended Complaint is barred, in whole or in part, because even if any claim were initially made in accordance with the agreement protocol, Plaintiff's alleged claims were not properly preserved in accordance with the Contract documents.

7. Defendant affirmatively states that the Amended Complaint is barred, in whole or in part, due to the express provisions of the Contract documents establishing Plaintiff's sole responsibility for issues with respect to all Underground Facilities, including issues that relate to

Plaintiff's duty to determine the exact location of all utilities and structures, to expose subsurface utilities and structures sufficiently in advance of the proposed work, and if damage is caused, to repair and restore all underground utilities, the cost of which is deemed incidental to the Contract Price.

Price.

8. Defendant affirmatively states that the Amended Complaint is barred, in whole or in part, because under the Contract documents, delay due to the discovery of Underground Facilities was expressly contemplated by the parties, and any potential costs were deemed to be incidental to the Contract Price.

9. Defendant affirmatively states that Plaintiff's failure to timely assert its equitable adjustment claim and to satisfy all conditions precedent under the Contract documents is fatal to its breach of contract claim.

10. Defendant affirmatively states that the Amended Complaint is barred, in whole or in part, by the doctrines of estoppel, ratification, acquiescence, and/or waiver.

11. Defendant affirmatively states that the Amended Complaint is barred or restricted by Plaintiff's failure to mitigate damages, if any.

12. Defendant affirmatively states that the damages claimed by Plaintiff, if any, were caused by entities other than Defendant.

13. Defendant affirmatively asserts its right to have any and all fault that proximately caused or contributed to the acts, injuries, and damages of which Plaintiff complains, if any, apportioned among those responsible therefore and, if Defendant is held liable to any degree to Plaintiff in this matter, it has and hereby asserts a right of contribution of and from any party against whom any apportionment is made.

14. Defendant asserts all applicable statutes of limitation as an affirmative defense barring all or some of Plaintiff's asserted claims.

15. Defendant presently has insufficient knowledge or information upon which to form a belief as to whether it may have additional, as yet unstated, affirmative defenses.

Defendant reserves the right to assert additional defenses in the event its discovery in the course of the defense of this matter reveals grounds for the additional defenses including, but not limited to, the defenses set forth in Rule 8(c) of the West Virginia Rules of Civil Procedure.

WHEREFORE, Defendant The Sanitary Board of the City of Charleston, West Virginia,

(i) prays Plaintiff's claims for relief against Defendant be dismissed with prejudice; (ii) prays Plaintiff take nothing from Defendant; (iii) prays judgment be entered against Plaintiff and in favor of Defendant; and (iv) prays the Court grant to Defendant such other and further relief as the Court deems to be just and proper.

COUNTERCLAIM

Independently of the above Answer, Defendant/Counter-Plaintiff, The Sanitary Board of the City of Charleston, West Virginia ("CSB") makes and presents, pursuant to W. Va. R. Civ. P. 13, the following Counterclaim against Plaintiff/Counter-Defendant, J.F. Allen Corporation ("J.F. Allen"), and respectfully alleges and avers as follows:

INTRODUCTION

1. J.F. Allen filed its original Complaint on June 30, 2014, and on November 17, 2014 brought an Amended Complaint against CSB for breach of contract, alleging that CSB is liable for "additional and extra costs" and "delay" costs arising from the parties' December 13, 2011 construction agreement.

2. For purposes of this Counterclaim only, and without admitting any of the allegations therein, CSB incorporates by reference the allegations of the Amended Complaint.

CSB also incorporates by reference its Answer and each and every affirmative defense asserted in response to Plaintiff's Amended Complaint.

PARTIES

3. CSB is a municipal sewer utility serving Charleston and adjacent areas in Kanawha County, West Virginia, with its principal office located at 208 26th Street West, Charleston, Kanawha County, West Virginia. At all times relevant, CSB was the Owner under the construction contract and with respect to the project at issue.

4. J.F. Allen is a West Virginia corporation, with its principal office located at 33 Red Rock Rd., Buckhannon, Upsher County, West Virginia. At all times relevant, J.F. Allen was the Contractor under the construction contract and with respect to the project at issue.

FACTUAL BACKGROUND

A. The Construction Agreement

5. On or about December 13, 2011, CSB, as Owner, and J.F. Allen, as Contractor, entered into a written construction Agreement (the "Agreement") for work generally described as "Kanawha Two-Mile Creek Sewer Improvements — Sewer Replacements Sugar Creek Drive Sub-Area, Contract 10-8" (the "Project"). (See Ex. A, Agreement at 1; *see also* Am. Compl. ¶

5.)

6. The Project involved a series of improvements to the City of Charleston's municipal sewer system, including gravity sewer replacements, manhole installation, house service connections, and restoration of paved and non-paved areas.

7. Defendant Burgess & Niple, Inc. provided professional services to CSB and was designated as the Engineer/Architect on the Project ("B&N" or "Engineer"). (*Id.* ¶ 2; *see also* Am. Compl. ¶¶ 6-7.)

8. The Agreement provided an original contract price of \$5,160,621.75, "subject to additions and deductions by Change Order and quantities actually performed," required substantial completion by January 2, 2013, and required final completion by February 1, 2013, which was later extended by Change Order to June 14, 2013. (*Id.* ¶ 4; *see also* Am. Compl. ¶¶ 8-10.)

9. A total of six change orders and quantity adjustments increased the contract price in the amount of \$394,977, for a final adjusted contract amount of \$5,555,598.

B. Contract Time and Liquidated Damages

10. Article 3 of the Agreement sets forth the parties' agreed-upon terms with respect to Contract Time and Liquidated Damages.

11. Section 3.1, entitled "Contract Time," provides that "[t]he work will be substantially complete within 365 calendar days and ready for final payment within 395 calendar days after the date when the Contract Time commences to run as provided in the Notice to Proceed and in paragraph 14.07.B and 14.07.C of the General Conditions. Substantially complete shall include completion of all sewer lines and manholes including all house services connected to the new sewer." (Ex. A, § 3.1.)

12. Section 3.2 of the parties' Agreement expressly provides for a \$1,000 per day liquidated damages for each consecutive calendar day that expires after the Contract Time, as follows:

3.2. LIQUIDATED DAMAGES. OWNER and CONTRACTOR
recognize that time is of the essence of this Agreement and that

OWNER will suffer financial loss if the work is not completed within the time specified in paragraph 3.1 above, plus any extensions thereof allowed in accordance with Article 12 of the General Conditions. They also recognize the delays, expense, and difficulties involved in proving the actual loss suffered by OWNER, if the work is not completed on time. Accordingly, instead of requiring any such proof, OWNER and CONTRACTOR agree that as liquidated damages for delay (but not as a penalty), CONTRACTOR shall pay OWNER *the sum of \$1,000.00 for each consecutive calendar day that expires after the time specified in paragraph 3.1, or any proper extension thereof* granted by OWNER for completion and readiness for final payment.

(Ex. A. § 3.2 (emphasis added).)

C. Course of Performance under the Agreement

13. Construction of the Project began on January 9, 2012.

14. The final completion date established by the parties' Agreement and its Change Orders was June 14, 2013.

15. Actual final completion of the Project occurred on November 6, 2013, 144 days after the June 14, 2013 final completion date.

16. J.F. Allen submitted its request for Final Payment on or about November 4, 2013.

17. On November 5, 2013, B&N submitted its written recommendation to CSB for Final Payment to J.F. Allen.

18. CSB issued Final Payment, check no. 2068, in the amount of \$143,320.43 to J.F. Allen on or about November 20, 2013.

19. On or about May 7, 2014, approximately six months after Final Payment was made under the Agreement, J.F. Allen submitted a written request to B&N seeking additional compensation from CSB for extra, non-contractual work.

20. On May 12, 2014, B&N returned J.F. Allen's request, noting that under the Agreement, "B&N is no longer authorized to provide professional services for this project."

21. On or about November 17, 2014, more than one year after completion of the Project and 362 days after Final Payment was issued, J.F. Allen filed the instant Amended Complaint, amending its claim for breach of contract against CSB.

COUNT I — BREACH OF CONTRACT

22. Defendant incorporates by reference all preceding paragraphs as though the allegations were fully set forth in this paragraph.

23. The Agreement is a valid and enforceable contract, supported by adequate consideration, and was offered and voluntarily accepted by the parties thereto.

24. All conditions precedent to the enforcement of the Agreement have been satisfied.

25. CSB performed its obligations under the Agreement by paying J.F. Allen for completion of the work in accordance with the contract documents, including its Change Orders, in the amount of \$5,555,598.

26. J.F. Allen, however, did not timely perform its obligations within the time frame specified in paragraph 3.1 of the Agreement, plus any extensions allowed in accordance with Article 12 of the General Conditions.

27. J.F. Allen's untimely performance constitutes a breach of time requirements set forth in the parties' Agreement.

28. As a direct and proximate result of J.F. Allen's breach under § 3.1 of the Agreement, CSB is entitled to liquidated damages provided in § 3.2 of the Agreement, in the contract amount of \$1,000 per day for 144 consecutive days which transpired between the June

14, 2013 final completion date established by the parties' Agreement and its Change Orders and

J.F. Allen's actual final completion of the Project, which occurred on November 4, 2013.

PRAYER FOR RELIEF

WHEREFORE, for these reasons, CSB asks for entry of judgment in its favor and against

J.F. Allen as follows:

- a. For liquidated damages resulting from J.F. Allen's breach in an amount not less than One Hundred Forty-Four Thousand Dollars (\$144,000.00);
- b. Pre-judgment and post-judgment interest; and
- c. All other relief that is equitable and just.

Respectfully submitted,

THE SANITARY BOARD OF THE
CITY OF CHARLESTON, WEST
VIRGINIA

By Counsel

Vivian H. Basdekis

David Allen Barnette (WV Bar No. 242)

Vivian H. Basdekis (WV Bar No. 10587)

JACKSON KELLY PLLC

500 Lee Street, East, Suite 1600

P. O. Box 553

Charleston, WV 25322-0553

Tel: (304) 340-1000; Fax: (304) 340-1272

Email: dbarnette@jacksonkelly.com

vhbasdekis@jacksonkelly.com

*Counsel for Defendant, The Sanitary Board
of the City of Charleston, West Virginia*

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

J.F. ALLEN CORPORATION,
a West Virginia Corporation,

Plaintiff,

v.

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

Defendants.

Civil Action No. 14-C-1182
Judge Kaufman

CERTIFICATE OF SERVICE

I, Vivian H. Basdekis, do hereby certify that I have served a true and exact copy of the foregoing *Charleston Sanitary Board's Answer and Counterclaim to Plaintiff's Amended Complaint* upon the following persons by depositing the same in the regular course of the United States Mail, postage prepaid, on this 17th day of May, 2016, as follows:

Charles M. Johnstone, II, Esq.
Madeline G. George, Esq.
JOHNSTONE & GABHART, LLP
P.O. Box 313
Charleston, WV 25321
Counsel for Plaintiff

Peter T. Demasters, Esq.
Kyle T. Turnbull, Esq.
Flaherty Sensabaugh Bonasso PLLC
48 Donley St., Suite 501
Morgantown, WV 26501
Counsel for Burgess & Niple, Inc.

Vivian H. Basdekis
Vivian H. Basdekis (WV Bar No. 10587)

AGREEMENT

Exhibit A

THIS AGREEMENT is dated as of the 13th day of December in the year 2011 by and between The Sanitary Board of the City of Charleston, West Virginia (hereinafter called OWNER) and J.F. Allen Company (hereinafter called CONTRACTOR).

OWNER and CONTRACTOR, in consideration of the mutual covenants hereinafter set forth, agree as follows:

Article 1. WORK.

CONTRACTOR shall complete all work as specified or indicated in the Contract Documents. The work is generally described as follows:

Kanawha Two-Mile Creek Sewer Improvements - Sewer Replacements Sugar Creek Drive
Sub-Area, Contract 10-8

The project for which the work under the Contract Documents may be the whole or only a part is generally described as follows:

Work associated with this Contract generally includes 6,910 linear feet of 10"; 14,868 linear feet of 8"; and 1,070 linear feet of gravity sewer replacements. The work further includes 177 manholes and 230 customer service replacements.

Article 2. ENGINEER/ARCHITECT.

For this agreement, the ENGINEER/
ARCHITECT is designated as:

Burgess & Niple, Inc.
4424 Emerson Avenue
Parkersburg, WV 26104

who is hereinafter called ENGINEER/ARCHITECT and who is to act as OWNER's representative, assume all duties and responsibilities, and have the rights and authority assigned to ENGINEER/ARCHITECT in the Contract Documents in connection with completion of the work in accordance with the Contract Documents.

Article 3. CONTRACT TIME.

3.1. The work will be substantially complete within 365 calendar days and ready for final payment within 395 calendar days after the date when the Contract Time commences to run as provided in the Notice to Proceed and in paragraph 14.07.B and 14.07.C of the General Conditions. Substantially complete shall include completion of all sewer lines and manholes including all house services connected to the new sewer.

3.2. LIQUIDATED DAMAGES. OWNER and CONTRACTOR recognize that time is of the essence of this Agreement and that OWNER will suffer financial loss if the work is not completed within the time specified in paragraph 3.1 above, plus any extensions thereof allowed in accordance with Article 12 of the General Conditions. They also recognize the delays, expense, and difficulties involved in proving the actual loss suffered by OWNER if the work is not completed on time. Accordingly, instead of requiring any such proof, OWNER and CONTRACTOR agree that as liquidated damages for delay (but not as a penalty), CONTRACTOR shall pay OWNER the sum of \$1,000.00 for each consecutive calendar day that expires after the time specified in paragraph 3.1, or any proper extension thereof granted by OWNER for completion and readiness for final payment.

Article 4. CONTRACT PRICE.

4.1. OWNER shall pay CONTRACTOR for completion of the work in accordance with the Contract Documents in current funds of \$ 5,160,621.75, in accordance with the Bid Schedule as awarded by the OWNER as included herein, subject to additions and deductions by Change Order and quantities actually performed.

Article 5. PAYMENT PROCEDURES.

CONTRACTOR shall submit Applications for Payment in accordance with Article 14 of the General Conditions. Applications for Payment will be processed by ENGINEER/ARCHITECT as provided in the General Conditions.

5.1. **PROGRESS PAYMENTS.** OWNER shall make progress payments on account of the Contract Price on the basis of Contractor's Applications for Payment as recommended by ENGINEER/ARCHITECT monthly during construction as provided in the General Conditions.

All progress payments will be on the basis of the progress of the work measured by the schedule of values established in paragraph 2.07 of the General Conditions (and in the case of Unit Price work based on the number of units completed) or, in the event there is no schedule of values, as provided in the General Requirements.

5.2. **FINAL PAYMENT.** Upon final completion and acceptance of the work in accordance with paragraphs 14.07.B and 14.07.C of the General Conditions, OWNER shall pay the remainder of the Contract Price as recommended by ENGINEER/ARCHITECT as provided in said paragraphs 14.07.B and 14.07.C.

Article 6. INTEREST.

All monies not paid when due as provided in Article 14 of the General Conditions shall bear interest at the rate provided by law at the place of the project.

Article 7. CONTRACTOR'S REPRESENTATIONS.

In order to induce OWNER to enter into this Agreement, CONTRACTOR makes the following representations:

7.1. CONTRACTOR has examined and carefully studied the Contract Documents (including the Addenda listed in paragraph 8) and the other related data identified in the Bidding Documents including "technical data."

7.2. CONTRACTOR has visited the site and become familiar with and is satisfied as to the general, local, and site conditions that may affect cost, progress, performance, or furnishing of the work.

7.3. CONTRACTOR is familiar with and is satisfied as to all federal, state, and local laws and regulations that may affect cost, progress, performance, and furnishing of the work.

7.4. CONTRACTOR has carefully studied all reports of explorations and tests of subsurface conditions at or contiguous to the site and all drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the site (except Underground Facilities) which have been identified in the Supplementary Conditions as provided in paragraph 4.02.A of the General Conditions. CONTRACTOR accepts the determination set forth in paragraph 4.02 of the Supplementary Conditions of the extent of the "technical data" contained in such reports and drawings upon which CONTRACTOR is entitled to rely as provided in paragraph 4.02 of the General Conditions. CONTRACTOR acknowledges that such reports and drawings are not Contract Documents and may not be complete for CONTRACTOR's purposes. CONTRACTOR acknowledges that OWNER and ENGINEER/ARCHITECT do not assume responsibility for the accuracy or completeness of Information and data shown or indicated in the Contract Documents with respect to Underground Facilities at or contiguous to the site. CONTRACTOR has examined and agreed with provisions concerning responsibilities for the adequacy of data furnished to prospective BIDDERS with respect to subsurface conditions, other physical conditions and underground facilities, and possible changes in the Contract Documents due to differing or unanticipated conditions appear in paragraphs 4.02, 4.03, and 4.04 of Section 00 70 00, "General Conditions," and Section 00 73 00, "Supplementary Conditions."

7.5. CONTRACTOR has obtained and carefully studied (or assumes responsibility for having done so) all such additional supplementary examinations, investigations, explorations, tests, studies, and data concerning conditions (surface, subsurface, and Underground Facilities) at or contiguous to the site or otherwise which may affect cost, progress, performance, or furnishing of the work or which relate to any aspect of the means, methods, techniques, sequences, and procedures of construction to be employed by CONTRACTOR and safety precautions and programs incident thereto. CONTRACTOR does not consider that any additional examinations, investigations, explorations, tests, studies, or data are necessary for the performance and furnishing of the work at the Contract Price, within the Contract Times, and in accordance with the other terms and conditions of the Contract Documents.

7.6. CONTRACTOR is aware of the general nature of work to be performed by OWNER and others at the site that relates to the work as indicated in the Contract Documents.

7.7. CONTRACTOR has correlated the information known to CONTRACTOR, information and observations obtained from visits to the site, reports and drawings identified in the Contract Documents, and all additional examinations, investigations, explorations, tests, studies, and data with the Contract Documents.

7.8. CONTRACTOR has given ENGINEER/ARCHITECT written notice of all conflicts, errors, ambiguities, or discrepancies that CONTRACTOR has discovered in the Contract Documents and the written resolution thereof by ENGINEER/ARCHITECT is acceptable to CONTRACTOR, and the Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.

Article 8. CONTRACT DOCUMENTS.

The Contract Documents which comprise the entire agreement between OWNER and CONTRACTOR concerning the work consist of the following:

8.1. This Agreement.

8.2. Exhibits to this Agreement.

8.3. Bidding Requirements including Advertisement, Bids and Instructions to BIDDERS, and Supplementary Instructions. Contract Forms including Agreement, Approval and Certification of Legal and Fiscal Officers, Bonds, Notice of Award, Notice to Proceed, Change Order, General Conditions, and Supplementary General Conditions.

8.4. Specifications and Supplemental Specifications as listed in Section 00 01 10.03, "Table of Contents," from Division 0 through Division 48 prepared or issued by Burgess and Niple, Inc., dated August, 2011 and revised -----, 20--.

8.5. Drawings prepared by Burgess & Niple, Inc., numbered G-01 - G-07, C-01 - C-24,
D-01 - D-06 (37 sheets), dated August, 2011 and revised -----, 20--.

8.6. ADDENDA:

No. 1, dated September 27, 2011

No. 2, dated September 30, 2011

No. -----, dated -----, 20--

No. -----, dated -----, 20--

No. -----, dated -----, 20--

No. -----, dated -----, 20--

8.7. Bidding Forms including Noncollusion Affidavit, Bid Bond or Guaranty, Scope of Bids, and Bid Schedule.

8.8. Documentation submitted by CONTRACTOR prior to Notice of Award.

8.9. All completed forms including procurement forms and contract forms as listed in Section 00 10.03, "Table of Contents."

8.10. The following which may be delivered or issued after the Effective Date of the Agreement and are not attached hereto: All Written Amendments and other documents amending, modifying, or supplementing the Contract Documents pursuant to paragraphs 3.04.A and 3.04.B of the General Conditions.

8.11. The documents listed in paragraphs 8.2 et seq. above are attached to this Agreement (except as expressly noted otherwise above).

There are no Contract Documents other than those listed above in this Article 8. The Contract Documents may only be amended, modified, or supplemented as provided in paragraph 3.04.A or 3.04.B of the General Conditions.

Article 9. MISCELLANEOUS.

9.1. Terms used in this Agreement which are defined in Article 1 of the General Conditions will have the meanings indicated in the General Conditions.

9.2. No assignment by a party hereto of any rights under or interests in the Contract Documents will be binding on another party hereto without the written consent of the party sought to be bound; and, specifically but without limitation, monies that may become due and monies that are due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

9.3. OWNER and CONTRACTOR each binds itself, its partners, successors, assigns, and legal representatives to the other party hereto, its partners, successors, assigns, and legal representatives in respect of all covenants, agreements, and obligations contained in the Contract Documents.

9.4. Any provision or part of the Contract Documents held to be void or unenforceable under any Law or Regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon OWNER and CONTRACTOR, who agree that the Contract Documents shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

IN WITNESS WHEREOF, OWNER and CONTRACTOR have signed six (6) copies of this Agreement. Two counterparts each have been delivered to OWNER, CONTRACTOR, and ENGINEER/ARCHITECT.

The effective date of this Agreement shall be December 13, 2011.

OWNER:

The Sanitary Board of the City of Charleston,
West Virginia
By [Signature]
Name Larry L. Roller
Title General Manager

(SEAL)

ATTEST:

By [Signature]
Name Tim G. Haapala
(Please Type or Print)
Title Operations Manager

Address for giving notices
208 26th Street
Charleston, WV 25312

CONTRACTOR:

J.F. Allen Company
By [Signature]
Name Michael D. Griffith
Title Vice President
Address P.O. Box 2049
Buckhannon, WV 26201
Telephone (304) 472-8890
Employer Identification No. 55-0328627
Contractor's License No. WV000376
(If a corporation, a second officer must sign.)
By [Signature]
Name Gregory S. Hadjis
(Please Type or Print)
Title President

(SEAL)

ATTEST:

By [Signature]
Name Mary Ellen Lydon
(Please Type or Print)
Title Corporate Secretary

Address for giving notices
P.O. Box 2049
Buckhannon, WV 26201

(If CONTRACTOR is a corporation, attach
evidence of authority to sign.)

THE SANITARY BOARD OF THE CITY OF CHARLESTON, WEST VIRGINIA
KANAWHA TWO-MILE CREEK SEWER IMPROVEMENTS
SEWER REPLACEMENTS SUGAR CREEK DRIVE SUB-AREA
CONTRACT 10-8

List of Contract Items to be Included in this Award to:

J.F. Allen Company
P.O. Box 2049
Buckhannon, WV 26201

(1) Item	(2) Description	(3) Quantity	(4) Unit	(5) Unit Prices in Figures Labor & Material	(6 = 3 x 5) Total Extended Price in Figures
1	6" PE DR 13.5 Sanitary Sewer Pipe (0' to 8' Depth)	217	l.f.	\$58.00	\$12,586.00
4	6" SDR 35 Polyvinyl Chloride Sewer Pipe (0' to 8' Depth)	462	l.f.	49.00	22,638.00
6	6" SDR 26 Pressure Rated Polyvinyl Chloride Pipe (0' to 8' Depth)	391	l.f.	84.00	32,844.00
6A	6" SDR 26 Pressure Rated Polyvinyl Chloride Pipe (8' and Up Depth)	67	l.f.	73.00	4,891.00
11	8" SDR 35 Polyvinyl Chloride Sewer Pipe (0' to 81 Depth)	6,963	l.f.	64.00	445,632.00
12	8" SDR 35 Polyvinyl Chloride Sewer Pipe (8' to 121 Depth)	957	l.f.	85.00	81,345.00
14	8" SDR 26 Pressure Rated Polyvinyl Chloride Sewer Pipe (0' to 8' Depth)	4,420	l.f.	83.00	366,860.00
15	8" SDR 26 Pressure Rated Polyvinyl Chloride Sewer Pipe (8' to 12' Depth)	2,267	l.f.	120.00	272,040.00
18	8" Ductile Iron Sewer Pipe, Push-On Joint (0' to 8' Depth)	203	l.f.	89.00	18,067.00

48712-46648*11/26/2011
DWB:rem

(1) Item	(2) Description	(3) Quantity	(4) Unit	Unit Prices in Figures (5) Labor & Material	(6 ÷ 3 x 5) Total Extended Price in Figures
19	8" Ductile Iron Sewer Pipe, Push-On Joint (8' and Up Depth)	58	l.f.	116.00	6,728.00
21	10" SDR 35 Polyvinyl Chloride Sewer Pipe (0' to 8' Depth)	2,069	l.f.	96.00	198,624.00
22	10" SDR 35 Polyvinyl Chloride Sewer Pipe (8' to 12' Depth)	1,087	l.f.	115.00	125,005.00
24	10" SDR 35 Polyvinyl Chloride Sewer Pipe (16' and Up Depth)	269	l.f.	210.00	56,490.00
25	10" SDR 26 Pressure Rated Polyvinyl Chloride Sewer Pipe (0' to 8' Depth)	893	l.f.	109.00	97,337.00
26	10" SDR 26 Pressure Rated Polyvinyl Chloride Sewer Pipe (8' to 12' Depth)	1,823	l.f.	133.00	242,459.00
27	10" SDR 26 Pressure Rated Polyvinyl Chloride Sewer Pipe (12' to 16' Depth)	267	l.f.	197.00	52,599.00
29	10" Ductile Iron Sewer Pipe, Push-On Joint (0' to 8' Depth)	49	l.f.	92.00	4,508.00
30	10" Ductile Iron Sewer Pipe, Push-On Joint (8' to 16' Depth)	453	l.f.	230.00	104,190.00
53	Bore and Jack, 20" Casing Pipe	156	l.f.	511.00	79,716.00
57	Precast Concrete Manhole Type A, New Location, (0' to 4' Depth)	8	ea.	2,627.00	21,016.00
58	Precast Concrete Manhole Type A, New Location, (4' to 8' Depth)	82	ea.	2,936.00	240,752.00

48712-46648*11/16/2011
DWB:rcm

(1) Item	(2) Description	(3) Quantity	(4) Unit	(5) Unit Prices in Figures Labor & Material	(6) = 3 x 5 Total Extended Price in Figures
59	Precast Concrete Manhole Type A, New Location, (8' to 12' Depth)	62	ea.	3,755.00	232,810.00
60	Precast Concrete Manhole Type A, New Location, (12' to 16' Depth)	4	ea.	4,477.00	17,908.00
61	Precast Concrete Manhole Type A, New Location (16' and Up Depth)	2	ea.	5,243.00	10,486.00
64	Precast Concrete Manhole Type D, New Location, (0' to 8' Depth)	1	ea.	4,581.00	4,581.00
68	Abandonment of Existing Manhole/Sewer	73	ea.	818.00	59,714.00
69	Inside Drop Connection, 8" Sewer	72	v.f.	157.00	11,304.00
71	Manhole Vent	7	ea.	2,198.00	15,386.00
73	Sewer Cleanout, House Service	227	ea.	1,141.00	259,007.00
75A	Wye Branch Connection, 6"x 6", DRI3.5 PE	2	ea.	537.00	1,074.00
76	Wye Branch Connection, 8"x 6", SDR 35 Polyvinyl Chloride	78	ea.	111.00	8,658.00
77	Wye Branch Connection, 8" x 6", SDR 26 Pressure Rated Polyvinyl Chloride	65	ea.	526.00	34,190.00
78	Wye Branch Connection, 10" x 6", SDR 35 Polyvinyl Chloride	34	ea.	201.00	6,834.00

48712 46648*11/26/2011
DWB:rem

(1) Item	(2) Description	(3) Quantity	(4) Unit	Unit Prices in Figures (5) Labor & Material	(6 = 3 x 5) Total Extended Price in Figures
79	Wye Branch Connection, 10" x 6", SDR 26 Pressure Rated Polyvinyl Chloride	51	ea.	1,142.00	58,242.00
86	6" SDR 35 Polyvinyl Chloride Sewer Pipe, House Service	3,496	l.f.	49.00	171,304.00
87	6" SDR 26 Pressure Rated Polyvinyl Chloride Sewer Pipe, House Service	3,826	l.f.	53.00	202,778.00
88	6" Ductile Iron Sewer Pipe, Push-On Joint, House Service	524	l.f.	65.00	34,060.00
89	Difficult House Service Installation	63	ea.	1,561.00	98,343.00
90	Abandoned House Service Verification	34	ea.	597.00	20,298.00
94	Pavement Replacement, Type A-1, Asphalt over Concrete	237	s.y.	161.00	38,157.00
96	Pavement Replacement, Type A-3, Asphalt	8,752	s.y.	63.00	551,376.00
97	Pavement Replacement, Type C, Asphalt	73	s.y.	126.00	9,198.00
98	Pavement Replacement, Type D, Gravel	295	s.y.	22.00	6,490.00
99	Pavement Replacement, Type F, Concrete	328	s.y.	267.00	87,576.00
101	1½" Full Width Asphalt Pavement Overlay	31,109	s.y.	11.70	363,975.30
102	Cold Milling	30,357	s.y.	1.85	56,160.45
103	1½" Temporary Surface Course Pavement Replacement	900	s.y.	118.00	106,200.00
104	Concrete Sidewalk Replacement	12	s.f.	266.00	3,192.00

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DWB:rcm

(1) Item	(2) Description	(3) Quantity	(4) Unit	Unit Prices in Figures (5) Labor & Material	(6 = 3 x 5) Total Extended Price in Figures
105	Streambank Protection	417	c.y.	120.00	50,040.00
106	Concrete Anchor Collar	32	ea.	581.00	18,592.00
108	Permanent Grading and Seeding	10,549	s.y.	1.00	10,549.00
109	Erosion Control Wattles and Type A Matting per WVDOH Section 715.24	1,520	s.y.	8.00	12,160.00
110	Erosion Control Wattles and Type B Matting per WVDOH Section 715.24	98	s.y.	8.00	784.00
111	Audio-Video Color Taping	1	l.s.	25,000.00	25,000.00
112	Granular Backfill	1,000	c.y.	63.00	63,000.00
113	Additional Excavated Trench	500	c.y.	10.00	5,000.00
114	Concrete Encasement	40	c.y.	314.00	12,560.00
116	Penetration/Removal of Unknown Buried Walls	21	ea.	348.00	7,308.00

Total of Contract Items for Contract 10-8

\$ 5,160,621.75