

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

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.

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. J.F. Allen timely notified the Defendants of each and every item which resulted in delay, disruption extra or additional work or extra costs.

13. In violation of their duties to J.F. Allen, the Defendants failed and refused to review, process and execute Change Orders, to pay for the original contract amount, or to compensate J.F. Allen for substantial extra and additional work performed, and increased costs, delays and disruptions.

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

14. J.F. Allen restates and re-alleges each and every allegation set forth in paragraphs 1 through 13 of its Complaint as if the same were fully set forth herein.

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

16. The Defendants were aware of and J.F. Allen has provided proper notice of all of its claims including, but not limited to, those related to errors in the plans and specifications, claims for extra compensation, delays, disruptions and differing site conditions.

17. Specifically, 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:

- a. Utility conflicts;
- b. Interference by other contractors/utilities;
- c. Loss of productivity;
- d. Temporary paving issues;
- e. Excessive restoration costs;
- f. Extended general conditions; and
- g. Additional asphalt repair costs.

18. The 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 caused compensable interruptions and interference with J. F. Allen's ability to perform its contractor obligations; and
- e. CSB has failed and refused to timely respond to requests for change orders, equitable adjustment and requests for clarifications and corrections to the project plans and specifications.

19. 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: UNJUST ENRICHMENT AGAINST DEFENDANT,  
THE SANITARY BOARD OF THE CITY OF CHARLESTON, WEST VIRGINIA

20. J.F. Allen restates and re-alleges each and every allegation set forth in paragraphs 1 through 19 of its Complaint as if the same were fully set forth herein.

21. In addition to construction work contemplated by the original contract documents, the additional work and costs incurred by J.F. Allen as referenced in Count I above were all satisfactorily performed and installed by J.F. Allen and have been incorporated into the Project for the benefit of the CSB thereby creating an implied or quasi contract between J.F. Allen and CSB to pay the reasonable value for all work performed and installed.

22. CSB has breached its implied or quasi contract with J.F. Allen by failing and refusing to pay for the extra work and additional work performed and incorporated into the Project by J.F. Allen.

23. CSB continues to be unjustly enriched by retaining the benefit of the work performed by J.F. Allen without compensating J.F. Allen therefore.

24. As a direct, proximate and foreseeable result of CSB's breach of duties owed to J.F. Allen and CSB'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.

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

25. J.F. Allen restates and re-alleges each and every allegation set forth in paragraph 1 through 24 of its Complaint as if the same were fully set forth herein.

26. 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.

27. 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.

28. 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.


29. 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:



Charles M. Johnstone, II, Esq. (WVSB #5082)  
Madeline G. George, Esq. (WVSB #12357)  
JOHNSTONE & GABHART, LLP  
Post Office Box 313  
Charleston, West Virginia 25321  
Tel: (304) 343-7100  
Fax: (304) 343-7107  
*Counsel for Plaintiff*

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