

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(BALTIMORE DIVISION)**

HOWARD ROBSON INC.
891 Stone Battery Road, P.O. Box 309
Landisville, Pennsylvania 17538

and

LIBERTY MUTUAL INSURANCE COMPANY
175 Berkeley Street,
Boston, Massachusetts 02116

Plaintiffs,

v.

THE TOWN OF RISING SUN
1 East Main Street
Rising Sun, Maryland 21911.

Defendant.

CIVIL ACTION NO. _____

JURY TRIAL DEMANDED

COMPLAINT

Plaintiffs, Howard Robson Inc. and Liberty Mutual Insurance Company, by and through its undersigned counsel, by way of Complaint against Defendant, The Town of Rising Sun, aver as follows:

PARTIES

1. Plaintiff, Howard Robson Inc. (“HRI”) is a corporation organized under the laws of the Commonwealth of Pennsylvania, with its principal place of business at 891 Stony Battery Road, P.O. Box 309, Landisville, Pennsylvania 17538.

2. Plaintiff, Liberty Mutual Insurance Company (“Liberty”) is a corporation of the Commonwealth of Massachusetts, with its principal place of business at 175 Berkeley Street, Boston, Massachusetts 02116.

3. Defendant, The Town of Rising Sun (“Rising Sun”) is a municipal corporation organized under the laws of the State of Maryland, with its principal office located at 1 East Main Street, Rising Sun, Maryland 21911.

JURISDICTION AND VENUE

4. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the parties are citizens of different States and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

5. The venue is proper in this judicial district under 28 U.S.C. § 1391(b) because this is the judicial district in which the Defendant resides and a substantial part of the events and omissions giving rise to this action occurred within this jurisdictional district.

6. The Court has jurisdiction over all claims asserted herein pursuant to 28 U.S.C. § 1367. Therefore, venue is proper in this Court and the Court has jurisdiction over this matter.

FACTUAL BACKGROUND

BID SOLICITATION & AWARD

7. On or about September 16, 2011, Rising Sun issued a solicitation for public bids for the construction of improvements to a wastewater treatment plant (the “Project”) located within The Town of Rising Sun. However, the date for the submission of bids was delayed at least four times by the issuance of bid addenda, each of which implemented changes in the design of the Project.

8. Although the contract award was due to be made by Rising Sun to HRI within 60 days of bid opening, Rising Sun requested and HRI consented to an extension of the award date to December 31, 2011, in order to allow Rising Sun additional time to resolve funding issues related to the Project. The supposed resolution of these funding issues again delayed the commencement of construction at the site.

9. On or about March 20, 2012, HRI and Rising Sun finally entered into a contract (the "Contract"), pursuant to which HRI was retained to perform the construction services at the Project which were specified in the bid solicitation.

10. The documents which comprise the Contract include but are not limited to the following: the Form of Agreement between Owner and Contractor for Construction Contract (Stipulated Price), the General Conditions, The Supplementary Conditions, Division 1 of the Specifications (General Requirements), the Payment Bond, the Performance Bond, Technical Specifications, and the Drawings. A copy of the Form of Agreement between Owner and Contractor for Construction Contract (Stipulated Price) is attached as Exhibit "A." The remaining documents comprising the Contract are too voluminous to attach as an exhibit to the Complaint and Defendant is already in possession of same.

11. Pursuant to the Contract, HRI agreed to construct significant upgrades to nearly all major process functions at the wastewater treatment plant owned by Rising Sun, including but not limited to: a new influent pump station; a new utility water pump station; a new headworks building; a new filter facility; a new plant operations building; a new oxidation ditch; a new post anoxic re-aeration reactor; a new compressor building; a new selector reactor; a new disinfection facility; and a new alum storage facility.

12. Pursuant to the Contract, Rising Sun agreed to pay HRI the sum of \$7,754,240.00 (the “Contract Price”) for the performance of the specified construction services at the Project.

13. The Contract provided that time was of the essence and the Project was to be substantially completed within 639 days and ready for final payment within 669 days (the “Contract Time”).

14. Liberty, as surety, and HRI, as principal, issued payment and performance bonds in connection with the Project. Liberty has and maintains its equitable subrogation claim rights as well as other rights in contract to all proceeds from any recovery on the claims asserted herein.

RISING SUN’S ENGINEER CHANGE

15. The Project was originally designed by RK&K Engineers (“RK&K”), acting as Rising Sun’s engineer for the Project, and the Plans and Specifications forming the basis of the bid solicitation and HRI’s Contract were prepared by RK&K.

16. Sometime before HRI’s commencement of physical construction at the Project, Rising Sun terminated its relationship with RK&K and engaged CDM Smith, Inc. (“CDM”) to act as Rising Sun’s engineer and construction manager on the Project.

17. CDM was engaged by Rising Sun to administer the construction based upon a set of plans and specifications which CDM did not prepare. CDM repeatedly advised HRI that it had not been retained to interpret RK&K’s design.

18. As set forth in greater detail below, Rising Sun’s decision to terminate its relationship with RK&K and employ CDM resulted in significant delay, disruption and hindrance to HRI’s ability to construct the Project as planned, because among other reasons: (i) at times, Rising Sun refused to provide engineering information required by HRI to construct the

Project; (ii) Rising Sun's responses to HRI's requests for information and submittals were untimely; and (iii) Rising Sun attempted to and/or did, in fact, change, modify and/or redesign significant portions of the work set forth in the original Contract documents, both through the issuance of new/revised design documents and by improperly rejecting conforming submittals and requesting that a design change be implemented before the submittal would be approved.

CONSTRUCTION OF THE PROJECT

19. Even though the Contract was formed in March 2012, for reasons unknown to HRI, Rising Sun delayed the issuance of a "notice to proceed" with physical construction until June 28, 2012.

20. Even after issuing the Notice to Proceed, physical commencement of construction was delayed until July 2012, because Rising Sun had not obtained the requisite permits needed to allow HRI to commence physical construction at the site.

21. HRI's construction at the Project commenced on or about July 12, 2012.

22. After mobilizing to the site and commencing physical construction of the Project, Rising Sun subjected HRI to requirements that were materially different from the requirements specified in the Contract and Rising Sun directed HRI to perform numerous items of additional and extra work which fell outside the scope of the original Contract.

23. As set forth below, numerous acts and omissions of Rising Sun caused HRI to suffer lengthy project delays, all through no fault of HRI.

24. After beginning work on the Project, HRI was directed by Rising Sun to employ techniques and perform additional and extra work to address what CDM regarded as omissions and deficiencies in the Contract documents previously prepared by RK&K.

25. Rising Sun would take an inordinate amount of time to review submittals and answer simple questions regarding the Project, causing HRI's work to be delayed.

ENDLESS RE-DESIGNS AND DELAYS

26. Although HRI did its best to move the project forward, Rising Sun often refused to provide the engineering answers necessary to build the Project and when Rising Sun did provide answers, it often took an inordinate amount of time to do so.

27. In March 2013, Rising Sun directed HRI to halt construction of several structures, including the Plant Operations structure and the Headworks structure, because they were considered by Rising Sun and CDM to be improperly designed by RK&K.

28. In May of 2013, Rising Sun announced to HRI that it had decided to completely redesign significant portions of the Project – even though the Project had already been underway for ten months.

29. The directive to halt work on the Plant Operations and Headwork's structure came at a time when Rising Sun was already delaying other critical path aspects of the Project as a result of its failure to provide timely responses to submittals and other requests for critical engineering and design information needed by HRI to proceed with construction of the Project, as well as attempts by Rising Sun to have HRI "redesign" other aspects of the Project through the submittal review process.

30. As of May 2013, Rising Sun's directive to halt work on the Plant Operations and Headworks structures, together with its other failures resulted in the cessation of all critical path work on the Project (the "May 2013 Work Suspension").

31. At a May 20, 2013, regularly scheduled Project meeting, Rising Sun announced to HRI that it had executed a "Design Amendment" authorizing CDM to redesign whatever Project elements it determined were required to be redesigned, including, but are not limited to, the Plant Operations Building and Plant Headworks structure.

32. Rising Sun, however, failed to publish any new proposed design documents in a timely manner.

33. From May 2013 through April 2014, HRI remained on the Project site, in order to maintain and protect the work and equipment already in place and stored on site, even though no critical path work could be performed during that time period.

34. From May 2013 through April 2014, HRI continued to attend monthly and sometimes weekly progress meetings, even though no critical path progress could be discussed or reported, because Rising Sun had not yet published the proposed design documents needed to proceed with critical path construction.

35. At each monthly progress meeting after May 2013, HRI was directed to remain on site, on the basis that the proposed design information needed to resume critical path construction work would soon be made available.

36. After HRI's numerous requests for status, Rising Sun, through CDM, finally announced in August 2013 that it intended to redesign the Headworks and Plant Operations structures to be constructed of concrete block, a design which all parties acknowledged would be substantially more expensive than the design that was included in the original plans and specifications.

37. In August 2013, despite the passage of several months time since the May 2013 Work Suspension, Rising Sun still had no firm plans or specifications available for pricing by HRI; rather, all Rising Sun could do was advise that it was “working on the redesign documents.”

38. In November 2013, seven months after commencement of the May 2013 Work Suspension, Rising Sun finally provided proposed partial redesign documents to HRI for pricing.

39. HRI promptly requested pricing from its subcontractors and suppliers for the redesigned work and provided preliminary pricing to Rising Sun.

40. In January 2014, nine months after the May 2013 Work Suspension, Rising Sun advised HRI that the concrete block buildings were going to be too costly and they were going to “evaluate” other design alternatives.

41. As late as March 2014, eleven months after commencement of the May 2013 Work Suspension, Rising Sun still had no definite plans or specifications in place to enable HRI to resume critical path work on the Project.

42. In fact, even as of the filing of this action, Rising Sun still has not provided a complete and definite set of plans and specifications needed to resume critical path work on the Project.

43. In addition to the wholesale proposed redesign of the Plant Operations and Headworks structures, Rising Sun attempted to redesign other aspects of the Project, by making sweeping pronouncements, without providing any of the detailed engineering information needed by HRI and its subcontractors to price and implement the pronouncements. Such

pronouncements constitute improper attempts by Rising Sun to force HRI to perform engineering design work – which is the very work CDM was hired by Rising Sun to perform.

44. By way of example, and without limitation, Rising Sun through CDM issued Field Order Number 28 on or about December 2, 2013 which re-classified the electrical requirements for a number of the structures on the Project. This re-classification would have resulted in significant changes to numerous electrical components and installation techniques, including changes to certain items of the electrical work already in place. A meeting was convened in mid-December to provide HRI with guidance requiring the reclassification. None was provided at the meeting nor in follow up to the meeting, as promised. Because Rising Sun did not provide an actual electrical redesign, the scope of this change was unknown. To date, Rising Sun has not provided direction concerning the design changes to the electrical work and all electrical work on the Project remains at a standstill.

45. By way of a further example, and without limitation, Rising Sun continues, to this day, to ignore a significant design flaw regarding the disposition of sludge. The Contract drawings put out for bid did not include plant press equipment. Without such plant press equipment, there will be no mechanism to process the sludge or prevent an eventual overflow of the banks of the existing sludge lagoon if and when the Project becomes operational. Rising Sun has acknowledged this design flaw/omission and it has indicated that the design flaw would be handled in the future. To date, Rising Sun has not published any proposed design documents which would even attempt to address this critical design omission, thereby causing certain future delays, when and if the other critical path work ever resumes.

RISING SUN'S REFUSAL TO PAY HRI FOR WORK DELAY

46. As a direct result of Rising Sun's acts and omissions, including the May 2013 Work Suspension, the critical path of the Project was delayed and HRI incurred substantial additional and unanticipated costs and expenses – costs and expenses that HRI would not have incurred had HRI been permitted to construct the Project as originally designed and as originally planned.

47. On February 7, 2014, HRI documented the additional costs and expenses incurred as a result of the May 2013 Work Suspension, from the commencement of that work suspension, May 1, 2013 through October 31, 2013, and requested reimbursement of such expenses, totaling \$589,854.39, exclusive of extended unabsorbed home office overhead expenses incurred during the period of such suspension and delay.

48. On March 7, 2014, HRI documented the additional costs and expenses incurred as a result of the May 2013 Work Suspension for the period of November 1, 2013 through February 28, 2014, and requested reimbursement of such expenses, totaling \$441,061.47, exclusive of extended unabsorbed home office overhead expenses incurred during the period of such suspension and delay.

49. On May 23, 2014, HRI documented the additional costs and expenses incurred as a result of the May 2013 work suspension for the period of March 1, 2014 through April 5, 2014, and requested reimbursement of such expenses, totaling \$112,032.81, exclusive of extended unabsorbed home office overhead expenses incurred during the period of such suspension and delay.

50. By submission dated May 10, 2014, HRI quantified the extended unabsorbed home office overhead expense incurred as a result of Rising Sun's delays, which amounted to \$1,685.12 per day of delay, using the *Eichleay* formula.

51. HRI is entitled to recover the sum of \$571,255.68 (339 days of suspension and Delay x \$1,685.12), for the extended unabsorbed home office overhead expense incurred as a result of Rising Sun's delays.

52. To date, Rising Sun has failed and refused to remit payment to HRI for its delay costs incurred between May 1, 2013 through the present. Worse yet, despite prior acknowledgment of its responsibility for the suspension and delay, one of the Commissioners announced that Rising Sun would never reimburse HRI for any of its suspension or delay costs – a clear and unequivocal breach and/or anticipatory breach of the Contract.

TERMINATION OF CONTRACT

53. On March 21, 2014, HRI provided Rising Sun with its written Notice of Intent to Terminate the Contract. A copy of the written Notice of Intent is attached hereto as Exhibit B and incorporated herein by reference as if set forth herein at length. HRI's March 21, 2014 Notice cited, *inter alia*, the extended work suspension as a basis for HRI's right to terminate the Contract, as by the date of such Notice, Rising Sun's work suspension had continued unabated for nearly 11 months from May 2013 to March 2014.

54. Rising Sun failed to remedy the Project suspension within the time prescribed under the Contract or cure any of the deficiencies identified in HRI's March 21, 2014 Notice.

55. Rather than commit to a design which would have allowed HRI to resume work, Rising Sun responded to HRI's March 21, 2014 letter with the issuance of three Requests for

Proposals (“RFPs”) (identified as RFPs 17, 18, and 19 respectively) which included partial and incomplete engineering information representing a clumsy attempt to redesign certain aspects of the Project.

56. The RFP’s did not cause or allow HRI to resume any critical path work on the Project, because, *inter alia*, the RFPs were just another attempt by Rising Sun to have HRI provide yet more pricing for yet more potential design changes, design changes which Rising Sun has not committed to implement and which Rising Sun is free to reject or revise after learning the cost. This conduct had been exhibited earlier in the Project, in that Rising Sun would request that HRI and its subcontractors and vendors price some design change, only to have Rising Sun reject that change in favor of having them price some other potential design.

57. At the time they were issued, the RFPs could not be immediately or properly priced by HRI, because they were flawed and incomplete.

58. Even if the new design was workable and the price proposed by HRI was acceptable to Rising Sun, the RFP’s did not allow for the immediate resumption of construction, because any redesign would have required approval by Rising Sun’s funding source, which would have resulted in yet more suspension and delay.

59. Rising Sun’s RFPs 17, 18, & 19 were not workable and contained numerous design flaws.

60. Flaws reflected in RFP 17 include, *inter alia*, the following:

- a) The layout of new ductwork conflicts with the door to the pump station.

- b) The inclusion of new and additional ductwork interferes with and renders the equipment elevator as inoperable.
- c) New specifications reference a combustible gas detection system. This system, however, has been omitted from the drawings.

61. Flaws reflected in RFP 18 include, *inter alia*, the following:

- a) Rising Sun wishes to use the interior lighting fixtures as exterior fixtures which will not work and will void the manufacturer's warranty.
- b) The handrail requested by the RFP to be mounted on a precast structure might void the applicable warranty.
- c) There is no design provided for the "heat trace" system mentioned in this RFP and the manufacturer of the equipment in question has previously advised CDM that no such "cold weather heat trace package" exists and that heat trace cannot be used in the manner prescribed in the RFP.

62. Flaws reflected in RFP 19 include, *inter alia*, the following:

- a) P-2 general note 1 refers to spec section 15400, which does not exist.
- b) The RFP improperly attempts to shift the entire responsibility to design an HVAC control system to HRI's vendor – a control system for an HVAC system which the vendor did not design, supply or install.
- c) There is an inconsistency as to whether the Headworks is now an open air structure or contained in a building.

63. On April 5, 2014, HRI terminated the Contract with Rising Sun, by issuance of the written Notice attached hereto as Exhibit "C," and which is incorporated herein by reference as if set forth herein at length.

64. On May 12, 2014, HRI, Liberty and Rising Sun attended a confidential mediation conducted by a third party mediator but the mediation terminated without the parties reaching resolution of any of the claims between and among Rising Sun and HRI.

DEMOBILIZATION

65. HRI is demobilizing from the Project and has incurred expenses exceeding \$57,967.63 in order to complete the demobilization. (Demobilization is being completed and the costs associated therewith are still being tallied).

66. HRI has advised its subcontractors and vendors that the Contract has been finally terminated and expects it will be billed additional amounts by such subcontractors and vendors as a result of such termination. To the extent HRI is liable for such costs and expenses, Rising Sun is responsible to fully reimburse HRI.

67. Prior to and after commencement of the May 2013 Work Suspension, large deliveries of equipment previously released by the Owner for fabrication and/or approved for delivery, and large amounts of equipment were delivered to the site. Much of this equipment could not be installed due to the May 2013 Work Suspension and the lack of design information needed to complete predecessor work required to install such equipment. This equipment had to be stored in many tractor trailer size shipping containers on site.

68. Part of the expense incurred by HRI during the extended suspension involved maintaining the stored equipment in order to preserve the manufacturers' warranties on such equipment.

69. After formally terminating the Contract and before fully demobilizing, at the request of Rising Sun, HRI met with representatives of Rising Sun and CDM and provided the details concerning required maintenance of the site and stored equipment in order to prevent damage to work in place and/or voiding the manufacturers' warranties.

70. On information and belief, the required maintenance work was not performed by Rising Sun after the Contract was terminated, which will result in significant cost increases when and if work at the Project site ever resumes.

ABUSE OF THE SUBMITTAL PROCESS

71. Throughout the course of this Project, Rising Sun hindered, delayed and obstructed HRI's ability to perform the work when and as planned, thereby increasing HRI's cost of performance by the failure of Rising Sun to timely or properly return and/or respond to submittals for the Project.

72. The failure of Rising Sun to respond to HRI's submittals severely impacted its ability to prosecute its work on the Project, when and as planned by HRI. Examples include, but are not limited to the following:

- a) Door Submittal – HRI provided Rising Sun with a submittal for 16 doors on May 1, 2012. On February 14, 2014 – 21 months later – Rising Sun approved only 2 of the doors (with design changes). The remaining 14 doors are still unresolved after 2 years.

- b) Compressor Layout Submittal – HRI provided Rising Sun with the compressor building layout in February of 2014. To date, however, the drawings have not been returned.
- c) Potable Well Submittal – HRI provided Rising Sun with its potable well report on November 28, 2012, which was never returned.
- d) Alum Tank Shop Drawing Resubmittal – HRI provided Rising Sun with its alum tank shop drawing resubmittal on January 24, 2013. This was simply a confirmatory submittal, yet was never approved or returned.
- e) Lab Casework Submittal – HRI provided Rising Sun with its lab casework submittal on May 1, 2012, which was never returned.
- f) Various Operations and Maintenance Manual Submittals – Numerous such submittals were provided and ignored, beginning in May of 2012.

73. Rising Sun would often hold HRI's submittals for months at a time and then respond in an effort to improperly force HRI to redesign the Project.

74. Rising Sun was not properly evaluating or responding to HRI's submittals. Instead, Rising Sun was using the submittal process to rewrite the Contract and redesign the Project. Examples of Rising Sun's improper responses to submittals include, *inter alia*, the following:

- a) Miscellaneous Metals Submittal – The miscellaneous metal submittal response includes changes to the stairs, gratings, landings, handrails, and I-beams to conform to other design changes. As a consequence, critical electrical work (which required affixing conduits to the metals) was delayed.
- b) Mechanical Screen Equipment Submittal – The submitted mechanical screen equipment was the equipment specified by Rising Sun in the bid solicitation but approval was delayed by Rising Sun's plan to redesign the Project and replace the previously specified metal building to protect the equipment from the elements with an unspecified heat trace system that will allow the equipment exposed to the elements year round.

- c) Cascade Steps Submittal – Rising Sun through CDM issued Field Order Number 15 on August 18, 2013 and agreed to pay HRI’s subcontractor to provide a design for aeration steps, which are apparently needed, but which design details were previously deleted from the Contract by addendum. After agreeing to pay HRI’s vendor for the design work, Rising Sun improperly rejected the submittals in an effort to force its contemplated design on the vendor without paying for it.
- d) Potable Well Pump Submittal – HRI’s submittal included a type of pump specified within the design drawings. Rising Sun rejected HRI’s submittal and requested that a different pump, not specified, be used.
- e) Influent Pump Station Submittal – Rising Sun continues to suspend this work on the grounds that it is evaluating the potential re-routing of instrumentation and power cables. Rising Sun also rejected an HRI submittal even though it included one of the two types of pumps specified in the Contract. Rising Sun instructed HRI to install the other type of pump, although not required in the original Contract.
- f) Three Motor Control Center Equipment Submittals are not yet approved because they are being redesigned by Rising Sun along with various other Project components.

ADDITIONAL WORK COMPLETED ON THE PROJECT

75. At the request and direction of Rising Sun, HRI performed numerous work items which were outside the scope of the original Contract on the Project, including, without limitation: (i) Rising Sun directed HRI to perform items of work which were not required by the Contract, and (ii) Rising Sun directed that certain items of Work called for in the Project be performed in a manner other than the manner required or permitted by the original Contract (collectively, the “Extra Work”).

76. HRI submitted requests for change orders to Rising Sun through CDM, seeking an appropriate increase in the Contract Price and the Contract Time for the additional cost and

time incurred or expected to be incurred by HRI as a result of the Extra Work and changes requested by Rising Sun.

77. Rising Sun wrongfully failed and/or refused to issue change orders for the following items of the Extra Work:

- a) Change Request No. 2, regarding the removal of additional trees, in the amount of \$14,298.77;
- b) Change Request No. 8, regarding the reinforcement details of concrete cascade aeration steps, in the amount of \$1,811.25;
- c) Change Request No. 10, regarding additional flat weirs and modifications to the Contract weirs, in the amount of \$4,029.25;
- d) Change Request No. 11, regarding MCC-C and MCC-P Modifications, in the amount of \$4,519.20;
- e) Change Request No. 12, regarding oxidation ditch wall notching, in the amount of \$1,487.63;
- f) Change Request No. 18, regarding rerouting incoming electrical and telephone service, in the amount of \$20,067.36;
- g) Change Request No. 23, regarding precast endwall and storm drain extension, in the amount of \$11,082.53;
- h) Change Request No. 27, regarding additional work at the lagoon, in the amount of \$7,673.70;
- i) Change Request No. 28, regarding additional survey/lay-out for the filter facility and the plant operations building, in the amount of \$5,448.42;
- j) Change Request No. 29, regarding additional signage, in the amount of \$267.91;
- k) Change Request No. 30, regarding extra construction entrance work, in the amount of \$2,154.87;
- l) Change Request No. 31, regarding Field Order No. 3, Restrained Joints for ductile iron pipe, in the amount of \$2,367.46;

- m) Change Request No. 32, regarding additional concrete for encasement of pipes beneath the bio-retention pond, in the amount of \$14,449.07;
- n) Change Request No. 33, regarding Field Order No. 7, yard piping additional bends, in the amount of \$10,186.49;
- o) Change Request No. 34, regarding upsize non-potable water to 4 inches in diameter, in the amount of \$6,091.21;
- p) Change Request No. 35, regarding increased size of sluice gate, post anoxic re-aeration reactor, in the amount of \$1,897.50;
- q) Change Request No. 36, regarding additional structural work for valve vault on the filtration facility, in the amount of \$7,225.85;
- r) Change Request No. 37, regarding additional expenses during over-excavation at the clarifiers and pump station, in the amount of \$14,936.38;
- s) Change Request No. 38, regarding Field Order No. 2, concrete encasement of pipes, in the amount of \$43,820.87;
- t) Change Request No. 39, regarding Field Order No. 8, headworks channel & grit chamber reinforcing, in the amount of \$13,084.14;
- u) Change Request No. 40, regarding Field Order No. 12, drain piping layout change, in the amount of \$651.30;
- v) Change Request No. 44, regarding an additional silt fence, in the amount of \$1,958.10;
- w) Change Request No. 45, regarding upsize influent pumps, in the amount of \$35,499.26;
- x) Change Request No. 46, regarding an additional 12" plug valve, in the amount of \$3,129.57;
- y) Change Request No. 48, regarding precast building modifications - labor only, in the amount of \$3,636.30;
- z) Change Request No. 49, regarding Delmarva delay and reroute power, in the amount of \$23,727.60;

- aa) Change Request No. 50, regarding B&B pole building modifications as per submittal comments, in the amount of \$13,201.66;
- bb) Change Request No. 51, regarding generator pad extras, in the amount of \$2,338.38;
- cc) Change Request No. 52, regarding stone road north of clarifier as per owner request, in the amount of \$4,207.32;
- dd) Change Request No. 53, regarding stone backfill at driveway, in the amount of \$1,830.01;
- ee) Change Request No. 54, regarding blower pad revisions per comment, in the amount of \$1,280.57; and
- ff) Change Order Request No. 55, regarding additional beams for post anoxic tank, in the amount of \$6,163.89.

78. HRI fully and completely performed the work identified in the preceding paragraph of this Complaint.

79. Despite repeated requests, Rising Sun has failed and refused to compensate HRI for the costs incurred as a result of the performance of the work identified in paragraph 77, above, which totals \$284,523.82.

COUNT I.
BREACH OF CONTRACT

80. Plaintiffs hereby incorporates the preceding paragraphs as though set forth fully herein.

81. Rising Sun breached the Contract by, *inter alia*, the following acts and omissions:
- a) Suspending all critical path construction work in May 2013 and failing and refusing to perform the work needed to end such suspension in a timely manner and failing to direct or authorize CDM to do so in a timely manner;

- b) Failing and refusing to provide the design and engineering information required to construct the Project in a timely manner and failing to direct CDM to do so in a timely manner;
- c) Failing to respond to construction submittals in a timely manner and failing to direct CDM to do so;
- d) Rejecting and delaying the approval of submittals for improper reasons and purposes, including for the purpose of “redesigning” or attempting to have HRI redesign the submitted component;
- e) Failing and refusing to approve proper change order requests and issue change orders to the Contract and failing to direct CDM to do so;
- f) Failing and refusing to approve change order requests and approve change orders in a timely manner and failing to direct CDM to do so;
- g) Failing to pay for the Extra Work performed on the Project and failing to do so in a timely manner;
- h) Failing to pay for the additional costs and expenses incurred as a result of the May 2013 work suspension and other delays caused by the acts and omissions of Rising Sun and those for which Rising Sun is responsible, including CDM and RK&K;
- i) By Rising Sun’s announcement in a public meeting of the town that Rising Sun would never compensate HRI for the costs and expenses incurred as a result of the admitted 2013 Work Suspension and resulting delays;
- j) Failing and refusing to perform its duties and obligations on the Project in good faith and failing to direct CDM to do so;
- k) Failing and refusing to pay the documented costs incurred by HRI to demobilize from the Project;
- l) Failing to pay HRI the retainage withheld on work previously completed by HRI;
- m) Failing and refusing to pay HRI for work completed on the Project prior to termination of the Contract by HRI and its subcontractors and vendors;
- n) Failing to cure its default, causing the Contract to be terminated, and failing to cure its default within the time period permitted by the Contract;

- o) Otherwise failing and refusing to perform the obligations of the Owner under the Contract in order to enable HRI to construct the Project as planned by HRI within time and cost planned by HRI at the time it submitted its bid;
- p) Otherwise failing to direct and compel CDM to perform its obligations on the Project Contract in order to enable HRI to construct the Project as planned by HRI within time and cost planned by HRI at the time it submitted its bid;
- q) Fundamentally altering the nature of the Project and HRI's obligations thereby effectuating a cardinal change;
- r) Failing to provide reasonable and adequate assurances and evidence of financial of financial arrangements to pay all Contract balances due; and
- s) Otherwise failing to fulfill its contractual responsibilities.

A. Nonpayment of Delay Adjustments:

82. Under the terms of the Contract, HRI is entitled to payment for delays beyond its control. Pursuant to Section 12.03 of the General Supplementary Provisions:

If Owner, Engineer or other contracts or utility workers performing other work for Owner as contemplated by Article 7, or anyone for whom Owner is responsible, delays, disrupts, or interferes with the performance or progress of the Work, then Contractor shall be entitled to an equitable adjustment in the Contract Price or the Contract Times, or both. Contractor's entitlement to an adjustment of the Contract Times is conditioned on such adjustment being essential to Contactor's ability to complete the Work within the Contract Times.

83. HRI did not cause any delay in the performance or progress on the Project. To the contrary, Rising Sun is responsible for delays, disruptions and interfered with the performance or progress of the work on the Project, including without limitation, the delays to the critical path caused by the 2013 Work Suspension.

84. As a result of Project delays beyond HRI's control, HRI incurred unanticipated costs and expenses on the Project.

85. HRI timely and properly submitted all invoices and backup documentation to Rising Sun for payment of costs and expenses incurred for Project delays from May 1, 2013, through the termination of the Contract on April 5, 2014.

86. As a direct and proximate result of Rising Sun's breach of contract, HRI has incurred damages totaling at least \$1,714,204.20.

87. HRI is entitled to immediate payment, in the amount of \$1,714,204.20, for the additional costs and expenses incurred as a result of the 2013 Work Suspension and resulting delays.

B. Unpaid Change Orders:

88. HRI completed a number of work items beyond the scope of the Contract on the Project.

89. At the request or direction from Rising Sun and/or CDM, HRI timely and properly submitted request for change orders for completed work on the Project to Rising Sun.

90. Despite HRI's repeated requests and demands, Rising Sun has failed and refused to pay HRI for this Extra Work.

91. As a direct and proximate result of Rising Sun's breach of contract, HRI has incurred damages consisting of unpaid balances due for performance of the Extra Work in the amount \$284,523.82.

C. Remaining Balances Owed on the Contract:

92. HRI has fulfilled all of conditions precedent to payment under the Contract for the work performed at the Project.

93. As a result of HRI properly terminating the Contract, HRI is also entitled to immediate payment for all remaining Contract balances, including but not limited to the following: completed work prior to termination, additional labor, equipment and material costs from completed work, overhead and profit for completed and uncompleted work, and reasonable expenses directly attributable to termination.

94. HRI is owed \$260,388.32 in retention currently withheld by Rising Sun for completed work on the Project.

95. HRI expects to be billed additional sums by its subcontractors and vendors for work performed, and material/equipment specially fabricated for the Project which was not previously invoiced, including without limitation:

- a) Tri Jay Electrical Inc. ("Tri Jay") has specially fabricated certain electrical equipment including motor control centers and they are being stored at the vendor's climate controlled facility in order to maintain the equipment warranties. Tri Jay is expected to invoice HRI an amount in excess of \$33,950.00 for the equipment and its extended storage;
- b) An Oxidation Ditch System and Clarifier system which have been supplied by Siemens Industries, Inc. in the amount of \$58,000.00;
- c) Fiberglass baffles and wiers which have been fabricated and will be delivered shortly, in the amount of \$21,328.50 (which includes the upcharge of \$4,029.25 for the change referenced in ¶ 77, above); and
- d) HRI has advised its subcontractors and vendors that the Contract has been terminated and HRI reserves the right to supplement and revise the amounts due under this paragraph as and when it receives final invoicing from the various subcontractors and vendors.

96. HRI has incurred and continues to incur demobilization cost in an amount to be determined, and for which Rising Sun is obligated to pay to HRI. The costs already exceed \$57,967.63. HRI reserves the right to supplement and revise the amounts due under this paragraph as and when it receives final tallies of the costs and expenses incurred.

97. As a direct and proximate result of Rising Sun's breach of contract, HRI has incurred damages consisting of, *inter alia*: retention, requisitions and demobilization costs in excess of \$431,634.45.

WHEREFORE, Plaintiffs demand judgment against The Town of Rising Sun, in an amount in excess of \$2,430,362 plus interest, costs, attorneys' fees, and such other and further relief as this Court may deem appropriate and equitable.

COUNT II.
QUANTUM MERUIT & QUANTUM VALEBANT

98. Plaintiffs incorporate all of the foregoing paragraphs as though fully set forth at length herein.

99. To the extent that there is no adequate remedy at law, Plaintiffs plead Count II of their Complaint in the alternative.

100. Rising Sun received the benefit and use of labor and materials sold and furnished by HRI on the Project in accordance with the Contract.

101. HRI provided labor, materials and services to Rising Sun with the expectation that it would be paid for them, and Rising Sun was provided labor, materials, and services under circumstances that put Rising Sun on notice that it was required to pay for them.

102. Rising Sun appreciated and realized the benefit of the labor, materials and services conferred upon it by HRI, and the acceptance and retention of these benefits without compensating HRI, would be inequitable.

103. HRI, is entitled to the *quantum meruit* and *quantum valebant* value of the labor, materials, and services provided for the benefit of Rising Sun.

WHEREFORE, Plaintiffs demand judgment against The Town of Rising Sun, in an amount in excess of \$75,000.00, plus interest, costs, attorneys' fees, and such other and further relief as this Court may deem appropriate and equitable.

COUNT III.
UNJUST ENRICHMENT

104. Plaintiffs incorporate all of the foregoing paragraphs as though fully set forth at length herein.

105. To the extent that there is no adequate remedy at law, Plaintiffs plead Count III of their Complaint in the alternative.

106. HRI provided labor and materials for the work, and performed services at the Project for the benefit of Rising Sun.

107. Rising Sun was enriched by the labor and materials furnished to it by HRI, to the impoverishment of HRI, and there is a relationship between the enrichment and the impoverishment.

108. There is no adequate justification for Rising Sun to keep benefits conferred upon it without providing compensation.

109. The value of the benefits conferred on Rising Sun, which consists of the labor and materials provided by HRI and other services performed by HRI identified above, remains unpaid by Rising Sun.

110. Rising Sun's retention of benefits and labor, material and services provided by HRI without the payment of their value would be unjust.

WHEREFORE, Plaintiffs demand judgment against The Town of Rising Sun, in an amount in excess of \$75,000.00 plus interest, costs, attorneys' fees, and such other and further relief as this Court may deem appropriate and equitable.

JURY DEMAND

111. Pursuant to Fed. R. Civ. P. 38, Plaintiffs demand a trial by jury in the above captioned action on all issues so triable.

/s/ Christine M. Debevec

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