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HAND DELIVERED
July 16, 2015

Vermont Superior Court
JUL 16 2015
Chittenden Unit

Carmen Cote, Court Manager
Vermont Superior Court, Chittenden Civil Division
175 Main Street
P.O. Box 187
Burlington, VT 05402

Re: Vermont Gas Systems, Inc. v. Over and Under Piping Contractors, Inc.
Dkt No. _____

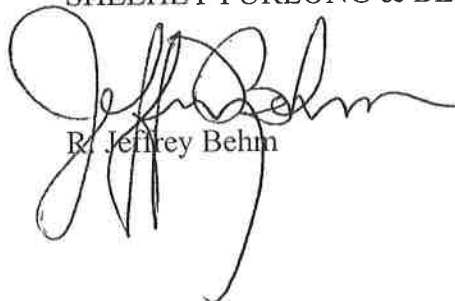
Dear Carmen:

I enclose for filing in the above-referenced matter a Complaint, together with a check in the amount of \$295.00 for the filing fee.

If you have any questions, please do not hesitate to contact me.

Sincerely,

SHEEHEY FURLONG & BEHM P.C.


R. Jeffrey Behm

RJB/srr
Enclosure

STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. _____

Vermont Gas Systems, Inc.,)
Plaintiff)
)
v.)
)
Over and Under Piping Contractors, Inc.,)
Defendant)

Vermont Superior Court
JUL 16 2015
Chittenden Unit

COMPLAINT

The Parties

1. Plaintiff Vermont Gas Systems, Inc., (“VGS”) is a Vermont corporation with a principal place of business in South Burlington, Vermont.
2. Over and Under Piping Contractors, Inc. (“O&U”) is a New York corporation with a principal place of business in Auburn, New York.

Background Facts

3. In or about October, 2013, VGS sent an “invitation to bid” dated October 8, 2013 to various contractors regarding the planned construction of a natural gas transmission pipeline of about 42 miles in length running between Colchester and Middlebury, Vermont, and known as the Addison Natural Gas Pipeline Project (“ANGP Project”).
4. The bid documents sent to the potential bidders contained a draft form of contract that informed bidders of the general content of the contract that VGS expected to enter with the contractor selected from the bid process.
5. On or about December 4, 2013, O&U submitted a bid to act as the contractor on the construction of the ANGP Project.

6. In April 2014, after further communications with O&U, VGS notified O&U of its intent to enter a contract with O&U for the ANGP work.

Attempts to Negotiate and Execute a Final Written Contract

7. The work that O&U was to complete in constructing the ANGP Project was set forth in significant detail in a lengthy set of project work specifications.

8. O&U was to be paid approximately \$45 million in total for its work in constructing the ANGP Project.

9. In connection with the submission of its bid, O&U reviewed the bid documents including the form of contract, terms and conditions provided to it by VGS during the bid process. The bid documents made clear that the successful bidder was required to negotiate in good faith a contract substantially consistent with the material terms of the form of contract and conditions included with bid documents.

10. The \$45 million to be paid to O&U for completing work under the contract was a fixed price that was to be paid to O&U in provisional progress payments measured against schedule of values. The provisional progress payments were subject to final acceptance of the full scope of the work by VGS.

11. The progress payments were not intended to and did not exactly track the actual value of the work performed by the contractor, however, full payment of the fixed contract price was conditioned upon full completion and acceptance of all contract work. Had O&U completed the full scope of work, progress payments ultimately would have equaled the fixed contract price.

12. In the event that VGS terminated the contract prior to the completion of the ANGP Project work, compensation for work completed by the contractor was to be determined upon a cost basis rather than through progress payments measured against a schedule of values.

13. Condition 15.4 of the contract form in the bid documents provided VGS with authority to terminate the contract without cause. In the event VGS terminated the contract without cause, VGS was to compensate O&U for acceptable work it had performed in accordance with the Project work specifications by paying O&U for reasonable costs it incurred in performing the work, plus a reasonable sum for overhead and profit on such work.

14. On May 23, 2014, VGS provided O&U with a proposed written contract conformed, among other things, to account for a revised date for starting work on the ANGP project.

15. The May 23, 2014 proposed contract contained the same Condition 15.4 as contained in the contract form included in the bid documents. It provided that VGS could terminate the contract without cause and, in doing so, would be obligated to pay O&U for its reasonable costs in performing acceptable work in accordance with project work specifications plus a reasonable sum for profit and overhead on such work.

16. Although O&U did suggest certain revisions to the proposed contract, at no time did O&U ever object to or suggest revisions to the language in Condition 15.4.

17. VGS was unable to obtain O&U's execution of the contract by June 26, 2014 when earth moving on the ANGP Project began. Thereafter, VGS performed its obligations as defined in the proposed written contract, and O&U represented that it was complying with the material terms of that document.

18. Between June 26 through September 2014, VGS continued unsuccessfully to attempt to obtain formal execution of the proposed written contract.

19. Between the start of work on June 26 until VGS terminated its agreement with O&U in November 2014, O&U failed to comply with its obligation to act in good faith to finalize and execute a written contract with VGS.

Performance Of The Agreement

20. O&U began laying pipe for the ANGP Project on or about July 21, 2014.

21. During the Summer and Fall of 2014, O&U represented it was performing its work consistently with the contract specifications and its warranties.

22. During the course of its work the Summer and Fall of 2014, O&U submitted applications for progress payments from VGS consistent with the May 23, 2014 contract document.

23. O&U also requested change order payments pursuant to the terms of the May 23, 2014 contract document.

24. VGS responded to O&Us applications for payment and change order requests consistently with the May 23, 2014 contract document.

25. O&U's work on the ANGP Project was inefficient, slow and fell short of meeting the installation schedule targets for construction of the pipeline. By November, 2014, O&U had installed 5.65 miles of pipe, less than 14 percent of the 42 miles of transmission pipeline to be constructed in the ANGP Project.

26. By November, 2014, O&U had been paid \$9,187,654 in progress payments, which represented 20 percent of the total that O&U was to receive for constructing the entire ANGP Project.

27. The amounts paid by VGS were in response to O&U's payment applications 1-9.

28. In November 2014, VGS notified O&U that it was terminating its ANGP agreement with O&U without cause.

29. O&U continued to submit payment applications and requests for change orders so that, as of May, 2015, it had submitted 12 payment applications and 61 requests for change order payments. Its claims for payment, including what it has already been paid, total \$18,858,881 (over 40 percent of the entire ANGP Project price), even though it has constructed only 14 percent (5.65 miles) of the ANGP pipeline.

30. VGS has repeatedly requested O&U to provide it with information reflecting the costs and expenses O&U has incurred in performing the work underlying its claims for payment, and O&U has consistently refused to provide VGS with that information.

31. VGS has offered to pay O&U for all acceptable work it has properly performed based upon the reasonable costs it has incurred in performing the work, but O&U has rejected any cost based method of payment.

32. VGS has determined that it is entitled to payments or credits for back charges from O&U due to work that O&U over billed, failed to complete, or improperly performed and for damage it inflicted on the property of VGS and third parties during the performance of the ANGP work.

33. In or about May 2015, O&U recorded contractors liens pursuant to 9 V.S.A. § 1921 *et seq.* on easements and pipeline facilities owned by VGS in the Town of Williston.

Count I – (Declaratory Judgment – Breach of Contract)

34. The allegations set forth in paragraphs 1-33 above are realleged and incorporated herein.

35. VGS and O&U agreed that O&U would construct the ANGP Project in return for payment from VGS.

36. VGS and O&U understood and agreed that VGS had authority to terminate their agreement without cause.

37. Both VGS and O&U understood and agreed that in the event VGS terminated their agreement without cause, O&U would be paid for its work based on the methodology set forth in Condition 15.4 of the May 23, 2014 contract document.

38. Condition 15.4.1-4 provides that O&U should be paid for its costs and expenses in performing acceptable work consistent with the ANGP Project specifications plus a reasonable sum of profit and overhead for such work.

39. VGS requests the Court to enter a judgment pursuant to 12 V.S.A. § 4711 *et seq.* declaring that VGS and O&U agreed that:

- (i) VGS could terminate without cause its ANGP Agreement with O&U and any rights O&U had to construct the ANGP Project;
- (ii) O&U is entitled to compensation only for acceptable work it performed in accordance with the work specifications prior to VGS's termination of the ANGP agreement; and
- (iii) Any compensation that O&U is entitled to receive for the work described in subparagraph (ii) above should be determined based upon the reasonable costs O&U incurred to perform the work plus a reasonable sum of profit and overhead for such work, less any back charge due VGS from O&U.

40. VGS further requests the Court to enter judgment declaring that O&U breached its agreement with VGS by refusing to provide VGS with the cost information it requested in order to determine the amount of compensation O&U should receive for the work it performed under the ANGP Project prior to the termination without cause.

Count II – (Alternative Request for Declaratory Judgment - Quasi Contract)

41. The allegations set forth in paragraphs 1-40 above are realleged and incorporated herein.

42. In the alternative to the Request for Declaratory Relief set forth in Count I of this Complaint, if it is found there was no agreement between VGS and O&U in their ANGP contract for determining the compensation that should be paid to O&U for acceptable work it completed in accordance with the project work specifications, prior to VGS's termination of the ANGP Agreement without cause the Court should enter a declaratory judgment implying such an agreement and apply equitable principles to determine the appropriate amount of payment O&U should have received for acceptable work prior to the termination without cause.

43. The Court should also declare in its judgment that under principles of quantum meruit and unjust enrichment, O&U was entitled to receive no more than the reasonable costs it incurred to complete acceptable work in accordance with the agreed upon specifications, plus a reasonable amount for profit and overhead less any back charges due to VGS.

Count III – Breach of Contract (Back Charges)

44. The allegations in paragraphs 1-43 above are realleged and incorporated herein.

45. O&U warranted that all work it performed on the ANGP project would be performed in a good and satisfactory manner, in accordance with the work specifications, and

would not be defective. In performing work on the ANGP Project, O&U damaged property belonging to VGS, private land owners and the State.

46. O&U billed VGS and received payments for work that was later discovered to be incomplete and improperly performed.

47. O&U breached its ANGP contract with VGS by overbilling VGS for certain items of work and improperly performing or failing to complete other work. O&U submitted bills for certain of its work that were excessive and unwarranted.

48. As a result of the property damage caused by O&U in performing its work, and its failure to complete or properly perform work for which O&U was paid, VGS has and will be required to pay for repairs.

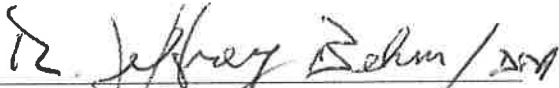
Prayer for Relief

WHEREFORE, Plaintiff VGS respectfully requests this Court to grant the following relief:

- A. Enter judgment for Plaintiff and grant the declaratory relief requested in Count I of this Complaint.
- B. In the alternative, enter judgment and grant the declaratory relief requested in Count II of this Complaint.
- C. Under both Counts I and II, order O&U to provide a full accounting of all costs and expenses it incurred in performing work on the ANGP Project in accordance with the work specifications, and the overhead and profit reasonably allocated to such work.
- D. Enter judgment for Plaintiff on Count III.
- E. Grant such other relief as the Court deems just and reasonable.

Dated at Burlington, Vermont this 16th day of July, 2015.

VERMONT GAS SYSTEMS, INC.

By: 

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