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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STRIDER CONSTRUCTION CO., INC.,

Plaintiff,

vs.

IDAHO WATER RESOURCE BOARD,

Defendant.

CV01-22-10932

Case No. _____

PLAINTIFF'S COMPLAINT

Fee Category: A.A.2 - \$221.00

Plaintiff Strider Construction Co., Inc. ("Strider") alleges as follows:

I. PARTIES

1.1 Strider is a corporation formed in the state of Washington. Strider is, and at all relevant times has been, registered as a Contracting Business in the State of Idaho. Strider has satisfied all prerequisites to the filing of this action.

1.2 Defendant Idaho Water Resource Board (the “Board”) is a body organized and existing under the laws of the State of Idaho, and is a body corporate and politic that may sue and be sued.

II. JURISDICTION AND VENUE

2.1 This Court has jurisdiction because the acts, omissions, and transactions giving rise to this suit took place in Idaho. The written contract between the parties was executed under and is governed by the laws of Idaho. The District Court has jurisdiction over this matter under I.C. § 1-705.

2.2 Venue is appropriate in this Court because the written contract executed between the parties designates Ada County as the proper venue for any litigation arising out of the contract.

III. FACTS

3.1 The Board solicited bids from contractors based on written plans and specifications provided by the Board for certain improvements to the Priest Lake Water Management Project Outlet Dam located in Priest Lake, Idaho. Strider submitted a bid and was selected by the Board to enter a contract for the performance of the work.

3.2 On or about August 20, 2020, the Board and Strider executed a written fixed-price construction contract (the “Contract”) for the improvements to the dam.

3.3 The contracted-for improvements (the “Project”) included installation of a new concrete and armor rock scour apron extension, extending the height of the existing tainter gates, replacing trunnion pins, and strengthening existing gate assemblies as well as repairing existing concrete, expansion joints, and the existing railing.

3.4 The agreed fixed price contract amount at the time of execution was \$1,542,334. The work was to start upon receipt of a Notice to Proceed from the Board and be completed in one season by April 1, 2021.

3.5 Under the terms of the Contract, the Board was obligated to provide Strider with Drawings, Plans, and Specifications for the Project work. The Drawings, Plans, and Specifications are part of the “Contract Documents.”

A. Site Access and Metal Fabrication Delay

3.6 On September 14, 2020, Strider received the Notice to Proceed, which indicated that Strider would have access to the site starting September 15, 2020 to perform its mobilization, field set-up and upland preparatory work. However, Strider was not able to access the work area as indicated in the Notice to Proceed.

3.7 Strider made arrangements to start the work, but after the Notice to Proceed was issued the Board notified Strider that there were issues related to accessing the work area apparently caused by disputes between the Board and the neighboring land owners over private property access and use agreements.

3.8 All on-site activities were suspended until the Board finalized a redesign of the access road and negotiation of the necessary access agreement(s). Strider was finally allowed on site on October 22, 2020.

3.9 The delay caused by the Board’s issues gaining access for Strider to the work site caused the modified access road to be completed on or around November 12, 2020—weeks later than originally scheduled.

3.10 After gaining site access, Strider discovered that work on the existing metal gates was not correctly dimensioned in the Contract Documents. The design in the Contract Documents also contemplated a fabrication that was not constructible.

3.11 Strider notified the Engineer and a Work Change Directive (“WCD”) was ultimately issued on or about December 8, 2020 that modified the structural design related to the gates. The WCD greatly impacted the fabrication schedule, and the delivery of the metal fabrication moved onto and controlled the critical path in the overall schedule.

3.12 Strider experienced over 60 calendar days of delay related to the gate metal work and incurred significant costs associated with this delay totaling \$189,235.25 for things such as extended field overhead and management, supervision, temporary facilities, equipment standby and under-utilization, and dewatering.

3.13 The Board has recognized that there was a “change” regarding the gates, as confirmed by the WCD and the payment for physical work scope changes, but the Board has not recognized or paid for the cost impacts to the overall project schedule caused by the 60 calendar days of delay related to the gate metal work.

3.14 The Project, which was supposed to be completed within one season, was extended into a second season.

B. Cofferdam and Dewatering Design Defect

3.15 In order to make the repairs and improvements to the dam, the Specifications called for Strider to divert the stream and use dewatering methods to create a dry workspace.

3.16 The Specifications instructed Strider to select a cofferdam system from the options listed in the Specification 02 20 00 – 2.01.A. Cofferdams are watertight enclosures pumped dry to permit construction below the level of the river. All the listed systems were

surficial, meaning they would sit on top of the stream bed and not be driven down or embedded below the surface of the stream bed. The Contract Documents did not contemplate the use of a cofferdam formed with piling driven below the stream bed.

3.17 Strider, consistent with its bid, used the “Supersacks with plastic sheeting” system from the options listed in the Specification 02 20 00 – 2.01.A.

3.18 The Contract Documents also required Strider to comply with the permit issued by the U.S. Army Corps of Engineers (the “Permit”) for the Project. The Permit refers to a supersack system and requires all work to be performed in accordance with the attached drawings. The drawings attached to the Permit show a surficial cofferdam that does not involve excavating or driving coffer cells into the stream bed.

3.19 The Contract Documents contemplated the work would be completed in two roughly equal phases with two cofferdams. Phase 1 would isolate approximately half of the work area with a supersack cofferdam, dewatering, and turbidity management to provide temporary access so that work in that “cell” could be completed. During Phase 2 the work would shift to a second “cell” created by a second cofferdam.

3.20 Strider installed the supersack cofferdams as specified in the Contract Documents and Permit, but the specified cofferdam system did not produce the intended result. Strider incurred additional costs trying to improve and troubleshoot the cofferdams to produce the intended workable dry area.

3.21 The upstream coffer cell experienced more water infiltration than anticipated but was manageable through enhanced dewatering (pumping). However, the downstream coffer cell did not provide sufficient isolation from infiltration when installed as specified.

3.22 Strider repeatedly notified the Board in meetings and through written correspondence that the cofferdams were not performing as intended despite Strider building in accordance with the Contract Documents. Inflows at the downstream cell were too great and turbid to manage through dewatering (pumping and treatment systems).

3.23 Multiple letters were sent to the Board in December 2020 regarding the problems with the cofferdams, particularly the downstream cofferdam. Strider sought direction on how to proceed, but the Board did not give any such direction.

3.24 To mitigate delays to the Project caused by the Board's deficient design and lack of direction, Strider installed sheet pile (a non-surficial method) in an attempt to cut off subterranean water flow into the coffer cell. Strider also took efforts to enhance the supersack walls and pumping system to try to achieve the proper result in the coffer cell. These extra efforts exceeded what was contemplated in the Contract Documents and brought additional costs exceeding \$339,806.63. Strider is entitled to an equitable adjustment for those costs, but the Board has not acknowledged or paid those costs incurred by Strider as a result of the deficient design.

C. Change of Condition

3.25 The Contract Documents and the geotechnical information provided by the Board contemplated a firm subgrade (stream bed) upon which to construct the cofferdams and apron improvements. However, the actual conditions were not as specified.

3.26 During work on the cofferdams, Strider also discovered the grades provided in the Contract Documents did not accurately reflect the topography of the stream bed and were off by as much as eight feet vertically in some areas.

3.27 These differing conditions were unforeseen and unknown to Strider at the time of bid and were not indicated in the Contract Documents.

3.28 Throughout December 2020, Strider notified the Board during meetings and in written correspondence of the differing conditions encountered, the impacts those conditions presented, and additional work required as a result.

3.29 The differing condition of the stream bed impacted the downstream cofferdam and also impacted the rock scour pad and concrete apron slab work. The concrete slab was not able to cure in a water free environment, and the Phase 1 rock scour protection design section excavation and stone placement installation technique had to be modified, which impacted productivity.

3.30 In Phase 2, Strider worked under a revised cofferdam plan to install sheet pile cofferdams both upstream and downstream. In spite of these efforts water was observed flowing from under the existing footing of the dam into the cell. This condition was brought to the attention of the Board.

D. Stop Work Order

3.31 On December 4, 2021, the Board issued a Stop Work Order (“SWO”) instructing Strider to stop work. While it was obvious that the problem needed to be investigated and solution found to allow work to resume, the Board did not take steps to that end.

3.32 Based on assurances from the Board confirmed in meeting minutes that the Board would compensate Strider for its efforts, Strider was forced to take the lead due to the Board’s inaction and hired geotechnical engineers to assess the issue. With the consultation of registered professional engineers, Strider arranged a field test to determine the source of the problematic water flow into the cells.

3.33 Strider believed and understood that the Board would compensate Strider for the SWO and the investigation efforts through a modification to the Contract (*i.e.* Change Order). This work was outside of the Contract base scope and was necessitated by the differing condition and deficient Plans and Specifications calling for a surficial cofferdam system.

3.34 The Board assured Strider that if Strider demonstrated that the inflow of water into the coffer cell was from under the dam, the Board would issue a Contract modification which would address Strider's efforts to define the problem, develop a solution, and compensate Strider for those efforts and the impacts to the Project.

3.35 Strider provided engineering support and demonstrated in a field test observed by the Board's representative the water was coming from under the dam. During a December 2021 meeting, the Board agreed that the inflow was from under the dam and agreed to the grout curtain wall solution that was proposed by Strider and its engineer consultants as a way forward.

3.36 However, the Board, contrary to its earlier assurances, refused to issue a Contract modification and refused to pay Strider for the costs expended to study the inflow issue and develop the grout plan solution. The Board has failed to provide any other basis or support for the differing site condition.

3.37 Strider incurred in excess of \$420,428.32 in costs related to the differing subgrade conditions. That amount includes costs for driving sheet pile and steel plates and additional dewatering, field overhead for a 14-day delay in Season 1, and the SWO and investigation of the problem in Season 2.

3.38 The Board's December 4, 2021 SWO to this day remains in effect. Although Strider has presented a grout curtain wall solution as directed and agreed to by the Board, the Board has not executed a Change Order to address the additional costs incurred in developing that plan or to perform that work. The Project is at an impasse.

E. Tainter Gate Work

3.39 After the SWO was issued, the Board asked Strider if there was any work that could be done without dewatering the downstream cell while a solution of the change of conditions was being developed.

3.40 Strider indicated that it could perform the tainter gate work, but would have to incur extra costs to do the work in wet conditions instead of the contemplated dewatered cell.

3.41 The Board requested a cost estimate from Strider, which was provided. The pricing was discussed in meetings and via email. The Board indicated it would execute a Change Order for the work.

3.42 The April 6, 2022, progress meeting notes documented the Board's indication that it would process the Change Order for payment.

3.43 However, after Strider performed the tainter gate work consistent with the Contract Documents, the Board changed positions and indicated it would not process the Change Order and that Strider had not shown the work had changed.

F. Payment Delays and Improper Withholding

3.44 The Board has repeatedly failed to uphold its payment obligations under the Contract and Idaho law.

3.45 The Contract calls for invoicing based on an approved Schedule of Values. Strider submitted such invoices in the form of Pay Estimates submitted through the prescribed project document management system, Bentley.

3.46 The Board repeatedly failed to timely review the Pay Estimates and has failed to timely pay amounts owed, without providing a basis for such action or documentation of same in Bentley

3.47 For example, Strider submitted Pay Estimate 6 in Bentley on January 12, 2022 seeking payment for work performed in December 2021. But Strider did not receive payment until March 28, 2022. Even then, the payment was not for the full amount submitted in Pay Estimate 6 because the Board instructed Strider to remove amounts associated with Change Order 3 (an approved Change Order) from the Pay Estimate. There is no basis for excluding payment of the approved Change Order 3 costs.

3.48 The Board has failed to pay or improperly withheld amounts from Pay Estimates 3, 4, 6, and 7.

IV. FIRST CAUSE OF ACTION: BREACHES OF CONTRACT

4.1 Strider incorporates and realleges paragraphs 1.1-3.48 herein.

4.2 The Board has breached the express terms of the written Contract as well as certain warranties and statutory duties which by law supplement and are automatically implied in every written construction contract entered into by a government body like the Board.

Breaches of Express Terms

4.3 The written Contract contains specific terms on payment and changes.

4.4 The Board breached the terms of the Contract by failing to review and respond to Pay Estimates timely, failing to issue payment for work performed and properly billed, and improperly withholding payment for work performed and properly billed.

4.5 The Board has breached the terms of the Contract by unreasonably refusing to execute Change Orders and Contract modifications addressing changes in the work and changed conditions.

4.6 These breaches caused Strider to incur financial hardship and damages.

4.7 Strider is entitled to recover its breach damages—including interest, attorneys’ fees, and costs pursuant to Idaho Code 12-120(3)—at an amount to be proven at trial.

Breaches of Contractual Terms and Contractual Duties Owed as a Matter of Law

4.8 Under Idaho law, implied in every contract is a duty of good faith and fair dealing. This duty is read into the Contract as a matter of law.

4.9 The Board breached its duty of good faith and fair dealing by providing assurances to Strider that it would be compensated and later refusing to honor those assurances without explanation.

4.10 The Board breached its duty of good faith and fair dealing by unreasonably withholding payment without explanation and in violation of the terms of the Contract. The Board’s withholding of undisputed amounts owed for work performed is an improper attempt to gain financial leverage and is a breach of the duty of good faith and fair dealing.

4.11 The Board’s inaction and non-responsiveness to Strider’s communications seeking direction on how to proceed regarding the differing conditions and deficient plans and specifications is a breach of duty of good faith and fair dealing.

4.12 Strider suffered delays and additional costs as a result of the Board’s breach of the duty of good faith and fair dealing.

4.13 Under Idaho law, when a construction contract requires the contractor to build in accordance with the Owner’s provided plans and specifications, the Owner impliedly warrants that the Plans and Specifications are sufficient, buildable, and will produce a product that performs as intended.

4.14 The Board provided the Plans and Specifications that Strider was required to build in accordance with, and therefore, the Board warranted the Plans and Specifications were free from defects, buildable, and would produce the intended end-result if followed. The Board's warranty of the Plans and Specifications is automatically read into the construction contract by operation of law.

4.15 The Board has breached the warranty of Plans and Specifications by providing deficient plans and specifications. Strider followed the plans and specifications, but the cofferdam system specified was inadequate. Strider suffered delays and additional costs as a result of the Board's breach and is entitled to damages in an amount to be proven at trial.

4.16 Under Idaho law, an Owner who executes a construction contract impliedly warrants that it will not interfere with or hinder the contractor's performance of the work. Owners owe a duty to not interfere or hinder the work. This duty is automatically read into every construction contract as a matter of law.

4.17 The Board breached its duty to not interfere or hinder Strider. The Board interfered with and hindered Strider's ability to complete the work through Board inaction and non-responsiveness. The Board failed to provide Strider with timely access to the work after issuing a Notice to Proceed. The Board also interfered and hindered Strider's performance when it contradicted its own assurances, unreasonably reversed positions, failed to respond to Strider's Project correspondence, failed to provide necessary direction, and did not respond to or properly pay Strider's Pay Estimates.

4.18 Strider suffered delays and additional costs due to the Board's interference and hindrance. Strider is entitled to damages in an amount proven at trial.

4.19 Strider is entitled to recover its breach damages—including interest, attorneys’ fees, and costs pursuant to Idaho Code 12-120(3)—at an amount to be proven at trial.

V. SECOND CAUSE OF ACTION: VIOLATION OF IDAHO PROMPT PAYMENT ACT, I.C. § 67-2302

5.1 Strider incorporates and realleges paragraphs 1.1-3.48 herein.

5.2 The Board is a government body subject to the Idaho Prompt Payment Act.

5.3 The statutory duties provided in the Prompt Payment Act supplement the written terms of the Contract between the Board and Strider.

5.4 The Prompt Payment Act requires timely payment of invoices submitted under service contracts including contracts for construction repairs or improvements.

5.5 The Prompt Payment Act requires the Board to certify and pay Strider’s Pay Estimates within 60 days of receipt or, if there is a dispute over an item in the Pay Estimate, the Board is required to notify Strider of the issue in writing within 10 days of receiving the invoice.

5.6 The Board violated the Prompt Payment Act when it failed to timely pay or timely notify Strider of an issue with Pay Estimates 3, 4, 6, and 7.

5.7 Strider is entitled to damages—including interest, attorneys’ fees, and costs—at an amount to be proven at trial.

VI. THIRD CAUSE OF ACTION: DECLARATORY JUDGMENT

6.1 Strider incorporates and realleges paragraphs 1.1-3.48 herein.

6.2 Article 18 of the Contract provides that Strider has a right to terminate the Contract if, through no act or fault of Strider or its subcontractors, agents, or employees, the work is stopped for a period of 90 consecutive days by issuance of an order by a public authority having jurisdiction and authority which requires all work to be stopped.

6.3 Section 18.2 of the Contract provides that in the event Strider terminates the Contract, it is entitled to compensation for all work performed prior to termination plus reasonable costs incurred in preparing to perform the terminated portion of the work plus a fair and reasonable allowance for direct job-site overhead and profit related to such preparations and the reasonable costs of settling and paying claims arising out of the termination of subcontracts or orders.

6.4 Strider seeks a declaratory judgment finding that the Board's December 4, 2021 SWO is an order by a public authority that required work to cease for a period exceeding 90 consecutive days due to no fault of Strider or its subcontractors, agents, or employees, and therefore Strider is entitled to terminate the Contract and recover damages as specified in the Contract.

VII. PRAYER FOR RELIEF

WHEREFORE, Strider requests the following relief:

7.1 For judgment awarding monetary damages in favor of Strider pursuant to its various theories of recovery in an amount to be proven at trial but in any event, an amount not less than \$1,534,000.00;

7.2 For declaratory judgment that Strider's termination of the Contract is proper and Strider is entitled to recover its termination damages;

7.3 For prejudgment and postjudgment interest;

7.4 For Strider's attorneys' fees and costs as provided by law, including Idaho Code 12-120(3); and

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7.5 For such other and further relief as the Court deems just and equitable.

DATED: This 28th day of July, 2022.

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