

**IN THE UNITED STATES COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK**

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**BABCOCK & WILCOX  
CONSTRUCTION CO., INC.,**

**Plaintiff,**

**v.**

**FRANCIS HARVEY AND SONS, INC.,**

**Defendant.**

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**No. 13 cv 1892 (HJB)  
ECF Case**

**COMPLAINT FOR BREACH OF  
CONTRACT, BREACH OF  
COVENANT OF GOOD FAITH AND  
FAIR DEALING, FRAUD AND  
DIVERSION OF TRUST FUNDS/  
BREACH OF TRUST**

**COMPLAINT**

COMES NOW the Plaintiff, Babcock & Wilcox Construction Co., Inc. ("BWCC"), by counsel, and for its Complaint against Francis Harvey and Sons, Inc. ("FHS") states as follows:

**Parties and Jurisdiction**

1. Plaintiff BWCC is incorporated in the State of Delaware and has its principal place of business in Barberton, Ohio. BWCC is in the business of construction, construction management and maintenance services.
2. On information and belief, Defendant FHS is incorporated and has its principal place of business in the Commonwealth of Massachusetts, and is a contractor specializing in civil works, site remediation, and concrete work.
3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1332 in that complete diversity exists between the litigants and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.
4. Venue of this action is proper in this Court pursuant to 28 U.S.C. §1391.

**Factual Background**

5. Berlin Station, LLC (“Berlin Station” or “Owner”) is the owner of certain property in Berlin, New Hampshire upon which the Burgess BioPower Plant is being constructed.

6. BWCC entered into an agreement dated August 29, 2011 (the “Agreement”) with Berlin Station pursuant to which BWCC agreed to serve as the contractor for construction of the Burgess BioPower Plant, a 75-megawatt power plant which will generate power by burning low-grade wood (the “Project”).

7. Prior to entering into the Agreement with the Owner in August 2011, BWCC submitted a request for proposal (the “Solicitation”) to FHS to obtain a bid from FHS to perform certain civil work on the Project in the event BWCC was successful in obtaining a contract with the Owner to construct the Project.

8. In response to BWCC’s Solicitation, FHS submitted a subcontract bid.

9. On August 16, 2011, while BWCC was “awaiting a finalized contract” for the Project, BWCC issued a Letter of Intent to FHS to govern civil work performed by FHS until issuance of a formal contract.

10. After BWCC entered into the Agreement with Berlin Station on August 29, 2011, FHS began performing work relating to the Project on or about September 19, 2011. FHS began direct craft work on the Project site on or about October 26, 2011.

11. BWCC and FHS entered into the formal contract (the “Subcontract”) contemplated by the Letter of Intent on November 10, 2011. FHS performed certain site work on the Project pursuant to the Subcontract. A true and accurate copy of the Subcontract is attached hereto as Exhibit 1.

12. FHS engaged various lower tier subcontractors, vendors and suppliers to perform work and/or supply materials for the Project.

13. In response to change order proposals submitted by FHS, BWCC executed three Subcontract amendments in December 2011 and January 2012. Each amendment itemized additional work. True and accurate copies of the three amendments are attached hereto as Exhibit 2.

Subcontract Provisions

14. The scope of work that FHS agreed to perform under the original Subcontract was divided into three line items – (1) Site Civil Work, (2) Demolition Work, and (3) Environmental Work (site remediation clean-up and ground water management). The Subcontract amendments added other discrete items of work.

15. FHS agreed to a fixed price for performance of Site Civil Work. FHS agreed to perform the Demolition Work and the Environmental Work on a time and materials basis.

16. The Subcontract required FHS to submit invoices for payment to BWCC on a monthly basis. FHS invoiced BWCC separately for each line item of its scope of work.

17. The Subcontract required that, for fixed price work, FHS was to provide an estimate to BWCC by the fifth of each calendar month setting forth the amount and value of work completed in the prior month.

18. For all work invoiced on a time and materials basis, the Subcontract required FHS to submit backup documentation, including “timesheets, shipping papers, receipts, etc.” with its invoices.

19. The Subcontract also required that, upon the request of BWCC, FHS would submit further documentation to support its invoices.

20. The Subcontract required that “all work will be performed in accordance with the National Maintenance Agreements Policy Committee, Inc. (“NMAP”) form of agreement . . . .” The NMAP agreement provides that “[n]o subsistence, travel allowance, mileage or pay for travel time is required to be paid to any employee covered by the terms of this Agreement.”

21. The Subcontract provided that, upon receipt of FHS’ approved monthly estimate, BWCC would, within forty-five (45) days, issue payment. However, payment by BWCC was not considered as an acceptance of the work performed.

22. The Subcontract stated that any amount otherwise payable under the Subcontract could be withheld, in whole or in part, by BWCC if:

- a. any claims were filed against FHS by BWCC or third parties;
- b. FHS was in default of any Subcontract condition;
- c. there was reasonable doubt that the Subcontract could be completed for the balance of the Subcontract Price; or
- d. FHS failed to promptly pay its employees, suppliers or lower-tier subcontractors.

23. The Subcontract also addressed extra work on the Project. Such extra work was to be performed on a cost-plus basis, with specified overhead and profit rates charged only on the cost of labor.

24. The Subcontract provided that FHS would pay its suppliers and lower-tier subcontractors all amounts due to them in a timely manner.

25. Under the Terms of the Subcontract, FHS was obligated to defend, protect, and indemnify BWCC and the Owner, and all property belonging to either of them, against all liens or claims filed on account of work done by FHS, its vendors, and/or its subcontractors of any



tier. FHS was required to discharge any such claim within five (5) days of receipt of a written notice from BWCC to do so. If FHS failed to discharge such claims, BWCC could, at its option, discharge the lien or claim and hold FHS liable for all fees, costs, and expenses incurred by BWCC as a result.

26. The Subcontract provided that BWCC could withhold amounts due to FHS, or terminate the Subcontract, if FHS failed to remedy defaults or provide satisfactory evidence that such defaults would be remedied within three (3) days of receipt of a Notice of Default from BWCC. Instances of default included, but were not limited to, FHS becoming insolvent or being unable to meet its obligations, FHS violating a condition or provision of the Subcontract, or FHS performing under the Subcontract in bad faith or not in accordance with the Subcontract terms.

27. In the event of termination of FHS, the Subcontract stated that BWCC could take whatever steps it deemed expedient to complete FHS' Subcontract work and charge FHS with the cost of completing FHS' Subcontract work and the expenses of administering any subcontract for the completion of such work. If such expenses exceeded the amount owed by BWCC to FHS, then FHS would be liable for the excess amount.

28. The Subcontract provided that questions with respect to the construction or interpretation of the Subcontract, or the performance by either party under the Subcontract, would be determined in accordance with the laws of the State of New York.

29. The Subcontract further provided that FHS "irrevocably and unconditionally submits for itself and its property in any legal action or proceeding relating to the Subcontract or the performance thereof or for recognition and enforcement of any judgment in respect thereof, to the exclusive jurisdiction of the State of New York, and any state or federal court located in the State of New York and consents and agrees to suit being brought in such courts."

Defendant's Improper Billing and Double-Billing

30. Over the course of FHS' performance under the Subcontract, FHS requisitioned BWCC a total of \$7,411,931. That requisitioned amount does not reflect the amount actually earned by FHS on the Project.

31. Early in its performance of the Subcontract, FHS experienced cash flow problems and requested that BWCC expedite payments to FHS in return for early payment credits. BWCC obliged and made early payments to FHS.

32. FHS then engaged in billing practices and tactics inconsistent with the Subcontract, including, but are not limited to:

- a. FHS submitted invoices which double-billed BWCC for Subcontract work for which FHS had already been paid;
- b. FHS submitted invoices that did not include supporting documentation and failed to provide proper documentation when requested to do so by BWCC;
- c. FHS submitted invoice documentation which did not support the corresponding amounts billed to BWCC such that on multiple occasions invoiced amounts were greater than amounts contained in the supporting documentation;
- d. FHS submitted invoices that improperly added overhead and profit to all Subcontract cost categories;
- e. FHS submitted invoices for fixed-price billing items that overstated the percent complete of such items and/or incorrectly stated that work had been performed; and

- f. FHS submitted invoices for additional expenses for which FHS had not obtained approval under the Subcontract's extra work provisions.

Misrepresentation of Costs

33. FHS modified and misrepresented invoices from lower tier subcontractors and vendors to increase the amounts that FHS billed to BWCC.

34. Under the Subcontract, FHS was to remove and dispose of contaminated soil at the Project Site. FHS' rate of payment was dependent upon the amount of soil removed and rates charged by the landfill to which the soil was taken.

35. Prior to hauling soil, FHS was required to submit, for approval by BWCC, rates per ton that FHS intended to utilize. FHS failed to submit rates for approval.

36. FHS also is obligated by the terms of the Subcontract to provide original weigh tickets from the landfills documenting the tonnage of soil removed and disposed of at each location. FHS invoiced BWCC for more tonnage than was supported by the weigh tickets that were provided to BWCC.

37. FHS altered the invoices of the Scott Larson Group, LTD ("SLGL"), a lower tier subcontractor FHS retained to provide hazardous waste and emergency response training. FHS altered SLGL's invoices to increase the billed amount. FHS then submitted the altered invoices as part of its invoice to BWCC in order to overbill by that amount.

38. FHS altered the invoices of Cyn Environmental Services ("CES"), a lower tier subcontractor retained to provide non-hazardous water disposal services. FHS altered CES invoices to increase the billed amount. FHS then submitted the altered invoices as part of its invoice to BWCC in order to overbill by that amount.

Failure to Pay Subcontractors and Vendors and to Discharge Liens

39. On each of the twelve (12) invoices submitted to BWCC, FHS certified that “to the best of the Contractor’s knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for the work, for which previous Certificates of Payment were issued and payments received from the Owner, and the current payment shown is now due.”

40. BWCC relied on these certifications and issued payments to FHS without any withholding for anticipated claims due to non-payment.

41. Contrary to its certifications, FHS did not pay its vendors, suppliers and lower tier subcontractors.

42. In January 2012, BWCC first received notice from an FHS lower tier subcontractor, Rainmaker Utility Locating/Boyle Building Corp., that FHS was delinquent in its payments. Over the next three (3) months, no less than ten (10) additional lower tier subcontractors notified BWCC or the Owner that FHS had not paid amounts due. Each notice came in the form a notice of claim or notice of intent to file a lien.

43. Upon receipt of each such notice, BWCC notified FHS of its contractual obligation to discharge such liens and claims within five (5) days. FHS, however, failed to respond to many of BWCC’s notices.

44. As a result of FHS’ failure to respond, BWCC was required to defend against the liens and claims of FHS’ lower tier subcontractors. Several of these subcontractors filed lien attachments against the Project property. In several cases, BWCC was required to substitute a bond for the lien. BWCC incurred significant costs, including legal fees and bond costs,



responding to liens and claims that FHS failed to discharge. BWCC continues to incur costs and expenses associated with FHS' failure to respond to lower tier subcontractor and supplier liens and claims.

Additional Incidents of Failure to Pay

45. As a result of FHS' payment failures, BWCC was forced to incur costs that it is entitled to charge against FHS under the Subcontract.

46. BWCC received notice from a union whose members were employed by FHS on the Project that FHS had failed to make required payments to the union's fringe benefit fund. BWCC notified FHS of the union's claim, but FHS took no action. After investigating the claim, BWCC found it reasonable and paid the delinquent amount to the union on behalf of FHS.

47. In addition, BWCC was forced to pay one of FHS' lower tier subcontractors – SLGL – directly for training certificates, despite having already paid FHS for the training. FHS billed BWCC for SLGL's training and was paid in full. FHS, however, failed to pay SLGL. SLGL then refused to provide training certificates until it received payment from BWCC. BWCC was forced to make the payments.

Termination of Subcontract

48. On February 22 and March 8, 2012, executives of BWCC and FHS met to discuss FHS' failure to meet subcontract requirements and obligations. FHS did not provide any assurances at either meeting that it was willing and/or able to perform its contractual obligations.

49. On March 7, 2012, BWCC documented the parties' earlier discussions regarding FHS' inadequate billing practices. BWCC provided FHS until March 12, 2012 to correct a number of deficient billing practices, including improperly billing for travel and subsistence, failure to provide third-party invoices as documentary support for its invoices to BWCC, and