

FOSTER

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

VILLAGE OF ELM GROVE
13600 Juneau Boulevard
Elm Grove, WI 53122

Plaintiff,

v.

MICHELS CORPORATION
817 West Main Street
P.O. Box 128
Brownsville, WI 53006

MICHELS PIPELINE CONSTRUCTION, INC.
a division of Michels Corporation
16500 West Rogers Drive
New Berlin, WI 53151

and

CONTINENTAL CASUALTY COMPANY
c/o Its Registered Agent
CT Corporation System
8040 Excelsior Drive, Suite 200
Madison, WI 53717

Defendants.

Case No

08 CV 1481

Case Code: 30303
(Other Contracts)

CLERK OF COURTS

APR 24 2008

THIS IS AN AUTHENTICATED COPY OF AN
ORIGINAL DOCUMENT FILED IN THE CLERK
OF COURTS OFFICE WAUKESHA COUNTY.

SUMMONS

TO: Michels Corporation and
Michels Pipeline Construction, Inc.
c/o Ned J. Czajkowski, Esq.
CMT Legal Group, Ltd.
N16 W23217 Stone Ridge Drive, Suite 290
P.O. Box 708
Waukesha, WI 53187-0708

Continental Casualty Company
c/o Its Registered Agent
CT Corporation System
8040 Excelsior Drive, Suite 200
Madison, WI 53717

You are hereby notified that the plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is Clerk of Circuit Court, Waukesha County Courthouse, 515 West Moreland Boulevard, Waukesha, WI 53188-2428, and to plaintiff's attorneys, Kevin J. Lyons and Matthew R. McClean, whose address is Davis & Kuelthau, s.c., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202. You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (45) days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

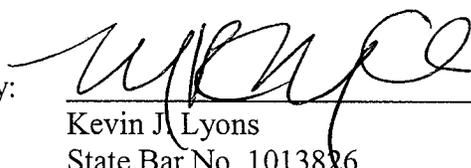
Dated this 24 day of April, 2008.

DAVIS & KUELTHAU, S.C.
Attorneys for Plaintiff
Village of Elm Grove

P.O. Address:

111 East Kilbourn Ave., Suite 1400
Milwaukee, WI 53202-6613
(414) 276-0200

By: _____


Kevin J. Lyons
State Bar No. 1013826
Matthew R. McClean
State Bar No. 1041470

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COMPLAINT

PARTIES

1. The Village of Elm Grove (the Village) is a municipality in Waukesha County, Wisconsin, with a population of approximately 6,200 residents. Elm Grove is governed by a Village Board of Trustees consisting of seven volunteers who serve two-year terms. The current Village Board President is Neil Palmer. The Board appoints a Village Manager to serve as the chief executive officer for the Village, currently David DeAngelis.

2. Michels Corporation is a domestic corporation and is licensed to do business in Wisconsin. The Michels Corporation began in 1960 as a pipeline construction company and is now an international engineering and construction contractor, with multiple subsidiary enterprises specializing in a variety of construction areas, including its Michels Tunneling division. Michels Tunneling is located at 16500 West Rogers Drive in New Berlin, Wisconsin 53151. Michels Tunneling has more than 30 years of experience in the construction of storm and sanitary sewers, including extensive, relevant experience in dealing with glacial soils containing cobbles and boulders and running or flowing soils.

3. Michels Pipeline Construction Inc. is a division of Michels Corporation (Michels Corporation, Michels Pipeline Construction Inc., and Michels Tunneling, collectively referred to as Michels). Michels Pipeline Construction is the named party to the contract with the Village that is the subject of this action.

4. Continental Casualty Company, located at CNA Plaza, Chicago, Illinois 60685, issued a performance bond to Michels for the project described in this action, and is therefore a necessary party to this action.

FACTS

5. Underwood Creek runs through the Village and its downtown business district, and historically has created flooding problems for the area. To address the flooding, the Village and the City of Brookfield joined with the Southeastern Wisconsin Regional Planning Commission (SEWRPC) to study stormwater management alternatives for both communities. In February 2000, SEWRPC recommended a plan that called for a double box culvert to divert stormwater underground and around the Village downtown business district and merge with the natural creek in the southeast corner of the Village. Shortly thereafter, the Village formed a

downtown master plan committee to address enhancement of the downtown business district. It was clear to the Village that businesses were not going to invest in the downtown area if they were susceptible to flooding. As plans to enhance the downtown area evolved and the SEWRPC plan was evaluated, residents and staff of the Village developed a further plan to address flooding and stormwater management, revitalization of the downtown area, and the environmental enhancement of Underwood Creek. Later in 2002, the Village retained Hey and Associates to do preliminary hydraulic modeling to further refine and review potential impacts of a potential stormwater management project and specific components of the SEWRPC recommendations.

6. The Village planned to fund the flood control project through a combination of outside grants, Tax Increment Finance District (TIF) funding, and Stormwater Utility fee. Although numerous commercial properties and single family homes were located within the 100-year flood plain of Underwood Creek, new construction and improvements had been significantly limited within the flood plain. The Village expected these limitations, coupled with the constant threat and reality of flooding, to lead to a gradual property value decline. The project would reduce the size of the 100-year flood plain and thus increase the ability of owners to improve their properties and thus increase the value of the property. Through TIF funding, the base tax revenue generated from the current property value would continue to be available for all Village purposes. The additional tax revenue generated from the increased property value would be used to pay the cost of the flood control project. The increased property value and resulting additional tax revenue would not occur without successful completion of the flood control project.

7. On March 10, 2003, the Village retained Earth Tech, Inc., an engineering firm located at 1020 North Broadway, Suite 400, Milwaukee, Wisconsin 53202, to perform preliminary engineering services for various potential project alternatives as identified in the Hey and Associates and SEWRPC reports. Earth Tech's services included providing a geotechnical investigative report of the project area. After preliminary engineering was complete, the Village selected an alternative and hired Earth Tech to do the final design and specifications for the project's construction.

8. In June 2005, Earth Tech produced a geotechnical study entitled "Geotechnical Study for Flood Control Final Design, Elm Grove, Wisconsin." Among the key elements of the report were the following:

The anticipated soil conditions through the tunnel zone are predominantly dense to very dense poorly graded sand and gravel, with occasional cobbles and boulders.

...

Ground water levels and granular soils, especially those located near a discharge area (i.e. Underwood Creek) can rise or fall several feet during relatively short periods of time. It is important that the tunneling Contractor collect groundwater level data from the temporary piezometers (B41 and B45) that are located on each end of the tunnel zone to verify the depth of groundwater before proceeding with the tunneling activities. This is an important [sic] since unsaturated granular soils will have a tendency to "run" during tunnel boring, whereas saturated granular soils will have a tendency to "flow." Controlling or mitigating the potential to "run" is much more straightforward (and less costly) than controlling or mitigating the potential of "flowing" soils. Generally controlling flowing ground necessitates special tunneling techniques and/or groundwater pumping/control. Regardless, both conditions will require some level of soil support, both in circumference and at the face or heading of the tunnel.

...

Jacking the pipe(s) in concert with the excavation/boring should provide the needed lateral/circumference support. However, face

support is a separate issue that will require at a minimum an open face tunnel boring machine (TBM) with an outer shield with face breasting capabilities. Given unsaturated conditions an open face machine of this type should adequately hold the face and minimize ground loss. A pressurized face TBM (e.g. Slurry Shield or Earth Pressure Balance Machine) might provide better face support during the boring, but is generally more practical/efficient in soils that have a potential to flow (e.g. saturated sands). . . .

Ultimately, running or flowing soils result in lost ground, which can cause undesirable settlement at the surface. This is an especially important consideration when tunneling under the Canadian Pacific Railroad tracks. These particular tracks are used for high-speed passenger travel and thus are very sensitive to even small amounts of settlement. Settlement control and monitoring are addressed in the project Specifications.

Another consideration in selecting a TBM for this project in [sic] the possibility that boulder obstructions could be encountered during the tunneling operation. The investigative borings strongly indicated the presence of boulders, which should be a consideration by the Contractor when selecting a TBM, as well as in planning stages. Having access to the face of the tunnel for boulder retrieval or blasting (if allowed) may be beneficial.

(Emphasis supplied.)

9. The Village sent the project out for bid on September 30, 2005 and published on October 6 and October 13 in the Village's official newspaper.

10. The Village and Earth Tech held a pre-bid meeting with potential bidders on October 11, 2005. Earth Tech project design manager Richard Klein described the entire project, including the 108-inch diameter sewer tunnel that needed to be constructed under Watertown Plank Road and the Canadian Pacific Railroad tracks. Klein also stated that the Village wanted substantial completion by August 1, 2006, and final completion by September 1, 2006. No potential bidder raised questions about cobbles and boulders or soil stabilization. Michels did not attend the pre-bid meeting.

11. Contract specification Section 01112 of the construction contract documents, entitled "Summary of Work" summarizes the relevant portion of the project as follows:

Work of this Contract entails the construction of approximately 870 feet of bored and jacked 108-inch diameter RCP storm sewer, 590 feet of 6-foot by 9-foot box sewer, 530 feet of 8-foot by 10-foot box sewer, 135 feet of 4-foot by 8-foot double cell box sewer, 6 cast-in-place concrete junction chambers, sanitary sewer relays, excavation and grading, seeding, and asphalt road reconstruction.

12. Contract specification Section 02445 of the construction contract documents, entitled "Tunneling and Jacking of Large Diameter Pipe," addresses tunnel related items as stated in the section summary:

Section includes Work necessary for tunnel and work shaft construction. This includes, but may not be limited to excavation; ground support; control, handling, and disposal of water; lighting; ventilation; tunnel boring machine and shield; and specific Canadian Pacific Railway (CPRR) crossing requirements.

(Emphasis added.)

This section provides that the selection of the means and methods of construction is the responsibility of the contractor. This section also states that the contractor has specific responsibility to minimize lost ground, provide ground support systems, adequately support the ground and adjacent structures, and to select the appropriate tunnel boring machine. The contractor explicitly agrees that neither the Village nor Earth Tech is responsible for the contractor's means and methods. Section 02445 further provides:

Section 02445, Part 1.03.A: The CONTRACTOR has all responsibilities with regard to ground support systems.

(Emphasis supplied.)

Section 02445, Part 1.05.C.1: Prior to the start of Work, the CONTRACTOR shall submit a generalized Work plan to the ENGINEER. This submittal is in addition to the detailed schedule that is required in Section 01330 – SUBMITTALS. The Work

plan shall include descriptions indicating the proposed locations of workshafts, facilities, and equipment to be utilized and describing the methods of construction.

Section 02445, Part 1.05.C.2: The methods proposed shall provide for immediate and adequate support of the ground, adjacent structures and other facilities.

Section 02445, Part 1.05.C.3: The CONTRACTOR'S selection of means and methods is integral to the planning and execution of the Work under this Contract. Accordingly, the ENGINEER will review the submittal and may offer comments for the CONTRACTOR'S consideration. However, for this specific submittal, neither response nor lack of response by the ENGINEER shall be considered to represent approval or rejection of the CONTRACTOR'S means and methods for accomplishing tunnel and workshaft construction for the project or any specific work site. Neither the ENGINEER nor OWNER accept any responsibility for the adequacy of the CONTRACTOR'S means and methods nor for any damages to public or private property resulting therefrom, such responsibilities remaining with the CONTRACTOR.

Section 02445, Part 3.01.A.1: The CONTRACTOR'S selection of means and methods for excavation is integral to the planning and execution of the Work of the project as specified. The selection of means and methods is the responsibility of the CONTRACTOR and the selected means and methods shall be capable of coping with subsurface conditions encountered. Design of the initial ground support for tunnel and workshaft excavations is the CONTRACTOR'S responsibility, and the initial ground support shall be installed as necessary.

Section 02445, Part 3.01.B.1: Excavation is classified as soil excavation or boulder obstruction excavation, as defined previously in this Section. However, the CONTRACTOR shall complete all excavation regardless of the types of materials encountered. The CONTRACTOR shall review the Geotechnical Report, make a site visit, and make his own interpretation of the kind and extent of the various materials that will be encountered in the excavation as well as the presence or absence of water.

Section 02445, Part 3.01.D.1: Perform tunnel and workshaft excavation, including installation of initial ground support systems, in a manner that will minimize the movement of the ground in front of and surrounding the excavation, and minimize subsidence of the surface, structures, and utilities above and in the vicinity of

the excavation. Support the ground in a manner to prevent loss of ground and keep the perimeters and faces of the tunnel, passages, and bottoms of workshafts stable. Support the face of the excavation by positive means during all shut down periods. No face support used during shut down periods shall rely solely on hydraulic pressure.

Section 02445, Part 3.01.O.1: The initial set-up of shields and tunnel boring machines prior to start of excavation shall be appropriate to the configuration of the shield or machine and to the ground conditions. The initial set up shall permit the shield or tunnel boring machine to begin and continue the excavation within line and grade tolerances. The CONTRACTOR shall excavate and install initial ground support (including jacking or placing pipe, injection bentonite slurry, injecting contact grout and removing boulders) in sequence designed to maintain the face in a stable condition. The face of the excavation shall be controlled to prevent loss of ground, using methods appropriate to the ground and groundwater conditions encountered.

(Emphasis supplied.)

13. The “Standard General Conditions of the Construction Contract,” Section 00700,

Article 6.01.A also provides the following:

Contractor shall supervise, inspect, and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Work in accordance with the Contract Documents. Contractor shall be solely responsible for the means, methods, techniques, sequences, and procedures of construction.

(Emphasis supplied.)

14. The bidding closed on October 24, 2005.

15. The Village received three bids for the project. Michels submitted the low bid of \$4,758,429 and was awarded the contract on November 28, 2005. The Village and Michels subsequently signed the construction contract for a price of \$4,622,874 on February 24, 2006.

16. The Contract terms were provided to all bidders before the job was bid and before the pre-bid conference. These terms included the following:

ARTICLE 4 – CONTRACT TIMES

4.01 *Time is of the Essence*

A. All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract.

4.02 *Dates for Substantial Completion and Final Payment*

A. The Work will be substantially completed by August 1, 2006.

B. The Work will be completed and ready for final payment by September 1, 2006, in accordance with Paragraph 14.07 of the General Conditions.

4.03 *Liquidated Damages*

A. CONTRACTOR and OWNER recognize that time is of the essence of this Agreement and that OWNER will suffer financial loss if the Work is not completed within the times specified in Paragraph 4.02 above, plus any extensions thereof allowed in accordance with Article 12 of the General Conditions. The parties also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by OWNER if the Work is not completed on time. Accordingly, instead of requiring any such proof, OWNER and CONTRACTOR agree that as liquidated damages for delay (but not as a penalty), CONTRACTOR shall pay OWNER \$900.00 for each day that expires after the time specified in Paragraph 4.02 for Substantial Completion until the Work is substantially complete.

B. After Substantial Completion, if CONTRACTOR shall neglect, refuse, or fail to complete the remaining Work within the Contract Time or any proper extension thereof granted by OWNER, CONTRACTOR shall pay OWNER \$200.00 for each day that expires after the time specified in Paragraph 4.02 for completion and readiness for final payment until the Work is completed and ready for final payment.

C. In addition to liquidated damages set forth above, CONTRACTOR shall be liable for all additional costs for ENGINEER's services beyond substantial and final completion dates. OWNER will deduct these costs from any monies due or that may become due CONTRACTOR or Surety and pay ENGINEER for said services.

Project Manual, Underwood Creek High Flow Diversion Sewer, Agreement, pp. 00520-1 to 00520-2. (Emphasis supplied.)

4.03 *Differing Subsurface or Physical Conditions*

A. *Notice:* If Contractor believes that any subsurface or physical condition at or contiguous to the Site that is uncovered or revealed either:

1. is of such a nature as to establish that any “technical data” on which Contractor is entitled to rely as provided in Paragraph 4.02 is materially inaccurate; or

2. is of such a nature as to require a change in the Contract Documents; or

3. differs materially from that shown or indicated in the Contract Documents; or

4. is of an unusual nature, and differs materially from conditions ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract Documents;

then Contractor shall, promptly after becoming aware thereof and before further disturbing the subsurface or physical conditions or performing any Work on connection therewith (except in an emergency as required by Paragraph 6.16.A), notify Owner and Engineer in writing about such condition. Contractor shall not further disturb such condition or perform any Work in connection therewith (except as aforesaid) until receipt of written order to do so.

B. *Engineer’s Review:* After receipt of written notice as required by Paragraph 4.03.a, Engineer will promptly review the pertinent condition, determine the necessity of Owner’s obtaining additional exploration or tests with respect thereto, and advise Owner in writing (with a copy to Contractor) of Engineer’s findings and conclusions.

C. *Possible Price and Times Adjustments*

1. The Contract Price or the Contract Times, or both, will be equitably adjusted to the extent that the existence of such differing subsurface or physical condition causes an increase or decrease in Contractor’s cost of, or time required for, performance of the Work; subject, however, to the following:

a. such condition must meet any one or more of the categories described in Paragraph 4.03.A; and

b. with respect to Work that is paid for on a Unit Price Basis, any adjustment in Contract Price will be subject to the provisions of Paragraphs 9.07 and 11.03.

2. Contractor shall not be entitled to any adjustment in the Contract Price or Contract Times if:

a. Contractor knew of the existence of such conditions at the time Contractor made a final commitment to Owner with respect to Contract Price and Contract Times by the submission of a Bid or becoming bound under a negotiated contract; or

b. the existence of such condition could reasonably have been discovered or revealed as a result of any examination, investigation, exploration, test, or study of the Site and contiguous areas required by the Bidding Requirements or Contract Documents to be conducted by or for Contractor prior to Contractor's making such final commitment; or

c. Contractor failed to give the written notice as required by Paragraph 4.03.A.

3. If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, or both, a Claim may be made therefor as provided in Paragraph 10.05. However, Owner and Engineer, and any of the Related Entities shall not be liable to Contractor for any claims, costs, losses, or damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) sustained by Contractor on or in connection with any other project or anticipated project.

Standard General Conditions of the Construction Contract, National Society of Professional Engineers for EJCDC (2002). (Emphasis supplied.)

10.05 Claims

B. Notice: Written notice stating the general nature of each Claim, shall be delivered by the claimant to Engineer and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. The responsibility to substantiate a Claim shall rest with the party making the Claim.

Notice of the amount or extent of the Claim, with supporting data shall be delivered to the Engineer and the other party to the Contract within 60 days after the start of such event (unless Engineer allows additional time for claimant to submit additional or more accurate data in support of such Claim. A Claim for an adjustment in Contract Price shall be prepared in accordance with the provisions of Paragraph 12.01.B. A Claim for an adjustment in Contract Time shall be prepared in accordance with the provisions of Paragraph 12.02.B. Each Claim shall be accompanied by claimant's written statement that the adjustment claimed is the entire adjustment to which the claimant believes it is entitled as a result of said event. The opposing party shall submit any response to Engineer and the claimant within 30 days after receipt of the claimant's last submittal (unless Engineer allows additional time).

F. No Claim for an adjustment in Contract Price or Contract Times will be valid if not submitted in accordance with this Paragraph 10.05.

13.08 *Acceptance of Defective Work*

A. If, instead of requiring correction or removal and replacement of defective Work, Owner (and, prior to Engineer's recommendation of final payment, Engineer) prefers to accept it, Owner may do so. Contractor shall pay all claims costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) attributable to Owner's evaluation of and determination to accept such defective Work (such costs to be approved by Engineer as to reasonableness) and the diminished value of the Work to the extent not otherwise paid by Contractor pursuant to this sentence. If any such acceptance occurs prior to Engineer's recommendation of final payment, a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work, and Owner shall be entitled to an appropriate decrease in the Contract Price, reflecting the diminished value of Work so accepted. If the parties are unable to agree as to the amount thereof, Owner may make a Claim therefore as provided in Paragraph 10.05. If the acceptance occurs after such recommendation, an appropriate amount will be paid by Contractor to Owner.

Standard General Conditions of the Construction Contract, National Society of Professional Engineers for EJCDC (2002). (Emphasis supplied.)

14.02 *Progress Payments*

...

D. *Reduction in Payment*

1. Owner may refuse to make payment of the full amount recommended by Engineer because:

a. claims have been made against Owner on account of Contractor's performance or furnishing of the Work;

b. Liens have been filed in connection with the Work, except where Contractor has delivered a specific bond satisfactory to Owner to secure the satisfaction and discharge of such Liens;

c. there are other items entitling Owner to a set-off against the amount recommended; or

d. Owner has actual knowledge of the occurrence of any of the event enumerated in Paragraphs 14.02.B.5.a through 14.02.B.5.c or Paragraph 15.02.A.

2. If Owner refuses to make payment of the full amount recommended by Engineer, Owner will give Contractor immediate written notice (with a copy to Engineer) stating the reasons for such action and promptly pay Contractor any amount remaining after deduction of the amount so withheld. Owner shall promptly pay Contractor the amount so withheld, or any adjustment thereto agreed to by Owner and Contractor, when Contractor corrects to Owner's satisfaction the reasons for such action.

Standard General Conditions of the Construction Contract, National Society of Professional Engineers for EJCDC (2002). (Emphasis supplied.)

17. The Village retained the engineering firm Graef Anhalt Schloemer (GAS) to serve as the Owner's Representative. Engineer Richard J. Bloomer of GAS was principally responsible for overseeing the construction work on the project.

18. On January 10, 2006, six weeks after Michels was awarded the Contract, the Village and Earth Tech held a pre-construction meeting with representatives of the Village, Earth Tech, GAS, the Wisconsin Department of Natural Resources, Michels and representatives of

Michels' subcontractors. Michels distributed its construction schedule and final contract revisions were discussed. Michels' schedule provided that Michels would start construction on the tunneling shafts on February 22, 2006 and complete the shafts on April 20, 2006. It would begin the open box cut culvert work on March 31, 2006 and finish on May 11, 2006. Michels would then do its two tunnel runs. It would dig the first run from shaft 5 to 4, beginning on May 3, 2006. After completion of the first run, it would dig the second run from shaft 3 to 4, beginning on May 26, 2006. Michels would perform its remaining work between May 11, 2006 and July 28, 2006. On this schedule, Michels would meet its substantial completion target of August 1, 2006, and the final completion deadline of September 1, 2006. Meeting notes show no discussion of cobble and boulders or soil stabilization.

19. On March 7, 2006, two weeks after Michels' scheduled start time, Michels began excavation for tunnel shaft No. 5.

20. On April 19, 2006, Michels began its tunneling operations with the start of its run from shaft No. 5 to shaft No. 4.

21. On April 26, 2006, after only one week of tunneling, Michels ceased its tunneling operations and did not resume tunneling until January 19, 2007.

22. At a meeting on April 28, Michels told the Village, Earth Tech and GAS that it was having problems dealing with boulders and running soils.

23. On May 8, 2006, Michels stated that ground stabilization was necessary in order for it to continue its tunneling operations and identified Layne Christensen as a potential subcontractor to perform grouting to help provide the stabilization.

24. On June 12, 2006, at the Village's request, Michels provided a new schedule for its performance. The schedule provided that Layne Christensen would conduct its grouting work

from June 26 to September 19, 2006. Michels would resume its tunnel runs by October 10, 2006. Michels would complete the project by November 30, 2006. Michels did not meet this schedule.

25. By letter dated June 20, 2006, Michels asserted for the first time in writing that it had encountered a differing site condition while tunneling in April and requested a change order to add to the time and money allotments of the Contract. The request was rejected by the Village and Earth Tech.

26. This written notice came 55 days after Michels had stopped tunneling, and was untimely under the terms of the Contract.

27. On July 14, 2006, nearly three months after Michels stopped working, the Village contacted Michels' surety, Continental Casualty, to apprise them of the problems and a possible forthcoming claim.

28. On August 9, 2006, Michels filed a Request for Mediation.

29. In September 2006, Michels advised the Village that it would be unable to obtain the necessary grouting work from subcontractor Layne Christensen. Michels then contracted with subcontractor Hayward Baker for the needed grouting work.

30. Hayward Baker began its grouting work on November 1, 2006, and completed it on November 15, 2006.

31. Approximately ten weeks after the grouting work was completed, Michels restarted its tunneling work on January 19, 2007, the end of its 275-day work delay.

32. On February 16, 2007, Michels advised GAS that the tunnel had a defect in that it was (and is) 22 inches below design grade, and that a sag had been created in the tunnel itself. The "dip" in the tunnel will require monitoring by the Village and added maintenance expense.

The additional maintenance, however, was determined to be a less expensive remedy than replacement of the tunnel section.

33. On April 14, 2007, Michels completed its first tunnel run of 380 feet from shaft 5 to 4 in 38 days of tunneling (ten feet per day).

34. On May 9, 2007, twenty-five days later, Michels began its second tunneling run of 481.6 feet from shaft 3 to 4. Michels completed the second tunneling run on May 26, 2007, 14 days of active tunneling (over thirty-four feet per day).

35. A Certificate of Substantial Completion was issued on December 4, 2007, retroactive to September 27, 2007 -- 423 days after the substantial completion date of the contract. A punch list was prepared by Bloomer and submitted to Michels with the Certificate. Work on the punch list items is ongoing. Final completion has not yet been achieved.

36. The conditions encountered during the project were of the type that Michels should have anticipated, based on a review of available data and reports, the contract documents, its past experience in tunneling and in working in the area, and its knowledge of the region and its soils.

37. The parties attempted to resolve the matter through mediation, which was conducted on April 8, 2008 and April 22, 2008. No resolution could be reached.

FIRST CAUSE OF ACTION –
Breach of Contract

38. The Village incorporates the allegations of paragraphs 1-37 herein.

39. The Village and Michels made a binding contract on November 28, 2005.

40. The Contract consisted of the Project Manual, the Standard General Conditions of the Construction Contract, and the Specifications.

41. Michels breached the Contract by failing to meet the specifications for tunnel alignment. The installation and alignment of the Underwood Creek High Flow Diversion Sewer between manhole structure 5 and manhole structure 4 was not accomplished within the grade tolerance specified, which constitutes a defect in the work. The Village accepted the tunnel in its defective condition, pursuant to § 13.08 of the *Standard General Conditions*.

42. Michels breached the contract by failing to reach substantial completion of the project by August 1, 2006, and in failing to achieve final completion of the project by September 1, 2006.

43. As a result of Michels' breach of the contract, the Village has incurred damages, including additional maintenance expense, engineering and expert costs, professional fees, actual attorneys' fees, lost tax revenue from the TIF District, and is entitled to liquidated damages pursuant to the terms of the contract.

SECOND CAUSE OF ACTION –
Breach of Duty of Good Faith

44. The Village incorporates the allegations of paragraphs 1-43 herein.

45. The Village and Michels owe each other the duty to act in good faith towards the other party and deal fairly when negotiating and performing the contract.

46. Michels breached the duty of good faith in the following non-exclusive ways:

- underbidding the job with the intent to seek additional payment through claimed change orders;
- walking off the job for 275 days;
- failing to give written notice for 55 days after walking off the job site;
- attempting to leverage the time of essence clause for additional payment;
- refusing to engage a solution to the claimed tunneling problem until contact was made by the Village with the bonding company;
- overevaluating its damages claim by including contract items as change order items;
- seeking to evade responsibility for the project by trying to have the Village and Earth Tech make decisions regarding means and methods;

- knowingly using a TBM inadequate for the expected subsurface conditions;
- prioritizing other projects with greater financial implications to Michels over the Elm Grove Project.

47. As a result of Michels' bad faith, the Village has incurred damages, including additional maintenance expense, engineering and expert costs, professional fees, actual attorneys' fees, lost tax revenue from the TIF District, and is entitled to liquidated damages pursuant to the terms of the contract.

DEMAND FOR JUDGMENT

WHEREFORE, the Village demands the following:

1. Liquidated damages pursuant to the contract;
2. Added maintenance expense, engineering costs and other professional fees resulting from the delay and the defective performance;
3. Attorney fees and litigation costs pursuant to the Contract;
4. Lost revenue from the TIF District and other compensatory damages;
5. Consequential damages;
6. Other reasonable costs and fees; and
7. Other relief deemed equitable by the Court.

Dated this 24 day of April, 2008.

DAVIS & KUELTHAU, S.C.
Attorneys for Plaintiff
Village of Elm Grove

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