SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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SIEMENS ELECTRICAL, LLC,

Plaintiff,

-against-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants.

----------x

Date Index No. Purchased:_____

Index No. _____

SUMMONS

The basis for venue is that the contract between the parties specifies that claims shall be heard and determined in the courts of the State of New York located in the City and County of New York, that Defendants are the City of New York and a New York City agency, and that the cause of action arose in New York County:

Plaintiff's address is 527 Madison Avenue, 8th Floor, New York, NY 10022

TO: The City of New York
c/o Office of the Corporation Counsel
100 Church Street
New York, New York 10007

The New York City Department of Environmental Protection
c/o Office of the Corporation Counsel
100 Church Street
New York, New York 10007

YOU ARE HEREBY SUMMONED and required to serve upon plaintiff's attorneys an answer to the Verified Complaint in this action upon the undersigned attorney for the plaintiff within twenty days after the service of this summons, exclusive of the day of service, or within thirty days after service is complete if this summons is not personally delivered to you within the State of New York. In case of your failure to answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York
November 19, 2018

EVERSHEDS SUTHERLAND (US) LLP

By: /s/ Lee C. Davis
Lee C. Davis
Lawrence A. Dany
Eversheds Sutherland (US) LLP
1114 Avenue of the Americas, 40th Floor
New York, NY 10036
(212) 389-5000
Attorneys for Plaintiff Siemens Electrical, LLC

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Index No.

VERIFIED COMPLAINT

Plaintiff Siemens Electrical, LLC (SE), formerly known as Schlesinger-Siemens Electrical, LLC, by its attorneys, Eversheds Sutherland (US) LLP, files this Verified Complaint against Defendants The City of New York and The New York City Department of Environmental Protection (collectively, the City), as follows:

PRELIMINARY STATEMENT

1. This lawsuit arises out of the City's grossly negligent and reckless conduct in connection with the design and construction of the Croton Water Treatment Plant – a 1,200,000 square foot underground facility in the Bronx that can treat up to 30% of the City's drinking water supply. At a cost in excess of $3.2 billion – billions more than the $992 million estimate the City publicly announced in 2003 – Croton is one of the largest capital projects in the history of New York City.

2. In 1998, the City agreed to construct the Croton Plant after entering into a Consent Decree with the United States of America and the State of New York to resolve the City's long-standing violations of federal law concerning water quality.

3. The Consent Decree, as amended in 2005, required the City to meet certain design and construction deadlines under threat of massive stipulated penalties. Specifically, the City was required to complete "the final design" of the Plant by April 30, 2006, and to advertise for bids for construction of the Plant by June 1, 2006.

4. Faced with the risk of massive penalties for missing either of these milestones, the City represented to both the United States and bidding contractors that the Plant design was "complete." In so doing, the City acted with gross negligence and reckless indifference to the rights of the contractors it later hired to build the Plant, including SE, since the City knew or reasonably should have known that properly completing the design would require hundreds of millions of dollars in additional work and would add additional years to the Project's duration, both of which ultimately proved true and dramatically increased the costs to the contractors.

5. The City's representation in 2006 that the design was complete was false. As of June 2006, when it advertised for bids, the City had not yet made fundamental engineering and design decisions required for the work. Indeed, after representing that the Plant design was complete, the City paid its design engineers over $59 million in additional fees to complete the Plant's design while construction was underway – with much of that design occurring after the date the Plant was supposed to be finished. To save itself from penalties that would be owed to the federal and state governments, the City decided to award fixed price contracts based upon the incomplete Plant design that the City knew or reasonably should have known would require hundreds of millions of dollars in design changes and years of corresponding delay.

6. In January 2007, the City awarded SE two separate trade contracts to perform the electrical work required for the Project. At the time of SE's bids and the resulting contracts, the City did not disclose to SE (or, to SE's knowledge, the other trades) the true state of the Plant's

design. When the City awarded SE the electrical contracts, the City knew or reasonably should have known that SE would sustain massive financial losses because the SE bids (submitted as required in October of 2006) did not (and could not) reflect the inevitable impacts of the large-scale design changes the City would require after the work commenced. The City also knew that undisclosed additional work and additional time required to complete the design would undermine SE's reasonable expectation of obtaining the benefit of its contractual bargain.

7. The City's reckless indifference to contractors' rights set them on an unnecessarily costly, risky, and uncertain course. Over the span of the Project, the City ultimately issued the trade contractors a staggering number of change orders necessary to complete the Plant: almost 1,100 to date, with DEP continuing to issue change orders. The City issued over 228 of those change orders to SE totaling more than $57 million (a 43% increase to SE's original contract) – with over $33 million of that additional work directed *after* SE's contract completion date. The largest and most disruptive of the changes came over three years after construction began and when SE's base conduit work was over 50% complete, requiring changes to SE's existing work in over 80% of the Plant area. The impact of the City's belated design critically disrupted the Project and caused SE 1,997 days of delay in the completion of its work, 1,789 days of which are compensable, and over $103 million in unanticipated additional costs, excluding interest.

8. The City – not SE – was the cause of these cost overruns, yet the City refuses to fairly compensate SE for any part of the over $103 million in added cost, excluding interest, that SE incurred to mitigate the consequences of the City's reckless decision to proceed with the work based upon fundamentally incomplete design documents.

9. As the City has refused to honor its contractual commitments, SE brings this lawsuit to recover fair payment for the unexpected massive costs incurred over years of additional work

that SE devoted to complete the City's critical Plant, which now provides drinking water to millions of New York City residents.

10. Despite the fact that the Plant has been operational for over three years, as of the filing of this Complaint, SE and other prime contractors remain working at the Project as a result of the City's tardy design or design errors.

PARTIES

11. SE is a limited liability company organized under the laws of Delaware with its principal place of business at 527 Madison Avenue, 8th Floor, New York, New York 10022.

12. Defendant the City of New York is a municipal entity within the State of New York. The City of New York is authorized by law to maintain a Department of Environmental Protection (DEP) that acts as the City's agent and for which it is ultimately responsible.

13. DEP is a city agency with its principal place of business at 59-17 Junction Boulevard, Flushing, New York 11373.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this matter pursuant to CPLR 301 and CPLR 302(a).

15. Venue in this proceeding lies in New York County pursuant to CPLR 501, in accord with the parties' contract.

FACTS COMMON TO ALL CAUSES OF ACTION

16. On November 24, 1998, the City, the United States, and the State of New York entered into a Consent Decree requiring DEP to build a filtration plant to treat the Croton Water Supply System. The Consent Decree resolved the City's long-standing violations of federal law

concerning its failure to treat water from the Croton Watershed, which supplies drinking water to millions of the City's residents.

17. A Second Supplement to the Consent Decree was filed on January 31, 2005. The Second Supplement included a requirement for the City to meet the following milestones to design and complete the Plant:

April 30, 2006:	Complete the final Plant design
June 1, 2006:	Advertise for bids for construction
February 9, 2007:	Issue notices to proceed for construction
May 1, 2011:	Complete construction and commence startup and testing
October 31, 2011:	Commence operation of the Plant

The City's failure to meet these milestones exposed it to significant penalties to be paid to the federal and state governments.

18. When the City made these commitments it had not yet even selected a site for the Project. The City nevertheless agreed to provide, under the threat of stipulated penalties, a complete design for the yet-to-be-located facility by April 2006 – a little more than a year later.

19. In the ensuing months, the City worked toward but failed to complete the Plant's design.

20. In April 2006, the City approached the first critical consent decree milestone: completion of Plant design and advertisement for bids for the construction contracts.

21. Faced with the risk of massive penalties for missing the milestone, and with the design not yet complete, the City made a reckless decision: it represented to the United States that the Plant design was fully complete. This representation was false. The Project design was not even close to completion.

22. As of June 2006, the City had not yet made fundamental engineering and design decisions required to yield a complete and functional Plant. To avoid stipulated penalties, the City intentionally decided to issue incomplete Plant designs, obtain bids, and execute contracts for work based on those incomplete designs. Without disclosure, the City decided to complete critical design work after construction was underway.

The Contracts

23. In September and October 2006, the City received bids for construction of the Plant. SE submitted the lowest bids for Contract No. CRO-312-E1 (low voltage electrical work) and Contract No CRO-312-E2 (high-voltage electrical work).

24. Following the awards, on or about January 21, 2007, SE and the City entered into two contracts – one for low-voltage electrical work in the amount of $134,680,000 (the "E1 Contract"), and another for high-voltage work (the "E2 Contract"). The E2 Contract had a base value of $37,678,000. The City's breach of its obligations under the E2 Contract is the subject of a separate lawsuit, which is presently stayed by consent of the parties. *SE Electrical, LLC v. The City of New York et al.*, Index No. 650338/16 (N.Y. County) (filed January 21, 2016).

25. The scope of work under the E1 Contract included the supply and installation of low voltage electric power (480 volts and below), lighting and control equipment, radio communications, telephone, fire alarm, public address, security, and emergency generators.

26. The City awarded other prime contracts for the Project to Skanska USA/Tully Construction Co. (Skanska or the G-Prime) for general construction contract work in the amount of $1,327,700,000; to Durr Mechanical Construction for heating, ventilation, and air conditioning work in the amount of $105,700,000; and to Picone/WDF, Joint Venture for plumbing work in the amount of $58,475,000.

27. On August 21, 2007, the City issued a Notice to Proceed to SE for the E1 and E2 Contracts, each with a work commencement date of August 21, 2007.

28. SE's contracts required SE to perform the work in accord with a Milestone Schedule. Under the schedule, SE's contract completion date for the Project was April 12, 2012.

Incomplete Design Impacts the Work

29. The City's 2006 misrepresentation that the Project design was complete was revealed as false only after construction began and the City started issuing change orders to all of the prime contractors to implement its numerous design revisions. Well after work was underway, the City issued substantial change orders relating to the design of above-ground Plant structures, including details implementing an allowance to finish and clad the structures. The timing and nature of the architectural design for these structures were so vastly different from what was shown in the contract documents that the City's original design could not have been final as represented in 2006.

30. The City's years-late completion of design of the above-ground Plant structures ultimately totaled more than $130 million in additional work to Skanksa.

31. More prejudicial to SE than the delay from the City's late design of the above-ground Plant structures, however, was the City's response to its own delay. Facing the prospect of missed Consent Decree Milestones and consequent penalties, the City again acted in disregard of SE's rights by intentionally manipulating its Project schedule (then projecting a delay of 617 days) to "mask" the impact of the late design.

32. In February 2010, in an effort to hide and reduce the days of delay it created through changes orders issued to that point – delays the City had to report to the federal government – the City drastically changed its schedule in hopes of meeting the Consent Decree Milestones for

completion of construction, commissioning, and Plant operation. The City unilaterally moved a substantial portion of SE's work originally scheduled as part of the construction phase – and thus to precede the Milestones for construction completion and Plant operation – to now follow and occur *after* completion of all construction and commissioning. As a result, the City was able to report to the United States that construction would be complete and the Plant would be ready to operate by the Consent Decree Milestones, even though much of the contract work of SE and the other prime contractors remained.

33. The City's actions severely impacted the timing and cost of SE's work. As a result of the City's unilateral rescheduling effort to avoid penalties, the extensive work SE was scheduled to perform over the five years between 2007 and 2012 would now have to wait until after the Plant was commissioned, even though SE's work was not dependent upon completion of that Milestone. Any delays to the Milestone for Plant commissioning during that period would necessarily delay SE. For this principal reason, SE is still on site as of the date of this Complaint, over six years after SE's originally-scheduled completion date, and over three full years following Plant commissioning.

34. Even after changing the design for the Plant's above-ground structures, and re-sequencing SE's work, the City continued its efforts to overcome the Plant's incomplete design. Design revisions and change orders to other contractors disrupted SE's work throughout the course of the Project. For example, in September 2010, the City initiated another series of massive changes to the design on which SE had bid. Most critically, the City issued electrical Change Orders 71-76 (known as the CO 76 Series), in which the City changed wholesale a wide array of critical Plant operating equipment specified in the bid documents.

35. The CO 76 Series changes occurred over three years after construction began and when SE's base conduit work was over 50% complete. The CO 76 Series significantly affected SE's work in over 80% of the Plant (93 of 108 work areas). Specifically, these design changes affected 6,038 conduits, or 22% of SE's already installed work. But for the CO 76 Series and subsequent change orders, SE was prepared to achieve completion of construction on schedule as then projected.

36. As further evidence of the City's reckless disregard for SE's rights, the City knew that it would need to issue the CO 76 Series changes at least a year before it actually directed the changes to SE.

37. Rather than electing to stop the ongoing work, complete the design, and issue the changes, the City allowed SE to continue with work that the City knew was no longer required and that SE would have to change. The City's decision not only cost SE time and expense associated with performing the extra work in the CO 76 Series, it had a dramatic and negative impact on SE's productivity, costing millions of dollars in unproductive labor.

38. The City realized that its late change orders to SE and other contractors, including the CO 76 Series, again threatened its ability to meet the Consent Order Milestones. The City accordingly developed yet another plan to improve the Project's optics and minimize the potential for substantial penalties to the United States by making it easier to achieve the Consent Decree Milestone for completion of the Plant for startup and testing.

39. Although Croton is one overall plant, it is split into two virtually-identical processing facilities known informally as plants A and B. The Consent Decree Milestones applied to the overall Project (both plants). In April 2011, the City decided to change the Project schedule so that the City needed to complete construction of only plant A for startup and testing to meet the

Consent Decree Milestone. With this approach, and through various other mitigation strategies, the total delay and impact of the City's CO 76 Series was reduced vis a vis the City's liability for Consent Decree penalties. But it did not alter or overcome the serious negative impact to SE and the other contractors caused by DEP's continuous and significant design defects and change orders.

40. Following the devastating CO 76 Series changes, the City continued to make numerous additional changes to SE's work and the work of other contractors, and reconfigured fundamental, process-level engineering for the Plant.

41. For example, in 2011 and through July 2012, among other changes, the City reconfigured the design of the Main Control Room, changed the critical Process Monitoring and Control System, and relocated key Local Control Panels and Local Control Stations – all of which related to changes to fundamental processes required for Plant operation. The City also belatedly required changes to the control strategies for the Process Monitoring and Control System to reflect how the Plant would manage the water treatment process.

42. At the time of these changes, SE had completed the majority of the power conduit and wiring for most control systems necessary to achieve the Consent Decree Milestone for Plant testing and start-up. But because of these belated changes to fundamental plant process and operation, SE could neither install its power, wiring and controls conduit to those panels, nor pull and terminate wires to those panels. Once again, the City's conduct prevented SE from completing its work and minimizing its mounting costs.

43. The City's changes to the Project's design continued unabated. After September 1, 2012, the City issued SE a series of late change orders relating to, among other things, the Plant fire alarm, smoke detector systems, and security systems. These systems were among the work

activities the City removed in 2010 from the scheduled work activities required to achieve the final Consent Decree Milestone, and required SE to perform many years later at extra cost.

44. From September 1, 2012, and onward, the City issued SE a total of 122 change orders with an aggregate value in excess of $33 million. The City issued all of these changes, which represent a 25% increase to the original value of the E1 Contract, *after* SE's original contract completion date. SE is still on site working through change orders arising from the City's incomplete design.

SE's Damages and Claim

45. The City's incomplete design and delayed issuance of the massive amount of change orders during construction plagued the Project and, together with other factors, caused SE to suffer disruption and diminished productivity as it sought to complete its work. The multiple change orders and stop work orders issued to SE and other contractors, which adversely impacted SE's work, required SE to devote more labor hours at tremendous expense, to overcome the disrupted and inefficient nature of its work resulting from the City's incessant design changes and patent failure to manage the Project schedule.

46. SE's electricians performing base contract work were impacted throughout the Project by the same adverse conditions that the City admitted affected SE's change order work.

47. Because of the stacking of trades, restricted access, congestion, extended and overtime shift work, the impact of changed work on unchanged work, the need to re-engineer and to re-perform work already in place, multiple stop work orders, poor environmental conditions, unexpectedly having to perform its work in an operating plant, and other factors, SE's labor hours on base contract work were just as adversely impacted (or more so) as labor hours spent on newly-ordered change order work.

48. In total, the City's actions resulted in 208 days of excusable delay plus 1,789 days of compensable delay in the completion of SE's work through September 30, 2017, at a cost to SE of $77,753,705, plus interest, in addition to $26,159,166 in disruption and lost productivity costs, plus interest.

49. A cardinal change occurred because the City directed fundamental changes to SE's entire undertaking through the magnitude and number of the City's changes and stop work orders, which materially impacted SE's work. The City cardinally changed the E1 Contract by unilaterally abandoning the original Contract schedule, then substituting a materially revised schedule that caused years of delays and productivity losses to SE's work.

50. Rather than seeking to rescind the E1 Contract, the completion of which was essential to millions of New Yorkers, SE timely protested the City's changes and performed under a reservation of rights. The cardinal nature of the changes was not clear at the time, and SE was justified in continuing its performance.

51. On September 19, 2018, SE filed a Notice of Claim with the New York City Office of the Comptroller, the New York City Law Department, and the New York City Department of Environmental Protection. On September 21, 2018, the Comptroller acknowledged receipt of the Claim, assigning it number 2018LW02724. SE hereby refers to and incorporates Claim 2018LW02724 as if fully set forth herein.

52. At least thirty (30) days have elapsed since the claim or claims upon which this action is founded were presented to the Comptroller for adjustment, but the Comptroller has neglected or refused to make an adjustment or payment thereof for thirty (30) days after such presentment by SE.

53. SE has complied with all applicable contractual and administrative procedures and conditions precedent to this action.

54. All conditions precedent to this action and the relief sought herein have occurred or have been waived or excused.

DEMAND FOR RELIEF

55. SE repeats and re-alleges each and every allegation contained in numbered paragraphs 1 through 54 above as though set forth fully and at length here again.

56. The intentional acts and omissions of the City constitute breach of contract, and gross negligence and reckless indifference to SE's rights under the Contract.

57. SE has substantially complied with its obligations to complete its work under the Contract, despite the City's acts and omissions that have acted to disrupt SE's work.

58. Because of the City's fundamental alteration throughout the Project to SE's undertaking at bid time, SE is entitled to additional compensation for breach of contract.

59. SE is entitled to be reimbursed for its increased costs of performance under the cardinal change principle as recognized under New York law.

60. Implied in the Contract is a covenant of good faith and fair dealing.

61. The City fundamentally breached the covenant of good faith and fair dealing by issuing a multitude of change orders; preventing or hindering SE's access to the work site; preventing SE from prosecuting its electrical work using the means, methods, and sequence that SE contemplated at the time of contracting; repudiating and abandoning the City's "time is of the essence" promise and obligations flowing therefrom; and implementing change order work that was outside the scope of the parties' agreement.

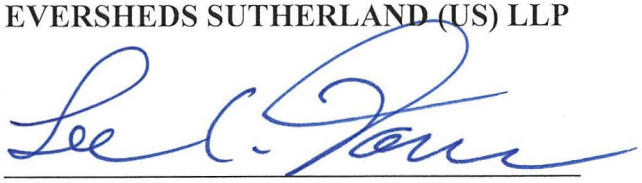
62. As a direct and proximate result of the City's breach of the Contract, SE has been damaged in an amount to be determined at trial but in no event less than $103,732,871, plus

prejudgment interest as provided by law, with the total amount (including interest) due as of October 31, 2018, being $143,319,215.

WHEREFORE, SE demands judgment awarding damages in favor of SE and against defendant City in an amount to be determined at trial, and in no event less than $103,732,871, plus prejudgment interest calculated through October 31, 2018, in the amount of $39,586,344, for a total of no less than $143,319,215, together with future pre-judgment interest to accrue at the rate of 9% per year, or $777,997 per month, and awarding SE such other and further relief as the Court deems fair and proper, including attorney's fees and costs.

Dated: New York, New York
November 19, 2018

EVERSHEDS SUTHERLAND (US) LLP

By: 

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Attorneys for Plaintiff Siemens Electrical, LLC

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

BERNHARD LEINER, being duly sworn, deposes and says:

That he is the Chief Executive Officer of Plaintiff Siemens Electrical, LLC; that he has read the foregoing VERIFIED COMPLAINT; and believes the contents are true based upon deponent's knowledge and Plaintiff's books and records. The deponent makes the Verification because Plaintiff is a limited liability corporation and deponent is an officer representative.

Bernhard Leiner

Subscribed and Sworn to before me on this
19th day of November, 2018.

ANTONIO E. CLARKE
Notary Public, State of New York
No. 01-6149179
Qualified in Queens County
My Commission Expires July 03, 2022

NOTARY PUBLIC