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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

ALASKA LOGISTICS, LLC,

Plaintiff,

v.

NEWTOK VILLAGE COUNCIL and
GOLDSTREAM ENGINEERING, INC.

Defendants.

Case No.: 3:18-cv-00108

PLAINTIFF'S AMENDED ANSWER TO
NEWTOK'S COUNTERCLAIMS AND
PLAINTIFF'S COUNTERCLAIMS TO
COUNTERCLAIMS

Pursuant to Fed. R. Civ. P. 15(a)(1)(A), Plaintiff Alaska Logistics, Inc. ("Alaska Logistics") hereby submits the following amended answer the Counterclaims of Defendant Newtok Village Counsel ("Newtok") (ECF No. 6) and asserts Plaintiff's Counterclaims to the Counterclaims as follows:

NEWTOK'S COUNTERCLAIMS

**Counter Claim No. 1
Fraud/Misrepresentation/Unfair and Deceptive Practices**

89. Deny.

90. Deny.

91. Deny.

92. Admit that Newtok, or others acting on its behalf, paid bid amounts

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1 shortly after bid was awarded to Alaska Logistics. Deny that the bid amounts are the
2 full amount owing to Alaska Logistics.

3 93. Deny.

4 94. Admit that rate unit for change orders were based, in part, on TEUs.
5 Deny remaining allegations.

6 95. Deny.

7 96. Deny.

8 97. Deny.

9 98. Deny that the crusher screens were held as “hostage freight.” Deny that
10 Alaska Logistics released the crusher screens “only after prolonged negotiations and
11 threatened litigation.” Alaska Logistics lacks knowledge or information sufficient to
12 form a belief about the truth of the remaining allegations in Paragraph 98 of Newtok’s
13 Counterclaims.

14 99. Deny.

15 100. Deny.

16 101. Deny.

17 **Counter Claim No. 2**
18 **Breach of Contract - Fuel**

19 102. Admit.

20 103. Admit.

21 104. Deny.

22 105. Alaska Logistics lacks knowledge or information sufficient to form a
23 belief about the truth of the allegations in Paragraph 105 of Newtok’s Counterclaims.

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106. Deny.

Counter Claim No. 3
Breach of Contract – Diverted/Hostage Freight

107. Admit that Alaska Logistics agreed to transport road construction materials and equipment per the Invitation for Bid (“IFB”). Deny that Alaska Logistics specifically agreed to transport crusher screens or 13 specific pieces of construction material.

108. Deny.

109. Deny.

110. Deny.

111. Deny.

Counter Claim No. 4
Breach of Contract – Damage to Crusher

112. Admit.

113. Alaska Logistics lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 113 of Newtok’s Counterclaims.

114. Deny that Newtok is entitled to damages from Alaska Logistics due to damaged freight. Alaska Logistics lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 114 of Newtok’s Counterclaims.

115. Deny.

Counter Claim No. 5
Breach of Contract – Change in POD to Seward

116. Admit.

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117. Admit.

118. Alaska Logistics lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 118 of Newtok's Counterclaims.

119. Deny.

AFFIRMATIVE DEFENSES

1. Newtok's Counterclaims fail to state a claim upon which relief can be granted.

2. Newtok's Counterclaims are barred or limited by its own breach of contract.

3. Newtok's Counterclaims are barred or limited by its modification of the contract.

4. Newtok's Counterclaims are barred or limited by unclean hands.

5. Newtok's Counterclaims are barred or limited by its negligence or that of third parties over whom Alaska Logistics had no control.

6. Newtok's Counterclaims are barred or limited by the Carriage of Goods by Sea Act, 46 U.S.C. App. §§ 1300-15.

7. Newtok's Counterclaims are barred by its failure to provide timely notice and failure to follow Alaska Logistics' claim notification procedures set forth in the Alaska Logistics, LLC Transportation Agreement and bill of lading.

PLAINTIFF'S COUNTERCLAIMS TO COUNTERCLAIMS

I. PARTIES

1. Plaintiff Alaska Logistics, LLC ("Plaintiff" or "Alaska Logistics") is a Washington limited liability company with a primary place of business in Seattle,

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1 Washington.

2 2. Defendant Newtok Village Council (“NVC”) is the governing body of
3 the Indian tribe Newtok Village located in Newtok, Alaska.

4 3. Defendant Goldstream Engineering, Inc. (“Goldstream”) is an Alaska
5 corporation with a primary place of business in Fairbanks, Alaska.

6 **II. JURISDICTION AND VENUE**

7 4. Subject matter jurisdiction exists under 28 U.S.C. § 1332, as the parties
8 are completely diverse and the matter in controversy exceeds, exclusive of interest and
9 costs, the sum of seventy-five thousand dollars (\$75,000).

10 5. Admiralty jurisdiction also exists under 28 U.S.C. § 1333 as this matter
11 involves the breach of a maritime contract.

12 6. Venue is proper under 28 U.S.C. § 1391 as a substantial part of the
13 events or omissions giving rise to these claims occurred in this district and the
14 defendants reside in this district.

15 **III. FACTUAL BACKGROUND**

16 ***NVC Issues Invitation to Bid***

17 7. On March 17, 2017, NVC issued an “Invitation to Bid” (“IFB”),
18 prepared by Goldstream, for barge transportation services for the Mertarvik Road
19 Construction Project. *See* Exhibit A (ECF No. 1-1). Goldstream was one of NVC’s
20 contractors and was heavily involved in the Mertarvik Road Construction Project.

21 8. Section I of the IFB states that NVC is “accepting bids from interested
22 Bidders to provide barge services from the Port of Anchorage to Mertarvik, AK on
23 Nelson Island near Newtok, Alaska. Barge services require transport of 25,000 gallons

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1 of ultra low sulfur diesel (ULSD) and diverse road construction materials and
2 equipment, including but not limited to corrugated metal pipe (culvert), vehicles, fuel
3 tanks, and various heavy equipment.”

4 9. Section I of the IFB further states “Materials will be loaded into
5 containers or crated with a total estimated 400 tons of freight, departing from
6 Anchorage, Alaska. A loading planning manifest is appended at the end of this
7 document.”

8 10. Section II of the IFB provided June 1, 2017 as the estimated delivery
9 date to Mertarvik.

10 11. Section III(2) of the IFB stated that “Bidders may choose to bid on one
11 or both of NVC’s transportation needs” and instructed bidders to submit separate bid
12 forms for (a) “25,000 gallons of ULSD fuel delivery”; and/or (b) “Construction supplies
13 & equipment.”

14 12. Section IV(2) of the IFB stated that the “materials for the project are
15 currently being consolidated at the Port of Anchorage, Alaska and is the project Point of
16 Departure (POD).”

17 13. Section VI(1) of the IFB stated that the “Bidder will provide a proposed
18 purchase agreement between NVC and the Bidder with project specific terms and
19 conditions as part of the bid.”

20 14. The IFB included a “Planning Manifest: Estimated Shipping Weights
21 and Dimensions.” The Planning Manifest provided for the shipment of 27 items of
22 construction supplies & equipment (*i.e.*, excluding fuel), including 100,000 lbs. of
23 “additional freight.”

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NVC Issues Addenda to IFB

15. On March 29, 2017 and March 30, 2017, NVC issued Addenda to the IFB. *See* Exhibit B (ECF No. 1-2).

16. For the additional freight, Addendum #2 instructed Bidders to “Assume three (3) 20’ containers at 15,000 lbs each and three (3) flats: one (1) at 55’ L x 12’W x 4’H and two (2) at 20’L x 8’W x 8’H.”

17. As amended, the Planning Manifest provided an estimated shipping weight of 772,281 lbs. for the construction supplies & equipment.

18. The vast majority of the cargo set forth in the Planning Manifest, as amended, consisted of “rolling stock” or construction vehicles and freight which could easily be rolled on and off barges with minimal stevedoring.

19. Neither the IFB, nor the Planning Manifest, nor Addenda provided for or required or contemplated that the Bidders would transport anything other than construction supplies & equipment and fuel.

Alaska Logistics Submits Bid

20. On March 31, 2017, Alaska Logistics submitted its bids to NVC. Alaska Logistics bid \$267,899 to transport the construction supplies & equipment and \$124,950 for the fuel delivery. *See* Exhibit C (ECF No. 1-3).

21. Pursuant to Section VI(1) of the IFB, Alaska Logistics submitted an “Alaska Logistics, LLC Transportation Agreement” (“Transportation Agreement”) with its bid.

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22. Article 3 of the Transportation Agreement states, “Payment must be made within 30 days of invoice. If payment is not made within 30 days of invoice, finance charges will be assessed and applied at 12% per annum.”

23. Article 4.3 of the Transportation Agreement contains a forum selection clause which provides, “Any action brought by either party to enforce any term or provision of this contract shall be commenced in the United States District Court for the Western District of Washington at Seattle, as appropriate.”

24. Although the IFB stated that the ranking would be released and notice of apparent low bidder would be made on March 31, 2017, Goldstream did not provide a Notice of Intent to Award to Alaska Logistics, stating that it was the apparent low bidder for the transportation of the construction supplies & equipment, until April 16, 2017—less than four weeks before Alaska Logistics was supposed to begin loading and preparing for shipment to Mertarvik.

25. Together, the IFB, Addenda, Alaska Logistics’ Bid, and Transportation Agreement formed the contract or agreement (“Contract”) for the parties.

26. NVC’s agreement to the forum selection clause set forth in the Transportation Agreement constitutes a waiver of sovereign immunity to the extent NVC is entitled to invoke or is protected by such doctrine.

27. Alaska Logistics did not receive the award for the transportation of the 25,000 gallons of fuel. However, Alaska Logistics later agreed to deliver 10,000 gallons of fuel to Mertarvik outside of the IFB and Contract.

Goldstream Fails to Timely Provide Shipping Manifest

28. After receiving notice of the bid award, Alaska Logistics repeatedly

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1 asked Goldstream for an actual shipping manifest (not estimated) so it could plan and
2 prepare for the transportation of NVC and/or Goldstream's cargo. Despite repeated
3 requests, Goldstream did not provide a shipping manifest to Alaska Logistics until
4 May 11, 2017, several days before Alaska Logistics was scheduled to begin loading.
5 NVC and/or Goldstream's delays in providing notice of the bid award and delivering
6 the actual shipping manifest to Alaska Logistics seriously impaired Alaska Logistics'
7 ability to plan for and arrange the appropriate labor, shipping containers or flats, and
8 other items necessary to load the cargo.

9 29. By information and belief, NVC and/or Goldstream purchased or leased
10 the construction supplies & equipment and other items long before May 11, 2017 when
11 Goldstream provided the actual shipping manifest to Alaska Logistics, and therefore
12 had advance knowledge of the nature, quantity, and volume of freight that needed to be
13 transported but deliberately failed to notify Alaska Logistics of same.

14 ***Cargo Provided to Alaska Logistics for Shipment Materially Differs***
15 ***From Cargo Set Forth in IFB and Addenda***

16 30. The actual cargo provided to Alaska Logistics for delivery to Mertarvik
17 materially differed from the representations set forth in the IFB and Addenda in several
18 respects.

19 31. First, the actual cargo that was provided to Alaska Logistics for
20 transportation to Mertarvik was not limited to construction supplies & equipment. The
21 cargo included three 60' modular housing units ("mods") and refrigerated food items
22 which were not set forth in the IFB or Addenda. Alaska Logistics was forced to
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1 transport the refrigerated cargo by a different vessel on a separate trip to keep it from
2 spoiling.

3 32. Second, the “additional freight” provided to Alaska Logistics required
4 far more cargo space to transport. For example, the IFB and Addenda estimated that the
5 cargo would require six 20’ containers, three 40’ containers, and three flats. Actually,
6 the cargo required three 20’ containers, seven 40’ containers, and 12.75 flats, an
7 increase of 158% twenty-foot equivalents (“TEUs”), a measurement used for
8 calculating cargo space. The additional freight also did not consist of “rolling stock”
9 like many of the other items set forth in the Planning Manifest.

10 33. Third, despite NVC and/or Goldstream’s representations that the cargo
11 would be “staged” and ready for shipment, the cargo was not ready for shipment when
12 it was provided to Alaska Logistics, requiring Alaska Logistics to expend significantly
13 more time and labor preparing the cargo for shipment to Mertarvik.

14 34. Fourth, NVC and/or Goldstream requested that Alaska Logistics make
15 separate deliveries originating from Seward, AK and Seattle, WA which were not points
16 of departure in the IFB or otherwise set forth in the Contract.

17 35. Despite the challenges presented by NVC and/or Goldstream’s failure to
18 timely provide notice of the bid award or deliver a shipping manifest and materially
19 different cargo received, Alaska Logistics’ crews worked diligently to prepare and load
20 the cargo for delivery to Mertarvik.

21 ***Alaska Logistics Requests Change Order***

22 36. On May 15, 2017, shortly after receiving the cargo, Alaska Logistics
23 contacted Mark Sherman, president of Goldstream, to advise him that there would be

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1 additional costs associated with shipping NVC and/or Goldsteam's actual freight.

2 37. On May 18, 2017, after its barges were underway, Alaska Logistics sent
3 a formal change order ("Change Order #1") in the amount of \$231,391. *See* Exhibit D
4 (ECF No. 1-4).

5 38. On May 28, 2017, Mr. Sherman responded to the charge order request.
6 Mr. Sherman's letter stated, in part: "We acknowledge that you shipped freight for us
7 out of Seattle that was not included in the original RFP, and a second small load out of
8 Seward on the 2nd barge. We also acknowledge and appreciate your wiliness to
9 transport frozen food out of Seward and to keep it connected to a power source to keep
10 it frozen during the voyage, which was also not part of the original RFP. There were
11 also some additional costs for loading in Anchorage, including having a crane to pick
12 up the 20,000-gallon fuel tank and rebranding rolls of geotextile." Nevertheless, Mr.
13 Sherman offered merely \$65,000 for the additional freight/services, which Alaska
14 Logistics promptly rejected.

15 39. On June 1, 2017, Paul Charles, president of Newtok Village Council,
16 sent a letter to Alaska Logistics accepting Change Order #1 in full. Mr. Charles wrote,
17 "The Newtok Village Council is in agreement to pay the extra charges which totals
18 \$213,391.00 [sic] per your May 18, 2018 request." *See* Exhibit E (ECF No. 1-5).

19 ***Alaska Logistics Delivers Cargo***

20 40. Meanwhile, Alaska Logistics delivered and began unloading the cargo at
21 Mertarvik.
22
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1 41. Due to the differences in the actual cargo, Alaska Logistics was forced to
2 expend significantly more time and labor unloading the cargo. The mods in particular
3 delayed the offload by several days.

4 42. In addition, despite Goldstream's assurances that it would have fuel
5 tanks ready to receive the 10,000 gallons of fuel delivered by Alaska Logistics, NVC
6 and/or Goldstream was not capable of receiving the fuel at the time of delivery.
7 Consequently, Alaska Logistics was forced to leave its fuel tanks at Mertarvik so
8 Goldstream would have fuel to continue its construction operations.

9 ***NVC Fails to Provide Additional Compensation***

10 43. On June 19, 2017, Alaska Logistics submitted a second change order
11 ("Change Order #2) in the amount of \$9,755 for further adjustments for the
12 transportation services.

13 44. On June 29, 2017, Mr. Charles sent Alaska Logistics a letter requesting
14 additional documentation supporting the change orders. Nonetheless, Mr. Charles
15 stated that Newtok "acknowledges that additional freight costs have been incurred by
16 Alaska Logistics to transport our material and supplies to Mertarvik and we are in
17 agreement to pay the extra charges." See Exhibit F (ECF No. 1-6).

18 45. On September 28, 2017, Alaska Logistics provided NVC with additional
19 documentation supporting its change orders per NVC's request, including time records
20 of the Alaska Logistics employees who worked on the loading and unloading
21 operations. Alaska Logistics also provided updated invoices to NVC.

22 46. Despite NVC and/or Goldstream's express agreement to Change
23 Order #1, NVC and Goldstream's acknowledgment that Alaska Logistics is owed

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1 additional compensation, and Alaska Logistics' submission of additional documentation
2 supporting its change orders, Defendants have failed to provide any additional
3 compensation for the barge transportation services Alaska Logistics provided to NVC
4 and Goldstream.

5 **IV. FIRST CAUSE OF ACTION**

6 **(Breach of Contract Against Defendants)**

7 47. Plaintiff incorporates the statements above as if set forth in full.

8 48. Defendants breached the Contract by, among other actions:

9 a. Providing cargo that materially differed from the representations
10 set forth in the IFB and Addenda;

11 b. Providing cargo for shipment that did not consist of construction
12 materials & supplies; and

13 c. Failing to pay the amounts owing to Alaska Logistics under the
14 Contract; and

15 49. In addition, NVC expressly agreed to Change Order #1, which modified
16 the Contract, but failed to pay the amounts required under Change Order #1, as well as
17 amounts due under other change orders.

18 50. Defendants' actions constitute a breach of contract.

19 51. As a result of Defendants' actions, Plaintiff has sustained, and continues
20 to sustain, damages in an amount to be proven at trial.

21 **V. SECOND CAUSE OF ACTION**

22 **(Breach of Good Faith and Fair Dealing Against Defendants)**

23 52. Plaintiff incorporates the statements above as if set forth in full.

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1 53. There is implied in every contract, including the Agreement at issue in
2 this action, a covenant of good faith and fair dealing by all parties.

3 54. Defendants breached that implied covenant by, among other breaches,
4 providing cargo that materially differed from the representations set forth in the IFB and
5 Addenda and failing to pay the amounts owing to Alaska Logistics under the Contract
6 and change orders.

7 55. As a result of Defendants' breach, Plaintiff has sustained, and continues
8 to sustain, damages in an amount to be proven at trial.

9 **VI. THIRD CAUSE OF ACTION**

10 **(*Quantum Meruit* Against Defendants)**

11 56. Plaintiff incorporates the statements above as if set forth in full.

12 57. Defendants requested barge transportation services from Alaska
13 Logistics and agreed to pay Alaska Logistics for those services.

14 58. Alaska Logistics provided the services requested by Defendants in
15 reliance on their promises to compensate Alaska Logistics for that work. Accordingly,
16 Alaska Logistics is entitled to the reasonable value of the services Alaska Logistics
17 provided for which Defendants have not fully paid.

18 **VII. FOURTH CAUSE OF ACTION**

19 **(Misrepresentation Against NVC)**

20 59. Plaintiff incorporates the statements above as if set forth in full.

21 60. NVC made representations to Alaska Logistics concerning the quantity,
22 weight, dimensions, nature or character, and point of departure of the cargo for barge
23 transportation.

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1 61. NVC's statements were false at the time they were made and NVC knew
2 them to be false.

3 62. NVC either intentionally made the false statements for the purpose of
4 inducing Alaska Logistics to rely on those statements or NVC failed to exercise
5 reasonable care to ensure the truthfulness of the statements.

6 63. Because of NVC's intentional or negligent misrepresentations, Alaska
7 Logistics has sustained, and continues to sustain, damages in an amount to be proven at
8 trial.

9 **VIII. FIFTH CAUSE OF ACTION**

10 **(Misrepresentation Against Goldstream)**

11 64. Plaintiff incorporates the statements above as if set forth in full.

12 65. Goldstream made representations to Alaska Logistics concerning the
13 quantity, weight, dimensions, nature or character, and point of departure of the cargo for
14 barge transportation.

15 66. Goldstream's statements were false at the time they were made and
16 Goldstream knew them to be false.

17 67. Goldstream either intentionally made the false statements for the purpose
18 of inducing Alaska Logistics to rely on those statements or Goldstream failed to
19 exercise reasonable care to ensure the truthfulness of the statements.

20 68. Because of Goldstream's intentional or negligent misrepresentations,
21 Alaska Logistics has sustained, and continues to sustain, damages in an amount to be
22 proven at trial.

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IX. SIXTH CAUSE OF ACTION

(Unfair Trade Practices Against Defendants)

69. Plaintiff incorporates the statements above as if set forth in full.

70. Defendants made misrepresentations to Alaska Logistics concerning the quantity, weight, dimensions, nature or character, and point of departure of the cargo for barge transportation.

71. The fraudulent and/or misleading acts of Defendants constitute, in whole in or part, "unfair or deceptive practices," prohibited under AS 45.50.471 or common law.

72. The unfair and deceptive acts of Defendants entitle Alaska Logistics to punitive and exemplary damages, in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Alaska Logistics, LLC prays for the following:

1. That Newtok takes nothing by reason of its Counterclaims;
2. That Newtok's Counterclaims be dismissed with prejudice and in their entirety;
3. That Plaintiff be awarded the relief requested in its Complaint for Damages and Counterclaims to Counterclaims;
4. That Plaintiff be awarded its attorney's fees and costs; and
5. For such other relief as the Court deems just and equitable.

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1 Dated this 13th day of July, 2018.

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3 LE GROS, BUCHANAN & PAUL

4 By: s/Dustin C. Hamilton
5 DUSTIN C. HAMILTON, ABA
6 #1405024
7 Attorneys for Plaintiff Alaska Logistics,
8 LLC
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the Court, and serve it on all associated counsel.

I certify under penalty of perjury under the laws of the United States and State of Washington that the foregoing is true and correct.

s/Stephanie Gurney

Legal Assistant

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