

**ORIGINAL**

FILED  
COURT OF CLAIMS  
OF OHIO

2014 JUN 23 PM 3: 28

**IN THE COURT OF CLAIMS OF OHIO**

OHIO DEPARTMENT OF  
TRANSPORTATION,

Plaintiff/Counterclaim-Defendant,

v.

E.J. WARD, INC.,

Defendant/Counterclaim-Plaintiff.

Case No. 2014-00405-PR

**MOTION OF PLAINTIFF/COUNTERCLAIM-DEFENDANT  
TO AMEND ITS COMPLAINT**

Now comes the Plaintiff/Counterclaim-Defendant which moves to amend its complaint to allege damages it has incurred since originally filing its complaint – namely the hiring of a contractor to replace Defendant/Counterclaim-Plaintiff which was terminated.

Counsel for Defendant/Counterclaim-Plaintiff has no objection to this amendment. The amended complaint is attached to this Motion. Plaintiff/Counterclaim-Defendant moves that it be filed *instanter*.

Respectfully submitted,

MICHAEL DEWINE  
Ohio Attorney General



WILLIAM C. BECKER (0013476)  
RICHARD J. SILK, JR. (0074111)  
Ohio Attorney General's Office  
Assistant Attorneys General  
Court of Claims Defense  
150 E. Gay Street, 18<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-7447 FAX (614) 644-9185  
[william.becker@ohioattorneygeneral.gov](mailto:william.becker@ohioattorneygeneral.gov)  
[rick.silk@ohioattorneygeneral.gov](mailto:rick.silk@ohioattorneygeneral.gov)  
*Counsel for Plaintiff/Counterclaim-Defendant*

**ON COMPUTER**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion of Plaintiff/Counterclaim-Defendant  
to Amend Its Complaint was sent by regular U.S. Mail, postage prepaid, this <sup>23<sup>rd</sup></sup>~~20~~ day of June,  
2014, to:

Hansel H. Rhee  
John P. Gilligan  
Nicole R. Woods  
Ice Miller LLP  
250 West Street, Suite 700  
Columbus, Ohio 43215  
*Attorneys for Defendant E.J. Ward, Inc.*



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WILLIAM C. BECKER (0013476)  
Principal Assistant Attorney General



3. The DIRECTOR and ODOT relied on Defendant's representations as to the adequacy of the hardware and/or software and system design for the FUEL MANAGEMENT SYSTEM and, as a result ODOT paid Defendant \$2,130,243.84 of the \$6,048,809.00 contract price for the installation, including hardware and software.

4 The DIRECTOR on behalf of ODOT is entitled to recover the installment payments and to recover damages and costs incurred as a result of the breaches and failures of Defendant.

### **THE PARTIES**

5. Plaintiff, the DIRECTOR, pursuant to Ohio Revised Code Section 121.02(D) is the duly appointed Director of the Ohio Department of Transportation, a department of the State of Ohio. ODOT operates pursuant to relevant portions of Title 55 of the Ohio Revised Code, among others, and has its principal office in Columbus, Ohio.

6. Defendant E.J. Ward, Inc. is a Nevada Corporation and has its principal place of business in San Antonio, Texas. Its agent for the service of process is in care of Nevada Registered Agents, Registered Agent, 4600 Kietzke Ln., Ste. N254, Reno, NV 89502-500. E.J. Ward was engaged by ODOT to install, design and furnish hardware and software for the Fuel Management System.

### **JURISDICTION AND VENUE**

10. This Court has jurisdiction over Defendant under Ohio Revised Code Sections 2305.01 and 2307.382(A)(1) and (2), in that the Defendant transacted business and contracted to supply goods and perform services in the State of Ohio.

11. The Contract provides that the parties and terms of the contract are governed by the laws of Ohio. See page 4 of Contract, Exhibit B.

12. Venue is proper in Franklin County under Civ.R. 3(B)(3) and (6) and Ohio Revised Code Section 5513.01(A) because Defendant conducted activity in Franklin County and that the breach that gave rise to the instant Complaint, and all or part of the claims for relief pled in this Complaint arose in Franklin County.

### **COUNT I. BREACH OF CONTRACT**

13. The DIRECTOR and ODOT incorporate paragraphs 1 through 12 as though fully rewritten herein.

14. On or about June 25, 2012, the DIRECTOR issued a Request for Proposal (RFP) #509-12 for the installation of a Fuel Management System, including hardware and software. Exhibit A. The intent was to purchase a system to track fuel usage and assist in tracking the lifecycle and performance of ODOT's motor fleet; the system was to include the monitoring and management of fuel consumption, inventory tracking and audit/compliance monitoring.

15. In response to the RFP, Defendant E.J. Ward, Inc. submitted a bid on or about July 20, 2012, to implement a state wide fuel management system for ODOT and to provide the technology needed to complete the project. The original bid submitted by Defendant Ward was for approximately \$8,889,043.00. On August 10, 2012, E.J. Ward submitted a Best and Final offer to ODOT for RFP #509-12 in the amount of \$6,281,775.00 for the fuel management system, pursuant to the revised offer, and \$1,281,385.00 for a 1 year data plan. The final contract price was contingent on the results of the gap analysis, number of ODOT fueling sites and number of cars in ODOT's fleet. See Exhibit C.

16. E.J. Ward and ODOT entered into a written agreement on August 27, 2012, wherein Defendant agreed to design, install and deliver hardware and software for an Automated

Fuel Management System at over one hundred fifty (150) ODOT fuel locations throughout Ohio. A copy of said contract is attached as Exhibit A.

17. In September 2012, the contract price for the statewide fuel management system was determined to be \$6,048,809.00. See Exhibit D. In March 2013, the CONTRACT was amended as to the billing terms. See Exhibit E.

18. The installation of the system started sometime in the fall of 2012 and at a later date extensive issues in activating the sites to communicate with the ODOT wireless network became evident.

19. The problems with the installation issues and/or equipment continued and came to a head when a Ford F150 lost power while being operated by two ODOT employees. The two employees went left of center and were almost in an accident due to the loss of power by the truck.

20. As a result, ODOT terminated the contract for non-compliance with the contract terms on April 10, 2013 and rejected and/or revoked acceptance of the E.J. Ward equipment that has been installed at several ODOT locations around the state. See Exhibit F. The contract was terminated pursuant to contract provision Exhibit A, page 10, paragraph 28.

21. Defendant breached the CONTRACT by failing to properly design, install a Fuel System, including the sale of hardware and software that conformed to the intent, specifications and conditions prescribed by the DIRECTOR in the CONTRACT and RFP #509-12, and protect ODOT and Director from defective materials and installations.

22. The DIRECTOR and ODOT performed their obligations under the CONTRACT.

23. As a direct and proximate result of Defendant's breach of contract, the DIRECTOR and ODOT are entitled to recover the payments made to Defendant E.J. Ward in the

amount of \$2,130,243.84 as well as incidental and consequential damages, **including but not limited to the cost of a substitute vender.** In addition, Plaintiffs will incur additional costs to remove the non-compliant installation and materials in excess of \$25,000.

### COUNT II. BREACH OF EXPRESS WARRANTY

24. The DIRECTOR and ODOT incorporate by reference the allegations contained in paragraphs 1 through 23 above as though fully rewritten herein.

25. As part of the express provisions of the CONTRACT, Defendant agreed to correct system defects of the hardware and software for system malfunctions or functional deviations from the ODOT approved design. The RFP, Exhibit A, page 17 #9 expressly states:

Warranty – The contractor shall provide warranty coverage for both hardware and software system components for 1 year from the Statewide Implementation date. The Contractor must correct system defects (hardware & software), which are system malfunctions or functional deviations from ODOT approved system design. No requirements or design changes are involved in the correction of application defects. The Contractor must take corrective action and ensure that the system performs as designed. During the warranty period the contractor will provide toll-free telephone support for hardware and software 24/7 (24 hours a day/7 days a week). Warranty shall include system upgrades.

In response, the E.J. Ward proposal stated, that “its hardware and software will be free from defects in material and workmanship for a two (2) year period following delivery.”

The system installed by Defendants did not perform as designed and the defects were not corrected as warranted.

26. The CONTRACT contained a description of the goods which was made part of the basis of the bargain.

27. ODOT discovered defects to the system during the project installation and within the warranty period.

28. E.J. Ward was aware of the defects and refused to correct the defects in compliance with the contract and made representations that the hardware and software of the automated fuel management system as installed would work properly.

29. Despite repeated notices of defects that do not meet CONTRACT requirements, Defendant has refused to refund the monies paid and reclaim the hardware and software.

30. As a result of Defendant's breach of the expressed warranty, the DIRECTOR on behalf of ODOT is entitled to cancel the CONTRACT and recover the \$2,130,243.84 paid to E.J. Ward for the Automated Fuel Management System **as well as the cost of a substitute vendor.**

### **COUNT III. BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY**

31. The DIRECTOR and ODOT re-allege and incorporate by reference the allegations contained in paragraphs 1 through 30 above.

32. As a manufacturer and/or seller of the hardware and software for the automated fuel management system, Defendant E.J. Ward is a merchant of such goods.

33. The hardware and software failed to pass without objection in the trade under the contract description.

34. The hardware and software for the automated fuel management system was not fit for its ordinary purpose.

35. Defendant failed to provide an automated fuel management system that was merchantable and as a result Defendant breached an implied warranty of merchantability.

36. As a result of Defendant's breach of the implied warranty of merchantability, the DIRECTOR on behalf of ODT is entitled to cancel the CONTRACT and RECOVER the \$2,130,243,82 paid, its expenses incurred as well as incidental and consequential damages in excess of \$25,000 **including but not limited to the cost of a substitute vendor.**

**COUNT IV. BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE**

37. The DIRECTOR and ODOT re-allege and incorporate by reference the allegations contained in paragraphs 1 through 36 above.

38. Defendant E.J. Ward at the time of bidding and contracting had reason to know the particular purpose for which the automated fuel management system was required.

39. The DIRECTOR and ODOT relied on Defendant's skill and judgment to select or furnish hardware and software suitable for the installation of the automated fuel management system and Defendant knew of this reliance.

40. Defendant failed to provide hardware and software that was fit for its particular purpose and as a result Defendant breached an implied warranty that the automated fuel management system shall be fit for the particular purpose.

41. As a result of Defendant's breach of the implied warranty that the automated fuel management system shall be fit for a particular purpose, the DIRECTOR on behalf of ODOT is entitled to cancel the CONTRACT and recover the \$2,130,243.84 paid for the fuel management system, its expenses incurred as well as incidental and consequential damages in excess of \$25,000 **including but not limited to the cost of a substitute vendor.**

### COUNT V. UNJUST ENRICHMENT

42. The DIRECTOR and ODOT re-allege and incorporate by reference the allegations contained in paragraphs 1 through 41 above.

43. Defendant has been unjustly enriched to the detriment of the DIRECTOR and ODOT by accepting a benefit in the form of payments for an Automated Fuel Management System that did not work properly and performed in a deficient manner.

44. The Defendant had knowledge of the benefit it received.

45. The retention of the benefit under these circumstances would be unjust.

46. As a direct and proximate result of the unjust enrichment by Defendant, the DIRECTOR on behalf of ODOT is entitled to recover the \$2,130,243.84 paid to E.J. Ward as well as the cost of a substitute vendor.

### PRAYER FOR RELIEF

WHEREFORE, the DIRECTOR requests that this Court enter judgment in his favor on behalf of ODOT and against Defendant as follows:

1. Enter judgment for the DIRECTOR and ODOT on each count of the Complaint;

2. Award the DIRECTOR on behalf of ODOT restitution of the \$2,130,243.84 paid for the Automated Fuel Management System and/or its fair and reasonable damages in excess of \$25,000; **as well as the cost of securing a substitute vendor which exceeds \$1,000,000.00.**

3. Award the DIRECTOR on behalf of ODOT prejudgment and post-judgment interest;

4. Award the DIRECTOR on behalf of ODOT its attorney's fees and costs;

5. Award the DIRECTOR on behalf of ODOT such further relief as may be just and proper.

Respectfully submitted,

MICHAEL DEWINE  
Attorney General of Ohio

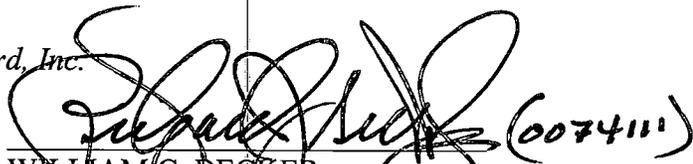


WILLIAM C. BECKER (0013476)  
RICHARD J. SILK, JR. (0074111)  
Principal Assistant Attorney General  
Court of Claims Defense  
150 East Gay Street, 18th Floor  
Columbus, OH 43215-3130  
Phone (614) 466-7447

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Amended Complaint was sent by regular U.S. mail, postage prepaid, this 23<sup>rd</sup> day of June, 2014 to:

Hansel H. Rhee  
John P. Gilligan  
Nicole R. Woods  
Ice Miller LLP  
250 West Street, Suite 700  
Columbus, Ohio 43215  
*Attorneys for Defendant E.J. Ward, Inc.*



WILLIAM C. BECKER  
Principal Assistant Attorney General