

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN  
MILWAUKEE DIVISION**

**NORTH AMERICAN MECHANICAL, INC.,** )  
4401 Hwy 19 )  
Windsor, Wisconsin 53598 )

Plaintiff, )

v. )

**WALSH CONSTRUCTION COMPANY II, LLC,** )  
929 West Adams Street )  
Chicago, IL 60607 )  
c/o CSC-Lawyers Incorporating Service Company )  
8040 Excelsior Drive, Suite 400 )  
Madison, Wisconsin 53717 )

Defendant. )

CASE NO. \_\_\_\_\_

**COMPLAINT**

North American Mechanical, Inc., (hereinafter “North American”), by and through undersigned counsel, files this Complaint against Walsh Construction Company II, LLC (hereinafter “WCC”) and shows the Court as follows:

**PARTIES**

1. Plaintiff North American is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 4401 Hwy 19 Windsor, WI 53598. North American is a citizen of Wisconsin and Delaware.

2. Defendant WCC is a Limited Liability Company, organized and existing under the laws of the State of Illinois, having its principal place of business at 929 West Adams Street, Chicago, Illinois 60607. WCC is a citizen of Illinois. WCC is authorized to conduct business in

the State of Wisconsin and may be served through its registered agent CSC-Lawyers Incorporating Service Company, 8040 Excelsior Drive, Suite 400, Madison, Wisconsin 53717.

### **JURISDICTION AND VENUE**

3. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332 because the matter in controversy exceeds in value \$75,000, exclusive of interest and costs and is between citizens of different States.

4. Venue in this Court is proper under 28 U.S.C. § 1391 because the construction project giving rise to the claim is located in Walworth County, Wisconsin.

5. All conditions precedent to the filing of this action have been performed, excused, or waived. Plaintiff demands trial by jury.

### **THE PROJECT AND SUBCONTRACT**

6. This action arises from a construction project known as the Mercy Walworth Hospital and Medical Center Expansion (the "Project") in Lake Geneva, Walworth County, Wisconsin. WCC was the general contractor for the Project.

7. On June 24, 2010, WCC entered into a Subcontract Agreement (the "Subcontract") with North American to install the Fuel Oil, HVAC, Mechanical Piping Package, Plumbing and Medical Gas Systems for the Project. (Relevant portions of the Subcontract are attached hereto as Exhibit A.)

8. The agreed price for North American's work under the Subcontract was \$3,996,000, subject to adjustment for changes, additional work and other factors.

9. North American began work on the Project on June 11, 2010.

**NORTH AMERICAN’S CLAIMS FOR ADDITIONAL AND CHANGED WORK**

10. Under the Subcontract, North American is entitled to a time extension in which to perform its work and to an adjustment in the Subcontract price for additional or change order work that it was directed or required to perform by WCC.

11. Upon requesting changed work, WCC was required by the Subcontract to issue a Change Order to North American.

12. At a minimum, the Subcontract obligated WCC to pay North American for changed work on a time and materials basis in “an amount equal to the direct cost of labor and materials actually and reasonably used to perform such change [W]ork, plus mark up for overhead and profit as allowed in the Contract Documents (15% maximum if not specified).”

13. During the course of North American’s performance of its work WCC directed and required North American to perform a substantial amount of work that was outside of the scope of the Subcontract ("Changed Work").

14. North American submitted proper and timely invoices for its Changed Work ordered by WCC during the Project, including, for example, the following changes and additions:

<b><u>Description of Changed Work</u></b>	<b><u>Cost</u></b>
▪ 1 <sup>st</sup> Floor BIM Coordination Costs	\$142,773.65
▪ PR-7	159,809.61
▪ Boiler Storage for Dec. and Jan.	1,097.72
▪ 2 <sup>nd</sup> Floor BIM	122,962.50
▪ Boiler Storage and Transfer	4,163.40
▪ LL BIM	208,342.82
▪ B Area BIM	256,819.38
▪ Deck Deflection	1,465.78
▪ MCU Filters	173.35
▪ BIM Plumbing PR Deductions	(22,378.12)
▪ Walsh Forklift and Bobcat Use	9,187.33
▪ Area B Temp. Boiler and Scanner T & M	3,946.95
▪ Kitchen PRV T and M	487.59

▪ A Boilerroom Demo	1,504.35
▪ PR-20R	74,574.22
▪ AHU-3 Riser Fire-Smoke Damper T & M	4,831.82
▪ 1B215 Corridor Ceiling Fire Dampers	2,457.11
▪ MRI Duct Re-route T & M	1,892.13
▪ MRI Ceiling and Duct Demo T &M	1,594.05
▪ B Boilerroom Gas Pipe Demo T & M	898.11
▪ A Section Sink Removal & Replacement	26,427.70
▪ 1B202 Staff Toilet T & M	3,778.58
▪ Relocated MRI Zone Valve's T & M	3,383.01
▪ 2-16 and 2-17-12 OT	2,161.30
▪ 1B204 Fire Dampers/Access Panels	1,395.30
▪ PR-21	547.24
▪ 1B169 MRI Med Gas Panel Relocation T & M	433.11
▪ Area B Grid Line Discrepancy	5,565.74
▪ Plumbing Area A Slab Imaging	985.94
▪ RFI P-91 Mixing Valve	2,783.19
▪ 2-24 2-25-12 OT	3,793.32
▪ AHU-3 Heating Coil Drain Pan	665.69
▪ Nursery Humidifier Water Damage	2,511.51
▪ Loose Set Floor Lab Sink	139.37
▪ Additional Lab Faucet	1,792.61
▪ 1B170 Ice Maker	1,214.23
▪ Owner Supplied Air Compressor Drip Leg	320.01
▪ EF-35 Sound Insulation	975.10
▪ A Basebord Grilles	3,056.64
▪ PR-23	870.55
▪ Area A South Storm Piping T & M	2,067.61
▪ Pharmacy Return Duct T & M	1,001.00
▪ Owner Request Med Air Outlets	1,060.01
▪ 0A150 Floor Cleanout T & M	745.87
▪ A Existing Grille Replacement	442.39
▪ Area A Med Gas Oxy Outlet Replacement	2,559.56
▪ PR-24	8,658.10
▪ PACU Vac. Outlets	4,727.22
▪ RFI P-99 Added Lav. Carrier	430.79
▪ Added Oxygen Valve in 0C167	2,821.26

15. To date, WCC has failed to pay for the Changed Work that North American performed on the Project.

**NORTH AMERICAN'S CLAIMS FOR INEFFICIENCY AND ACCELERATION**

16. The Subcontract incorporated a Project schedule that included a construction start date of May 3, 2010 and a finish date of November 7, 2011.

17. North American was required to perform its work based on the Subcontract and those documents included in the Subcontract.

18. Subsequent to the Parties' execution of the Subcontract, North American submitted, and WCC reviewed and approved, North American's Work schedule.

19. North American reasonably expected to be able to perform its Work pursuant to the Subcontract schedule for the Project.

20. WCC had an obligation to coordinate and manage its subcontractors and work activities on the Project consistent with the requirements of the Subcontract documents and in a manner so as not to interfere with North American's performance.

21. The Subcontract required WCC to act in good faith in allowing subcontractors site access and access to work areas, utilities, storage space, and other characteristics of the Project site and work ("Site Resources") to North American and other subcontractors on the Project. (Exh. A, ¶ 5.1)

22. The Subcontract stated that if North American's work was delayed, hindered or interfered with through no fault of North American, WCC was required to either extend the time of North American's performance of its work or order North American to accelerate its work with additional labor and materials.

23. During the course of the Project, WCC required North American to proceed with work that was not in accordance with the Subcontract schedule and in an unreasonable manner.

24. WCC required North American to perform work out-of-sequence despite having received notice from North American that such work either could not be performed efficiently or not performed at all due to incomplete work by other Project subcontractors. WCC was aware that its insistence that North American perform its Work out-of-sequence and inefficiently would

result in North American incurring additional Project costs and expenses, nevertheless, WCC required North American to proceed with work in such a manner.

25. As a result of WCC's directions to North American and lack of proper project management and coordination of work, North American also incurred costs arising from schedule compression, demobilization and remobilization of its workforce, stacking of trades, restricted access to work areas, and inefficient delivery of HVAC and plumbing services.

26. North American requested time extensions as a result of these impacts, but WCC refused to grant those extensions despite its obligation to do so in the Subcontract. This in turn caused North American to incur further costs and expenses.

27. An example of this is depicted in a June 8, 2011 letter from North American to WCC, which explained that a proposed schedule issued by WCC was incomplete and did not permit a reasonable period of time for North American to perform its Work. A copy of the June 8, 2011 letter is attached hereto as Exhibit B.

28. On August 18, 2011, North American emailed WCC's Project Manager explaining that WCC's proposed C&D Building Completion schedule contained false assumptions regarding the completion of work by other Project contractors and hindered North American's ability to perform its Work. A copy of the August 18, 2011 email is attached hereto as Exhibit C.

29. In response to a subsequent February 16, 2012 email from North American concerning contractor congestion and delays on the Project, WCC admitted "at this point everyone is behind schedule." A copy of the February 16, 2012 email is attached hereto as Exhibit D.

30. WCC ignored multiple requests by North American for extensions of time to complete its Work and required North American to accelerate its Work to meet an unreasonable

Project schedule. WCC also refused to compensate North American for impacted work, despite requests from North American.

### **COUNT I - BREACH OF CONTRACT**

31. North American incorporates herein by reference all of the allegations contained in Paragraphs 1 through 30 of this Complaint and reaffirms and realleges same as if set forth in full herein.

32. On multiple occasions during the Project, WCC ordered North American to perform Work outside of its original scope of Work without compensating North American for the Changed Work or issuing a Change Order.

33. North American performed Changed Work at the direction of WCC during the course of the Project and timely submitted requests for payment pursuant to the Subcontract.

34. North American and its counsel have made repeated written requests to WCC to address WCC's non-payment for the Changed Work without success. Copies of these requests are attached hereto as Exhibits E, F and G. WCC failed to even respond to North American's counsel's letters.

35. WCC materially breached the Subcontract by failing and refusing to compensate North American for Changed Work requested by WCC and itemized in Paragraph 14 herein which presently totals over \$1,000,000.

36. WCC further materially breached the Subcontract by precluding North American from proceeding with its Work as planned (without compensating North American therefor) because of, among other things: failing to competently manage and coordinate the Project schedule, failing to competently manage and coordinate other subcontractors on the Project, and preventing North American from completing its work consistent with the Subcontract terms.

37. WCC also breached the Subcontract by refusing to grant North American's repeated requests for extensions of time to complete its Work.

38. As an experienced general contractor, WCC knew that without ease of access to the Project site and coordination of all of its subcontractors, North American's Work would be delayed, hindered and interfered with through no fault of North American.

39. WCC repeatedly disregarded such knowledge and unnecessarily ordered North American to perform its Work out-of-sequence from the manner in which HVAC and plumbing work is typically performed.

40. On multiple occasions, WCC ignored written correspondence from North American about the scheduling and coordination of its Work and denied North American's requests for reasonable extensions of time to perform such Work.

41. In some instances during the Project, WCC exacerbated the problems caused by its schedule management deficiencies by requiring North American to accelerate its Work with additional labor and materials.

42. WCC's actions and, specifically, its sequencing orders to North American were unnecessary in themselves and were detrimental to North American's ability to efficiently perform its Work.

43. WCC breached its Subcontract duty to North American to allocate site resources in good faith and in doing so hampered North American's progress and drastically increased its labor costs beyond those contemplated in the Subcontract.

44. WCC's breach of its Subcontract caused North American to incur additional labor, material, and equipment costs and extended job site costs for impacts, delays and disruptions for which it has not been compensated in an amount of at least \$1,800,000.



45. North American is legally and contractually entitled to recover its additional costs from WCC as a result of WCC's material breach of the Subcontract.

46. North American is also entitled to an extension to its contract performance period.

47. All conditions precedent to North American's right to recover the aforesaid sums from WCC have occurred, or have been performed, waived, satisfied or otherwise excused by the conduct of WCC.

### **COUNT II – QUANTUM MERUIT**

48. North American incorporates herein by reference all of the allegations contained in Paragraphs 1 through 30 of this Complaint and reaffirms and realleges same as if set forth in full herein.

49. North American at the request or acquiescence, or insistence of WCC, provided Changed Work, and performed Subcontract Work under burdensome and disruptive conditions, all of which caused North American's Work to be more expensive and its costs to be greater than they should have been, all of which benefited WCC.

50. WCC had appreciation and knowledge of North American's Changed Work and Subcontract Work and accepted same knowing that North American expected to be paid.

51. WCC received and accepted those benefits from North American under circumstances such that it would be unfair, unjust, and inequitable to allow WCC to retain those benefits without compensating North American for the full value of those benefits.

52. Despite repeated demands, North American has not received full value from WCC for those benefits.

53. As a direct and proximate result of WCC's failure to pay for North American's Work and Changed Work on the Project, North American has suffered monetary damages.

54. North American is entitled in equity to recover from WCC damages equal to the reasonable value of the services rendered and materials supplied for the Project, the amount of which to be proved at trial, together with applicable costs and interest.

55. All conditions precedent to North American's right to recover the aforesaid sums from WCC have occurred, or have been performed, waived, satisfied or otherwise excused by the conduct of WCC.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

a. Judgment against WCC for damages in breach of the Subcontract, including outstanding payment applications for Changed Work totaling at least \$1,000,000, additional labor, material, and equipment costs and extended job site costs of at least \$1,800,000, pre- and post-judgment interest, costs, and such other and further relief as the Court deems just and proper under the circumstances; and

b. Judgment against WCC for damages in quantum meruit, including all amounts unpaid that have been submitted in North American's payment applications, pre and post judgment interest, costs, and such other and further relief as the Court deems just and proper under the circumstances.

**TRIAL BY JURY**

Plaintiff demands a trial by jury.

Respectfully submitted this 12<sup>th</sup> day of June, 2012.

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