

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

HOONAH INDIAN ASSOCIATION

Plaintiff,

v.

CITY OF HOONAH,

Defendant.

Case No. 1JU-17-980 CI

ANSWER TO COMPLAINT

The City of Hoonah (the “City”), through counsel, Simpson, Tillinghast, Sorensen & Sheehan, P.C., hereby answers Hoonah Indian Association’s (“HIA”) complaint (the “Complaint”) filed in Case No. 1JU-17-980 CI. Except as hereinafter expressly admitted, the City specifically denies each and every allegation, statement, matter and thing contained in the Complaint.

ANSWER TO THE COMPLAINT

1. Admit on information and belief the allegations in Paragraph 1 of the Complaint.
2. Admit the allegations in Paragraph 2 of the Complaint.
3. Admit the allegations in Paragraph 3 of the Complaint.
4. Admit that HIA is the federally recognized tribal government in Hoonah, Alaska.

Admit that the City and HIA entered into the Cooperative Project Agreement (the “Agreement”), and that the City hired HIA as primary/general contractor for the Hoonah Tunnel Bluffs Project (the “Project”) because, among other considerations, HIA hired subcontractors – Channel Construction, Inc. (“Channel”) and R&M Engineering, Inc. (“R&M”) – with experience on projects of similar size and scope. Admit that the purpose of the Project was to remedy hazardous conditions on Cannery Road, Hoonah, Alaska. Deny the remaining allegations in Paragraph 4.

5. Admit that as the owner of the Project, the City was engaged in the Project. Admit that the City Council and Mayor received briefings on the Project from HIA and its subcontractors. Admit that HIA requested that the design of the Project be amended and a percentage of the work regarding blasting and extracting rock be deleted from the Project, and the City agreed to this request. Admit that HIA’s subcontractor R&M provided the City with a drawing showing an amended design of the Project and a percentage of the work regarding blasting and extracting rock was deleted from the Project. Admit that the amended design and deletion reduced the size and scope of work on the Project. Admit that HIA did not submit and

1 the City did not approve any change order or written amendment to the Agreement regarding an
2 increase in cost associated with this amended design or deletion of work on the Project. Admit
3 that HIA and its subcontractor Channel failed to follow the amended Project design by blasting
4 and extracting more rock than described in the amended Project design and blasting and extracting
5 a large amount of rock outside the amended Project boundaries. Deny the remaining allegations
6 in Paragraph 5 of the Complaint.

7 6. Admit that the City paid HIA upon receipt of invoices during Phase I of the Project.
8 Deny the remaining allegations in Paragraph 6 of the Complaint.

9 7. Admit that during the Project, HIA decided to store blasted and extracted rock
10 from the Project on real property in Hoonah. Admit that HIA and its subcontractor Channel failed
11 to follow the amended Project design by blasting and extracting more rock than described in the
12 amended Project design and blasting and extracting a large amount of rock outside the amended
13 Project boundaries. Admit that HIA has demanded payment for storage of blasted and extracted
14 rock from the Project. Deny the remaining allegations in Paragraph 7 of the Complaint.

15 8. Deny the allegations in Paragraph 8 of the Complaint.

16 9. Admit that the City and HIA entered into the Agreement, and that the City hired
17 HIA as primary/general contractor for the Project. Admit that the purpose of the Project was to
18 remedy hazardous conditions on Cannery Road. Without sufficient information to form a belief
19 as to the truth or falsity of remaining allegation in Paragraph 9 of the Complaint, and therefore
20 deny the same.

21 10. Admit that cultural issues were considered, among other considerations, in the
22 City's decision to hire HIA as primary/general contractor for the Project. Admit that a "License
23 Agreement" was executed by Huna Totem Corporation ("HTC"), the City and HIA regarding
24 HIA's and its subcontractors' access to the Project. Without sufficient information to form a
25 belief as to the truth or falsity of remaining allegations in Paragraph 10 of the Complaint, and
26 therefore deny the same.

11. Admit that the purpose of the Project was to remedy hazardous conditions on
Cannery Road. Without sufficient information to form a belief as to the truth or falsity of
remaining allegations in Paragraph 11 of the Complaint, and therefore deny the same.

12. Admit that HIA as primary/general contractor hired subcontractor R&M to work
on the Project. Admit that the City Council and Mayor received briefings on the Project from

1 HIA and its subcontractors. Admit that head tax money was used to pay for part of the Project.
2 Without sufficient information to form a belief as to the truth or falsity of the remaining
3 allegations in Paragraph 12 of the Complaint, and therefore deny the same.

4 13. Admit that HIA and its subcontractor R&M drafted drawings and plans regarding
5 the Project, which were approved by the City. Without sufficient information to form a belief as
6 to the truth or falsity of the remaining allegation in Paragraph 13 of the Complaint, and therefore
7 deny the same.

8 14. Admit that on January 8, 2015 the City voted to start the Project with HIA as
9 primary/general contractor for the Project. Deny the remaining allegations in Paragraph 14 of the
10 Complaint.

11 15. Admit the allegations in Paragraph 15 of the Complaint.

12 16. Admit that the Agreement describes the cultural issues regarding the Project, and
13 that cultural issues were considered, among other considerations, in the City's decision to hire
14 HIA as primary/general contractor for the Project. Admit that the Agreement speaks for itself.
15 Deny the remaining allegations in Paragraph 16 of the Complaint.

16 17. Deny the allegations in Paragraph 17 of the Complaint.

17 18. Admit on information and belief the allegations in Paragraph 18 of the Complaint.

18 19. Deny the allegations in Paragraph 19 of the Complaint.

19 20. Deny the allegations in Paragraph 20 of the Complaint.

20 21. Admit that HIA requested that the design of the Project be amended and a
21 percentage of the work regarding blasting and extracting rock be deleted from the Project, and
22 the City agreed to this request. Admit that HIA's subcontractor R&M provided the City with a
23 drawing showing an amended design of the Project and a percentage of the work regarding
24 blasting and extracting rock was deleted from the Project. Admit that the amended design and
25 deletion reduced the size and scope of work on the Project. Admit that HIA did not submit and
26 the City did not approve any change order or written amendment to the Agreement regarding an
increase in cost associated with this amended design or deletion of work on the Project. Admit
that HIA and its subcontractor Channel failed to follow the amended Project design by blasting
and extracting more rock than described in the amended Project design and blasting and extracting
a large amount of rock outside the amended Project boundaries. Deny the remaining allegations
in Paragraph 21 of the Complaint.

1 22. Admit that during a March 2, 2015 special meeting of the City Council the Project
2 and funds for the Project were discussed. Deny the remaining allegations in Paragraph 22 of the
3 Complaint.

4 23. Admit that HIA requested that the design of the Project be amended and a
5 percentage of the work regarding blasting and extracting rock be deleted from the Project, and
6 the City agreed to this request. Admit that HIA's subcontractor R&M provided the City with a
7 drawing showing an amended design of the Project and a percentage of the work regarding
8 blasting and extracting rock was deleted from the Project. Admit that the amended design and
9 deletion reduced the size and scope of work on the Project. Admit that HIA did not submit and
10 the City did not approve any change order or written amendment to the Agreement regarding an
11 increase in cost associated with this amended design or deletion of work on the Project. Admit
12 that HIA and its subcontractor Channel failed to follow the amended Project design by blasting
13 and extracting more rock than described in the amended Project design and blasting and extracting
14 a large amount of rock outside the amended Project boundaries. Deny the remaining allegations
15 in Paragraph 23 of the Complaint.

16 24. Admit that from February to May 2015, HIA breached the terms and conditions of
17 the Project, the Agreement and a License Agreement (that had been executed by HTC, the City
18 and HIA regarding HIA's and its subcontractors' access to the Project). Admit that HIA's
19 breaches included, but were not limited to, failure to have a construction bond, failure to properly
20 manage the Project, failure to maintain one lane of traffic on Cannery Road during non-blasting
21 times, failure to adequately protect historical and cultural memorials, failure to stop aggregate
22 from being blasted into marine waters, and failure to complete the work and vacate the Project as
23 agreed to. Without sufficient information to form a belief as to the truth or falsity of the remaining
24 allegation in Paragraph 24 of the Complaint, and therefore deny the same.

25 25. Admit that in May 2015, HTC terminated the License Agreement because of
26 HIA's breaches. Admit that Project was suspended in May 2015 because of HIA's breaches and
the tourism season. Deny the remaining allegations in Paragraph 25.

27 26. Admit that in August and September 2015, when HTC realized that HIA was
mobilizing construction equipment to restart the Project, HTC again advised HIA that the License
Agreement was terminated. Admit that HTC advised the City and HIA that if HIA crossed HTC's
land to complete work on the Project, HTC would file a lawsuit against HIA for trespass. Admit

1 that in an effort to get the Project completed, the City was forced to negotiate, on behalf of HIA,
2 the reinstatement of the License Agreement with HTC. Admit that the City incurred considerable
3 costs and strife from HTC, the City's partner in other ventures, because of HIA's breaches. Deny
4 the remaining allegations in Paragraph 26 of the Complaint.

5 27. Admit that on November 25, 2015 HIA and the City executed the First Addendum
6 to the Agreement, which amended the time frame of the Project. Deny the remaining allegations
7 in paragraph 27 of the Complaint.

8 28. Deny the allegations in Paragraph 28 of the Complaint.

9 29. Admit that during the Project, HIA decided to store blasted and extracted rock
10 from the Project on real property in Hoonah. Admit that HIA and its subcontractor Channel failed
11 to follow the amended Project design by blasting and extracting more rock than described in the
12 amended Project design and blasting and extracting a large amount of rock outside the amended
13 Project boundaries. Admit that on or about June 1, 2016, HIA demanded payment for storage of
14 blasted and extracted rock from the Project. Deny the remaining allegations in Paragraph 29 of
15 the Complaint.

16 30. Deny the allegations in Paragraph 30 of the Complaint.

17 31. Admit that on or about August 31, 2016, HIA demanded payment for storage of
18 blasted and extracted rock from the Project. Deny the remaining allegations in Paragraph 31 of
19 the Complaint.

20 32. Deny the allegations in Paragraph 32 of the Complaint.

21 33. Deny the allegations in Paragraph 33 of the Complaint.

22 34. Deny the allegations in Paragraph 34 of the Complaint.

23 35. Deny the allegations in Paragraph 35 of the Complaint.

24 36. Admit that HIA requested that the design of the Project be amended and a
25 percentage of the work regarding blasting and extracting rock be deleted from the Project, and
26 the City agreed to this request. Admit that HIA's subcontractor R&M provided the City with a
drawing showing an amended design of the Project and a percentage of the work regarding
blasting and extracting rock was deleted from the Project. Admit that the amended design and
deletion reduced the size and scope of work on the Project. Admit that HIA did not submit and
the City did not approve any change order or written amendment to the Agreement regarding an
increase in cost associated with this amended design or deletion of work on the Project. Admit

1 that HIA and its subcontractor Channel failed to follow the amended Project design by blasting
2 and extracting more rock than described in the amended Project design and blasting and extracting
3 a large amount of rock outside the amended Project boundaries. Admit that in June 2015, the
4 United States Corps of Engineers advised the City that because HIA had blasted rock into marine
5 waters, the Project was in violation of federal law. Admit that the City was forced to negotiate
6 resolution of HIA's violation. Admit that in December 2015, the United States Environmental
7 Protection Agency ("EPA") agreed to take over prosecution of HIA's violation. Admit that the
8 City incurred considerable costs to deal with and negotiate resolution of HIA's violation. Without
9 sufficient information to form a belief as to the truth or falsity of the remaining allegations in
10 Paragraph 36 of the Complaint, and therefore deny the same.

11 37. Admit that HIA has demanded payment, and that the City has advised HIA and its
12 subcontractors and employees that their negligent work on the Project has caused additional costs
13 to the City. Admit that the City has been advised that several problems with the Project caused
14 by HIA and its subcontractors and employees remain unresolved and more work will be necessary
15 to fix the problems. Admit that HIA provided no answer to the City regarding how HIA planned
16 to resolve additional costs to the City and resolve the problems and finish the Project; therefore,
17 the City terminated HIA's and its subcontractors' work on Project. Admit that HIA's
18 communications have been limited to payment demands to the City, without a clear explanation
19 why HIA is owed money. Admit that HIA and the City agreed to the cost of the Project, and no
20 party agreed that more funds would be spent on the Project. Deny the remaining allegations in
21 Paragraph 37 of the Complaint.

22 38. Deny the allegations in Paragraph 38 of the Complaint.

23 39. Admit that during the Project, HIA decided to store blasted and extracted rock
24 from the Project on real property in Hoonah. Admit that the City owns the blasted and extracted
25 rock from the Project. Admit that HIA and its subcontractor Channel failed to follow the amended
26 Project design by blasting and extracting more rock than described in the amended Project design
and blasting and extracting a large amount of rock outside the amended Project boundaries.
Admit that HIA has demanded payment for storage of blasted and extracted rock from the Project.
Deny the remaining allegations in Paragraph 39 of the Complaint.

40. Without sufficient information to form a belief as to the truth or falsity of any
allegation in Paragraph 40 of the Complaint, and therefore denies the same.

41. Deny the allegations in Paragraph 41 of the Complaint.

42. Admit that during the Project, HIA decided to store blasted and extracted rock from the Project on real property in Hoonah. Admit that the City owns the blasted and extracted rock from the Project. Admit that HIA and its subcontractor Channel failed to follow the amended Project design by blasting and extracting more rock than described in the amended Project design and blasting and extracting a large amount of rock outside the amended Project boundaries. Admit that HIA has demanded payment for storage of blasted and extracted rock from the Project. Deny the remaining allegations in Paragraph 42 of the Complaint.

43. The City re-denies and incorporates the denials in Paragraphs 1 – 42 of this Answer.

44. Admit that the City and HIA entered into the Agreement, and that the City hired HIA as primary/general contractor for the Project. Deny the remaining allegations in Paragraph 44.

45. Admit that HIA requested that the design of the Project be amended and a percentage of the work regarding blasting and extracting rock be deleted from the Project, and the City agreed to this request. Admit that HIA's subcontractor R&M provided the City with a drawing showing an amended design of the Project and a percentage of the work regarding blasting and extracting rock was deleted from the Project. Admit that the amended design and deletion reduced the size and scope of work on the Project. Admit that HIA did not submit and the City did not approve any change order or written amendment to the Agreement regarding an increase in cost associated with this amended design or deletion of work on the Project. Admit that HIA and its subcontractor Channel failed to follow the amended Project design by blasting and extracting more rock than described in the amended Project design and blasting and extracting a large amount of rock outside the amended Project boundaries. Deny the remaining allegations in Paragraph 45 of the Complaint.

46. Deny the allegations in Paragraph 46 of the Complaint.

47. Deny the allegations in Paragraph 47 of the Complaint.

48. The City re-denies and incorporates the denials in Paragraphs 1 – 47 of this Answer.

49. Admit that HIA requested that the design of the Project be amended and a percentage of the work regarding blasting and extracting rock be deleted from the Project, and

1 the City agreed to this request. Admit that HIA's subcontractor R&M provided the City with a
2 drawing showing an amended design of the Project and a percentage of the work regarding
3 blasting and extracting rock was deleted from the Project. Admit that the amended design and
4 deletion reduced the size and scope of work on the Project. Admit that HIA did not submit and
5 the City did not approve any change order or written amendment to the Agreement regarding an
6 increase in cost associated with this amended design or deletion of work on the Project. Admit
7 that HIA and its subcontractor Channel failed to follow the amended Project design by blasting
8 and extracting more rock than described in the amended Project design and blasting and extracting
9 a large amount of rock outside the amended Project boundaries. Deny the remaining allegations
10 in Paragraph 49 of the Complaint.

11 50. Deny the allegations in Paragraph 50 of the Complaint.

12 51. Deny the allegations in Paragraph 51 of the Complaint.

13 52. The City re-denies and incorporates the denials in Paragraphs 1 – 51 of this
14 Answer.

15 53. Admit that during the Project, HIA decided to store blasted and extracted rock
16 from the Project on real property in Hoonah. Admit that the City owns the blasted and extracted
17 rock from the Project. Admit that HIA and its subcontractor Channel failed to follow the amended
18 Project design by blasting and extracting more rock than described in the amended Project design
19 and blasting and extracting a large amount of rock outside the amended Project boundaries.
20 Admit that HIA has demanded payment for storage of blasted and extracted rock from the Project.
21 Deny the remaining allegations in Paragraph 53 of the Complaint.

22 54. Deny the allegations in Paragraph 54 of the Complaint.

23 55. Deny the allegations in Paragraph 55 of the Complaint.

24 56. Deny the allegations in Paragraph 56 of the Complaint.

25 57. Deny the allegations in Paragraph 57 of the Complaint.

26 58. The City re-denies and incorporates the denials in Paragraphs 1 – 57 of this
Answer.

59. Admit that during the Project, HIA decided to store blasted and extracted rock
from the Project on real property in Hoonah. Admit that the City owns the blasted and extracted
rock from the Project. Admit that HIA and its subcontractor Channel failed to follow the amended
Project design by blasting and extracting more rock than described in the amended Project design

1 and blasting and extracting a large amount of rock outside the amended Project boundaries.
2 Admit that HIA has demanded payment for storage of blasted and extracted rock from the Project.
3 Deny the remaining allegations in Paragraph 59 of the Complaint.

4 60. Admit that HIA demanded payment for storage of blasted and extracted rock from
5 the Project. Deny the remaining allegations in Paragraph 60 of the Complaint.

6 61. Admit that during the Project, HIA decided to store blasted and extracted rock
7 from the Project on real property in Hoonah. Deny the remaining allegations in Paragraph 61 of
8 the Complaint.

9 62. Deny the allegations in Paragraph 62 of the Complaint.

10 **AFFIRMATIVE DEFENSES TO THE COMPLAINT**

11 The City asserts these affirmative defenses based upon information presently available
12 and in order to avoid waiver. The City reserves the right to withdraw any of these affirmative
13 defenses or to assert additional affirmative defenses as further information becomes available.

14 Further answering the Complaint, and as a first, separate and affirmative defense thereto,
15 the City repeats, realleges and incorporates by reference herein each and every answer contained
16 in the introduction and Paragraphs 1 – 62.

17 **FIRST AFFIRMATIVE DEFENSE**

18 The Complaint fails to state a claim upon which relief can be granted.

19 **SECOND AFFIRMATIVE DEFENSE**

20 HIA is estopped from asserting a claim because of HIA's or another person or entities
21 own acts, omissions, and conduct.

22 **THIRD AFFIRMATIVE DEFENSE**

23 Any claim by HIA against the City is barred by the doctrine of accord and satisfaction
24 insofar as the City has complied with all its duties under the law and agreement with HIA.

25 **FOURTH AFFIRMATIVE DEFENSE**

26 HIA failed to repair and replace defective work resulting in the City incurring additional
costs for completion and correction of the HIA's work. Therefore, if found liable, the City claims
a set-off against any damages owed HIA.

FIFTH AFFIRMATIVE DEFENSE

HIA is barred from claiming or recovering any damages or other relief because the City
has no privity and is not a party to any agreement with HIA or its subcontractors.

SIXTH AFFIRMATIVE DEFENSE

1 HIA is barred from claiming or recovering any relief on grounds that HIA’s conduct was
2 such that it constituted a waiver.

SEVENTH AFFIRMATIVE DEFENSE

3 HIA is barred from claiming or recovering any damages or other relief because of having
4 failed to exercise reasonable care and diligence to mitigate any alleged damages.

EIGHTH AFFIRMATIVE DEFENSE

5 HIA’s damages, if any, are the result of HIA’s or person or entities own comparative fault
6 for which they may not recover.

NINTH AFFIRMATIVE DEFENSE

7 HIA’s claims are barred by the doctrine of unclean hands.

TENTH AFFIRMATIVE DEFENSE

8 HIA’s damages, if any, are the result in whole or in part of superseding forces or of the
9 acts or omissions of other persons or entities, for which the City is not responsible.

ELEVENTH AFFIRMATIVE DEFENSE

10 HIA is prevented from seeking monetary damages against the City because it assumed the
11 risk of the Agreement and assumed the risk related to HIA’s and its subcontractors work on the
12 Project.

TWELFTH AFFIRMATIVE DEFENSE

13 To the extent HIA seeks recovery in contract, HIA materially breached or is chargeable
14 with breach of the terms and conditions of such contract and is entitled to no relief.

THIRTEENTH AFFIRMATIVE DEFENSE

15 Any alleged conduct or omission by the City was not the cause in fact or proximate cause
16 of any injury suffered.

FOURTEENTH AFFIRMATIVE DEFENSE

17 The City alleges on information and belief that HIA’s claims are invalid and
18 unenforceable for failing to comply with the law and the terms and conditions in the agreements
19 regarding this matter.

PRAYER FOR RELIEF


20 WHEREFORE, the City prays for relief as follows:

- 21 1. Judgment dismissing the Complaint with prejudice;

2. Damages against HIA;
3. Pre- and post-judgment interest on all damages awarded, to be computed at the statutory rate;
4. Judgment for an award of costs and attorney's fees and disbursements in defending and asserting claims in this lawsuit, as is allowed under Alaska law and any agreement; and
5. For such other and further relief as the court may deem proper.

DATED at Juneau, Alaska this 21st day of December, 2017.

SIMPSON, TILLINGHAST, SORENSEN & SHEEHAN, P.C.
Attorneys for City of Hoonah


James J. Sheehan
ABA No. 0506056

Pursuant to Alaska Civil Rule 5.1, Defendant City of Hoonah requests that all documents be served by email to following email addresses: jsheehan@stsl.com, kmiller@stsl.com, and bhagstrom@stsl.com, instead of service by mail.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 21, 2017, a true and correct copy of this document was served on the following parties by first class mail and email:

Paul H. Grant
313 Coleman Street
Juneau, AK 99801
paulgrantjuneau@gmail.com
Attorney for Hoonah Indian Association


Barbara Hagstrom