

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EMD SERVICES INTERNATIONAL, :
L.L.C. :

Plaintiff, :

v. :

CIVIL ACTION NO.: 1:08-cv-609

BENDER SHIPBUILDING & REPAIR :
CO., INC.; and OSG AMERICA, L.P., :
F/K/A MARITRANS, INC. :

Defendants. :

COMPLAINT

COMES NOW EMD Services International, L.L.C., Plaintiff in the above styled cause (hereinafter "EMD"), by and through counsel, and files this complaint against Bender Shipbuilding & Repair Company, Inc (hereinafter "Bender"), and OSG America, L.P., f/k/a Maritrans, Inc. (hereinafter "OSG"), as follows:

PARTIES

1. Plaintiff EMD is a Louisiana limited liability company with its principal place of business located at 1133 First Avenue, Harvey, Louisiana 70058.
2. Defendant Bender is an Alabama corporation with its principal place of business located at 265 South Water Street, Mobile, Alabama 36603.
3. Upon information and belief, Defendant OSG is a Delaware limited partnership with its principal place of business located at Two Harbour Place, 302 Knights Run Avenue, Suite 1200, Tampa, FL, 33602.

SUBJECT MATTER JURISDICTION

4. Plaintiff EMD re-alleges and adopts paragraphs 1 through 3, supra.

5. This Court can exercise subject matter jurisdiction over this action, pursuant to 28 U.S.C. § 1332, because there is complete diversity of citizenship between the parties, and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

VENUE

6. Plaintiff EMD re-alleges and adopts paragraphs 1 through 5, supra.

7. Venue for this action is proper in United States District Court for the Southern District of Alabama Mobile County, Alabama, pursuant to 28 U.S.C. § 1391(a), because a substantial part of the events or omissions giving rise to the claims occurred in this judicial district.

8. A substantial part of the events or omissions giving rise to the claims asserted in this complaint occurred in the Southern District of Alabama because (i) Defendant Bender is building ATB Tug Bender Hull #8016 in Mobile County, Alabama; (ii) the engines supplied by Plaintiff EMD for ATB Tug Bender Hull #8016 were (or are to be) installed in ATB Tug Bender Hull #8016 in Mobile County, Alabama; (iii) Defendant Bender breached its subcontract with Plaintiff EMD in Mobile County, Alabama, when it failed to pay, in a timely manner, Plaintiff EMD for the engines; (iv) Plaintiff EMD filed a vessel lien on ATB Tug Bender Hull #8016 in the probate court records for Mobile County, Alabama, and is seeking in this lawsuit to foreclose on that lien; and (v) ATB Tug Bender Hull #8016 is presently located in, Mobile County, Alabama, upon information and belief.

FACTS

9. Plaintiff EMD adopts and re-alleges paragraphs 1 through 8, supra.

10. Upon information and belief, Defendant OSG contracted with Defendant Bender to construct and build a vessel -- ATB Tug Bender Hull #8016 -- for it in Mobile, Alabama.

11. Defendant Bender, in turn, entered into a subcontract with Plaintiff EMD, on or about December 15, 2006, under which Plaintiff EMD was to supply two Electro-Motive Diesel Sixteen Cylinder Model 710G7C (2984KW) engines for ATB Tug Bender Hull #8016.

12. Under the plain language of the subcontract, Defendant Bender agreed to pay, and was responsible for paying, \$1,600,000.00 to Plaintiff EMD for the supply of the engines for ATB Tug Bender Hull #8016. Specifically, Defendant Bender agreed to pay to Plaintiff EMD \$1,520,000.00 no later than 30 days after shipment of the engines, and to pay the balance of \$80,000.00 upon completion of successful sea trials and delivery of the vessel to Defendant OSG. The engines were shipped on or about June 11-12, 2008.

13. In addition, Defendant Bender requested that Plaintiff EMD perform additional work and/or modifications outside of the scope of the original contract, and agreed to pay Plaintiff EMD for these changes and/or modifications.

14. Plaintiff EMD made the requested changes and/or modifications in good faith and in reliance of statements made by Defendant Bender that it would pay, in a timely manner, for the changes.

15. The changes and/or modifications requested by Defendant Bender totaled \$33,804.00.

16. Plaintiff EMD modified the engines for ATB Tug Bender Hull #8016, in accordance with the subcontract documents and change orders, and delivered the engines to

Defendant Bender for installation in ATB Tug Bender Hull #8016.

17. Defendant Bender failed to pay Plaintiff EMD timely for the engines, as required by the subcontract.

18. In August 2008, after Plaintiff EMD demanded the money owed and due to it for the work provided, Defendant Bender again refused to pay. After attempting in good faith to resolve the dispute without court intervention, Plaintiff EMD filed a Verified Statement of Watercraft Lien, in the Probate Court records for Mobile County, Alabama, against ATB Tug Bender Hull #8016, pursuant to Ala. Code § 35-11-60. The lien was in the amount of \$1,633,804.00. A copy of the Verified Statement of Watercraft Lien is attached hereto as **Exhibit "A."**

19. Plaintiff EMD filed the Verified Statement of Watercraft Lien within six months of the last day that it performed work and/or supplied the engines for ATB Tug Bender Hull #8016.

20. Following the filing of the Verified Statement of Watercraft Lien, representatives of Defendant Bender assured Plaintiff EMD that the entire lien amount, would be satisfied but, to date, Defendant Bender and/or Defendant OSG has only paid Plaintiff EMD a portion (\$414,000.00) of the money that is due and is currently owed.

COUNT ONE
(Foreclosure on Verified Statement of Watercraft Lien)

21. Plaintiff EMD adopts and re-alleges paragraphs 1 through 20, supra.

22. Plaintiff EMD, per its subcontract, furnished to Defendant Bender two engines that were (or that will be) installed or fitted on ATB Tug Bender Hull #8016, a vessel built, repaired, fitted, furnished, supplied or victualled within Alabama.

23. Plaintiff EMD has demanded, but the Defendants have refused to pay, the total amount due and owing to it.

24. All conditions precedent to relief, as demanded herein, have been performed or have occurred.

WHEREFORE, Plaintiff EMD demands judgment against the Defendants, individually or collectively, in the form of: (1) a finding by this Court that a watercraft lien on the vessel exists in favor of Plaintiff EMD for the payment of the sum of \$1,219,804.00, plus interest and costs; (2) a finding by this Court that Plaintiff EMD's watercraft lien is superior to any other liens that may exist on ATB Tug Bender Hull #8016; (3) a finding by this Court that Defendant Bender and/or Defendant OSG is required to pay Plaintiff EMD \$1,219,804.00, plus interest and costs; (4) an order that ATB Tug Bender Hull #8016 is to be sold in the event of default of the payment; (5) an order that the cost of sale be paid out of the proceeds of the sale and the remainder be applied to the amounts due to Plaintiff EMD so far as it will suffice; and (6) such other and further relief as is appropriate.

COUNT TWO
(Breach of Contract)

25. Plaintiff EMD adopts and re-alleges paragraphs 1 through 24, supra.

26. Defendant Bender entered into a valid and binding subcontract with Plaintiff EMD, on or about December 15, 2006, under which Plaintiff EMD was to supply two Electro-Motive Diesel Sixteen Cylinder Model 710G7C (2984KW) engines for ATB Tug Bender Hull #8016.

27. Plaintiff EMD fully and timely performed under the subcontract.

28. Defendant Bender breached its obligations and duties under the subcontract by failing to pay Plaintiff EMD for the work and services performed in accordance with the terms of

the subcontract.

29. Plaintiff EMD was damaged as a direct result of Defendant Bender's breach of contract.

WHEREFORE, Plaintiff EMD demands judgment against Defendant Bender in the amount of \$1,219,804.00, plus interest and costs.


COUNT THREE
(Unjust Enrichment)

30. Plaintiff EMD adopts and re-alleges paragraphs 1 through 29, supra.

31. Plaintiff EMD fully and timely performed under the subcontract for the supply of two Electro-Motive Diesel Sixteen Cylinder Model 710G7C (2984KW) engines for ATB Tug Bender Hull #8016, but has not been paid in full for its services and work.

32. Defendant Bender, as the purchaser of the engines, and Defendant OSG, as the eventual owner of ATB Tug Bender Hull #8016, are receiving a benefit to which they are not entitled, and are holding money that, in equity and good conscience, belongs to Plaintiff EMD.

WHEREFORE, Plaintiff EMD demands judgment against Defendants Bender and OSG, individually or collectively, in the amount of \$1,219,804.00, plus interest and costs.



ALLEN E. GRAHAM (GRA051)
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The Defendants are to be served by personal process server at the following addresses:

Bender Shipbuilding & Repair Company, Inc.

C/O T.B. Bender, Jr., Registered Agent

265 South Water Street

Mobile, AL 36603

OSG America, L.P., f/k/a Maritrans, Inc.

C/O The Corporation Trust Company, as Registered Agent

1209 Orange Street

Wilmington, DE 19801