

JUN 15 2022

No. S-222719
Vancouver Registry



In the Supreme Court of British Columbia

Between

ACCIONA WASTEWATER SOLUTIONS LP by its General Partner, AWS
GENERAL PARTNER INC.

Plaintiff

and

GREATER VANCOUVER SEWERAGE AND DRAINAGE DISTRICT

Defendant

and

ACCIONA WASTEWATER SOLUTIONS LP, AWS GENERAL PARTNER
INC., ACCIONA AGUA CANADA INC., ACCIONA INFRASTRUCTURE
CANADA INC., CORPORACION ACCIONA INFRAESTRUCTURAS S.L,
ACCIONA CONSTRUCCION S.A. and IACCIONA AGUA S.A.

Defendants by way of Counterclaim

COUNTERCLAIM

Filed by: Greater Vancouver Sewerage and Drainage District ("GVS&DD")

To: Acciona Wastewater Solutions LP, AWS General Partner Inc., Acciona Agua
Canada Inc., Acciona Infrastructure Canada Inc., Corporacion Acciona
Infraestructuras S.L., Acciona Construccion S.A. and Acciona Agua S.A.

This action has been brought by the plaintiff(s) against the defendant(s) for the relief set out in the notice of civil claim filed in this action.

TAKE NOTICE that the Defendant GVS&DD claims against you for the relief set out in Part 2 below.

IF YOU INTEND TO RESPOND to the claim made against you in this counterclaim, or if you have a set-off or counterclaim that you wish to have taken into account at the trial, YOU MUST FILE a response to counterclaim in Form 4 in the above-named registry of this court within the time for response to counterclaim described below and SERVE a copy of the filed response to counterclaim on the address for service of the defendant(s) bringing this counterclaim.

YOU OR YOUR LAWYER may file the response to counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to counter-claim within the time for response to counterclaim described below.

Time for response to counterclaim

A response to counterclaim must be filed and served on the defendant(s) bringing this counter claim,

- (a) if you were served with the counterclaim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the counterclaim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the counterclaim anywhere else, within 49 days after that service, or
- (d) if the time for response to counterclaim has been set by order of the court, within that time.

CLAIM OF THE DEFENDANT BRINGING THE COUNTERCLAIM

Part 1: STATEMENT OF FACTS

- 1. The Plaintiff by Counterclaim, the GVS&DD, repeats and relies on the facts and allegations contained in its response to civil claim filed in this proceeding.
- 2. The GVS&DD relies on the defined terms in its response to civil claim, but repeats some here for ease of reference. All other capitalized terms used in this counterclaim are defined terms in the Project Agreement or the DCS Agreement.

Background

- 3. The GVS&DD is responsible for, among other things, the treatment and discharge of all wastewater from residences and businesses within the Metro Vancouver region, and is constituted under the *Greater Vancouver Sewerage And Drainage District Act*, SBC 1956, c. 59 with an address for service at 1800 - 510 West Georgia Street, Vancouver, British Columbia.
- 4. The GVS&DD is the owner of the NSWWTP currently being constructed in the District of North Vancouver to replace the Lions Gate Wastewater Treatment Plant. The GVS&DD is an experienced owner and operator of five wastewater treatment plants in the Lower Mainland.

5. The NSWWTP is being built to serve 250,000 residents in the Districts of West and North Vancouver, the City of North Vancouver, and the Squamish and Tsleil-Waututh Nations. The NSWWTP will include secondary and tertiary treatment of wastewater, which the existing wastewater treatment plant does not provide.
6. The Project is subject to Federal regulatory control administered by Environment and Climate Change Canada (“ECCC”), under a regulatory framework which includes the *Fisheries Act*, RSC 1985, c F-14 (the “**Fisheries Act**”) and annexed to it, the *Wastewater Systems Effluent Regulation* (“**WSER**”) (the “**Regulatory Framework**”).
7. Acciona Wastewater Solutions LP (“**Acciona**”), is an extraprovincial limited partnership registered in British Columbia and incorporated under the laws of Manitoba, created for the sole purpose of carrying out the design, construction, commissioning and one year performance period operation of the NSWWTP, with an address for service in this matter of 20th Floor, 250 Howe Street, Vancouver, British Columbia.
8. AWS General Partner Inc. (“**AWS**”) is the general partner of Acciona, and is an extraprovincial company registered in British Columbia and incorporated under the laws of Canada with an address for service in this matter of 20th Floor, 250 Howe Street, Vancouver, British Columbia.
9. Acciona Agua Canada Inc. (“**Acciona Agua Canada**”) is an extraprovincial company registered in British Columbia and incorporated under the laws of Canada with a registered office address at 2600 - 595 Burrard Street, P.O. Box 49314, Vancouver, British Columbia.
10. Acciona Infrastructure Canada Inc. (“**Acciona Infrastructure**”) is an extraprovincial company registered in British Columbia and incorporated under the laws of Canada, with a registered office at 2600 - 595 Burrard Street, P.O. Box 49314, Vancouver, British Columbia.
11. Corporacion Acciona Infraestructuras S.L. (“**Corporacion Acciona**”) is a company incorporated pursuant to the laws of Spain with a registered office at Avda De Europa – Numero 18, Parque Empresarial La Moraleja 28108, Alcobendas 28, Madrid, Spain.
12. Acciona Construccion S.A. (“**Acciona Construccion**”) is a company incorporated pursuant to the laws of Spain with a registered office at Avda De Europa – Numero 18, Parque Empresarial La Moraleja 28108, Alcobendas 28, Madrid, Spain.
13. Acciona Agua S.A. (“**Acciona Agua Spain**”) is a company incorporated pursuant to the laws of Spain with a registered office at Avda De Europa – Numero 22, Planta Baja, Alcobendas 28, Madrid, Spain.

The Project Agreement

14. On or about April 5, 2017, the GVS&DD and Acciona, by its general partner AWS, entered into the Original PA, a form of “design build finance” (“**DBF**”) agreement, under

which Acciona became responsible for the design, construction, financing, testing and commissioning of the Project.

15. The Original PA was subsequently amended effective October 31, 2019 (the “**Amended PA**”) pursuant to an Amendment to the Project Agreement between the GVS&DD and Acciona made October 31, 2019 (the “**Amending Agreement**”). The Original PA and the Amended PA are collectively referred to herein as the “**Project Agreement**” or “**PA**”.

Project Schedule

16. Acciona was required under the Project Agreement to provide monthly updates to the Project Schedule (“**Project Schedule Updates**”). Acciona was required to ensure each Project Schedule Update met certain requirements, and was at all times an accurate, reasonable and realistic representation of Acciona’s plans for the completion of the Project in accordance with the requirements of the Project Agreement.
17. A Project Schedule Update is a Submittal under the Project Agreement, and is subject to the Review Procedure in Appendix 2B of Schedule 2 of the PA. The GVS&DD could, acting reasonably, assign a “Rejected”, “Correct Deficiencies” or “Reviewed” comment to Project Schedule Updates. Under the Review Procedure, Acciona had 15 Business Days to correct and resubmit to the GVS&DD a Submittal assigned a “Rejected” or “Correct Deficiencies” comment by the GVS&DD.

Project Target Dates

18. The Project Agreement has the following target dates Acciona was required to meet:
 - (a) Target Secondary Treatment Completion Date – August 1, 2023;
 - (b) Target Acceptance Date – September 19, 2023;
 - (c) Target Tertiary Filtration Completion Date – January 19, 2024; and
 - (d) Longstop Date – September 19, 2024.

(together the “**Project Target Dates**”)
19. Under the Project Agreement, Acciona had complete responsibility for the Design and Construction of the NSWWTP, and was required to deliver the NSWWTP, in compliance with the PA, complete and operational and fit for its intended uses by the Target Acceptance Date.

Acciona’s Obligation to Comply with Laws, Permits and Obtain Permits

20. In undertaking the Design and Construction, Acciona was required to comply with all applicable Laws, including the British Columbia Building Code, and Permits, including municipal permits.

21. Acciona was also required to obtain various Permits, including necessary consents and agreement from third parties needed to carry out the Project in accordance with the Project Agreement.

Acciona's Obligation to Indemnify

22. Pursuant to the Project Agreement, Acciona must indemnify and keep the GVS&DD indemnified at all times from and against all Direct Losses the GVS&DD may sustain in connection with:
 - (a) a breach by Acciona of, or non-compliance by Acciona with, Permits or Laws;
 - (b) a failure of Acciona to obtain all necessary Permits in accordance with the Project Agreement; and
 - (c) a failure by Acciona to achieve Secondary Treatment Completion on or before the Target Secondary Treatment Completion Date,

subject to certain exceptions in the Project Agreement not applicable here.

(the "**Acciona Indemnity**")

Related Agreements and Obligations

23. Consistent with the DBF structure, Acciona does not itself undertake the design and construction of the NSWWTP. Rather, Acciona 'passed down' its obligations to Acciona Agua and Acciona Infrastructure (together the "**DCS Contractor**"), which assumed all of Acciona's obligations under the Project Agreement, on a back-to-back basis, with respect to the design and construction of the NSWWTP pursuant to a Design, Construction and Services Agreement with Acciona (the "**DCS Agreement**"). The DCS Agreement was executed on or about April 5, 2017, the same date the Original PA was executed.
24. The Project Target Dates are the same in the DCS Agreement as the Project Agreement.
25. On or about April 5, 2017, the GVS&DD and the DCS Contractor entered into an agreement which provides the GVS&DD with certain rights in the event the Project Agreement was terminated by the GVS&DD (the "**Collateral Agreement**"). Among other things, the Collateral Agreement gives the GVS&DD the right to become a party to the DCS Agreement in place of Acciona.
26. On or about April 5, 2017, Acciona Construcción absolutely, unconditionally and irrevocably guaranteed as a direct obligation to the GVS&DD the full and prompt performance and observance by Acciona of the covenants, agreements, undertakings and obligations of Acciona with respect to the Acciona Indemnity (the "**AC Parent Guarantee**").

27. On or about April 5, 2017, Acciona Agua Spain absolutely, unconditionally and irrevocably guaranteed as a direct obligation to the GVS&DD the full and prompt performance and observance by Acciona of the covenants, agreements, undertakings and obligations of Acciona with respect to the Acciona Indemnity (the "**AAS Parent Guarantee**").
28. On or about December 12, 2019, Corporacion Acciona unconditionally and irrevocably guaranteed as a direct obligation to Acciona the full and punctual payment, observance and performance by the DCS Contractor of the DCS Contractor's obligations under the DCS Agreement, including the payment of any present or future amount or liability owing by the DCS Contractor to Acciona (the "**DCS Parent Guarantee**").

DCS Contractor Obligations

29. The back-to-back nature of the Project Agreement and the DCS Agreement means the DCS Contractor had the same contractual obligations for the design and construction of the NSWWTTP to Acciona as Acciona had to the GVS&DD under the Project Agreement. Specifically, the DCS Contractor was required to carry out, perform and observe Acciona's obligations under the Project Agreement with respect to the Design and Construction of the NSWWTTP.
30. The DCS Agreement also contains the same terms as the Project Agreement with respect to compliance with applicable Laws, Permits, material breaches, events of default and termination. Specifically, the DCS Agreement contained the following terms:
 - (a) the DCS Contractor had to ensure each Project Schedule Update met the applicable requirements and was at all times an accurate, reasonable and realistic representation of the DCS Contractor's plans for the completion of the Project in accordance with the requirements of the DCS Agreement;
 - (b) a failure by the DCS Contractor to provide a Project Schedule Update which met the applicable requirements is a "Contractor Material Breach" under the DCS Agreement;
 - (c) the DCS Contractor was to deliver the NSWWTTP, in compliance with the PA, complete and operational and fit for its intended uses by the Target Acceptance Date, and by no later than the Longstop Date;
 - (d) Secondary Treatment Completion was to be achieved by the Target Secondary Treatment Completion Date and Tertiary Filtration Completion was to be achieved by the Target Tertiary Filtration Completion Date;
 - (e) the DCS Contractor was to indemnify Acciona from and against losses sustained by Acciona in connection with the DCS Contractor's failure to achieve Secondary Treatment Completion on or before the Target Secondary Completion Date;

- (f) a breach, or series of breaches, by the DCS Contractor of its obligations under the DCS Agreement the consequence of which is:
 - (i) a risk of material liability of Acciona and/or the GVS&DD to third persons; or
 - (ii) that Acciona is reasonably likely to be materially deprived of the benefit of the DCS Agreement,
 is a “Contractor Material Breach” under the DCS Agreement;
- (g) if the DCS Contractor failed to remedy a Contractor Material Breach in accordance with the terms of the DCS Agreement, the Contractor Material Breach became a Contractor Event of Default and gave Acciona the right to terminate the DCS Agreement; and
- (h) the DCS Contractor was required to comply with applicable Laws, and to obtain and comply with various Permits in undertaking the Design and Construction.

Duty of Care

- 31. Acciona and the DCS Contractor each owed the GVS&DD a duty of care to perform their respective obligations under the Project Agreement and DCS Agreement with the degree of skill and care, diligence, prudence and foresight of a DBF contractor experienced with facilities similar in scope, nature and complexity to the Project.

Project Co Material Breaches under Project Agreement

- 32. A failure by Acciona to provide a Project Schedule Update which complied with the requirements of the Project Agreement was a Project Co Material Breach under the Project Agreement (“**Project Schedule Material Breach**”) (section 6.3 of Schedule 2 of the PA).
- 33. A breach, or a series of breaches, by Acciona of its obligations under the Project Agreement, the consequence of which is:
 - (a) a risk of material liability of the GVS&DD to third persons (“**Material Liability Risk Breach**”); or
 - (b) that the GVS&DD is reasonably likely to be materially deprived of the benefit of the Project Agreement (“**Material Deprivation Breach**”),
 is a Project Co Material Breach under the Project Agreement (definition (c)(2) and (c)(3) of Project Co Material Breach in Schedule 1 of the PA).
- 34. The Regulatory Framework places the GVS&DD, its officers, directors and agents at risk of significant fines and penalties, and potentially criminal consequences, if Secondary Treatment Completion is not achieved by the Target Secondary Treatment Completion Date.

35. If Acciona failed to remedy a Project Co Material Breach in accordance with the terms of the Project Agreement, the Project Co Material Breach became a Project Co Event of Default and gave the GVS&DD the right to terminate the Project Agreement (section 12.4 of the PA).

Acciona's Project Schedule Material Breach

36. Acciona breached the Project Agreement by failing to comply with the requirements relating to Project Schedule Updates. The GVS&DD, acting reasonably, assigned a "Rejected" comment to Acciona's Project Schedule Updates for January, February and March 2021. In addition to failing to meet the PA requirements, Acciona made hundreds of changes to dates and durations of completed work so the Project Schedule Updates did not accurately reflect the actual completion dates, and made hundreds of other changes contrary to proper and good scheduling practice.
37. Acciona failed to correct the Project Schedule Updates in breach of the Review Procedure of the PA.
38. Accordingly, the GVS&DD gave Acciona a notice of Project Schedule Material Breach on May 26, 2021.

Acciona's Material Liability Risk Breach and Material Deprivation Breach

39. On June 30, 2021, Acciona submitted a Project Schedule Update (the "**June 30 Project Schedule Update**") which, unilaterally and in the absence of any right or entitlement under the Project Agreement, purported to extend the Project Target Dates by approximately 26 months, a non-excusable extension of the Project Schedule of more than 55 percent of the construction period agreed in the Amended PA.
40. The purported extension by Acciona of the Project Target Dates by approximately 26 months would put the GVS&DD at risk of material liability to third parties, specifically fines, penalties and other regulatory consequences under the Regulatory Framework.
41. The purported extension by Acciona of the Project Target Dates by approximately 26 months would materially deprive the GVS&DD of the benefit of the Project Agreement as it would not receive a complete and operational, and fit for its intended uses wastewater treatment facility until more than two years after the Target Acceptance Date and more than 14 months after the Longstop Date.
42. Subsequent to the delivery of the June 30 Project Schedule Update, and without entitlement under the PA, Acciona purported to extend the Target Acceptance Date by another five months, further increasing the delay for this target date to 31 months.
43. The GVS&DD gave Acciona notice on July 14, 2021 of a Material Liability Risk Breach and a Material Deprivation Breach.
44. Acciona failed to remedy the Project Schedule Material Breach, the Material Liability Risk Breach and the Material Deprivation Breach in accordance with the terms of the

Project Agreement and each became a Project Co Event of Default. On October 15, 2021, the GVS&DD gave notice to Acciona of the Project Co Events of Default in accordance with the Project Agreement.

45. Under a related agreement with Acciona's lenders, there was a 90 day period in which the lenders could, in the event of a Project Co Event of Default, step in. The GVS&DD could not terminate the Project Agreement during this 90 day period unless the lenders advised they were not exercising their step in rights.
46. At the end of the 90 day step in period, on January 20, 2022, the Project Co Events of Default continued unremedied by Acciona, and the GVS&DD terminated the Project Agreement in accordance with its terms.

Acciona's Secondary Treatment Completion Breach

47. In breach of the Project Agreement, under the June 30 Project Schedule Update Acciona would not achieve Secondary Treatment Completion on or before the Target Secondary Treatment Completion Date in breach of the PA (the "**Secondary Treatment Completion Breach**").

Acciona's Breach of Permits, Failure to comply with Laws and Failure to obtain Permits

48. In breach of the Project Agreement, and in breach of the Municipal Excavation Permit, Acciona released untreated groundwater directly into the District of North Vancouver's sewer system, and failed to properly operate and maintain the treatment system required under the Municipal Excavation Permit.
49. In breach of its obligation to obtain Permits under the Project Agreement, Acciona failed to obtain crane swing agreements for the operation of the five cranes it used for the Project (together with the breaches and failures in paragraph 48, the "**Permit Breaches**").

Acciona's Breaches of the Acciona Indemnity

50. As a result of Acciona's Secondary Treatment Completion Breach the GVS&DD has sustained, and will sustain, Direct Losses for which Acciona is required to indemnify the GVS&DD under the Acciona Indemnity. In breach of the Acciona Indemnity, Acciona has failed to indemnify the GVS&DD for any Direct Losses.
51. As a result of Acciona's Permit Breaches the GVS&DD has sustained, and will sustain, Direct Losses for which Acciona is required to indemnify the GVS&DD under the Acciona Indemnity. In breach of the Acciona Indemnity, Acciona has failed to indemnify the GVS&DD for any Direct Losses.

DCS Contractor Material Breaches

52. Pursuant to the DCS Agreement, the DCS Contractor received from Acciona, within one business day of receipt by Acciona, the GVS&DD's notice of Project Schedule Material

Breach, notice of Target Date Material Breaches and notice of Project Co Events of Default.

53. Each of the Project Schedule Material Breach, the Material Liability Risk Breach and the Material Deprivation Breach set out in paragraphs 36-43 were caused by equivalent Contractor Material Breaches under the DCS Agreement, on or about the same dates, by the DCS Contractor.
54. The DCS Contractor failed to remedy the Contractor Material Breaches in accordance with the terms of the DCS Agreement and each became a Contractor Event of Default.
55. On or about January 21, 2022, the GVS&DD exercised its rights under the Collateral Agreement to become a party to the DCS Agreement in place of Project Co, which became effective on January 24, 2022.
56. On or about January 25, 2022, the GVS&DD gave notice to the DCS Contractor of the Contractor Events of Default under the DCS Agreement.
57. On or about January 25, 2022, the GVS&DD terminated the DCS Agreement.

DCS Contractor Breaches relating to Secondary Treatment Completion Breach and Permit Breaches

58. The Secondary Treatment Completion Breach and Acciona's Permit Breaches were caused by equivalent DCS Contractor breaches under the DCS Agreement, on or about the same dates, by the DCS Contractor, and has caused, or will cause, losses to the GVS&DD.

Other Breaches by Acciona and DCS Contractor

59. In addition to the breaches already set out, Acciona and the DCS Contractor breached the Project Agreement and the DSC Agreement, respectively, and their duties of care, the particulars of which include:
 - (a) the inability to, and failing to, properly interpret, understand and implement the Design and Construction Specifications;
 - (b) failing to undertake a comprehensive and properly coordinated approach to the Design of the Project resulting in innumerable design errors, omissions, PA non-compliances and delays to Design and Construction of the Project;
 - (c) using multiple design consultants for different components of the Project without coordination, engaging consultants without experience in similar wastewater treatment plants, engaging consultants late in the design development process, and changing design consultants during the design of the Project, resulting in innumerable design errors and omissions and multiple failures to coordinate the Design and Construction of the Project, and causing delay to the Design and Construction of the Project;

- (d) failing to understand and rectify PA non-compliances identified by the GVSⅅ
- (e) undertaking and completing portions of the Design late;
- (f) producing design Submittals with innumerable errors and omissions, and of poor quality, resulting in the need for multiple revisions and resubmittals for review under the Project Agreement, causing increased costs to the GVS&DD and delay to the Design and Construction of the Project;
- (g) failing to prepare the Hazard Identification and Risk Assessment and Equipment Lifting and Replacement Plan to the standard prescribed in the Project Agreement causing unsafe working conditions, and which will negatively impact the operation and maintenance of the Facility;
- (h) failing to have sufficient and qualified site supervision during the Construction to ensure the Construction was carried out in accordance with Design requirements and with quality management requirements;
- (i) a lack of understanding of Good Industry Practice;
- (j) failing to undertake the Design and Construction of the Project in accordance with Good Industry Practice;
- (k) a lack of understanding of applicable Laws, including the British Columbia Building Code;
- (l) failing to undertake the Design and Construction of the Project in accordance with applicable Laws, including the British Columbia Building Code;
- (m) failing to comply with Permits, including breaching environmental requirements;
- (n) failing to obtain necessary Permits;
- (o) failing to properly coordinate information and activities between Design and Construction personnel;
- (p) failing to properly coordinate, manage and supervise Construction resulting in errors and deficiencies, poor quality construction and very low productivity, resulting in delays to the Construction of the Project;
- (q) failing to undertake Construction safely;
- (r) failing to comply with their obligations with respect to the Project Schedule;
- (s) producing untrue and inaccurate Project Schedules and Project Schedule Updates, knowing they would be relied upon by the GVS&DD, carelessly or without having reasonable grounds to believe they were true and accurate;

- (t) failing to undertake the Design and Construction in accordance with the Project Schedule;
- (u) submitting RFIs claiming conflicts and inconsistencies in the Design and Construction Specifications which they ought to have known were not conflicts and inconsistencies;
- (v) submitting RFIs seeking relaxations in the Project Agreement as a result of their previous Design errors and omissions;
- (w) claiming Changes when they ought to have known there was no Change under the Project Agreement;
- (x) claiming Changes for components of the Design when they ought to have known those claims had been resolved under the Amending Agreement and Amended PA; and
- (y) claiming Supervening Events when they ought to have known no Supervening Events under the PA had occurred.

Bad Faith by Acciona and DCS Contractor

60. Acciona and the DCS Contractor breached their respective duties of good faith and honest performance, and acted in a high-handed and reprehensible manner, the particulars of which include:
- (a) wrongfully and intentionally asserting interpretations of the PA which they knew were incorrect for the purpose of escaping their obligations, or covering up their breaches, negligence and incompetence, for financial gain or to avoid financial loss;
 - (b) wrongfully and intentionally submitting RFIs claiming conflicts and inconsistencies in the Design and Construction Specifications, which they knew were not conflicts and inconsistencies to avoid their obligations and for financial gain or to avoid financial loss;
 - (c) wrongfully and intentionally claiming Changes when there was, in fact, no Change under the Project Agreement or DCS Agreement, to avoid their obligations and for financial gain or to avoid financial loss;
 - (d) wrongfully and intentionally claiming Changes for components of the Design when those claims had been resolved under the Amending Agreement and Amended PA, to avoid their obligations and for financial gain or to avoid financial loss;
 - (e) wrongfully and intentionally claiming Supervening Events when they knew no Supervening Event under the PA had occurred, to avoid their obligations and for financial gain or to avoid financial loss;

- (f) manipulating the Project Schedule to conceal their inability to progress the Design and Construction in accordance with the Project Schedule, and in an effort to wrongfully place blame for delays on the GVSⅅ
- (g) wrongfully and intentionally producing Project Schedules and Project Schedule Updates knowing they would be relied upon by the GVS&DD and knowing them to be untrue and inaccurate or reckless as to their truth or accuracy;
- (h) wrongfully and intentionally withholding from the GVS&DD the extent of the delay to the Project Target Dates caused by their breaches, negligence, wrongful conduct and incompetence by providing false Project Schedule Updates;
- (i) wrongfully and intentionally misstating communications from the GVS&DD with respect to comments on Submittals in an effort to wrongfully place blame for delay on the GVSⅅ
- (j) wrongfully and intentionally using PLCs in its HVAC controls design when they knew provisions in Schedule F, Proposal Extracts, and in Schedule 3, Design Requirements, governed that design, to avoid their obligations and for financial gain or to avoid financial loss;
- (k) wrongfully and intentionally failing or refusing to disclose RFP proposals to suppliers, Acceptable Manufacturers and Alternative Manufacturers because the RFP proposals did not include all of the PA requirements or misstated the PA requirements;
- (l) wrongfully and intentionally misrepresenting to the GVS&DD that suppliers, Acceptable Manufacturers, and Alternative Manufacturers could not meet the PA requirements;
- (m) wrongfully and intentionally misrepresenting to the GVS&DD that products, equipment and systems were not available, and demanding a Change, when they knew they were available;
- (n) wrongfully and intentionally refusing to organize meetings between the GVS&DD and suppliers, Acceptable Manufacturers and Alternative Manufacturers to conceal their misrepresentations to the GVS&DD, and to conceal their intentional misconduct with respect to RFP proposals and the supply of products, equipment and systems;
- (o) wrongfully and intentionally claiming the Design and Construction were impacted by an alleged discovery in January 2020 of a new layer of liquefiable soils at the Project Site when they knew there was no such discovery in January 2020, in an effort to place blame for delay on the GVSⅅ and

- (p) wrongfully and intentionally trying to avoid their obligations for certification for Milestone 5 in order to receive payment for Milestone 5 when they knew they were not entitled to such payment.

Demand on DCS Parent Guarantee

- 61. Pursuant to the DCS Parent Guarantee, the GVS&DD, as Project Co, delivered a demand in writing to Corporacion Acciona to pay and perform all obligations of the DCS Contractor guaranteed by the DCS Parent Guarantee, including the payment of any present or future amount or liability owing by the DCS Contractor to the GVS&DD as Project Co.
- 62. In breach of the DCS Parent Guarantee, Corporacion Acciona has failed to pay and perform the obligations guaranteed by the DCS Parent Guarantee.

Demand on and Breach of AC Parent Guarantee and AAS Parent Guarantee

- 63. Pursuant to the AC Parent Guarantee, the GVS&DD delivered a demand in writing to Acciona Construccion to indemnify the GVS&DD for all Direct Costs the GVS&DD has sustained and will sustain as a result of the breaches of the Acciona Indemnity.
- 64. In breach of the AC Parent Guarantee, Acciona Construccion has failed to indemnify the GVS&DD for any Direct Losses.
- 65. Pursuant to the AAS Parent Guarantee, the GVS&DD delivered a demand in writing to Acciona Agua Spain to indemnify the GVS&DD for all Direct Costs the GVS&DD has sustained and will sustain as a result of the breaches of the Acciona Indemnity.
- 66. In breach of the AAS Parent Guarantee, Acciona Agua Spain has failed to indemnify the GVS&DD for any Direct Losses.

Damages

- 67. The breaches of the Project Agreement by Acciona, the breaches of the DSC Agreement by the DCS Contractor, the breaches of duties, misrepresentations and the negligence of Acciona and the DCS Contractor, the bad faith actions of Acciona and the DCS Contractor, the breach of the DCS Parent Guarantee by Corporacion Acciona, the breach of the AC Parent Guarantee by Acciona Construccion and the breach of the AAS Parent Guarantee by Acciona Agua Spain have caused and will cause damages, costs and expenses to the GVS&DD in an amount exceeding \$500 million.
- 68. The damages, costs and expenses the GVS&DD has suffered and will suffer include without limitation:
 - (a) costs of procuring, appointing and mobilizing replacement contractor(s);
 - (b) increased amounts paid or payable by the GVS&DD to replacement contractor(s) for the performance of obligations equivalent to the unfulfilled obligations of Acciona and the DCS Contractor, including the cost of remedying Design and

procurement PA non-compliances, Construction defects and obtaining warranties for the work in place and to be performed equivalent to those provided for in the Project Agreement and DCS Agreement;

- (c) increased costs to procure equipment and materials for the Project;
- (d) consulting costs;
- (e) increased administrative costs;
- (f) increased insurance costs;
- (g) increased costs to secure, maintain and protect the Project site;
- (h) increased costs for other works related and incidental to the Project;
- (i) increased operating costs to operate the Existing Facility after the Target Secondary Treatment Completion Date;
- (j) delay costs;
- (k) fines and penalties under the *Fisheries Act* and *WSER*;
- (l) other Direct Losses; and
- (m) any accrued but unpaid amounts owing and payable by Acciona to GVS&DD that remain unpaid.

Part 2: RELIEF SOUGHT

1. The GVS&DD seeks judgment for:
 - a. general, special and punitive damages against Acciona, AWS, Acciona Agua and Acciona Infrastructure for their respective breaches of contract, negligence, negligent misrepresentations, fraudulent misrepresentations, bad faith and high-handed and reprehensible misconduct;
 - b. general and special damages against Corporacion Acciona, Acciona Construccion and Acciona Agua Spain for their respective breaches of contract;
 - c. contractual interest, or alternatively, interest pursuant to the *Court Order Interest Act*, RSBC 1996, c. 79;
 - d. costs on a solicitor-client indemnity basis against Acciona, AWS, Acciona Agua and Acciona Infrastructure for their wrongful and intentional breaches of the Project Agreement and DCS Agreement respectively, and their respective bad faith and high-handed and reprehensible misconduct or, alternatively, costs on a party-party basis;

- e. costs on a party-basis against Corporacion Acciona, Acciona Construccion and Acciona Agua Spain;
- f. such further and other loss and damage as may be proven at trial; and
- g. such further and other relief as this Honourable Court may deem just.

Part 3: LEGAL BASIS

1. The GVS&DD and Acciona were parties to the Project Agreement pursuant to which Project Co was to design and build the NSWWTTP in accordance with the terms of the Project Agreement.
2. Under the DCS Agreement with Acciona, the DSC Contractor assumed Acciona's obligations to design and build the NSWWTTP in accordance with the terms of the Project Agreement and the DCS Agreement.
3. Acciona must indemnify the GVS&DD for all Direct Losses the GVS&DD may sustain as a result of Acciona's breach of the Acciona Indemnity.
4. Acciona and the DSC Contractor each owed the GVS&DD duties of care.
5. The GVS&DD and the DSC Contractor entered into the Collateral Agreement which entitled the GVS&DD to take the place of Acciona in the DCS Agreement if the GVS&DD terminated the Project Agreement.
6. Corporacion Acciona unconditionally and irrevocably guaranteed the payment, observance and performance by the DCS Contractor of the DCS Contractor's obligations under the DCS Agreement pursuant to the DCS Parent Guarantee.
7. Acciona Construccion absolutely, unconditionally and irrevocably guaranteed the full and prompt performance and observance by Acciona of the covenants, agreements, undertakings and obligations of Acciona with respect to the Acciona Indemnity pursuant to the AC Parent Guarantee.
8. Acciona Agua Spain absolutely, unconditionally and irrevocably guaranteed the full and prompt performance and observance by Acciona of the covenants, agreements, undertakings and obligations of Acciona with respect to the Acciona Indemnity pursuant to the AAS Parent Guarantee.
9. Acciona breached the Project Agreement entitling the GVS&DD to terminate the Project Agreement.
10. Acciona breached its duties of care owed to the GVS&DD, was negligent, breached its duty of good faith and honest performance, and engaged in high-handed and reprehensible misconduct.

11. Acciona knowingly misrepresented without belief of their truth and accuracy, or reckless as to their truth and accuracy, Project Schedules and Project Schedule Updates, knowing the GVS&DD would, and did, rely on such false misrepresentations.
12. Alternatively, Acciona carelessly misrepresented or without having reasonable grounds for believing their truth and accuracy, Project Schedules and Project Schedule Updates, knowing the GVS&DD would, and did, rely on such negligent misrepresentations.
13. Acciona breached the Acciona Indemnity.
14. Pursuant to the Collateral Agreement, the GVS&DD took the place of Acciona in the DCS Agreement.
15. The DCS Contractor breached the DCS Agreement entitling the GVS&DD, as Acciona, to terminate the DCS Agreement.
16. The DCS Contractor breached its duties of care owed to the GVS&DD, was negligent, breached its duty of good faith and honest performance, and engaged in high-handed and reprehensible misconduct.
17. The DCS Contractor knowingly misrepresented without belief of their truth and accuracy, or reckless as to their truth and accuracy, Project Schedules and Project Schedule Updates, knowing the GVS&DD would, and did, rely on such false misrepresentations.
18. Alternatively, the DCS Contractor carelessly misrepresented or without having reasonable grounds for believing their truth and accuracy, Project Schedules and Project Schedule Updates, knowing the GVS&DD would, and did, rely on such negligent misrepresentations.
19. The GVS&DD, as Acciona, delivered a demand in writing to Corporacion Acciona to pay and perform the DCS Contractor's obligations under the DCS Agreement pursuant to the DCS Parent Guarantee. In breach of the DCS Parent Guarantee, Corporacion Acciona has failed to pay and perform the DCS Contractor's obligations.
20. The GVS&DD delivered a demand in writing to Acciona Construccion to indemnify the GVS&DD for all Direct Costs the GVS&DD has sustained and will sustain as a result of the breaches of the Acciona Indemnity. In breach of the AC Parent Guarantee, Acciona Construccion has failed to indemnify the GVS&DD for any Direct Losses.
21. The GVS&DD delivered a demand in writing to Acciona Agua Spain to indemnify the GVS&DD for all Direct Costs the GVS&DD has sustained and will sustain as a result of the breaches of the Acciona Indemnity. In breach of the AAS Parent Guarantee, Acciona Agua Spain has failed to indemnify the GVS&DD for any Direct Losses.
22. As a result of the above breaches, misrepresentations, and high-handed and reprehensible misconduct, the GVS&DD has incurred and will continue to incur costs and expenses, and has suffered and will continue to suffer damages.

23. The GVS&DD pleads and relies on:

- a. the *Partnership Act*, RSBC 1996, c. 348;
- b. Part 14 of the *Supreme Court Civil Rules* and claims costs;
- c. the *Court Order Interest Act*, RSBC 1996, c 79; and
- d. the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c. 28.

Plaintiff By Counterclaim's address for service: 1800 – 510 West Georgia Street
Vancouver, British Columbia
V6B 0M3

Fax number address for service (if any): N/A

E-mail address for service (if any): N/A

Place of trial: Vancouver

The address of the registry is: The Law Courts
800 Smithe Street
Vancouver, British Columbia
V6Z 2E1

Norton Rose Fulbright Canada LLP

Date: 15/JUN/2022

per: 

Signature of Beth Allard
lawyer for Plaintiff by Counterclaim

Rule 7-1 (1) of the Supreme Court Civil Rules states:

1. Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

Form 11 (Rule 4-5(2))

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION
FOR SERVICE OUTSIDE BRITISH COLUMBIA**

The Plaintiff by counterclaim claims the right to serve this pleading on the Defendants Corporacion Acciona Infraestructuras S.L., Acciona Construccion S.A. and Acciona Agua S.A. outside British Columbia on the ground that the proceeding concerns contractual obligations to be performed in British Columbia, and concerns contractual obligations under contracts which, by their express terms, are governed by the law of British Columbia, and on the basis there is a real and substantial connection between British Columbia and the facts in this proceeding, as enumerated in section 10(e)(i) and 10(e)(ii) of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c. 28, on which the Plaintiff by Counterclaim relies.

APPENDIX

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

Action to enforce breaches of contract, negligence and misrepresentation.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money

- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4:

Partnership Act, RSBC 1996, c. 348

Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c. 28

Court Order Interest Act, R.S.B.C. 1996, c. 79

In the Supreme Court of British Columbia

Between:

ACCIONA WASTEWATER SOLUTIONS LP by its
General Partner, AWS GENERAL PARTNER INC.

Plaintiff

and

GREATER VANCOUVER SEWERAGE AND
DRAINAGE DISTRICT

Defendants

and

ACCIONA WASTEWATER SOLUTIONS LP, AWS
GENERAL PARTNER INC., ACCIONA AGUA
CANADA INC., ACCIONA INFRASTRUCTURE
CANADA INC., CORPORACION ACCIONA
INFRAESTRUCTURAS S.L, ACCIONA
CONSTRUCCION S.A. and ACCIONA AGUA S.A.

Defendants by way of counterclaim

COUNTERCLAIM

NORTON ROSE FULBRIGHT CANADA LLP

Barristers & Solicitors
1800 – 510 West Georgia Street
Vancouver, BC V6B 0M3
Attention: Beth Allard