



IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

**MDG CONTRACTING &
ENVIRONMENTAL SOLUTIONS,
LLC,**

Plaintiff,

v.

**MONTGOMERY COUNTY
COMMUNITY COOPERATIVE
DISTRICT AND FICTITIOUS
DEFENDANTS A-Z,**

Defendants.

Case No. _____

JURY TRIAL DEMANDED

COMPLAINT

MDG Contracting & Environmental Solutions, LLC makes the following complaint against the Montgomery County Community Cooperative District (“Co-Op,”) and would show the following as grounds.

Introduction

The Montgomery Whitewater Park (“Park”) is a planned 120-acre recirculating whitewater park located on the banks of the Alabama River alongside Interstate 65. As a quasi-public project, one of the stated goals for the Park’s design and construction was to award thirty percent of the work to minority- and women-owned business enterprises (“MBEs.”) Yet from the outset, a vile stew of greed and racism plagued construction. With the Co-op’s knowledge, Mississippi-based general contractor JESCO, Inc. mismanaged scheduling of the work, including construction scope sequencing, and blamed resulting cost overruns on MBEs. JESCO then used self-inflicted cost overruns as a pretext to not pay MDG and reduced MBE’s scopes of work—invariably awarding

the MBEs' former work to JESCO to self-perform or send to those within its "good ol' boy" network, and at times performing the work with a largely undocumented—and cheaper—work force. As a result of JESCO's actions, MDG—an MBE operated and controlled by an African-American man and Métis Nations man—is owed millions of dollars for the work it performed that ultimately benefitted the Co-Op.

Parties

1. MDG is a Delaware limited liability company authorized to do business in the State of Alabama. MDG is a Minority Business Enterprise operated by an African American man and Métis Nations man.

2. On information and belief, the Co-Op is a local government cooperative district formed under Title 11, Chapter 99B of the Code of Alabama 1975 that may sue or be sued in this state's courts. *See* Ala. Code § 11-99B-7(2) (granting cooperative districts power "[t]o sue and be sued in its own name in civil actions").

3. Fictitious Defendants A-Z are unknown parties who have assumed contractual duties in administering the contract between JESCO and MSG and breached those duties, interfered with that contract, or otherwise prevented MDG from completing its scope of work under its contract with JESCO.

Jurisdiction and Venue

4. The Court has jurisdiction over the subject matter under Ala. Code §§ 12-11-31 and 35-11-220 as it seeks both to invoke the Court's equitable jurisdiction and to enforce a material-man's lien in excess of \$50.00.

5. The Court has jurisdiction over the Co-Op's person because it is a legal entity formed and primarily doing business in the State of Alabama.

6. Venue is proper in this Court under Ala. Code §§ 6-3-7(a)(1) and 35-11-220, because a substantial portion of the events or omissions giving rise to the claims took place in Montgomery County and this action seeks enforcement of a lien against property located in Montgomery County.

Facts

7. In August 2019, the Montgomery County Commission ("Commission") announced the Park's development as the culmination of "Project Catalyst," a years-long effort to bring a white-water park to Montgomery.

8. When complete, the Park will cover 120 acres near the banks of the Montgomery River and lie between Maxwell Air Force Base and Interstate Highway 65. The Park's location ("Property") is more particularly described in Exhibit 1.A to this complaint, a true and correct copy of MDG's Verified Statement of Lien filed in the Office of the Judge of Probate of Montgomery County. The Park's activities will include zip-lining, whitewater rafting, kayaking, paddle-boarding, shopping, and dining.

9. The Commission and the Montgomery County Public Building Authority formed the Co-Op in September 2019. The Co-Op's purpose, as stated in its certificate of formation is

for outdoor recreation and related activities and shall consist generally of the planning, establishment, development, acquisition, construction, improvement, maintenance, equipping and/or operation of facilities in the areas described in the immediately succeeding sentence, including facilities for outdoor recreation and activities, amphitheaters, lodging and conference space, dining, retail, parking and related facilities. ... The Projects are to be located in the County within the corporate limits of the City of Montgomery, Alabama in an area generally bounded to the south by

Maxwell Boulevard, to the west by Maxwell Air Force Base, and to the north and east by the Alabama River.

10. As the entity responsible for developing the Park, the Co-Op hired Southern Whitewater Development Group, LLC as the Developer of Record and S2O Design and Engineering, LLC as Architect. It then selected JESCO as the Construction Manager and General Contractor at risk for the Park construction, awarding it a contract (“Prime Contract”) to memorialize their agreement.

11. The Co-Op made plain in the Prime Contract that it had a goal that JESCO would award at least thirty percent of the Prime Contract’s scope of work to MBEs.

12. According to the United States Census Bureau, Montgomery County’s population in July 2021 was 60.6% Black or African American, 0.3% American Indian or Alaska Native, and 3.9% Hispanic or Latino.

13. MDG became aware of the Park construction project, and, as an MBE, submitted a proposal for part of the scope of work, including concrete, mechanical, and electrical work.

14. JESCO awarded MDG a portion of the Park’s scope of work, including concrete, mechanical, and electrical work, memorializing their agreement with a contract (“Subcontract”). The Co-Op established goals of minority/MBE participation that JESCO could not satisfy. Nevertheless, the Co-Op insured that JESCO include reference to certain MBE goals in the Subcontract including a statement that JESCO was:

committed to increase participation by MBE in the contracting and procurement process. It is important to the success of the Project and to the funding of the Project that local community and MBEs be given adequate opportunity to bid on various aspects of construction and to be represented in the work force constructing the project.

15. From the outset, JESCO was hostile to this goal. When MDG outlined its plan to hold workshops to develop MBE interest, JESCO replied that it considered the retention of MDG (and

only MDG) to satisfy the Co-Op's 30% goal and instead began to push or "suggest" MDG retain non-MBE contractors by providing names of JESCO-preferred contractors.

16. From the beginning of MDG's performance, it was apparent JESCO did not want to work with MDG. Within only a few days after MDG mobilized to the site, JESCO threatened to remove significant work from MDG's contract, without adequate cause to do so.

17. JESCO's Project Manager, in one phone call in 2022, even referred to MDG's Chief Executive Officer Gil Berry, an African American man, as "boy."

18. JESCO employees expressed hostility toward one female MDG employee suggesting she not talk to a male JESCO site inspector to avoid offending him by reason of her gender.

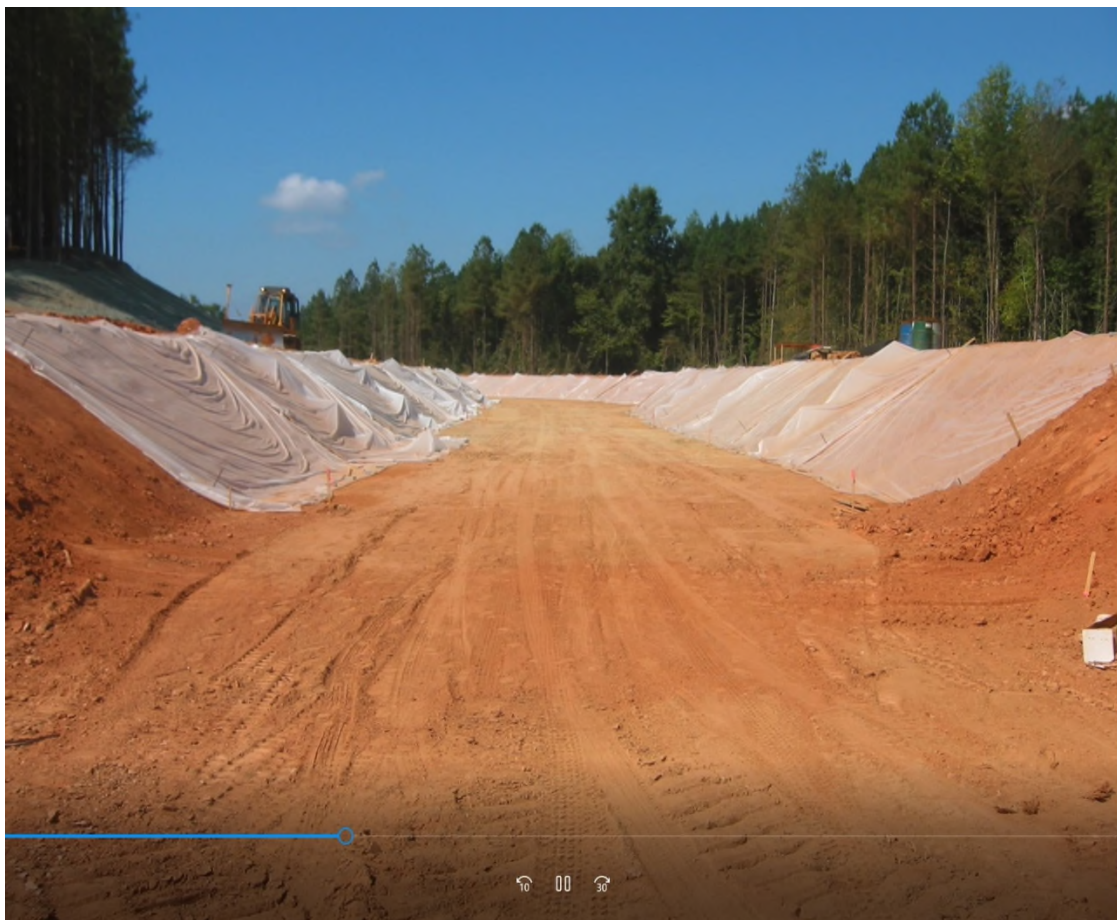
19. JESCO consistently failed to provide accurate and detailed construction plans, leading to constant revision and rework on MDG's part. When MDG did receive construction plans from JESCO, they frequently had contradictory hand-written amendments causing further confusion and negative impacts on the work.

20. JESCO was also contractually charged with providing a construction schedule that would establish when certain of the trades were expected to perform their work. Either by neglect or design, JESCO did not issue its first baseline schedule until December 2021, many months after substantive work began on the project. This delay in issuing a schedule caused further confusion and disruption on the project. Even after the schedule was issued, key sequencing was often changes without sufficient time to allow MDG to react, plan, or perform its work in a smooth and uninterrupted manner.

21. JESCO's efforts to harm MDG at times was constant, intentional, and widespread. By way of example, JESCO was required by contract and industry standard to coordinate the work in a

manner that would not interfere with or make MDG's work more difficult to perform. Part of MDG's scope of work required it to install a large amount of underground piping. To accomplish this work in an efficient manner, JESCO should have allowed MDG to coordinate this work with the site work contractor so that as soil was being placed to the appropriate elevations, MDG could install the piping as work progressed. Installing the underground piping in this manner would allow the work to be performed more quickly, more efficiently, and at lower cost for MDG. Instead, JESCO refused to provide MDG the ability to schedule the work with the site work contractor. And JESCO's site work contractor ended up placing a large quantity of soil in the location where the underground piping had to be placed. MDG did not anticipate or expect that it would have to incur the very large costs, both in money and time, to excavate into this large amount of newly-placed soil to install the underground pipe. As a result, MDG was needlessly caused to incur a large additional expense and lost valuable construction time on the project.

22. JESCO's site work contractor also was required to shape and form the soil along channels and water features so that concrete work could be quickly and efficiently performed. After completing the channels, the site work contractor was to protect its work by placing Visqueen or some other temporary water barrier to protect the slopes from erosion that may result from rainstorms. In fact, at the initial bid phase of the construction process, the developer presented photographs of another whitewater construction project that depicted how the side channels would be protected:



23. Despite JESCO's knowledge that its site work contractor was to protect its work in this fashion, it did not require the site work contractor to do so. Moreover, JESCO did not insure its site work contractor formed its work so as to preclude the likelihood that erosion would occur into the areas in which MDG would perform its work. Instead, it heaped up soil along the top of the excavations in which MDG was to place concrete in such a manner so that erosion after rain storms into MDG's work area was inevitable as shown below:



24. When JESCO called on MDG to perform a mockup concrete pour for the Whitewater Channel without providing adequate advance notice so as to allow MDG to assemble the necessary resources for this work, MDG advised JESCO a few more days were needed. JESCO refused. MDG then began to prepare and discovered the substandard excavation work and called it to JESCO's attention. JESCO demanded that MDG perform the mockup pour anyhow. Because of the inadequate soil protection erosion had occurred and the pour took several times more concrete than designed. The additional weight caused MDG's forms to buckle, and resulted in a pour that did not meet aesthetic standards. JESCO demanded that MDG redo the pour at its own cost, then blamed the fiasco on MDG.

25. JESCO's intent to damage its principal MBE contractor, with the Co-Op's knowledge, is also demonstrated by JESCO's requirement that MDG post a payment and performance bond even though JESCO itself did not post such a payment bond to the Co-Op. In an effort to further damage

MDG, JESCO withheld payment of millions of dollars in payments that were owed under the contract and law. This precluded MDG's ability to pay all of its subcontractors and vendors in a timely manner. Understandably, the subcontractors and vendors became concerned about payment. Knowing that it had imposed significant financial duress on MDG by not paying it, JESCO also contacted subcontractors and vendors to insist that subcontractors and vendors make claims against MDG's bond. As one vendor confided in MDG, the vendor had never been so persistently encouraged by a general contractor to make bond claims against subcontractor before.

26. JESCO employees also established a betting pool in which they bet on how quickly they could get MDG terminated. As a result of this betting pool each JESCO employee had an incentive to make its principal MBE contractor—MDG—fail and be terminated. The Co-Op knew JESCO was encouraging the termination of MDG, but failed to prevent it.

27. JESCO's failure to schedule trades led to MDG performing substantial rework. On more than one occasion, MDG had already performed work pursuant to plans and specifications, but then JESCO would wrongfully require that rework occur. This caused MDG to incur needless additional costs.

28. JESCO employees frequently berated MDG and one of its subcontractors' employees over non-issues. These harangues included abusive, vulgar, and as noted above, sometimes-racist language. JESCO's unprofessional conduct led to Southern Whitewater employee (and designated Co-Op Representative) Jeffrey Gustin admonishing JESCO to stop. Yet JESCO's abuse persisted.

29. JESCO's poor scheduling also led to dangerous work conditions for MDG's labor force. Other trades—usually non-MBEs—would use cranes to move wooden forms directly over MDG's labor force while it was working. Other trades would also drive trucks through where MDG's labor

force was working. When MDG brought these safety incidents to JESCO's attention, JESCO ignored them.

30. Though non-MBE contractors and JESCO created safety issues for MDG, JESCO blamed MDG for a supposed lack of attention to safety, even though JESCO also named MDG's safety inspector Linda Buxton its "Safety Spotlight" winner in March 2022.

31. As stated above, MDG was not just bound to perform under its contract, but it was also charged with providing opportunities to much smaller MBEs. It did so by conducting a recruiting workshop, interviewing MBE's and providing training on managing cash flow and manpower. This was important to MDG as one of its core values was to foster an environment that would lead to inclusivity, and it was supposed to be important to the Co-Op. MDG's contract even contains specific direction that MDG work with Montgomery County's MWB Liason officer, a task it eagerly undertook.

32. MDG's agreement with JESCO, and JESCO's agreement with the Co-Op, also acknowledges that MBE's are socially disadvantaged, defines that as those "who have been subjected to racial or ethnic prejudice," and acknowledges that MBEs also are often economically disadvantaged and could not perform on a project this resource intensive due to diminished capital and credit opportunities, unless provided with additional assistance from MDG. MDG provided such assistance, with no help from JESCO.

33. MDG provided numerous work opportunities to socially and economically disadvantaged workers and subcontractors. A photo of MDG's work force is below:



34. MDG is proud of its accomplishments in developing a diverse work force, but not every subcontractor performed as required. One subcontractor that struggled was Bulls Construction, LLC. MDG hired Bulls as a subcontractor to perform concrete installation services. Bulls performed those services for a brief while, but as Bulls completed its first section of the work, MDG received notification on July 6, 2022 from Mr. Gustin that Bulls' work needed substantial repair. On July 7, 2022, the following day, JESCO's desires came true and Mr. Gustin recommended MDG be terminated, including on scopes of work that had never been criticized. While MDG agreed that Bulls' work needed repairs, MDG maintained then and now that termination was not

warranted. And despite the fact that JESCO was to provide MDG with notice and a 7 day period in which to correct any defects, it did not afford MDG that opportunity.

35. JESCO wrongfully terminated the Subcontract on July 11, 2022.

36. Four days later, JESCO offered to retract its termination in exchange for onerous concessions from MDG, including removing all concrete and electrical work from MDG's scope of work.

37. JESCO's proposed deductive change order removing the electrical and concrete work included unreasonable terms and conditions and has not been accepted.

38. After Mr. Gustin further reviewed JESCO's demands to terminate MDG, he recommended that JESCO reinstate MDG in part. MDG contends termination was never warranted, and at present, there is no written agreement that memorializes the legal basis for the action taken by JESCO nor the resulting rights and responsibilities of each party.

39. JESCO refused to take action on several millions of dollars of change orders for additional work and delay costs from JESCO's schedule mismanagement. JESCO further delayed payment on MDG's June and July 2022 pay applications for \$2,242,461.11 and \$772,118.75, respectively. More specifically, although payments were to be made on a monthly basis by contract and law, JESCO did not even make payment for the June, 2022 Progress Invoice until October 27, 2022, and July's payment until November 7, 2022. In turn, within three days after JESCO finally issued to MDG, MDG paid out 100 percent of the payments to MDG's vendors and subcontractors, keeping none of it to cover MDG's own costs and expenses.

40. To this day, JESCO is unable to coherently articulate whether MDG has been unilaterally terminated for convenience, for default, or the legal basis for taking work away from MDG.

41. Since that action, JESCO has either performed that work itself using a largely undocumented workforce or awarded the work to non-MBE subcontractors using largely undocumented workforces.

42. MDG has continued, and continues, to perform work on Park construction despite JESCO withholding millions of dollars in payments. MDG has in fact now paid millions of dollars to subcontractors and vendors above what JESCO has paid it. Even still, MDG receives daily threats and demands from JESCO that MDG provide proof of payment from MDG subcontractors and vendors for which it has never received payment from JESCO. This is further evidence of JESCO's transparent efforts to financially ruin its principal MBE contractor, MDG.

43. Every action taken by JESCO cited above was known to the Co-Op, or should have been known to the Co-Op. Had the Co-Op intended to insure that MBE contractors were not mistreated on this project, the Co-Op could have and should have intervened.

44. On December 29, 2022, MDG filed the Verified Statement of Lien attached as Exhibit 1 to this Complaint in the Office of the Judge of Probate of Montgomery County, stating an amount due from the Co-Op of \$7,666,762.00 for work done and materials supplied to the Park construction.

Count One Enforcement of Mechanic's or Materialman's Lien

45. MDG incorporates each preceding paragraph as if set forth here.

46. A lien exists in favor of any person, firm, or mechanic who performs any work or labor upon or furnishes any material, fixture, or machinery for any building or improvement on land. Ala. Code § 35-11-210.

47. MDG performed work and labor and supplied materials, fixtures, and machinery to the Property.

48. MDG provided the Co-Op with notice of its lien in conformity with Ala. Code § 35-11-210.

49. MDG filed a verified statement of lien against the Property in the Office of the Judge of Probate of Montgomery County in conformity with Ala. Code § 35-11-213 within the time for filing prescribed by Ala. Code § 35-11-215.

50. MDG has not received any of the money due under its claimed lien.

Count II **Quantum Meruit/Valebant**

51. MDG incorporates each preceding paragraph as if set forth here.

52. In the alternative to Count III, if MDG is not in contractual privity with the Co-Op, MDG sues for Quantum Meruit.

53. Should the Court find that MDG does not have a valid lien or contract with the Co-Op, MDG has no adequate remedy at law.

54. MDG performed work on and supplied goods and materials to the Property with the Co-Op's knowledge and consent.

55. The Co-Op knew MDG expected to be paid for its work performed on and goods and materials supplied to the Property.

56. The Co-Op has received and will receive benefit from MDG's work performed on and goods and materials supplied to the Property.

Count III
Breach of Contract

57. MDG incorporates each preceding paragraph as if set forth here.

58. Mr. Gustin and Southern Whitewater, as the Co-Op's designated representatives and agents, assumed certain duties in voluntarily administering and directing MDG's work and negotiating contract changes with MDG.

59. The Co-Op's assumed duties included negotiation of contract changes and payments as well as direction of MDG's means and methods of performance.

60. The Co-Op benefitted from this arrangement by retaining MDG as a valuable subcontractor and forestalling work disruptions. MDG was to benefit by receiving timely pay for work completed and a reduction in the amount of abusive and arbitrary administration from JESCO.

61. The Co-Op breached its duties by not dealing with MDG according to established industry standard and commercially reasonable practices, including insuring certain promises made to MDG were fulfilled. MDG still has not been paid, and JESCO has removed a major portion of MDG's scope of work on pretextual bases. JESCO has compounded the harm by not only withholding payment, but also making a claim on MDG's bond thereby further damaging MDG. These breaches damaged and continue to damage MDG.

Request for Relief

In consideration of the foregoing, MDG asks that the Court enter a judgment:

- A. establishing a lien against the Property in MDG's favor for \$7,666,762.00 along with interest and costs;

B. against the Co-Op and in MDG's favor for \$7,666,762.00 along with interest and costs including payment of attorneys' fees according to Alabama's Timely Payment to Contractors Act; and

C. condemning the Property for sale all as provided in Ala. Code § 35-11-224;

or, in the alternative:

A. against the Co-Op for \$7,666,762 along with interest and costs along with whatever legal or equitable relief the Court may find appropriate to make MDG whole, including payment of attorneys' fees and interest according to Alabama's Timely Payment to Contractors Act.

Respectfully submitted this 12th day of January 2023.

JURY TRIAL DEMANDED.

/s/ C. William Daniels, Jr.

C. WILLIAM DANIELS, JR. (DAN023)

MICHAEL W. RICH (RIC097)

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TO BE SERVED BY CERTIFIED MAIL AT THE FOLLOWING:

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