

STATE OF NEW HAMPSHIRE

GRAFTON COUNTY, SS:

SUPERIOR COURT

CASE NO: 215-2014-CV- 299

SMITH RIVER ENERGY, LLC  
P.O. BOX 309  
GRAFTON, NH 03240

COPY

v.

TOWN OF GRAFTON,  
7 LIBRARY ROAD  
GRAFTON, NH 03240,

AND

SEAN FROST  
576 WILD MEADOW ROAD  
GRAFTON, NH 03240,

JOHN DOE #1,  
ADDRESS UNKNOWN,

JOHN DOE #2,  
ADDRESS UNKNOWN,

DEFENDANTS,  
JOINTLY AND SEVERALLY.

**COMPLAINT &**  
**DEMAND FOR JURY TRIAL**

Smith River Energy, LLC sues the Town of Grafton and Sean Frost and the John Doe defendants for breach of contract, unlawful bid-rigging, tortious interference with contract, and a violation of the consumer protection act, all arising from Frost and the Doe defendants' joint efforts to manipulate the public bidding process and sabotage Smith River's winning bid:

### **Parties**

1. Smith River Energy, LLC ("Smith River") is a New Hampshire limited liability company doing business in Grafton, New Hampshire.
2. Town of Grafton ("Grafton") is a New Hampshire municipal corporation located in Grafton County.
3. Sean Frost ("Frost") is a selectman of the Town of Grafton and resides in the Town of Grafton.
4. John Doe #1 and John Doe #2 are believed to reside in the Town of Grafton.

### **Jurisdiction**

5. This Court has subject matter jurisdiction over the civil claims. RSA 491:7.
6. This Court may exercise personal jurisdiction over the defendants because they are physically located Grafton County.
7. Venue is appropriate in this Court because all parties are located in Grafton county. RSA 507:9. This case may also be eligible for transfer to the Business and Commercial Dispute Docket in Merrimack County. RSA 491:7-a.

### **Factual Background**

8. In or prior to 2013, Grafton obtained class-action settlement payments related to the defective heating system in the Grafton Fire Department.
9. Grafton intended to use that money to make repairs to its Fire Department's heating system.
10. Frost, a Grafton selectman, worked with Grafton's Fire Chief and a contractor at

Partridge Family Heating Services.

11. Through Frost and Babiarz, the Town worked together with Partridge to identify and create specifications for the fire department project.
12. Frost suggested to Partridge that if Partridge helped Grafton develop the project specifications and Partridge submitted a bid, then Frost would make sure that Grafton awarded the public contract to Partridge.

### **The Town's Invitation to Bid on the Fire Department Building**

13. In 2013, Grafton posted a first request for proposals to make repairs to its fire department. Grafton's request for proposal was non-specific on certain points, allowing bids to differ in scope, engineer, warranty, and other substantial details.
14. Partridge submitted a barebones bid—running only a few sentences—for \$118,000, which included work for three heating zones and a one-year warranty.
15. Smith River submitted a bid for \$137,000, which included work for eight heating zones and a five-year warranty.<sup>1</sup>
16. Grafton chose Partridge's bid as the winner.
17. However, Partridge backed out and failed to perform, claiming delays in formalizing the agreement beyond Partridge's barebones bid.

### **Grafton Opens a Second Round of Bidding**

18. Grafton opened a new round of bidding with a new, second request for proposal.  
  
Grafton Selectmen modified the new request to allow contractors greater flexibility.

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<sup>1</sup> There were several differences between the bids. This description is not an exhaustive comparison and only serves to show that they did differ in some substantial ways. Each specific difference is of little importance for the notice purposes of this Complaint.

Bidding closed on May 12, 2014.

19. After bid submissions were closed, the Selectboard met again to consider bids.

20. Smith River had submitted the only bid. In summary, Smith River's bid provided for work to begin almost immediately and payment terms of:

1. a total price of \$77,500;
2. a 40% deposit due within one week of acceptance;
3. two payments of 20% as milestones were completed; and
4. the final 20% on project completion.

21. Displeased, Frost produced a written, one-page bid from another contractor from his back pocket. Frost moved to have Grafton accept it immediately, though the bid was not timely submitted. Frost had not yet read Smith River's bid. No one seconded Frost's motion.

#### **Grafton Unambiguously Accepts Smith River's Proposal**

22. To Frost's dismay, the other two Selectmen *did* read Smith River's proposal and found it thorough and acceptable.

23. Two selectmen approved, but Frost voted against. Grafton accepted Smith River's offer on August 14, 2013 in a signed writing.

24. Right above the signature line for the two, signing selectmen, the offer conspicuously, unambiguously stated:

"We, the Grafton Selectboard accept this proposal. We under that acceptance of this proposal constitutes a binding contract between the Town of Grafton and Smith River Energy, LLC."

25. Under the contract, the Town's first payment of \$31,000 was due a week later on August 21, 2013. Smith River was to begin work immediately.
26. In this short span of time before the first payment was due, Frost scrambled and, in collaboration with third parties, authored and mailed an anonymous letter to residents of Grafton. (Frost admitted writing and mailing the letter at a later Selectboard meeting.)
27. Curiously sent from the Town's Ambulance's P.O. Box, Frost's letter described how Frost had conspired with Partridge—and other parties he has not yet named—and urged Grafton residents to appear at the next Selectboard meeting to demand that Grafton not proceed with the fire department project.

#### **Grafton "Cancels" the Contract**

28. On the very day the first payment was due, the Grafton Selectboard decided that it was "canceling the contract."
29. In any case, the contract provided that Grafton was liable for payments up to cancellation. Under the contract, that was a 40% deposit.
30. Smith River inquired when Grafton would be paying the deposit.

#### **Grafton Denies the Contract Existed**

31. Grafton responded that the parties had no agreement, because no contract was ever formed. The Town responded that Smith River's submission was merely a "proposal" from which a contract could not be formed.
32. Grafton explained that the Selectboard voted to accept Smith River's offer by a vote

of 2-1, and the selectmen signed Smith River's proposal to memorialize that vote.

33. Grafton explained, the Selectboard actually—and unknown to Smith River—intended to execute a new, separate agreement at later date.

34. Grafton further explained that because it had not yet executed a separate agreement, no contract was formed.

35. Grafton's explanation for its breach and refusal to pay defies rational, legal explanation.

36. Grafton informed Smith River that it would not pay him, but that Smith River was invited to bid at a later date.

#### **Grafton Holds a Third Round of Bidding**

37. Between the time of the second and third rounds, there was a single-member change to the Grafton Selectboard: the new individual is Frost's brother-in-law.

38. Grafton decided to hold another round of bidding.

39. Smith River submitted a timely new bid to Grafton. The bid was substantially similar to Smith River's previous bid that was accepted by Grafton.

40. However, Smith River further informed the Town—in conspicuous bolded text—with its offer that an acceptance would resolve any past disputes about the prior contract.

41. Smith River submitted its bid on the project on June 5, 2014. Once again, it was the *only bidder*.

#### **Third Round: Grafton Rejects Smith River's Bid**

42. Even though the language was substantially similar to the language that Grafton first

accepted; even though Grafton invited Smith River to bid again; even though Smith River was the only bidder, Grafton declined to accept Smith River's bid.

43. Paradoxically, the new Grafton Selectboard said that it could not accept Smith River's bid because it had to resolve the outstanding litigation with Smith River. The very same litigation that acceptance of Smith River's new bid would have resolved.

**Grafton Hastily Tries a Fourth Round of Bidding**

44. Grafton hastily put together a fourth round of bidding to end on July 31.

45. Once again, Smith River submitted a timely bid that was substantially the same as the previous bid. Once again, Smith River's bid was the only bid submitted.

46. Grafton rejected Smith River's bid again.

47. At the public meeting where this new bid was rejected, Frost publicly announced that he would will never willingly see Grafton do business with Smith River.

48. Grafton has repeatedly failed to resolve this matter informally—including repeated proposals to simply perform the agreed upon work—despite ample opportunity.

49. Smith River is now compelled to bring this action not only to remedy its breached contract but to shine light on the unlawful behavior of the Grafton Selectboard, Sean Frost, and those who Frost is working with to defraud Grafton's taxpayers.

**COUNT I: BREACH OF CONTRACT,  
AGAINST TOWN OF GRAFTON**

50. All prior paragraphs are incorporated.

51. Smith River Energy submitted an offer to the Town to make certain repairs and improvements to the Town of Grafton's Fire Department.

52. The offer included conspicuous language that acceptance of the offer would create a binding contract.
53. The Town accepted Smith River's offer when two selectmen, on behalf of the Town, objectively manifested the Town's assent to the terms of the offer by signing it.
54. As valuable consideration for Smith River's promise to perform services as described by the offer, the Town promised to pay \$77,500.
55. Because both parties objectively manifested their assent to be bound by an agreement which was supported by sufficient consideration, Smith River and the Town entered into a binding contract.
56. Grafton breached the contract when it failed to make the first payment.
57. Further, Grafton breached the contract in violation of its implied covenant of good-faith and fair dealing because Frost, acting for Grafton, continually undermined the contract that Grafton was obligated to pay.
58. The contract further provided for interest rate at the maximum rate and for reasonable collection costs and attorneys fees.
59. Therefore, Grafton is liable to Smith River on the contract for all lost profits on the contract, interest since the date of breach, costs, and reasonable attorney's fees.

**COUNT II: UNLAWFUL RESTRAINT OF TRADE**  
**IN VIOLATION RSA 356:2,**  
**AGAINST TOWN OF GRAFTON,**  
**SEAN FROST, JOHN DOE #1, AND JOHN DOE #2**

60. All prior paragraphs are incorporated.
61. Frost acted in conspiracy with John Doe #1 and Doe #2 to ensure that Frost had the

power to direct a public contract to an intended recipient.

62. Grafton, through Frost, colluded with Partridge Family Heating, promising that the public contract would be awarded to Partridge regardless of other bids.

63. Grafton and Frost conspired with Partridge to restrain commerce, and fix and control the price of a bid for a public contract, in violation of RSA 356:2.

64. Grafton and Frost further conspired with Doe #1 and Doe #2 to sabotage and undermine Grafton's adherence to the contract that Smith River obtained in the second round of bidding.

65. Grafton, Frost, Doe #1, and Doe #2 knew that this type of bid-rigging in a public contract was illegal, but they nonetheless did so willfully and flagrantly.

66. Therefore, Grafton, Frost, Doe #1, and Doe #2 are liable to Smith River by RSA 356:11, II for the full amount of the contract plus treble damages, costs, and reasonable attorney's fees.

**COUNT III: TORTIOUS INTERFERENCE WITH CONTRACT,  
AGAINST SEAN FROST, JOHN DOE #1, AND JOHN DOE #2**

67. All prior paragraphs are incorporated.

68. By virtue of its contract to make certain repairs to the fire department building, Smith River had an economic relationship with Grafton.

69. Frost, Doe #1, and Doe #1, knew of the contractual relationship between Smith River and the Town.

70. Frost intentionally and improperly interfered with this relationship, by wielding both social influence and political influence to compel Grafton to breach the contract.

71. Smith River was damaged by Frost's tortious interference.
72. Therefore, Sean Frost is liable to Smith River for the value of the contract that his tortious interference caused. Doe #1 and Doe #2 are likewise liable for conspiring with Frost.

**COUNT IV: CONSUMER PROTECTION ACT,**  
**RSA 358-A:2,**  
**AGAINST TOWN OF GRAFTON, SEAN FROST,**  
**JOHN DOE #1, and JOHN DOE #2**

73. All prior counts are incorporated.
74. Grafton, Frost, Doe #1, and Doe #2 engaged in an unfair and deceptive act or practice by making a side-agreement with Partridge for the pricing of a public contract, which tends to harm competition in violation of RSA 358-A:2, XIV.
75. Grafton and Frost knew that this was an unfair and deceptive practice that would harm competition in the pricing of a public services contract, but willfully and knowingly chose to divert that contract to Partridge anyway.
76. When Grafton and Frost's attempts to rig the bidding in Partridge's favor, Grafton and Frost exerted deliberate effort to undermine and sabotage the contract that Grafton "accidentally" — from Frost's perspective—awarded to Smith River.
77. Frost conspired with Doe #1 and Doe #2 in deciding to exert his political and social influence to sabotage Smith River's contract.
78. Smith River was directly injured by Grafton and Frost's unlawful bid-rigging and price-fixing, and Frost has acted with the deliberate purpose to harm competition by

sabotaging Smith River's contract.

79. Therefore, Grafton, Frost, Doe #1, and Doe #2, are liable under RSA 358-A:10 to Smith River for up to treble damages for its lost profits, including costs and reasonable attorney's fees.

**COUNT V: CIVIL CONSPIRACY**  
**AGAINST SEAN FROST, JOHN DOE #1, and JOHN DOE #2**

80. All prior paragraphs are incorporated.

81. Frost, Doe #1, and Doe #2, by their words and their actions, agreed among themselves to act to tortiously interfere with Smith River's contract and to engage in unlawful, anticompetitive conduct forbidden by RSA 356.

82. Each defendant knew that the others intended to harm Smith River, and each defendant explicitly or implicitly agreed to participate in the joint plan, intending that Smith River be harmed.

83. Therefore, Frost, Doe #1, and Doe #2 are jointly and severally liable for the tortious acts of their fellow conspirators.

WHEREFORE, Smith River Energy, LLC requests the following relief from this Court:

1. Judgment against Town of Grafton on the contract for all lost profits, contractual interest, costs, and reasonable attorneys fees;
2. Judgment against all Defendants for \$232,500, inclusive of treble damages under RSA 356:11(b) and RSA 358-A:10, against Town of Grafton, Sean Frost, John Doe #1, and John Doe #2.
3. Reasonable costs and attorneys fees under the contract and pursuant to RSA

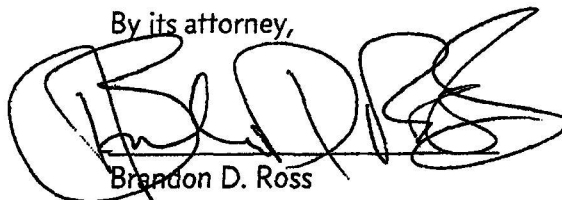
356:11(b) and RS 358-A:10; and

4. Any other relief that is just or equitable.

Respectfully submitted,

Smith River Energy, LLC

By its attorney,



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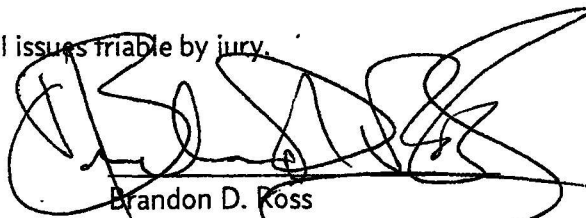
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Date: September 2, 2014

**DEMAND FOR JURY TRIAL**

Smith River Energy, LLC requests a trial by jury on all issues triable by jury.



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Date: September 2, 2014

