

CAUSE NO. 19-1614-C26

CITY OF GEORGETOWN
Plaintiff,

v.

BUCKTHORN WESTEX, LLC,
Defendant.

§ **IN THE DISTRICT COURT**
§ Williamson County - 26th Judicial District Court
§
§ _____ **JUDICIAL DISTRICT**
§
§ **WILLIAMSON COUNTY, TEXAS**

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

The City of Georgetown, Texas hereinafter referred to as "Plaintiff," or "City," files this Original Petition against Buckthorn Westex, LLC, hereinafter referred to as "Defendant," or "Buckthorn," and would show the Court as follows:

I. DISCOVERY CONTROL PLAN

1. The City intends to conduct discovery under a Level 3 Discovery Control Plan as more fully set out in Texas Rule of Civil Procedure 190.4.

II. PARTIES

2. The City of Georgetown is a home-rule municipality chartered and incorporated in Williamson County and situated entirely in Williamson County, Texas.

3. Buckthorn Westex, LLC is a Delaware limited liability company, which conducts business in the State of Texas. Defendant Buckthorn may be served with process by serving C T Corporation System, 1999 Bryan Street, Suite 900, Dallas, TX 75201-3136.

III. JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this lawsuit under the provisions of Chapter 37 of the Texas Civil Practice and Remedies Code.

5. Pursuant to Texas Rule of Civil Procedure 47(c), the City seeks monetary relief over One Million Dollars (\$1,000,000.00). The City also seeks judgment for all other relief to which it is justly entitled.

6. Venue is proper in Williamson County pursuant to Section 15.002(a)(1) of the Texas Civil Practice and Remedies Code because all or part of the events or omissions forming the basis of the lawsuit occurred in Williamson County, Texas.

7. Alternatively, venue is proper in Williamson County pursuant to provisions of the Solar Project Power Purchase Agreement (“Agreement”) entered between Buckthorn and the City, the provisions of which are confidential.

8. As of the time of filing, damages are within the jurisdictional limits of the Court.

IV. FACTUAL BACKGROUND

9. Georgetown’s municipally-owned electric utility, currently called Georgetown Utility System (“GUS”), was established in 1911, and has used power supply contracts to provide electricity to its customers since it shuttered its city-owned power plant in 1945. The City ended a long-term wholesale power contract in 2012 with the Lower Colorado River Authority, allowing the City to seek new power suppliers.

10. On August 9, 2014, the City, acting as GUS, issued a Request for Proposals (“RFP”) from companies qualified and experienced in the development, generation, and dispatch of electrical energy produced from renewable solar energy resources located in the Electric Reliability Council of Texas (“ERCOT”) system. In particular, GUS desired to purchase up to 150 megawatts (“MW”) of energy and capacity and associated environmental attributes/renewable energy credits from qualified solar facilities for a term of up to twenty-five years beginning no later than December 31, 2016. The RFP anticipated, under a power purchase

agreement (“PPA”) structure, that GUS would purchase the energy, capacity, and environmental attributes for up to 150 MW from either existing solar generation or generation to be constructed.

11. On September 18, 2014, SunEdison Utility Solutions, LLC (“SunEd”) submitted a proposal for six different generation facilities, one of those facilities being the Buckthorn 1 project, a solar electric generating facility with an aggregate nameplate capacity of 150 MWh. SunEd’s proposal was to manage the entire process, including site selection, system design, financing, procurement, permitting, construction, and maintenance.

12. On October 28, 2014, the City selected SunEd’s bid proposal for the Buckthorn 1 project, and immediately proceeded to conduct negotiations for entering into a whole purchase power agreement with SunEd.

13. Through the negotiations of a wholesale power purchase agreement, it was determined that the City would contract with SunEd’s wholly owned subsidiary Buckthorn Westex, LLC, a Delaware limited liability company.

14. The City and Buckthorn entered into the Agreement on February 24, 2015. Generally, the Agreement provides for the delivery of electricity from the Buckthorn facility, and contains numerous material terms dictating the operation, dispatching, and delivery of power from the Buckthorn facility and the purchase of that power. Among its numerous provisions, the Agreement provided for a date for the initiation of construction, and a date for commercial operation. The parties also agreed to keep the terms and negotiations of the Agreement confidential.

15. The Agreement has a term of 25 years at a fixed price, and was entered into with the intent to provide stability for the City’s wholesale power costs.

16. On March 28, 2016, the Parties executed the First Amendment to the Agreement, the terms of which, like the Agreement, are confidential, but is incorporated into the Agreement.

17. During the negotiation of the First Amendment to the Agreement, Buckthorn possessed material confidential information, to which it knew Georgetown had no access nor knowledge of, concerning the expected performance of the facility. Buckthorn did not disclose that information to Georgetown during or after those negotiations.

18. On April 20, 2016, SunEd filed for Chapter 11 bankruptcy protection.

19. In the Fall of 2016, NRG Energy, Inc. (“NRG”) finalized its purchase of roughly 1,500 MW of utility-scale solar and wind projects from bankrupt SunEdison for \$183 million. Part of that acquisition was the acquisition on November 9, 2016, of the 150 MW construction-ready Buckthorn solar project for upfront cash consideration of \$11 million.

20. On November 9, 2016, the Parties executed the Second Amendment to the Agreement, the terms of which, like the Agreement, are confidential, but are incorporated into the Agreement.

21. During the negotiation of the Second Amendment to the Agreement, Buckthorn possessed material confidential information, to which it knew Georgetown had no access nor knowledge of, concerning the expected performance of the facility. Buckthorn did not disclose that information to Georgetown during or after those negotiations.

22. The Buckthorn solar plant began operation on July 1, 2018.

23. The Buckthorn solar plant is a mile long. It covers 1,250 acres, an area approximately the size of 947 football fields. The plant contains 1.7 million solar panels that are mounted on a single-axis tracking system so that they rotate over the course of each day.

24. On March 30, 2018, NRG completed the sale of 100% of its ownership interest in Buckthorn to NRG Yield, Inc. for cash consideration of approximately \$42 million. On August 31, 2018, NRG Yield, Inc. changed its name to Clearway Energy, Inc. (“Clearway”).

25. The City has not cited nor described specific relevant terms of the Agreement in this Petition, as it would normally do in such a pleading, in order to keep the terms of the Agreement confidential in a commercially reasonable manner, and to avoid an assertion by Buckthorn that the City has somehow breached the Agreement by disclosing confidential information. The City believes that elements of the Agreement should remain confidential to protect its competitive nature, but looks to the Court for guidance on what material provisions can and should be discussed publicly. Thus, all discussion of the Agreement and its operation herein reflects and refers to information that is already in the public domain.

26. In the beginning of 2019, in reviewing the actions and performance of Buckthorn under the Agreement, the City determined that Buckthorn had committed numerous material breaches of the terms of the Agreement, including but not limited to Sections 3.11, 5.1, and 6.6. These ongoing breaches have resulted in unnecessary financial losses to the City.

27. Additionally, in the beginning of 2019, the City determined, on information and belief, Buckthorn’s possession of material confidential information, to which it knew Georgetown had no access nor knowledge of, concerning the expected performance of the Facility. The City also confirmed that Buckthorn did not disclose that information to Georgetown during or after the negotiations surrounding the Agreement or any of its subsequent amendments.

28. On March 29, 2019, the City sent Buckthorn a Notice of Default under the terms of the Agreement, identifying previous and ongoing material breaches of provisions of the Agreement.

29. Since March 29, 2019, the Parties have attempted to resolve Buckthorn's material breaches without resorting to litigation, but such negotiations have thus far failed, resulting in the filing of this Petition.

V. PLAINTIFF'S CAUSES OF ACTION

A. Count 1 – Fraud by Nondisclosure

30. The City incorporates by reference the allegations contained in the preceding paragraphs as if fully set forth herein.

31. Through its representations during the negotiation of the Agreement and its subsequent amendments, Buckthorn concealed from and failed to disclose certain material facts to Georgetown related to the Facility. Buckthorn, based on prior representations relating to the Facility, had a duty to disclose those material facts to Georgetown. Buckthorn knew that Georgetown was ignorant of those facts, and that it did not have an equal opportunity to discover those facts. Buckthorn was deliberately silent when it had a duty to relay those facts. The City relied on the nondisclosed information regarding the Facility when it entered into the Agreement as well as the First and Second Amendments to the Agreement, and as a result of the reliance suffered damages as a result of acting without the knowledge of the undisclosed facts.

B. Count 2 – Breach of Contract

32. The City incorporates by reference the allegations contained in the preceding paragraphs as if fully set forth herein.

33. Subject to and without waiving Count 1 above, the Agreement is a valid and enforceable contract. The City is a party to the Agreement and is authorized to bring suit to enforce its terms, and has performed all contractual obligations.

34. Buckthorn through its actions has materially breached the Agreement, including but not limited to Sections 3.11, 5.1, and 6.6. As a result of these material breaches the City has been harmed.

C. Count 3 – Declaratory Judgment

35. The City incorporates by reference the allegations contained in the preceding paragraphs as if fully set forth therein.

36. Texas Civil Practice & Remedies Code Sections 37.001, *et seq.* provides a way to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. A person “interested under...written contract, or other writings constituting a contract...may have determined any question of construction or validity arising under the...contract...and obtain a declaration of rights, status, or other legal relations thereunder.” Tex. Civ. Prac. & Rem. Code § 37.004.

37. The City is entitled to a declaration that Buckthorn’s breaches described above constitute an “event of default” under the Agreement, and the City is thus entitled to terminate the Agreement.

D. Count 4 – Attorneys’ Fees

38. The City incorporates by reference the allegations contained in the preceding paragraphs as if fully set forth herein.

39. The City is entitled to its costs and reasonable and necessary attorneys’ fees pursuant to Texas Civil Practice & Remedies Code Sections 37.009 and 38.001. Accordingly,

the City seeks recovery all of its court costs and its reasonable and necessary attorneys' fees associated with prosecuting its claims, both at the trial court level and on any appeal.

VI. DAMAGES AND REMEDIES

40. The City incorporates by reference the allegations contained in the preceding paragraphs as if fully set forth herein. The City hereby seeks the following damages, remedies, and relief:

- a) The rescission and/or cancellation of the Agreement;
- b) A declaration that Buckthorn's breaches constitute an "event of default" under the Agreement, and the City is thus entitled to terminate the Agreement;
- c) All of its general, actual, special, and consequential damages, as may be determined by the finder of fact, including pre- and post-judgment interest thereon;
- d) Costs of court; and
- e) Attorneys' fees as provided by law.

VII. PRAYER

WHEREFORE, PREMISES CONSIDERED, the City asks this Court to set this matter for trial and, upon final trial issue a judgment granting and awarding to the City the damages, remedies, and relief requested by the City above, and pursuant to Texas Rule of Civil Procedure 47(D), judgment granting the City all such other and further relief to which it is justly entitled at law and/or equity.

Respectfully submitted,

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