LATOYA GRAYES
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DEC 07 2018
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CLERK DISTRICT COURT

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

Case No. D-202-CV-2018-

CV 2018089555
SUMMONS (ES) ISSUED

CITY OF ALBUQUERQUE,
Plaintiff,

v.

BYD MOTORS, INC.,
Defendant.

COMPLAINT FOR BREACH OF WARRANTIES, BREACH OF CONTRACT, FRAUDULENT MISREPRESENTATION, NEGLIGENT MISREPRESENTATION, AND VIOLATION OF UNFAIR PRACTICES ACT

Parties and Jurisdiction

The Plaintiff, City of Albuquerque ("City"), by and through its attorney, Sanchez, Mowrer & Desiderio, P.C., and the City Attorney for the City of Albuquerque, files this Complaint for Breach of Warranties, Breach of Contract, Fraudulent Misrepresentation, Negligent Misrepresentation, and Violation of Unfair Practices Act against Defendant BYD Motors, Inc. ("BYD").

1. The City is an incorporated municipality within the County of Bernalillo, New Mexico.

2. Upon information and belief, BYD is a Wyoming corporation, whose principal place of business is in California.

3. BYD transacted business in New Mexico.

4. This Court has jurisdiction over BYD, to which BYD has consented.

5. The Court has jurisdiction over the parties.

6. Venue is proper in this Court.

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General Allegations

7. The City and BYD entered in a contract on January 26, 2017, attached as **Exhibit A.**

8. The contract incorporated a Request for Proposals, Solution Number P2016000031, for 60-foot 5-Door Bus Rapid Transit ("BRT") Buses ("RFP"), attached as **Exhibit B**; BYD's proposal in response to the RFP ("Proposal"), **Exhibit C**; and BYD's Best and Final Offer, **Exhibit D** (collectively, the "Contract").

9. Under the Contract, BYD agreed to provide the City eighteen (18) 60-foot 5-door BRT buses for the Albuquerque Rapid Transit ("ART") bus project, including manuals, training, certain other features and delivery charges for a total price of $22,921,136.56.

10. BYD promised to deliver the buses beginning the week of June 26, 2017, with all the buses to be delivered no later than the week of October 2, 2017.

11. BYD represented and warranted that the buses would conform to the specifications and warranties stated in the RFP and Proposal.

12. BYD represented and warranted that the buses would be safe and free of corrosion and defects.

13. BYD represented and warranted that the batteries would meet or exceed the route model, including speed elevation and pull, as specified in the RFP.

14. BYD represented and warranted that the buses could be driven for 275 miles on a single battery charge.

15. BYD represented and warranted that the buses would be Altoona-tested, recognizing that passing the Altoona test is a Federal Transportation Administration requirement.

16. BYD represented and warranted that it would provide the City with the results of the Altoona testing prior to delivery of any buses.

17. BYD represented and warranted that it would provide the City with certifications that the buses met federal standards, the RFP specifications and the RFP and Proposal warranties, including a signed crash-worthy certificate, for each and every bus delivered to the City.

18. BYD delivered fifteen (15) buses to the City.

19. There were substantial delays with respect to the delivery of those buses; all the buses were not delivered to the City by the week of October 2, 2017.

20. Upon inspection, the City discovered that the buses, individually and collectively as a fleet, were not free of defects, including, but not limited to, cracks in their frames and bodies; welds as to frames that were improper or incomplete; frames were rusting; clamps, wiring and hoses were improperly installed; wires and cables were exposed.

21. Upon inspection, the City discovered that the buses were not safe, including, but not limited to, the brakes not functioning properly; the rear doors opening while the buses were in motion; the placement of the exit door was such that passengers would not be able to exit the buses in an emergency; the batteries could catch on fire with little possibility of putting out the fire; the high voltage wiring was exposed and not properly highlighted; security for wheelchairs did not properly secure wheelchairs; and the bridge plates did not function properly.

22. As a result of those safety issues, the City determined that if the City placed the buses in operation it would expose drivers and passengers to serious risks of injuries, including fatalities.

23. Upon inspection, the City discovered that the average miles per charge that buses could be driven was substantially lower than the 275 miles represented by BYD.

24. Upon information and belief, the BYD buses have not passed the Altoona testing.

25. Upon information and belief, the buses cannot meet the speed elevation and pull specified in the RFP.

26. BYD did not provide the City with signed certificates of crash-worthiness for any of the buses.

27. The buses did not conform to BYD's affirmations, descriptions, representations and promises, and cannot be repaired.

28. The nonconformity of the buses individually and as a fleet, substantially impaired the value of all the buses to the City.

29. BYD knew and understood that the City contracted to purchase the fleet of buses to operate the ART program. The City was not able to do so with the buses delivered to it.

30. BYD intentionally, carelessly and recklessly delivered buses that it knew, or should have known, were not as it represented, were in violation of federal requirements and industry standards, and were dangerous if they were operated.

31. The City, on numerous occasions, within a reasonable period of time after delivery of buses, informed BYD that it had rejected all the buses.

32. The City reasonably assumed and relied on BYD's assurances that BYD would cure any nonconformities. BYD did not do so.

33. The defects in the buses cannot be cured.

34. On November 13, 2018, the City gave BYD formal notice that it was rejecting the buses, or, to the extent it had accepted any buses, that it was revoking its acceptance of those buses and that it would seek damages for losses suffered by the City.

35. On November 28, 2018, in response to the City's notice that it was rejecting or revoking acceptance of the buses, BYD removed and took possession of all 15 buses.

36. The City no longer has the buses.

37. The City has reasonably, and in good faith, covered by purchasing ten (10) substitute buses at a price of $9,063,142.51.

38. At this time, the City is not able to acquire the additional 8 buses.

39. The City has incurred reasonable incidental damages in the inspection, care and custody effecting cover and delay.

40. The City has suffered consequential damages resulting from BYD's delivery of nonconforming goods, breach of contract, or misrepresentations, about which BYD at the time of contracting, had reason to know and which could reasonably have been prevented.

Count I
Breach of Express Warranty

41. The City incorporates ¶¶ 1-40.

42. BYD affirmed, promised and represented that the buses were free of defects and safe.

43. BYD affirmed, described, promised and represented that the buses met all the RFP specifications and warranties under the RFP and the Proposal.

44. BYD affirmed, promised and represented that it would have the buses Altoona-tested and would provide the City with a copy of the results of that test before delivery of any buses.

45. BYD affirmed, promised and represented that it would provide the City with certifications required by federal transportation law and rules, the RFP and the Proposal, including signed certifications that each bus was crash-worthy.

46. BYD affirmed, described, promised and represented that the buses could be driven 275 miles on a single battery charge.

47. BYD affirmed, promised and represented that it would deliver all the buses no later than the week of October 2, 2017.

48. Each of these affirmations, descriptions, promises and representations were related to the buses and were part of the basis on which the City contracted with BYD.

49. The buses did not conform to each and every affirmation, description, promise and representation made by BYD.

50. The City rightfully rejected the buses.

51. The City justifiably revoked acceptance of the buses it may have accepted.

52. BYD removed the buses, and took possession and ownership of them.

53. As a result of BYD's breaches of express warranties, the City has suffered damages, including incidental and consequential damages.

Count II
Breach of Implied Warranty of Merchantability

54. The City incorporates ¶¶ 1-53.

55. BYD is a merchant with respect to the buses that are the subject of this Contract between it and the City.

56. The buses delivered by BYD do not pass without objection in the trade under the Contract description.

57. The buses delivered by BYD are not fit for their ordinary purposes; the City cannot place those buses in operation.

58. The City rightfully rejected the buses.

59. The City justifiably revoked acceptance of any of the buses it may have accepted.

60. BYD removed the buses, and took possession and ownership of them.

61. As a result of BYD's breach of the implied warranty of merchantability, the City has suffered damages, including incidental and consequential damages.

Count III
Breach of Implied Warranty of Fitness for Particular Purpose

62. The City incorporates ¶¶ 1-61.

63. The City had a particular purpose for each and every bus it agreed to purchase from BYD pursuant to the Contract. That particular purpose was to acquire electric buses that would meet the needs of ART as described in the RFP.

64. At the time of the contract, BYD knew, or had reason to know, of the City's particular purpose.

65. The City relied on BYD to manufacture and deliver buses that conformed to its particular purpose.

66. BYD knew, or had reason to know, that the City was relying on BYD to manufacture and deliver buses that would conform to its particular purpose.

67. The buses that BYD delivered to the City did not conform to the City's particular purpose; they were unsafe and could not be put into operation because of their defects.

68. The City rightfully rejected the buses.

69. The City justifiably revoked acceptance of the buses it may have accepted.

70. BYD removed the buses, and took possession and ownership of them.

71. As a result of BYD's breach of the implied warranty of fitness for a particular purpose, the City has suffered damages, including incidental and consequential damages.

Count IV
Breach of Contract

72. The City incorporates ¶¶ 1-71.

73. BYD breached its contract with the City, causing the City to suffer damages, including incidental and consequential damages.

Count V
Fraudulent Misrepresentation

74. The City incorporates ¶¶ 1-68.

75. BYD intentionally or recklessly misrepresented the material facts concerning the buses, including that they would be free of defects and safe, in order to induce the City to contract with it for the purchase of the buses.

76. BYD intentionally or recklessly misrepresented that the buses would pass Altoona-testing before it delivered any buses.

77. BYD intentionally or recklessly misrepresented that it would provide the City with certificates that the buses complied with federal standards, the RFP and the Proposal, including signed certificates of crashworthiness.

78. BYD intentionally or recklessly misrepresented that it would deliver all the buses that conformed to the Contract no later than the week of October 2, 2017.

79. BYD's misrepresentations were for the purpose of inducing the City to contract with it for the purchase of the buses.

80. The City justifiably relied on those misrepresentations of material facts.

81. The City has suffered injury because of BYD's intentional or reckless misrepresentations of material facts related to the buses, causing the City to suffer damages, including incidental and consequential damages.

Count VI
Negligent Misrepresentation

82. The City incorporates ¶¶ 1-81

83. BYD had a duty not to misrepresent that the buses were safe, free of defects, passed Altoona testing, and met all federal and industry standards.

84. BYD reasonably knew, or should have known, of the number and severity of defects in the buses, and that the buses were not safe and were not operational.

85. BYD knew, or should have known, that it could not provide the City with the buses that passed the Altoona testing.

86. BYD knew, or should have known, that it could not provide the City with certificates evidencing that the buses met federal standards, the RFP and the Proposal, including signed certificates that the buses were crash-worthy.

87. BYD knew, or should have known, that it could not deliver buses to the City that conformed to the Contract no later than the week of October 2, 2017.

88. BYD's negligent misrepresentations caused the City to suffer substantial injury.

89. BYD's negligent misrepresentations were the proximate cause of the City's injury.

90. As a result of BYD's negligent misrepresentations, the City has suffered damages, including incidental and consequential damages.

Count VII
Violation of Unfair Practices Act

91. The City incorporates ¶¶ 1-90.

92. BYD made oral and written representations concerning the buses that were false or misleading.

93. BYD knowingly made those false or misleading representations in connection with the sale of the buses to the City in the ordinary course of BYD's business, including, but not limited to, representing that the buses would be free of defects; would comport with federal and industry standards and RFP specifications and the Proposal warranties; that the buses would pass Altoona testing; and that the batteries would power the buses for 275 miles on a single charge.

94. Those representations were of the type that would deceive or mislead any person.

95. As a result of BYD's deceptive and misleading representations, the City has suffered substantial damages.

96. BYD willfully engaged in deceptive trade practices, for which the City is entitled to treble damages.

WHEREFORE, the City respectfully prays this Court for:

A. Damages, including incidental and consequential damages;

B. Treble damages for BYD's willfully engaging in deceptive practices in violation of the New Mexico Unfair Practices Act;

C. Punitive damages;

D. Prejudgment interest;

E. Attorney fees;

F. Court costs; and

G. Such other relief this Court decides is fair and just.

Respectfully submitted,

SANCHEZ, MOWRER & DESIDERIO, P.C.

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