

STATE OF MAINE  
PENOBSCOT, SS.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO.

STATE OF MAINE, and )  
DIRECTOR, DIVISION OF )  
COMMUNITY SERVICES, )  
 )  
Plaintiffs )  
 )  
v. )  
 )  
PENQUIS COMMUNITY ACTION )  
PROGRAM, INC., a non-profit )  
corporation duly incorporated )  
in the State of Maine with )  
a principal place of )  
business in Bangor, County )  
of Penobscot, State of Maine, )  
 )  
Defendant )

COMPLAINT

#### INTRODUCTION

1. This action is brought by the State of Maine, and the Director of the Division of Community Services ("DCS") to recover damages for breach of contract arising from Penquis Community Action Program, Inc.'s administration of a weatherization program funded under a grant from DCS.

#### PARTIES

2. Plaintiff State of Maine is a sovereign state and brings this action by and through its Attorney General pursuant to 5 M.R.S.A. § 192 (1979) and the powers vested in him by the common law.

3. Plaintiff Director of the Division of Community Services administers DCS, a division of the Executive Department of the State of Maine, and brings this case under her authority to administer weatherization or energy conservation programs under 5 M.R.S.A. §§ 3514, 3515 (Pamph. 1988).

4. Defendant Penquis Community Action Program, Inc. ("Penquis") is a non-profit corporation duly incorporated in the State of Maine with principal offices located in Bangor, County of Penobscot, State of Maine. At all times relevant to this Complaint, Penquis was designated as a "community action agency" (5 M.R.S.A. § 3519 (Pamph. 1988)) and received grants from DCS to weatherize low-income housing in Penobscot and Piscataquis Counties.

#### JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 4 M.R.S.A. § 105 (Supp. 1988).

6. Venue is founded upon 14 M.R.S.A. § 501 (1980).

#### STATUTORY AND REGULATORY BACKGROUND

7. Pursuant to 42 U.S.C. § 6861, et seq., 42 U.S.C. § 8621, et seq., and 10 C.F.R. Parts 440, 600, the United States Departments of Energy (DOE) and Health and Human Services (HHS) administer federal grants to develop and implement state weatherization assistance programs for the purpose of weatherizing the residences of low-income persons.

8. DCS is charged with the responsibilities of state government relating to the planning and financing of community action agencies and the administration of state and federal services' programs and block grants, including the DOE and HHS weatherization assistance grants. 5 M.R.S.A. § 3514 (Pamph. 1988).

9. In connection with its administration of the DOE and HHS weatherization grants, DCS issues grants from state and federal funds to community action agencies for the implementation of the weatherization program. See 5 M.R.S.A. § 3518-3519 (Pamph. 1988) and State of Maine Division of Community Services Weatherization and Repair Program, Final Revised Rules (7/5/83), and (7/1/85).

#### FACTUAL BACKGROUND

10. From approximately October, 1983 to December, 1985, Penquis received approximately \$2 million under Sub-Grant Agreements from DCS for the purpose of weatherizing nearly 2,000 residential units owned or leased by low-income persons in Penobscot and Piscataquis Counties.

11. Under the Sub-Grant Agreements with DCS, Penquis was obligated to:

(a) Implement the DOE Low Income Weatherization Program in accordance with the provisions, policies and requirements of the State of Maine Weatherization Repair Program: Final Revised Rules and the Accounting and Reporting Guide for Weatherization Programs;

(b) Adhere to all applicable federal statutes, regulations and grant conditions. Those regulations include, inter alia, the duty to "adequately safeguard" funds, property and assets under the grant and to assure that such funds, property and assets are used "solely for authorized purposes." 10 C.F.R. § 600.109(b)(3); and

(c) Provide supervision of persons implementing the weatherization program sufficient to ensure that the program is conducted in accordance with federal and state purposes, policies, requirements and job duties, as set forth in the DCS Rules.

12. At all times relevant to this Complaint, low-income persons applied to Penquis for weatherization of their homes under the Penquis Weatherization Program. After Penquis selected persons who were eligible to receive its weatherization services, it assigned an "estimator" to conduct a weatherization audit of each home in order to prescribe weatherization work and materials within federal and state guidelines. Penquis then assigned either a crew of Penquis employees or an independent contracting firm ("subcontractor") to install the weatherization materials pursuant to Penquis' specifications. Following completion of the weatherization work, a Penquis inspector inspected each home for the purpose of ensuring that the work was performed in a workmanlike manner and in accordance with specifications. If the inspector

identified deficiencies in workmanship or materials, he was supposed to order the Penquis crew or subcontractor to remedy the problem or perform a "rework" on the home. He was then to conduct a follow-up inspection in order to ensure that the rework had been performed.

13. At all times relevant to this Complaint, Penquis entered into contracts with a number of subcontractors for the performance of the weatherization work under the Weatherization Program. Pursuant to the contracts, the subcontractors agreed to perform the weatherization work in accordance with the highest standards prevalent in the subcontractor's area at the time of performance. In addition, the contracts provided that Penquis would not pay the subcontractor for the work under the contract until Penquis had inspected the work, determined the work to have been "satisfactorily performed," and issued a completion certificate to the subcontractor.

COUNT I

(Breach of Sub-Grant Agreement)

14. Plaintiffs repeat, reallege and incorporate herein by reference paragraphs 1-13 of this Complaint.

15. Penquis failed to perform its duties under the Sub-Grant Agreements, including, but not limited to:

(a) Recklessly and negligently failing to adequately supervise the performance of its employees and subcontractors in the implementation of the weatherization grant;

(b) Recklessly and negligently failing to conduct a reasonably competent inspection of all residential units following weatherization; and

(c) Recklessly and negligently failing to adequately account for funds, property and other assets under the Sub-Grant Agreements and to ensure that such funds, property or assets would be used only for authorized purposes under the grant.

16. As a result of its failure to perform its duties under its Sub-Grant Agreements with DCS, Penquis is liable for the following economic loss to DCS and the State of Maine for the period October, 1983 to December, 1985:

(a) Penquis paid its subcontractors approximately \$326,500 in funds provided by DCS for materials which were installed by the subcontractors in such a manner as to render them functionally deficient;

(b) Penquis paid its subcontractors approximately \$311,900 in funds provided by DCS for materials which were never installed;

(c) As a result of the missing materials and deficient workmanship, there was a diminution of market value in the homes weatherized under the Weatherization Program;

(d) The deficient workmanship and missing materials in the homes under the weatherization program caused consequential damage to parts of the homes which were not worked on by Penquis crews or subcontractors; and

(e) DCS will have to expend approximately \$1,500,000 to install the missing materials, repair the deficient workmanship, and remedy the damages arising from the missing materials and deficient workmanship.

COUNT II

(Breach of Sub-Grant Agreement)

(Alternate Count)

17. Plaintiffs repeat, reallege and incorporate herein by reference paragraphs 1-16 of this Complaint.

18. In the alternative, Penquis failed to perform its duties under the Sub-Grant Agreements, including, but not limited to:

(a) Intentionally failing to adequately supervise the performance of its employees and subcontractors in the implementation of the weatherization grant;

(b) Intentionally failing to conduct a reasonably competent inspection of all residential units following weatherization; and

(c) Intentionally failing to adequately account for funds, property and other assets under the Sub-Grant Agreements and to ensure that such funds, property or assets would be used only for authorized purposes under the grant.

19. As a result of its failure to perform its duties under its Sub-Grant Agreements with DCS, Penquis is liable for the following economic loss to DCS and the State of Maine for the period October, 1983 to December, 1985:

(a) Penquis paid its subcontractors approximately \$326,500 in funds provided by DCS for materials which were installed by the subcontractors in such a manner as to render them functionally deficient;

(b) Penquis paid its subcontractors approximately \$311,900 in funds provided by DCS for materials which were never installed;

(c) As a result of the missing materials or deficient workmanship, there was a diminution of market value in the homes weatherized under the Weatherization Program;

(d) The deficient workmanship and missing materials in the homes under the weatherization program caused consequential damage to parts of the homes which were not worked on by Penquis crews or subcontractors; and

(e) DCS will have to expend approximately \$1,500,000 to install the missing materials, repair deficient workmanship, and remedy the damages arising from the missing materials and deficient workmanship.

### COUNT III

(Breach of the Agreement for Inspection)

20. Plaintiffs repeat, reallege and incorporate herein by reference Paragraphs 1-19 of this Complaint.

21. Following DCS' identification of serious deficiencies in the Penquis weatherization program, DCS and Penquis entered into an "Agreement for Inspection and Evaluation of Penquis Community Action Program's Weatherization Program" ("Inspection Agreement") dated 10/31/86, a copy of which is attached hereto as Exhibit A.

22. Under the Inspection Agreement, Penquis agreed to pay DCS up to \$200,000 in order to fund a reinspection program to identify which residential units previously weatherized by Penquis required reworks due to deficient workmanship or missing materials.

23. By letter dated January 27, 1987, Penquis notified DCS that it would not fulfill its obligations under the Inspection Agreement. Specifically, Penquis stated that it could pay only up to a total of \$50,000 for the reinspections, not the \$200,000 that it had agreed to pay.

24. As of the date of this Complaint, Penquis has paid DCS \$50,000 for reinspections under the Inspection Agreement.

25. Penquis is liable for the breach of the Inspection Agreement in the amount of the cost of reinspecting the homes under that Agreement, up to \$150,000.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs State of Maine and the Director of Community Services, request that this Court order judgment as follows:

1. Order Penquis to pay the costs of installing the missing materials, repairing the deficient workmanship, and remedying the damages arising from the missing materials and deficient workmanship, for work performed under the Sub-Grant Agreements from October, 1983 to December, 1985;

2. In the alternative, order Penquis to pay DCS the money misapplied under the Sub-Grant Agreements from October, 1983 to December, 1985, in the amount of approximately \$638,400.

3. Order Penquis to pay the State up to \$150,000, for the costs of reinspecting the nearly 2,000 homes which were weatherized under the Sub-Grant Agreements during the period October, 1983 to December, 1985;

4. Order Penquis to pay the costs of this suit; and

5. Order such other relief as this Court deems just and proper.

Respectfully submitted,

JAMES E. TIERNEY  
Attorney General

DATED:

\_\_\_\_\_  
STEPHEN L. WESSLER  
Deputy Assistant Attorney General

DATED:

\_\_\_\_\_  
LEANNE ROBBIN  
Assistant Attorney General  
State House Station 6  
Augusta, Maine 04333  
(207) 289-3661

Attorneys for State of Maine and  
Division of Community Services