

Continuous Emission Monitoring System: Mississippi Steel Mill Breach of Warranty/Contract Action



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Various federal and state environmental programs require facilities to meet specific emission/effluent limits and monitoring requirements.

The inability of purchased equipment to meet applicable regulatory or permit requirements sometimes leads to breach of contract/warranty litigation between the permittee and equipment vendor.

A recent example involved a continuous emission monitoring system ("CEMS").

A United States District Court (Northern District, Mississippi) addressed in a March 31st opinion a Columbus, Mississippi steel plant's (Steel Dynamics Columbus, LLC ["Steel Dynamics"]) action against a firm (Altech Environment USA Corp. ["Altech"]) alleging defects in two CEMS the company had supplied.

The U.S. District Court held a bench trial to review the parties' contentions. It subsequently issued an opinion based on its Findings of Facts.

CEMS are a type of air pollution control monitoring that provide continuous data on the amount of certain pollutants emitted by the facilities.

The Steel Dynamics Clean Air Act Title V permit issued by the Mississippi Department of Environmental Quality ("MDEQ") required the installation of CEMS to monitor four pollutants. They included nitrogen oxide (NOx), carbon monoxide (CO), volatile organic compounds (VOCs), and sulfur dioxide (SO2).

An Altech proposal to supply the CEMS was accepted by Steel Dynamics. The proposal included a number of elements:

- The CEMS would monitor the relevant pollutants as required by Steel Dynamics Title V permit issued by the Mississippi Department of Environmental Quality ("MDEQ")
- A "DAS computer" which would be pre-loaded with software to operate the CEMS to receive usable information from the monitoring devices
- A one-year maintenance contract (including quarterly maintenance)
- Support services for startup, Relative Accuracy Test Audit ("RATA") testing
- Regulatory approval

Every quarter the CEMS were to undergo a performance test that would be calibrated. A RATA would be undertaken annually.

The CEMS were installed at the Steel Dynamics plant in 2011.

Steel Dynamics stated that it experienced multiple operating issues with the CEMS over the course of three years of operation. As a result, the company filed an action against Altech alleging the CEMS were defective.

The causes of action alleged included:

1. Negligence
2. Breach of contract
3. Breach of warranties

4. Contractual indemnification

Steel Dynamics' action sought to recover from Altech alleged damages which included:

1. The cost of the CEMS
2. The costs incurred in trying to make the CEMS work
3. A fine imposed by MDEQ
4. Attorney's fees

The Court's Findings of Fact indicated that Steel Dynamics issued a purchase order to Altech in the amount of \$447,610.20 to obtain the required CEMS. Altech understood that Steel Dynamics intended to use the CEMS units to monitor emissions from the steel plant to maintain compliance with the Title V permit.

An undated "Goods and Services: Terms and Conditions of Purchase" ("Terms") was stated to have included two sections related to liability. The Court noted:

One section provides for an express warranty and the other disclaims all implied warranty. . . .as relevant here, the Terms warrant that the CEMS "(i)" shall be of good quality and free from defects, latent in paper, in design, materials and workmanship; [and] . . .shall be suitable and sufficient for their specified purpose . . . The terms also state that "THERE ARE NO OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING THE WARRANTIES MERCHANTABILITY OR FITNESS FOR AN INTENDED PURPOSE."

Language was also included addressing remedies. One limited recourse for breach of express warranty repair and/or replacement of the CEMS at Altech's option. The other included two clauses limiting Steel Dynamic's recoverable damages. One limits all damages (except for indemnity) to the CEMS purchase price, and the other precludes all incidental and consequential damages.

The opinion describes the CEMS operating history over the course of three years. A summary of the CEMS events over this period of time included:

- 2011
- Problems related to inaccurate configuration data provided by Steel Dynamics
- By mid-March the analyzers had been "re-ranged" with updated Steel Dynamics damage
- Altech engineer conclusion that service remained "incomplete" because heater changes were required
- Analyzer in the second CEMS could not measure SO₂ or NO_x (by mid-October)
- The DAS computer is "not working" (by mid-October)
- All three temperature controllers in the first CEMS would not function and had to be replaced (by mid-October)
- 2012
- Multiple services and persistent problems with analyzers in both CEMS and shared DAS computer
- CEMS indicated thousands of alarms daily
- Steel Dynamics bought a new computer and prepared to install new software from Contec provided by Altech

- Continued problems after calibration of CEMS by Altech engineers
- Performance testing on the second CEMS remained very unstable and out of calibration (very unstable on all calibrations)
- None additional service visits
- Altech engineer indicated to “truly fix” problems with the second CEMS software in the analyzer had to be downloaded from the on-site CEMS/transferred to a test unit at Altech/repared and then re-loaded back onto the on-site CEMS
- No evidence the repair was ever performed
- 2013
- Steel Dynamics indicates critical issues remain
- Steel Dynamics/Altech continued to struggle to identify/correct continued problems referencing analyzers, temperature controllers and computer
- Contec notified Altech that there were major problems with the databases for 2012 and 2011
- DAS computer stated to be corrupted
- Altech purchased replacement computer and provided at no cost
- New computer/software suffered same problems causing CEMS analyzers to not function
- Both CEMS provided faulty data and a RATA still could not be scheduled (exceeding Altech’s revised deadline)
- Altech notified Steel Dynamics that warranty on the first CEMS expires January 25, 2013 and warranty on the second CEMS expires July 22, 2013
- Steel Dynamics states it still does not have a usable system

MDEQ issued Steel Dynamics a Notice of Violation (“Notice”) on June 28, 2013. The Notice cited two alleged violations of the Title V permit which included:

- The CEMS was installed but could not function longer than 12 to 22 hours at a time and could not pass a RATA
- Steel Dynamics failed to report CEMS malfunctions

Steel Dynamics subsequently retained a different CEMS vendor to conduct ambient air tests on Altech’s CEMS. The systems were stated to have “failed pretty badly” in regards to NOx.

Steel Dynamics “gave up” on the Altech CEMS because it considered the results of the ambient air tests to be a failure. The company negotiated a \$135,000 penalty with MDEQ which it paid. Further, the company agreed to contract with a third party to conduct monthly emission tests until Steel Dynamics installed working CEMS.

The Court held a three-day bench trial addressing Steel Dynamics’ causes of action.

1. Negligence

As to the alleged cause of action for negligence, the Court cited Mississippi law and noted that the breach of a contract (whether described as negligent or not) is not actionable under an ordinary negligence theory unless breaching the contract also breached a duty of care recognized by tort law. It further noted that there must be a duty of care fixed by law and independent of the contract.

The Court rejects the negligence claim stating:

. . . the tort duty found in a contract is not breached by failing to perform a contract obligation at all but by causing damages due to carelessness in the performance of the contract. Steel has made no allegations in this regard.

2. Breach of implied warranties/contractual disclaimer:

Altech argued that the breach of implied warranties is barred by the Terms express language bars all implied warranty claims: § 11-7-18 and § 75-2-719(4) Mississippi Code. One is deemed inapplicable and

the latter is held to not prohibit disclaimer of liability for such warranties (i.e., the Terms is not barred from prohibiting the implied warranty claims).

3. Breach of contractual warranty

Steel Dynamics argued that Altech breached its contractual warranty by:

- a. Delivering CEMS that “never became operational”
- b. Delivering CEMS that failed to comply with express warranties in the Terms of the CEMS (should be of good quality and free from defects. . . [and] shall be suitable and sufficient for their specified purpose)

The Court reviews a number of the issues that arose in the operation of the CEMS. Despite noting some of Steel Dynamics deficiencies in installing the equipment and supplying inaccurate data, it notes that:

. . .the bulk of the recurring problems, which related to the analyzer or the computer, had little or nothing to do with these deficiencies.

The testimony of an expert witness (regarding CEMS) for Steel Dynamics is cited. He is stated to have credibly concluded that “the inaccurate data did not cause recurrent problems.” As a result, the Court concludes that the CEMS, as delivered, were unsuitable and insufficient for their specified purpose – monitoring pollutants in compliance with Steel Dynamics Title V permit.

Altech is held to have breached the contractual warranty.

The Court then addresses certain damage issues. It initially rejects an Altech argument that Steel Dynamics did not provide required notification because of a failure to notify Altech of the breach. Further, the exclusive limited warranty is held to not limit Steel Dynamics’ remedies.

The Court also addresses an argument for preclusion of consequential and incidental damages. It holds that to the extent that the exclusive repair – and/or – replaced warranty failed in its essential purpose, a separate consequential and incidental damages limitation also fails under § 75-2-719(2) with respect to damages resulting from a breach of warranty.

Finally, the Court undertakes a review of the various damage items that Steel Dynamics allegedly incurred. The Court excludes a number of items for reasons such as failure to show by preponderance of the evidence that the relevant invoices were defect-related or defect-caused. Another excluded item included invoices for particulate and coalescing filters which were stated as being likely either maintenance items or necessary because of the operating environment of Steel Dynamics’ plant (and not because of the CEMS defects).

[A copy of the Opinion can be downloaded here.](#)