

DISTRICT COURT, CITY AND COUNTY OF  
DENVER, STATE OF COLORADO

1437 Bannock Street  
Denver, Colorado 80202  
Telephone: (720) 865-8301

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**Plaintiff:** REGIONAL TRANSPORTATION DISTRICT

v.

**Defendant:** REGIONAL RAIL PARTNERS;  
BALFOUR BEATTY INFRASTRUCTURE, INC.; and  
GRAHAM CONTRACTING, LTD.

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Balfour Beatty Infrastructure, Inc., and Graham  
Contracting, Inc.:**

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Division: 259

**DEFENDANT REGIONAL RAIL PARTNERS', ET AL.,**  
**ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS**  
**TO PLAINTIFF REGIONAL TRANSPORTATION DISTRICT'S COMPLAINT**

The Defendants REGIONAL RAIL PARTNERS, Balfour Beatty Infrastructure, Inc. and Graham Contracting, Ltd. (hereinafter collectively referred to as “Defendants” or “RRP”), by and through its undersigned counsel, hereby Answer the Plaintiff REGIONAL TRANSPORTATION DISTRICT’s (hereinafter “RTD”) Complaint and files its Counterclaims for Declaratory Judgement.

## **ANSWER TO RTD’S COMPLAINT**

### **I. PARTIES AND VENUE**

1. RRP is without knowledge as to the factual circumstances alleged in Paragraph 1 and therefore denies the allegations.
2. RRP admits the allegations in Paragraph 2 of Plaintiff’s Complaint.
3. RRP admits the allegations in Paragraph 3 of Plaintiff’s Complaint.
4. RRP denies the allegations in Paragraph 4 of Plaintiff’s Complaint.
5. RRP denies the allegations in Paragraph 5 of Plaintiff’s Complaint.

### **II. FACTUAL ALLEGATIONS**

6. RRP denies the allegations in Paragraph 6 of Plaintiff’s Complaint.
7. RRP denies the allegations in Paragraph 7 of Plaintiff’s Complaint.
8. RRP denies the allegations in Paragraph 8 of Plaintiff’s Complaint.
9. RRP denies the allegations in Paragraph 9 of Plaintiff’s Complaint.
10. RRP denies the allegations in Paragraph 10 of Plaintiff’s Complaint.
11. RRP denies the allegations in Paragraph 11 of Plaintiff’s Complaint.
12. RRP denies the allegations in Paragraph 12 of Plaintiff’s Complaint.
13. RRP denies the allegations in Paragraph 13 of Plaintiff’s Complaint.
14. RRP denies the allegations in Paragraph 14 of Plaintiff’s Complaint.
15. RRP denies the allegations in Paragraph 15 of Plaintiff’s Complaint.
16. RRP denies the allegations in Paragraph 16 of Plaintiff’s Complaint.

17. Paragraph 17 contains references the Contract, which speaks for itself; otherwise denied.
18. Paragraph 18 contains references the Contract, which speaks for itself; otherwise denied.
19. RRP denies the allegations in Paragraph 19 as characterized by RTD.
20. RRP denies the allegations in Paragraph 20 as characterized by RTD.
21. Paragraph 21 contains references the Contract, which speaks for itself; otherwise denied.
22. RRP denies the allegations in Paragraph 22 of Plaintiff's Complaint.
23. RRP denies the allegations in Paragraph 23 as characterized by RTD.
24. RRP denies the allegations in Paragraph 24 as characterized by RTD.
25. RRP denies the allegations in Paragraph 25 of Plaintiff's Complaint.
26. Paragraph 26 contains references the Contract, which speaks for itself; otherwise denied.
27. RRP denies the allegations in Paragraph 27 of Plaintiff's Complaint.
28. RRP denies the allegations in Paragraph 28 of Plaintiff's Complaint.
29. RRP denies the allegations in Paragraph 29 of Plaintiff's Complaint.
30. RRP denies the allegations in Paragraph 30 of Plaintiff's Complaint.

**FIRST CLAIM FOR RELIEF**

(Declaratory Judgment Pursuant to C.R.C.P. Rule 57)

31. RRP denies the allegations in Paragraph 31 of Plaintiff's Complaint.

**SECOND CLAIM FOR RELIEF**

(Injunction Relief for Specific Performance Pursuant to C.R.C.P. Rule 65)

32. Contemporaneously with this Answer, RRP moves to dismiss RTD's Second Claim for Relief. Therefore, no response is due for Paragraph 32 of Plaintiff's Complaint.
33. RRP's response to Paragraph 32 is adopted as its response to Paragraph 33 of Plaintiff's Complaint.

**THIRD CLAIM FOR RELIEF**

(Declaratory Judgment Pursuant to C.R.C.P. Rule 57)

34. RRP denies the allegations in Paragraph 34 of Plaintiff's Complaint.

WHEREFORE, RRP respectfully requests that this Court dismiss RTD's Complaint in its entirety with prejudice.

**RRP's AFFIRMATIVE DEFENSES**

1. As and for its first affirmative defense, RRP affirmatively states that this Court lacks Subject Matter Jurisdiction.
2. As and for its second affirmative defense, RRP affirmatively states that RTD has not stated a cause of action for which relief can be granted.
3. As and for its third affirmative defense, RRP affirmatively states that RTD committed a prior material breach of the Contract.
4. As and for its fourth affirmative defense, RRP affirmatively states that RTD has failed to properly pursue the Dispute Resolution Procedures per the Contract.
5. As and for its fifth affirmative defense, RRP affirmatively states that RTD has not satisfied conditions precedent to filing an action for equitable relief.
6. As and for its sixth affirmative defense, RRP affirmatively states that RTD has prevented the performance of the Contract.
7. As and for its seventh affirmative defense, RRP affirmatively states that RTD's claims are void as against public policy pursuant to C.R.S.A. § 24-91-103.5.
8. As and for its eighth affirmative defense, RRP affirmatively states that RTD has breached the covenant of good faith and fair dealing with regard to the Contract.
9. As and for its ninth affirmative defense, RRP affirmatively states that RTD has unclean hands with regard to the lawsuit filed.
10. As and for its tenth affirmative defense, RRP affirmatively states that RTD has failed to act in a commercially responsible manner.

## **COUNTERCLAIM**

As and for its Counterclaim against RTD, RRP pleads as follows:

### **INTRODUCTION**

1. On December 13, 2013, RRP and RTD entered into a contract for the design and construction of RTD's North Metro Rail Line ("Project"), RTD Contract No. 13DH008 ("Contract"). *See Composite Exhibit A, Contract provisions in relevant parts.*

2. Since the execution of the Contract, RTD has inappropriately administered the Contract, misinterpreted and misapplied the Contract terms and conditions, and violated the implied covenants of good faith and fair dealing, among others, all in an effort to deny RRP's entitlement to additional compensation and time and to cast blame on RRP for substantial delays to completion of the Project for which RTD is solely responsible.

3. As a result of RTD's actions, RRP's rights under the Contract are in doubt. Therefore, RRP brings this action for Declaratory Judgment pursuant to C.R.C.P. Rule 57 and respectfully requests this honorable Court to interpret the following Contract terms and conditions, set forth herein.

4. While the Contract includes an arbitration clause, Section 31 of Attachment 13 provides, in part:

A Dispute involving only issues of law, specific performance, injunctive relief, fraud, malfeasance, misrepresentation or the legality of the Contract must be resolved by litigation in the State District Court for the City and County of Denver.

### **PARTIES, JURISDICTION, AND VENUE**

5. RRP is a joint venture between Balfour Beatty Infrastructure, Inc. (f/k/a Balfour Beatty Rail, Inc.) and Graham Contracting, Ltd. who are authorized to do and doing business in the State of Colorado.

6. RTD is a political subdivision and special district of the State of Colorado.

7. This Court has jurisdiction and venue is proper pursuant to Section 31 of Attachment 13 of the Contract as this is an action for Declaratory Judgment pursuant to C.R.C.P. Rule 57. Venue is also proper for this action pursuant to C.R.C.P. 98(c) because some or all of the conduct at issue occurred in the City and County of Denver.

## GENERAL ALLEGATIONS

8. On December 13, 2013, RRP and RTD entered into a Contract for the design and construction of RTD's North Metro Rail Line. RTD issued Notice to Proceed ("NTP") the same day as the Contract was signed.

9. The Contract is voluminous, made up of multiple parts, and in the possession of RTD; therefore, only select portions at issue are attached.

10. The Project and RRP's responsibility under the Contract may be generally divided into three scopes of work: (1) Design of the Project based upon design criteria set forth in the Contract; (2) Assist RTD in **Right-of-Way ("ROW")** acquisitions for a certain portion of the Project; and, (3) Construct the Project based upon RRP's approved design.

11. RTD's responsibility under the Contract may be generally divided into three scopes: (1) Timely and properly pay for the Work RRP performs; (2) Timely and properly administer the Contract including, but not limited to, reviewing submittals from RRP, managing Third-Parties impacted by RTD's Project (such as Burlington-Northern/Santa Fe Railroad ("BNSF") and the City of Thornton), providing written direction to RRP based upon requests from Third-Parties, granting extensions of time for events for which RTD is responsible, increasing the amount to be paid to RRP by way of Change Order; and, (3) Facilitating RRP's performance of the Work.

12. Notwithstanding RTD's contractual obligations, RTD has failed to fulfill its responsibilities and has, instead, misinterpreted and misapplied the Contract terms and conditions in an effort to deny RRP's entitlement to significant extensions of time and compensation. Specifically, RRP is entitled to a 599-calendar day extension and in excess of \$40 million increase in the Contract price due to delay events for which RTD is solely responsible.

## ROW ACQUISITION

13. The Project is divided into two phases of ROW acquisition. For Phase 1, RTD manages ROW acquisition solely on its own. See e.g., Section 4.1(a) of Attachment 2. For Phase 2, RRP assists RTD with ROW acquisition. Several Contract terms and conditions define the scope of RRP's assistance and the relief RRP is entitled to attendant to ROW scopes of work.

14. Section 16 (a) of the Contract provides:

### **16 ROW MANAGEMENT**

- (a) Regarding Phase 2, the Contractor shall evaluate, assess, appraise, manage/schedule the ROW process, and assist RTD in the acquisition of the ROW parcels required for the Project, as further defined in Attachment 6 (*ROW Requirements*). *See Exhibit A.*<sup>1</sup>

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<sup>1</sup> All Contract citations on the following pages are found in Composite **Exhibit A**.

15. Section 26.10.2 (a) (i) of the Contract provides:

**26.10.2 LIMITATION ON DELAY DAMAGES**

(a) Acceleration Costs; Delay Damages

- (i) Acceleration costs shall be compensable hereunder only with respect to Change Orders issued by RTD as an alternative to allowing an extension of a Completion Deadline as contemplated by Section 26.10.3 (*Limitation on Time Extensions*). Other Critical Path delay and disruption damages shall be compensable as per Part 7 of this Contract and only in the case of **(1) an RTD-caused delay** to the extent that it entitles the Contractor to an extension of a Completion Deadline, **(2) an RTD-Directed Change** to the extent that it necessitates rearrangement of Contractor's Work Plan, **(3) a Critical Path delay caused by another RTD Contractor**, or **(4) a Utility Critical Path delay** to the extent that it entitles Contractor to an extension of a Completion Deadline, **(5) a Critical Path delay related to any Third Party Agreements to the extent that it entitles Contractor to an extension of a Completion Deadline** or **(6) a Critical Path delay related to an Unknown Environmental Condition.**

16. Section 26.16 (a) of the Contract provides:

**26.16 LIMITATION ON DELAY DAMAGES**

- (a) ***Both Parties are under a duty to mitigate damages.*** Should an incident occur or a circumstance arise that does or could result in a CO, ***each Party has an affirmative duty to take steps to limit the extent of damages as much as possible.*** Failure to mitigate damages will result in disallowing those damages that could have been avoided had the aggrieved or claiming Party taken the appropriate steps. ***This applies to all claims*** including delay Claims and Claims for differing Site conditions.

17. Section 43 (a) of the Contract provides:

**43. CAPTIONS**

- (a) The captions and section headings appearing herein are included solely for convenience of reference and are not intended to affect the interpretation of any provision of this Contract.

18. Section 2 (a) of Attachment 3 provides:

**2. SCHEDULE MANAGEMENT**

- (a) The Schedules shall represent *a practical plan* to complete the Work within the Completion Milestones and convey the manner and progress of the Work. The Schedules shall include involvement coordination with other Contractors, all Utility Companies, Governmental Agencies, Third Party Transit Oriented Developers (TOD), engineers, architects, Subcontractors and material suppliers in the development of the Baseline Schedule and updating of subsequent Monthly Progress Schedules.

19. Sections 2.5 (b) of Attachment 3 provide:

**2.5 FLOAT**

- (b) Suppression or consumption of Float by artificially extending Activity durations, dummy activities, or preferential sequencing shall not be allowed. Critical activities are defined as activities occurring on the longest path through the Project Schedule and/or Float less than 20 Days. Activities with 20 or fewer Days of Float shall be monitored and diligently pursued.

20. Section 2.7 of Attachment 3 provides:

**2.7 SCHEDULE CONTINGENCY**

- (a) Owner Directed Schedule Contingency (applies only to ROW parcels that the Contract is responsible for i.e., Phase 2 and the ROW for the 70th Avenue primary access)
  - (i) Owner Directed Schedule Contingency (ODSC) is defined as an amount of time added to the Project Schedule to mitigate the effects of potential Schedule risks associated to the ROW Management process outlined in Attachment 6 (ROW Requirements).
  - (ii) The Contractor shall include a visible Schedule Activity within each ROW parcel fragment of 30 Work Days of ODSC into the Baseline Schedule. ODSC shall not be added to the duration of individual Activities. The visible ODSC Schedule Activity shall be the sole successor to the ROW Construction Clearance milestone and the sole predecessor to the start of construction for the area affected by that ROW parcel.
  - (iii) Contractor shall include all costs for the complete duration of the Project, including overhead and profit of the duration for ODSC.

(iv) ODSC shall be used at the sole discretion of the RTD Representative for RTD-caused ROW delays to the Critical Path of the Approved Baseline Schedule.

(b) Contractor's Responsibility

(i) Prior to drawing down (incorporating the use of) ODSC into the Project Schedule, the Contractor shall follow the change process by submitting appropriate documentation to the RTD Representative for review and Approval in accordance to Part 7 (Changes) of the Contract.

(A) At a minimum, the Contractor shall provide a no cost Time Impact Analysis as outlined above in Section 2.4(k) submitted with the change documentation submittals.

(ii) The Contractor shall provide ODSC Status Reports:

(A) The Contract shall provide a monthly status report of ODSC as part of the Monthly Progress Schedule and Monthly Progress Report submittals. At a minimum, status reports shall include an itemized summary of all Time Impacts and total overall duration impact to the Schedule Contingency, and a narrative of any changes from the previous month's status report.

(B) Upon completion of all ROW activities, Contractor shall submit a summary of all Time Impacts associated to ODSC to the RTD Representative for review and final Approval.

(iii) Contractor ROW Completion Incentive

(A) Remaining ODSC shall become Project Float upon final Approval in writing by the RTD Representative.

21. Section 1 of Attachment 6 provides, in part:

**1.1 GENERAL SCOPE**

(a) The Contractor shall designate a Project Right-of-Way Coordinator (PRC), either an individual or an organization, to be responsible for acquisition of right-of-way (ROW) and easements.

(b) RTD will manage and purchase the acquisition of Project ROW from DUS to 72nd Station. All utility and construction easements from DUS to 72nd Station shall be the Contractor's responsibility, including

environmental testing and remediation. All easements are subject to the activities listed in paragraph (c) below.

- (c) The Contractor's PRC shall manage, subject to RTD's approvals, the acquisition of the Project ROW North of 72nd Station and conduct activities related to ROW acquisition in accordance with the Contract. RTD will purchase all properties acquired for ROW (relocation costs are included), including permanent easements. RTD will not pay for temporary construction easements. The PRC shall manage schedule delays associated with all reviews, ROW acquisition, relocations, etc., both stated or implied and shall not be compensated for any Schedule delays. These ROW activities include, but are not limited to:
  - (i) deeds;
  - (ii) technical appraisal;
  - (iii) appraisal review;
  - (iv) negotiation;
  - (v) acquisition assistance to RTD;
  - (vi) title insurance procurement;
  - (vii) title clearance;
  - (viii) acquisition closings;
  - (ix) condemnation support;
  - (x) relocation assistance;
  - (xi) property management;
  - (xii) negotiation for clearance and demolition with property owners;
  - (xiii) environmental testing and remediation, as required;
  - (xiv) environmental NEPA documentation, as required;
  - (xv) utilities; and
  - (xvi) irrigation ditches.

## 1.2 RTD APPROVAL

- (a) The Contractor's PRC shall coordinate with the RTD Manager of Real Property for all elements associated with the ROW management and acquisition process. **The Contractor's PRC will act at the direction of the RTD Manager of Real Property.**

## 1.3 ROW COSTS

- (a) The Contractor's PRC shall provide and pay the costs of all services and documentation preparation for ROW Acquisition and Relocation Files for properties needed for construction, including all amendments and additions (Final ROW), acquisition and related relocation assistance, including those properties required for relocation of utilities as described Attachment 14 (Utilities). RTD will purchase all properties acquired for ROW (relocation costs are included), including

all permanent easements required for construction. RTD will not pay for temporary construction easements.

22. Section 3.1.1 of Attachment 6 provides:

### **3.1.1 ROW SCHEDULE**

- (a) The Contractor shall submit a ROW Schedule for the acquisition and delivery of Final ROW to RTD as part of the Baseline Schedule, in accordance to Attachment 3 (Project and Construction Management) of the Contract. At a minimum, the Contractor shall include in the Schedule the following (See CDRL):
  - (i) the beginning date and anticipated completion date of Final ROW acquisition;
  - (ii) priorities for parcels whose acquisition will significantly impact the Project Schedule and/or affect its Critical Path; and
  - (iii) restriction of RTD quality assurance reviews to a maximum of ten appraisal or acquisition files at any given time.

23. Section 3.1.7 of Attachment 6 provides:

### **3.1.7 SCHEDULE DELAY**

- (a) The Contractor shall assume responsibility for any delays to the Project Schedule that result from submittal of inadequate or incomplete appraisal, acquisition or relocation file packages and/or the inability of the Contractor's PRC to acquire any ROW in a timely manner.

24. Section 4 of Attachment 6 provides, in part:

## **4. FINAL ROW SCOPE SERVICES**

### **4.1 GENERAL**

- (a) The Contractor's PRC shall complete all administrative activities and prepare all documentation sufficient to acquire the Final ROW. The Contractor shall obtain the RTD Manager of Real Property's review and approval of all FMVs and related documents, legal descriptions, acquisition documentation, purchase prices and funding and closing procedures. The Contractor shall not commence any negotiations with landowners until the appraisal and acquisition package has been approved by RTD. The Contractor shall incorporate a minimum of 90 Business Days into the Schedule for negotiations. (See CDRL)

## 4.2 EMINENT DOMAIN

- (a) If the Contractor's PRC and landowner cannot agree upon a purchase price acceptable to the RTD Manager of Real Property, RTD may, at its sole discretion, approve an acquisition through condemnation or eminent domain procedures. The Contractor's PRC shall provide support services to RTD's attorneys for acquisition through condemnation and eminent domain procedures, including the Contractor's PRC developing the package for condemnation. The Contractor's PRC shall incorporate 135 Business Days into the Schedule for eminent domain procedures. The 135 Business Days begins on the day after all required documentation is submitted to the RTD Manager of Real Property's office.

25. Implied terms and conditions contained in the Contract further affect the Parties duties and responsibilities for ROW acquisition. These implied terms and conditions include:

- a. RTD has an implied duty of good faith and fair dealing;
- b. RTD has an implied duty not to hinder RRP's performance;
- c. RTD has an implied duty to cooperate with RRP to facilitate RRP's performance; and,
- d. RTD has an implied duty not to actively interfere with RRP's performance.

26. During the course of the Project, RTD has asserted that RRP is solely responsible for all delays associated with ROW acquisition irrespective of the cause of the delay. Alternatively, RTD has asserted that to the extent RRP is entitled to an extension of time, RRP is not entitled to compensation associated with that delay. In other words, RTD contends the Contract includes "no damages for delay" provisions barring RRP's recovery.

27. During the course of the Project, RTD has asserted that any delays associated with the use of eminent domain procedures is RRP's responsibility to be borne by RRP without any extension of time or additional compensation.

28. Contrary to RTD's contentions, RRP is entitled to compensable extensions of time under the Contract for delays to the Project for which RTD is responsible, including delays associated with ROW acquisition.

29. With respect to ROW acquisition, RRP is only responsible for delays "that result from submittal of inadequate or incomplete" file packages or an act or omission of RRP's Project Right-of-Way Coordinator ("PRC") not influenced by RTD. Therefore, RTD is responsible for all other delays to ROW acquisition and RRP is entitled to a compensable time extension to the extent such delay impacts the critical path of the

Project. RTD's responsibility for delays and compensation also includes time impacts if RTD decides to implement eminent domain procedures.

30. While RRP's PRC is a subcontractor to RRP, the PRC acts at the direction of RTD. Based upon the implied covenants set forth above, RTD is obligated to timely and properly provide direction to the PRC so as not to impact RRP's performance.

31. RTD's contention that RRP is responsible for any and all delays associated with ROW acquisition is belied by Section 3.1.7 of Attachment 6 of the Contract because if RRP was responsible for all delays, there would be no reason to define the delays for which RRP is responsible.

32. Eminent domain is a contingent activity which is only to be incorporated in the Project Schedule if and when RTD decides to implement eminent domain procedures. If RTD never decides to implement eminent domain procedures, no related activities are needed in the Schedule. Those activities would only serve to suppress float in the schedule, mask the actual critical path of the Project, and not represent a practical plan to complete the Work.

33. Even when eminent domain procedure activities are incorporated in the Schedule, after RTD decides to implement eminent domain procedures, the activities are only included in the Schedule for the specific ROW parcel for which condemnation is sought.

34. The Contract requires RRP to develop a "practical plan" for the Work. A practical plan does not include a 6-month time duration for activities which may or may not occur (eminent domain procedures). A contractor and owner would not be able to properly plan and manage the project, flow of labor, equipment, and materials, among other things, if such contingent activities were included in the schedule.

35. The Contract requires RRP to include for each ROW parcel in the Schedule an activity to account for delays for which RTD is responsible. Termed "Owner Directed Schedule Contingency" ("ODSC"), this specific activity is clearly set forth in the Contract and provides RTD up to a 30-day "bank" of time for which RRP receives no additional time or compensation. Once the ODSC is consumed, RRP is again entitled to a compensable time extension for delays for which RTD is responsible.

36. If RTD's interpretation that RRP is solely responsible for all delays associated with Phase 2 ROW acquisition is correct, then Section 2.7 of Attachment 3 and Section 3.1.7 of Attachment 6 would be meaningless. Therefore, to give meaning to Section 2.7 of Attachment 3 and Section 3.1.7 of Attachment 6, RTD's interpretation must be incorrect.

37. Section 2.7 of Attachment 3 represents a "no damages for delay" provision in the Contract. There exist no other "no damages for delay" provisions in the Contract.

38. RTD's assertion that RRP is responsible for the time and costs associated with eminent domain procedures, if RTD decides to implement it, represents an attempt to impose a "no damages for delay" clause.

39. Contrary to RTD's position, Section 4.2 of Attachment 6 does not require RRP to include eminent domain procedures in the Baseline Schedule or any Updates. Instead, Section 4.2 requires RRP's PRC to "incorporate" the eminent domain procedure activities into the

Schedule **after** RTD decides to implement it. All other Schedule functions are defined by Contract as RRP's responsibility.

40. Contrary to RTD's position, Section 4.2 of Attachment 6 does not require eminent domain procedure activities to be included in the "ROW schedule for each parcel of property needed for the Project." Unlike Section 2.7 of Attachment 3 for ODSC, Section 4.2 only requires the addition of activities **after** RTD decides to implement eminent domain procedures and then only for the specific ROW parcel for which eminent domain is sought. Indeed, Section 4.2 does not make any reference to "to each parcel of property."

41. If RTD decides to implement eminent domain procedures for a ROW parcel, RTD is responsible for the delays and associated costs resulting from its decision. RRP is only responsible for delays in ROW acquisition associated with an act or omission of its PRC. Neither RRP nor its PRC decide to implement eminent domain procedures. Moreover, RTD may also decide not to implement eminent domain procedures, and pay more money to the property owner to avoid the delays associated with eminent domain procedures. RRP and its PRC are powerless to mitigate significant time-related costs by paying more money to the property owner to finally acquire the property. Therefore, because neither RRP nor its PRC have any control over the ultimate acquisition of ROW property, RTD is solely responsible for delays resulting from prolonged negotiations and/or its decision to implement eminent domain procedures.

42. As an example, in November 2015, RTD directed RRP's PRC to advise the property owner at the 104<sup>th</sup> Avenue Station to either agree to the price RTD offered or RTD would commence eminent domain procedures on December 1, 2015. *See Exhibit B, 11/20/2015 Last and Final Offer Parcel Nos. NM-46REV1 & NM-48REV2*. Contrary to its direction to the PRC, RTD decided not to implement eminent domain procedures on December 1, 2015 even though the property owner would not agree to RTD's terms and conditions for acquisition. Instead, RTD decided that it would continue to negotiate with the property owner over an amount less than \$200,000. To date, RTD has continued the negotiations with the property owner notwithstanding the potential delays to the Project.

43. RRP incurs approximately \$2 million per month in overhead costs. In other words, for every month the Project is delayed, RRP incurs an additional \$2 million in costs. From December 1, 2015 to the filing of this Counterclaim, 18 months have passed.

44. Pursuant to Section 26.16 of the Contract, RTD is under a duty to mitigate costs and damages RRP may incur due to events which may affect the work.

45. Had RTD implemented eminent domain procedures to acquire the ROW associated with the 104<sup>th</sup> Avenue Station on December 1, 2015, 135 business days (the period of time RTD states in the Contract it requires for eminent domain procedures) would have concluded on June 14, 2016.

46. Section 4.1 of Attachment 6 provides that RRP is to anticipate 90 business days for negotiations associated with ROW acquisition.

47. The 90 business days associated with the 104<sup>th</sup> Avenue Station parcel acquisition expired prior to RTD's direction to RRP's PRC to advise the property owner, in November 2015, to accept RTD's "final" offer or RTD would commence eminent domain procedures.

48. RTD is solely responsible for any delays which may result from continued negotiations with the property owner concerning the 104<sup>th</sup> Avenue Station because RTD decided to continue negotiations and to not implement eminent domain procedures.

49. By failing to timely acquire the 104<sup>th</sup> Avenue Station property, RTD breached its duty to mitigate as set forth in Section 26.16 of the Contract.

50. Even if RTD's interpretation of Section 4.2 of Attachment 6 were correct, which it is not, RTD's interpretation would convert Section 4.2 into a "no damages for delay" provision. As a "no damages for delay" provision, Section 4.2, unlike the ODSC provision, violates Colorado law because it is not sufficiently specific and unambiguous as to place RRP on notice when it submitted its Proposal to RTD for the Project. Therefore, as a "no damages for delay clause," Section 4.2 is void and unenforceable.

### **RECOVERY SCHEDULE**

51. During the course of the Project, RTD asserted that it was entitled to a Recovery Schedule.

52. At no time is it determined that RRP is responsible for delays associated with the Project.

53. Section 2.3 (b) (v) of Attachment 3 provides:

#### **Recovery Schedule**

(A) When in the RTD Representative's opinion, the CPM Schedule fails to reflect the Project's actual plan and method of operation or the projected completion date is beyond the Substantial Completion Date, as indicated by the CPM Schedule, the RTD Representative may require that within 30 Calendar Days the Contractor submit a Recovery Schedule (See CDRL) for completion of the remaining work by the Substantial Completion Date, for review. The Contractor shall be responsible for any additional costs incurred in revising the CPM Schedule.

54. Section 2.8 of Attachment 3 provides:

#### **2.8 RESPONSIBILITY FOR COMPLETION**

(a) The Contractor agrees that when, in the RTD Representative's sole opinion, Contract milestone or completion dates will not be met, ***and the Contractor is determined to be the cause of the delay to these dates***, the Contractor shall take some or all of the following actions, as directed by the RTD Representative:

(i) increase resources;

(ii) increase the number of working hours per working day/week; and/or

(iii) propose a recovery schedule.

- (b) Prior to proceeding with any of the above actions, the Contractor shall notify and obtain Acceptance from the RTD Representative for the proposed Schedule changes. If actions are Approved, the Schedule revisions shall be incorporated by the Contractor into the Schedule during the next update period. Any additional costs incurred by Contractor as a result of its failure to meet the latest Approved Contract Schedule shall be borne by the Contractor.

55. Section 2 of Attachment 13 provides, in part:

It is possible that the Parties will establish an Issues List upon which the Parties will list all potential issues, including potential claims. When a Party lists a potential claim, it does not need to file a NCOP until that Party has sufficient knowledge of the circumstances that it has the basis for an actual claim seeking an adjustment, clarification, interpretation or amendment of Contract terms, including compensation or an alteration of the duration of the Contract term. For example, an event may occur which could affect the Schedule (such as a delay in RTD providing materials), by the Parties are not clear on the effect of the event on the Schedule until a later date (when scheduled work on the Critical Path is delayed because the materials are not available). The Claim Notice (NCOP in this example) must be provided within 7 Days after it is apparent that the event will affect the Schedule.

56. RRP does not owe RTD a Recovery Schedule because the cause of the Project delays is not determined.

### **RRP's ENTITLEMENT TO VACANT POSSESSION**

57. Pursuant to the Contract, RRP was entitled to vacant possession of ROW RTD was acquiring from BNSF by the dates RTD set forth in the Contract.

58. Section 1 (b) of Attachment 2 provides:

- (b) This Attachment identifies availability dates for right-of-way (ROW) parcels being acquired by RTD. The Contractor shall commence with the Work under the assumption that the ROW vacant possession milestones listed in this Attachment govern when site Work for the defined parcel can begin. No activity of any kind shall take place until the Contractor is authorized to do so.

59. Section 4.1 (b) of Attachment 2 provides:

- (c) RTD will, at its own cost, obtain and provide to the Contractor, and the Contractor will take Vacant Possession of, each part of each Site within the time periods set out in this Attachment.

60. Pursuant to Section 4.1 (c) of Attachment 2, RTD was to provide Vacant Possession to RRP for the identified parcels as follows: (1) NM-1, BNSF, January 1, 2014; (2) NM-1A, BNSF, January 31, 2016; and, (3) NM-1D, BNSF, January 31, 2016.

61. Contrary to the terms of the Contract, RTD failed to provide RRP with Vacant Possession, as defined by RTD in the Contract, on the dates set forth above.

62. The Contract defines Vacant Possession as:

In relation to the Site, access to and possession thereof or making available to the Contractor the right use therein in accordance with Contract Section 5 (*License and Right to Use*) in its then existing state and condition, subject to: ...

63. Section 5 (b) of the Contract provides:

(b) RTD grants to the Contractor the license provided by this Section 5 solely for the purpose of providing the Contractor and its Subcontractors the access necessary to **survey, design and construct** the Project.

64. Section 5.1 (a) of the Contract provides, in part:

(a) For Phase 1, RTD will, at its own cost, purchase and provide to the Contractor, and the Contractor will take, Vacant Possession of the Site within the time periods established by the requirements in Attachment 3 (*Project and Construction Requirements*), and otherwise subject to the restrictions of use set forth in and/or right of entry permits specified therein or in the definition of Vacant Possession. ...

65. RTD's failure to provide Vacant Possession, as defined by RTD in the Contract, by the dates set forth above constitutes a breach of contract.

### **BNSF THIRD-PARTY CONSTRUCTION AGREEMENT**

66. On March 31, 2015, RTD entered into a Third-Party Agreement with Burlington Northern Santa Fe Railway Company (hereinafter "BNSF") to address RTD's acquisition of certain BNSF property for RTD's use for its North Metro Rail Line. *See Exhibit C, March 31, 2015 Construction and Maintenance Agreement between RTD and BNSF ("BNSF/RTD Construction and Maintenance Agreement")*

67. Pursuant to the Contract, RTD should have finalized and executed the BNSF/RTD Construction and Maintenance Agreement prior to the issuance of NTP. See *Exhibit A Section 2.3.3 (c) of Attachment 2*.

68. RTD's failure to finalize and execute the BNSF/RTD Construction and Maintenance Agreement prior to issuance of NTP issued to RRP constitutes a breach of contract.

69. During the course of the Project, RTD required RRP to comply with all requests of BNSF regarding RRP's design of the Project without issuing appropriate change orders for increased compensation and time.

70. RTD contends that RRP assumed all obligations RTD owes to BNSF under the BNSF/RTD Construction and Maintenance Agreement.

71. Section 14.2 (a) of the Contract provides:

#### **14.2 DISPUTES WITH PROJECT THIRD PARTIES RELATING TO THE CONTRACTOR SUBMITTALS**

- (a) If any Project Third Party alleges that any Contractor Submittal submitted to that Project Third Party does not comply with the requirements for such Contractor Submittal as set out in the Third-Party Agreements and RTD agrees with the Contractor that there is a reasonable basis for challenging the Project Third Party's allegation (or it has been determined pursuant to the Dispute Resolution Procedure that there is a reasonable basis), RTD shall either:
  - (i) dispute such allegation in accordance with the appropriate dispute resolution procedures set out in the applicable Third-Party Agreement following consultation with the Contractor to the extent reasonably practicable under the circumstances; or
  - (ii) implement either a Contract Directive or a Change Order instructing the Contractor to comply with the requirements of the relevant Project Third-Party.

72. Section 17.1 (a) (iv) of the Contract provides:

### **17. CONSTRUCTION**

#### **17.1 THE WORK**

- (a) The Contractor shall carry out and complete the Work:
  - (iv) taking all necessary steps and acts to perform and discharge RTD's obligations on RTD's behalf under the Third-Party Agreements, other than as identified in Attachment 9 (Utilities).

73. Section 2.3.3 (a) of Attachment 2 provides:

**2.3.3 THIRD PARTY AGREEMENTS**

- (a) In accordance with the Contract, the Contractor shall take all steps and perform all acts necessary to implement each of RTD's obligations to the Project Third Parties under the Third Party Agreements as part of the Work.

74. Section 2 of Attachment 4 provides:

**2. THIRD PARTY AGREEMENTS**

- (a) In accordance with the Contract, the Contractor shall take all steps and perform all acts necessary to implement each of RTD's obligations to the Project Third Parties under the Third Party Agreements as part of the Work.
- (b)
- (c) If any Project Third Party requests the Contractor to fulfill an obligation required of RTD in any Third Party Agreement that the Contractor is not required to perform in accordance with this Contract, the Contractor shall notify RTD immediately and respond as instructed by RTD.

75. Nowhere in the Contract does it state that RRP assumes all obligations of RTD in any Third-Party Agreement.

76. There exist obligations RTD owes to BNSF or any other Third-Party which are not contractual obligations for RRP to fulfill.

77. If RRP assumed all of RTD's obligations to BNSF or any other Third-Party, Section 14.2 of the Contract, Section 2.3.3 (b) of Attachment 2, and Section 2 (b) of Attachment 4 would be meaningless. Therefore, RTD's contention that RRP assumed all of RTD's obligations to BNSF and other Third-Parties is incorrect.

78. When BNSF or any other Third-Party requests RRP to perform a task (including modifying RRP's design) which is not included within RRP's Contract, RTD is required to give RRP written direction as to how to proceed.

79. If RTD directs RRP to comply with BNSF's or any other Third-Party's request which requires RRP to perform work RRP is not obligated to perform under the Contract, RTD must issue a change order to compensate RRP for the additional cost and time, if any. RTD's failure to issue such change orders constitutes a breach of contract.

80. The Contract includes time frames for RTD and Third-Party reviews of RRP designs. RTD is obligated to manage itself and its Third-Parties so that design reviews are timely performed. If RTD's and/or a Third-Party's review exceeds the time allotted under the Contract,

RRP is entitled to a change order from RTD for the additional time and cost incurred on the Project, if any.

81. As part of the documents RTD provided to RRP for RRP to rely upon in preparing its Proposal for the Project, RTD provided a prior Third-Party Agreement RTD had with BNSF to be considered a draft of the Third-Party Agreement RTD would enter into with BNSF for this Project. See “draft” Third-Party Agreement. *See Exhibit D, March 31, 2010 Draft Agreement between RTD and BNSF (“BNSF/RTD Draft Agreement”).*

82. Pursuant to Section 3.3 of the BNSF/RTD Draft Agreement, (*See Exhibit D*), Third-Party Agreement and Section 5.2 of the BNSF/RTD Construction and Maintenance Agreement, (*See Exhibit C*), BNSF is required to appoint a representative with authority to participate in reviews of RRP’s design. RTD’s failure to assure that BNSF appointed a representative with authority prior to issuance of NTP constitutes a breach of contract.

83. Pursuant to Section 3.3 of the BNSF/RTD Draft Agreement, (*See Exhibit D*), and Section 5.2 of the BNSF/RTD Construction and Maintenance Agreement, (*See Exhibit C*), BNSF must perform its review of RRP’s design in such time so as to not impact or delay RRP’s performance of the Work. RTD’s failure to assure that BNSF’s design review did not impact or affect RRP’s performance constitutes a breach of contract.

84. During development of RRP’s Proposal for the Project, RTD directed RRP to rely upon an October 26, 2012 letter from RTD to BNSF concerning the “FasTracks – North Metro Rail Line Request for ROW Exchange.” *See Exhibit E, 10/26/2012 RTD FasTracks ROW Exchange Correspondence to BNSF.* In the exhibits to this correspondence letter, RTD identifies “BNSF’s proposed track expansion plan ... for Coal 1 & 2.” The correspondence further states, “The proposed NM tracks and station layout does not preclude future BNSF tracks **in the configuration BNSF specified.**” Contrary to this letter, BNSF required RRP to develop its design based upon further BNSF potential track expansion and not what was specified in the October 26, 2012 correspondence of *Exhibit E*.

85. The RTD/BNSF Construction and Maintenance Agreement further defines BNSF’s rights to comment, review and approve the design. *See Exhibit C.* Specifically, Section 2.3 G.2 provides in part:

BNSF shall have the right to **comment** on the design or construction of RTD’s improvement located within the Corridor (or adjacent, if such improvements affect the Corridor) prior to RTD commencing construction of such improvements, if BNSF believes any proposed construction, design or operations of RTD will affect the **safe operations or level of utility** of the Parties’ operations. If there is any dispute concerning proposed plans and specifications for RTD Work or adjacent improvements proposed by RTD, the Parties **will promptly meet** and work together in good faith **to resolve such dispute.**

86. While BNSF may comment on the design to the extent it affects safe operations and level of utility of **BNSF's operations**, the comments must still be reasonable and in accordance with stated guidelines. Further, if there is a dispute concerning BNSF's comments, RTD and BNSF are to promptly resolve the dispute - which did not occur here.

87. Distinct from BNSF's right to comment, the Construction Agreement sets forth BNSF's right to review and approve in Section 3.4.

Whenever this Construction Agreement provides for review and approval by BNSF, RTD must provide BNSF's designated representative...with plans and specifications...and/or such other information reasonably necessary for BNSF to review such request...RTD will provide 90% and 100% plans for the RTD Work to BNSF for its review and approval. BNSF's review of RTD Work that is solely to be operated and maintained by RTD and its contractors will be limited to a review of track clearances, signal coordination, and safety impacts to BNSF...BNSF will promptly review the applicable subject matter or waive in writing its right to approve. Any BNSF approval, which shall not be unreasonably delayed or withheld, will include any conditions that BNSF may impose in connection with its approval...If BNSF objects to any portion of the applicable subject matter, the Parties shall meet to resolve in good faith any objections...RTD will be solely responsible for determining whether its plans and specifications, construction, and maintenance of the RTD Work meet its needs and will provide for safe operation of its proposed passenger operations.

88. RTD's failure to limit the scope of BNSF's design reviews and comments constitutes a breach of contract. Alternatively, RTD's failure to timely issue an appropriate change order to RRP to address the additional costs and time RRP incurred as a result of BNSF's expanded design review constitutes a breach of contract.

89. By failing to properly administer and manage its Third-Party Agreement with BNSF, RTD breached its duty to mitigate pursuant to Section 26.16, among others.

### **BNSF EXTRA WORK**

90. During the course of the Project, BNSF requested RRP to modify its design beyond the design criteria set forth in the Contract.

91. RTD directed RRP to comply with BNSF's requests, but has failed to issue an appropriate change order to compensate RRP for the additional cost and time.

92. As an example, BNSF requested and RTD directed RRP to modify its design for slope protection at the Skyway Bridge. Nothing in the Contract design criteria required the modified design RTD required. Therefore, RTD's direction constitutes extra work.

93. As another example, BNSF requested and RTD directed RRP to modify its design to change the nature and extent of certain walls along the RTD/BNSF ROW line. Nothing in the Contract design criteria required the modified design RTD required. Therefore, RTD's direction constitutes extra work.

94. As a third example, BNSF requested and RTD required RRP to modify its design to accommodate future BNSF tracks not contemplated in the Request for Proposals for the Project or the Contract. Nothing in the Contract design criteria required the modified design RTD required. Therefore, RTD's direction constitutes extra work.

**WHEREFORE**, Regional Rail Partners, a Balfour Beatty Infrastructure, Inc. / Graham Contracting, Ltd. Joint Venture respectfully requests this honorable court to enter a Declaratory Judgment as follows:

1. Eminent domain procedures are contingent activities which are only to be incorporated in the schedule if and when RTD decides to initiate such proceedings.
2. RTD is responsible for the time and costs associated with eminent domain procedures, if RTD decides to implement such procedures.
3. RRP's PRC works at the direction of RTD.
4. RRP is only responsible for ROW acquisition delays to the extent its PRC fails to perform in accordance with the Contract.
5. RTD is responsible for the costs and time associated with the delayed negotiations for the acquisition of the 104<sup>th</sup> Avenue Station property.
6. RTD is not entitled to a Recovery Schedule at this time because responsibility for the 599-calendar day delay has not been determined.
7. RTD breached the Contract by failing to finalize and enter its Third-Party Agreement with BNSF prior to issuing NTP.
8. RTD breached the Contract by failing to assure that BNSF appointed a representative with authority prior to issuance of NTP.
9. RRP has not assumed RTD's Third-Party Agreements.
10. RRP is not obligated to comply with or otherwise satisfy all RTD obligations under RTD's Third-Party Agreements.
11. RTD is responsible for the time and costs associated with BNSF's failure to timely review and approve RRP's design.
12. RTD is obligated to mitigate impacts to RRP's costs and time of performance due to events which may affect the Work.

13. RTD is obligated to facilitate BNSF's review of RRP's design so as not to impact RRP's performance of the Work.

14. RTD breached the Contract by failing to facilitate BNSF's review of RRP's design and by failing to assure that BNSF timely completed its review.

15. RTD breached the Contract by failing to mitigate impacts to RRP due to BNSF's untimely reviews of RRP's design.

16. RTD's direction to RRP to comply with BNSF requests which are beyond the Contract design criteria constitutes extra work for which RRP is entitled to a change order to compensate it for the additional cost and time.

17. Such other relief as the Court deems just and proper.

Respectfully submitted this 5<sup>th</sup> day of June, 2017.

Respectfully Submitted,

/s/ Rhyddid Watkins

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**Attorneys for Defendants**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 5, 2017, a true and correct copy of the foregoing **DEFENDANT REGIONAL RAIL PARTNERS', ET AL., ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS TO PLAINTIFF REGIONAL TRANSPORTATION DISTRICT'S COMPLAINT** was filed and served upon the following via electronic the Colorado Courts E-filing Service.

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/s/ Sonja Beamon  
Legal Administrative Assistant