

Small Claims
 County Court
 District Court
 Probate Court
 Juvenile Court
 Water Court

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City and County of Denver, State of Colorado
Court Address: 1437 Bannock St., Denver, CO 80202

**Regional Transportation District,
Plaintiff,**

v.

**Regional Rail Partners; Balfour Beatty Infrastructure, Inc.;
and Graham Contracting Ltd.
Defendant.**

COURT USE ONLY ▲

Case Number

Div.:

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**CIVIL COMPLAINT FOR DECLARATORY JUDGMENTS
AND INJUNCTION FOR SPECIFIC PERFORMANCE**

Plaintiff Regional Transportation District (“RTD”), by counsel, alleges as follows:

I. PARTIES AND VENUE

1. RTD is a political subdivision and special district of the State of Colorado with its primary place of business located at 1600 Blake Street, Denver, CO 80202.

2. Regional Rail Partners (“RRP”) is a Joint Venture consisting of Balfour Beatty Rail, Inc. (now merged into Balfour Beatty Infrastructure, Inc.) and Graham Contracting Ltd. Its primary place of business is 1765 121st Ave., Westminster, CO.

3. On December 13, 2013, RTD and GBBH, now RRP (designated in the Preamble of the Contract as a Joint Venture consisting of Balfour Beatty Rail, Inc. and Graham Contracting Ltd.) executed the RTD FasTracks, North Metro Rail Line Contract (“Contract”) (RTD Contract No. 13DH008) with officers of both Balfour Beatty Rail, Inc. and Graham Contracting Ltd. signing on behalf of their respective firms. The Contract was executed at the RTD offices located at 1560 Broadway in Denver, Colorado

4. RTD is requesting relief, pursuant to C.R.C.P. Rules 57 and 65 in the form of declaratory judgments and a mandatory injunction relief requiring specific performance based upon the clear and unambiguous language of the Contract and the parties’ past course of dealing.

5. The Contract, Attachment 16, Sections 14 and 31, establishes both venue and jurisdiction in the State District Court for the City and County of Denver when seeking such relief.

II. FACTUAL ALLEGATIONS

6. Under the Contract, RRP has agreed to design, build, and manage the Right-of-Way (“ROW”) acquisition of the RTD Commuter Rail Line which will run from the Denver Union Station to a commuter rail station at 124th Ave. in Thornton. The line will be known as the N Line. The initial value of the Contract was \$343,294,855.00, but the value of the Contract has increased with various Change Orders.

7. The portion of the Contract pertinent to this action is the ROW Management (primarily Attachment 6 of the Contract) with an initial, scope of work, value of \$2,221,800.

8. Attachment 6, *Right-of-Way Requirements*, describes RRP’s duties, obligations and rights in the management of the ROW acquisition. Section 1.1, *General Scope*, lists the various tasks that RRP is required to perform in order to be paid the \$2,221,800 for ROW Management.

9. Attachment 6, Section 1.1 required RRP to designate a Project Right-of-Way Coordinator (“PRC”) to be responsible for the acquisition of ROW and easements. The PRC is to manage and conduct all activities related to ROW acquisition including condemnation support.

10. RRP hired H. C. Peck as its PRC subcontractor and, as such, the PRC is an agent for RRP. The PRC is paid by RRP. RTD pays RRP when the PRC performs the tasks listed in Attachment 6. H. C. Peck is well known and accomplished in all phases of property acquisition.

11. In the Request for Proposals, to which RRP submitted a Proposal, RTD included the Terms and Conditions of the Contract. Attachment 6, Section 4.2 instructed the PRC to incorporate 135 business days into the schedule for eminent domain proceedings for each parcel of property needed for the Project.

12. Attachment 6, Section 1.1 (c) states that the PRC shall manage the acquisition of the Project ROW and shall manage schedule delays associated with all reviews, ROW acquisition, relocations, etc, both stated and implied, and shall not be compensated for any Schedule Delays. Attachment 6, Section 1.2 (c) states that the PRC shall make the request to the RTD Manager of Real Property to commence condemnation proceedings. Attachment 6, Section 3.1.7 states that the Contractor shall assume responsibility for any delays to the Project Schedule that result from the inability of the PRC to acquire ROW in timely manner.

13. In the Request for Proposals, RTD instructed each potential proposer that in planning its access to the various construction sites, the successful proposer would need to account in its ROW acquisition schedule for negotiations and condemnation for each parcel of property needed for the project (referring to Attachment 6 for the specific time periods).

14. Attachment 3, Section 2.3 (b) (i) (A), *Original Baseline Schedule* required the contractor to provide it with a schedule that shows all known scheduled activities. ROW acquisition is a scheduled activity and possible eminent domain proceedings are included in Attachment 6.

15. RTD needs such a schedule with all known, possible eventualities to properly prepare for the opening of the North Metro Rail Line; prepare appropriate bus and train schedules; and prepare for the operations and maintenance services on the North Metro Rail Line the moment the line is open for public use.

16. The Contract was written to account for the fact that it is much preferred both politically and financially for RTD to have a conservative schedule that is fully extended to account for all potential events rather than apologizing to the public and wasting money for opening preparations when the opening of the line is delayed by known potentialities such as eminent domain proceedings. If the project is delivered early to RTD by the contractor because eminent domain proceedings were not necessary to acquire property, RTD can use the time for additional systems testing and operator training.

17. RRP submitted a Proposal to RTD which diagramed a typical ROW schedule fragnet which included 135 business days for potential eminent domain proceedings for each parcel being acquired. A fragnet is simply a small section of the overall Baseline Schedule addressing a specific category or task. The fragnet in RRP's Proposal was listed as a "typical" ROW schedule fragnet and said nothing in regards to the fragnet being incorporated into the schedule only when it has been decided that Eminent Domain must be used to acquire the specific parcel of property. On the same page as the fragnet, RRP stated that it was responsible for ROW acquisition.

18. Volume II of the Contract Section 51 (a) and the Instructions to Proposers, Section 1.7 (b), both establish that the RFP including the instructions and the Proposal are Contract Documents. As such they are binding on the Contractor. Furthermore, the Preamble of the Contract incorporates the RFP including addenda and the Proposal into the Contract.

19. In its Original Baseline Schedule, submitted by RRP as required by the Contract on September 19, 2014 and approved by RTD in October of 2014, RRP showed 135 business days for potential eminent domain proceedings for all known parcels of property to be acquired.

20. In subsequent schedules, also submitted as required by the Contract, RRP repeatedly showed 135 business days for potential eminent domain proceedings for all known parcels to be acquired.

21. Volume II, Section 13 (e) *Contractor's Proposal is a Commitment* states, "The Contractor's Proposal is, and each Contractor Submittal shall be a commitment to, the design or the specifications as shown in the Contractor's Proposal or such Contractor Submittal such that the design or information as depicted therein shall be a requirement of this Contract from the date of approval of such Contractor Submittal...if the design depicted in any Contractor Submittal does not comply or is in conflict with any pre-existing requirement of the Contract (including the Contractor's Proposal) such pre-existing requirement of the Contract shall prevail. If a Contractor's Submittal varies from the Contractor's Proposal, the Contractor shall specifically describe the variance and the reasons why such a variance is beneficial to RTD and shall obtain RTD's approval for such variance."

22. Pursuant to Volume II, Section 13 (e) RRP is committed to both its Proposal and to its prior Baseline Schedules which showed the 135 business day durations for possible eminent domain proceedings. By operation of the Contract terms, placing 135 business days into the ROW schedule for possible eminent domain proceedings is a requirement of the Contract.

23. In the June 2016 schedule, (submitted in August of 2016) RRP, for the first time and without RTD's approval, removed the eminent domain durations on all parcels being acquired claiming that it did not need to add the 135 business day duration for each parcel to the ROW schedule until RTD chose to use eminent domain for that parcel.

24. In addition to removing the eminent domain durations; RRP, in a December 16, 2016 letter, asserted that if RTD chose to use eminent domain to acquire a parcel which was on the critical path of the schedule, RTD would be forced to compensate RRP for the delay to the schedule caused by the eminent domain proceedings.

25. Based upon prior claims for delays, a 135 business day delay would mean that RRP could claim millions of dollars in delay damages for each parcel of property identified on the critical path of the schedule being acquired with eminent domain proceedings.

26. There is no contractual basis for a delay claim for a piece of work not on the critical path. Before any delay claim can be considered, it is essential to determine the critical path schedule. The critical path could be dependent on the property acquisition schedule when it is extended when 135 business days are added for the possibility of eminent domain proceedings.

27. RRP made the assertions regarding eminent domain when RTD denied RRP's delay claim on drainage work performed at the National Western Stock Show. RTD denied RRP's claim for various reasons including the fact that the construction of the 104th Ave. station and the related parking structure constituted the longest durations for the project (the critical path) based upon RRP's April, 2016, schedule that was submitted to RTD in June of 2016. This was due, in part, to RRP's delays in acquiring the parcels of property needed for the site, especially when the 135 business days are added to the schedule for the possibility of eminent domain proceedings on each parcel needed for the 104th Ave. work.

28. RRP belatedly came up with its new interpretation of the schedule provisions of the Contract, which contradicts both RRP's proposal and its previously submitted schedules, in order to accuse RTD of compensatory delays rather than taking responsibility for delays to the Project and the related costs.

29. RRP made its new assertions regarding eminent domain with the intent of trying to manipulate the project's critical path so that RRP's own delays in acquiring parcels for the 104th Ave. site would no longer be relevant to the critical path, and so that RRP could instead point to delays at National Western Stock Show site as the blame for delays of the critical path.

30. If RRP were to succeed in its belated attempt to change the Contract and contradict its Proposal and its previously submitted schedules to no longer require it to include 135 business days for potential eminent domain proceedings, this would have the effect of fundamentally shifting the risk that the parties bargained for in the Contract, suddenly making RTD potentially subject to millions of dollars in delay claims even if the value of a parcel that had to be acquired by eminent domain was only a fraction of that cost.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment Pursuant to C.R.C.P. Rule 57)

31. RTD requests this Court to enter a Declaratory Judgment interpreting the Contract to require RRP to restore 135 business day durations for possible eminent domain proceedings back into the ROW schedule for each parcel of property needed for the project.

SECOND CLAIM FOR RELIEF
(Injunction Relief For Specific Performance Pursuant to C.R.C.P. Rule 65)

32. RTD requests this Court to Order the Specific Performance of RRP to restore the 135 business day durations for possible eminent domain proceedings back into the ROW schedule for each parcel of property needed for the project.

33. With the durations placed back into the ROW schedule, the Project will have a more complete schedule that can be announced to the public by RTD that is less likely to be extended past the projected completion date when eminent domain proceedings are required to obtain parcels.

THIRD CLAIM FOR RELIEF
(Declaratory Judgment Pursuant to C.R.C.P. Rules 57)

34. RTD requests this Court to enter a Declaratory Judgment interpreting the Contract such that RTD is not required to compensate RRP for schedule delays associated with ROW acquisition and specifically not to be required to compensate RRP for the 135 business day duration for eminent domain proceedings should RTD approve the PRC's request to acquire a parcel of property through eminent domain proceedings.

WHEREFORE, RTD respectfully requests that this Court enter Orders of Declaratory Judgment stating that the Contract requires RRP to enter a 135 business day duration for possible eminent domain proceedings into the ROW schedule for each parcel of property needed for the project and that RTD is not required to compensate RRP for schedule delays associated with ROW acquisition and specifically is not required to compensate RRP for the 135 business day duration for eminent domain proceedings.

Furthermore, RTD respectfully requests this Court to Order the Specific Performance of RRP to restore and keep a 135 business day duration for possible eminent domain proceedings into the ROW schedule for each parcel of property needed for the project.

Submitted this 12th day of May 2017,

REGIONAL TRANSPORTATION DISTRICT

/s/ James A. Stadler

James A. Stadler

Pleading was filed electronically pursuant to Rule 121 §1-26.

Original signature on file in counsel's office

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