

Purple Line Transit Constructors, LLC  
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USA

Document ID: PLTC-PLTP-L-1089  
File No.: 100B-001-101-RL

May 1, 2020

Mr. Peter van der Waart van Gulik  
Chief Executive Officer / Project Manager  
Purple Line Transit Partners LLC  
6811 Kenilworth Avenue Suite 400  
Riverdale, MD 20737  
Peter.Waart@purplelinepartners.com

**Subject: NOTICE OF UNCONDITIONAL ELECTION TO TERMINATE DESIGN-BUILD CONTRACT**

Dear Mr. van der Waart van Gulik,

Reference is made to the Amended and Restated Design-Build Contract between Purple Line Transit Partners LLC (“PLTP”) and Purple Line Transit Constructors, LLC (“PLTC”) dated June 14, 2016 (the “DB Contract”) and the Public-Private Partnership Agreement between the Maryland Department of Transportation (“MDOT”) and the Maryland Transit Administration (“MTA”) (collectively “Owner”) and PLTP dated April 7, 2016, as amended on June 14, 2016 (the “PPPA”). All terms used herein but not defined herein shall have the meanings ascribed to them in the DB Contract.

**I. Introduction**

As you are aware, the Purple Line Project (the “Project”) has been beset by myriad significant Relief Events and Owner-Caused Delays that have resulted in extensive delays to the Critical Path of the Project, far in excess of 365 days. Despite this, the Owner has been unwilling to grant PLTC any of the compensable time extensions it has sought and refused to grant any additional Compensation Amounts. PLTC (along with PLTP and PLTO) has been attempting to work with MTA for almost three years (since June 2017) to amicably and fairly resolve these substantial issues without success. Indeed, in December 2019, after six months of intense negotiations, all parties came to an agreement in principle on a settlement of certain issues, only to have MTA refuse to move forward with that deal on the eve of execution. Over one month later, MTA proposed a revised deal adding disputed items and placing additional significant cost and schedule risk on PLTC that were not part of the prior agreement. PLTC has negotiated in good faith with MTA in the hopes of reaching a resolution that allowed its continued participation in the Project. PLTC even offered to forego any profit on this Project and was willing to complete it at cost.

PLTC and its member companies should not be required to finance the hundreds of millions of dollars in added costs for issues that are out of its control, not of its making, and that constitute Relief Events and Owner-Caused Delays under the DB Contract and the PPPA. Accordingly, and for the additional reasons set forth below among others, pursuant to section 19.2.1.5(c) of the DB Contract, PLTC hereby submits its Notice of an Extended Delay of 365 days or more to the Critical Path and its Notice of Unconditional Election to Terminate the DB Contract (the “Termination Notice”) and requests that PLTP deliver to Owner its Notice of Unconditional Election to Terminate the PPPA because an Extended Delay, as that term is defined in the DB Contract and PPPA, has actually resulted in more than 365 days of Critical Path delay to the Project.

## **II. The Relief Events and Owner-Caused Delays**

As set forth below and as reflected in the March 2020 Project Schedule Update, PLTC has identified 976 days of Critical Path delay that have actually resulted from a combination of Relief Events and Owner-Caused Delays. Despite this, MTA has refused to grant even a single day of a compensable time extension or acknowledge even one dollar in additional costs even though these Relief Events and Owner-Caused Delays are MTA's responsibility. For the avoidance of doubt, all of the Relief Events and Owner-Caused Delays listed below are pass-through claims under the DB Contract for which MTA has ultimate responsibility under the PPPA, and all such claims have been duly reviewed, certified, and submitted by PLTP to MTA.

### **A. The ROD Claim (PLTC-PLTP-CL-0003; PLTC-PLTP-L-0640-2)**

The first significant Relief Event that delayed the Critical Path of the Project was the vacatur of the Record of Decision ("ROD"), the effects of which lasted for over a year. During that time, PLTC was prohibited from performing any final design and all construction work for the vast majority of the alignment.

MTA has recognized from the outset of the Project that the ROD vacatur is a Relief Event under the DB Contract and the PPPA, entitling PLTC and PLTP to a time extension and additional compensation, even going so far as to submit multiple affidavits in Federal Court during the ROD litigation saying so. Although the ROD vacatur significantly impacted the earliest stages of design and construction, PLTC, for almost three years, has steadfastly worked with PLTP and MTA to amicably resolve this Relief Event. The ROD vacatur delayed the Critical Path of the Project by 266 calendar days and resulted in significant extra compensable costs to PLTC. Accordingly, PLTC submitted Request for Change Order ("RCO") 001 (PLTC-PLTP-L-0640-2) and Claim 3 (PLTC-PLTP-CL-0003) for the ROD vacatur seeking a 266 calendar day time extension and \$130,989,568 in additional Compensation Amounts.

### **B. The ROW Claim (PLTC-PLTP-CL-0005; PLTC-PLTP-L-0726)**

The delays to the Critical Path of the Project continued with the Owner's delays in providing Right of Way ("ROW") parcels it was required to provide under the PPPA and DB Contract. MTA was late in providing nearly every ROW parcel out of the original 600+ parcels it was required to acquire under the Property Acquisition Schedule (Exhibit 9 of the PPPA and the DB Contract), by more than two years in some cases. The ROW issues were compounded by MTA's delays in acquiring additional utility easements that were necessary to design and build the Purple Line.

PLTC highlighted this issue to MTA as early as 2015 during the proposal stage, as part of the question and answer process. At that time, PLTC stated to MTA that, based on the preliminary engineering that MTA had included with the Request for Proposals, MTA would need to acquire at least 100 additional utility easements that were not included on the Property Acquisition Schedule that MTA created. In response to these statements by PLTC, MTA stated that it would procure the additional utility easements at its own cost and schedule risk, and it eventually added a specific provision to the PPPA to reflect this agreement.

Without the identification of the additional ROW within and upon which the Project was to be constructed, or access to it, PLTC could not design and construct the Project and Critical Path delays resulted. MTA failed to act on numerous PLTC-submitted ROW requests in a timely fashion, in some cases reversing itself months after it had agreed to acquire certain ROW parcels. This cost the Project valuable time and required extensive redesigns that significantly delayed vital utility relocations at the earliest stages of the Project.

MTA's delay in providing ROW is a Relief Event and Owner-Caused Delay under the PPPA and DB Contract, and it delayed the Critical Path of the Project by 79 calendar days, in addition to the delays caused by the ROD Claim. Accordingly, PLTC submitted RCO-009A (PLTC-PLTP-L-0726) and Claim 004 (PLTC-PLTP-CL-0005) seeking an additional 79 calendar day time extension, and \$90,304,637 in additional Compensation Amounts. The combination of Critical Path delays caused by the ROD Claim (Claim 3) and the ROW Claim (Claim 4) total 345 calendar days of delay to the Critical Path of the Project.

### **C. The CSX Delay (PLTC-PLTP-L-0801; PLTC-PLTP-L-1065)**

As set forth in PLTC RCO 31 (PLTC-PLTP-L-0801, as supplemented by PLTC-PLTP-L-1065), the next significant Relief Event to delay the Critical Path of the Project resulted from amendments to the Third Party Agreement between CSXT Transportation, Inc. ("CSX") and MTA that added new design criteria that were not part of the Contract Documents at the Setting Date of the Project. Prior to execution of the PPPA and DB Contract, MTA and CSX executed a Third Party Agreement that established the design criteria to be used for Purple Line construction in and around CSX-owned property. PLTC prepared its designs in accordance with those defined criteria and all other applicable design criteria required by the Contract Documents. CSX rejected PLTC's contractually compliant designs and insisted on design criteria not required by the Contract Documents.

In February 2018, almost two years after the Project began, CSX and MTA executed an amendment to their Third Party Agreement that changed the design criteria and required the addition of a crash wall in Segment 1 of the Project. Upon receiving the new CSX design criteria, PLTC updated its design to comply with them, but CSX has yet to approve these updated designs. In addition to delaying design activities, this issue has delayed all follow-on procurement and construction activities. This has caused significant delays to the Critical Path of the Project because the affected walls need to be constructed before the train can operate.

The amendment to the CSX-MTA Third Party Agreement after the Setting Date imposed new and different design requirements that resulted in a material modification to the Project design. Thus, it is a Relief Event and an Owner-Caused Delay under the PPPA and the DB Contract. As set forth in Supplement 1 to RCO 31 (PLTC-PLTP-L-1065), this Relief Event has resulted in at least 161 calendar days of Critical Path delay to the Project, in addition to the delays from the ROD Claim and the ROW Claim. PLTC also estimates that this Relief Event entitles it to \$130,273,035 in additional Compensation Amounts. The combination of Critical Path delays caused by the ROD Claim (Claim 3), the ROW Claim (Claim 4), and RCO 31 – CSX, have resulted in a total of 506 calendar days of delay to the Critical Path of the Project.

### **D. RCO 21 – Maryland Department of Environment ("MDE") Delay (PLTC-PLTP-L-0806, PLTC-PLTP-L-1051, PLTC-PLTP-L-1081)**

As set forth in PLTC RCO 21 (PLTC-PLTP-L-0806 as supplemented by PLTC-PLTP-L-1051, PLTC-PLTP-L-1081) and the March 2020 Project Schedule Update, the final Relief Event discussed in this Termination Notice that has resulted in Critical Path delay of the Project results from MDE's new and changing requirements, guidance and criteria regarding Maryland Pond Code 378 ("MD 378"), which did not exist as of the Project Setting Date. Prior to the Setting Date, MDE applied MD 378 only when an impoundment or dam was intentionally created. Nothing in the MDE regulations, design manuals, or design guidance concerns or governs the design of an "unintentional dam," which is how MDE is now classifying embankments and associated culverts on this Project.

PLTC has spent the last two years trying to work with MDE on this and related issues, without success. MDE has constantly changed how it is interpreting and applying MD 378 to the Purple Line Project,

including its requirements for the methodologies to be used. MDE has also re-classified embankments and culverts on private property that predate the Purple Line Project as “dams,” although MDE never previously classified these embankments and culverts as dams. MDE’s changes have required PLTC to go through lengthy design and approval processes to address these previously non-existent dams, including some that are outside of the Project ROW. MDE’s refusal to approve designs in areas impacted by its new interpretation of MD 378 has delayed design, as well as all subsequent procurement and construction activities in these areas. MDE’s constantly evolving and changing interpretations and application of MD 378 to the Purple Line Project constitute a Change in Law and a Relief Event under the PPPA and the DB Contract.

As set forth in Supplement 2 to RCO 21 (PLTC-PLTP-L-1081) and the March 2020 Project Schedule Update, this Relief Event has delayed the Critical Path of the Project by at least 470 calendar days in addition to the delays caused by the ROD Claim, the ROW Claim, and the CSX Delay, and resulted in an estimated \$167,545,120 in additional Compensation Amounts owed to PLTC. Further, because MDE continues to change its guidelines, interpretation, and application of MD 378 to the Purple Line, these delays and financial impacts are likely to get worse. The combination of Critical Path delays caused by the ROD Claim (Claim 3), the ROW Claim (Claim 4), CSX Delays (RCO 31), and MDE Delays (RCO 21), have resulted in a total of at least 976 calendar days of delay to the Critical Path of the Project and total estimated Compensation Amounts of at least \$519,112,360.

### **III. PLTC’s Right to Terminate the DB Contract for Extended Delay**

Section 19.2.1.5(c) of the DB Contract provides:

If an event has occurred which DB Contractor anticipates will become an “Extended Delay” under the PPPA that results in 365 or more days of Critical Path delay, but neither Owner nor Concessionaire has, under the PPPA, delivered to the other a notice of unconditional election to terminate the PPPA, DB Contractor may provide written notice thereof to Concessionaire, no earlier than fifty (50) days prior to DB Contractor’s anticipated start of such “Extended Delay,” requesting that Concessionaire deliver such notice to Owner under the PPPA.

The DB Contract adopts the meaning of “Extended Delay” set forth in the PPPA. The PPPA in turn defines “Extended Delay,” in relevant part, as “...(d) a combination of Force Majeure Events, Relief Events and Owner-Caused Delays during the Design-Build Period that have resulted in a delay to the Critical Path of 365 days or more.”

The Relief Events and Owner-Caused Delays set forth in Section II of this notice, namely the ROD Claim (Claim 3), the ROW Claim (Claim 4), the CSX Delay (RCO 31, as supplemented), and the MDE Delay (RCO 21, as supplemented), have resulted in delay to the Critical Path of the Project of at least 976 calendar days. Notably, the MDE Delay alone has resulted in at least 470 calendar days of delay to the Critical Path of the Project. The delays caused by these Relief Events started years ago and are ongoing. Accordingly, the conditions of section 19.2.1.5(c) of the DB Contract have been met and PLTC has the right to deliver to PLTP this Termination Notice and to request that PLTP deliver to Owner its notice of unconditional election to terminate in accordance with the PPPA.

#### **IV. Conclusion**

Throughout the Purple Line Project, PLTC's primary objective has been to deliver high-quality execution of the Project on budget and on time. PLTC has done everything in its power to execute the Purple Line Project in a timely and efficient manner. But Relief Events and Owner-Caused Delays that are MTA's responsibility under the PPPA and the DB Contract, have actually resulted in at least 976 calendar days of Critical Path delay to the Project.

PLTC recognizes the gravity of this action for itself, the other Project participants, and the public that the Project was intended to serve. For this reason, PLTC has made every reasonable effort to avoid it. PLTC has spent the last three years attempting to work with PLTP and MTA to amicably resolve these issues and even offered to complete the Project at cost with no profit to PLTC, on an open-book basis. Unfortunately, this was to no avail.

For the four major issues—ROD, ROW, CSX, and MDE—that have resulted in the Critical Path delays to the Project, PLTC has yet to be granted a single day of compensable time extension or have a single dollar added to the Contract Price. Without being granted the contractual relief to which it is entitled, PLTC would be forced to absorb hundreds of millions of dollars in additional costs that are MTA's responsibility. This is neither reasonable nor sustainable for PLTC. Left with no other alternatives, PLTC is delivering this Termination Notice under section 19.2.1.5(c) of the DB Contract and requests that PLTP deliver such notice to Owner in accordance with the PPPA.

Pursuant to section 19.8.2.1 of the DB Contract, PLTC is available to meet with PLTP within the next two days to develop and finalize a transition plan for the orderly transition of DB Work, demobilization and transfer of Project management, care, custody, and control to PLTP and/or Owner. Please advise of your availability to meet and discuss the transition plan as required by section 19.8.2.1 of the DB Contract.

If you have any questions, please contact me at 240-825-4605.

Sincerely,



Scott Risley, PE  
Purple Line Transit Constructors, LLC  
Project Manager

cc: Jane Garvey, Meridiam  
Terry Towle, Fluor  
Mark Schiller, Lane  
Seth Firmender, Lane  
Allen Wiggins, Lane  
Michael Traylor, Traylor Bros.  
Steve Owen, Traylor Bros.