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Marilyn Burgess - District Clerk Harris County
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By: Marcella Hill
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2020-51751 / Court: 129

CAUSE NO. _____

A STATUS CONSTRUCTION LLC,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
v.	§	**HARRIS COUNTY, TEXAS**
	§	
CITY OF BELLAIRE, TEXAS,	§	
	§	
Defendant.	§	**_____ JUDICIAL DISTRICT**

PLAINTIFF'S ORIGINAL PETITION FOR DECLARATORY RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff A Status Construction LLC, and petitions the Court pursuant to the Declaratory Judgments Act, Chapter 37 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE, for interpretation of a construction contract and a declaration that, under the contract, Plaintiff is owed payment by Defendant the City of Bellaire, Texas, for costs associated with numerous day delays, extra work, and change orders, and in support thereof would respectfully show the Court the following:

I.
DISCOVERY CONTROL PLAN

1. Discovery in this case is intended to be conducted under Level 2 of Rule 190 of the TEXAS RULES OF CIVIL PROCEDURE.

II.
STATEMENT OF RELIEF SOUGHT

2. Plaintiff seeks monetary relief over two hundred thousand dollars ($200,000.00) but not more than one million dollars ($1,000,000.00). The relief sought is within the jurisdictional limits of the court. This statement is made solely for the purpose of providing information on the

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nature of the case in compliance with TEX. R. CIV. P. 47, does not affect Plaintiff's substantive rights, and is made subject to Plaintiff's right to amend.

III.
PARTIES & SERVICE

3. Plaintiff A Status Construction LLC is a Texas Limited Liability Company with its principal place of business located at 8951 Ruthby Street, Suite 12, Houston, Harris County, Texas 77061.

4. Defendant City of Bellaire, Texas is a political subdivision located in and of the State of Texas and may be served with process pursuant to TEX. CIV. PRAC. & REM. CODE § 17.024 by serving citation on the mayor, clerk, secretary, or treasurer.

IV.
JURISDICTION AND VENUE

5. This Court has jurisdiction over the parties and claims because Defendant is a Texas municipality, and the amount in controversy comports with the jurisdictional limitations of the Court.

6. Venue is proper in this Court because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in Harris County, Texas.

V.
FACTUAL BACKGROUND

7. In early 2019, A Status Construction, LLC ("A Status") entered into two contracts with the City of Bellaire, Texas (the "City") to furnish labor and materials for the construction of improvements for the City at the 5100-5200 Block of Spruce St. and 200 Block of N. Fifth St. in Bellaire, Texas 77041 (the "19005 Contract") and at the 4500 Block of Maple St. and 500 Block of Bolivar St. in Bellaire, Texas 77041 (the "19004 Contract") (collectively, "the Contracts"). *See* **EXHIBIT A** and **EXHIBIT B** attached hereto and incorporated herein for all purposes.

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8. Throughout both Projects, on numerous occasions, A Status timely notified the City of Bellaire of delays caused by both adverse weather conditions and unforeseen obstacles that arose due to the negligence of the City and the City's engineer, ARRK Engineers ("AARK"). A Status submitted corresponding proposed change orders, orders for extra work, and requests for time extensions, accompanied by extensive documentation substantiating each delay.

9. Specifically, A Status submitted the requests on the following dates:

a. 10/04/2019 - A Status sent initial day delay requests to the City and ARRK, which was ignored;

b. 11/26/2019 - A Status sent a formal letter regarding the time delays to both the City Manager and other City officials;

c. 12/9/2019 - A Status sent the day delay requests via e-mail to ARRK, in a new format;

d. 02/04/2020 - A Status sent a delay report with red line drawings to City officials;

e. 02/24/2020 - A Status sent updated summarized day delay requests to ARRK and City officials;

f. 04/21/2020 - A Status sent a summarized list of outstanding Change Orders to City officials.

10. Despite repeatedly submitting these requests, the City did not review or respond to any of these requests until May 20, 2020, over seven months after A Status first sent the requests to the City. In the meantime, A Status continued to extend over eight hundred thousand dollars ($800,000.00) of its own funds to finance the impact costs associated with the numerous delays, change orders, and extra work in order to keep the Projects moving and abide by the terms of the

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Contracts. Specifically, A Status expended a total of seven hundred thirty-four thousand fifty-eight dollars and forty-one cents ($734,058.41) for impact costs associated with day delays under the 19004 and 19005 Contracts, and a total of eighty-two thousand nine hundred thirty-four dollars ($82,934.00) for costs associated with change orders and extra work under the 19005 Contract.

11. Most of the delays, change orders, and extra work arose from flaws in the design plans submitted by ARRK, or from delayed responses by ARRK. In accordance with the terms of the Contract, the City is responsible for ARRK's design and engineering errors:

> 2.10 – ADEQUACY OF DESIGN. It is understood that the OWNER believes it has employed competent engineers and/or designers. It is, therefore, agreed that the OWNER shall be responsible for the adequacy of the design, sufficiency of the contract documents, the safety of the structure and the practicability of the operations of the completed project, provided that the CONTRACTOR has complied with the requirements of the said contract documents, all approved modifications thereof and additions and alterations thereto approved in writing by the OWNER. The burden of proof of such compliance shall be upon the CONTRACTOR to show that he has complied with the requirements of the contract documents and approved modifications thereof and all approved additions and alterations thereto, as the same shall have been interpreted by the PROFESSIONAL.

12. On July 6, 2020, A Status retained counsel to pursue its claims for nonpayment against the City. The Project is now nearing completion, and the City still refuses to compensate A Status for a vast majority of the costs mentioned above.

13. To date, Plaintiff has suffered irreparable harm from Defendant's inaction and has incurred extensive and excessive damages.

14. Having no alternative, Plaintiff now files this Original Petition for Declaratory Relief against Defendant.

VI.
CAUSES OF ACTION

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15. Subject to and without waiving the foregoing, Plaintiff asserts the following claims against Defendant:

A. BREACH OF CONTRACT

16. The above paragraphs are incorporated herein by reference as if set forth in full.

17. Plaintiff and Defendant entered into two valid and enforceable contracts whereby Plaintiff was to furnish labor and materials for the construction of improvements for Defendant in exchange for the monetary compensation from Defendant.

18. Plaintiff has performed under the terms of the Contracts by furnishing all labor and materials required to complete each construction project; however, Defendant has materially breached the Contracts by failing to perform pursuant to the terms thereof. Specifically, Defendant breached the following provisions in the Contracts:

19. By failing to substantively respond to Plaintiff's request for time extensions for a period of over seven months, and by ultimately rejecting A Status's request for time extensions under the Project, the City has failed to comply with Section 5 of the Contract, which provides:

> 5.02 EXTENSION OF TIME – The CONTRACTOR agrees that he has submitted his Proposal in full recognition of the time required for the completion of this project, taking into consideration the average climatic range and industrial conditions prevailing in this locality, and has considered the liquidated damage provisions as hereinafter set forth and that he shall not be entitled to, nor will he request, an extension of time on this Contract, except when completion of the work has been delayed by any act of neglect of the OWNER, the PROFESSIONAL, or any employee of either, by other contractors employed by the OWNER, by changes ordered in the work, by strikes, lockouts, fires and unusual delays by common carriers, by unavoidable cause or causes beyond the CONTRACTOR's control, or by any cause which the PROFESSIONAL shall decide justifies the delay. The CONTRACTOR shall give the PROFESSIONAL prompt notice, in writing, of the cause of such delay; and ***within ten (10) days after receipt***

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> ***of a written request for an extension of time from the CONTRACTOR, supported by all requested documentation, the PROFESSIONAL shall submit such written request, together with his written recommendation, to the City Council of the City of Bellaire for consideration, and the City Council shall grant an extension of time for completing the work, sufficient to compensate for the delay***. (emphasis added)

20. By denying A Status's requests for reimbursement of impact costs associated with the numerous day delays, change order requests, and extra work requests, the City is in violation of Section 2.05 of the Contract, which states as follows:

> 2.05 DAMAGES – In the event the CONTRACTOR is damaged in the course of the completion of the work by the act, negligence, omission, mistake or default of the OWNER or of the PROFESSIONAL or of any other contractor employed by the OWNER upon the work, thereby causing loss to the CONTRACTOR, the OWNER agrees that it will reimburse the CONTRACTOR for such loss. In the event the OWNER is damaged in the course of the work by the act, negligence, omission, mistake or default of the CONTRACTOR, or should the CONTRACTOR unreasonably delay the progress of the work being done by others on the job so as to cause loss for which the OWNER becomes liable, then the CONTRACTOR shall reimburse the OWNER for such loss.

21. Furthermore, Section 7.03 of the Contract governs disputes between the Contractor and the City regarding claims for Extra Work. This Section covers any claims for extra work / change orders. A Status could not come to an agreement with the City for payment using Method (A) or Method (B), so based on the Contract, payment must be made using Method (C) which requires the Contractor be paid be paid "the 'actual field cost' of the work, plus fifteen percent (15%)." Despite submitting the extra work claims and documenting the costs associated with said work, the City has refused to pay A Status the full amounts in accordance with Method (C).

> 7.03 EXTRA WORK – It is agreed that the CONTRACTOR shall perform all Extra Work under the direction of the

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PROFESSIONAL when presented with a written work order signed by the PROFESSIONAL, subject, however, to the right of the CONTRACTOR to require written confirmation of such Extra Work order by the OWNER. It is agreed that the basis of compensation to the CONTRACTOR for work either added or deleted by a Change Order, or for which a claim for Extra Work is made, shall be determined by one or more of the following methods:

Method (A) – By agreed unit prices; or

Method (B) – By agreed lump sum; or

Method (C) – If neither Method (A) nor Method (B) be agreed upon before the Extra Work is commenced, then the CONTRACTOR shall be paid the "actual field cost" of the work, plus fifteen percent (15%).

In the event said Extra Work is performed and paid for under Method (C), then the provisions of this paragraph shall apply and the "actual field cost" is hereby defined to include the cost to the CONTRACTOR of all workers, such as foremen, timekeepers, mechanics and laborers, and materials, supplies, trucks, rentals on machinery and equipment, for the time actually employed or used on such Extra Work, plus actual transportation charges necessarily incurred together with all power, fuel, lubricants, water and similar operating expenses, plus all necessary incidental expenses incurred directly on account of such Extra Work, including Social Security, Old Age Benefits and other payroll taxes, and a rateable proportion of premiums on Performance and Payment Bonds and Maintenance Bonds, Public Liability and Property Damage and Worker's Compensation, and all other insurance as may be required by law or ordinance, or directed by the OWNER, or by them agreed to.

The PROFESSIONAL may direct the form in which accounts of the "actual field cost" shall be kept and the records of these accounts shall be made available to the PROFESSIONAL. The PROFESSIONAL or OWNER may also specify in writing, before the work commences, the method of doing the work and the type and kind of machinery and equipment to be used, otherwise these matters shall be determined by the CONTRACTOR. Unless otherwise agreed upon, the prices for the use of machinery

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and equipment shall be determined by using one hundred percent (100%), unless otherwise specified, of the latest schedule of Equipment Ownership Expense adopted by the Associated General Contractors of America where practicable, and the terms and prices for the use of machinery and equipment shall be incorporated in the written Extra work Order. ***The fifteen percent (15%) of the "actual field cost" to be paid to the CONTRACTOR, shall cover and compensate him for his profit, overhead, general superintendence and field office expense, and all other elements of cost and expense not embraced within the "actual field cost" as herein defined***, save that where the CONTRACTOR's camp or field office must be maintained primarily on account of such Extra Work, then the cost to maintain and operate the same shall be included in the "actual field cost".

No claim for Extra Work of any kind will be allowed unless ordered in writing by the PROFESSIONAL. In case any orders or instructions, either oral or written, appear to the CONTRACTOR to involve Extra Work for which he should receive compensation or an adjustment in the construction time, he shall make written request to the PROFESSIONAL for written order authorizing such Extra Work. Should a difference of opinion arise as to what does or does not constitute Extra Work, or as to the payment therefor, and the PROFESSIONAL insists upon its performance, the CONTRACTOR shall proceed with the work after making written request for written order and shall keep an accurate account of the "actual field cost" thereof, as provided under Method (C). The CONTRACTOR shall then have the right to submit his claim directly to the OWNER by proper certification and attestation, on forms provided by the OWNER. If the OWNER shall fail to pay or guarantee to pay said amount claimed within thirty (30) days of the date of submission, the CONTRACTOR shall have the right to file suit in the District Court of Harris County, Texas, for declaratory judgment or other relief, to determine his rights to such claim; and if he shall fail to file suit within sixty (60) days after the date of presentment to the OWNER, the CONTRACTOR shall lose and forfeit his right to make such claim for Extra Work at any later date, and all claims held by the CONTRACTOR shall be deemed forfeited and forever barred if the CONTRACTOR shall accept final payment without having first filed suit in the District Court.

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22. By failing to compensate A Status for the costs associated with day delays, change orders, and extra work, Defendant has essentially abandoned the Project, thereby triggering Section 8.02 of the Contract:

> 8.02 – ABANDONMENT BY OWNER. In case the OWNER shall fail to comply with the terms of this Contract and should fail or refuse to comply with said terms within ten (10) days after written notification by the CONTRACTOR, then the CONTRACTOR may suspend or wholly abandon the work, and may remove therefrom all machinery, tools and equipment, and all materials on the site of the work that have not been included in payments to the CONTRACTOR and have not been wrought into the work. And thereupon, the PROFESSIONAL shall make an estimate of the total amount earned by the CONTRACTOR, which estimate shall include the value of all work actually completed by said CONTRACTOR (at the prices stated in the attached Proposal where unit prices are used), the value of all partially completed work at a fair and equitable price, and the amount of all Extra Work performed at the prices agreed upon, or provided for by the terms of this Contract, and a reasonable sum to cover the cost of any provisions made by the CONTRACTOR to carry the whole work to completion and which cannot be utilized. The PROFESSIONAL shall then make a final statement of the balance due the CONTRACTOR by deducting from the above estimate all previous payments by the OWNER and all other sums that may be retained by the OWNER under the terms of this Agreement, and shall present the same to the CONTRACTOR for the CONTRACTOR's approval; and upon the CONTRACTOR's approving the same as being true, correct and accurate, and upon payment of said sum, the CONTRACTOR shall release the OWNER of any and all liability growing out of or by reason of said Contract, and then the same shall be presented to the OWNER, who shall pay to the CONTRACTOR, on or before thirty (30) days after the date of notification by the CONTRACTOR of the balance shown by said final statement as due the CONTRACTOR under the terms of this Agreement.

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23. As a result, Plaintiff suffered the damages outlined herein as a direct result of Defendant's breach of the Contracts between the parties.

B. QUANTUM MERUIT

24. The above paragraphs are incorporated herein by reference as if set forth in full.

25. Plaintiff performed labor for Defendant under the parties' Contracts. Specifically, Plaintiff incurred a total of seven hundred thirty-four thousand fifty-eight dollars and forty-one cents ($734,058.41) in impact costs associated with delays under both Projects which were caused by the negligence of both the City of Bellaire and ARRK Engineers. Plaintiff has incurred an additional eighty-two thousand nine hundred thirty-four dollars ($82,934.00) in costs associated with change orders and extra work outside the original scope that were approved by the City under the 19005 Contract. Defendant has outright refused to reimburse Plaintiff for any of these costs.

26. Defendant benefited from Plaintiff performing the labor.

27. Plaintiff was never fully compensated for the labor performed.

28. Accordingly, Plaintiff incurred the damages outlined herein.

VII.
DECLARATORY JUDGMENT

29. The above paragraphs are incorporated herein by reference as if set forth in full.

30. Plaintiff seeks a declaratory judgment that Sections 5.02, 2.05, and 7.03 of both the 19004 and 19005 Contracts require Defendant to reimburse Plaintiff for total of seven hundred thirty-four thousand fifty-eight dollars and forty-one cents ($734,058.41) in impact costs associated with delays in both Projects that were due to the fault of the Defendant and/or the Defendant's engineer.

31. Plaintiff further seeks a declaratory judgment that Sections 5.02, 2.05, and 7.03 of the 19005 Contract requires Defendant to reimburse Plaintiff for a total of eighty-two thousand nine hundred thirty-four dollars ($82,934.00) for costs associated with change orders and extra work outside of the original scope that were approved by Defendant and Defendant's engineer,

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pursuant to Method (C) of Section 7.03 of the Contract.

VIII.
ATTORNEYS' FEES, INTEREST, AND COSTS OF COURT

32. The above paragraphs are incorporated herein by reference as if set forth in full.

33. As a result of Defendant's actions as stated and shown herein, A Status has been required to retain Patout | Law, PLLC, to prosecute the claims set forth herein and have and will incur reasonable and necessary attorneys' fees, expenses, and costs of court in pursuing these and potentially other claims.

34. A Status hereby seeks recovery of such attorneys' fees, expenses, and costs of court from Defendant pursuant to Chapter 38 of the TEXAS CIVIL PRACTICE & REMEDIES CODE, the terms of the parties' agreement, and any other applicable statute or common law.

35. Attorneys' fees should be awarded for any and all services rendered up to and including trial, and any and all post-trial motions and appeals.

IX.
NO WAIVER

36. The rights and claims asserted herein by A Status are not intended to waive any other legal or equitable rights A Status may have against the City of Bellaire, all of which are hereby expressly reserved.

X.
RULE 193.7 NOTICE

37. Pursuant to Rule 193.7 of the TEXAS RULES OF CIVIL PROCEDURE, A Status hereby gives actual notice that any and all documents produced may be used against all parties producing the document at any pre-trial proceeding or trial of this matter without the necessity of authenticating the document.

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XI.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff A Status Construction LLC respectfully prays that Defendant the City of Bellaire, Texas be cited to appear and file an answer, and pray for a further finding that A Status Construction LLC recovers from Defendant for the following:

A. Declaratory Judgment in favor of Plaintiff pursuant to TEX. CIV. PRAC. & REM. CODE § 37, finding and determining that as announced:

1. Under both the 19004 and 19005 Contracts, Defendant the City of Bellaire, Texas owes Plaintiff A Status Construction a total of seven hundred thirty-four thousand fifty-eight dollars and forty-one cents ($734,058.41) in impact costs associated with delays in the Project that were due to the fault of the City and the City's engineer; and

2. Under the 19005 Contract, Defendant the City of Bellaire, Texas owes Plaintiff A Status Construction a total of eighty-two thousand nine hundred thirty-four dollars ($82,934.00) for costs associated with extra work outside of the original scope that was approved by the City.

B. Statutory interest under TEX. GOV'T CODE CH. 2251, et. Seq.;

C. Costs of suit;

D. Attorneys' fees;

E. Such other and further relief to which Plaintiff may be justly entitled to at law or in equity.

Respectfully submitted,

PATOUT | LAW, PLLC

/s/ John J. Patout Jr.

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