

**L & L Painting Co., Inc. v Contract Dispute
Resolution Bd. of City of N.Y.**

2008 NY Slip Op 30177(U)

January 14, 2008

Supreme Court, New York County

Docket Number: 0117508/2006

Judge: Marcy S. Friedman

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARCY S. FRIEDMAN**
Justice

PART 57

I + L Painting

INDEX NO. 117508106

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

City

The following papers, numbered 1 to _____ were read on this motion to/for *Art 78 petition*

Petition
Notice of ~~Motion~~/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 1a
2, 2a-2c

Answering Affidavits — Exhibits _____

Replying Affidavits _____ *Memos of Law m1-m3*

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *petition is denied*
as per accompanying decision/order dated 1-14-08.

FILED

JAN 22 2008

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1-14-08

MARCY S. FRIEDMAN *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

L & L PAINTING CO., INC., and ODYSSEY
CONTRACTING CORP.,

Index No.: 117508/06

Petitioners,

ORDER

For an Order Pursuant to Article 78 of the CPLR,

- against -

THE CONTRACT DISPUTE RESOLUTION
BOARD OF THE CITY OF NEW YORK, THE
CITY OF NEW YORK, and THE CITY OF NEW
YORK DEPARTMENT OF TRANSPORTATION,

Respondents.

_____ x

In this Article 78 proceeding, petitioners L&L Painting Co., Inc. and Odyssey Contracting Corp. (collectively “petitioner” or “L&L”) challenge a determination of the City of New York Contract Dispute Resolution Board (“CDRB” or “Board”), dated July 27, 2006, which denied a petition by L&L for additional compensation from respondent City of New York Department of Transportation (“DOT”) for work arising under a contract between L&L and DOT, pursuant to which L&L contracted to remove lead-based paint from the Queensboro Bridge.

The contract provides for petitioner to construct and install a scaffolding platform over the roadways of the bridge in order to protect vehicles and pedestrians using the bridge while the work is performed. The bridge has eight lanes (four lower and four upper) in the inner roadway

for vehicular traffic, and two outer roadways with one lane each for pedestrian and bicycle traffic. It is undisputed that the inner and outer roadways have different elevations. The dispute between the parties is over the height at which the platform must be installed over the roadway surfaces. The DOT claims that the contract requires the platform to be placed at a height of 14 feet above both the inner and outer roadway surfaces. Petitioner agrees that the contract requires the platform to be placed at a height of 14 feet above the 8 lanes of the inner roadway, but contends that the contract does not require placement of a platform at 14 feet above the two lanes of the outer roadways. Petitioner further contends that because the outer roadways are at a higher elevation than the lower lanes of the inner roadway and because there are electrical conduit cables and light posts that obstruct the outer roadways, the maximum vertical clearance over the outer roadways is substantially less than 14 feet, and falls between 8 feet 5 inches and 12 feet. Petitioner thus claims that installation of a platform with a 14 foot clearance over the outer roadways requires the relocation of existing power cables and thus constitutes "additional work" for which petitioner is entitled to compensation.

More particularly, the parties' dispute concerns the interpretation of a project drawing, Sheet No. 26 R, which was provided to bidders and governs the scope of work. Petitioner claims that Note 5 on Sheet No. 26 R, which states that "minimum vertical clearance of 14 feet shall be maintained above all roadways," is applicable only to the platform above the inner roadways, as shown by arrows limiting Note 5 to this area on the drawing of the cross-section of the bridge which is part of Sheet No. 26 R. According to petitioner, note 7, which states that "all protective shielding, platforms and containments shall be installed in accordance with approved shop drawings to the satisfaction of the contractor's engineer," is instead applicable to the outer

roadways, as shown by the arrows on the cross-section. Petitioner asserts that these limitations are confirmed by the facts that field measurements obtained by petitioner in connection with the bidding process confirmed that the clearance above the outer roadways was less than 14 feet, and that Sheet No. 26 R is a scaled drawing and clearly shows, when its measurements are multiplied by the stated scale, that the clearance above the outer roadways is only approximately 12 feet 6 inches. (See Pet.'s Memo. Of Law at 5-11.) In opposition, respondents argue that petitioner's claim is barred by its failure to comply with a contractual provision that required it to clarify any ambiguities in the contract before submitting its bid. (Resps.' Memo. Of Law at 4.)

Respondents also characterize petitioner's interpretation of Note 7 as authorizing petitioner to "build and install structures based on an unapproved design, in contravention of DOT's directives, as long as its Engineer was satisfied with the resulting installation." Respondents contend that this interpretation, permitting petitioner unilaterally to determine the clearance over the outer roadways, is unreasonable. (Id. at 6.)

The CDRB decision ("Decision") which is challenged in this proceeding held, with one dissent, that "DOT produced a confusing and contradictory set of drawings," and that "the conflict between the drawing and its notes indeed created an ambiguity in the contract." (Decision at 4.) The Board also found that Note 7 "gives the contractor's engineer the ability to approve certain parts of the work, but only after the drawings are approved by the City." (Id. at 3-4.) The Board further noted that the City rejected petitioner's drawings providing for clearance of less than 14 feet for the portion of the platform over the outer roadways, and that "[t]here is nothing indicating that the contractor's engineer has complete authority to determine the height of the platform, particularly in light of the unequivocal language in Note 5." (Id. at 4.) The

Board concluded that petitioner failed to comply with its obligation to clarify the ambiguity prior to bidding. (Id. at 6.)

The Rules of the City of New York, which govern resolution of disputes arising out of construction contracts with the City, expressly provide that court review in an Article 78 proceeding of a CDRB decision “shall be limited to the question of whether or not the CDRB’s decision was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion.” (9 RCNY § 4-09[g][6].) This standard of review is consistent with that provided for by CPLR 7803 (3). In undertaking such review, the court may not substitute its judgment for that of a board or administrative agency and must uphold the board’s or agency’s determination if it has a rational basis. (See Matter of Pell v Board of Educ., 34 NY2d 222 [1974].)

Applying this standard, the court concludes that the CDRB Decision must be upheld. The court finds that there is a rational basis for the CDRB’s determination that the parties’ contract is ambiguous. It is well settled that in determining whether a contract is ambiguous the “initial question * * * is whether the agreement on its face is reasonably susceptible of more than one interpretation.” (Chimart Assocs. v Paul, 66 NY2d 570, 573 [1986]; Nausch v Aon Corp., 283 AD2d 353 [1st Dept 2001].) Here, Note 5 requires a minimum clearance of 14 feet for platforms above “all roadways” without limitation. However, this Note appears on the drawings to be limited to the platforms above the inner roadways and, as petitioner itself claims, the measurements on the drawings show a clearance of substantially less than 14 feet above the outer roadways. There is thus a rational basis for the CDRB’s finding that the drawings were confusing, and that the conflict between the drawings and the notes in Sheet No. 26 R created an

ambiguity.

As petitioner acknowledges, paragraph 7(A) of the contract expressly imposes an obligation on prospective bidders to obtain interpretation of any patent ambiguity or inconsistency in the contract, and thus provides:

Request for Interpretation or Correction. Prospective Bidders must examine the Contract documents carefully and before bidding must request of the Agency Chief Contracting Officer (the "ACCO") in writing for an interpretation or correction of every patent ambiguity, inconsistency or error therein which should have been discovered by a reasonably prudent bidder.

The court is unpersuaded by petitioner's contention that the inconsistency in the contract, if any, was latent, not patent. Petitioner does not discuss authority construing these terms. However, there is substantial authority that a patent ambiguity is "one which appears on the face of the instrument" (58 NY Jur2d, Evidence and Witnesses § 588), and that a patent ambiguity may be found where there is an inconsistency or discrepancy between the terms of the contract. (See Thalle Constr. Co. v City of New York, 256 AD2d 157 [1st Dept 1998]; Interstate Gen. Govt. Contrs., Inc. v Stone, 980 F2d 1433 [Fed Cir 1992].) In contrast, a latent ambiguity arises where the language of the contract is clear on its face and "suggests but a single meaning," but some extrinsic or collateral matter makes the meaning uncertain, as where the words of the contract could apply to two different things and parole evidence is necessary to show which of them was intended. (See 58 NY Jur 2d, Evidence and Witnesses § 587; Petrie v Trustees of Hamilton Coll., 158 NY 458 [1899][conveyance of named brook presented latent ambiguity where it was unclear which of two branches of the brook of that name was intended to be conveyed].)

Moreover, it is well settled, as the CDRB held, that where a contract requires a contractor to raise any ambiguities or any questions about the requirements of the job with the City before

submission of its bid and the contractor fails to do so, as here, the contractor will be bound by the City's interpretation of the contract.¹ (E.g. Cipico Constr., Inc. v City of New York, 279 AD2d 416 [1st Dept 2001]; Thalle Constr. Co. v City of New York, 256 AD2d 157, supra; Lake Constr. & Dev. Corp. v City of New York, 211 AD2d 514 [1st Dept 1995]; Arnell Construc. Corp. v Board of Educ., 193 AD2d 640 [2d Dept 1993]. See also Acme Bldrs., Inc. v Facilities Dev. Corp., 51 NY2d 833 [1980].)

Contrary to petitioner's further contention, the CDRB Decision is not invalid because the CDRB did not specifically cite paragraph 7A of the contract or expressly find that the ambiguity was "patent." An agency's determination is not rendered invalid because it fails to set forth all of the evidence the agency considered, or all of the reasons on which it relied, in reaching the determination. (See Matter of Brookdale Hosp. Ctr. Tenants Assn. v Goldman, 99 AD2d 702 [1st Dept 1984]; Matter of Tenant's Advisory Comm. of Sky View Towers v Starr, 87 Misc 2d 93 [Sup Ct, Queens County 1976], affd 54 AD2d 701 [2d Dept], affd 42 NY2d 1044 [1977].) However, the determination must contain sufficient findings of fact to enable the reviewing court to determine whether there was a rational basis for the determination. (See, Matter of Simpson v Wolansky, 38 NY2d 391 [1975]; Matter of Deutsch v Catherwood, 31 NY2d 487 [1973].) In the instant case, the CDRB's extensive discussion of the above-cited legal authorities concerning a contractor's obligation to request pre-bid clarification of ambiguities is sufficient to show that the CDRB adequately reviewed the parties' contract for ambiguities, and to support its finding that

¹Petitioner alleges that it requested confirmation from the DOT at the pre-bid meeting of the dimensions of the tower portals (legs) above the outer roadways. But petitioner makes no showing that it requested clarification of the height at which the platform would be required to be erected above the outer roadways. (See Petition, ¶ 53.)

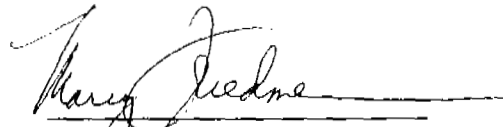
petitioner's failure to request clarification of the clearance required for outer roadways prior to the submission of its bid is fatal to its claim in this proceeding.

Petitioner's additional bases for challenge to the CDRB Decision are also without merit. Petitioner does not provide any factual support for its conclusory assertion that panel member Jockers, an attorney, lacked the requisite background experience to evaluate the parties' dispute over the proper interpretation of the contract. Petitioner also fails to establish that the CDRB should have afforded it equitable relief from the 14 foot clearance requirement based on its claim that such clearance was unnecessary because an errant truck would be unlikely to be able to enter the outer roadways. The court has considered petitioner's remaining contentions and finds them to be without merit.

It is accordingly hereby ORDERED that the petition is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
January 14, 2008


MARCY FRIEDMAN, J.S.C.