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| Matter of A.F.C. Enters., Inc. v New York City Tr. Auth. |
| 2009 NY Slip Op 31678(U) |
| July 24, 2009 |
| Supreme Court, New York County |
| Docket Number: 117236/2007 |
| Judge: Joan A. Madden |
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PRESENT: Hon Joan A. Madden

PART 11

Index Number : 117236/2007

A.F.C. ENTERPRISES, INC

vs

NYC TRANSIT AUTHORITY

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 6/19/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

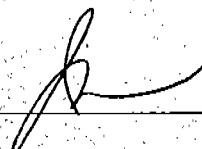
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision

FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: July 24, 2009



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

UNFILED JUDGMENT
This judgment has not been entered by the court and notice of entry cannot be given.

In the Matter of the Application of

A.F.C. ENTERPRISES, INC.,

Petitioner,

for a Judgment Pursuant to CPLR Article 78

- against -

Index No. 117236/2007

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

-----X
JOAN A. MADDEN, J.:

In this proceeding pursuant to CPLR article 78, petitioner A.F.C. Enterprises, Inc. (AFC) seeks a judgment: (1) vacating a determination by the Chief Engineer of respondent New York City Transit Authority (NYCTA), which denied AFC's claim for additional compensation -- under a contract between the parties -- for allegedly transporting and disposing of an amount of petroleum-contaminated waste material which exceeded the amount that the contract assumed to be present; and (2) remanding the matter to NYCTA for a calculation of the actual amount of such contaminated material, and of the amount of the additional compensation which should be paid to AFC.

BACKGROUND

In 2005, NYCTA solicited bids on a contract (*see* Answer, Ex. A [hereinafter, the Contract]) for the rehabilitation of hydrant systems at six transit yards -- the Jamaica, 38th Street, East 180th Street, Westchester, 239th Street and Coney Island yards -- located in the boroughs of Queens, Brooklyn and the Bronx. The Contract involved the excavation of more than 10,000 cubic yards of soil to allow for the placement of fire hydrant piping, and associated site restoration work. Bidders asked NYCTA certain questions that were incorporated, with their answers, in an addendum to the Contract. Those included:

Question 41: Please confirm that all excavated trench materials are to be disposed of off-site and replaced with off-site borrow fill material.

Answer 41: It is the Contractor's responsibility to test (characterize) the excavated

soil and based on the results of the test, handle/dispose/reuse the excavated material in accordance with all applicable Federal, State [and] local regulations. For bid purposes, assume all excavated material is Industrial Waste as defined in 6 NYCRR Part 360 and Part 364 with no petroleum contaminated soil. ...

Question 42: Disposal prices vary substantially depending on the chemical content of the materials requiring disposal. The disposal facilities will not quote pricing without being provided with chemical test data on the soils requiring disposal. Please provide test data or another alternative to pricing the disposal, such as an allowance. Please clarify this issue so that all bidders can include the proper costs in their estimates.

Answer 42: Please refer to answer 41.

(Contract, Addendum No. 2, at 7-8.) A later addendum to the Contract included the following additional bidders' questions and answers:

Question 72: Answer number 41 ... is vague and requires clarification. We need to know exactly how much material is contaminated and will require replacement material and off-site disposal. ...

Answer 72: Please refer to [a revised answer 41] and revised contract specification 12R attached as part of this addendum.

Question 83: ... **6 NYCRR Part 360 does not in itself tell us if the material is contaminated or not.** Without having the soil analysis to guide us, we cannot determine the type of [facility] and the disposal cost associated with same. ... We bring this to your attention because of the cost differentiation between the disposal of ... material as non-contaminated industrial waste @ +/- \$20.00/cy vs. contaminated industrial waste @ +/- \$80.00/cy May we suggest, since you do not have any Pre-Bid Soil Testing to distribute, that you direct bidders to assume the material is either non-contaminated or that the material is contaminated and to what degree to base our bid on.

Answer 83: Please refer to the revised contract specification section 12R attached as part of this addendum.

(*Id.*, Addendum No. 3, at 4, 6-7 [emphasis added].)

Section 12R in the revised Contract is entitled "Specification Section 12R—Removal of Solid Waste" (SOIL) and it provides, in paragraph 1.3 (c), that:

[f]or bid purposes, ninety five (95) percent of the excavated soil, measured along the horizontal projection of the length of the pipe, shall be assumed to be non-

contaminated solid waste and five (5) percent of the excavated soil, measured along the horizontal projection of the length of the pipe, shall be assumed to be petroleum (gasoline, fuel oil) contaminated non-hazardous solid waste. See 6 NYCRR Part 360 for definition of solid waste and petroleum contaminated solid waste.

Section 12R, paragraph 1.3(a) requires the contractor to prepare a plan for an “environmental anticipatory boring program” (“EABP”) to manage solid waste, which the contractor would use, after acceptance by NYCTA. Section 12R, paragraph 1.3(d) requires “[a]ll excavated material shall be managed in accordance with :

- 6 NYCRR Part 360 and Part 364
- NYSDEC STARS Memo #1, Petroleum-Contaminated Soil Guidance Policy
- 29 CFR 1910.120 Occupational Safety and Health Administration (OSHA) Worker Protection
- All applicable Federal, State and local requirements for shortage, transportation and disposal.

Section 12R, paragraph 3.4(a) requires the contractor to perform “real time” field testing, during the course of soil excavation, to ensure that soil was being properly managed and disposed of.

NYCTA awarded the Contract to AFC on November 23, 2005 at a bid price of \$7.9 million. AFC allegedly discovered, as a result of the laboratory tests which were performed pursuant to the Contract, that substantially more than 5% of the soil was petroleum-contaminated. The Contract provided that AFC could seek an equitable adjustment in the Contract price if AFC encountered physical conditions in the course of the work which differed materially from those indicated in the Contract (*see* Contract, art 1.06). On or before June 20, 2006, AFC notified NYCTA of the purported material difference attributable to the allegedly excessive amount of contaminated soil, and requested a work order providing for additional compensation under the Contract (*see* Mikuszewski Affid., ¶ 3 and Ex. 3).¹

¹It appears that all or most of the allegedly contaminated soil could not have been used as on-site backfill even if it were not contaminated, because it did not satisfy “gradation requirements” set forth in Contract specification section 2B (*see* Petition, Ex. 11, at 2). AFC does not seek additional compensation under the Contract on the ground that unanticipated extra costs were incurred by the

Pursuant to article 8.01 (a) of the Contract, NYCTA's Construction Manager was authorized "to determine in the first instance all questions of any nature whatsoever arising out of, under, or in connection with, or in any way related to or on account of, [the] Contract" (*see also* Contract, arts 1.02 [13], 1.06 [a]; Answer, ¶ 49). By letter dated January 5, 2007, the Construction Manager denied AFC's claim for additional compensation, without explanation, and directed AFC to "dispose of all the excess soil ... at no additional cost to [NYCTA]" (Petition, Ex. 10).

AFC challenged the Construction Manager's determination by submitting a dispute notice, dated January 5, 2007 (*see* Answer, Ex. D [hereinafter, the Dispute Notice]), to NYCTA's Chief Engineer. The Contract authorized the Chief Engineer, "acting personally, to render a final and binding decision" with regard to AFC's claim for additional compensation (Contract, art 8.03 [b] [1]). The parties' additional submissions to the Chief Engineer included: NYCTA's response dated March 12, 2007 (*see* Answer, Ex. F [hereinafter, NYCTA's Response]); AFC's reply dated March 30, 2007 (*see id.*, Ex. G [hereinafter AFC's Reply]); and NYCTA's supplemental letter dated April 23, 2007 (*see id.*, Ex. H [hereinafter, NYCTA's Supplemental Letter]). Following a hearing in June or July 2007, the Chief Engineer issued a determination, dated August 31, 2007 (*see* Petition, Ex. 1 [hereinafter, the Determination]), which denied AFC's claim for additional payment in connection with the disposal of the allegedly contaminated soil.

The Determination contains a 13-paragraph "background and facts" section in which the Chief Engineer set forth AFC's and NYCTA's respective arguments and positions. The Chief Engineer noted therein that, for purposes of characterizing soil as contaminated, AFC relied upon criteria that were set forth in two documents promulgated by the New York State Department of Environmental Conservation (NYSDEC): Spill Technology and Remediation Series Memorandum #1, Petroleum-Contaminated Soil Guidance Policy (the STARS Memo); and Technical and Administrative Guidance Memorandum #4046, Determination of Soil Cleanup Objectives and

necessity of disposing of the soil off-site rather than using the soil as backfill, but on the ground that unanticipated extra costs were incurred because of the necessity of disposing of the soil in a manner that was appropriate for contaminated soil as opposed to uncontaminated soil.

Cleanup Levels (TAGM #4046). The STARS Memo contains tables of “guidance values,” and TAGM #4046 contains tables of “recommended soil cleanup objectives,” which indicate the limits of acceptable contaminant concentration levels for various possible soil contaminants.

AFC had submitted laboratory test reports to NYCTA, in conjunction with AFC’s original request for additional compensation under the Contract, which indicated that the allegedly contaminated soil contained certain semi-volatile organic compounds (SVOCs) in concentration levels that exceeded the guidance values set forth for those SVOCs in the STARS Memo and the recommended soil cleanup objectives set forth for those SVOCs in TAGM #4046 (*see* Petition, ¶ 28 and Ex. 8; Mikuszewski Affirm., ¶¶ 1, 2, 3 and Exs. 1, 2, 3). AFC had submitted a report to the Chief Engineer, with the Dispute Notice, which appears to summarize the salient findings from the laboratory reports in a more condensed form (*see* Petition, ¶ 33 and Ex. 11, Letter from P. W. Grosser Consulting dated Dec. 7, 2006).

In her Determination, the Chief Engineer set forth NYCTA’s position and arguments as follows:

[NYCTA] requested proof that the soil was contaminated with petroleum and [AFC] provided data from their analytical laboratory but [NYCTA] stated that this data made no correlation to the regulatory standard in 6 NYCRR Part 360 which is explicitly referenced in the Contract.

[NYCTA] further stated that it had reviewed the data from [AFC’s] laboratory and determined that there was no “petroleum contaminated” soil at the yard sites consistent with the applicable governing regulations in Part 360 of 6 NYCRR. [NYCTA] further indicated to [AFC] that while the data showed some ... SVOCs ... at all yards and low levels of Volatile Organic Compounds (VOCs) at two facilities, this did not reflect “petroleum contamination” and further stated that SVOCs are common indicators of other materials present in the urban environment such as ash (cinder) and asphalt which were identified in the bid documents.

[NYCTA] in its response indicated that it had asked [AFC] where it had disposed of the soil from Jamaica Yard to which [AFC] presented “weigh receipts” for the material from a facility in New Jersey which, according to [NYCTA’s] statements is permitted by the [New Jersey Department of Environmental Protection (NJDEP)] to operate as a Class B recycling facility and is permitted to receive only Bulky Waste and Construction and Demolition (C&D) waste, but not petroleum contaminated non-hazardous waste.

[NYCTA] states that [AFC’s] own documentation makes it clear that the material excavated was C&D Waste (without petroleum or hazardous materials) per NJDEP

regulations and consistent with similar definitions in 6 NYCRR Part 360. C&D waste is defined under 6 NYCRR Part 360 as an "uncontaminated solid waste."

[NYCTA] further states that based upon [AFC's] own laboratory data, the soil excavated was clearly C&D waste and any attempt by [AFC] to claim it incurred extra costs in disposing of this material is without merit.

[NYCTA] states that the guidance values that [AFC] used from [the STARS Memo] are intended to apply at petroleum spill sites and that ... TAGM #4046 was designed as guidance for the determination of cleanup levels at Inactive Hazardous waste sites and that as such, both of these guidelines are inapplicable because the yards are neither spill sites nor hazardous waste sites.

(Determination, at 2-3.)

The Chief Engineer then set forth her decision in a four-paragraph "discussion" section, of which the first paragraph was a one-sentence delineation of the issue presented by the parties' dispute and the second paragraph was comprised of a quotation of paragraph 1.3 (c) of Section 12R.

In the third and fourth paragraphs, the Chief Engineer concluded that:

Part 360 of 6 NYCRR defines C&D waste as uncontaminated solid waste. [AFC's] own laboratory testing and weigh receipts from the New Jersey facility which accepted the material indicate that the excavated soil was classified as construction and demolition (C&D) waste per 6 NYCRR Part 360 and also as per [NJDEP] N.J.A.C. 7:26-2.13C which governed the facility.

Therefore there is no possible interpretation of the facts other than that the waste removed from the site conformed to the Contract definition of non-contaminated solid waste. Accordingly, for all of the aforementioned facts and circumstances and after consideration of the arguments presented to me in writing, I have no choice but to deny this claim.

(*Id.* at 3-4.) AFC asked the Chief Engineer to reconsider her Determination, by letter dated September 18, 2007, but the Chief Engineer denied AFC's request, by letter dated October 4, 2007.

AFC's petition in this proceeding asserts that, as of the date thereof, AFC had excavated a total of 16,029.42 tons of material along the horizontal projection of the length of the pipe at the work sites, of which 7,876.64 tons, or 49% of the total amount, was petroleum-contaminated material. AFC alleges that it has incurred an additional \$909,866.86 in costs for the handling, transporting and disposal of contaminated material which was not anticipated by the Contract's assumption that only 5% of the excavated material would be contaminated.

DISCUSSION

Article 8.05 of the Contract provides that the Chief Engineer's Determination "shall be subject to review ... in the form of a challenge ... under Article 78 of the [CPLR] ..., it being understood [that] the review of the Court shall be limited to the question of whether or not the [Determination] is arbitrary, capricious or lacks a rational basis." "[A]rbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Vanech v City of New York*, 285 AD2d 367, 369 [1st Dept 2001] [citing *Matter of Pell v Board of Educ.*, 34 NY2d 222, 231 (1974)]). "Judicial review of the propriety of any administrative determination is limited to the grounds invoked by the agency in making its determination" (*Matter of AVJ Realty Corp. v New York State Div. of Hous. & Community Renewal*, 8 AD3d 14, 17 [1st Dept 2004] [citation and internal quotation marks omitted]).

The Chief Engineer based her Determination that AFC was not entitled to additional payment under the Contract upon two grounds: (1) that AFC's own laboratory testing indicated that the allegedly contaminated soil was uncontaminated "construction and demolition (C&D) waste," as that term is defined in 6 NYCRR part 360; and (2) that the "weigh receipts from the New Jersey facility which accepted" the soil indicated that it was classified as uncontaminated C&D waste under both 6 NYCRR part 360 and "[NJDEP] N.J.A.C. 7:26-2.13C." With respect to each of those grounds, the Chief Engineer ostensibly adopted NYCTA's arguments without any explanation or independent, critical analysis.² However, a review of the grounds which were invoked by the Chief Engineer in reaching her decision indicates that the Determination was arbitrary and capricious, because it was without sound basis in reason, and in disregard of the terms of the Contract and the relevant facts (*see Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 [1983]).

As stated, the first ground for the Chief Engineer's Determination was that AFC's own laboratory testing indicated that the allegedly contaminated soil fell within the definition of

²The third paragraph of the "discussion" section of the Determination, which sets forth the grounds for the Chief Engineer's decision, essentially reiterates the "summary" paragraph contained in NYCTA's Response (*see* NYCTA's Response, at 3).

uncontaminated C&D waste set forth in 6 NYCRR part 360. NYCTA did not dispute in the proceeding before the Chief Engineer, and does not dispute in this proceeding, AFC's contention that -- under the STARS Memo and TAGM #4046 criteria -- the allegedly contaminated soil would be deemed contaminated.³ Rather, insofar as the Chief Engineer based her Determination on the first of the grounds invoked by her, she presumably found to be meritorious NYCTA's argument that the STARS Memo and TAGM #4046 criteria were not applicable in determining whether soil was non-contaminated or petroleum-contaminated for purposes of the assumptions, set forth in paragraph 1.3 (c) of Section 12R, that 95% of the excavated soil would be non-contaminated and 5% of the excavated soil would be petroleum-contaminated. She also presumably accepted as valid NYCTA's arguments that the determination of whether soil was non-contaminated or petroleum-contaminated should be based, instead, upon definitions of those terms derived from 6 NYCRR part 360, and that, based upon such definitions, the allegedly contaminated soil was uncontaminated C&D waste.

NYCTA maintained that the TAGM #4046 and STARS Memo criteria were not appropriate criteria for determining whether excavated soil was contaminated, or petroleum-contaminated, because: (1) TAGM # 4046 is only applicable to "soil cleanup at ... Federal Superfund, State Superfund, 1986 EQBA Title 3, and Responsible Party sites where there are hazardous conditions," and none of the NYCTA transit yards involved here falls within any of the foregoing designations (Answer, ¶ 58); (2) the STARS Memo is only intended to address the cleanup of a site where there

³NYCTA's memorandum of law asserts that "[a]t issue in the claim underlying this proceeding is the definition of [the terms 'non-contaminated' and 'petroleum-contaminated']," and that the "Chief Engineer's resolution of the parties' dispute ultimately depended on her interpretation of the Contract, and specifically on the applicable definition of petroleum contamination thereunder" (NYCTA Mem. of Law, at 1, 9). The Chief Engineer asserts, in an affidavit submitted by her in this proceeding, that she "found the definition of 'petroleum contamination' to be critical to a determination of liability," and that she could "find no basis for determining that the soil was 'petroleum contaminated' as per the referenced regulatory definition," i.e., the definition proffered by NYCTA and alleged by it to be derived from 6 NYCRR part 360 (Crawford Affid., ¶ 6). Those assertions would seem to indicate that the Chief Engineer's decision hinged upon her choice between the competing definitions of the term "petroleum contamination" which were offered by the parties, and that -- under AFC's proffered definition based upon the criteria set forth in the Stars Memo and TAGM #4046 -- the soil in question would be deemed contaminated.

has been a petroleum spill, and AFC never documented, reported or alleged that a petroleum spill had occurred at any of the sites from which the soil was excavated; and (3) paragraph 1.3 (c) expressly directs the reader to “[s]ee 6 NYCRR Part 360 for definition of solid waste and petroleum contaminated solid waste.”

The Chief Engineer’s Determination was not arbitrary or capricious insofar as it decided that the TAGM #4046 criteria were not appropriate criteria for determining whether soil was contaminated, or petroleum-contaminated, for purposes of the assumptions set forth in paragraph 1.3 (c). AFC has submitted, in this proceeding, an affirmation by its counsel which states that TAGM #4046 is “the leading industry document for the standards and evaluation of whether excavated soil is contaminated” (Goldstein Affirm., ¶ 6), and an affidavit by a licensed professional engineer which asserts that TAGM #4046 is: “the appropriate regulatory reference for evaluating whether soil is contaminated by materials such as petroleum, hazardous waste or industrial waste”; “the applicable industry standard for analyzing whether soil excavated from industrial sites, such as rail yards, is contaminated”; and “the leading reference used by environmental and civil engineers in New York State and New York City” (McGuckin Affid., ¶¶ 7, 8, 9).

However, those submissions were not part of the record before the Chief Engineer and, in any event, it is immaterial whether application of the TAGM #4046 criteria for purposes of determining whether the excavated soil was contaminated and/or petroleum-contaminated may have been appropriate as a general matter, or whether the usage of those criteria is standard within a particular industry or among engineers. The relevant question is whether, under the terms of the Contract, the TAGM #4046 criteria were a valid basis for deeming soil to be contaminated, or petroleum-contaminated, for purposes of the assumptions contained in paragraph 1.3 (c).

AFC has not identified any provision of the Contract which would establish the validity of the TAGM #4046 criteria for such purposes. Section 12R contains various provisions which expressly rendered all or portions of AFC’s work under the Contract subject to, inter alia: “applicable Federal, State and local laws and regulations, and [NYCTA] policies”; “[a]ll applicable

Federal, State and local requirements for storage, transportation, and disposal”; “all local, State and federal regulatory requirements”; and “applicable Federal, State and local regulations and [NYCTA] requirements” (Contract, Section 12R, ¶¶ 1.2 [a], 1.3 [d], 3.4 [a], 3.5 [a]). Other provisions of the Contract required, more generally, AFC’s compliance with: environmental provisions “applicable by virtue of City, State or Federal law, rule or regulation which are not specifically designated in ... the Contract”; and “all local, State and Federal laws, rules and regulations applicable to this Contract and to the Work to be done hereunder, whether or not referenced in the Contract Documents” (*id.*, Information for Bidders, ¶ 10 [a]; art 10.14). AFC has not established that TAGM #4046 is a New York State law, rule, regulation or requirement, or an NYCTA policy or requirement, and AFC has articulated no other contractual basis for application of the TAGM #4046 criteria.

However, NYCTA’s arguments that the STARS Memo criteria were inapplicable is without merit, as the provisions of Section 12R evince the parties’ intent to make the STARS Memo criteria applicable to the question of whether soil should be deemed contaminated for purposes of the assumptions contained in paragraph 1.3 (c), without regard to whether the soil was from a site which had been affected or contaminated by a petroleum spill. Paragraph 1.3 (d) of Section 12R expressly mandates that “[a]ll excavated material,” and not merely excavated material from a site which has first been established to have been affected or contaminated by a petroleum spill, “shall be managed in accordance with” the STARS Memo (emphasis added). Paragraph 1.2 (c) of Section 12R provides that “[s]oils which are being reused shall not be transported prior to the performance of necessary laboratory analyses and receipt of the laboratory reports confirming that the soil has satisfied the appropriate Guidance Values of the [STARS Memo]” Thus, the latter paragraph made satisfaction of the STARS Memo guidance values a requirement for all excavated soil that was being reused, without regard to whether that soil had been independently established, as a preliminary matter, to have come from a site that was affected or contaminated by a petroleum spill.

Use of the STARS Memo criteria in determining whether excavated soil was petroleum-contaminated, for purposes of disposal, was also consistent with Contract specification section 2A,

paragraph 1.7, which is entitled "Disposal of Materials Excavated." Subparagraph 1.7 (c) (2) provides that, "[w]henver the Contractor desires ... to dispose of or use excavated soil as clean fill at off-site location(s) other than a regulatory agency permitted disposal facility," "[c]omposite soil samples must at a minimum be analyzed for," inter alia, "petroleum contaminants" by means of "method [Environmental Protection Agency (EPA)] 8021 and 8270." Paragraph 1.7 (c) (3) provides that "[a] soil may be deemed as 'clean fill' only if *none* of the listed analytes' concentrations exceeds the regulatory levels" (emphasis added).

The STARS Memo provides that contaminant concentration levels are determined, for purposes of comparison to the guidance values set forth therein, "using EPA standard Methods 8021 or 8270," and that those are "[t]he methods recommended and most often used for petroleum-contaminated soils," and the "preferred [methods] for identifying compounds of concern for gasoline and fuel oil" (Answer, Ex. E, STARS Memo, at 3, 8, 11). In the laboratory reports which AFC submitted to NYCTA, and the more condensed report which AFC submitted to the Chief Engineer, the findings that concentration levels for certain SVOCs in the allegedly contaminated soil exceeded the guidance values that were set forth for those compounds in the STARS Memo were ostensibly predicated upon results obtained pursuant to EPA Method 8270.

NYCTA contends that application of the STARS Memo criteria was not appropriate because paragraph 1.3 (c) of Section 12R directs the reader to "[s]ee 6 NYCRR Part 360 for definition of solid waste and petroleum contaminated solid waste." However, paragraph 1.3 (c) does not direct the reader to see 6 NYCRR part 360 for a definition of the term "non-contaminated," which is used in the assumption -- set forth in the same paragraph -- that 95% of the excavated soil will be non-contaminated.⁴ A determination as to whether soil was non-contaminated, for purposes of the

⁴It might seem upon a first reading -- because the 95% non-contaminated and 5% petroleum-contaminated assumptions are contained in the same sentence and because the sum of 95% and 5% equals 100% -- that the term "non-contaminated" is merely intended to mean not petroleum-contaminated. However, that is clearly not the case. NYCTA acknowledges that soil would be contaminated, even if it were not petroleum-contaminated, if the soil contained hazardous waste or industrial waste (*see* Answer, ¶ 43-44; NYCTA Mem. of Law, at 13; NYCTA's Response, at 6;

assumption that 95% of the excavated soil would be non-contaminated, would presumably have to be informed by the criteria set forth in the STARS Memo in view of the circumstances that: (1) paragraph 1.3 (c) does not direct the reader to any particular source for a definition of the term “non-contaminated”; (2) the term “non-contaminated” was clearly intended to mean non-contaminated for purposes of disposal, inasmuch as the assumption was included in the Contract, in the first instance, as a means of addressing bidders’ concerns regarding the potential variability of possible disposal costs; and (3) paragraph 1.3 (d) mandates that “[a]ll excavated material shall be managed in accordance with” the STARS Memo, and the disposal of excavated material is a means by which excavated material is “managed.”

NYCTA has not argued that 6 NYCRR part 360 and the STARS Memo criteria are mutually exclusive or incompatible, such that application of the STARS Memo criteria would necessarily contravene, or preclude the application of, any provision of 6 NYCRR part 360. Rather, the parties’ understanding that 6 NYCRR part 360 and the STARS Memo criteria were compatible, and could both be applied, is evidenced by the requirement, set forth in paragraph 1.3 (d) of Section 12R, that “[a]ll excavated material shall be managed in accordance with” both 6 NYCRR part 360 and the STARS Memo.

Insofar as the Chief Engineer based her Determination upon the first of the two grounds invoked by her, she also presumably accepted as valid NYCTA’s arguments that -- based upon definitions of the terms “petroleum contaminated” and “non-contaminated” that were purportedly derived from 6 NYCRR part 360 -- AFC’s own laboratory testing indicated that the allegedly contaminated soil was uncontaminated C&D waste. NYCTA asserted that, although AFC’s Dispute Notice repeatedly used the terms “contaminated” and “uncontaminated” without defining them, “[a]ppropriate definitions are ... readily and clearly presented in ... 6 NYCRR Part 360 and related materials ...” (NYCTA’s Response, at 6).

NYCTA’s Supplemental Letter, at 2; Section 12R, ¶ 3.5 [b]). Thus, the assumption that 95% of the excavated soil will be non-contaminated has separate force, and is independent, from the assumption that 5% of the excavated soil will be petroleum-contaminated.

However, NYCTA did not identify any such definitions. Rather, in characterizing the allegedly contaminated soil as non-contaminated under 6 NYCRR part 360, NYCTA relied primarily upon the definition of the term “construction and demolition (C&D) debris,” which is set forth in 6 NYCRR 360-1.2 (b) (38):

[c]onstruction and demolition (C&D) debris means uncontaminated solid waste resulting from the construction, remodeling, repair and demolition of utilities, structures and roads; and uncontaminated solid waste resulting from land clearing. Such waste includes, but is not limited to bricks, concrete and other masonry materials, soil, rock, wood ..., land clearing debris, ... [and] asphaltic pavement

(Emphasis in original.) In support of its argument that the allegedly contaminated soil was, in fact, uncontaminated C&D debris, NYCTA also cited NYSDEC Declaratory Ruling 27-35, which provides that, “[b]y definition, C&D debris must be uncontaminated” (NYCTA’s Response, at 6 and Append. B, Ex. IV, Attach. 2, at 3).⁵

However, NYCTA’s arguments predicated upon the definition of C&D debris and Declaratory Ruling 27-35 did not provide a separate or independent basis for a conclusion that the allegedly contaminated soil was uncontaminated. The definition and the declaratory ruling clearly indicate that solid waste must be uncontaminated, as a preliminary matter, in order to qualify as C&D debris. Accordingly, inasmuch as NYCTA did not adequately and independently demonstrate that the allegedly contaminated soil was uncontaminated, NYCTA could not rely upon its conclusory and inadequately substantiated characterization of the soil as C&D debris as a means of establishing that the soil was uncontaminated.

NYCTA also argued that the allegedly contaminated soil was uncontaminated in accordance with 6 NYCRR 360-7.1 (c) (4), which provides that:

[u]ncontaminated means C&D debris that is not mixed or commingled with other solid waste at the point of generation, processing or disposal, and that is not contaminated with spills of a petroleum product, hazardous waste or industrial waste. Contamination from spills of a petroleum product does not include asphalt or concrete pavement that has come into contact with petroleum products through normal vehicle use of the roadway.

⁵Declaratory Ruling 27-35 was not issued until September 28, 2006, more than 10 months after NYCTA awarded the Contract to AFC.

(Emphasis in original; *see* NYCTA's Supplemental Letter, at 2.) The allegedly contaminated soil was therefore uncontaminated, NYCTA argued, because it was not contaminated with a spill or spills of a petroleum product, hazardous waste or industrial waste.

However, that definition of the term "uncontaminated" is, again, circular and not instructive for purposes of the instant dispute. Material must be C&D debris in order to fall within that definition and, as previously set forth, material must be uncontaminated in order to qualify as C&D debris. Moreover, pursuant to 6 NYCRR 360-7.1 (c), the term "uncontaminated" has the meaning set forth in subsection 6 NYCRR 360-7.1 (c) (4) only "when used in this Subpart," i.e., 6 NYCRR subpart 360-7, which is entitled "Construction and Demolition Debris Landfills." That the definition has particular applicability to the regulation of C&D debris landfills is reflected in the definition's requirement that uncontaminated material be uncontaminated in two different respects, that is: (1) that the material be uncontaminated as an original matter, a requirement which is set forth in the definition's requirement that the material be C&D debris, i.e., debris which is, by definition, uncontaminated; and (2) that the material not subsequently be contaminated by some process or event which transpires in the course of its being collected, transported and placed in a C&D debris landfill, a requirement which is set forth in the definition's requirement that the C&D debris not be "mixed or commingled with other solid waste at the point of generation, processing or disposal, and ... not [be] contaminated with spills of a petroleum product, hazardous waste or industrial waste." While NYCTA attempted to rely upon what is only a portion of the second part of the definition -- namely, the statement that uncontaminated means "not contaminated with spills of a petroleum product, hazardous waste or industrial waste" -- that portion of the definition does not adequately define, for purposes of the parties' dispute, what makes material or debris uncontaminated, such that it qualifies as C&D debris as an original matter.

NYCTA contended in its submissions to the Chief Engineer that "AFC never determined that a petroleum spill had occurred, and thus offers no data to support any legitimate claim of contamination" (NYCTA Supplemental Letter, at 2). However, NYCTA's contention disregarded

the independent significance of Section 12R's assumption that 95% of the excavated soil would be non-contaminated, the provisions of the Contract which effectively made the STARS Memo criteria an appropriate basis for determining whether excavated soil was contaminated, and the laboratory reports produced by AFC, which indicated that the allegedly contaminated soil contained SVOCs in concentration levels which exceeded the guidance values set forth for those SVOCs in the STARS Memo.

Moreover, in attempting to define a petroleum spill, and notwithstanding NYCTA's assertions that despite its failure to identify the definition of the term "petroleum contaminated" in NYCRR part 360, its definition can be derived from it, NYCTA itself relied upon sources outside of 6 NYCRR part 360. NYCTA cited 6 NYCRR 611.2 (g), which provides that "[s]pill or spillage means any escape of petroleum from the ordinary containers employed in the normal course of storage, transfer, processing or use" (NYCTA Supplemental Letter, at 2).⁶ NYCTA's Response asserted, without citing any source for the assertion, that "[a] 'spill' of petroleum product is simply defined as occurring when you *see it, smell it, measure it or report it*" (NYCTA's Response, at 6 [emphasis in original]). NYCTA's Supplemental Letter asserted -- alternatively, and again without citing any authority for the assertion -- that:

[i]ndication of a petroleum spill at a site is established by (1) observation of an oily discoloration or staining on the soil; (2) smelling chemical or petroleum odors; and/or (3) a positive result upon organic vapor analysis, using, for example, a Photoionization Detector Meter which can detect most organic and selected inorganic compounds.

⁶Pursuant to 6 NYCRR 611.2, the definition of "spill or spillage" set forth in paragraph (g) thereof is only "applicable to this Part," i.e., part 611, which is entitled "Environmental Priorities and Procedures in Petroleum Cleanup and Removal." If, as NYCTA argued, the STARS Memo criteria are not applicable to the parties' dispute because AFC did not demonstrate, as a prerequisite to applicability of the STARS Memo, that the excavated soil was contaminated by a petroleum spill, then NYCTA's reliance upon definitions set forth in 6 NYCRR part 611 would be inappropriate, because the provisions of that part "apply to the establishment ... of priorities and procedures necessary to ensure prompt and environmentally correct cleanup and removal when a discharge occurs" (6 NYCRR 611.1 [b]), and NYCTA has not demonstrated, as a prerequisite to the applicability of the provisions of that part, that any petroleum discharge occurred.

(NYCTA's Supplemental Letter, at 2.) NYCTA argued that "[n]one of these criteria were satisfied in this case" (*id.*).

Inasmuch as NYCTA did not ascribe the foregoing two statements of what should be deemed to indicate a petroleum spill to any particular source, their applicability to the parties' dispute is unclear. However, insofar as "[a] 'spill' of petroleum product" may be "defined as occurring when you ... *measure it*," AFC may be deemed to have satisfactorily demonstrated the occurrence of a petroleum spill -- by measuring it -- when AFC produced laboratory testing reports indicating that the allegedly contaminated soil contained SVOCs in concentration levels which exceeded the guidance values that were set forth for those compounds in the table of "guidance values for fuel oil contaminated soil," which is contained in the STARS Memo, which is a "Petroleum-Contaminated Soil Guidance Policy."

For all of the foregoing reasons, the first of the two grounds which the Chief Engineer invoked as the basis for her Determination did not afford a rational basis for the Determination. Nor did the second of the grounds invoked, i.e., that "the weigh receipts from the New Jersey facility which accepted the material" indicated that it was classified as C&D waste under both "6 NYCRR Part 360 and ... [NJDEP] N.J.A.C. 7:26-2.13C."

NYCTA asserted in its submissions to the Chief Engineer: that, "[w]hen [NYCTA] asked AFC where it had disposed of the soil from the excavation at the first site (Jamaica Yard), AFC presented 'weigh receipts' for the material from the Mazza and Sons Inc., ... NJDEP ... Facility [the Mazza Facility] ... in Tinton Falls, NJ"; that the Mazza Facility "*does not accept petroleum or hazardous material waste*"; that "C&D debris, containing concrete, brick and asphalt ... *can* be disposed of at the facility"; and that "the 'weigh receipt' from this facility is stamped to indicate that the material received from AFC was exactly that" (NYCTA's Response, at 2, 3 [emphasis in original]). NYCTA submitted copies of what appear to be four weigh receipts from the Mazza Facility, dated between May 31 and July 24, 2006, which characterized the material received under those receipts as "concrete/brick/aspha[lt]" (*id.*, Append. B, Ex. I, Attach. 1). According to NYCTA,

the weigh receipts indicated that the material was C&D waste under NJDEP regulations, and under the definition of C&D debris set forth in 6 NYCRR 360-1.2 (b) (38).

However, the weigh receipts which NYCTA submitted to the Chief Engineer appear to represent only approximately 147 tons of material that was received by the Mazza Facility.⁷ AFC's Reply asserted that a total of 12,500 tons of excavated material had been disposed of from the work sites as of the date thereof, and set forth the names of the facilities which had allegedly received all of that material, and the number of tons which each facility had allegedly received (*see* AFC's Reply, at 5). AFC asserted that only 3,256 tons of the material had been disposed of at the Mazza Facility (*id.*). In NYCTA's Supplemental Letter, submitted after AFC's Reply, NYCTA did not challenge or dispute the accuracy of any of the foregoing figures.

AFC's figures, if correct, would indicate that only approximately 26% of the total tonnage that was disposed of was disposed of at the Mazza Facility, and that the Mazza Facility weigh receipts represented less than 1.2% of the total tonnage. Assuming, *arguendo*, that approximately 1.2%, or even 26%, of the total tonnage of excavated soil that AFC had disposed of had been disposed of as uncontaminated C&D debris, that would not disprove AFC's assertions that it had disposed of substantially in excess of 5% of the excavated soil in a manner appropriate for contaminated soil. Accordingly, inasmuch as the four weigh receipts which NYCTA submitted to the Chief Engineer did not represent a sufficiently substantial portion of the waste material which AFC had disposed of to form any basis for determining whether AFC's claim did or did not have

⁷Although NYCTA's Response stated that AFC gave NYCTA the weigh receipts from the Mazza Facility in response to NYCTA's query as to where AFC had disposed of the excavated soil from the Jamaica Yard, AFC's Reply asserted that the weigh receipts were submitted by AFC to NYCTA not at NYCTA's request but, rather, with AFC's request for payment for the disposal (*see* AFC's Reply, at 4). AFC's assertion would appear to be corroborated by a provision in the Contract which required AFC to furnish NYCTA with documentation including "truck manifests [and] Treatment Storage and Disposal Facility (TSDf) receipts" (Contract, Section 12R, ¶ 2.1). Insofar as AFC was contractually obligated to submit copies of weigh receipts to NYCTA, a question would arise as to why NYCTA submitted weigh receipts in the proceeding before the Chief Engineer for *only* 147 tons out of the much larger total amount of excavated material that was disposed of.

merit, the weigh receipts did not afford a rational basis for the Chief Engineer's Determination.⁸

AFC contends that the Determination was arbitrary and capricious, and should be vacated, on the additional ground that the Chief Engineer improperly delegated the duty of evaluating AFC's claim, and/or the duty of drafting the Determination, to NYCTA's "in-house counsel" (Petition, ¶ 43; *see also* AFC Mem. of Law, at 5-6). According to AFC, this delegation violated the terms of the Contract, which provides, with respect to a dispute of the type initiated by the Dispute Notice, that "the parties ... authorize the Chief Engineer ..., *acting personally*, to render a final and binding decision." (Contract, art 8.03 [b] [1] [emphasis added]).

However, the Chief Engineer asserts in the affidavit which she has submitted in this proceeding: that "[she] reached [her] determination in the dispute underlying this proceeding in [her] own capacity"; that "at no time did [she] delegate [that] responsibility or otherwise allow another to take over [her] function as arbiter of [that] dispute"; and "that NYCTA's 'in-house counsel' was in no way involved in the preparation of [her] response" (Crawford Affid., ¶ 8). Inasmuch as AFC has alleged no factual basis for its conclusory assertions that the Chief Engineer herself did not evaluate the merits of AFC's claim and/or draft the Determination, but bases those assertions only upon "information and belief" (*see* Petition, ¶ 43; AFC Mem. of Law, at 5), AFC has not established that the Determination should be vacated on the ground that it was a decision made or drafted by counsel rather than by the Chief Engineer.

AFC has submitted an affirmation which makes a demand for a jury trial "to determine issues of fact about the quantity of contaminated soil excavated by [AFC] pursuant to its contract with [NYCTA]" (Goldstein Affirm., ¶ 2). However, inasmuch as the parties' submissions have raised no issue of fact requiring a trial (*see* CPLR 7804 [h]), but are sufficient to enable a determination that the Chief Engineer's Determination was arbitrary and capricious for the reasons already set forth

⁸In its submissions in this proceeding, NYCTA asserts that "[h]ow a particular waste disposal facility may choose to characterize the excavated material is simply not germane to this dispute. What is relevant is whether the soil was contaminated pursuant to the definition of the term in the Contract" (NYCTA Mem. of Law, at 16; *see also* Answer, at 74).

herein, AFC's request for a jury trial is denied.

CONCLUSION AND JUDGMENT

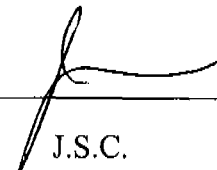
For the foregoing reasons, it is hereby

ADJUDGED that the petition is granted to the extent that the determination of the Chief Engineer of the New York City Transit Authority (NYCTA) dated August 31, 2007, which denied petitioner's application for additional payment under NYCTA's Contract C-34808, is vacated and annulled, and the matter is remanded for reconsideration and determination by NYCTA in a manner consistent herewith.

This constitutes the decision and judgment of this Court.

Dated: July 24, 2009

ENTER:



J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 741B).