

**Matter of Judlau Contr., Inc. v Metropolitan Transp.
Auth.**

2009 NY Slip Op 33205(U)

January 21, 2009

Supreme Court, New York County

Docket Number: 113660/09

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

Index Number : 113660/2009

JUDLAU CONTRACTING, INC

VS.

METROPOLITAN TRANSPORTATION

SEQUENCE NUMBER : 001

ARTICLE 78

PART 15

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-6

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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: 1/21/10.


HON. EILEEN A. RAKOWER

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: PART 5

-----X

In the Matter of the Application of
JUDLAU CONTRACTING, INC.,

Index No.
113660/09

Petitioner,

-against-

DECISION
and ORDER

METROPOLITAN TRANSPORTATION AUTHORITY,
MTA CAPITAL CONSTRUCTION COMPANY, THE
NEW YORK CITY TRANSIT AUTHORITY, and
JOSEPH F. TRAINOR, P.E.,

Mot. Seq.
001

Respondents.

-----X

HON. EILEEN A. RAKOWER:

Petitioner Judlau Contracting, Inc. (“Judlau”) brings this action to annul two decisions dated May 27, 2009, by Respondent Joseph F. Trainor (“Chief Engineer”), Chief Engineer of Metropolitan Transportation Authority Capital Construction (“MTACC”), which denied Judlau compensation for performing work Judlau alleges constituted additional work not part of the contract between the parties. The present dispute arises out of a MTACC construction project known as the South Ferry Terminal Project (“the Project”).

The Project consisted of four separate contracts, entered into by MTACC, acting by the New York City Transit Authority (“NYCTA”). The specific contract underlying the present dispute is Contract A-36006, South Ferry Terminal Finishes and System, 7th Avenue/ Broadway Line “A” Division (IRT) (“the Subject Contract”). The Subject Contract provided for the “installation of certain subway track components in the Bellmouth Area, including areas designated as Tracks V-1, V1A, V-4, and V4A.”

On May 11, 2006, Judlau submitted a low bid of \$122,421,000 on the Subject Contract, and on August 8, 2006, NYCTA issued a Notice of Award to Judlau to perform the work called for under the Subject Contract.

During the course of its performance of the contract, Judlau claims that its subcontractor North Star Contracting Corp. ("North Star") was forced to perform additional work that was supposed to have been performed under Contract A-35976 prior to the commencement of North Star's work, and which was necessary in order for North Star to perform its work under the Subject Contract. At issue in this proceeding are two specific claims submitted by North Star on February 27, 2009.

The first claim is for increased costs in the amount of \$232,386.00 "arising from the unforeseen demolition work required at the existing structural invert, under Track V-1," as well as "other extra work necessary to meet the required track profile and to accommodate third rail timbers." North Star claimed that, while it was required to re-profile existing tracks V-1 and V-4, the Subject Contract did not require it to chop the existing structural invert; in fact, North Star argued, the Subject Contract's answer to Addendum Question #28 provided that the A-35976 contractor would finish the structural invert prior to the placement of new track on the subject location by North Star. In addition, North Star argued that earlier precedent dictated that it was entitled to compensation for this additional work, as North Star claims that it was paid for similar additional work on Track V-4.

North Star's second claim was for \$46,208.70 for the removal of extra ballast at Track V-1 which North Star alleged was beyond the limits indicated in the Subject Contract, and was in fact the responsibility of the A-35976 contractor to complete prior to North Star's performance in the subject location. North Star claimed that Contract A-35976 provided that the contractor therein was required to lower the structural invert and remove existing Type II track from the area between Station 213+43 and Station 210+19. Instead, the A-35976 contractor only removed Type II track from Station 213+06 to Station 210+65, thereby leaving Type II track and surrounding ballast from Station 213+43 to 213+06, and from Station 210+65 to 210+19. North Star relied on Drawing T-2 and the answer to Addendum Question #19 in support of its claims.

In two separate decisions dated May 27, 2009, the Chief Engineer denied both of North Star's claims. With respect to North Star's claim for the alleged unforeseen demolition work, the Chief Engineer noted that (1) Contract Drawing T-4 showed that North Star was required under the Subject Contract to re-profile 321' of Track V-1 from Station 210+19 to Station 213+43; (2) the answer to Addendum Question #390 stated that "[a]t the end of Contract A-35976 track V-1

shall have a +/- 250 ft. segment of Type I (ballasted on structural invert) track"; and (3) drawing S-208A for contract A-35976 showed the extent of the A-35976 contractor's responsibilities for the lowering of invert and had the portion from Station 213+06 to Station 213+42.57 marked for "future lowering". Based upon the foregoing, the Chief Engineer found that North Star was required under the contract to perform the demolition work which North Star claimed to be beyond the scope of its contract. The Chief Engineer also rejected North Star's claim that it was entitled to additional compensation based upon MTACC's prior payment for allegedly similar additional work on Track V-4, referring to Article 3.11 of the Subject Contract, titled "NO ESTOPPEL AND NO WAIVER".

With respect to North Star's claim for the removal of extra ballast, the Chief Engineer noted that "although question #390 did not state the exact stationing limits, the contractor had access to supplementary box contract drawings[] S-208A" and other documents which "clearly indicated the lowering and restoration limit of Track V-1 and provide overwhelming evidence that the condition complained of... was not unanticipated."

The instant Article 78 proceeding ensued. Judlau submits a verified petition and a memorandum of law in support of its petition. Annexed to the petition as exhibits are copies of the Chief Engineer's decisions; correspondence between North Star and MTACC; the Subject Contract; and several contract drawings. Respondents have submitted a verified answer and a memorandum of law. Annexed to the answer as exhibits are relevant contract provisions; contract drawings; and correspondence between the parties. Judlau has submitted a reply affirmation and memorandum of law in reply.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary

and capricious” if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

Here, the court finds that the Chief Engineer’s determinations are supported by a rational basis, and thus are entitled to deference from the court. The evidence in the record relied on by the Chief Engineer in his decisions supports the finding that conditions encountered by North Star were not differing site conditions, as alleged by North Star. This evidence supported the Chief Engineer’s conclusion that the A-35976 contractor was to remove ballast and lower the invert over some, but not all of the 321' of Track V-1 which Judlau/North Star was required to reprofile. Moreover, the documents relied upon by Judlau were superseded by the subsequent drawings and answers, which formed the basis of the Chief Engineer’s determinations.

Wherefore it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied

Dated: January 21, 2009



EILEEN A. RAKOWER, J.S.C.