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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 111723/2009
PILE FOUNDATION CONSTRUCTION
VS.
NYC DEPT OF ENVIRONMENTAL
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

...n this motion to/for _____

PAPERS NUMBERED

...tice 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 petition is decided per attached

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).

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

Dated: 4/27/10

EMILY JANE GOODMAN 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 17

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In the Matter of the Application of PILE FOUNDATION CONSTRUCTION COMPANY, INC.,

Petitioner,

Pursuant to Article 78 of the CPLR,

Index No. 111723/09

-against-

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

Respondents.

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EMILY GOODMAN, J.SC.:

This claim arises out of a dispute over a contract, known as the Paerdegat Basin Water Quality Facility, Contract No. CSO-4B (the Contract), between petitioner Pile Foundation Construction Company, Inc. (Pile) and respondent The New York City Department of Environmental Protection (DEP). This was apparently one of several projects by DEP to abate combined sewer overflows (CSO) to New York State waters. The object of this phase of the project was primarily to build a CSO facility at the head of Paerdegat Basin (a canal which is part of the Jamaica Bay system). Part of the project at issue here involved dredging the canal and removing the dredged material, which would become the property of Pile, by barge.

As of February 24, 2005, Pile wrote a change order (No. CSO-4B-02) (the Change Order) in response to DEP's instruction to reduce the amount of dredging work performed under the Contract and a change in the method of transportation for disposal of dredged material to trucking from barging. Pile's change order indicated that it was due a credit of $518,775 for

compensation for the dredged material that it had anticipated having to use as fill at its other sites. By letter dated November 13, 2006, DEP objected to Pile's recalculation of the amount due under the Contract, claiming that it was in violation of the Contract specifications, the dredging permit issued by the New York State Department of Conservation and the United States Army Corps of Engineers, and the dredging application. After some fruitless negotiation, DEP forced[1] the Change Order on September 9, 2004, and deducted $2,101,561.25 from the Contract price of $119,101,386.00. Pile, in turn, objected to DEP's reduction. Eventually, respondent, The New York City Contract Dispute Resolution Board (CDRB), issued a final determination confirming the Change Order as forced by DEP. Pile now seeks to vacate the decision of CDRB pursuant to Article 78 of the CPLR.

Pile was the low bidder on the Contract ($119,101,386), at some 20% lower than the DEP estimate, and 17% below the second lowest bidder. According to the Petition, at a pre-award meeting of October 17, 2001, Pile cited several factors that contributed to the low bid, including a plan to utilize the dredged material from the canal as fill on Pile's other projects. DEP's written description of the pre-award meeting, that was shared with Pile, indicates that explanation for the low bid was that there would be a savings on soil excavation and disposal, not on dredged material. *See* Answer, Exhibit D, Report of October 22, 2001 on the Pre-Award Meeting.

Pile was awarded the Contract on April 10, 2002. The Contract contemplated the

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[1]DEP states that the term forced change order is used to describe a contract change authorized in writing by the Commissioner pursuant to Article 25 of the Contract when the contractor and the city cannot agree on the cost. Essentially, it is a unilateral change to the Contract, made by the city.

construction of CSO retention tanks, construction of a deep cut-off wall to reduce dewatering requirements, and foundation and substructure work for above-grade structures. The Contract not only required dredging of materials, but their disposal. Under the Contract, all materials resulting from the dredging would become the property of the contractor. *See* General Specification 02325 - Dredging, Part 3.02.

The Contract also included a merger clause that provides that "[t]he Written Contract herein, contains all terms and conditions agreed upon by the parties hereto, and no other agreement, oral or otherwise, regarding the subject matter of the Contract shall be deemed to exist or to bind any of the parties hereto, or to vary any of the terms herein." Contract, Article 73.

By letter of December 11, 2006, Pile submitted a claim for a Commissioner's Determination on DEP's authority to "force" the Change Order, and DEP's rejection of Pile's entitlement to a credit for the value of the dredged material from the canal. The Commissioner's Determination denied the relief sought. Pile then appealed to the Comptroller, who, as of November 7, 2008, also rejected Pile's claim.

Finally, as of December 5, 2008, Pile filed a claim with CDRB, the respondent herein, arguing that the forced Change Order was improper, that Pile had presented conclusive evidence of the value of, and entitlement to, proceeds from the dredged material in its Change Order calculations.

The CDRB, under the Procurement Policy Board Rule 4-09, has the authority to hear claims "about the scope of work delineated by the contract, the interpretation of contract documents, the amount to be paid for extra work or disputed work performed in connection with

the contract, the conformity of the vendor's work to the contract, and the acceptability and quality of the vendor's work ..." 9 RCNY 4-09 (a) (2). The parties agreed to this method of dispute resolution in Article 27 of the Contract.

It is well settled that judicial review of an administrative agency determination is limited to whether the determination was arbitrary and capricious, that is, without a rational basis in the administrative record (*see* CPLR 7803 [3]; *Matter of Arrocha v Board of Education of City of New York*, 93 NY2d 361, 363-364 [1999]; *Matter of Scherbyn v Wayne-Finger Lakes Board of Cooperative Educational Services,* 77 NY2d 753, 757-758 [1991]; *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County,* 34 NY2d 222, 231-232 [1974]; *Matter of Climent v Board of Education of Community School District No. 22*, 288 AD2d 312, 313 [2d Dept 2001]). "'[A] court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion'" *(Matter of Arrocha*, 93 NY2d at 363, quoting *Matter of Pell,* 34 NY2d at 232 (emphasis in original; citation omitted); *Matter of Partnership 92 LP & Building Management Company v State of New York Division of Housing & Community Renewal*, 46 AD3d 425, 429 (1st Dept 2007), *affd* 11 NY3d 859 (2008). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell*, 34 NY2d at 231). "[O]nce it has been determined that an agency's conclusion has a 'sound basis in reason,' the judicial function is at an end" (*Paramount Communications v Gibraltar Casualty Company,* 90 NY2d 507, 514 (1997), quoting *Matter of Pell,* 34 NY2d at 231).

The objections to the decision by the CDRB are that: (i) while the CDRB found that, in light of the Contract provisions that referenced disposal of the materials to approved treatment facilities, Pile was required to dispose of the dredged material and not reuse the material, the CDRB should have found that there is nothing in the Contract that prohibits such re-use and allowed the credit; and (ii) the forced Change Order was improper and without any authority or justification under the Contract.

The CDRB's determination that Pile was required to dispose of the materials and not reuse the materials is supported by a rational basis, is not in error of law and is not arbitrary or capricious. The Contract contains no any indication that a reduction in the dredging entitles Pile to remuneration, and the Contract, which does not reference resale of the materials, references disposal at approved treatment facilities. Nor was it improper for the CDRB to exclude parole evidence as it was barred by the Contract's merger clause. As such, the evidence as to what may, or may not, have been agreed at the pre-award meeting is not dispositive of the requirements of an otherwise complete Contract. *Cohan v Sicular*, 214 AD2d 637, 638 (2nd Dept 1995) ("[w]hile general merger clauses are ineffective to exclude parol evidence of fraud in the inducement ... a specific disclaimer destroys allegations that the agreements were executed in reliance upon contrary oral misrepresentations" [internal quotation marks and citations omitted]).

With regard to whether DEP had the authority to force the Change Order, Article 25 of the Contract provides that "changes may be made to this Contract only as duly authorized in writing by the Commissioner in accordance with the Laws. All such changes, modifications and amendments will become a part of the Contract." As such, the Commissioner not only had the authority to write the Change Order, but he is the *only* person with the authority to actually

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change the Contract without agreement. The CDRB opined that

> changes are normally issued in the form of a written change order. Although the term 'forced change order' is absent from the Contract and PPB Rules, it is still a written change order authorized by the Commissioner and is not inconsistent with Article 25. Practically speaking, there is no difference between a change order and one that is forced. Like a change order, Pile had the option of accepting the forced order or disputing it as provided by the Contract and PPB Rules. Almost every dispute that comes before this Board involves a forced change order in that a contractor objects to a commissioner's unilateral decision about the scope of work. While most disputes involve a commissioner's denial of a contractor's request for additional funds relating to work performed, a change order by a commissioner valuing deleted work is no different because both involve a contract modification which is being imposed upon the contractor. Since the instant 'forced change order' is subject to review under the PPB rules and is consistent with the Contract, we find that Pile's objection is without merit.

The Court concurs with this analysis as that the Change Order in this matter was no different in enforcement than any other change order. Here, Pile had a full opportunity to object to the terms of the Change Order, and did so. There is no evidence presented that the decision by the CDRB as to the efficacy of the Change Order was not rational, or was arbitrary, or was affected by error of law.

Accordingly, it is hereby

ADJUDGED that the Petition is denied and the proceeding is dismissed.

This Constitutes the Decision and Judgment of the Court.

Dated: April 27, 2010

J.S.C.