

**TAP Elec. Contr. Serv., Inc. v New York City Transit
Auth.**

2014 NY Slip Op 30954(U)

April 8, 2014

Sup Ct, New York County

Docket Number: 100297/13

Judge: Paul Wooten

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

TAP ELECTRICAL CONTRACTING SERVICE, INC.,

Petitioner,

INDEX NO. 100297/13

-against-

MOTION SEQ. NO. 001

NEW YORK CITY TRANSIT AUTHORITY,
Respondent,

For a Judgment Pursuant to the Provisions of Article 78 of the New York Civil Practice Law and Rules.

The following papers, numbered 1 to 4 were read on this motion by petitioner for an order and judgment pursuant to Article 78 of the Civil Practice Law and Rules.

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) _____

2, 3, 4

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

In this Article 78 proceeding, TAP Electrical Contracting Service, Inc. (petitioner) seeks a judgment vacating the portion of the determination of the Chief Engineer of the New York City Transit Authority (NYCTA), dated October 8, 2012, which denied petitioner's claim for reimbursement of additional engineering development costs for the Central Management System (CMS) and the Video Management System (VMS) (collectively, equipment), in connection with petitioner's replacement of its supplier for contractually-required equipment. Additionally, petitioner seeks an Order directing NYCTA to pay for all sums reasonably expended by petitioner with regard to the additional CMS and VMS engineering on the project. NYCTA is in opposition and maintains that the Chief Engineer's determination to deny petitioner's request for costs in connection with petitioner's replacement of its supplier for contractually-required equipment must be upheld as it was reasonable, rational and consistent with the relevant laws.

FILED

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BACKGROUND

NYCTA contracted with the petitioner to install certain video systems and related computer controls at NYCTA's facilities in Staten Island, New York (Verified Petition at ¶ 3). The project consisted of the installation of new high-tech video surveillance/security system for 19 stations of the Staten Island Railway (*id.* at ¶ 19). Petitioner maintains that "[a]s part of its bid package and Contract, NYCTA required [petitioner] to install a particular video control package made by SteelBox which was essentially the 'brains' of the project" (*id.* at ¶ 4). Petitioner further alleges that the contract lists SteelBox as the sole source equipment supplier and there was no option for petitioner to use an "or equal" or "other substitute" in place of SteelBox (*id.*). Petitioner avers that in placing its bid to NYCTA, it used the pricing it received from SteelBox and relied on SteelBox for the CMS and VMS design as well as its past experience working with the company. However, after petitioner was awarded the bid for the NYCTA project, SteelBox became insolvent and was unable to deliver the required product (*id.* at ¶ 8).

According to petitioner, NYCTA commenced searching for a new vendor for video control services, as well as instructed petitioner to do so, as NYCTA wanted to use this kind of system consistently throughout the entire New York Subway System (*id.* at ¶ 23, 24). Petitioner proffers that as no immediately acceptable alternate supplier existed at the time of SteelBox's insolvency, petitioner's engineers worked with various companies to develop a product that could meet NYCTA's standard, and per NYCTA's suggestion petitioner sought to develop a new system with Teleste Corporation (Teleste) (*id.* at ¶ 25, 28). Teleste later withdrew from the project and petitioner proffers that on NYCTA's instruction it began to work with NICE Orsis (NICE) so that the NICE system would work as the "brains" of the system (*id.* at ¶ 31). However, petitioner maintains that NYCTA then changed the scope of this project from "simply providing a service to the 19 stations of the Staten Island railroad to a demonstration project for the entire New York City Subway System" (*id.* at ¶ 32). This change in scope for the NICE

system petitioner proffers was far beyond what was originally specified in the contract which specified the SteelBox product (*id.*). Petitioner asserts that with the approval of NYCTA, it purchased the equipment from NICE for a price that NYCTA negotiated with NICE (*id.* at ¶ 33). Thereafter, petitioner sought payment from NYCTA for (1) the additional cost of the NICE equipment which was more costly than the original SteelBox equipment, and (2) the direct cost of finding a replacement for SteelBox and re-engineering the project to work with the replacement vendor NICE (*id.* at ¶ 34).

Soon thereafter, petitioner maintains that the parties became involved in a disagreement over who was responsible for the additional costs related to finding a replacement vendor for SteelBox (*id.* at ¶ 9). Pursuant to section 8.03 of the contract, NYCTA and petitioner submitted the above two issues to the NYCTA Chief Engineer for a determination (*id.* at ¶ 10; Verified Petition at exhibit B). The Chief Engineer accepted submissions from the parties and heard oral argument on September 11, 2012 and he rendered a determination on October 8, 2012 (Verified Petition, exhibit C). In his determination, the Chief Engineer found petitioner was entitled to the material cost differential for finding a replacement for the SteelBox, however he found petitioner was not entitled to engineering, integration and testing costs. Petitioner avers that the Chief Engineer's determination is arbitrary and lacks a rational basis, as the additional cost of the NICE equipment and petitioner's additional engineering cost to develop the NICE equipment are components of the same issue. Specifically, this issue is the failure of SteelBox and the development and supply of a replacement. The NICE equipment would never have worked, petitioner argues, had petitioner not re-engineered the system. Petitioner also maintains that the Chief Engineer's determination violates the contract between the parties as there is no requirement in the contract that petitioner find a replacement for SteelBox, but the determination imposes this duty on petitioner. Furthermore, according to petitioner, the Chief Engineer provided no rationale for denying compensation for the engineering costs for the NICE equipment and only specifically addressed the portion of the engineering costs as it

related to the Teleste equipment. Petitioner also proffers that the determination of the Chief Engineer was not supported by substantial evidence.

In opposition, NYCTA proffers, *inter alia*, that petitioner groups together all three categories of costs that it demanded in connection with the supplier's replacement and presumes that since the Chief Engineer found merit to one of those categories, namely the equipment cost differential, he necessarily should have found merit to the other two categories. Not only does NYCTA proffer that this presumption is incorrect, the Chief Engineer evaluated each of petitioner's cost claims individually and found independent and proper grounds for denying the two claims that are at issue here. Those reasons, which NYCTA proffers are amply supported by the record and the contract are: "(1) [petitioner] is responsible for performing the engineering tasks necessary to integrate and ensure the functionality of the equipment under the Contract; and (2) even if [NYCTA] was responsible for [petitioner]'s alleged additional engineering efforts, [petitioner] failed to provide the contractually-required notice and documentation of its claim for this alleged extra work" (NYCTA Memorandum [Memo.] of Law in Opposition at p. 3). Petitioner's efforts on obtaining the specified equipment to meet the contract's functionality requirements were part of its contractual obligations as a general contractor and systems integrator, and this is why the Chief Engineer found this claim meritless. This obligation was well within the scope of the contract, avers NYCTA, and the Chief Engineer's interpretation of the contract's scope must be given wide deference as a matter of law in this proceeding.

Further, NYCTA avers that the scope of review for this Article 78 proceeding is more restricted than the relief petitioner is seeking to the extent that the Court cannot vacate the determination of the Chief Engineer on the basis of substantial evidence. Specifically, the parties expressly agreed in Article 8.05(a) of the contract that the judicial review would be limited to whether a determination of the Chief Engineer is "arbitrary, capricious or lacks a rational basis" (NYCTA Memo. of Law in Opposition at p. 11; Verified Petition, exhibit A at

Article 8.05[a]). Additionally, the contract does not contain an "error of law" or lack of "substantial evidence" standard against which the determination of the Chief Engineer may be reviewed (NYCTA Memo. of Law in Opposition at p. 11). NYCTA proffers it merely informed petitioner that NICE would be an acceptable replacement for SteelBox, and petitioner was under no obligation or direction to go with NICE. Furthermore, Article 8.04 of the contract contains strict documentation and notice requirements for claims for any monetary damages sustained as a result of NYCTA's actions, as well as claims for extra work, within seven days of the incurrence of such loss or damage which petitioner did not follow (see NYCTA Memo. of Law in Opposition at p. 18; Verified Petition, exhibit A at Article 8.04[a]).

DISCUSSION

The standard of review in this Article 78 proceeding is whether the Chief Engineer's determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; see also *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Furthermore, the Court of Appeals has held "that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; see also *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of West Vil. Assoc. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000] [a rational and reasonable determination of the DHCR within its area of expertise is entitled to deference by the courts]). As such, a court "may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 278 [1972]; see also *Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]).

The Court is bound by the scope of review that is contained within Article 8.05(a) of the contract (see *NAB Constr. Corp. v Metropolitan Transp. Auth.*, 180 AD2d 436 [1st Dept 1992]). As such, the question before the Court is whether the Chief Engineer's determination is arbitrary and capricious or lacks a rational basis. The Court holds that the record supports that the Chief Engineer's determination to deny petitioner's claim for reimbursement of additional engineering development costs for the equipment in connection with petitioner's replacement of its supplier for contractually-required equipment was not arbitrary and capricious. Specifically, in rendering the determination, the Chief Engineer considered the parties' positions, conducted a detailed analysis of the facts in the record, and considered the relevant contract provisions. As there was a rational and reasonable basis for the determination, it is entitled to deference by this Court and will not be overturned. Accordingly, petitioner's application must be denied.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

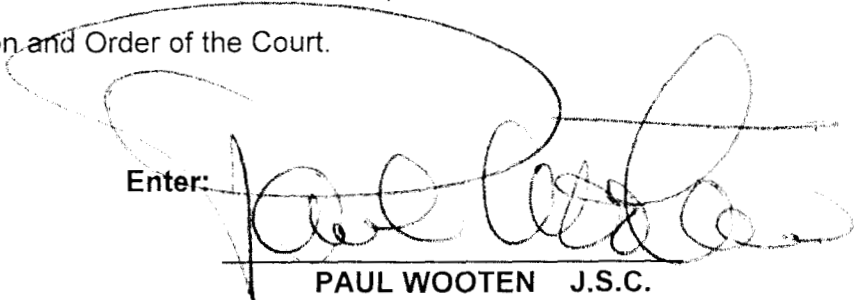
ORDERED that petitioner TAP Electrical Contracting Service, Inc.'s Article 78 petition is denied and the proceeding is dismissed, without costs or disbursements to respondent; and it is further,

ORDERED that the respondent NYCTA shall serve a copy of this Order, with Notice of Entry, upon the petitioner.

This constitutes the Decision and Order of the Court.

Dated: 4-8-14

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PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: : DO NOT POST REFERENCE

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