

**Perfetto Contr. Co. Inc. v New York City Dept. of
Parks & Recreation**

2014 NY Slip Op 32837(U)

October 30, 2014

Supreme Court, New York County

Docket Number: 450145/2014

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 3

-----X
PERFETTO CONTRACTING CO. INC.,

Plaintiff,

-against-

Index No. 450145/2014
Motion Seq. No. 001
Motion Date: 6/24/2014

NEW YORK CITY DEPARTMENT OF PARKS
AND RECREATION,

Defendant.

-----X
Bransten, J.

In this action for breach of a construction contract, plaintiff Perfetto Contracting Co. Inc. ("PCC") seeks summary judgment in its favor in the amount of \$1,469,142.00, together with interest, costs, and disbursements. In addition, PCC moves to strike defendant's affirmative defenses. Defendant The City of New York s/h/a New York City Department of Parks and Recreation ("DPR") cross-moves for an order granting summary judgment in its favor and dismissing the complaint in its entirety.

I. Background

On January 13, 2010, defendant DPR awarded plaintiff PCC a competitive contract to construct a district headquarters with comfort station in Bushwick Inlet Park in Brooklyn. The contract is a unit-price contract, providing that the sum to be paid by DPR to PCC be determined by multiplying unit prices, established in the first instance by the contract, by the actual quantities of the various items of work performed by PCC. *See*

Affidavit of Lo Chan ("Chan Aff.") ¶ 9 & Ex. B § 34. In addition, the contract states that the quantities specified in the contract are estimates that may change. *Id.* Ex. B § 34.

In relevant part, the contract provides that the unit price of an item must be renegotiated by the parties where the amount required is 125% or more of the original estimate (an "overrun"). The contract further provides that if the parties "cannot agree on a new unit price, then [DPR] shall order [PCC] and [PCC] agrees to provide additional quantities of the item on a time and material basis for the actual and reasonable cost as determined" by adding the costs of the necessary materials, necessary direct labor, and all relevant payroll, sales, and property taxes. *See id.* Ex. D §§ 26.1.2, 26.2.

The underlying dispute involves the unit price per square foot to be paid by DPR for PCC's installation of certain overrun quantities of temporary sheeting at the project. The original bid estimate quantity for temporary wood sheeting was 200 square feet. PCC bid \$70 per square foot to install the temporary sheeting. *Id.* Ex. C.

During construction, the parties determined that it was necessary to excavate more extensively and more deeply than originally anticipated. This increased excavation work required the installation of additional quantities of temporary sheeting – more than 125% of the original quantity estimate. By letter dated November 18, 2010, DPR advised PCC that the projected quantity for temporary sheeting had been increased from 200 square feet to 5,000 square feet and that it estimated the unit price at \$34 per square foot. *Id.* Ex.

G. In that letter, DPR also requested that PCC provide three bids and a comprehensive breakdown of costs for the overrun quantity.

PCC disputed the \$34 per square foot temporary sheeting unit price by formally notifying DPR of a condition causing extra work and requesting that DPR issue a change order increasing the scope of work to include temporary sheeting. *See* Affidavit of Cesare Perfetto ("Perfetto Aff.") Ex. H.

On February 14, 2011, PCC submitted a notice of dispute with the DPR Commissioner ("Commissioner"). *See* Perfetto Aff. Ex. I. In the notice, PCC requested that DPR issue a change order covering a number of changes to the scope of PCC's work, including the increased depth of the foundation excavation and the installation of additional temporary sheeting.

DPR then advised PCC that no change order was required because no change to the design had occurred, and that, instead, DPR had merely clarified the project drawing regarding the depth of the foundation excavation. In that letter, DPR further advised that Article 27 of the contract sets forth mechanisms for paying for the increased work and material without issuance of a change order. *See* Chan Aff. Ex. H.

On April 22, 2011, Lo Chan, the Commissioner's senior counsel for capital projects, issued a determination on behalf of the Commissioner, in which he noted that the majority of PCC's concerns had been resolved, or would be resolved in subsequent

determinations. *See Perfetto Aff. Ex. J.* In that determination, he found that "the fair and reasonable price for the overrun price of the temporary sheeting is \$47 per sq ft." *Id.* Accordingly, the overrun price for temporary sheeting for quantities greater than 125% of the engineer's estimate is \$47 per square foot." *Id.* DPR explained that "[t]he price is calculated by averaging the temporary sheeting prices submitted by all the bidders on the project." *Id.* In the letter, Chan did not set a maximum quantity of temporary sheeting for which PCC could seek reimbursement.

PCC chose not to appeal the Commissioner's determination, and did not submit a notice of claim to the Comptroller's Office of the City of New York (Comptroller), although permitted to do so by the dispute resolution provisions found in Article 27 of the contract..

By unit item overruns letter dated April 29, 2011, DPR authorized PCC to "overrun" temporary sheeting at \$47 per square foot for a projected quantity of 5,000 square feet. *See Perfetto Aff. Ex. K.* On September 7, 2011, DPR issued a unit item overruns letter, revising the projected quantity and authorizing PCC to overrun temporary sheeting at \$47 per square foot for a projected quantity of 12,000 square feet.

Subsequently, PCC submitted to DPR a requisition for payment for work performed from July 16, 2011 to September 15, 2011, including the installation of 25,374.55 square feet of temporary sheeting at \$47 per square foot. *See Perfetto Aff. ¶*

24; Chan Aff. ¶ 28. On October 11, 2011, DPR approved payment for 12,000 square feet of temporary sheeting at \$47 per square foot but refused to pay PCC for installed temporary sheeting in excess of 12,000 square feet. *See Perfetto Aff. ¶ 24.*

On October 19, 2011, PCC filed a new notice of dispute with the Commissioner, regarding DPR's refusal to pay for temporary sheeting quantities in excess of 12,000 square feet. *See Perfetto Aff. Ex. L.* On January 4, 2012, PCC filed a notice of claim with the Comptroller regarding the same issue. *See id. Ex. M.*

By letter dated November 16, 2012, DPR, on behalf of the Commissioner, acknowledged existence of the \$47 per square foot unit item price fixed by the April 22, 2011 determination, and then rescinded it, on the grounds that the price was merely an offer based on a projected quantity of sheeting lower than that installed, and "was issued with the understanding that the parties would continue to resolve all other outstanding issues" with prices favorable to DPR. *See Chan Aff. Ex. L.* Having failed to complete such negotiations in good faith, DPR's letter stated that PCC should not benefit from a unit price unfavorable to DPR. DPR's letter concluded by noting that PCC's "appeal is currently before the Comptroller's Office and will be decided accordingly." *Id.*

Subsequently, PCC and the Comptroller settled the temporary sheeting dispute by increasing the final quantity temporary sheeting to 31,386 square feet. *See Perfetto Aff. Ex. N* (Comptroller Apr. 23, 2013 settlement letter agreement); *Ex. O* (Comptroller May

28, 2013 dispute settlement agreement). The settlement, however, did not address the overrun unit price for the temporary sheeting.

On June 4, 2013, PCC submitted to DPR a requisition for payment based on \$47 per square foot for 31,386 square feet of temporary sheeting, which DPR rejected. *Id.* Ex. P. In its rejection letter, DPR reminded PCC that it had previously rescinded its offer of \$47 per square foot for quantities of temporary sheeting in excess of 125% of the original estimate. *See Perfetto Aff. Ex. Q.* DPR also agreed to pay the previously approved payment of \$47 per square foot for 12,000 square feet and advised that payment for sheeting in quantities above 12,000 square feet must be renegotiated. *Id.* Last, in that letter, DPR warned PCC that it reserved its right to withhold future payments for quantities of temporary sheeting in excess of 125% of the original estimate. *Id.*

On June 10, 2013, PCC filed a new notice of claim with the Comptroller in which it disputed DPR's rejection of PCC's invoices and rescission of its previous determinations and the settlement agreement. *See Perfetto Aff. Ex. E.*

A few weeks later, PCC commenced an action against DPR before Kings County Supreme Court for breach of contract and to enforce both the April 22, 2011 Commissioner's determination setting the overruns temporary sheeting unit price at \$47 per square foot, and the April 23, 2013 settlement between the Comptroller and PCC

setting the total quantity at 31,138 square feet. In September 2013, the parties stipulated to change the venue of this action to New York County.

II. Discussion

Each side now moves for summary judgment in its respective favor, contending that no triable issues of fact exist. PCC contends that the Commissioner's determination as to item unit price is final and binding on both parties, and that DPR cannot rescind either that determination or the Comptroller's settlement as to final quantity. Therefore, according to PCC, DPR must pay it \$47 per square foot for 31,386 square feet of temporary sheeting.

DPR contends that the Commissioner's determination requires it to pay \$47 per square foot for sheeting up to 12,000 square feet, not 31,386 square feet. DPR further contends that it never authorized payment of any sum for quantities of temporary sheeting above 12,000 square feet and that PCC must renegotiate the price for those overruns or accept payment on a time-and-material basis, in accordance with Article 26 of the contract.

A. *Exhaustion of Remedies*

As a threshold matter, the parties dispute whether PCC has fully exhausted its administrative remedies before commencing this action, and whether PCC should have commenced this action as a CPLR Article 78 special proceeding.

This action is properly commenced in accordance with the contract dispute resolution terms. The well-established law of contract interpretation provides that:

[i]n interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement.

Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied.

Am. Exp. Bank v. Uniroyal, Inc., 164 A.D.2d 275, 277 (1st Dep't 1990) (internal citations omitted). Further, "[w]hether or not a writing is ambiguous is a question of law to be resolved by the courts." *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). "Absent proof of fraudulent misrepresentation or qualitative alteration of work, express terms of unit price government contract govern parties' rights and obligations." *D.A. Elia Constr. Corp. v. N.Y. State Thruway Auth.*, 289 A.D.2d 665, 666 (3d Dep't 2001).

The contract provides, in relevant part, that all disputes regarding "the scope of work delineated by the Contract, the interpretation of Contract documents, the amount to be paid for Extra Work or disputed work" "shall be finally resolved in accordance with the provisions of this article and the PPB [Procurement Policy Board] Rules." *See Perfetto Aff. Ex. F §§ 27.1.1, 27.1.2.* The contract and the PPB Rules provide, in relevant part, that, where such a dispute arises, PCC must submit a written notice of dispute to the Commissioner within 30 days after receipt of a written determination by DPR. *See id. § 27.4; id. Ex. G (PPB Rule 4-09(d)).* They further provide that the Commissioner's decision is final and binding on all parties, but may be appealed by PCC to the Comptroller within 30 days after receipt. *See Perfetto Aff. Ex. F § 27.4.3 ("Finality of Commissioner's Decision. The Commissioner's decision shall be final and binding on all parties, unless presented to the Contract Dispute Resolution Review Board (CDRB) pursuant to this article. The City may not take a petition to the (CDRB)."); id. Ex. G (PPB Rule 4-09(e)).* They provide that, in the event that the claim has not been timely settled or adjusted by the Comptroller, PCC may petition the CDRB to review the Commissioner's determination. *See Perfetto Aff. Ex. F § 27.7; id. Ex. G (PPB Rule 4-09(g)).* Last, they provide that a CDRB determination may be appealed by any party by means of an Article 78 special proceeding before the courts. *See Perfetto Aff. Ex. F §*

27.7.4; *id.* Ex. G (PPB Rule 4-09(g)(6)). Neither the contract terms nor the PPB Rules permit DPR to appeal a determination issued by the Commissioner or by the Comptroller.

Here, there is no dispute that PCC: (1) did not appeal the Commissioner's April 22, 2011 determination setting the overruns unit price for temporary sheeting at \$47 per square foot, and (2) has agreed to accept \$47 per square foot for the sheeting. In addition, the undisputed documentary record demonstrates that PCC and the Comptroller agreed to a settlement fixing the total quantity of temporary sheeting at 31,386 square feet. The record does not contain any documentary evidence demonstrating that the Commissioner or the Comptroller issued a determination fixing that quantity.

Nothing in either the contract or the PPB Rules may be construed as prohibiting PCC from commencing a plenary action arising out of allegations that DPR, after expiration of the 30-day limitations period for appeals at each level, failed to comply with the Commissioner's determination or the settlement agreement with the Comptroller.

Contrary to DPR's contention, PCC was not required to appeal the DPR's November 16, 2012 decision rescinding the Commissioner's determination because the issues raised in that decision had previously been determined by the Commissioner. To permit DPR to rescind a decision issued by its own appeals level, and require PCC to appeal such rescission would be to impermissibly rewrite the contract dispute resolution terms and eviscerate the appeals procedures required by DPR. In commercial contracts

negotiated at arms' length by sophisticated, counseled businesspeople, "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" by, for example, adding or excising terms. *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004) (internal quotation marks and citation omitted). Pursuant to the express terms of the contract and PPB Rules, DPR is bound by the Commissioner's decision, and does not have a right of appeal.

Contrary to DPR's contention, the "no-estoppel" provision of the contract does not permit DPR to withdraw, amend, or limit application of the Commissioner's unit price determination. "If an agreement is clear, complete and unambiguous, the contract should be enforced according to its terms, reading the document as a whole to put the words and phrases in proper focus." *Harrison & Burrows Bridge Constructors, Inc. v. State of N.Y.*, 42 A.D.3d 779, 780 (3d Dep't 2007). "In general, 'the express terms of a unit price contract govern the parties' rights and obligations.'" *Id.* (quoting *D.A. Elia Constr. Corp.*, 289 A.D.2d at 666).

The no-estoppel provision provides, in relevant part:

34.1 Neither the City nor any Agency, officer, agent or employee thereof, shall be bound, precluded or estopped by any determination, decision, approval, order, letter, payment or certificate, made or given under or in connection with this Contract by the City, the commissioner, the Resident Engineer, or any other officer, agent or employee of the City,

either before or after the final completion and acceptance of the Work and payment therefor:

34.1.1 From showing the true and correct classification, amount, quality or character of the Work actually done; or that any such determination, decision, or order, letter, payment or certificate was untrue, incorrect or improperly made in any particular, or that the Work, or any part thereof, does not in fact conform to the requirements of the Contract; and

34.1.2 From demanding and recovering from the Contractor any overpayment made to it, or such damages as the City may sustain by reason of the Contractor's failure to perform each and every part of its Contract.

See Perfetto Aff. Ex. S § 34.1.

By its clear and unambiguous terms, the no-estoppel provision permits DPR to rescind a Commissioner's determination in certain circumstances delineated in subsections (1) and (2).

None of these circumstances is present here. DPR does not contend that the Commissioner misstated any classification, amount, quality, or character of PCC's work, nor does it claim that the Commissioner's determination is untrue, incorrect or improperly made. DPR does not argue that PCC's work failed to conform to the contract requirements and does not seek to recover an overpayment to PCC. Last, DPR does not claim to have sustained damages arising out of a PCC's alleged nonperformance. Thus, the no-estoppel provision is not implicated here because DPR has failed to identify any of

the specified grounds for such rescission. For these reasons, PCC is not barred from litigating this action.

B. *Enforcement of the Commissioner's Determination & the Settlement Agreement*

Next, PCC contends that it is entitled to receive \$47 per square foot of temporary sheeting up to 31,386 square feet, the maximum quantity fixed by the settlement agreement between it and the Comptroller. PCC further admits that it is not entitled to payment for sheeting actually installed in excess of that quantity.

Although DPR initially argued that the \$47 per square foot unit price did not apply to quantities of sheeting in excess of 250 square feet, it now concedes that it is bound to pay that unit price for quantities up to 12,000 square feet. *See* Affirmation of Christopher M. Bletsch ¶¶ 20, 25 ("DPR will live up to its end of the bargain."). DPR contends, however, that PCC is not entitled to receive \$47 per square foot for quantities of temporary sheeting between 12,000 sf and 31,386 square feet, and that PCC is contractually limited to either renegotiate the unit price for that quantity, or to receive compensation equal to the actual and reasonable value of such work.

The documentary evidence conclusively demonstrates that DPR must pay, and PCC must accept, \$47 per square foot for temporary sheeting up to a maximum of 31,386 square feet. In the April 22, 2011 Commissioner's determination, DPR, on behalf of the

Commissioner, determined that "the fair and reasonable price for the overrun price of the temporary sheeting is \$47 per sf. . . . Accordingly, the overrun price for temporary sheeting for quantities greater than 125% of the engineer's estimate is \$47 per square foot." Thus, DPR set a minimum quantity, but did not set a maximum quantity of temporary sheeting for which PCC could seek reimbursement. PCC did not appeal that determination.

Subsequently, PCC properly appealed DPR's refusal to pay PCC's requisition for payment of \$47 per square foot for 25,374 square feet of temporary sheeting to the Commissioner. PCC then properly appealed DPR's refusal to pay PCC for quantities of temporary sheeting in excess of 12,000 to the Commissioner and then to the Comptroller. PCC and the Comptroller settled the temporary sheeting dispute by increasing the final quantity of temporary sheeting to 31,386 square feet. *See Perfetto Aff. Ex. N* (Comptroller Apr. 23, 2013 settlement letter agreement); *Ex. O* (Comptroller May 28, 2013 dispute settlement agreement).

The settlement did not address the unit price for the temporary sheeting, nor was there any reason to address that price. The unit price had previously been fixed by the Commissioner at \$47 per square foot for sheeting quantities above 250 square feet.

DPR's contention that the Commissioner fixed the temporary sheeting unit price at \$47 per square foot upon PCC's alleged promises of certain future conduct is without

merit and fails to raise any triable issues of fact. Specifically, DPR contends that the unit price was set at a rate "favorable" to PCC because DPR had revised the projected quantity from 200 square foot to a maximum of 5,000 square feet, DPR wished to expedite the progress of the work, and PCC agreed to continue to negotiate other disputed unit prices at rates more favorable to DPR. *See* Chan Aff. ¶¶ 24, 32; *id.* Ex. L. DPR further contends that PCC did not adhere to their bargain, and, therefore, is no longer entitled to the \$47 per square foot unit price for the temporary sheeting. *See* Chan Aff. ¶¶ 24, 32.

As explained by Chan in DPR's November 16, 2012 letter to PCC:

[T]he [DPR] is rescinding the commissioner's determination dated April 22, 2011 for the temporary sheeting on the following grounds: (a) the offer was issued to address the quantities at the time of the negotiations and (b) the offer was issued with the understanding that the parties would continue to resolve all the other outstanding issues necessary to expedite the completion of the project. Since, [PCC] did not allow [DPR] to complete its negotiations on the remaining items and quantities; it cannot seek to benefit from a portion of the negotiations that is favorable to it without having resolved the quantities at issue and all other outstanding issues remain unresolved between the parties.

See Chan Aff. Ex. L.

However, nothing in the April 22, 2011 Commissioner's determination may be interpreted as making the \$47 per square foot rate contingent upon any future conduct by PCC.

Further, the existence of such condition precedent to the applicability of the rate is directly contradicted by the determination itself. In it, Chan explicitly stated that:

I have reviewed the bids for the temporary sheeting item for this contract and have found that the fair and reasonable price for the overrun price of the temporary sheeting is \$47 per [sf]. The price is calculated by averaging the temporary sheeting prices submitted by all the bidders on the project. Accordingly, the overrun price for temporary sheeting for quantities greater than 125% of the engineer's estimate is \$47 per sf.

(DPR Apr. 22, 2011 Commissioner's determination letter at 2).

The Commissioner, in conformity with the contract, issued a final and binding determination that the unit price for overrun quantities of temporary sheeting is \$47 per sf. Even assuming that the Commissioner indeed issued that determination in the belief that the quantity would not exceed a particular square footage, or would be significantly less than the 31,386 sf to which the parties later stipulated, or that PCC would agree to a particular rate for other disputed unit prices, such expectations are not material to this discussion because the Commissioner did not expressly discuss such expectations, or expressly base the determination on such expectations.

Contrary to DPR's contention, the contract provisions governing methods of payment for overruns and extra work have been satisfied, and, therefore, there is no need to refer to the January 11, 2013 report prepared by URS Corporation, DPR's resident engineer on the project, regarding the temporary sheeting unit price. In relevant part, the

contract provides that DPR reserves the right to renegotiate the unit price of items requiring a quantity in excess of 125% more than the original quantity estimate (overruns). *See* Chan Aff. Ex. D § 26.1.2. The contract further provides that, if DPR and PCC "cannot agree on a new unit price, then [DPR] shall order [PCC] and [PCC] agrees to provide additional quantities of the item on a time and material basis for the actual and reasonable cost as determined" by adding the costs of the necessary materials, necessary direct labor, and all relevant payroll, sales, and property taxes. *See id.* §§ 26.1.2, 26.2.

In the April 22, 2011 determination, the Commissioner quoted the contract provisions governing methods of payment for overruns and extra work, and then determined that the "fair and reasonable price for the overrun price of the temporary sheeting is \$47 per [sf] . . . for quantities greater than 125% of the engineer's estimate." *See* Perfetto Aff. Ex. J at 2. Therefore, DPR has already fixed the overrun unit price in accordance with the contract terms.

The court has considered DPR's other contentions, and finds them to be without merit.

III. Conclusion

For the foregoing reasons, the Court dismisses defendant DPR's affirmative defenses and grants plaintiff Perfetto Contracting Co.'s motion for summary judgment in

the amount of \$911,142 – equal to the difference between 31,386 square feet and 12,000 square feet multiplied by \$47.

Accordingly, it is

ORDERED that plaintiff Perfetto Contracting Co.'s motion to strike defendant's affirmative defenses is granted; and it is further

ORDERED that plaintiff Perfetto Contracting Co.'s motion for summary judgment on the complaint is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff Perfetto Contracting Co. Inc. and against defendant New York City Department of Parks and Recreation in the amount of \$911,142, together with interest at the statutory rate from June 4, 2013, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross-motion is denied in all respects.

Dated: New York, New York
October 30, 2014

ENTER:



Hon. Eileen Bransten, J.S.C.