

**Matter of Mugrose Constr. Corp. v City of New York
Dept. of Transp.**

2018 NY Slip Op 32765(U)

October 24, 2018

Supreme Court, New York County

Docket Number: 153456/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Part 57**

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**In the Matter of the Application of
MUGROSE CONSTRUCTION CORPORATION,**

Index No. 153456/2018

Petitioner(s)

DECISION/ORDER

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

Motion Seq. No. 1

--against--

**THE CITY OF NEW YORK DEPARTMENT OF
TRANSPORTATION, POLLY TROTTEBERG, as
As Commissioner of NEW YORK CITY DEPARTMENT
OF TRANSPORTATION and THE CITY OF NEW YORK,**

Respondent(s)

-----X
**Recitation, as required by CPLR §2219(a), of the papers considered on the
review of this Petition brought pursuant to CPLR §§ 7801 and 7803(3).**

PAPERS	NUMBERED
Notice of Petition and Petition and Affidavits and Exhibits Annexed	1
Answer in Special Proceeding and Exhibits Annexed	2
Petitioner's Verified Reply and Exhibits Annexed	3
Memorandum of Law	4, 5 & 6

**Upon the foregoing cited papers, it is adjudged that the Petition is
dismissed for the reasons set forth below.**

Reference is made to (i) a certain Contract No. HBQ1112 Emergency Deck Replacement at Metropolitan Avenue and Fresh Pond Road Bridge over the LIRR (the **Contract**), between Mugrose Construction Corporation (**Mugrose**) and the New York City Department of Transportation (the **DOT**) and (ii) the City of New York's Procurement Policy and Board Rules (**PPB Rules**). Terms used but not otherwise defined shall have the meaning set forth in the Contract.

Mugrose brought this proceeding under CPLR §§ 7801 and 7803(3) challenging DOT's determination to terminate the Contract based on Mugrose's default in failing to comply with certain terms of the Contract and the PPB rules.

By letter, dated September 8, 2017 (the **September Show Cause Letter**) from the DOT to Jeffrey Mazur, P.E., President of Mugrose, Mugrose was directed to appear at a meeting on September 14, 2017 to show cause as to why the DOT should not declare Mugrose in default of Section 48.1.14 of the Contract and Sections 4-10(b)(1)(iv)(A) and (B) of the PPB Rules and to provide a provide a schedule showing time of recovery and increased work force.

Section 48.14 of the Contract provides:

The Contractor or any of its officers, directors, partners, five (5%) percent shareholders, principals, or other persons substantially involved in its activities, commits any of the acts of omissions specified as grounds for debarment in the PPB rules.

Section 4-10(b)(1)(iv)(A) and (B) of the PPB Rules provides:

(1) Grounds for debarment include the following acts of omissions on the part of the vendor, or any of its officers, directors, partners, five percent shareholders, or other persons substantially involved in its activities:

(iv) violation of contract provisions, as set forth below:

(A) failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract, or

(B) unsatisfactory performance in connection with the terms of one or more contracts;

The September Show Cause Letter outlines the basis upon which the DOT required Mugrose to show cause as to how they were not in default of the Contract and why the DOT should not terminate the Contract. Among other grounds set forth in the September Show Cause Letter, the DOT indicated that Mugrose failed to abide by the approved critical path method (CPM) baseline schedule concerning installation of Stage-1 demolition shielding, which demolition shielding was to be completed by August 18, 2016 and which (as of the date of the letter, over approximately 365 days past its scheduled completion date) was only 64% complete.¹ In addition, the DOT indicated that the Stage-1 demolition and deck installation which was to be completed by September 23, 2016 and January 16, 2017, respectively, had also not been completed. The September Show Cause Letter further described Mugrose's failure to timely submit critical project submittals and/or shop drawings for review and approval or respond to comments. The September Show Cause Letter also indicated that while 69% of the Contract term had elapsed, less than 6% of the work had actually been completed.

In response to the September Show Cause Letter and the ensuing meeting, on September 26, 2017, Mugrose submitted an updated schedule and alleged that a temporary signal system, contaminated fill material and temporary roadway and summer moratorium all of which Mugrose claims was outside of its control delayed Mugrose and inhibited its ability to perform under the Contract. In the September 26, 2017 letter, Mugrose indicated that it was scheduled to meet with the Comptroller's Office on November 9, 2018 to resolve the issue of the temporary signal system. Once that issue was resolved, Mugrose wrote that Mugrose intended to request a formal Extension of Time.

By letter, dated October 5, 2017, Mugrose submitted a recovery schedule (the **Recovery Schedule**). The Recovery Schedule included among other things a commitment to complete the Stage 1 Bridge Deck Installation work by December 13, 2017 and otherwise provided that the Recovery Schedule was based on working two shifts, five days per week during Stages 2A, 2B & 3 to mitigate the delays incurred and that an additional 222 calendar days toward completion on August 21, 2018 was required.

By letter, dated October 23, 2017, the DOT indicated that the DOT did not accept the Recovery Plan because it did not present a viable recovery schedule in that even accepting the Recovery Plan submitted, only 144 days would be recovered

¹ According to the September Show Cause Letter, Mugrose was than 377 CCDs behind schedule.

and Mugrose still would fail to be back on schedule. With respect to the alleged delays and their impact, significantly, the DOT wrote:

The Time Impact Analysis you provided conclude that none of the three issues identified affected the completion of the project.

The DOT did however nonetheless permit the work to continue.

Ultimately, by letter, dated December 15, 2017 (the **December 15 Default Letter**) from the DOT to Mr. Mazur, DOT declared Mugrose in default of Section 48.1.14 of the Contract and Sections 4-10(b)(1)(iv)(A) and (B) of the PPB Rules – i.e., the very same provisions set forth in the September Show Cause Letter. The December 15 Default Letter also indicated that Mugrose was in default of Sections 48.1.3, 48.1.5, 48.1.11 and 48.1.14 of the Contract. The DOT noted in the December 15 Default Letter that Mugrose had not even complied with the schedule set forth in its own Recovery Plan (which the DOT had not accepted as described above) by failing to complete the Stage 1 Bridge Deck Installation Work as of December 13, 2017 and which work remained uncompleted at the time of the letter.

In its Petition, Mugrose argues that the Court should annul the declaration of default set forth in the December 15 Default Letter claiming (i) Mugrose was denied the opportunity to be heard because the December 15 Default Letter specified grounds for termination not set forth in the September Show Cause Letter and (ii) the DOT's default determination and termination was arbitrary and capricious because the DOT failed to properly account for the delays outlined by Mugrose outside of its control. These arguments are however unavailing.

Simply put, it is of no moment that the December 15 Default Letter contained additional grounds (i.e., extra grounds) for termination that were not specified in the September Show Cause Letter. The DOT had the right to terminate the Contract based solely on the grounds set forth in the September Show Cause Letter provided that the decision to do so was not arbitrary and capricious and otherwise was lawful. Put another way, the September Show Cause Letter outlined the basis upon which the DOT was considering holding Mugrose in default. To wit, Mugrose was over a year behind schedule as to certain portions of the work and Mugrose had failed to make timely critical path submissions. Mugrose was ordered to attend a meeting on September 14, 2017 and to respond and Mugrose did in fact respond by providing a Recovery Schedule which the DOT did not accept

because the DOT determined that the Recovery Plan was not viable in that it did not put Mugrose back on schedule. The fact that the DOT specified additional/extra grounds for termination and also noted that Mugrose did not even adhere to its own Recovery Schedule in the December 15 Default Letter does not in any manner change the unescapable fact that Mugrose was in default for the reasons set forth in the September Show Cause Letter.² A second opportunity to be heard was not required as to the original basis for termination. Moreover, failure to timely complete the critical project submittals was a sufficient basis to terminate the Contract in it of itself. *See Matter of Pile Found. Constr. Co., Inc. v New York City Dept. of Envtl. Protection*, 26 Misc.3d 1231(A), 907 N.Y.S.2d 103 (Table), 2010 WL 778765 (N.Y.Sup.), 2010 N.Y. Slip Op. 50339(U).

Finally, with respect to Mugrose's claim that the DOT failed to properly account for delays outside of its control, both the DOT's October 23, 2017 letter (discussed above) and Mugrose's own submissions contradict these assertions or change the conclusion that Mugrose was in fact in default for the reasons set forth in the September Show Cause Letter. In its letter, dated September 26, 2017, Mugrose claimed 246 days of the Contract term should be excused. As of September 8, 2017, 510 days of the 635 day Contract term had elapsed and only 6% of the Contract had been completed.³ Assuming that 246 days should be excused (i.e., and rejecting DOT's determination that the alleged delays did not have an impact on Mugrose's ability to perform the work), 283 days (i.e., 529 minus 246) or 45% (283 divided by 635) of the Contract term would have elapsed. The fact remains however that only 6% of the work was completed (i.e., and not 45%), Mugrose still would have failed to make timely critical project submissions and Mugrose still would be in default.

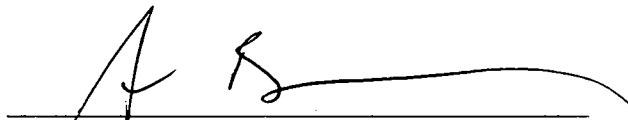
Accordingly, there is no basis to find that DOT's decision to terminate was arbitrary or capricious or otherwise unlawful or that the declaration of default should be annulled.

² Incidentally, the September Show Cause Letter also indicated that Mugrose had failed to complete the Stage 1 demolition work (and, in fact, alleged that Mugrose was approximately 1 year delayed with respect to this work) and deck installation work (and, in fact, alleged that Mugrose was approximately 9 months delayed with respect to this work) in accordance with the Contract and the CPM schedule.

³ As of September 26, 2017, 529 days had elapsed.

ADJUDGED that the application is denied and the petition is dismissed.

October 24, 2018



HON. ANDREW BORROK
J.S.C.