Matter of Framan Mech., Inc. v City of New York (Dept. of Envt. Protection)
2019 NY Slip Op 31486(U)
May 28, 2019
Supreme Court, New York County
Docket Number: 155568/18
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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In the Matter of the Application of
FRAMAN MECHANICAL, INC.,

Petitioner,

-against-

Index No. 155568/18

THE CITY OF NEW YORK (DEPARTMENT OF ENVIRONMENTAL PROTECTION),

Respondent.

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MELISSA A. CRANE, J:

In this article 78 proceeding, petitioner Framan Mechanical, Inc. (Framan) seeks a judgment (1) vacating the November 20, 2017 determination (the Determination) of respondent the City of New York (Department of Environmental Protection) (the DEP) that Framan was in default of the Standard Construction Contract between Framan and the DEP for Main Sewage Pumps and Piping Replacement at Bowery Way WWTP, Registration No. CTC 826 20131413846, Contract No. BB-61 (the Contract); (2) removing any reference to such alleged default from PASSPORT, the City of New York's on-line procurement database; and (3) finding that the Contract should have been terminated for the DEP's convenience on the grounds that the Determination was arbitrary and capricious, an abuse of discretion, affected by errors of law, and because the DEP's default hearing did not afford Framan its legal and proper due process rights to a full and fair opportunity to be heard prior to being declared in default.

For the reasons set forth below, Framan's application for Article 78 relief is denied.

FACTS

On March 4, 2013, the City, acting through the DEP, awarded Framan the Contract to complete Bowery Bay Wastewater Treatment Plant Main Sewage Tank Upgrades. The Contract

involves the replacement of all eight main sewage pumps, including suction piping, seven suction valves, high and low-level seal water skids, and ancillary seal water equipment (the Project) (petition, ¶ 10; *see* exhibit B; answer, ¶ 65).

On June 13, 2013, the DEP issued to Framan a Notice to Proceed (the NOP) (petition, ¶ 11; answer, ¶ 66). As of the date of the NOP, the Substantial Completion Date for the Project was January 23, 2017, and liquidated damages were assessable at $1,000 per day beyond this date (petition, ¶ 12, answer, ¶ 66).

As the scheduled Substantial Completion Date of January 23, 2017 approached, the Project was significantly behind schedule (answer, ¶ 78). In August 2016, Framan was advised that, in order to be able to continue receiving payment under the Contract, it needed to submit a Partial Extension of Time request at least 90 days prior to the scheduled Substantial Completion Date. Framan was provided with Standard Operating Procedure (SOP) 225 describing the process for Extension of Contract Time and Time Extension template forms (*id.*, ¶ 79; *see* exhibit 9). SOP 225, the template extension forms, and the Contract itself all provide that such extensions of time are necessary for the purpose of processing payments to the Contract beyond the scheduled Substantial Completion Date, and do not assign or excuse responsibility for the delay (*id.*, ¶ 80; *see* Contract, article 13.7, article 13.8.2 [d]; SOP 225).

SOP 225 explains that "When a Contract extends beyond the scheduled completion date indicated in the Contract Documents, Extension of Time (EOT) requests are required. . . . A Partial Extension of Time is applied for the Consultant/Contractor prior to final completion for the purpose of processing necessary Contract paperwork such as contractor payments" (*see* SOP 225). The extension request form – and the request ultimately signed and submitted by Framan – explicitly states that the extension is "for the purposes of expediting payment," and that "It is

understood that the City of New York does not, if the application for an extension of time should be granted, waive or release any claim it may have against the Contractor whether it be for actual or liquidated damages for any reason whatsoever" (*see* answer, exhibit 10).

Article 13.7 of the Contract provides that "Permitting the Contractor to continue with the Work after the time fixed for its completion has expired, or after the time to which such completion may have been extended has expired, or the making of any payment to the Contractor after such time, shall in no way operate as a waiver on the part of the City of any of its rights under this Contract" (*see* Contract, article 13.7). Additionally, Article 13.8.2 (d) of the Contract provides that a request for extension of time must include a "statement indicating the Contractor's understanding that the time extension is granted only for purposes of permitting continuation of Contract performance and payment for Work performed and that the City retains its right to conduct an investigation and assess liquidated damages as appropriate in the future" (*see id.*, article 13.8.2 [d]).

Framan initially submitted its application for a partial extension of time on October 26, 2016 (petition, ¶ 13; *see* exhibit C), but failed to submit a proper application package until February 8, 2017, after being reminded via email on February 2, 2017 that no payments could be made until the time extension was approved (*see* answer, 85; *see* exhibits 10 and 11). In that request, Framan asked that the Substantial Completion Date be extended from January 23, 2017 to August 29, 2019 (petition, ¶ 14).

On February 24, 2017, the DEP's Accountable Manager for the Project approved the Partial Extension Request (*id.*, ¶ 15). On March 17, 2017, the DEP's Chief Contracting Office approved the Partial Extension Request (*id.*, ¶ 16; *see* exhibit D). According to the Certificate for Partial Extension of Time Number 1 (the Extension Certificate), Framan's new Revised

Substantial Completion Date was August 29, 2019 (*id.*, ¶ 17; answer, ¶ 86). Consistent with the terms of the Contract, the Extension Certificate clearly states: "The City grants this extension so as to expedite a payment to the Contractor and does not waive or release any claim it may have against the contractor whether it be for actual or liquidated damages for any reason whatsoever" (*see* answer, exhibit 12).

The DEP contends that Framan's performance on the Project was deficient, in that it was unable to effectively complete the isolation and sealing of the pumps, a necessary prerequisite to the core contract work of replacing the pumps (*see id.*, ¶¶ 87-103). The DEP further contends that Framan's alleged inadequacy in performing this prerequisite work necessitated repeated plan shutdowns and caused delays to the Project (*see id.*, ¶¶ 104-123).

On March 22, 2017, the DEP sent Framan a Notice of Deficient Performance and rejection of Framan's Maintenance of Plant Operation Proposal (Notice of Deficient Performance). This notice mentioned that the Project was over 750 days behind schedule, and that the delays continued to mount because of Framan's failure to adequately seal the isolation plate on LLMSP#3, or to submit an acceptable means and method for doing so (*see id.*, exhibit 1 at exhibit A). The Notice of Deficient Performance further noted that Framan had failed to provide monthly progress updates on the Project's schedule as the Contract required, and directed Framan to submit a revised schedule and a new Maintenance of Plant Operation Proposal for sealing LLMSP#3 (*id.*; petition, ¶ 18).

By submission dated March 24, 2017, Framan contested the Notice of Deficient Performance, contending that Framan had performed its work under the Contract in full compliance, but had been unable to complete its work due to the improper actions of the DEP (petition, ¶ 19; *see* exhibit E).

On June 21, 2017, pursuant to Article 48.2 of the Contract, DEP Assistant Commissioner and Agency Chief Contracting Officer Elisa Velazquez (Velazquez) issued to Framan the Notice of Opportunity To Be Heard (the Notice) as to why Framan should not be declared in default of the Contract (petition, ¶ 22; see exhibit F).

The Notice set forth in detail the specifics of Framan's allegedly deficient performance that provided the potential bases for finding Framan in default, including, among other things, (a) emergency flooding on September 23, 2016 and May 26, 2017 at the DEP's Bowery Bay Wastewater Treatment Plan stemming from Framan's inability to seal Low Level Main Sewage Pump #3; (b) Framan's failure to perform work under Change Order 17 and Change Order 17R; (c) Framan's unsatisfactory environmental health and safety compliance record; and (d) Framan's delay and failure to comply with contractual provisions regarding scheduling (*see id.*, ¶ 24). The Notice further advised that these deficiencies could provide sufficient basis to find Framan in default based on Framan's "'fail[ure] to proceed with the Work when notified to do so by the Commissioner' (Art. 48.1.3), 'refus[al to proceed with the Work when and as directed by the Commissioner' (Art. 48.1.3), 'reduct[ion] of its working force which, if maintained, would be insufficient . . . to complete the Work in accordance with the Progress Schedule' (Art. 48.1.4), unreasonable 'delay[] [in] the performance and completion of the Work' (Art. 48.1.9), willful violation of Contract provisions (Art. 48.1.10), and inability to complete the work within the time provided for within the Contract (Art. 48.1.12 and Art. 48.1.12)" (*see* Notice at 6).

On July 6, 2017, in response to the Notice, Framan made a detailed submission challenging the hearing notice's allegations, that included narrative and documentary evidence (petition, ¶ 28, *see* exhibit G). On July 10, 2017, Framan made an additional supplemental

submission in response to the Notice with further documentary evidence (*id.*, ¶ 30; *see* exhibit H).

On July 13, 2017, Framan appeared at the Opportunity To Be Heard (the hearing) before Velazquez, whom the DEP Commissioner duly authorized to determine whether Framan was in default of the Contract (*see* petition, exhibit I [hearing transcript]). At the start of the hearing, Velazquez noted that she had reviewed Framan's written submissions in response to the Notice, and she summarized the potential bases for a finding of default as stated in the Notice (hearing tr at 5-8). At the hearing, Framan presented arguments and statements by its counsel Robert Hedinger, Framan President Frank Manginelli, Framan CFO John Manginelli, Framan Project Manager Demonic Manginelli, and Framan's scheduling consultant, Jim Beach. Framan requested and was granted the opportunity to make a further written submission after the hearing, which it did on August 3, 2017 (petition, ¶ 44; *see* exhibit J).

On November 10, 2017, after consideration of the entire record, Velazquez issued the Determination pursuant to article 49 of the Contract, declaring Framan in default of the Contract (petition, ¶ 6; *see* exhibit A). In the Determination, Velazquez specifically noted that she had reviewed and considered all of Framan's submissions.

The Determination describes in detail Framan's allegedly deficient performance that provided the bases for a finding of default, including: (1) Framan's inability to seal permanently LLMSP#3; (2) Framan's failure to follow directives regarding LLMSP#3 and perform work covered under Change Orders 17 and 17R; (3) Framan's failure to comply with environmental health and safety directives and contractual provisions; and (4) Framan's delay and failure to comply with contractual provisions regarding scheduling (*see* Determination at 2-10). The

Determination also addresses in detail the arguments and evidence Framan presented, and explains why they were not persuasive (*id.* at 10-18).

The Determination explains that Framan's significant deficiencies constituted grounds for finding Framan in default under the Contract based on Framan's "'fail[ure] to commence Work when notified to do so by the Commissioner' (Art. 48.1.3), 'refus[al to proceed with the Work when and as directed by the Commissioner' (Art. 48.1.3), 'reduct[ion] [of] its working force which, if maintained, would be insufficient . . . to complete the Work in accordance with the Progress Schedule' (Art. 48.1.4), unreasonable 'delay[] [in] the performance and completion of the Work' (Art. 48.1.9), willful violation of Contract provisions (Art. 48.1.10), and inability to complete the work within the time provided for within the Contract (Art. 48.1.12 and Art. 48.1.12)" (*see id.* at 1).

DISCUSSION

In support of its article 78 petition, Framan argues that "the Determination should be reversed for four independent reasons: (i) it was made in violation of lawful procedure; (ii) it was effected by errors of law; (iii) it was arbitrary and capricious; and (iv) it constituted an abuse of discretion" (Framan's memorandum of law at 3).

Administrative agencies have broad discretionary power when making determinations on matters they are empowered to decide. Section 7803 of the CPLR provides for very limited judicial review of administrative actions. In a challenge to an administrative decision pursuant to CPLR 7803 (3), judicial review is limited to whether the determination had a rational basis, or whether the action was arbitrary and capricious, or affected by an error of law (CPLR 7803 [3]; *Matter of Wooley v New York State Dept. of Correction Servs.*, 15 NY3d 275, 280 [2010]; *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]; *see*

Matter of Pile Foundation Constr. Co. Inc. v New York City Dept. of Envtl. Protection, 84 AD3d 963, 963-964 [2d Dept 2011] [citation omitted] ["The standard of judicial review is whether the determination that the petitioner was in default of its obligations under a contract with the New York City Department of Environmental Protection . . . was arbitrary and capricious, affected by an error or law, or lacked a rational basis"]).

A rational or reasonable basis for an administrative agency determination exists if there is evidence in the record to support its conclusion (*see Sewell v City of New York*, 182 AD2d 469, 473 [1st Dept 1991]). Conversely, an action is arbitrary if it "is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 of Town of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Courts do not review the facts de novo to arrive at an independent determination (*see Matter of Heintz v Brown*, 80 NY2d 998, 1001 [1992]; *see also Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 276-277 [1972]).

Under this standard, "the court's scope of review is limited to an assessment of whether there is a rational basis for the administrative determination without disturbing underlying factual determinations" (*Heintz*, 80 NY2d at 1001). It is well settled that:

> "[A] 'court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious.' Where the judgment of an agency involves factual evaluations in the area of that agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference. In such circumstances, 'a reviewing court may not reevaluate the weight accorded the evidence adduced . . . since the duty of weighing the evidence, interpreting relevant statutes and making the determination rests solely in the expertise of the agency'"

(*Awl Indus., Inc. v Triborough Bridge & Tunnel Auth.*, 41 AD3d 141, 142 [1st Dept 2007] [citations omitted]; *see Sullivan County Harness Racing Assn. Inc.*, 30 NY2d at 277 [court may

not overturn decision merely because it would reach a contrary conclusion; once a rational basis for the determination is shown, the function of judicial review has ended]; *Matter of Ignizio v City of New York*, 85 AD3d 1171, 1174 [2d Dept 2011] ["courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or [to] choose among alternatives"] [internal quotation marks and citations omitted]).

If the reviewing court finds that the determination is "supported by facts or reasonable inferences that can be drawn from the record and has a rational basis in the law, it must be confirmed" (*Matter of American Tel. & Tel. Co. v State Tax Commn.*, 61 NY2d 393, 400 [1984]).

Here, the DEP's Determination was rational, reasonable, and not an abuse of discretion, as the Determination had a sound basis in fact, was supported by the evidence in the administrative record, and was in accordance with applicable law. In addition, Framan was provided a full and fair opportunity to be heard.

The majority of Framan's petition is concerned with Framan's claim that it did not receive a full and fair hearing, and was denied due process. Framan contends that the conduct of Velazquez, the hearing officer, "conclusively demonstrated that her mind had been made up in advance" of the hearing, and that Velazquez "wrongfully acted throughout the hearing and determination process as an advocate of the DEP's position holding Framan in default" (Framan's memorandum of law at 5-6). According to Framan, because Velazquez, at the commencement of the hearing, "stated that the DEP 'ha[d] evidence' of Framan's default and then 'provide[d] a brief overview of the facts that have led us to those points,'" "the hearing officer put Framan on notice that she had already been 'led' to the determination of a default by

Framan **before** the Hearing had even commenced" (*id.*, citing hearing tr at 5-6) (emphasis in original).

Framan further argues that Velazquez "arbitrarily and wrongfully determined that due process only required (i) a hearing with a 'hard stop' of two hours; (ii) the raising of new issues by the DEP where Framan never had an adequate opportunity to prepare its defense; and (iii) the DEP's material reliance upon critical evidence that need not be shared with Framan" (*id.* at 5).

The court rejects these arguments, and finds that Framan was provided a full and fair opportunity to be heard.

On June 21, 2017, pursuant to article 48.2 of the Contract, Velazquez issued to Framan the Notice of Opportunity To Be Heard as to why Framan should not be declared in default of the Contract. The Notice set forth in detail the specifics of Framan's deficient performance, giving Framan clear notice of the potential bases for a finding of default. Framan was given a full and fair opportunity to present the reasons why it should not be found in default, both at the hearing, and through extensive written submissions, which totaled over 1,000 pages (*see* petition, exhibits G, H and J).

In claiming that it did not receive a full and fair hearing, and was denied due process, Framan misunderstands the nature of the opportunity to be heard to which it was entitled. In an administrative determination pursuant to a contractual right, "no quasi-judicial hearing is required; the petitioner need only be given an opportunity 'to be heard' and to submit whatever evidence he or she chooses and the agency may consider whatever evidence is at hand, whether obtained through a hearing or otherwise" (*Matter of Scherbyn*, 77 NY2d at 757-758; *see A.I. Smith Elec. Contrs., Inc. v Fire Dept. of the City of N.Y.*, 176 AD2d 149, 150 [1st Dept 1991] ["Contrary to petitioner's contention, a full evidentiary hearing is not required where an informal

hearing provides petitioner with an opportunity to be heard in accordance with the terms of the contract"]; *Albert Saggese, Inc. v Town of Hempstead*, 100 AD2d 885, 887 [2d Dept 1984] [finding that meeting "provided plaintiff an ample 'opportunity to be heard' and to explain, *inter alia*, why the delays were not its fault," and concluding that there was "no basis to elevate the contractual 'opportunity to be heard' requirement to the level of an adversarial hearing"], *affd* 64 NY2d 908 [1985]).

Indeed, an opportunity to be heard based only on written submissions is sufficient to satisfy the requirements of due process (*see e.g. Matter of Tyk v New York State Educ. Dept.*, 19 AD3d 427, 428-429 [2d Dept 2005]; *Matter of Tully Constr. Co. v Hevesi*, 214 AD2d 465, 466 [1st Dept 1995]). Moreover, "[t]he availability of an article 78 proceeding at the conclusion of the administrative process also satisfies any due process hearing requirements" (*Tully Constr.*, 214 AD2d at 466; *Matter of Action Elec. Contr. v Riverso*, 287 AD2d 560, 561 [2d Dept 2001]).

Article 48.2 of the Contract provides that "Before the Commissioner shall exercise his/her right to declare the Contractor in default, the Commissioner shall give the Contractor an opportunity to be heard, upon not less than two (2) Days notice" (Contract, article 48.2). "The plain meaning of this provision is merely that the [contractor] was entitled a hearing at which it may have attempted to persuade DEP that its performance pursuant to the contract had been satisfactory" (*Matter of Pile Found. Constr. Co. Inc. v New York City Dept. of Envtl. Protection*, 26 Misc 3d 1231[A], 2010 NY Slip Op 50339[U] [Sup Ct, Kings County 2010] [addressing same provisions of City contract), *affd* 84 AD3d 963 [2d Dept 2011]). The hearing was thus Framan's opportunity to present evidence to Velazquez of the reasons why it should not be held in default.

Framan contends that the fact that Velazquez summarized, in her opening statement, DEP's position as set forth in the Notice, shows bias or pre-determination of the decision to find

Framan in default. The argument, however, is misguided. At the start of the hearing, Velazquez summarized the potential grounds for a finding of default. This was in no way improper or indicative of bias. Indeed, it was entirely appropriate to state on the record the potential grounds for a finding of default in advance of Framan's opportunity to present on the record its arguments and evidence as to why it should not be found in default. Moreover, contrary to Framan's claim that Velazquez made no mention of its submission in response to the Notice (petition, ¶ 35), Velazquez specifically noted that she had reviewed Framan's written submission.

Framan also complains that the hearing was limited to two hours. However, Framan points to no valid reason why that was not sufficient time for it to present whatever evidence and arguments it wished to present orally, and does not identify any particular additional issues about which it wished to make further oral statements. As Framan acknowledges, the vast majority of that time was given to Framan to present its witnesses and arguments (*see id.*, ¶ 36, n 7).

Framan further asserts that it was unfairly surprised by the statements DEP witnesses made, claiming they presented new allegations to which Framan was ill-prepared to respond. However, a review of the statements made by Matthew Osit, DEP's Portfolio Manager for the Contract, and Elio Paradis, the facility manager for the Bowery Bay Wastewater Treatment Plant, reveals that these statements merely provided additional details regarding the alleged deficiencies in Framan's performance that had been described in the Notice of Opportunity To Be Heard. Moreover, Framan requested and was granted the opportunity to make a further written submission after the hearing, which it did on August 3, 2017 (*see id.*, ¶ 44; exhibit J).

Framan also argues that it was not given a full and fair opportunity to be heard because the DEP ignored the extension of time that was granted to Framan under the Extension Certificate, and therefore wrongfully faulted Framan for the delay to the Project beyond the

Substantial Completion Date of January 23, 2017 under the Contract. At the Opportunity to Be Heard, Framan similarly asserted that the Extension Certificate excused it from any responsibility for the delay to the Project (*see* hearing tr at 24-26).

However, in making this argument, Framan ignores the provisions of the Contract regarding extensions of time, as well the limitations set forth explicitly in its own request for the extension, and the Extension Certificate itself. All of these documents make clear that the partial extension of time is for the purpose of expediting payment to the contractor, and does not excuse the contractor from any responsibility for delay or release the contractor from any potential claim for actual or liquidated damages.

During the hearing, Framan claimed it had met its burden to show that it was not responsible for delay to the Project by submitting its request for an extension of 948 days, and receiving that extension. But, just as the Extension Certificate does not excuse or assign responsibility for delay, neither does Framan's request for an extension. Rather, consistent with the terms of the Contract, Framan's request explicitly states that the extension is "for the purposes of expediting payment," and that "It is understood that the City of New York does not, if the application for the extension of time should be granted, waive or release any claim it may have against the Contractor whether it be for actual or liquidated damages for any reason whatsoever."

Indeed, the city routinely grants extensions of time to permit payment to the contractor beyond the contract's scheduled Substantial Completion Date, thereby allowing the work to continue, while claims for damages (if properly preserved) and a determination of responsibility for delay are reserved for a later date (*see e.g. Hoyecki v City of New York*, 121 AD2d 905, 905 [1st Dept 1986] [after failing to meet a contract deadline for performance, contractor "requested

and received extensions of time to complete performance of the contract so that partial payment could be made . . . [and] was not required to await the outcome of the city's detailed investigation as to the causes of the delay"]; *Herman H. Schwartz, Inc. v City of New York (Rockaway Pollution Control Plant)*, 100 AD2d 610, 611 [2d Dept 1984] [where contract was granted a series of extensions beyond the contract completion date in which the "stated purpose of the granting of each extension was to expedite a payment to the [contractor]," and the "city did not waive or release any claim it might have against the [contractor] for liquidated or actual damages for any reason whatsoever," the city's counterclaim for liquidated damages was upheld by Special Term]).

Accordingly, this court finds that Framan was provided a full and fair opportunity to be heard.

Framan also contends that, even assuming that the process DEP utilized was proper and in full compliance with the principles of due process, "the DEP acted irrationally and without regard for material evidence demonstrating Framan's compliance with the contract" (Framan's memorandum of law at 11). Specifically, Framan argues that Velazquez failed to "properly consider all of the evidence submitted by Framan", and relied "solely on the disputed 'facts' alleged by the DEP," that "constitutes an administrative determination not supported by substantial evidence and a clearly erroneous interpretation of the law or the facts" (*id.* at 12).

Contrary to this argument, it is clear that the DEP's Determination had a rational basis and must be upheld. After issuing to Framan a Notice of Opportunity to be Heard that set forth in detail the potential bases for finding Framan in default, and hearing from Framan at the hearing and via extensive written submissions, the DEP considered all of the evidence presented, and rationally determined that Framan was in default of the contract. The Determination

exhaustively details the grounds for the finding of default, as well as the DEP's reasons for rejecting the evidence and arguments presented by Framan. Indeed, the Determination carefully addressed Framan's arguments as to why it should not be found in default, and explained why such arguments were unpersuasive. Thus, the Determination was clearly based on careful consideration of the facts, and was not arbitrary or capricious.

Accordingly, based upon the administrative record, this court finds that it was reasonable and rational for the DEP to find Framan in default of the Contract.

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondent.

This constitutes the decision and judgment of this court.

Dated: May 1, 2019

Enter:

J.S.C.

HON. MELISSA A. CRANE
J.S.C.