

Matter of Five Star Elec. Corp. v MTA Capital Constr. Co.
2019 NY Slip Op 31572(U)
June 3, 2019
Supreme Court, New York County
Docket Number: 150677/19
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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DECISION AND ORDER

Index No.: 150677/19

Motion Seq. No. 001

In the Matter of the Application of,

FIVE STAR ELECTRIC CORP. as an assignee of the
86th STREET CONSTRUCTORS JOINT VENTURE,

Petitioner,

-against-

MTA CAPITAL CONSTRUCTION COMPANY,
METROPOLITAN TRANSPORTATION AUTHORITY,
and NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

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CAROL R. EDMED, J.S.C.:

This Article 78 Petition arises out of the Second Avenue Subway construction project. Petitioner Five Star Electric Corp. (Five Star, or Petitioner) seeks payment for work that it contends was outside the scope of the subject contract. On September 24, 2018, respondent MTA Capital Construction’s (MTACC) Acting Chief Engineer, Donald Iannuzzi (Chief Engineer), issued a memorandum decision (The September 2018 determination), which denied Five Star’s claim for these payments (NYSCEF doc No. 6). The Petition alleges that the Chief Engineer’s determination should be vacated, as it was arbitrary and capricious, and in contravention of law. Respondents MTA, Metropolitan Transportation Authority (MTA), and New York City Transit Authority (NYCTA) (collectively, Respondents) seek an order dismissing the Petition, as well as reasonable attorney’s fees.

BACKGROUND

The prime contract in this action is entitled “Contract C-26012: Construction of the Second Avenue Subway Route 132A, 86th Street Station Finishes, Mechanical, Electrical and

Plumbing Systems, Ancillary Buildings and Entrances in the Borough of Manhattan” (*see* NYSCEF doc No. 15, [articles 4.03 and 4.04 of the prime, entitled “Extra Work,” and “Change Order Procedure and Basis for Payment”]). It was executed by MTACC, as owner, and 86th Street Constructors Joint Venture (the Joint Venture), as the general contractor. The Joint Venture subcontracted some of the work in the prime contract to Five Star by an agreement dated September 26, 2012 (NYSCEF doc No. 42).

As early as October 2015, there was a dispute between the parties as to whether certain work performed by Five Star was “Extra Work” under article 4.03 of the prime contract. At that time, the Joint Venture gave MTACC written notice of its claim on behalf of Five Star for “Extra Work” under the prime contract. Article 4.03 of the prime contract, entitled “Extra Work” provides:

“A. The Authority reserves the right to order changes which may result in additions to the amount, type or value of the Work shown in the Contract Documents and which are within the general scope of the Contract in accordance with this ARTICLE. Any such changes will be known as “Extra Work” and shall result in the issuance of a Change Order.

B. No Extra Work shall be performed except pursuant to written orders of the Engineer expressly and unmistakably indicating his intention to treat the work described therein as Extra Work. In the absence of such an order, if the Engineer shall direct, order or require any work which the Contractor deems to be Extra Work, the Contractor shall nevertheless comply therewith and shall promptly and immediately upon beginning the performance thereof or incurring costs attributable thereto, give written notice to the Engineer stating why he deems such work (hereinafter “Disputed Work”) to be Extra Work. Said notice is for the purposes of (1) affording an opportunity to the Engineer to cancel promptly such order, direction or requirement; (2) affording an opportunity to the Engineer to keep an accurate record of the materials, labor and other items involved; and (3) affording an opportunity to the Authority to take such action as it may deem advisable in light of such Disputed Work. The Disputed Work notice must include a statement regarding any claimed entitlement to a requested extension to the Contract Schedule or claim for Impact Costs, if any.”

(NYSCEF doc No. 15).

Article 4.04 of the prime contract, entitled “Change Order Procedure and Basis for Payment” provides:

“Extra Work shall result in a Change Order reflecting an equitable adjustment to the Total Contract Price representing reasonable costs related to the change in the Work. In addition, the Change Order will include the estimated Allowable Impact Costs with respect to the Extra Work in accordance with ARTICLE 2.07, CONTRACTOR'S DAMAGES FOR DELAY; provided in no event shall Allowable Impact Costs hereunder include any item of cost and expense otherwise payable under the Contract, including the related Change Order or Extra Work Directive, as the case may be. Extra Work may also result in an equitable adjustment in the Contract schedule for performance for both the Extra Work and any other work on the critical path necessarily affected by the Extra Work”

(*id.*).

The claim was for additional compensation relating to the installation of control wiring between Medium Voltage (MV) equipment and a mimic display panel. By letter dated December 17, 2015, MTACC rejected the claim, finding that the subject work, both its design and installation, was indicated by the contract documents (NYSCEF doc No. 10).¹

In September 2017, the Joint Venture reiterated its request for an “Additional Work” order on behalf of Five Star for the subject work. That same month, the parties

¹ Martin Hall, construction manager for the Second Avenue Subway project reasoned:

“the control wiring clarification between the mimic panel and other related MV/LV equipment due to addition of trip coil monitors is indicated in the response to RFI-330. MTACC has already issued AWO-056 which incorporates 24 trip coil monitors (installed inside the two mimic panels), conduit and associated wiring running between this referenced MV equipment and mimic panel. Specification Section 26 09 21, Power Control Center SCADA System, Article 2.4 Paragraph B states that the Contractor is to furnish and install all the wires, cables and conduits to provide all the interconnection between the components within the SCADA unit and associated substation unit/devices/equipment, (of medium voltage /low voltage/battery system etc.), in order to provide a fully functional operating SCADA system for power monitoring. Therefore, any contractual control wiring and associated conduits are not extra work”

(NYSCEF doc No. 10).

agreed to place the matter in suspension. In July 2018, the Joint Venture asked that the matter be activated. It was, in a process that culminated in the September 2018 determination.

The Chief Engineer framed the issue before him as “whether furnishing and installing MV control wiring cable between the North and South Facility Power Rooms is Extra Work” (NYSCEF doc No. 6). Answering the question in the negative, the Chief Engineer reasoned:

“The Contract Documents, which include the Contract Specifications, Contract Drawings and Drawing Notes, determine whether a Contractor has performed Extra Work which may result in an adjustment to the Total Contract Price. Note 9 on Contract Drawing 26012-EE6001 is very clear that the Contractor is responsible for the design and installation of the MV Switchgear Control. The Contractor's responsibilities regarding the extent of MV Switchgear Control wiring is reinforced by Contract Specification Section 26 34 10(2.18)(D)(4). [The Joint Venture] contention that it is licensed to install electrical work and not licensed to engineer or design it is not relevant. The Contractor accepted the requirements of the Contract and is bound by them. Based on the foregoing, [the Joint Venture's] claim of Extra Work for the engineering and designing of the MV Switchgear Control is without merit and is denied.”

(NYSCEF doc No. 6).

Petitioner argues that the Chief Engineer's decision was arbitrary and capricious, as the subject work was “Extra Work” under Article 4.03 of the prime contract.

Respondents argue that the Chief Engineer rationally determined the subject work to be within the scope of the contract documents, specifically the scope of work outlined in the prime contract.

DISCUSSION

CPLR 7803 states that review of a determination of an agency consists of whether the 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 Windsor Place Corp. v New York State DHCR*, 161 AD2d 279 [1st Dept 1990]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken “without sound basis in reason and ... without regard to the facts” (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*id.* at 231).

Matter of Pell reminded courts that we “have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence” (*id.* at 230 [internal quotation marks and citation omitted]). The court’s function is completed on finding that a rational basis supports the agency determination (*see Howard v Wyman*, 28 NY2d 434 [1971]). Where the agency’s interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 AD2d 72 [1st Dept 1985], *affd* 66 NY2d 1032 [1985]).

Here, the Chief Engineer’s determination was rational. Petitioner fails to show that the Chief Engineer was incorrect in his determination that Note 9 on Contract Drawing 26012-EE6001 provides that the Joint Venture and its electrical contractor is responsible for the design and installation of the MV switchgear control, interlock circuits, wiring and conduit. In fact, Petitioner concedes that Note 9 states that “the Contractor shall be responsible for the design and

installation of MV switchgear control, interlock circuits, wiring and conduit between medium and low voltage equipment, and between the north and south facility power rooms per Con Edison and manufacturer requirements” (NYSCEF doc No. 31 at 2).

Petitioner argues, however, that the language of Note 9 is insufficient to support a finding that the subject work was not “Extra Work,” under the prime contract. In its moving papers, Petitioner argues that its “claim concerns the lack information provided on the MV Wiring between the North and South Panels and its associated conduit, which prevented Five Star from estimating this work” (NYSCEF doc No. 3 at 4-5). In reply, Petitioner reiterates that “it is impossible for Five Star to have known or appreciated the costs it would incur in the performance of MV Wiring Work at the time of bid” (NYSCEF doc No. 31 at 2).

Thus, Five Star argues not that the contract did not indicate the subject work, but that it lacked enough specificity for Five Star to bid accurately. It was rational for the Chief Engineer to decide that work indicated under prime contract was not “Extra Work” under Article 4.03 of the same document. It may be true that Five Star underbid the contract. However, Five Star freely chose to not only make that bid, but to agree, under the contract documents, to a dispute resolution system in which MTACC itself determines disputes as to what is “Extra Work” and that those determinations can only be determined via Article 78 proceedings.

As is well know by sophisticated parties such as Five Star, Article 78 review of an agency determination offers less judicial scrutiny than a plenary action alleging breach of contract. Here, the court’s finding that the Chief Engineer’s decision was rational is sufficient to warrant dismissal of the Petition. While Respondents raise the issue of attorney’s fees in their Answer, the opposing papers do not address the issue. Thus, Respondents’ application for attorney’s fees is denied as abandoned.

CONCLUSION

Accordingly, it is

ORDERED AND ADJUDGED that petitioner Five Star Electric Corp. Article 78

Petition is denied; and it is further

ORDERED that Respondents application to dismiss the Petition is granted; and it is further

ORDERED that counsel for Respondents shall provide a copy of this decision, along with notice of entry, to all parties within 10 days of entry.

Dated: June 3, 2019

ENTER:



Hon. CAROL R. EDMED, J.S.C.

HON. CAROL R. EDMED
J.S.C.