Tutor Perini Corp. v City of N.Y. Off. of Admin. Trials & Hearings Contract Dispute Resolution Bd.
2020 NY Slip Op 31376(U)
May 12, 2020
Supreme Court, New York County
Docket Number: 161175/2019
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

----------X

TUTOR PERINI CORPORATION,

Plaintiff,

- v -

CITY OF NEW YORK OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS CONTRACT DISPUTE RESOLUTION BOARD, NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Defendant.

----------X

INDEX NO. 161175/2019

MOTION DATE 03/17/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 35, 36, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ORDERED that the petition for relief, pursuant to CPLR Article 78, of petitioner Tutor Perini Corporation (Motion Seq. 001) is denied and the petition is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for respondent New York City Department of Transportation shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for petitioner.

FINAL DISPOSITION

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Tutor Perini Corporation (Petitioner) seeks a judgment to overturn a Memorandum Decision (OATH Index No. 2254/19) dated October 2, 2019 (Decision) issued by Respondent Office of Administrative Trials and Hearings Contract Dispute Resolution Board (CDRB). For the following reasons, the petition is denied and this proceeding is dismissed.

BACKGROUND FACTS

The Project

On June 5, 2013, Respondent New York City Department of Transportation (DOT) entered into a contract (the Contract) with Petitioner to construct a cable-stayed bridge to replace the existing one located along City Island Road over Eastchester Bay (the Project). A Notice to Proceed was issued effective September 30, 2013 and established an original completion date of December 13, 2016. However, due to opposition from the local community, the Project was stayed by a court-issued injunction in November 2013.

Respondent DOT then directed Petitioner to investigate possible alternatives to the as-bid cable stay design under the Contractor Initiated Value Engineering Change (CIVEC) clause of the Contract. The CIVEC clause "encourage[s] the use of the Contractor's ingenuity and experience in arriving at a lower cost alternative with any time-saving construction methods other than those reflected in the Contract Documents, by the sharing of savings resulting therefrom" (NYSCEF doc No. 45, at 3). Pursuant to the CIVEC clause, Petitioner submitted a proposal to replace the as-bid cable-stayed bridge with a causeway-styled bridge. The proposal was approved, and further negotiations concluded upon Petitioner's submission of a new CPM Schedule for the Project on February 2016, reflecting a contact completion date of December 26, 2016 and substantial

completion date of June 7, 2017. Petitioner then submitted Change Order No. 2016-0049 for approval. This document stated that the change order will result in savings which will be shared equally between the City and Petitioner and that the cost of designing the new bridge structure and performance of new environmental study will be deducted from Petitioner's savings (NYSCEF doc No. 4). The Change Order was approved on May 25, 2016.

In the course of the execution of the Project, Respondent DOT approved four requests for time extension which ultimately moved the completion date of the Project to December 28, 2018 (NYSCEF doc No. 9). All four of Respondent's memoranda approving the requested extensions state that Petitioner waives all claims with the exception of items set out in a Bill of Particulars (BP Items) attached to Petitioner's letter # TPC-DOT-248C dated December 22, 2016 (NCSEF doc No. 5, at 14).

Petitioner's Claims for Equitable Adjustment in Price

On December 18, 2018, Petitioner submitted four separate requests for "equitable adjustment in price" for: (a) extended performance in the amount of $13,345,132.68; (b) additional escalation costs in the amount of $902, 853; (c) loss of productivity in the amount of $7,108,827 and (d) premium time costs from acceleration efforts in the amount of §1,585,159 (NYSCEF doc Nos. 11, 13, 15 and 17). By letters dated December 26, 2018, Respondent DOT denied all four requests on the basis that the Contract contains a "no damage for delay" clause which essentially exculpates the City from liability for delay occasioned by its act or by its representatives (NSCEF doc Nos. 12,14,16 and 18).

On January 25, 2018, Petitioner filed four notices of dispute with Respondent DOT for "Commissioner Determination" pursuant to the dispute resolution provision of the Contract. In the notices, Petitioner argued that DOT's approval of Petitioner's extension requests, which all

included a reservation of Petitioner's right to claim for time related costs, supersedes the boilerplate "no damage for delay" clause in the Contract (NYSCEF doc No. 19, 20, 21 and 22).

Claiming that it received no response from the DOT Commissioner, Petitioner filed four notices of claim with the New York City Comptroller on February 24, 2019. On March 18, 2019, the Comptroller advised Petitioner that it was consolidating and classifying all of Petitioner's claims as delay claims which would be reviewed pursuant to the Comptroller's authority under Section 93(i) of the New York City Charter (City Charter) (NYSCEF doc No. 28).

Pursuant to § 4-09 of the Procurement Policy Board Rules (PPB Rules), Petitioner challenged the Comptroller's determination with respondent CDRB on April 15, 2019 on the basis that the Comptroller's classification of Petitioner's claims as delay damages is erroneous and such classification shows the Comptroller's intention to deny them given that Section 93(i) of the City Charter "prohibits the Comptroller from revising "the terms of a contract of or agreement with the City after its execution."" (NYSCEF doc No. 29, ¶ 64-65). Petitioner maintains that its claims "arise not out of delay in the completion of Contract Work, but from the increased costs of performing work that was not in the Contract" (*Id.*, ¶ 67). Thus, Petitioner claims to be entitled to a price adjustment pursuant to Section 25.3 of the Contract covering compensation for "extra work" (*Id.*, ¶ 68).

CDRB dismissed Petitioner's petition after concluding that Petitioner's claims were rightfully classified as delay damages which are barred by the "no damages for delay" clause of the Contract and are outside CDRB's jurisdiction. Petitioner now challenges the CRDB Decision for being arbitrary, capricious and affected by several errors of law.

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [Ct App 1974]; *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 [1st Dept 1996]). A determination is only deemed arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts" (See *Century Operating Corp. v Popolizio*, 60 NY2d 483 [Ct App 1983], citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231). However, if there is a rational basis for the administrative determination, there can be no judicial interference (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232). It is also well settled that "[t]he interpretations of [a] respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational" (*Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251 [1st Dept 1994], citing *Matter of Salvati v Eimicke*, 72 NY2d 784 [Ct App 1988]).

Here, Petitioner essentially argues that respondent CDRB acted arbitrarily, capriciously and erroneously as a matter of law when it characterized Petitioner's claims as delay damages in total disregard of relevant facts, basic principles of contract interpretation and controlling case law on "extra work" and "no damage for delay" provisions. Respondent DOT counters that the Decision has a rational basis in fact and law.

Petitioner argues that its clams are not for delay damages but for "extra work". To support this position, Petitioner draws the attention of the Court to alleged "cardinal changes" to the Project

which caused Petitioner to perform "extra work" which is defined under the Contract as work "other than those required by the Contract at the time of award" (NYSCEF doc No. 1, ¶¶ 139-145, 149-156). Petitioner points to the change in delivery method (from "design-bid-build" to "design-build") and the alteration in bridge design (from cable-stay to causeway-styled) as the "cardinal changes" to the Project (*Id.*). As its claims are in the nature of claims for extra work, Petitioner maintains that the "no damage for delay" clause is inapplicable (*Id.*, ¶¶ 146-148). In addition, Petitioner contends that the "no damage for delay" clause cannot prevail over more specific contract clauses relating to extra work (NYSCEF docs Nos. 1, at 168-173; 55, at 18) and cannot apply when there is owner abandonment or replacement of [original] contract (NYSCEF doc No. 55, at 18).

DOT contends that CDRB rationally concluded, based on Petitioner's own evidence, that Petitioner's claims are for delay damages which are beyond CDRB's jurisdiction (NYSCEF doc No. 42, ¶¶226-238). DOT disputes Petitioner's position that there were "cardinal changes" to the Project, maintaining that the essential identity of the Project did not change as it has always been a "bridge replacement" (*Id.*, ¶ 239-246). As to the applicability of (and exceptions to) the "no damage for delay" clause, DOT argues that such issue is appropriate for adjudication in a plenary action, not in an Article 78 proceeding. Finally, DOT contends that its approval of time extensions containing Petitioner's reservation of right to claim for the BP Items is not tantamount to an acknowledgement that Petitioner is indeed entitled thereto (*Id.*, ¶253).

Here, the Court finds that CDRB had a rational basis for its determination that Petitioner's claims are for delay damages and that such determination is supported by record and precedent. In the challenged Decision, CDRB referred to Petitioner's own evidence to support its conclusion. Particularly, CDRB held that each of Petitioner's requests for equitable adjustment were based on

"excusable delay" (NYSCEF doc No. 2, at 5). An examination of Petitioner's papers confirms this finding (*see* NYSCEF doc No. 11, at 2 ["TPC is seeking an equitable adjustment for its extended performance cost as a result of excusable time delay…"]; NYSCEF doc No. 13, at 2 ["In addition to extended performance, TPC is seeking an equitable adjustment for…escalation cost as a result of excusable time delay…"]; NYCSEF doc No. 15, at 2 ["Loss of productivity is the direct labor costs resulting from changes to the way in which work could proceed as a result of the changes stemming from the late design approvals and other issues..."]; NYSCEF doc No. 17, at 2-3 ["TPC's total premium cost … would not have been necessary but for the excusable delays coupled with the expectation of the City to expedite the completion of the bridge"]).

The Court rejects Petitioner's position that its claims are not delay damages but claims for "extra work" arising from supposed "cardinal changes" to the Project. First, following settled precedent, CDRB rationally concluded that there were no cardinal changes here as although the design of the bridge changed, it did not fundamentally alter the essential identity of the Project (NYSCEF doc No. 2, at 6). As CDRB also aptly articulated, there was no significant change to the purpose of the Project which has always been the replacement of the existing bridge on site (*Id.*). Petitioner cannot rely on the case of *LAWS Constr. Corp v Dept of Parks & Recreation* (OATH Index No. 1445/15, May 28, 2014). In *LAWS*, while CDRB concededly stated that "[t]he only portion of the claim that may not qualify as a delay claim is [the] design changes to the golf course which resulted in extra work", CDRB also said that "[s]ince the design changes are inextricably intertwined with the delayed cover material, they are delay damages".

Here, the design changes were ultimately due to the delay caused by the court-issued injunction suspending all construction activities on the Project. Thus, following *LAWS*'s logic, claims arising from the design changes here may be considered as delay claims. Petitioner also

cannot rely on the contract definition of "extra work" to bolster its position. The bridge design alteration here was made pursuant to the CIVEC clause of the Contract which expressly allows construction methods "other than those reflected in the Contract". Thus, the CIVEC proposal for a causeway-style bridge necessarily caused work other than what was originally contemplated or required by the Contract, but this does not automatically put such work within the purview of "extra work" as Petitioner suggests.

As this Court finds that CDRB had a rational basis for its determination that Petitioner's claims are delay claims, the Court likewise finds that CDRB's conclusion that these claims are contractually barred by reason of the "no damage for delay" clause is reasonable and proper. The Court is not persuaded by Petitioner's contention that the application of Article 13.10 embodying the "no damage for delay" clause over the allegedly more specific provisions of Article 13.9.1 (on time extensions) and Article 25 (on "extra work") violates principles of contract interpretation. Article 25 on "extra work" is irrelevant as Petitioner's claims are for delay damages as discussed above. As to Article 13.9.1, Petitioner simply fails to show how the application of this provision excludes the application of Article 13.10. Article 13.9.1 sets out the "analysis and approval of time extensions" where extensions are expressly allowed under Article 13.10. Article 13.10 excludes damages, but allows for extensions, in case of delay on the part of the City.

It is for this same reason that the Court finds that DOT's approval of Petitioner's time extension requests is not tantamount to an implied approval of Petitioner's damage claims, even if those claims were expressly reserved. Article 13.8.2(c) of the Contract requires Petitioner to make express reservation of claims in its extension applications. The provision reads that the contractor "waives all claims except for those delineated in the application, and the particulars of any claims which the Contractor does not agree to waive ... includ[ing] a detailed statement of the dollar

amounts" (NYSCEF doc No. 43, at 22). The Court therefore accepts DOT's argument that its approval of Petitioner's extension applications, which included reservation of claims, was made pursuant to Article 13.8.2(c). Such approval, however, does not translate into an acknowledgment by DOT of Petitioner's entitlement to these claims.

Finally, the issue of whether the facts of this case fall under any of the judicially recognized exceptions to the "no damage for delay" clause is not before this Court. This Article 78 proceeding is limited to review of determinations made by CDRB which did not touch upon this issue as it was outside the board's jurisdiction. As CDRB correctly held, the dispute resolution of the Contract limits CDRB's jurisdiction to claims arising out of disputed work, a category that does not include delay damages (NYSCEF doc No. 2, at 3, citing *see CAB Assoc v City of New York*, 32 AD3d 229 [1st Dept 2006]).

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the petition for relief, pursuant to CPLR Article 78, of petitioner Tutor Perini Corporation (Motion Seq. 001) is denied and the petition is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for respondent New York City Department of Transportation shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for petitioner.

HON. CAROL R. EDMEAD, J.S.C.
J.S.C.

5/12/20
DATE

CHECK ONE:	[x]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[x] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE