| **Matter of Prismatic Dev. Corp. v New York City Tr. Auth.** |
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| 2020 NY Slip Op 33419(U) |
| October 20, 2020 |
| Supreme Court, New York County |
| Docket Number: 152206/2020 |
| Judge: Eileen A. Rakower |
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: Hon. EILEEN A. RAKOWER PART 6**
***Justice***

**In the Matter of the Application of**

**PRISMATIC DEVELOPMENT CORPORATION,**

**Petitioner,**

**Index No: 152206/2020**
**MOTION DATE**
**MOTION SEQ. NO. 1**
**MOTION CAL. NO.**

**For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules**

**-against-**

**THE NEW YORK CITY TRANSIT AUTHORITY and MARK BIENSTOCK, in his capacity as Chief Engineer,**

**Respondents.**

**The following papers, numbered 1 to _____ were read on this motion for/to**

| | **NUMBERED** | **PAPERS** |
|---|---|---|
| **Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...** | | ▌ |
| **Answer — Affidavits — Exhibits** | | |
| **Replying Affidavits** | | |

**Cross-Motion: Yes X No**

Petitioner Prismatic Development Corporation ("Petitioner" or "Prismatic") brings this proceeding pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") to vacate and annul the decision of Respondent Mark Bienstock, in his capacity as City Engineer, dated October 29, 2019, denying a claim submitted by Prismatic pursuant to Article 8.03 of Contract C-82004 (the "Contract").

The underlying dispute relates to Prismatic's request for additional payment over the Contract amount based upon "different site conditions relat[ing] to the installation of significantly greater lengths of H-pile than expressly anticipated in the Contract which called for Prismatic to design and construct the Clifton Shop in

the Borough of Staten Island" ("the Project"). Prismatic contends that the decision is "arbitrary, capricious, lacks a rational basis and is infected by an error of law."

Respondents interposed a Verified Answer and oppose the Petition.

## Factual Background

The Contract concerns the design and construction of a new railcar maintenance facility for the Staten Island Railroad, known as the Clifton Shop. The Contract is a "design-built" contract that was issued via a competitive bidding process. The prospective contractors were provided with a geotechnical report, prepared by C.J. Costantino & Associates ("Costantino" and the "Costantino Report") that detailed the geographical conditions of the site and provided observations for the design of foundations of the facilities.

Prismatic was awarded the Contract on December 30, 2016 for $163,750.00 with a duration of 43 months. The Costantino Report was designated as a "Baseline Document" that could be relied upon by the parties. Agreement I(B)1 at 2-3 (Ver. Pet., Ex. 2).

Article 1.06A of the Contract provides:

> The Contractor shall promptly, and before such conditions are disturbed, notify the Engineer in writing of: (1) latent physical conditions at the site differing materially from those indicated in the Contract Documents (sometimes referred to as a "Type I Differing Site Condition"); or (2) physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Contract but unknown to the Contractor until encountered during prosecution of the Work (sometimes referred to as a "Type II Differing Site Condition").

On September 18, 2018, Prismatic submitted notice under Article 8.01 of the Contract to NYCTA's Program Manager (the "Engineer" in the Contract) claiming that it encountered a Type "I" "differing site condition of the subsurface soils" and "requested a prompt investigation and determination of the Engineer

per Article 1.06 of the Contract Terms and Conditions." Prismatic claimed that there were "differing site conditions of the subsurface soils on this project, where the latent physical condition of the soils is materially different than those disclosed in the baseline contract documents." Prismatic attached a report prepared by Mueser Rutledge Consulting Engineers (MRCE) to substantiate its claim of differing site conditions. (Ver. Pet., Exh. 7).

Specifically, Prismatic asserted that, "Prior to our bid, and based on the Costantino Geotechnical Report, MRCE determined the average pile lengths at 60 ft" and included this pile length "in our bid pricing for all of the H-Piles required for the Project." Prismatic asserted:

> The results of the H-Pile test pile program performed post bid, however, found that the piles required additional driving and lengths materially deeper and beyond the pre-bid design determinations. Detailed in the attached MRCE Report, the post-bid geotechnical boring results administered by MRCE established that the subsurface soil properties were materially different from the results given in the Geotechnical Summary Report prepared by C.J. Costantino & Assoc. (Attachment "B"). As MRCE states, the MRCE boring test results found a significantly higher clay content in the bearing stratum of the subsurface soils. MRCE then chronicles how the high clay content lowered the pile resistance, which in turn caused the need for much longer piles.

Prismatic asserted that "[t]he revised piles will have both cost and time impacts," and detailed the same. (Ver. Pet., Exh. 7).

On October 24, 2018, the Engineer determined that Prismatic's "request for additional compensation for representing the site soil conditions to be materially different than the information presented in the contract documents has no merit." (Ver. Pet., Ex. 9).

On November 5, 2018, Prismatic submitted a Dispute Notice to the Authority's Contractual Disputes Review Board ("CDRB") under the Contract's ADR procedure challenging the October 24, 2018 decision. (Ver. Pet., Ex. 10). Prismatic wrote that the "dispute pertains to the actual subsurface site conditions, affecting the design and installation of these foundation steel H-piles, that are

materially different than the geotechnical information included in the bid package."

On December 12, 2018, the matter was transferred to the Chief Engineer per Article 8.03C of the Contract. On February 8, 2019, NYCTA submitted its response.

On October 29, 2019, the Chief Engineer rendered a 24-page determination denying Prismatic's claim. The Chief Engineer recognized the parties had presented "well crafted, thoughtful and comprehensive arguments which address a wide range of technical issues", reviewed the parties' arguments, and determined that Prismatic had not met its burden of showing a differing condition under the Contract.

## Legal Standard

Pursuant to the Contract, the scope of judicial review in this proceeding is limited to the question of whether or not the Chief Engineer's Determination is "arbitrary, capricious or lacks a rational basis." (*see, e.g., NAB Constr. Corp. v Metropolitan Transp. Authority*, 180 AD2d 436, 437 [1st Dep't 1992]).

Article 8.05(A) of the Contract provides, in relevant part:

> Any final determination of the Arbiter with respect to a Dispute initiated pursuant to Article 8.03, Dispute Resolution Procedure, shall be subject to review solely in the form of a challenge … under Article 78 of the New York Civil Practice Law and Rules … [with] it being understood the review of the Court shall be limited to the question of whether or not the Arbiter's determination is arbitrary, capricious or lacks a rational basis.

"An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010]. "[I]t is settled that in a proceeding seeking judicial review of administrative action, the 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." *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987].

**Discussion**

The Chief Engineer's Determination to deny Prismatic's claim of differing site conditions under the Contract and for additional compensation for the resulting impacts was not arbitrary, capricious or lacking a rational basis. In rendering the Determination, the Chief Engineer considered the parties' positions and contentions, analyzed the facts in the record, and applied the relevant contract provisions.

The Chief Engineer determined *inter alia* that "the Constantino (sic) Report, despite being unequivocally preliminary in nature, did in fact provide proposers with a realistic and accurate expectation regarding anticipated pile depths in the areas where those test piles were later driven" and made specific representations regarding the site conditions. The Chief Engineer determined that "while Prismatic may not have heeded the Constantino (sic) Report, particularly Paragraph 40, there does not appear to be any characteristics at the site of an unusual nature differing materially from those ordinarily encountered in work of this character." The Chief Engineer concluded that that "Article 1.06 and the requisite indications made by the Contract - such as the Constantino (sic) Report and its guidance regarding depths at which good support can be expected through the use of long piles, erodes any argument seeking to characterize the site as being one of an unusual nature." Further, the Chief Engineer concluded that Prismatic failed to comply with the Contract's notice requirements.

As there was a rational and reasonable basis for the determination, it is entitled to deference by this Court and will not be overturned. Accordingly, the Petition is denied.

Wherefore it is hereby

ORDERED that the Petition is denied and the proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: October 20, 2020

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

**Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION**