Matter of Mace Contr. Corp. v New York City Dept. of Envtl. Protection
2020 NY Slip Op 33834(U)
November 18, 2020
Supreme Court, New York County
Docket Number: 153387/2020
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

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IN THE MATTER OF THE APPLICATION OF MACE CONTRACTING CORP.,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF ENVIORNMENTAL PROTECTION, THE CITY OF NEW YORK, NEW YORK CITY CONTRACT DISPUTE RESOLUTION BOARD

Defendant.

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INDEX NO. 153387/2020

MOTION DATE 12/15/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 31, 32, 33, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

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

Upon the foregoing documents, it is

ADJUDGED that the application, pursuant to CPLR Article 78, of petitioner Mace Contracting Corp. (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

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

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

In this Article 78 proceeding, petitioner Mace Contracting Corp. (Mace) seeks an order to vacate a resolution of the respondent New York City Contract Dispute Resolution Board (CDRB) as arbitrary and capricious (motion sequence number 001). For the following reasons, this petition is denied and this proceeding is dismissed.

FACTS

Mace is a New York-licensed construction corporation. *See* verified petition, ¶ 1. The respondent New York City Department of Environmental Protection (DEP) is an administrative agency of the co-respondent City of New York (the City). *Id.*, ¶ 2. The CDRB is an administrative tribunal which is constituted within another City agency, the non-party Office of Administrative Trials and Hearings (OATH). *See* verified answer (CDRB), ¶ 1. Among its duties, the CDRB reviews the appeals of contractors aggrieved by contract dispute decisions rendered by the DEP and other City agencies. *Id.*, ¶¶ 2-6.

On August 28, 2015, the DEP awarded Mace a contract (the contract) to provide certain labor, materials and services in conjunction with the "East Branch Aeration" system project in Newtown Creek, Queens (the East Branch/Newtown project). *See* verified petition, ¶ 4; exhibit A. The parties acknowledge that part of Mace's work at the East Branch/Newtown project involved removing a large pile of soil and debris, approximately 18,000 cubic yards in size. *Id.*, ¶ 5; verified answer (DEP/City), ¶ 53. The parties also acknowledge that the DEP provided Mace and the other bidders on the East Branch/Newtown project with documents concerning the content of the debris pile, in order to assist them in determining the likely haulage and disposal costs associated with removing it, which they would incorporate into their bids. *Id.*, verified petition, ¶¶ 6-7; exhibits B-E; verified answer (DEP/City), ¶¶ 54-61; exhibit 2.

Mace states that, after it had commenced performing its work, it discovered that the debris pile contained a larger amount of "municipal solid waste" than was indicated in the documents that the DEP provided it. *See* verified petition, ¶ 8. Mace asserts that this disparity caused it to incur higher than anticipated disposal costs to remove the entire debris pile. *Id.*, ¶ 9. As a result, on June 8, 2016, Mace submitted a proposed change order to the DEP seeking $378,512.00 in increased disposal costs. *Id.*, ¶ 10; exhibit G. On August 14, 2017, the DEP's Environmental Audits Office (EAO) issued a "No Change Determination" that denied Mace's proposed change order. *Id.*, ¶ 16; exhibit M. On September 13, 2017, Mace submitted a "notice of dispute" to the DEP Commissioner's office, and separately submitted an "extension application" to the DEP to request an additional six months from the contract's original completion date in order to finish certain items of work, including the removal of the debris pile. *Id.*, ¶ 17, n 2; exhibits N, R. The DEP Commissioner issued a decision on February 21, 2018 that denied the "notice of dispute." *Id.*, ¶ 18; exhibit O. On March 23, 2018, Mace submitted a "notice of claim" to the Comptroller of the City of New York (the Comptroller) seeking reversal of the DEP Commissioner's denial of the proposed change order. *Id.*, ¶ 19; exhibit P. On December 12, 2018, the Comptroller denied the notice of claim. *Id.*, ¶ 20; exhibit Q. On January 11, 2019, Mace served a petition on CDRB seeking reversal of the Comptroller's denial. *Id.*, ¶ 21; exhibit S. On January 2, 2020, the CDRB issued a decision denying Mace's petition. *Id.*, ¶ 22; exhibit T.

For its part, the DEP presents a copy of the pre-bid analysis of the debris pile which it provided to potential bidders, and asserts that the Commissioner was correct to deny Mace's proposed change order because that analysis contained sufficient information for Mace to have accurately calculated its potential haulage/removal costs before it commenced work. *See*

verified answer (DEP/City), ¶¶ 54-61, 70-77; exhibit 2. The DEP also notes that Mace's September 13, 2017 extension application contained the following limiting language:

> "In consideration of the granting, for the purpose of expediting payment, by the [DEP's] Board Extension of Contract Time, of an extension of contract time fixed in [the contract] for the completion of work therein specified, we agree to and hereby release any and all claims, including but not limited to, damages for the delay or any other cause which we have against the City of New York, arising out of the aforesaid contract, Except for the following:
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> 1. Differential cost, labor rate increase.
> 2. Overhead related cost."

Id., ¶¶ 78-82; verified petition, exhibit R. The DEP asserts that this language operated as a waiver of the request in Mace's proposed change order for an increase in the cost of removing the debris pile. *Id.*, ¶¶ 78-82. Finally, the DEP asserts that the CDRB was correct both to enforce that waiver, and to find that Mace's petition failed on its merits. *Id.*, ¶¶ 83-96. On the former point, the relevant portion of the CDRB's January 2, 2020 decision stated as follows:

> "The Board [i.e., CDRB] agrees with DEP that Mace waived its claim by not expressly reserving it when it applied for a time extension. Article 13.8(c) of the Contract requires that a request for a time extension must include 'a statement 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.' In its time extension request, notarized September 15, 2017, Mace stated, 'we agree to and hereby release any and all claims' arising out of the contract, except for the following:
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> 1. Differential cost, labor rate increase.
> 2. Overhead related cost.
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> "Mace contends that it did not waive its claim because the term 'differential cost' referred to the difference between what it was expected to be paid for removal of the pile and the actual cost of removal. Mace emphasizes the general rule that a waiver is 'an intentional relinquishment of a known right' that 'should not be lightly presumed.' *See Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 (1988). As proof that it never intended to waive its present claim, Mace notes that it was raised in the Notice of Dispute submitted by counsel on September 13, 2017, two days before the application for a time extension, submitted by Mace's president, was notarized.
>
> "The general presumption against waiver does not apply here because there is a specific Contract provision that claims are waived unless they are specifically 'delineated in the application' for an extension of time. Contract § 13.8.2(c). Courts have repeatedly found that

claims are waived if they are not included in requests for extension of time and contractors cannot avoid waiver by including vague or broadly worded exceptions in their time extension requests. *See Mars Assoc., Inc. v City of New York*, 53 NY2d 627 (1981), aff'g, 70 AD2d 839 (1st Dept 1979) (finding claim waived even though contractor's request for time extension included an exception for 'various change orders and work under protest'); *LAWS Construction Corp. v Dep't of Parks & Recreation*, OATH Index No. 1445/14, mem. dec. at 10 (May 28, 2014), aff'd, Index No. 159473/2014 (Sup Ct, NY Co July 6, 2015), aff'd, 145 AD3d 523 (1st Dept 2016) (rejecting claim for additional payment due to change in design to golf course, because claim was waived by omission from time extension request, despite contractor's attempt to reserve claims for 'interferences with and construction changes in the work' and 'payment of . . . all monies for extra and additional work'); *Prismatic Development Corp. v Dep 't of Sanitation*, OATH Index No. 2405/14, mem. dec. at 8 (Oct. 22, 2014), aff'd, Index No. 100295/2015 (Sup Ct, NY Co 2015) (finding claim for additional costs resulting from 'hidden underwater, man-made obstruction' waived, despite contractor's attempt to reserve 'all claims for ... extra ... work' in extension request).

"Contrary to Mace's attempt to expand the plain meaning of 'differential cost' and how it is used in the context of the request for an extension of time, the use of the term 'differential cost' appears to refer to 'labor rate increases.' But even if the Board were to adopt Mace's broad reading of 'differential cost,' it does not comply with the contract's strict requirement to delineate any claims that are not waived. At oral argument, Mace's counsel acknowledged that the language in Mace's application for a time extension could have been more specific. Furthermore, Mace was represented by counsel by September 15, 2017, the date that its president signed the notarized request for an extension of time, given that Mace's retained counsel had filed the Notice of Dispute two days earlier. Thus, Mace is responsible for its failure to comply with the strict waiver provision expressly set forth in the contract because it submitted its request for an extension of time without specifically mentioning the change order at issue here." *Id.*; exhibit 1.

Mace commenced this Article 78 proceeding on May 27, 2020. *See* verified petition. The CDRB submitted an answer on August 21, 2020 in which it stated that it would "take no position in this litigation adverse to either party that [had] appeared before [it]." *See* verified answer (CDRB). The City and the DEP filed a joint answer with affirmative defenses on September 3, 2020. *See* verified answer (DEP/City). Discovery ensued despite the intervening Covid-19 national pandemic, and this matter is now fully submitted (motion sequence number 001).

DISCUSSION

Generally, a 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 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). Judicial review of a CDRB determination is limited to the question of whether it was 'made in violation of lawful procedure, was affected by an error of law, or was arbitrary or capricious or an abuse of discretion.'" *Matter of Start El., Inc. v City of New York*, 104 AD3d 488 (1st Dept 2013). A determination is only deemed arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (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. Here, Mace asserts two grounds for finding that the CDRB's January 2, 2020 decision was an arbitrary and capricious ruling: 1) that it was not supported by substantial evidence; and 2) that the CDRB was incorrect to enforce the waiver clause. *See* verified petition, ¶¶ 23-47. The court will address these arguments in reverse order so as to conform to the format of the CDRB's decision.

With respect to waiver, Mace asserts that: 1) "the CDRB'S reading of the term 'differential cost' is unsupported by law"; 2) it [Mace] lacked the intent to waive its claim; and 3) to find that it had would be inequitable. *See* petitioner's mem of law at 23-28. The DEP responds that the CDRB correctly applied the governing law to enforce the contract's waiver

clause, because Mace did not specify the claim that it wished to exempt with sufficient particularity. *See* respondents' mem of law at 11-14. The DEP is correct. In *Matter of LAWS Constr. Corp. v Contract Dispute Resolution Bd.* (145 AD3d 523 [1st Dept 2016]), the Appellate Division, First Department, upheld the CDRB's enforcement of a waiver clause in a contract that "required any request for an extension of time filed by petitioner to include a statement, 'in detail,' that petitioner 'waives all claims except for those delineated in the application, and the particulars of any claims which [petitioner] does not agree to waive.'" 145 AD3d at 524. Here, the CDRB decision noted that paragraph 13.8.2 (c) of the contract similarly provides that:

> "[An] application for extension of time shall set forth in detail:
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> * * *
>
> "A statement 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. For time extensions for Substantial Completion and final completion payments, the application shall include a detailed statement of the dollar amounts of each element of claim item reserved;"

See verified petition, exhibit U. The court notes that Mace denominated its proposed change order as seeking "Additional Cost for Debris/Soil Pile Disposal." *Id.*, exhibit G. However, the CDRB observed that Mace's September 13, 2017 extension application only delineated "differential cost, labor rate increase" and "overhead related cost" as exempt from waiver. *Id.*, exhibits R, T. In *Matter of LAWS Constr. Corp.*, the First Department held that the "CDRB rationally found that the claims at issue in both proceedings were not set forth with sufficient particularity in the broadly worded list of reserved claims in petitioner's . . . extension request." 145 AD3d at 524, citing *Mars Assoc. v City of New York*, 70 AD2d 839 (1st Dept 1979), affd 53 NY2d 627 (1981). Here, too, there is an obvious distinction between Mace's particularized claim for an increase caused by "Additional Cost for Debris/Soil Pile Disposal," and its broadly worded, indefinite waiver exemption of "differential cost[s]." As a result, the court finds that the CDRB was correct to enforce the contract's waiver clause pursuant to the holding of *Matter of*

LAWS Constr. Corp. The court notes that Mace's reply papers do not mention "waiver" at all. *See* petitioner's reply mem at 5-24. It appears that Mace has abandoned that issue. Therefore, the court concludes that the CDRB did not act arbitrarily or capriciously in finding that Mace waived its change order request for increased soil removal costs.

Although this finding affords a sufficient ground to dismiss the instant petition, the court nevertheless also addresses Mace's "substantial evidence" argument, which asserts that Mace "properly relied on the bid documents' characterization of the pile" as containing a lower amount of "municipal solid waste" than it actually did, and that the CDRB improperly minimized and/or ignored Mace's evidence of the disparity. *See* petitioner's mem of law at 13-22. The DEP responds that the CDRB's decision reviewed all of the evidence that Mace submitted, but nevertheless found that the conclusions that Mace's experts drew from the data were suspect. *See* respondents' mem of law at 15-20. Mace's reply papers re-assert its original argument that its' pricing bid relied on the limited, incorrect information that the DEP had supplied. *See* petitioner's reply mem at 11-24. At the bottom, it is clear that Mace's argument is a dispute over the correctness of the CDRB's evidentiary judgments. However, "the doctrine is well settled that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; * * * the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is 'substantial evidence.'" *Matter of Pell*, 34 NY2d at 230 (internal citations and quotation marks omitted). Here, the CDRB's decision plainly recites that it reviewed all of the pre-contract documents concerning the debris pile, and all of the subsequent material that Mace submitted. Because it did so, the court finds that the CDRB's factual determinations were based on "substantial evidence," regardless of the conclusions that Mace would have preferred it to dfraw from that evidence.

Therefore, the court rejects Mace's "substantial evidence" argument, and concludes that the CDRB's January 2, 2020 decision was not an arbitrary and capricious ruling. Accordingly, the court finds that Mace's Article 78 petition should be denied as meritless, and that this proceeding should be dismissed.

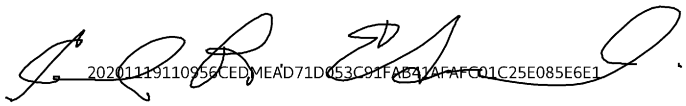
CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the application, pursuant to CPLR Article 78, of petitioner Mace Contracting Corp. (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

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

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



11/18/2020
DATE

CAROL R. EDMEAD, J.S.C.

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