SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREA MASLEY** **PART** **48**

Justice

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DEMATTEIS/DARCON, JOINT VENTURE,

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 652893/2016

MOTION DATE

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358

were read on this motion to/for JUDGMENT - SUMMARY.

This breach of contract action arises out of the construction of the Manhattan Community District 1/2/5 Garage for the New York City Department of Sanitation (DSNY) located at Spring and West Streets, New York, New York. Plaintiff DeMatteis/Darcon, Joint Venture moves, pursuant to CPLR 3212, for partial summary judgment on the issue of defendant The City of New York's (the City) liability for delay damages, and for an order setting this matter down for a trial on damages. For the reasons that follow, the motion is denied.

Background

On October 5, 2010, plaintiff, a limited purpose joint venture between Leon D. DeMatteis Construction Corp. (DeMatteis) and Darcon Construction Corp., and the City, acting through DSNY, entered into a written contract known as Capital Project No. S219-233A, Comptroller's Registration No. 20111410698 (Contract) for the construction

of a new building to house three DSNY district garages (Project) at a contract price of $194,844,500. (NYSCEF Doc No. [NYSCEF] 242, Steven Tartaro[1] [Tartaro] aff. ¶ 3.) Nonparty Turner Construction Co. (Turner) served as the construction manager on the Project. (*Id.* ¶ 13.)

The Contract[2]

According to the bid documents, the Contract was a "Construction Reform Pilot Project Contract," and contained language altering the City's then-existing standard construction contract language related to delay damages. (NYSCEF 248, Pilot Project FAQ at 2[3].) The pilot Contract allowed contractors to recover damages for delay under certain conditions, although it differentiated compensable delays from non-compensable delays. (*Id.* at 3.) In the event the City and the contractor agreed on the amount of delay damages, "such damages may be paid through a change order, if appropriate." (*Id.*)

Article 11 in the new pilot Contract sets out the procedure for claiming damages caused by delays in completing the work. (NYSCEF 243, Contract at 49.) Article 11.1 states that "[a]fter the commencement of any condition which is causing or may cause a delay in completion of the **Work**, including conditions for which the **Contractor** may be entitled to an extension of time," notifications and submittals pursuant to sub-provisions 11.1.2 and 11.1.3. Failure by the contractor to "strictly comply with the requirements" of

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[1] Tartaro is a senior vice president for construction at DeMatteis and the senior executive for plaintiff charged with direct daily responsibility for the Project. (NYSCEF 242, Tartaro aff. ¶¶ 1-2.)

[2] All bolded terms refer to defined terms contained in the original Contract.

[3] Pages refer to NYSCEF generated pagination.

the foregoing articles results in a waiver of "any and all claims for damages for delay arising from such condition." (*Id.* at 11.2 [Article 11.2].)

According to the bid documents, the Contract distinguished between compensable and non-compensable delays. Article 11.4, titled Compensable Delays, states, in relevant part:

> "11.4.1 The **Contractor** agrees to make claim only for additional costs attributable to delay in the performance of this **Contract** necessarily extending the time for completion of the **Work** or resulting from acceleration directed by the **City** and required to maintain the project schedule, occasioned solely by any act or omission to act of the **City** listed below. The **Contractor** also agrees that delay from any other cause shall be compensated, if at all, solely by an extension of time to complete the performance of the **Work**."

(NYSCEF 243, Contract at 50.) Compensable delays include the City's failure to take reasonable measures to coordinate the work (Article 11.4.1.1); "[e]xtended delays attributable to the City in the review or issuance of change orders, in shop drawing reviews and approvals or as a result of the cumulative impact of multiple change orders, which have a verifiable impact on project costs" (Article 11.4.1.2); and the Project site's unavailability for an extended period of time that significantly impacts the completion date (Article 11.4.1.3). (*Id.*) "Recoverable damages" include actual and necessarily incurred costs for labor, materials and equipment, insurance and bond costs, extended field office costs and extended contract site and home office overhead. (*Id.* at 51-52 [Article 11.7.1].) Article 11.4.2 provides that:

> "The provisions of this Article apply only to claims for additional costs attributable to delay and do not preclude determinations by the **Commissioner** allowing reimbursements for additional costs for **Extra Work** pursuant to Articles 25 and 26 of this **Contract**. To the extent that any cost attributable to delay is reimbursed as part of a change

> order, no additional claim for compensation under this section shall be allow."

(*Id.* at 50.)

Article 11.5, titled Non-Compensable Delays, states:

> "The **Contractor** agrees to make no monetary request for, and has included in its bid prices for the various items of the **Contract**, the extra/additional costs attributable to any delays caused by or attributable to the items set forth below. For such items, the **Contractor** shall be compensated, if at all, solely by an extension of time to complete the performance of the **Work**, in accordance with the provisions of Article 13. Such extensions of time will be granted, if at all, pursuant to the grounds set forth in Article 13.3"

(NYSCEF 243, Contract at 49-50.) "Non-compensable delays" include acts, errors and omissions by third parties, such as other contractors or utilities (Article 11.5.1); "[r]estraining orders, injunctions or judgments issued by a court which were caused by a Contractor's submission, action or inaction or by a Contractor's means and methods of construction, or by third-parties, unless such order, injunction or judgment was the result of an action or emission by the City" (Article 11.5.3); and "[e]xtra work which does not significantly affect the overall completion of the contract, reasonable delays in the review or issuance of change orders or field orders and/or in shop drawing reviews or approvals" (Article 11.5.7). (*Id.* at 50-51.)

Importantly, Article 11.9 states that "[i]f the parties agree that a compensable delay has occurred and agree on the amount of compensation, payment may be made pursuant to a written change order, subject to pre-audit by the **Engineering Audit Officer**, and may be post-audited by the **Comptroller** and/or the **Department**." (NYSCEF 243, Contract at 52.)

Article 13, which governs extensions of time for performance of the work, is also relevant. Under Article 13.1, "[i]f performance by the **Contractor** is delayed for a reason set forth in Article 13.3, the **Contractor** may be allowed a reasonable extension of time in conformance with this article and the **PPB** Rules."[4] (NYSCEF 243, Contract at 53.) Article 13.3 outlines the grounds for an extension, and states that if a written application for an extension of time for delay in completing the work is made, the contractor is entitled to an extension if the delay is caused "solely" by the acts or omissions of the City or other contractors on the Project or by supervening conditions beyond the parties' control. (*Id.* at 52-53.) Only the Commissioner or the Board for the Extension of Time (Board) may grant an extension.[5] (*Id.* at 52 [Article 13.2].)

Section 50(G) of DSNY's General Conditions Governing Major Construction Contracts dated March 9, 2010 (General Conditions) also discusses adjustments to the Contract completion time.[6] Section 50(G)(1)(a) provides that requests for extensions of time must comply with Articles 10, 11, and 13 of the Contract. (NYSCEF 261, General Conditions at 77.) Section 50(G)(1)(c) provides that a total Project time extension may

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[4] Article 5.2 provides that the Contract is subject to the rules promulgated by the City's Procurement Policy Board (PPB Rules) and in the event of a conflict between the Contract and the PPB Rules, the PPB Rules control. (NYSCEF 243, Contract at 41.)

[5] The Board consists of the Agency Chief Contracting Officer, the Corporation Counsel and the Comptroller, or their authorized representatives. (NYSCEF 243 at 55 [Article 13.9.3].)

[6] The General Conditions specifically identifies the Project and Contract. (NYSCEF 261, General Conditions at 8.)

be granted for delays beyond the contractor's control that affect the "Critical Path" of the Project.[7] (*Id.* at 78.)

> "To be considered as a basis for a total Project time extension, a given issue (i.e., delay, change order, etc.) must meet both of the following criteria:
>
> 1) It must be totally beyond the control of the Contractor and due to no direct or indirect fault of the Contractor.
>
> 2) It must result in a direct delay to work on the main Critical Path of the Project.

(*Id.* at 78 [Section 50(G)(a)].)

As for extensions of time for a "concurrent delay," Article 13.4 of the Contract states:

> "The **Contractor** shall not be entitled to receive a separate extension of time for each of several causes of delay operating concurrently, but, if at all, only for the actual period of delay in completion of the **Work** as determined by the **Commissioner** or the Board, irrespective of the number of causes contributing to produce such delay. If one of several causes of delay operating concurrently results from any act, fault or omission of the **Contractor** or of its **Subcontractors** or **Materialmen**, and would of itself (irrespective of the concurrent causes) have delayed the **Work**, no extension of time will be allowed for the period of delay resulting from such act, fault or omission."

(*Id.* at 54.) Section 50(G)(5)(a) in the General Conditions defines a "concurrent delay" as "two or more delays or areas of work slippage which are totally independent of on[e] another and which, if considered individually, would each affect the final Project

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[7] Section 1(B) in the General Conditions defines "critical path" to mean "[t]he sequence of Project network activities that add up to the longest overall duration of the Project. This determines the shortest time possible to complete the Project. Any delay of an activity on the Critical Path directly impacts the planned Project completion date (i.e. there is no float on the Critical Path)." (NYSCEF 261, General Conditions at 9.)

completion date according to the Project Schedule." (NYSCEF 261, General Conditions at 78.) Section 50(G)(5)(b) provides that a contractor may be granted a "concurrent Project time extension … where it is found that specific delays beyond the control of the Contractor would have affected the final Project completion date were it not for overriding delays due to other causes." (*Id.*)

Article 13.8 of the Contract, which describes the requirements for a written application for an extension of time, largely mirrors Section 4.03(c) of the PPB Rules (NYSCEF 336, PPB Rules at 2-3), and requires that an application set forth in detail the alleged cause of the delay, the date the delay began and ended and the number of days attributable to the delay. (NYSCEF 243, Contract at 54.) Notably, a contractor's application for a time extension 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." (*Id.* at 55 [Article 13.8.2(d)].)

Article 13.9 explains the process for analysis and approval of time extensions. For extensions of time for partial payments, Article 13.9.1(b) provides that the Commissioner may extend the time for Contract performance by 90 days "[i]f the Work is to be completed within less than one (1) year but more than six (6) months." (NYSCEF 243, Contract at 55.) For extensions of time for substantial completion and final completion payments, Article 13.9.2 requires the engineer to "prepare a written analysis of the delay (including a preliminary determination of the causes of delay, the beginning and end dates for each such cause of delay, and whether the delays are

excusable under the terms of this Contract)."[8] (*Id.*) Article 13.9.2 further provides that the engineer's report shall not operate as a waiver or release of any claim the City may have to assess actual or liquidated damages against a contractor. (*Id.*) Additionally, under Article 13.9.3, approval for time extensions for substantial completion or final completion payments shall be made by the Board. (*Id.*)

The "No Damage for Delay" provision in Article 13.10 of the Contract reads:

> "The **Contractor** agrees to make no claim for damages for delay in the performance of this **Contract** except as set forth in Article 11, and agrees that all it may be entitled to on account of any such delay for which compensation is not specifically provided for in Article 11 is an extension of time to complete performance of the **Work** as provided herein."

(*Id.* at 56.)

Regarding changes to the Contract, Article 25.1 provides that any changes to the Contract must be made in writing by the Commissioner, and that "[a]ll such changes, modifications and amendments will become a part of the **Contract**. **Work** so ordered shall be performed by the **Contractor**." (NYSCEF 243, Contract at 69.) Under Article 25.2, "**Contract** changes will be made only for **Work** necessary to complete the Work indicated in the original scope of the **Contract** and/or for non-material changes to the scope of the **Contract**." (*Id.*) Under Article 25.3, "[t]he **Contractor** shall be entitled to a price adjustment for **Extra Work** performed pursuant to a written change order."[9] (*Id.*)

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[8] The Contract partially defines the "Engineer" as "the person so designated in writing by the Commissioner to act as such in relation to this Contract." (NYSCEF 243, Contract at 38 [Article 2.1.13].)

[9] "Extra Work" is "Work other than that required by the Contract at the time of award which is authorized by the Commissioner pursuant to Chapter VI of this Contract" (NYSCEF 243, Contract at 39 [Article 2.1.15].)

Upon achieving substantial completion, Article 44.2 of the Contract requires the contractor to submit a "Substantial Completion" requisition and a "Final Verified Statement" containing:

> "any and all alleged claims against the **City** and any pending dispute resolution procedures in accord with the **PPB** Rules and this **Contract**, in any way connected with or arising out of this **Contract** (including those as to which details may have been furnished pursuant to Articles 11, 27, 28, and 30) setting forth with respect to each such claim the total amount thereof, the various items of labor and materials included therein, and the alleged value of each item; and if the alleged claim be one for delay, the alleged cause of each such delay, the period or periods of time, giving the dates when the **Contractor** claims the performance of the **Work** or a particular part thereof was delayed, and an itemized statement and breakdown of the amount claimed for each such delay."

(NYSCEF 243, Contract at 87-88). Article 45 provides that upon final acceptance of the work, the contractor shall submit a final payment requisition (Article 45.1) and a final verified statement of claims against the City arising out of the Contract that occurred after substantial completion was achieved (Article 45.2). (*Id.* at 88.)

The Project

Plaintiff commenced work on the Project on December 17, 2010. (NYSCEF 242, Tartaro ¶4.) By memorandum dated May 11, 2011, DSNY informed plaintiff that it had assigned the Contract to the New York City Department of Design and Construction (DDC) (collectively with DSNY and the City, the City) and that DDC would administer the Project through its completion. (*Id.* ¶ 3.)

The Contract specified a Project duration of 1,190 consecutive calendar days, or a completion date of March 20, 2014. (NYSCEF 279, Glenn E. Brue[10] [Brue] aff. ¶8; NYSCEF 355, Brue's Project Time Extension and Change Order Summary.) Plaintiff achieved substantial completion on December 3, 2015, 623 consecutive calendar days after the Project was originally scheduled to be completed, (NYSCEF 242, Tartaro aff. ¶ 4), except for uncompleted punch list work. (NYSCEF 279, Brue aff. ¶ 4.) Plaintiff attributes the 623-day delay to alleged material defects, errors and omissions with the design of the building, which resulted in DDC issuing 78 bulletins, DDC's alleged administrative delays in registering change orders, and DSNY's or DDC's failure to make the Project site available to plaintiff, all of which increased plaintiff's construction costs. (NYSCEF 263, Summons and Compl. ¶¶ 26, 30, 33-34.) "During the course of the Project, the City directed [plaintiff] to perform over $22 million of extra work under the Contract in 423 fully executed COs," each registered with the Comptroller permitting billing and payment. (NYSCEF 242, Tartaro aff. ¶ 4.) However, Tartaro states there were lengthy delays from the time DDC initiated a change order until the Comptroller registered it. (*Id.* ¶ 20; *see* NYSCEF 273, Plaintiff's CO Spreadsheet.) Thus, Tartaro states that plaintiff, at its own expense and with DDC's knowledge, undertook pre-registration change order work so it could maintain the Project schedule. (*Id.* ¶ 17.) Because of these delays, plaintiff filed Delay Claim No. 16 dated June 1, 2012 with DDC for "Extended delays … issuance of Change Orders, in shop drawing review … cumulative impact of multiple Change Orders" under Article 11.4.1.2. (NYSCEF 254,

[10] Brue is DDC's Program Director of the Sanitation and Dept of Environmental Protection Units. (NYSCEF 279, Brue aff. ¶ 2.)

Plaintiff Letter to DDC [June 1, 2012].) Plaintiff also filed Delay Claim No. 28 dated September 4, 2014 advising DDC that "added extra work and the lack of Registered Contract Change Orders will cause a delay." (NYSCEF 256, Plaintiff Letter to DDC [Sept. 4, 2014].)[11] Twelve of the 423 change orders noted an aggregate time extension of 427 consecutive calendar days. (NYSCEF 242, Tartaro aff. ¶ 29; NYSCEF 244, COs [12 with time extensions].) Ninety change orders recorded additional but unquantified time extensions. (NYSCEF 242, Tartaro aff. ¶ 29; NYSCEF 245-246, COs [90 without quantified time extensions].) Seven change orders executed after the substantial completion date of December 3, 2015 noted an aggregate time extension of 630 days. (NYSCEF 242, Tartaro aff. ¶ 29; NYSCEF 247, COs [post-substantial completion].)

On March 3, 2016, plaintiff filed a Substantial Completion Payment Requisition and a Final Verified Statement of Claims with DDC pursuant to Articles 11, 13, 25, 26 and 30 of the Contract. (NYSCEF 242, Tartaro aff. ¶ 8.) Plaintiff then filed a notice of claim on April 26, 2016 and an amended notice of claim on April 27, 2016 with the Comptroller and DDC. (*Id.* ¶ 9; NYSCEF 250, Notice of Claim.)

Plaintiff commenced this action on May 31, 2016 asserting two causes of action for (1) breach of contract arising from DDC's failure to issue a change order to pay for the 623-day delay within 60 days of plaintiff's submission of a Final Verified Statement of Claims under Articles 11.1.3 and 11.9 of the Contract and (2) breach of contract

[11] Over the course of the Project, plaintiff submitted 31 separate delay claims. (NYSCEF 242, Tartaro aff. ¶ 5). Delay Claim Nos. 11 through 31, which covered the period from October 11, 2011 through December 3, 2015, had an aggregate accounting of damages of $39,114,628.20, including subcontractor pass-through claims. (NYSCEF 275, plaintiff's mem of law at 13; See NYSCEF 250, Notice of Claim at 9/54 for a brief description of each claim.)

related to Addendum 2, Section 01271 of the Technical Specifications, General Requirements, a provision offering plaintiff an early completion incentive of up to $900,000. Plaintiff seeks damages of $57,331,521.80 on the first cause of action and $900,000 on its second cause of action. (NYSCEF 263, Summons & Complaint.) The City has interposed an answer pleading 15 affirmative defenses. (NYSCEF 264, Answer.)

Plaintiff now moves for partial summary judgment on the City's liability for delays on the Project under Article 11 and for a trial on damages.

Discussion

Plaintiff's Contentions

Plaintiff asserts that the City owes it delay damages under Article 11 of the Contract for the substantial delays caused by the City on the Project. Plaintiff's theory is that it is entitled to summary judgment on the City's liability for delays based on the multitude of change orders granting it time extensions under Articles 11, 13.4 and 25. Plaintiff's explains that "[u]nder Article 11, [it] must show that (i) the delay impacted the Critical Path, meaning the Contract Completion Date, (ii) the delay was of a nature made compensable under Article 11 . . . , (iii) DDC was, alone, responsible for the delay, and (iv) "the delay was the subject of the requisite notice and damages accounting." (NYSCEF 275, plaintiff's mem of law at 6.) In reliance on the COs, plaintiff argues that the "COs themselves satisfy the first three parts of this test" as (i) "the COs expressly provide for the extension of the Contract Completion Date, confirming that such delays impacted the Critical Path," (ii) 423 COs constitutes a multitude, (iii) "DDC . . . alone was responsible for that delay, with no concurrency by the [plaintiff]," and (iv)

plaintiff "provided the requisite notice under Article 11 related to the 'multiple' COs, first as Delay Claim #16 . . . and again as Delay Claim #18." (*Id.* at 6-7, 26.)

Plaintiff insists that "DDC was alone responsible for that delay" relying on Article 13.4 of the Contract and Article 50 of the General Conditions, which essentially reiterates Article 13.4. In plaintiff's view, Article 13.4 prevents the contractor from receiving an extension of time for any reason if in the same period the contractor is itself responsible for the concurrent delay. Thus, according to plaintiff, the CO extensions of time provide the basis "to establish and quantify the City's delay liability." (NYSCEF 275, plaintiff's mem of law at 7.) Further, plaintiff argues that since the City chose not to assess liquidated damages against plaintiff, then it is free from liability for delay because under the contract the City must assess liquidated damages if plaintiff was responsible for any delay. (*Id.*)

Plaintiff also points to Article 25 of the Contract for the proposition that change orders registered with the Comptroller form part of the Contract, and 19 (12 COs + 12 post-substantial COs noting time extensions) of the 423 change orders awarded plaintiff specific time extensions designated in consecutive calendar days. Again, plaintiff contends these 19 change orders conclusively establish the City's sole liability for all delays because plaintiff would not have received a time extension if it was responsible for a concurrent delay as per Article 13.4. Plaintiff also puts great weight on a statement by counsel for the City who, according to plaintiff, "conceded" at oral

argument on a prior motion that COs are part of the contract. (NYSCEF 272, April 24, 2018 tr. 18:22-19:7.)[12]

In addition, plaintiff cites Contract Specification 01271, titled Milestones, Liquidated Damages, Incentive Payments and Scheduling Constraints (Contract Specification), which sets forth four Project milestones, the last being substantial completion of the work. (NYSCEF 260, Contract Specification at 3-4 [Section 1.05(a)].) Section 1.04(A) provides, in part, that "[l]iquidated damages will be assessed against the Contractor should the actual time for completion of each milestone fail to occur within the scheduled time for completion of that milestone, plus any authorized time extensions." (*Id.* at 2-3.) Plaintiff submits that the City has not assessed any liquidated damages for plaintiff's failure to meet a Project milestone. Plaintiff contends additional support is found in DDC's Certificate of Completion and Acceptance signed in March 2016, obtained from the City during discovery, which shows that liquidated damages were not assessed because "[m]ultiple change orders were issued to the contractor for additional scope." (NYSCEF 274, Certificate of Completion at 1).

Legal Standards

A party moving for summary judgment under CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) The "facts must be viewed in the light most

[12] According to plaintiff, this motion was triggered by the City's judicial admission that "the time extensions reflected in the registered CO paperwork were confirmed and "part of the Contract," resolving that issue" in plaintiff's favor. (NYSCEF 275, Plaintiff's Memo of Law at 25/32.)

favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidentiary proof in admissible form sufficient to raise a material issue of fact. (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*)

When a contract is unambiguous, its interpretation is a question of law, and summary judgment is appropriate. (*South Rd. Assoc, LLC v International Bus. Machs. Corp.*, 4 NY3d 272 [2005].) "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). "[C]ourts should read a contract 'as a harmonious and integrated whole' to determine and give effect to its purpose and intent" and ensure that no provision is rendered meaningless. (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017] [citation omitted].) "[C]onflicting contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect." (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 133-134 [1st Dept 2017] [internal quotation marks and citation omitted].)

Plaintiff Has Not Established a Prima Facie Case of the City's Liability for Delay Damages

First, contrary to plaintiff's contention, the Contract does not allow DDC to award an extension of time to perform the Contract by way of a change order. Article 13.1 plainly and unambiguously states that if a contractor experiences a delay in performing

for one of the reasons set forth in Article 13.3, DDC may grant the contractor a time extension in accordance with the article and the PPB Rules (9 RCNY §4-03). Article 13 contemplates a formal process by which a written application for a time extension is made by the contractor and reviewed by the Commissioner or the Board. The Commissioner must then make a written determination if an extension is granted for partial payment (Article 13.9.1). For a time extension for substantial completion or for final completion payments, the engineer must perform a delay analysis and the Board must approve the extension. (Articles 13.9.2-13.9.3.) Here, plaintiff contends the change orders show DDC amended the Contract term to account for these time extensions, but none of the evidence demonstrates that the City waived compliance with Article 13.

Plaintiff also ignores the importance of Article 13, which sets out the procedure for obtaining time extensions. Allowing DDC to grant time extensions by way of a change order under Article 11 eviscerates Article 13 in its entirety. This result is impermissible under recognized precepts of contract interpretation. (*See HTRF Ventures, LLC v Permasteelisa N. Am. Corp.*, 190 AD3d 603, 609 [1st Dept 2021] [refusing to enforce a disclaimer provision to preclude a warranty period because it would render another provision meaningless]; *Eaglehill Genpar LLC v FPCG, LLC*, 188 AD3d 527, 529 [1st Dept 2020] [finding to follow the defendant's interpretation of the contract which would have rendered another clause meaningless].) Thus, it does not appear that a change order under Article 11 is the proper mechanism for granting an extension of time.

Plaintiff's reliance on Section 50(G) of the General Conditions is also unavailing. Section 50(G)(1)(a) plainly states that requests for time extensions shall be made in accordance with Article 13 of the Contract. Nowhere in Article 13, or even Section 4-03 of the PPB Rules, is a change order the contemplated method for granting a time extension.

Similarly, the language of Article 11 does not support plaintiff's position that the change orders conclusively demonstrate the City's fault for all Project delays. Article 11 contemplates that after a contractor submits a final verified statement of claims, DDC's Commissioner shall make a determination whether a compensable delay has occurred and the amount. If the parties agree a compensable delay has occurred and agree on the extent of damages, payment may be made by change order under Article 11.9. Critically, Article 11.5 does not allow recovery for non-compensable delays and states that any compensation shall be awarded, if at all, in the form of an extension of time to perform the work under Article 13. Plaintiff attempts, unpersuasively, to bypass the procedure outlined in Article 11 by arguing that DDC's issuance of seven post-substantial completion date change orders resolves the issue of delay. (NYSCEF 275, plaintiff's mem of law at 16.) But, as set out in Article 11.9, the Commissioner may issue a change order for delay only after an agreement on compensable delay and damages has been reached. There is no evidence that the parties have reached any such agreement.

Plaintiff's reference to *Ferreira Constr. Co. v City of New York* (2017 NY Slip Op 30453[U] [Sup Ct, NY County 2017] [Index No. 652458/2014]) is unhelpful. There, the court stated that the bid documents discussed how the changes in the 2008 Delay

Damages Pilot Standard Constructions Contract were meant to compensate contractors for delay, but ultimately dismissed the complaint because the plaintiff failed to bring the action within six months after substantial completion was achieved. (*Id.*, *2, 5). Significantly, the court noted that "an audit pursuant to Article 11 is a preliminary step in the determination of an Article 11 claim; it does not guarantee that the claim will be approved." (*Id.*, *12-13). Plaintiff does not claim that the engineering audit officer on this Project has performed a pre-audit under Article 11.9.

It is also apparent from reviewing the 19 change orders which had quantified time extensions totaling 1,057 consecutive calendar days that the primary purpose of each change order was to authorize payment for and to approve extracontractual work. Significantly, the following language appears immediately above the signature line in the "Contractor Approval" box on each change order form: "[s]ubmitted above is my cost proposal for contract change. The Contractor certifies that the cost and pricing data submitted are accurate, complete and current as of this date." (NYSCEF 247, COs [post-substantial completion] at 1). In the "Agency Approval" box, each change order form states: "[t]he amount of this contract is approved. Payment will be made in accordance with the agreement and shall not exceed the final authorized cost. Payment may not be made prior to registration of this contract change by the Comptroller's Office." (*Id.*) The time extension discussed on the second page of the change order form indicates that an extension was necessary to perform the extracontractual work, not that an extension was granted for delay attributed to the City or that the delay was compensable under Article 11.4. This comports with Article 25.3, which provides that the Contract price shall be adjusted by written change order.

Furthermore, the change orders do not indicate that an assessment had been made on whether there were concurrent delays under Article 13.4.

The court rejects plaintiff's contention that counsel's in-court concession is dispositive on the issue of delay. "A judicial admission [of a fact] is not itself dispositive but merely evidence of the fact admitted." (*MPEG LA, LLC v Samsung Elecs. Co., Ltd.*, 166 AD3d 13, 20-21 [1st Dept 2018] [internal quotation marks and citation omitted], *lv denied* 32 NY3d 912 [2018].) The City stated at an April 24, 2018 appearance before the court that change orders become part of the Contract under Article 25. (NYSCEF 272, tr at 18:22-19:3.) The City's "admission" is hardly remarkable and is even repeated. (See NYSCEF 317, Defendant's Memo of Law n. 4 at 10/40.) The "admission" is not meaningful because the fact that registered change orders form part of the Contract does not automatically translate to the City's liability for delay or whether those delays are compensable. Again, the primary purpose of each change order is to raise the original base price of the Contract to account for extracontractual work. A written change order ensures that plaintiff may bill the City for the extracontractual work, and plaintiff admits the Comptroller's registration of a change order allows it to get paid. (NYSCEF 242, Tartaro aff ¶17; NYSCEF 275, Plaintiff's Memo of Law at 11-12/32.) Further, plaintiff has not adequately explained why DDC elected to award plaintiff time extensions amounting to 630 consecutive calendar days in seven post-substantial completion change orders when, by plaintiff's own calaculation, the Project exceeded the original completion date by 623 days.

Plaintiff's assertion that the City waived its right to assess liquidated damages is not supported, as it ignores several clauses in the Contract. Under Article 13.7,

allowing a contractor to continue work after the completion date has passed does not constitute a waiver of the City's rights under the Contract. (NYSCEF 243, Contract at 54). Article 13.8.2(d) expressly reserves the City's right to assess liquidated damages even after a partial time extension is granted. (*Id.* at 55.) In the event the engineer prepares a written delay analysis related to an extension of time for substantial completion, Article 13.9.2 states that the City has not waived or relinquished its right to assess liquidated damages. (*Id.* at 55.) And Article 15.1 states that "[n]either the failure to assess liquidated damages nor the granting of any time extension shall operate as a waiver or release of any claim the City may have against the Contractor for either actual or liquidated damages." (*Id.* at 57.) Thus, plaintiff has not met its prima facie burden on summary judgment, and the motion is denied without regard to the sufficiency of the City's opposition.

Triable Issues of Fact Exist

Even assuming plaintiff satisfied its prima facie burden, the City has raised triable issues of fact sufficient to defeat summary judgment. First, there is an issue as to whether plaintiff is entitled to recover for a compensable delay. The City distinguished a time extension from a compensable delay. Under the Contract, a time extension allows a contractor to continue to work while reserving the contractor's right to seek delay damages. Even then, a contractor may recover only for compensable delay under Article 11.4, with damages payable by negotiated change order under Article 11.9, while Articles 11.5 and 13.10 allow a contractor to receive a reasonable extension of time for all other delays. None of the change orders establish whether the parties followed the

procedures in Article 11.9 resulting in an agreed upon compensable delay for which plaintiff is entitled to recover.

With respect to the revised Article 11 in the pilot Contract, the City raised a triable issue whether DDC may grant a time extension in a change order. Brue asserts that the revised article provides a mechanism by which agreed upon compensable delays may be paid, subject to audit as set forth in Article 11.9. (NYSCEF 279, Brue aff. ¶ 20.) Nothing in the revised article authorzied DDC to grant a time extension by change order. Brue further claims that DDC never issues change orders for time extensions in lieu of Approvals for Time Extension under Article 13, and that the time extensions referenced in the change orders submitted by plaintiff on the motion "were not intended as an acknowledgement by DDC of compensable delay nor were they used to supplant the contractually mandated procedure pursuant to Art. 13 to implement Partial Time Extensions and to analyze and approve a Final Time Extension." (*Id.* ¶¶ 19, 21.)

The City has also established that plaintiff's six partial time extensions pursuant to Article 13 preclude plaintiff's waiver argument. (NYSCEF 279, Brue aff. ¶ 14.) Each partial time extension included the following:

> "The City of New York 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. Also, it is understood that the time extension is granted only for the purpose of permitting continuation of contract performance."

(*See, e.g.,* NYSCEF 281, Certificates for Partial Time Extensions at 2). Crucially, this language does not support plaintiff's assertion that the City waived its right to seek liquidated damages.

There are also triable issues of fact as to the City's liability for all Project delays. Moreover, a partial time extension is not recognition by the City of its liability for Project delays. (*Tutor Perini Corp. v City of N.Y. Off. of Admin. Trials & Hearings Contract Dispute Resolution Bd.*, 2020 NY Slip Op 31376[U], *8 [Sup Ct, NY County 2020], *affd* 193 AD3d 665 [1st Dept 2021] ["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"]; *Matter of Framan Mech., Inc. v City of New York (Dept. of Envt. Protection)*, 2019 NY Slip Op 31486[U], *13 [Sup Ct, NY County 2019], *affd* 188 AD3d 455 [1st Dept 2020] [reasoning that a partial extension of time made for the purpose of expediting payment "does not excuse the contractor from any responsibility for delay or release the contractor from any potential claim for actual or liquidated damages"].) Thus, whether the City awarded time extensions to plaintiff is not dispositive of the delay issue.

As for the Certificate of Completion and Acceptance, the City has raised a triable issue of fact whether the certificate was ever issued. Article 44.1 of the Contract states that "[w]hen the **Work** in the opinion of the **Commissioner**, has been substantially but not entirely completed, he/she shall issue a certificate of **Substantial Completion**." (NYSCEF 243, Contract at 87.) Brue avers the certificate was a nullity as it was never issued to plaintiff (NYSCEF 279, Brue aff. ¶¶ 29-30), and plaintiff admits it obtained the certificate in discovery and not from DDC, directly. (NYSCEF 262, David Westermann [Westermann] affirmation ¶ 19.) Brue also states that DDC normally prepares the certificates as a project approaches final completion. (NYSCEF 279, Brue aff. ¶ 28.) In

this case, the certificate was prepared and executed before the engineer had prepared a delay analysis under Article 13. (NYSCEF 279, Brue aff. ¶¶ 29-30.)

Additionally, the City has raised an issue of fact whether the engineer's obligation to perform a delay analysis has been triggered. Once a request for a time extension for substantial completion and final completion payments is made, then under Article 13.9.2, the engineer must complete a written delay analysis to determine whether a delay is excusable. Brue claims that plaintiff has yet to achieve final completion or submit a Request for a Final Time Extension or a Requisition for Final Payment, which would trigger the engineer's delay analysis under Article 13.9.2. (NYSCEF 279, Brue aff. ¶¶ 2, 18.) Brue also observes that plaintiff claims it submitted a final verified statement on March 3, 2016, three months after the Project reached Substantial Completion. (*Id.* ¶ 9; NYSCEF 249, Final Verified Statement.) However, he notes that plaintiff did not submit proof of its delay damages in full until April 26, 2016. (NYSCEF 279, Brue aff. ¶ 9; NYSCEF 242, Tartaro aff at 7 n 17; NYSCEF 255, Final Verified Statement of Damages at 222.) Plaintiff commenced this action one month later, before the Commissioner's time to make a determination under Article 11.9 expired. (*See* NYSCEF 2, Compl. at 9.)

In addition, plaintiff claimed it is entitled to delay damages under Article 11.4.1.3 for the City's failure to grant it access to the Project site for more than 60 days. Tartaro states that DDC's Deputy Commissioner David Resnick told him to submit the delay claim, Delay Claim No. 1, to Turner for negotiation, but after interference from the Comptroller, DDC advised plaintiff that all delay claims would be addressed by the Comptroller after substantial completion. (NYSCEF 242, Tartaro aff. ¶¶ 13-14.) While

plaintiff complains DDC should have resolved Delay Claim No. 1, Article 11.1.3 states the "**Commissioner** *may* make a determination at any time after the **Contractor's** first submission of a statement of delay damages." (NYSCEF 243, Contract at 49). Thus, the Contract did not require DDC to resolve this claim before the Project reached substantial completion. In any event, the City has raised a triable issue of fact whether Delay Claim No. 1 is compensable. Article 11.5.3 provides, in part, that "[r]estraining orders, injunctions or judgments issued by a court which were caused … by third-parties" are non-compensable delays. (*Id.* at 51.) Here, the owner of the adjacent property north of the Project sought to enjoin construction of the garage; that litigation was not resolved in the City's favor until May 2011. (*See* NYSCEF 311, Email [May 6, 2011] at 2.)

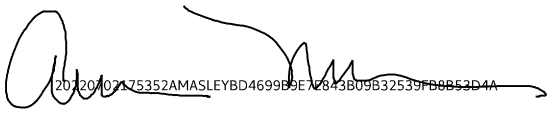
The City has also raised a triable issue of fact whether plaintiff, its subcontractors or sub-subcontractors or others were liable, in part, for at least some of the Project delays. Brue points to significant issues related to the work of plaintiff's electrical subcontractor, Barbaro Electric Co., Inc., plaintiff's structural foundation subcontractor, Hayward Baker, Inc. (HBI), and HBI's sub-subcontractor for pile driving and drilling work, Intercoastal Foundation & Shoring, Inc. (Intercoastal). (NYSCEF 279, Brue aff. ¶¶ 34-49.) The Project also encountered issues related to the installation and inspection of electrical service equipment owned by Consolidated Edison of New York Co., Inc. in the new building. (*Id.* ¶¶ 50-57.)

A triable issue of fact also exists whether the Comptroller's registration procedures caused Project delays, as plaintiff has suggested. Plaintiff claimed the Comptroller routinely delayed registering change orders, but Brue notes that plaintiff

admitted it performed pre-registration work on only 30 COs. (NYSCEF 279, Brue aff. ¶ 31.) It is unclear whether work on the 30 COs or, more importantly, on the seven post-substantial completion change orders affected the critical path of the Project.

Accordingly, it is

ORDERED that the motion brought by plaintiff DeMatteis/Darcon, Joint Venture for partial summary judgment on the issue of defendant the City of New York's liability (motion sequence no. 004) is denied.



7/2/2022
DATE

ANDREA MASLEY, J.S.C.

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