

**WSP USA Inc. v City of N.Y. Off. of Admin. Trials & Hearings**

2022 NY Slip Op 32552(U)

July 28, 2022

Supreme Court, New York County

Docket Number: Index No. 154047/2022

Judge: Arlene Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE BLUTH PART 14**

*Justice*

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WSP USA INC.,

Petitioner,

- v -

CITY OF NEW YORK OFFICE OF ADMINISTRATIVE  
TRIALS AND HEARINGS, CONTRACT DISPUTE  
RESOLUTION BOARD OF THE CITY OF NEW YORK,  
CITY OF NEW YORK, BRAD LANDER COMPTROLLER OF  
THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Respondents.

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INDEX NO. 154047/2022

MOTION DATE 07/27/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 21, 22, 23, 24, 27, 28, 29, 30, 31, 32

were read on this motion to/for ARTICLE 78.

The petition to reverse a January 10, 2022 decision by respondents is granted only to the extent that this proceeding is remanded for further proceedings on the merits of petitioner’s claims.

**Background**

Petitioner entered into a contract with respondent the New York City Department of Environmental Protection (“DEP”) in January 2017 to provide construction management services related to various wastewater and clean water projects throughout the city. The contract stated that the total amount to be paid to petitioner could not exceed \$6 million.

Respondents contend that beginning in early 2018 and continuing through the start of 2019, petitioner was removed as construction manager from each project to which it was

assigned due to unsatisfactory work. They point out that petitioner received an unsatisfactory rating for its job performance.

Petitioner argues that DEP improperly deducted amounts from invoices submitted by petitioner. Respondents paid a total of \$1,103,780.70 and deducted \$4,262,408. Petitioner filed a petition with respondent the Contract Dispute Resolution Board (“CDRB”) on February 17, 2021 and DEP subsequently moved to dismiss the petition. CDRB issued its final determination on January 10, 2022 dismissing the petition.

CDRB observed that “the City moved to dismiss the petition on the grounds that [the petition] is time-barred and because [petitioner] failed to follow the mandatory dispute resolution provisions in the contract and the Procurement Policy Board Rules” (NYSCEF Doc. No. 3 at 2). The decision noted that the “dispute involves partial payments by DEP on 17 invoices” (*id.* at 3). According to CDRB, DEP made 12 partial payments starting on May 13, 2019 and made the last payment on March 3, 2020 (*id.* at 2-3).

Petitioner apparently emailed DEP’s Program Manager on June 24, 2020 about the deductions taken off petitioner’s invoices and petitioner eventually filed a notice of claim with the Comptroller on December 10, 2020 (*id.* at 3). The Comptroller then asked petitioner to provide a copy of the notice of dispute filed with the DEP Commissioner and the DEP’s determination with respect to the notice of dispute (*id.*). CDRB insisted that petitioner admitted it had not filed a notice of dispute with DEP and instead petitioner focused on its appeal of its unsatisfactory rating issued by DEP (*id.*).

The Comptroller’s office denied petitioner’s claim on January 22, 2021 on the ground that petitioner failed to follow the dispute resolution procedure contained in the contract between petitioner and DEP (*id.*). That process required petitioner to file a notice of dispute within 30

days “of receiving written notice of the action or determination with which it disagreed” and that petitioner was then required to file a notice of claim with the Comptroller within 30 days of receiving the receipt of a decision by the head of DEP (*id.*).

CDRB found that “while petitioner appealed DEP’s unsatisfactory rating to DEP Commissioner Sapienza on February 14, 2019, said appeal is not a Notice of Dispute. The twelve-page document responds in detail to the evaluation, but only once does it briefly mention non-payment of invoices which it submitted on behalf of its contractors” (*id.* at 4). The decision continued “it is unclear when [petitioner] received the memoranda of partial payment. Thus, the later date of March 3, 2020, when DEP made its final partial payment, will be used as the trigger date for the 30-day timeframe” (*id.*). CDRB stressed that by that time DEP had withheld \$4.1 million from the \$5.8 million billed by petitioner and that the partial payments were agency actions that triggered the 30-day time period (*id.* at 4-5).

CDRB insisted that petitioner’s attempt to reach out to DEP personnel about the invoices did not extend the deadline in the contract for filing a notice of dispute (*id.* at 5). It found that the petition was time-barred because petitioner failed to follow the mandatory dispute resolution procedures (*id.* at 6).

Petitioner seeks to annul this determination and contends that DEP did not issue any written formal or final determinations which indicated final payment of the unpaid invoices. Petitioner argues that it filed a notice of claim pursuant to the contract on December 10, 2020. It argues that it was estopped from filing a notice of dispute because of DEP’s failures to respond to petitioner’s February 2019 appeal and petitioner’s extensive efforts to communicate about the unpaid balances on its invoices. Petitioner focuses on the fact that DEP agreed to look at the

invoices in communications from June 2020 and argues that its time to file a notice of dispute never began to run.

In opposition, respondents claims that the CDRB decision was rational and that the conclusion finding petitioner's claim as time-barred should not be disturbed. They point out that petitioner failed to present a notice of dispute to DEP as required by the contract and so the petition must be denied. Respondents argue that the timeframe was included in the contract and contractual provisions should not be ignored, especially where the provision is unambiguous. They maintain that petitioner failed to identify any basis upon which the Court could conclude that the CDRB decision was a violation of lawful procedure and asking the Court to reach a different conclusion is no reason to disturb the determination at issue here.

### **Discussion**

In an article 78 proceeding, “the issue is whether the action taken had a rational basis and was not arbitrary and capricious” (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*id.*). “If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable” (*id.*). “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

Section 12.03 of the contract between petitioner and DEP governs the resolution of disputes between the parties (NYSCEF Doc. No. 5). Section 12.03(D) (1) provides that “The Contractor shall present its dispute in writing (‘Notice of Dispute’) to the Agency head within

the time specified herein, or, if no time is specified, within thirty (30) days of receiving written notice of the determination or action that is the subject of the dispute” (*id.* at 79).

The “Agency Head” is then required to investigate the dispute and render a decision within thirty days after receiving the materials from the contractor (*id.* at 80). The contractor then has the option of presenting the dispute to the CDRB, but first must submit the dispute to the Comptroller (*id.*).

Petitioner filed a notice of dispute on April 28, 2021 (NYSCEF Doc. No. 13) with respect to the unpaid invoices. It is also clear that petitioner pursued a separate dispute about its unsatisfactory rating issued by DEP in February 2019. The question for this Court is whether it was rational for the CDRB to conclude that petitioner failed to comply with the procedural requirements to merit a consideration of petitioner’s claims on the merits. This Court finds that the CDRB’s decision was irrational and remands this action back to CDRB for a determination *on the merits* of the deductions taken out by DEP.

The CDRB decision found that the 30-day deadline for petitioner to file a notice of claim began to run on March 3, 2020—when the last payment was made by DEP to petitioner. The conclusion that the end of the payments from DEP constituted a “final determination” is belied by the extensive communications between petitioner and DEP that took place throughout 2020 and 2021 about the invoices. For instance, DEP sent a letter to petitioner in June 2021 asking for backup documentation concerning the April 2021 Notice of Dispute (NYSCEF Doc. No. 14). There is no indication in this letter that DEP considered the March 3, 2020 date from which the 30-day deadline should begin to run. There is also no suggestion in DEP’s October 1, 2021 correspondence with petitioner that DEP considered the unpaid invoices dispute to be time-barred under the terms of the contract (NYSCEF Doc. No. 16).

Central to the Court's finding is a February 3, 2022 letter (issued after the CDRB decision) from DEP (NYSCEF Doc. No. 18). In this communication DEP (a DEP employee with authority delegated by the DEP Commissioner) contends she was assigned to "review and render a determination regarding the April 28, 2021 Notice of Dispute" (*id.*). She added that "DEP acknowledges receipt of petitioner's response to DEP's October 1, 2021 document demands by email dated January 26, 2022. However, based upon the determination of the CDRB dated January 10, 2022 . . . which held that a notice of dispute had to be filed within 30 days of March 3, 2020, the notice of dispute dated April 28, 2021 is untimely and is denied as moot" (*id.*).

This letter makes clear that DEP agreed to consider the April 28, 2021 notice of dispute, engaged in a back and forth with petitioner and was seemingly prepared to issue some sort of determination until CDRB issued its determination. That makes little sense to this Court. DEP cannot engage in discussions with petitioner about the invoices for months and months while simultaneously claiming that petitioner's dispute is time barred. That is a classic bait-and-switch. While the Court recognizes that parties can seek to settle a dispute while also litigating an issue, DEP made no effort to assert its position at all. In other words, DEP could have "cordoned off" settlement negotiations while reiterating that it believed the April 2021 notice of dispute was time-barred. But it did not. Instead, it argued in an October 18, 2021 motion to dismiss before CDRB that petitioner's dispute was time-barred while also making petitioner submit additional documentation under the pretense of considering the notice of dispute. It seems as though the right hand didn't know what the left hand was doing.

The only fair resolution is to remand this proceeding to CDRB for a consideration of petitioner's claims on the merits. This Court has no interest in requiring DEP to pay petitioner

for substandard work (although the Court makes no finding about the quality of petitioner’s performance). But petitioner should have the opportunity, under these circumstances, to present its case to CDRB.

Accordingly, it is hereby

ADJUDGED that the petition is granted ONLY to the extent that the petition is remanded to respondent Contract Dispute Resolution Board of the City of New York for further proceedings that consider the merits of petitioner’s claims about the unpaid invoices and the Clerk is directed to enter judgment accordingly without costs or disbursements upon presentation of proper papers therefor.

7/28/2022

DATE



ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE