SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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INDEX NO. 150226/2023

MOTION DATE 05/05/2023

MOTION SEQ. NO. 001

In the Matter of

AMERICAN BRIDGE COMPANY,

Petitioner,

- v -

THE CONTRACT DISPUTE RESOLUTION BOARD OF THE CITY OF NEW YORK, THE CITY OF NEW YORK, acting by and through its Department of Transportation, and YDANIS RODRIGUEZ, as Commissioner of the Department of Transportation of the City of New York,

Respondents.

DECISION, ORDER, and JUDGMENT

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

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

In this proceeding pursuant to CPLR article 78, the petitioner seeks judicial review of a September 7, 2022 New York City Contract Dispute Resolution Board (CDRB) determination denying its application for an award of additional compensation pursuant to its contract with the New York City Department of Transportation (NYC DOT). That contract obligated the petitioner to perform the labor and furnish the equipment and material required to replace the upper roadway of the Ed Koch Queensboro Bridge. The petitioner, which had won the right to enter into the contract pursuant to a public bidding procedure, had requested that the CDRB award it additional costs that it had incurred after the bridge's actual measurements differed from the approximate pre-bid measurements communicated to it by the NYC DOT. In this regard, the petitioner claimed that the costs were required to pay for modifications that it needed to make to the protective shielding between the upper and lower roadways of the bridge, as mandated by the contract. The respondent CDRB answered the petition and the respondents City of New

York and NYC DOT Commissioner Ydanis Rodriguez (together the City respondents) separately answered the petition, denying all claims that the challenged determination was arbitrary and capricious or affected by an error of law. The City respondents also filed the administrative record. The petition is denied, and the proceeding is dismissed.

In November 2017, the NYC DOT solicited bids for the reconstruction of the upper roadway of the Ed Koch Queensboro Bridge. Prospective bidders, including the petitioner, received a bidding package that included standard construction project terms, project specifications, drawings, special provisions, and additional information that was to be incorporated into the contract. While bidders were allowed to tour the bridge, the NYC DOT determined that traffic lanes could not be closed to allow a bidder or its agents to take actual measurements during the pre-bid process. On January 10, 2018, in response to pre-bid questions, bidders were provided, in Addendum No. 4 to the contract, with information respecting the vertical clearance of the lower level of the bridge. Specifically, bidders were informed that the NYC DOT's review of the New York State Department of Transportation bridge inventory reflected that there was an approximately 14' 9" vertical clearance along the curb line of the lower inner roadways. The addendum expressly provided that "[t]he awarded Contractor is to verify actual dimensions as needed."

The parties agree that the petitioner, in calculating the bid that it submitted to the NYC DOT, relied on the 14' 9" vertical clearance measurement provided in response to the pre-bid question. There is nothing in the administrative record that suggests that the petitioner verified the actual dimensions at any time prior to the award of the contract.

The petitioner was the successful bidder. On June 26, 2018, or more than five months after being provided with the approximate vertical clearance of the lower roadway, the petitioner thus entered into a contract with the NYC DOT to provide the labor and material necessary to replace the upper roadway of the Ed Koch Queensboro Bridge for the lump sum of $274,145,000. Specification 619.29070129 required the petitioner to "design, furnish, fabricate,

erect, maintain, relocate, and dispose of temporary protective shielding." The temporary protective shielding was to be installed from the upper deck of the bridge to protect motorists and workers on the lower level of the bridge from falling or scattering construction debris.

According to the petitioner, after it incorporated the pre-bid measurement, Drawing No. SE-2, and the vertical clearance requirements set forth in Special Provision No. 28, it determined that "the elevation of the bottom flange of the existing floor beam to be 9 to 12 inches above the 14' 9" minimum vertical clearance along the curb line," and consequently designed the shield to allow for 9 to 12 inches of sag. The petitioner included in its bid the cost of a subcontracted "Safespan" system that would allow the safety shield to hang from permanent stringers, with an anticipated sag of 8 inches, without infringing on the minimum vertical clearance. On August 31, 2018, and thus after it had been awarded the contract, the petitioner determined that the actual measurement of the vertical clearance between the upper and lower roadways was 14' 3 11/16," that is, a clearance that was slightly more than 5½ inches shorter than anticipated, and "that the bottoms of the floor beams [were] not horizontal," but instead dipped at the center of the bridge, further reducing the "sag envelope" to only 4 inches instead of the anticipated 8 inches. The petitioner claimed that, upon taking these measurements, its intended plan was no longer feasible. It thus submitted a revised design plan to the NYC DOT to reduce the sag envelope to 4 inches by decreasing the tie-up spacing and hanging the shield to other stringers, which it claimed caused it to incur additional labor, time, and costs to perform.

In an e-mail dated September 20, 2018, the petitioner placed the NYC DOT on notice that there had been what it characterized as a "change in existing condition" affecting the vertical clearance requirements that would, in turn, affect the means and methods of completing the task, thus resulting in compensable delays. The NYC DOT's Engineer in Charge responded in a letter dated February 15, 2019, in which he stated that the petitioner was responsible for

determining and maintaining the minimum vertical clearance throughout the roadway cross section in accordance with the contract, and was responsible as well for the means and methods needed to install protective shielding.

On March 14, 2019, the petitioner filed a Notice of Dispute with the NYC DOT Commissioner, requesting "a price adjustment for Extra Work" caused by its reliance on pre-bid measurements that had been provided to it by the NYC DOT. In the notice, it requested

> "a Commissioner's Determination on the merits of a compensable delay . . . [because] the reduction in the minimum vertical clearance between the lower and upper roadways delayed the preparation and ultimate acceptance of American Bridge's Temporary Protective Shielding submittal. The delay in the Submittal led to a delay in the fabrication, procurement and ultimately the installation of the shielding system. These delays could delay the Project and have required American Bridge to mitigate any potential delays by inefficiently resequencing work"

On May 1, 2019, the NYC DOT's Associate Commissioner and Chief Contracting Officer affirmed the Engineer's determination, noting that, under the terms of the contract, the petitioner was required to "verify elevations and clearances prior to erecting scaffolding or protective shields," and that the responsibility for installing the protective shields had been imposed upon the petitioner. On May 30, 2019, the petitioner served a Notice of Claim upon the New York City Comptroller's Office, reiterating the claim for compensation for extra work, claiming that it already had incurred approximately $700,000 in additional costs, and expected to incur total costs for "extra work" in an amount between $4,500,000 to $7,100,000 by the end of the project. On February 26, 2020, the Comptroller denied the petitioner's claim, concluding that the petitioner had not been misled about the measurements of the vertical height clearances.

On May 1, 2020, the petitioner filed a petition with the CDRB, which operates, in part, under the auspices of the New York City Office of Administrative Trials and Hearings (OATH). On January 14, 2022, the NYC DOT filed its response to the petition. On March 4, 2022, the petitioner filed reply papers. The CDRB heard oral argument on the administrative petition on July 26, 2022. It did not take evidence at the hearing, but instead considered only the

administrative pleadings and documentation that previously had been submitted to it, which included the contract, relevant addenda, contract specifications, photographs of the bridge and work performed on it, drawings, and the prior determinations of the NYC DOT Engineer and the Comptroller. The petitioner argued that there were no factual issues in dispute, but that the case revolved around contract interpretation and contract law. It asserted that the NYC DOT was not permitted to rely on any purported exculpatory clause in the contract, and that the petitioner was entitled to rely on the proposed specifications provided to it in the bidding process. Specifically, the petitioner contended that

> "[i]n this case, what we have is the latter, where the contractor was to verify certain conditions in the field before proceeding with the work, in this case, installation of the SafeSpan, SafeSpan System. And if the conditions varied from what was shown on the plans and specs, the obligation of the contractor was to bring that to the Agency's attention so it could be addressed. But, if it required additional work, it was the obligation of the Agency under the contract and at law to pay for that additional work that resulted from the error in the plans and specifications."

It further argued that it did not assume an obligation under the contract to "determine the dimensions in the field." Rather, the petitioner claimed that it was the NYC DOT's obligation to provide accurate measurements prior to accepting the bid and entering into the contract. The petitioner attempted to distinguish prior CDRB determinations in which a contractor was given the opportunity to verify measurements and dimensions of a City project prior to the bidding process or the acceptance of the bid, asserting that, in this case, it was only given the opportunity to verify the measurements after it made its bid, albeit before the time when its bid was accepted. The NYC DOT countered that, in this matter,

> "the plans contained statements that put the, put the Petitioner or the contractor on notice that the existing site conditions are uncertain. But then, also, the public owner provides all the information that it possesses with regard to those site conditions. Right? So that's exactly what happened in this case. And in that situation, it's the standard of good faith. Was anything concealed, was anything held back or was anything representation in good faith? And Petitioner here cannot how any action taken by DOT that shows a concealment of any information that DOT knew or any action it took in bad faith.

> "Additionally, the explanations and the communications to American Bridge and to all bidders in this matter put them extremely on notice that the plans they were looking at were not measurements that were taken by DOT contemporaneously in the field, but were original documents that were comprised of the only information that DOT had with regard to the features at the site."

In this regard, the NYC DOT quoted from a statement including with the relevant drawing, which explicitly asserted that

> "[t]he dimensions and elevations shown on the plans have been obtained from the original drawings and shop drawings from the original structure and may vary from the actual dimensions and elevations as they exist on the field."

The NYC DOT thus argued that it should not be obligated to pay for any purported extra work or modifications that the petitioner was required to undertake to assure that the protective shielding properly covered the lower roadway of the subject bridge. Rather, it contended that the petitioner had both the opportunity and the obligation under the contract to take proper field measurements before it commenced the fabrication of the shielding system. Specifically, it asserted that, under the circumstances presented, the modifications did not constitute "extra work" in the first instance, but work that was required by the terms of the contract itself.

In a determination dated September 7, 2022, the CDRB denied the administrative petition. It reasoned that

> "[t]his tribunal has consistently held that 'statements . . . made on which the bidder, because of the language of the contract, cannot rely,' but 'are made in good faith' will result in the bidder assuming the risk of their accuracy. *American Wrecking Corp. of New Jersey v. Dep't of Sanitation*, OATH Index No. 229/04, mem. dec. at 8 (Dec. 22, 2003) (claim for extra compensation denied where contractor had incomplete information at the time of bid and therefore assumed the risk of achieving demolition and the removal of structures); *see Angelakis Construction Corp. v. Dep't of Environmental Protection*, OATH Index No. 3525/09, mem. dec. at 8 (Jan. 19, 2010) (claim for extra compensation denied because incorrectly estimating the weight of material to be removed does not constitute an unforeseen condition).
>
> "Here, DOT specifically stated that the measurement given was 'approximate' and taken from the New York State Bridge Inventory with additional instruction that the awarded contractor was to verify the measurements as needed. "Moreover, throughout the documents provided to the bidders in the contract, there were several instructions to verify and ensure minimum vertical clearance measurements. Section 1 of Special Provisions of the Contract states:

> 'The Contractor's attention is directed to the fact that, due to the nature of rehabilitation projects, the extent of rehabilitation Work cannot always be accurately determined prior to the commencement of Work. The Contract documents have been prepared, based upon field inspection and other information available at the time. Actual field conditions may require modifications in construction details and Work quantities. The Contractor shall perform the Work to meet field conditions.

"Additionally, Section 10 of the Special Provisions, entitled 'Existing Dimensions' provides:

> 'The Contractor shall verify and shall be responsible for the accuracy of all dimensions and elevations of the project site and existing structures indicated on the plans and shall notify the Engineer in writing to any errors or discrepancies that may be discovered therein. *The Contractor shall have no claim for damages that may result from an error or omission in regard to the aforementioned dimensions and elevations indicated on the plans*'"

(emphasis added) (some citations omitted). The CDRB further noted that Special Provision No. 28 of the contract recited that "[t]he Contractor shall verify elevations and clearances from the construction bench marks [sic] prior to erecting scaffolding or protective shields in order to [e]nsure that the minimum vertical clearance will be maintained."

The CDRB also explained that the petitioner was responsible for the means and methods of designing and installing the protective shielding, and chose to design a safety shield with an anticipated sag of eight inches. In light of that obligation, the CDRB found unpersuasive the petitioner's contention that it bore no responsibility when its initial design failed to achieve the requirements of the contract. In this regard, the CDRB distinguished the instant matter from the situation described in the decision of the Appellate Division, Third Department, in *CGM Construction, Inc. v Sydor* (144 AD3d 1434 [3d Dept 2016]). The CDRB noted that, in the *CGM* case, the contractor followed a design specification agreement and, thus, was not liable to the owner for defects in renovation work, while, in the instant matter, which involved a "performance contract" that allowed the contractor discretion to choose materials and methods necessary to perform the work, the contractor was responsible for those choices.

This CPLR article 78 proceeding ensued.

Where, as here, an administrative determination is made, and there is no statutory requirement of a trial-type hearing, that determination must be confirmed unless it is arbitrary and capricious, affected by an error of law, or made in violation of lawful procedure (*see* CPLR 7803[3]; *Matter of Madison County Indus. Dev. Agency v State of N.Y. Auths. Budget Off.*, 33 NY3d 131, 135 [2019]; *Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523, 528 [2018]; *Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435, 435 [1st Dept 2015]; *Matter of Batyreva v New York City Dept. of Educ.*, 50 AD3d 283, 283 [1st Dept 2008]; *Matter of Rumors Disco v New York State Liquor Auth.*, 232 AD2d 421, 421 [2d Dept 1996]; *see also* 9 RCNY 4-09 [applying the same standard to judicial review of determinations by the CDRB]). This standard of review has repeatedly been applied to the CDRB's determinations as to whether a contractor was entitled to compensation for "extra work" pursuant to a contract with a City agency (*see Matter of Tutor Perini Corp. v City of N.Y. Off. of Admin. Trials & Hearings Contract Dispute Resolution Bd.*, 193 AD3d 665, 666 [1st Dept 2021]; *Matter of LAWS Constr. Corp. v Contract Dispute Resolution Bd.,* 145 AD3d 523, 524 [1st Dept 2016]). Inasmuch as the petitioner made no allegations that the CDRB's determination was made in violation of lawful procedure, the CDRB's determination to deny the petitioner's administrative appeal must be confirmed unless it was arbitrary and capricious or affected by an error of law.

A determination is arbitrary and capricious where it is not rationally based, or has no support in the record (*see Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624, 624 [1st Dept 2015]), or where the decision-making agency fails to consider all of the factors it is required by statute to consider and weigh (*see Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604, 608 [2d Dept 2008]). Stated another way, a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Consequently, an agency determination is arbitrary and capricious where the agency provides only a "perfunctory

recitation" of relevant statutory factors or other required considerations as a basis for its conclusions (*Matter of BarFreeBedford v New York State Liq. Auth.,* 130 AD3d 71, 78 [1st Dept 2015]; *see Matter of Wallman v Travis*, 18 AD3d 304, 308 [1st Dept 2005] ["perfunctory discussion"]), provides no reason whatsoever for its determination (*see Matter of Rhino Assets, LLC v New York City Dept. for the Aging, SCRIE Programs*, 31 AD3d 292, 294 [1st Dept 2006]; *Matter of Jones v New York State Dept. of Corrections & Community Supervision*, 2016 NY Misc LEXIS 15778, *1-2 [Sup Ct, Erie County, Jul. 28, 2016]), or provides only a post hoc rationalization therefor (*see Matter of New York State Chapter, Inc., Associated Gen. Contrrs. of Am. v New York State Thruway Auth*., 88 NY2d 56, 756 [1996]; *Matter of L&M Bus Corp. v New York City Dept. of Educ*., 71 AD3d 127, 135 [1st Dept 2009]).

> "Notably, a fundamental principle of administrative law long accepted limits judicial review of an administrative determination solely to the grounds invoked by the respondent, and if those grounds are insufficient or improper, the court is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis. Consequently, neither Supreme Court nor this Court may search the record for a rational basis to support respondent's determination, or substitute its judgment for that of respondent"

(*Matter of Figel v Dwyer*, 75 AD3d 802, 804-805 [3d Dept 2010] [internal quotation marks and citations omitted]).

"Courts have rarely singled out error of law by name . . . as a question for consideration in an Article 78 proceeding" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 7803:1). "The question of whether an administrative agency's determination is affected by an error of law is often implicit in the nature of the grievance, and will often turn on the underlying substantive law applicable to the determination" (*Matter of Held v State of New York Workers' Compensation Bd.,* 2008 NY Slip Op 52741[U], *7, 2008 NY Misc LEXIS 10881, *20-21 [Sup Ct, Albany County, Jul. 7, 2008]; *see also* 14-7803 Weinstein-Korn-Miller, NY Civ Prac P 7803.01[3]). Hence, an administrative determination is affected by an error of law where the agency incorrectly interprets or improperly applies a statute, regulation, or rule (*see Matter of New York State Pub. Empl. Relations Bd v Board of Educ. of City of Buffalo,*

39 NY2d 86, 92 [1976]; *see generally Matter of CVS Discount Liquor v New York State Liq. Auth.*, 207 AD2d 891, 892 [2d Dept 1994]), or where its determination violates some other statutory or constitutional provision (*see Matter of New York State Pub. Empl. Relations Bd v Board of Educ. of City of Buffalo,* 39 NY2d at 93 [Fuchsberg, J., concurring] ["an order which is specifically and expressly forbidden by . . . statute is an error of law"]).

The CDRB rationally interpreted the subject contract to conclude that the petitioner was given the opportunity and had the obligation to take its own field measurements, either before its bid was accepted, or after the bid had been accepted but before it commenced fabrication of the subject protective shielding. It rationally concluded that the contract did not contain a clause exculpating the NYC DOT for any acts or omissions, and that, in any event, the NYC DOT made no misrepresentations as to the actual measurements of the vertical clearance between the lower and upper roadways. The CDRB also rationally determined that the petitioner's need to modify the protective shielding apparatus in light of the actual measurements of vertical clearance did not constitute "extra work," but, rather, was inherent in the description of the petitioner's obligations under the subject contract.

Nor has the petitioner established that the CDRB's determination was affected by an error of law. As the CDRB correctly explained, in the context of a construction contract, "statements may be made on which the bidder, because of the language in the contract, cannot rely," and that "if they are made in good faith [the bidder] takes the risk of their accuracy" (*Foundation Co. v State of New York*, 233 NY 177, 185 [1922]; *see Conduit & Foundation Corp. v State of New York*, 52 NY2d 1064, 1066-1067 [1981] [denying contractor's claim against the State for extra compensation due to alleged inaccurate plans because the contract "cautioned that these locations (gas, electrical lines, etc.) are not guaranteed nor is there any guarantee that all such lines in existence, within the contract limits, have been shown on the plans"]). Where, as here, the NYC DOT "made no misrepresentations and withheld no information, the p[etitioner] [i]s not entitled to extra compensation" (*All County Paving Corp. v Suffolk County*

Water Auth., 20 AD3d 438, 438 [2d Dept 2005] [contract specifications provided that there was "no guarantee that unknown, adverse, conditions [did] not exist underground in the vicinity of the drill site" and, hence, the contractor bore the risk of encountering unexpected subsurface soil conditions]).

The court rejects any argument that the petitioner may have that its "time was too limited to make an in-depth inspection" of the bridge, as that is what the petitioner "obligated itself to do by signing the contract" (*Costanza Constr. Corp. v City of Rochester*, 147 AD2d 929, 929 [4th Dept 1989]; *see IFD Constr. Corp. v Corddry Carpenter Dietz & Zack*, 253 AD2d 89, 94 [1st Dept 1999]). In any event, "[e]ven where a complete investigation [of the actual site conditions] is not possible," where "the [agency] withheld no information, and misrepresented nothing," and "[t]here was no basis to conclude that the City was in a better position to estimate the [actual conditions] than was" the contractor, the contractor will bear the costs of conforming its performance to its obligations under the contract (*Angelakis Construction Corp. v Department of Envtl. Protection*, OATH Index No. 3525/2009, 2010 NY OATH LEXIS 404, *33-34 [Jan. 19, 2010])

The petitioner's remaining contentions are without merit.

Accordingly, it is

ORDERED that the petition is denied; and it is

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.

8/18/2023
DATE

JOHN J. KELLEY, 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**