SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ROCKMORE CONTRACTING CORP.,

Petitioner,

- v -

CONTRACT DISPUTE RESOLUTION BOARD OF THE CITY OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION

Respondent.

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INDEX NO. 159703/2021

MOTION DATE 02/04/2022[1]

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, 30, 31, 32

were read on this motion to/for Article 78.

The petition to vacate a decision by respondent the Contract Dispute Resolution Board ("CDRB") is denied.

Background

This proceeding arises out of a decision by CDRB issued on June 25, 2021 (NYSCEF Doc. No. 3). CDRB explains that this dispute concerns petitioner's demand for additional compensation relating to a construction contract for the rehabilitation of a community center in Manhattan (*id*. at 1). Petitioner filed nine petitions arising out of its requests for additional monies.

Respondent the New York City Department of Design and Construction ("DDC") moved to dismiss before the CDRB on the grounds that petitioner waived its claims by not following the

[1] Although this proceeding was transferred to the part this week, it is only right for someone to acknowledge and apologize for the lengthy delay in the resolution of this proceeding. And so the Court apologizes, on behalf of the court system, that it took so long to decide this special proceeding.

procedure in Article 44 of the parties' contract (*id*. at 2). DDC also argued that petitioner had failed to provide detailed time and material records (*id*.).

CDRB noted that DDC issued a substantial completion payment of "$419,215.29 for contract work and $193,047.47" related to change orders in March 2019 (*id*. at 3). CDRB asserted that Article 44 of the contract required petitioner to submit a substantial completion requisition (*id*. at 3-4). It concluded that "that the change order log attached to its Final Verified statement was insufficient under Article 44 of the Contract, by failing to provide an itemized statement and breakdown of the amount claimed for each such delay as required" (*id*. at 4).

CDRB noted that the final verified statement from petitioner included only "a cursory description of the work performed along with the submitted cost" (*id*.). It added that petitioner "failed to reserve its claims in its Final Verified Statement because the attached log did not adequately identify 'the various items of labor and materials included,' for the change orders as called for in Article 44.2.1 of the Contract. These cursory descriptions are insufficient and do not comply with the requirements of the Contract. Moreover, the submitted value is not equivalent to the alleged value for each item. As a sophisticated contractor, who secured a $18.7 million project with DDC, [petitioner] should have understood the Contract's waiver provisions and specificity requirements" (*id*. at 5).

CDRB explained its rationale that "if [petitioner] were permitted to reserve it claims with vague and incomplete submissions, it would not only undermine, but also conflict with the purpose of Article 44, which is to provide DDC with a clear statement and breakdown, so that it can investigate each claim. This approach would shift the burden, from the contractor to the agency by requiring the agency to ascertain what specific claims the contractor intended to reserve. The Contract squarely places the burden on the contractor to reserve its claims with the

contractual requirement of specificity" (*id*. at 6). It also noted that petitioner accepted the substantial completion payment which, under the contract, operates as a waiver of any claims (*id*.).

CDRB added that petitioner failed to submit proper time records with respect to two change orders and this was an additional ground for dismissal of petitioner's claims for these specific tasks (*id*. at 7).

Petitioner insists that its final verified statement of claims complied with Article 44 of the contract and that it did not waive its right to seek payment under this statement. It emphasizes that it submitted notices of dispute to DDC prior to submitting the final verified statement of claims. It insists that the CDRB improperly relied on a portion of Article 44 that related solely to delay and that this dispute should be remanded for further proceedings as it was not required to submit an itemized statement. Petitioner also claims it properly submitted time and material records with respect to two specific change orders.

In opposition, DDC (respondent the City of New York joins in these papers) contends that petitioner secured a contract for this work for $18.7 million and ended up receiving over $25 million for the project. It contends that CDRB rationally concluded that the change orders only included minimal descriptions for each additional amount requested. DDC focuses on the statement submitted by petitioner (which included more than 250 change orders) and observes that it simply does not provide any details about the labor or materials included in each request.

DDC insists that petitioner clearly failed to comply with Article 28 of the contract regarding time and labor records with respect to two change orders and that DDC's alleged actual notice of the claims is irrelevant because strict compliance with the contract is required.

CDRB submitted an answer but did not take a position in this proceeding.

In reply, petitioner argues that CDRB's decision was made without any sound basis. It contends that CDRB adopted DDC's erroneous caselaw citations and that it properly asserted claims for extra work. It also insists that DDC never disputes the fact that it had actual knowledge of all of the claims at issue prior to petitioner's submission of the final verified statement.

Discussion

"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" (*Start El., Inc. v City of New York*, 104 AD3d 488, 488, 961 NYS2d 119 [1st Dept 2013] [internal quotations and citation omitted]).

The Court denies the petition as CDRB's decision was inherently rational. Article 44 of the contract required that:

> "A Final Verified Statement of 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 fur each" (NYSCEF Doc. No. 4, ¶ 44.2.1).

There is no dispute that petitioner was required to submit a statement that identified the "various items of labor and materials included therein, and the alleged value of each item." CDRB rationally concluded that submitting 250 change orders with vague descriptors did not satisfy petitioner's obligation under the contract. This submission (NYSCEF Doc. No. 16) shows that petitioner did not submit anything to identify the labor and materials for these items.

For instance, petitioner sought over $10,000 to "install 24 temporary upright heads." Nothing is included about the labor required for that or the materials.

CDRB cited more examples of the vague and conclusory items for which petitioner sought additional payments. "For example, Rockmore described the work performed under Change Order No. 156 as "Additional Asphalt", Change Order No. 227 as "Stair 1 4th Floor Ceiling Overhang" and Change Order No. 236 as "Damage from Coupon Rack." Similar descriptors were used for the other change orders listed in the log" (NYSCEF Doc. No. 3 at 4).

To be sure, petitioner was right to observe that CDRB should not have highlighted the fact that there was no itemized statement as, under a plain reading of the above cited provision of the contract, that requirement only applied to claims arising out of a delay. But that did not transform petitioner's submission into one that complied with the contract. Moreover, CDRB specifically noted that there was only a "cursory description of the work performed" and that petitioner's log did not "adequately identify 'the various items of labor and materials included'" (NYSCEF Doc. No. 3 at 4-5). In other words, CDRB did not rely solely on the lack of an "itemized statement" and cited to petitioner's indisputable failure to comply with this section of the contract. Petitioner clearly did not submit anywhere near the sufficient information necessary to permit DDC to investigate the extra payments petitioner was demanding.

The Court also finds that CDRB's alternative basis for dismissing two of petitioner's nine complaints on the ground that petitioner failed to comply with Article 28's time and record submission requirements was rational (NYSCEF Doc. No. 3 at 6-7). It rationally concluded that petitioner failed to strictly comply with the contract's requirements (*id.*).

And, critically, the contract provided that "The Contractor is warned that unless such claims are completely set forth as· herein required, the Contractor upon acceptance of the

Substantial Completion payment pursuant to this: article, will have waived any such claims" (NYSCEF Doc. No. 4, ¶ 44.2.1[a]). The Court is unable to find that CDRB's ultimate conclusion that petitioner waived its claims was irrational.

With respect to the actual notice issue, the Court finds that CDRB's decision was rational as well as it required strict compliance with the terms of the contract. Petitioner's claims that DDC has actual notice is not a basis upon which the contractual obligations could be excused (*Hudson Ins. Co., Inc. v City of New York*, 170 AD3d 622, 623, 96 NYS3d 558, 96 NYS3d 558 [1st Dept 2019] [noting that alleged representations about the contract's notice requirements did not excuse the failure to comply with the contract's strict notice requirements]). And the Court observes that the instant contract contained a merger clause (Article 73) which means that petitioner cannot avoid the contract's obligations (*id.*).

Accordingly, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements.

3/21/2024
DATE

ARLENE P. BLUTH, 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