

**Unionport Constructors, JV v Contract Dispute
Resolution Bd. of the City of N.Y.**

2024 NY Slip Op 31642(U)

May 9, 2024

Supreme Court, New York County

Docket Number: Index No. 160766/2022

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART 61M

Justice

-----X

UNIONPORT CONSTRUCTORS, JV,

Petitioner,

For a Judgment Pursuant to CPLR Article 78 of the Civil Practice Law and Rules

INDEX NO. 160766/2022

MOTION DATE 07/07/2023

MOTION SEQ. NO. 001

- v -

CONTRACT DISPUTE RESOLUTION BOARD OF THE CITY OF NEW YORK, CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondents.

DECISION, ORDER and JUDGMENT

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 35, 36, 37

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

Petitioner Unionport Constructors, JV bring this CPLR article 78 proceeding to annul, vacate and reverse a determination made by respondent Contract Dispute Resolution Board of the City of New York (CDRB) dated August 22, 2022, which denied as time-barred petitioner’s application challenging a determination made by respondent New York City Department of Transportation (DOT) regarding its request for additional compensation.

Background

In July 2017, DOT, acting on behalf of respondent City of New York (City) (together, City), and petitioner entered into contract no. 2017427410/HBX1131 (the Contract) for the replacement of the Bruckner Expressway over Westchester Creek (the Project) for a contract price of \$231,760,052.20 (NY St Cts Elec Filing [NYSCEF] Doc No. 1, petition ¶¶ 11-12;

NYSCEF Doc No. 19, City answer ¶ 49). The Contract contains a broad dispute resolution provision in Article 27. It provides as follows:

“27.1 All disputes between the City and the Contractor of the kind delineated in this Article 27.1 that arise under, or by virtue of, this Contract shall be finally resolved in accordance with the provisions of this Article 27 and the PPB Rules. This procedure for resolving all disputes of the kind delineated herein shall be the exclusive means of resolving any such disputes.

...

27.1.2 This Article 27 shall apply only to disputes about the scope of Work delineated by the Contract, the interpretation of Contract documents, the amount to be paid for Extra Work or disputed work performed in connection with the Contract, the conformity of the Contractor’s Work to the Contract, and the acceptability and quality of the Contractor’s Work; such disputes arise when the Engineer, Resident Engineer, Engineering Audit Officer, or other such designee of the Commissioner makes a determination with which the Contractor disagrees.

...

27.2 All determinations required by this Article 27 shall be made in writing clearly stated, with a reasoned explanation for the determination based on the information and evidence presented to the party making the determination. Failure to make such determination within the time required by this Article 27 shall be deemed a non-determination without prejudice that will allow application to the next level.

...

27.4 Presentation of Disputes to Commissioner
Notice of Dispute Agency Response. The Contractor shall present its dispute in writing (‘Notice of Dispute’) to the Commissioner within thirty (30) Days of receiving written notice of the determination or action that is the subject of the dispute” (NYSCEF Doc No. 5, petition, exhibit 2 at 42).

After construction on the Project commenced, a dispute arose over payment for excavation and backfill work. Contract item 206.03, titled “Conduit Excavation and Backfill including Surface Restoration” (NYSCEF Doc No. 5, petition, exhibit 3), set a unit price of \$377 per linear foot for such work (NYSCEF Doc No. 1, ¶ 14). After a progress meeting with DOT on December 4, 2019, petitioner, by email the same date, requested additional compensation

under Contract item 206.03 for excavation and backfill related to the installation of lighting and traffic conduits it had completed between March 21 and November 6, 2019 (NYSCEF Doc No. 19, ¶ 50; NYSCEF Doc No. 23, City answer, exhibit D). DOT's Deputy Director, Movable Bridges, denied petitioner's request by letter dated December 9, 2019 (the December 9 Letter), writing, in pertinent part:

“Please note that when installation of conduits requires excavation, backfill and surface restoration, payments will be made under the Contract Item 206.03. However, when conduit is installed in an area where the surface restoration is paid under a different item or not required, then the Contract Item 206.0201 - Trench and Culvert Excavation will be applicable” (NYSCEF Doc No. 7, petition, exhibit 4).

Contract item 206.0201 for “Trench and Culvert Excavation” set a unit price of \$8.33 per linear foot (NYSCEF Doc No. 1, ¶ 17).

By letter dated December 18, 2019, petitioner informed DOT that it disagreed with DOT's position, and repeated its request for payment under Contract item 206.03 (NYSCEF Doc No. 8, petition, exhibit 5). DOT's Deputy Director, Movable Bridges, responded to petitioner by letter on January 31, 2020. The letter referred petitioner to DOT's earlier December 9 Letter on the same subject and added that if petitioner did not agree with DOT's position as had been set forth previously, then “[petitioner] can pursue the matter further in accordance with protocol established in Article 27 of the Contract” (NYSCEF Doc No. 9, petition, exhibit 6).

On February 13, 2020, petitioner submitted a written Notice of Dispute to DOT in accordance with Article 27 of the Contract (NYSCEF Doc No. 10, petition, exhibit 7 at 1). In the Notice of Dispute, petitioner stated that it disagreed with DOT's position that excavation of lighting and traffic conduits be paid under Contract item 206.0201 instead of Contract item 206.03 (*id.*). Petitioner asserted that it was entitled to \$553,374 in additional compensation,

which represented the difference between payment under the two Contract items for completing 2,550 linear feet of excavation for lighting and traffic conduits work (*id.* at 2). On July 29, 2020, DOT's Associate Commissioner and Agency Chief Contracting Officer, as the Commissioner's designee, issued an agency determination denying petitioner's request for additional compensation for payment under Contract item 206.03 instead of Contract item 206.0201 (NYSCEF Doc No. 11, petition, exhibit 8 at 1-2). In denying the request, DOT's Associate Commissioner wrote:

“Item 206.03 contemplates Conduit excavation, backfill and surface restoration. Contractor was paid under Item 206.03 whenever contractor performed surface restoration along with excavation and backfilling. However, when a conduit is installed in an area where the surface restoration is paid under a different item or not required, then Contract item 206.0201 Trench and Culvert Excavation is applicable. NYCDOT do[es] not consider there is any merit in Contractors claim to get paid under Item 206.03, since no Surface restoration work was needed nor [did] UNIONPORT JV perform[] Surface restoration work” (*id.* at 1).

The Associate Commissioner's letter further advised that plaintiff could appeal the agency's final determination and submit a notice of claim to the Comptroller of the City of New York within 30 days of receipt of the decision (*id.* at 2).

Petitioner submitted a notice of claim dated August 27, 2020 to the Comptroller challenging DOT's determination (NYSCEF Doc No. 12, petition, exhibit 9). On May 27, 2021, the Comptroller determined that “[r]elying on Item 206.03 as the basis of payment would be an overpayment in instances where there is no surface restoration and where the surface restoration has or will be paid under a separate unit pay item. By the same token, it would constitute an inaccurate underpayment if paid under Unit Item 206.0201” (NYSCEF Doc No. 13, petition, exhibit 10 at 3-4). The Comptroller suggested that petitioner and DOT negotiate a new unit item for work involving excavation and backfill to install lighting and traffic conduits where the cost

of surface restoration does not exist or will be paid under a separate Contract item (*id.* at 4). Petitioner alleges that the Comptroller's directive is "patently impermissible and an effort to renegotiate the terms of a competitively bid contract well after the fact" (NYSCEF Doc No. 1, ¶ 26). In any event, negotiations for a new unit price were unsuccessful (*id.*, ¶ 27; NYSCEF Doc No. 19, ¶ 65).

On June 23, 2021, petitioner filed a petition with the CDRB to review the Comptroller's determination as contrary to the terms of the Contract and DOT's representation to bidders (NYSCEF Doc No. 14, petition, exhibit 11, ¶ 15). In its response dated April 7, 2022, the City argued the petition should be denied on three grounds. First, the City argued that petitioner was not entitled to additional compensation under Contract item 206.03 where, based on a plain reading of its terms, surface restoration is paid under a different item or is not required (NYSCEF Doc No. 29, City answer, exhibit J at 6). Next, the City argued that the petition was time-barred because petitioner's time to file a Notice of Dispute began to run from December 9, 2019, when DOT's Deputy Director issued a clear, unambiguous written decision in response to petitioner's December 4, 2019 request (*id.* at 8-9). Third, the City argued that petitioner had waived its claim for additional compensation by failing to submit time and material records as required under Article 28 of the Contract (*id.* at 10-11). Petitioner filed a reply on April 22, 2022 (NYSCEF Doc No. 4, petition, exhibit 1 at 3). The CDRB heard oral argument on June 26, 2022 (NYSCEF Doc No. 32, CDRB answer, exhibit 1).

In a memorandum decision dated August 22, 2022, the CDRB denied and dismissed the petition as time-barred (NYSCEF Doc No. 4 at 7). The CDRB concluded that DOT's Deputy Director had "plainly and unambiguously disagreed with" and rejected petitioner's request for additional compensation under Contract item 206.03 in the December 9 Letter (*id.* at 5). Citing

the New York City Procurement Policy Board (PPB) Rules, specifically 9 RCNY 4-09 (d) (1), the CDRB reasoned that petitioner's filing of a Notice of Dispute on February 13, 2020 was untimely by more than one month because DOT's "December 9, 2019 letter, in which it initially rejected petitioner's claim, and not respondent's January 31, 2020 letter, was the operative determination that triggered the 30-day filing deadline" (*id.*). Petitioner had also asserted that the December 9 Letter could not have triggered the 30-day filing deadline because the letter did not contain a reasoned explanation in accordance with Article 27.2 of the Contract (*id.* at 6). The CDRB rejected this contention and stated that the reasoned explanation requirement was not applicable to determinations rendered before a contractor has filed a Notice of Dispute.

Petitioner commenced this special proceeding on December 16, 2022 to annul, reverse and vacate the CDRB's decision, or, in the alternative, to remand the matter to the CDRB for a determination on the merits. The City and the CDRB have served separate answers.

Discussion

A decision by the CDRB is "final and binding on all parties" (9 RCNY 4-09 [g] 6)), and "[j]udicial 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 and capricious or an abuse of discretion'" (*Matter of Start El., Inc. v City of New York*, 104 AD3d 488, 488 [1st Dept 2013], quoting 9 RCNY 4-09 [g] [6]; *see also* CPLR 7803 [3]). An action is considered arbitrary or capricious when it is taken "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]). The court must sustain a determination if it is supported by a rational basis even if it would have reached a

different result (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; accord *Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 278 [1972]).

Here, petitioner has failed to carry its burden of demonstrating that the CDRB's determination was in violation of lawful procedure, arbitrary and capricious, or an abuse of discretion. The dispute as to whether petitioner should be compensated under Contract item 206.03 or Contract item 206.0201 involved interpretation of the Contract documents, and thus, it was the proper subject of the dispute resolution procedures in Article 27 and the PPB Rules. 9 RCNY 4-09 (d) (1) states, in part, that a "vendor shall present its dispute in writing ('Notice of Dispute') to the Agency Head within the time specified by the contract or, if no time is specified, within thirty days of receiving written notice of the determination or action that is the subject of the dispute." This language is repeated in Article 27.4 of the Contract.

The CDRB had a rational basis for concluding that petitioner's claim for additional compensation was time-barred because petitioner failed to timely file its Notice of Dispute within 30 days of the Deputy Director's December 9 Letter (*see Matter of Commodore Constr. Corp. v Contract Dispute Resolution Bd. of the City of New York*, 161 AD3d 548, 548 [1st Dept 2018] [reasoning that the CDRB rationally concluded that the petitioner's claim was time-barred because it had failed to timely file a Notice of Dispute]). Contrary to petitioner's contention, the December 9 Letter denying its request for compensation under Contract item 206.03 constitutes a determination rendered by an "Engineer, Resident Engineer, Engineering Audit Officer, or other designee of the Agency Head ... with which the vendor disagrees" (9 RCNY 4-09 [a] [2]; *see also Matter of CCA Civil, Inc. v Contract Dispute Resolution Bd. of the City of N.Y.*, 2018 NY Slip Op 30379[U], *12 [Sup Ct, NY County 2018]; *A-1 First Class-Viking Moving & Stor., Inc. v New York City Off. of Administrative Trials & Hearings Contract Dispute Resolution Bd.*, 2012

NY Slip Op 31463[U], *8 [Sup Ct, NY County 2012]). As the CDRB explained in its decision, the December 9 Letter clearly and unambiguously set forth the agency's position with respect to petitioner's request for compensation under Contract Item 206.03 where surface restoration was paid under a different item or where surface restoration was not required. Thus, the 30-day period within which to timely file a written Notice of Dispute began to run from petitioner's receipt of the December 9 Letter (9 RCNY 4-09 [d] [1]). Petitioner, however, filed a written Notice of Dispute on February 13, 2020, well beyond the 30-day period.

Petitioner also posits that the December 9 Letter did not constitute a "determination" because it did not submit documents to support its position that the work should be paid under Contract item 206.03 until December 18, 2019. Article 27.2 discusses determinations based on the "information and evidence presented," but, as aptly noted in the CDRB's determination, no additional information was needed (NYSCEF Doc No. 4 at 6). "Petitioner raised an issue related to the interpretation of the Contract, which the Deputy Director was authorized to resolve in the first instance" (*id.*). Hence, the CDRB rationally concluded that petitioner should have elevated the issue by filing a Notice of Dispute with DOB's commissioner.

The CDRB also had a rational basis to conclude that the December 9 Letter, and not DOT's January 31, 2020 letter, triggered the 30-day period within which a Notice of Dispute must be filed. The January letter merely repeated the agency's earlier position in rejecting petitioner's request that excavation and backfill work be paid under Contract item no. 206.03.

Last, the CDRB rationally determined that Article 27.2, which requires the inclusion of a "reasoned explanation" in any determination, does not apply to determinations made before a contractor files a Notice of Dispute. This language is repeated in 9 RCNY 4-09 (b), and "the CDRB is given deference to its interpretation of the statute governing its area of expertise" (*A-1*

First Class-Viking Moving & Stor., Inc., 2012 NY Slip Op 31463[U], *9, citing *Matter of Peckham*, 12 NY3d at 431.

Conclusion

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further ORDERED that the Clerk shall enter judgment accordingly.

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



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

5/9/2024

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE