

**E.W. Howell Co., LLC v New York City Dept. of
Design & Constr.**

2025 NY Slip Op 32399(U)

July 3, 2025

Supreme Court, New York County

Docket Number: Index No. 162052/2024

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 162052/2024

E.W. HOWELL CO., LLC,

MOTION DATE 12/19/2024

Petitioner,

MOTION SEQ. NO. 001

- v -

THE NEW YORK CITY DEPARTMENT OF DESIGN & CONSTRUCTION, THE OFFICE OF ADMINSTRATIVE TRIALS AND HEARINGS CONTRACT DISPUTE RESOLUTION BOARD

DECISION + ORDER ON MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 19, 20, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

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

Upon the foregoing documents, and after a final submission date of May 2, 2025, Petitioner E. W. Howell Co., LLC's ("Petitioner") petition for an order pursuant to CPLR 7803(3) annulling a decision dated August 21, 2024, issued by the City of New York's Office of Administrative Trials and Hearings Contract Dispute Resolution Board ("Contract Dispute Resolution Board") is denied. Respondent the New York City Department of Design and Construction's ("Department of Design and Construction") cross-motion to dismiss the petition pursuant to CPLR 7804(f) and CPLR 3211(a)(1), (a)(2), (a)(3), and (a)(7) is granted.

Pursuant to a contract with the Department of Design and Construction, Petitioner is a general contractor on a project known as the Bronx Animal Care Center (the "Project"). On February 1, 2023, Petitioner was issued a directive from a Department of Design and Construction project manager which changed the scope of Petitioner's work ("Directive 001"). Petitioner disputed the directive and filed a petition with the Contract Dispute Resolution Board. After

briefing and a hearing, on August 21, 2024, the Contract Dispute Resolution Board found that Directive 001 lacked the required prior written authorization to order Petitioner to perform the additional work. It also stated that if the proper authorization was obtained, Petitioner could be contractually required to perform extra work ordered by the Department of Design and Construction prior to a registered change order. After that decision was issued, the parties memorialized the work requested in Directive 001 in a registered change order (NYSCEF Doc. 27). As a result, the Department of Design and Construction argues the Petition is moot because the Contract Dispute Resolution Board agreed with Petitioner that Directive 001 was improper, and the work requested in Directive 001 has since been memorialized in a registered change order.

Respondent Department of Design and Construction's cross-motion to dismiss the petition is granted. In its memorandum of law, Petitioner argues that it cannot be required to perform non-contractual extra work absent a registered change order – but the work ordered is now in a registered change order, and Contract Dispute Resolution Board in its decision agreed with Petitioner that that Directive 001 lacked the required prior written authorization to order Petitioner to perform the additional work. Thus, there is no injury for this Court to remedy, as the Contract Dispute Resolution Board agreed with Petitioner and to the extent Petitioner performed the extra work without a change order, there now exists a registered change order ensuring Petitioner's compensation. Therefore, this matter is moot (*Only Properties LLC v New York City Department of Buildings*, 211 AD3d 541 [1st Dept 2022]).

Petitioner has failed to show any enduring negative consequences from either the registered change order or the issued decision to show that this matter remains ripe for judicial review (*see e.g. Santiago v Berlin*, 111 AD3d 487, 487 [1st Dept 2013]; *Encore College Bookstores, Inc. v City University of New York*, 75 AD3d 442, 443 [1st Dept 2010]). Petitioner's argument that the

Contract Dispute Resolution Board's decision may be relied upon as precedent is undercut by the express language of the Decision which states:

“In addition to its appeal of [Department of Design and Construction]'s Determination, Howell requested an advisory opinion as to whether a contractor may be directed to perform work prior to the registration of a change order that would apply to other directives and other projects for [Department of Design and Construction] (Tr. 26). However, the Board is limited to the claim before it and is not authorized to issue advisory opinions.”

Simply put, the harms that Petitioner seeks relief from no longer exist (*see also Percinthe v Department of Corrections and Community Supervision*, 227 AD3d 1347, 1348 [3d Dept 2024]).

Petitioner's argument that the Petition falls within the mootness exception is without merit. That exception requires a demonstration that the issue involves “(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on” (*see Metropolitan Steel Industries, Inc. v Dormitory Authority State of New York*, 72 AD3d 495, 495-96 [1st Dept 2010] quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-15 [1980]).

Petitioner has failed to show a likelihood of repetition given the unique nature and circumstances of each construction site and the varying situations where a contractor and New York City may dispute the work to be done under a contract. Assuming, *arguendo*, Petitioner has shown a likelihood of repetition, Petitioner has failed to show this is a phenomenon typically evading review. Indeed, New York City's standard contract explicitly contains a dispute resolution mechanism through the Contract Dispute Resolution Board, and the Contract Dispute Resolution Board's findings are reviewable via an Article 78 proceeding (*see* NYSCEF Doc. 5). Indeed, the very issue of which Petitioner complains – namely what is the proper course of action for a contractor when it disputes work ordered by New York City - has been litigated all the way to the Court of Appeals (*see Kalisch-Jarcho, Inc. v City of New York*, 72 NY2d 727 [1988]). Finally, this

is not a significant or important question not previously passed on. Petitioner, like most general contractors bidding for public works projects, are sophisticated entities who can negotiate the risk of disputed work into their contract price. In any event, Petitioner's argument about the procedure and remedies for disputed work not memorialized in a change order have been litigated time and time again (*Kalisch-Jarcho, supra*; see also *Pettinelli Elec. Co., Inc. v Board of Educ. of City of New York*, 226 AD2d 176 [1st Dept 1996]; *A.I. Smith Elec. Contractors, Inc. v City of New York*, 181 AD2d 542 [1st Dept 1992]).

Simply put, there is no active harm before this Court to adjudicate, making the Petition moot. Petitioner has failed to show that its now resolved dispute is so novel and so grave to fall into the mootness exception. Therefore, the Petition is dismissed.

Accordingly, it is hereby,

ORDERED that Petitioner E. W. Howell Co., LLC's petition for an order pursuant to CPLR 7803(3) annulling a decision dated August 21, 2024, issued by the City of New York's Office of Administrative Trials and Hearings Contract Dispute Resolution Board is denied as moot; and it is further

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ORDERED that Respondent the New York City Department of Design and Construction’s cross-motion to dismiss the petition pursuant to CPLR 7804(f) and CPLR 3211(a)(1), (a)(2), (a)(3), and (a)(7) is granted; and it is further

ORDERED that within ten days of entry, counsel for Respondent New York City Department of Design and Construction shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

7/3/2025
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE