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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR Justice

PART 33

Index Number : 101927/2012
PARKING SYSTEMS PLUS, INC.
vs.
N.Y.D.O.T
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 19, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-10

Answering Affidavits — Exhibits _____ | No(s). 11-12; 13-18

Replying Affidavits _____ | No(s). 19

Upon the foregoing papers, it is ordered that this motion is

See memorandum decision and judgment annexed hereto.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUL 13 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/10/12

_____, J.S.C.
ALEXANDER W. HUNTER JR

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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In the Matter of the Application of
Parking Systems Plus, Inc.,

Petitioner,

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

-against-

New York City Department of Transportation, John C. Liu,
In His Official Capacity as Comptroller of the City of New York,
City of New York Contract Dispute Resolution Board, and
City of New York Office of Administrative Trials and Hearings,

Respondents.

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Index No.: 101927/2012

Decision and Judgment

HON. ALEXANDER W. HUNTER, JR.

The application by petitioner for an order pursuant to C.P.L.R. Article 78, reversing the Contract Dispute Resolution Board's determination that petitioner was not entitled to additional compensation from the New York City Department of Transportation, dated February 23, 2012, is denied and the petition is dismissed, with costs and disbursements to respondents.

The instant petition arises out of contracts involving parking services in locations throughout New York City between petitioner, Parking Systems Plus, Inc. ("PSP"), and the New York City Department of Transportation ("DOT"). Petitioner entered into several contracts with DOT in 2004, 2005, and 2006, to operate and manage municipal parking garages. Each contract was for three years with an option to renew by the DOT after two years. At issue is Article 31 of the contracts pertaining to wage increases of unarmed security guards ("guards") in seven contracts, and cleaner-floor persons ("cleaners") in an additional eighth contract. This provision requires petitioner to pay the prevailing wage rate for guards and cleaners. Additionally, Article 31 states: "[t]he Contractor must strictly comply with all applicable provisions of the New York State Labor Law, including amendments thereto, and the provisions of Section 6-109 of the New York City Administrative Code, as amended."

In New York City, the prevailing wage for workers of public works projects is determined by the New York City Comptroller's Bureau of Labor Law ("Comptroller") under New York State Labor Law ("Labor Law") Article 8 "Public Work," Section 220, and under Article 9 "Prevailing Wage for Building Service Employees," Section 230, which are published annually in accordance with the New York City Administrative Code § 6-109 and Labor Law 220. Attached to each of the contracts is the Comptroller's prevailing wage schedule for the July 1 through June 30 periods. On July 1, 2007, the Comptroller increased the prevailing wage rate

schedule for cleaners from the wage range of $7.00 to $9.31 per hour and the supplemental benefits range of $1.28 to $2.17 per hour, to the wage rate of $10.00 per hour plus supplemental benefits of $1.50 per hour. Additionally, on July 1, 2007, the Comptroller increased the prevailing wage rate schedule for guards from $11.35 per hour and supplemental benefits of $0.78 per hour, to the wage rate range of $11.25 to $13.25 per hour plus supplemental benefits of $4.46 per hour.

Petitioner requested compensation from the DOT for the increase of the prevailing wage for cleaners through grant orders by letters dated August 6, 2007, March 31, 2008, and August 27, 2009, on the basis that the increase was unconscionable, unreasonable, unforeseeable, and presented hardship. The DOT acknowledges that similar requests for grant orders were made for guards. By letters dated September 29, 2009 and October 15, 2009, the DOT denied the requests for cleaners and guards. Thereafter, PSP filed notices of dispute with the DOT on October 6, 2009 and November 3, 2009. By letters dated January 14, 2010 and February 9, 2010, the DOT's Agency Chief Contracting Officer ("ACCO") denied petitioner's claim for compensation for the increase in the prevailing wages. The ACCO reasoned that "a change in the prevailing wage rate for a particular job title is not considered "extra work"" and therefore, PSP was not entitled to additional compensation. Additionally, the ACCO noted that contractors who bid on work are responsible to take into account for increases in the prevailing wage when bidding on contracts.

Petitioner then submitted notices of disputes with the Comptroller regarding the hardship that it faced by having to pay unconscionable increases. By letters dated June 3, 2010, the Comptroller, John C. Liu, denied petitioner's claim for guards and cleaners finding that in the absence of an escalation clause, there was no basis for petitioner to receive additional compensation for the prevailing wage increases. The Comptroller found that under General City Law § 20(5), the City had no power to grant additional compensation to any contractor for the same work specified in its contract. Thereafter, petitioner petitioned the City of New York Contract Dispute Resolution Board ("CDRB" or "Board") arguing that the wage increases were unforeseen and caused extreme economic hardship. PSP also argued that the DOT should be considered a joint employer. Respondent DOT argued that the petition should be denied because it was the contractor's obligation to pay the prevailing wage. The DOT argued that there was no escalation clause and additional payments were prohibited by General City Law § 20(5). During oral arguments on August 10, 2011, petitioner raised the argument that Labor Law 220 and 230 were distinct in that prevailing wages of contracts under 220 changed every year, while the prevailing wages remain constant for contacts under 230. The Board permitted PSP and the DOT to submit briefs regarding this issue.

The October 28, 2011 Memorandum and Decision of the CDRB denied petitioner's appeal and found that petitioner was not entitled to additional compensation from the DOT. Additionally, the Board found that it lacked jurisdiction to provide the equitable relief requested by petitioner.

First, petitioner asserts that the CDRB's determination was irrational, arbitrary and capricious, and an abuse of discretion. Petitioner argues that in Article 8, Section 220 contracts, the prevailing wage is assessed at the time the services are provided, which changes annually, and the State provides escalation clauses to provide for such increases. However, in Article 9,

Section 230 contracts, escalation clauses are not necessary because the prevailing wage rates remain static for the life of the contract since the statute states that the prevailing wage rates are to be specified in a schedule attached to the contracts. Petitioner argues that the absence of language discussing increases in prevailing wages in Article 9, section 230 is indicative of legislative intent to create differences in the prevailing wage requirements.

Additionally, petitioner argues that the CDRB failed to recognize that under Article 19B, the contracts provide for additional compensation for "Changes and Extra Work." Petitioner argues that while the work performed by petitioner did not change, the cost of work changed. Petitioner further argues that the increases were an unforeseen hardship because it availed itself of the schedules for the past ten years which showed wage increases ranging from three to five percent each year. Petitioner argues that it could not have foreseen the increase of almost fifty-two percent for guards in 2009 and twenty-seven percent for cleaners in 2007. Additionally, petitioner argues that it was left at the mercy of the DOT to "take it or leave it" and was pressured into lowering its bid. Petitioner avers that it was unable to walk away after the contracts were entered into because it would have suffered damages from the bonds it was required to post.

Second, petitioner asserts that the DOT should be considered a joint employer because petitioner acts as sub-contractor for the DOT. If petitioner did not operate the parking garages for the DOT, then the DOT would have to employ the guards and cleaners directly and pay the increased rates. Third, petitioner argues that it is entitled to compensation from the DOT since Administrative Code § 7-206 provides for illegal, but equitable relief, and this section is not superseded by General City Law § 20(5). Fourth, petitioner argues that it is entitled to equitable relief pursuant to the Charter of the City of New York, Chapter 13, Section 311(b)(7) that allows the Procurement Policy Board ("PPB") to promulgate rules establishing procedures for the fair and equitable resolution of contract disputes. Fifth, petitioner argues that allowing it additional compensation does not run afoul of the competitive bidding process because petitioner took into consideration increases in prevailing wages and supplemental benefits. Sixth, petitioner argues that the CDRB violates the PPB Rules because all three panelists presiding over its hearings inquired into aspects of the contract as if they had not dealt with these types of contracts in the past, lacking the requisite background to consider and resolve the merits of the dispute. Seventh, petitioner argues that it was denied due process because it was not given notice that it was involved in an official dispute until the CDRB and OATH stage of the proceeding and at the hearing it was not afforded the opportunity to question the determinations of the DOT or the Comptroller, cross-examine persons involved in making those determinations, or put forth any evidence or testimony of those who advised petitioner that a change order would be awarded.

Respondent CDRB refers to C.P.L.R. 7804(i), which authorizes a "judicial officer" to elect not to appear in an Article 78 proceeding. While the CDRB is an administrative body, and not a judicial one, the CDRB requests that the same principles underlying C.P.L.R. 7804(i) apply, and thus, it takes no position in this litigation.

Respondents DOT and Liu first assert that the determination by the CDRB is not unlawful, arbitrary or capricious, or an abuse of discretion. Second, respondents assert that petitioner failed to meet its burden of demonstrating that the CDRB's decision violates PPB Rule

4-09(g)(6) and section 7(f) of Article 14 of the Contract. Lastly, the DOT asserts that the actions of the CDRB were consistent with the statutory provisions governing the procurement of municipal services. Respondents DOT and Liu argue that a contractor is obligated to pay prevailing wages, including any increase in wages, during the life of the contract. Moreover, the contracts contain no escalation clauses making a mid-course increase in prevailing wages a risk borne by the contractor.

Respondents further argue that petitioner did not seek to be excused from performance initially and the contract is not unconscionable because petitioner bid on the contracts out of its own free will. Respondents additionally argue that petitioner's attempt to invoke a joint employer concept is without merit because the prevailing wage obligation is applicable exclusively to governmental contracts and Article 31 of the contracts makes it clear that the prevailing wage obligations are those of the contractor. The question of whether Section 230 of the Labor Law would require that mid-course wage increases be upheld should not be reached because petitioner assumed the obligation to pay the prevailing wage rate. Respondents further argue that the goals of sections 220 and 230 were not to benefit contractors, but to ensure that employees were paid the prevailing wage rate. Any absence of language is a reflection of the desire to afford the applicable official discretion to decide upon frequency under 230.

Respondents also argue that Administrative Code § 7-206 and can only be reviewed in an Article 78 proceeding challenging a specific determination on an application filed under that provision. Respondents note that petitioner never filed a 7-206 claim with the Comptroller or that there was not a specific ruling by the Comptroller on an application. Additionally, respondents argue that General Municipal Law § 20(5) bars the City from providing additional compensation, even if the claim was viewed as purely equitable because no additional work was performed. Respondents argue that additional compensation would run afoul of the competitive bidding process by encouraging bidders to bid unduly low with the expectation that additional sums could be obtained if costs were higher than anticipated.

In reviewing an administration decision under Article 78, courts defer to the judgment of the lead administrative body, and thus,"[i]t's not the province of the courts to second-guess thoughtful agency decisionmaking and, accordingly, an agency decision should be annulled only if its arbitrary, capricious or unsupported by the evidence." **Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast, 9 N.Y.3d 219, 232 (2007).** It is well established that "[w]hile judicial review must be meaningful, the courts may not substitute their judgment for that of the agency, for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives'" **Akpan v. Koch, 75 N.Y.2d 561, 570 (1990) (quoting Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417 (1986)).** The lead agency has the responsibility to "comb through reports, analyses and other documents before making a determination, it is not for a reviewing court to duplicate these efforts." **Matter of Riverkeeper, Inc., 9 N.Y.3d at 232.** A court's determination is based upon whether there is a rational basis for the agency's decision or whether it is arbitrary or capricious. **AWL Indus., Inc. v. Triborough Bridge & Tunnel Auth., 41 A.D.3d 141, 142 (1st Dept. 2007) (citation omitted).**

This court finds that petitioner has not demonstrated that the CDRB's determination was arbitrary and capricious or an abuse of discretion.

Labor Law 220 applies to laborers, workers or mechanics and provides that "[t]he prevailing rate of wage shall be determined… no later than thirty days prior to July first of each year, the prevailing rate of wage for the period commencing July first of such year through June thirtieth." **Labor Law § 220(5)(a).** Labor Law 230 applies to "building service employee[s]" who perform "work in connection with the care or maintenance of an existing building." **Labor Law § 230(6).** Labor Law 230 defines "prevailing wage" as "the wage determined by the fiscal officer to be prevailing for the various classes of building service employees in the locality." **Labor Law § 230(6).** The CDRB noted that upon reviewing the proposed amendment of 230, the Labor Committee wrote that "[t]he fundamental public policy embodied in the bill is that service employees employed by a contractor or a subcontractor in the performance of a service contract with a public agency should not be paid sub-standard wages." **Comm. on Labor Law Approval Mem. At 1, Bill Jacket, L. 1971, ch 777.** Additionally, as a matter of public policy, the overriding purpose of the prevailing wage requirements is to ensure that workers on public projects receive adequate pay and to eliminate unfair bidding by nonunion employers who might submit artificially low bids based on wages that are below the prevailing rates. **Brian Hoxie's Painting Co. v. Cato-Meridian Cent. School Dist., 76 N.Y.2d 207, 212 n.2 (1990).** As the CDRB found, a determination that would result in different procedures under Labor Law 220 and 230 would result in different procedures in determining prevailing wages for labors and service workers and frustrate legislative intent.

Furthermore, the CDRB had a rational basis for finding that although the New York State Labor Commissioner may have frozen prevailing wage rates for Labor Law 230 contracts, this did not require New York City to do so. The City Comptroller, as the "fiscal officer," sets prevailing wages for workers employed on public projects annually under Labor Law and the Administrative Code. **Labor Law §§ 230(6),(8), 231(4); Admin. Code § 6-109.** Under Labor Law 230, a city may elect to have a higher minimum wage, which would require this wage to be in effect on city contract work.

Moreover, the schedules attached to the contracts put petitioner on notice that the prevailing wages would increase if the Comptroller issued new rates during the life of the contracts. It is well established that if an agreement is clear and unambiguous on its face, it must be enforced according to its plain meaning of its terms. **IDT Corp. v. Tyco Group, S.A.R.L., 13 N.Y.3d 209, 214 (2009) (citations omitted).** The schedules attached to the contracts provided that: "This schedule is applicable to work performed from July 1, 2004, through June 30, 2005, unless otherwise noted. Changes to this schedule are published on our web site @ www.comptroller.nyc.gov. Contractors must pay the wages and supplements in effect when the building service employee performs the work." **Contract No. 20050037115-0000584087, Section 230 Prevailing Wage Index: July 1, 2004- June 30, 2005 at 1.**

The CDRB's determination that petitioner was not entitled to additional compensation based on petitioner's argument that the wage increases were unforeseen caused it economic hardship was not arbitrary and capricious or an abuse of discretion, and was in accordance with the Board's previous decisions. **See, L & L Painting Co., Inc. v. Department of Transp., OATH Index No. 1045/06, mem. Dec. (May 4, 2006) (CDRB denied claim for additional compensation due to increased fuel costs); Dart Mechanical Corp. v. Dept. of Sanitation,**

OATH Index No. 1815/06, mem. Dec. (Nov. 9, 2006), *aff'd*, Index No. 101494/07 (Sup. Ct. N.Y. Co. Oct. 10, 2007), *aff'd*, 57 A.D.3d 263 (1st Dept. 2008) (CDRB denied contractor's claim for additional compensation for increased costs of gas absorption chillers); SNF Holding Co. v. Dept. of Citywide Admin. Servs., OATH Index No. 1612/06, mem. Dec. (Sept. 14, 2006) (CDRB denied contractor's claim for increased compensation when there was no basis in the contract to change the price index used by the parties).

Additionally, the CDRB had a rational basis for finding that courts have not previously permitted contractors to recover additional compensation based on increases in the prevailing wage. **See, Brang Co. v. State Univ. Constr. Fund, 47 A.D.2d 178, 179 (3d Dept. 1975); D.M.V. Contracting Co. v. Bd. of Educ., 285 N.Y. 591 (1941).** It is well established that "where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." **401 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 281 (1968).** The legal excuse of impossibility and the doctrine of frustration of purpose are not available when the event which occurs was foreseeable and a provision could have been made for its occurrence. **Warner v. Kaplan, 71 A.D. 3d 1, 5-6 (1st Dept. 2009).** The CDRB had a rational basis for concluding that petitioner should have foreseen that the prevailing wages would remain the same for an effective period, but then would increase if the Comptroller issued new rates based upon the schedules that were attached to the contracts.

Moreover, petitioner was obligated to review the contract documents and inquire about its obligations to pay increases to the prevailing wages before submitting its bid. Section 8 of the Information for Bidders, entitled "Examination for Interpretation of Proposed Contract," states that prospective bidders must "examine the Contract Documents carefully and before bidding must request the Commissioner in writing for an interpretation or correction of every patent ambiguity, inconsistency or error therein...." **(Contract No. 20050037115-0000584087).** A petitioner's failure to discover and raise any ambiguity prior to submission of its bid, as required by the contract, renders a petitioner bound by a respondent's interpretation of the contract. **Cipico Constr., Inc. v. City of New York, 279 A.D.2d 416 (1st Dept. 2001).** Therefore, the CDRB's determination that petitioner was obligated to carefully review the documents and make inquiries before submitting its bid is not arbitrary and capricious or an abuse of discretion.

This court finds petitioner's remaining arguments without merit.

Accordingly, it is hereby,

ADJUDGED, that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondents; and it is further

ADJUDGED that respondent DOT, having an address at _____, respondent Liu, having an address at _____, respondent CDRB, having an address at _____, and respondent City of New York Office of Administrative Trials and Hearings, having an address at

_____, do recover from petitioner, having an address at _____, costs and disbursements in the amount of $_____, as taxed by the Clerk, and that respondents have execution therefor.

Dated: July 10, 2012

ENTER:

_____
J.S.C.

ALEXANDER W. HUNTER JR.

FILED

JUL 13 2012

NEW YORK
COUNTY CLERK'S OFFICE